

# TO ATTAIN “THE JUST REWARDS OF SO MUCH STRUGGLE”: LOCAL-RESIDENT EQUITY PARTICIPATION IN URBAN REVITALIZATION

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*[L]andlords . . . grow richer . . . in their sleep, without working, risking, or economizing. What claim have they, on the general principle of social justice, to this accession of riches? In what would they have been wronged if society had, from the beginning, reserved the right of taxing the spontaneous increase of rent, to the highest amount required by financial exigencies?<sup>1</sup>*

## I. INTRODUCTION

Annually, Americans pour out their sympathy for people displaced from their communities by natural disasters such as fires, floods, and hurricanes. We respond, knowing the anchor that the concept of “home” supplies to body, soul, and family; to a person’s ability to show up for work and perform in school, to meet friends, to worship with one’s congregation, and otherwise to pursue life, liberty, and happiness. Our empathy and our tax dollars offer balm even where people put themselves predictably in harm’s way, and fail to prepare for the inevitable by buying insurance or making more careful decisions. We intuit the toll exacted by the loss of familiar walls, private homes, and community-shared places.

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1. JOHN STUART MILL, *THE PRINCIPLES OF POLITICAL ECONOMY* 941 (Batoche Books 2001) (1848).

Redevelopment policy and practice in the U.S. has relied upon the massive relocation of poor people and the destruction of poor people's neighborhoods with only token recognition of the costs and burdens imposed on the displaced. Although the devastation of community, family, and lives is just as complete when the disaster is the government-sanctioned wrecking ball, comparable sympathy is not commonplace for urban redevelopment refugees.<sup>2</sup> This apathy contrasts sharply with the outrage that followed the Supreme Court's *Kelo v. City of New London*<sup>3</sup> decision, where middle-income people were forced from their homes because local officials believed the city needed the site to attract new employers.<sup>4</sup>

The displacement of low-income communities accomplished by urban redevelopment law and practice in the U.S. continues the inequities of urban renewal and targets "low-mobility populations"—those mostly poor and minority city residents who toil in the background in the office towers and tourist spots. Their material reality profoundly diverges from the imagination of policy makers and planners, as was unmasked by Hurricane Katrina's excruciating devastation of New Orleans in September 2005. The victims least able to escape the oncoming storm and last to be remembered in emergency planning and evacuation were predominantly poor, black, elderly, and disabled.<sup>5</sup> As in

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2. Some experts estimate average annual expenditures for disaster preparedness and relief at \$7 billion. See, e.g., Raymond Burby et al., *Unleashing the Power of Planning to Create Disaster-Resistant Communities*, 65 J. AM. PLAN. ASS'N 247, 248 (1999) (citing DAVID R. CONRAD ET AL., HIGHER GROUND: A REPORT ON VOLUNTARY PROPERTY BUYOUTS IN THE NATION'S FLOODPLAINS: A COMMON GROUND SOLUTION SERVING PEOPLE AT RISK, TAXPAYERS, AND THE ENVIRONMENT (1998)).

3. 125 S. Ct. 2655 (2005).

4. *Id.* For a taste of the forceful public reactions, see Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14 (describing the *Kelo* ruling as "shameful" and "scandalous and cruel"); Virginia Groark, *Connecticut Case Lit Fires of Rage*, CHI. TRIB., July 18, 2005, at 12; *Hands Off Our Homes*, ECONOMIST, Aug. 20-26, 2005, at 21, 21-22 [hereinafter *Hands Off Our Homes*]; Donald Lambro, *Home, Seized Home*, WASH. TIMES, July 18, 2005, at A16 (reporting a nation-wide legislative backlash). Additionally, the "Castle Coalition" website of the Institute for Justice became a clearinghouse for information about legislative efforts to limit eminent domain. See Castle Coalition, Citizens Fighting Eminent Domain Abuse, <http://www.castlecoalition.org> (last visited Oct. 19, 2006).

5. See David Gonzalez, *From Margins of Society to Center of the Tragedy*, N.Y. TIMES, Sept. 2, 2005, at A1; Scott Shane & Eric Lipton, *Government Saw Flood Risk But Not Levee Failure*, N.Y. TIMES, Sept. 2, 2005, at A1 (reporting one consultant's view that the state's evacuation planning paid little attention to "moving out New Orleans's 'low mobility' population—the elderly, the infirm and the poor without cars or other means of fleeing the city, about 100,000 people").

many U.S. cities, New Orleans's poorest residents had nowhere to go and no way to get outside their familiar districts.

The clamor of displaced residents for government participation in rebuilding their communities coalesced into a bipartisan proposal for federal, state and local aid that would have combined governmental powers of condemnation and eminent domain payments, cleared the land and permitted reconstruction by private developers.<sup>6</sup> Although the locally generated proposal was embraced enthusiastically by local and state government officials and the Louisiana congressional delegation, it foundered on the ambivalence of federal officials.<sup>7</sup>

The federal government's ineffective response to Katrina communities is at odds with the vigorous role of government in urban redevelopment. Around the United States, cities are being remade through increasingly intricate and opaque "public/private partnerships" ("PPPs"), by which local government agencies trade essential infrastructure at low or no cost in exchange for a profit-sharing stake or other return on the city's investment.<sup>8</sup> While this idea is not new, the scale of today's municipal reliance upon PPPs blurs the traditional separateness of the public and private sectors. Urban land is being reclaimed from low-wealth residents by local governments smitten with the entrepreneurial spirit. Augmenting their traditional land use powers with new means of collaboration and exchange with private developers, local governments seek to reap the benefits of increased investment, ownership and profit in land deals with those private developers. Local officials feel the heat of global competition for corporate location and are mindful that judging cities by their appearance and social climate has become a major assessment tool for the economic development professions.<sup>9</sup> They engage in energetic "image management" in which the city's land and buildings are assets and "presentation features."<sup>10</sup>

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6. See Louisiana Recovery Corporation Act, H.R. 4100, 109th Cong. (1st Sess. 2005).

7. Congressman Baker's bill, H.R. 4100, introduced in October 2005, proposed the formation of a public and private corporation that would buy destroyed homes for the owners' equity. It was rejected by the White House. See Bill Walsh, *Baker: Bush Offers Us 'Death Blow'; He'll Keep Pushing Own Bill to Rescue State*, TIMES-PICAYUNE, Jan. 28, 2006, at 1.

8. City officials became dealmakers during the 1970s in order to complete projects begun under federal urban policies, and used their funds to adapt the lessons learned following the withdrawal of federal funds in the 1980s—urban fiscal distress's peak. EDWARD J. BLAKELY, *PLANNING LOCAL ECONOMIC DEVELOPMENT: THEORY AND PRACTICE* 153-54 (2d ed. 1994).

9. *Fortune*, *Money*, *Financial World*, and other leading business periodicals issue annual assessments of cities' performance on this basis, as well as on their capacity to do business with the private sector.

10. BLAKELY, *supra* note 8, at 155.

This transformation of U.S. urban landscapes is proceeding at so great a pace and scale as to support the argument that government redevelopment is degenerating into an unconstitutional sale of the police power.<sup>11</sup> The contest for control of urban land and its occupants' futures illuminates the struggle in American law and politics to balance societal interests in the development or preservation of scarce resources, with the rights of individual property owners and of low-income residents whose legitimate interests in their homes are not viewed, legally or customarily, as "entitled."

Today's public/private cooperation has its origins in the first federal revitalization programs. Congress designed its redevelopment programs to be federally funded and driven, but implemented at the local level.<sup>12</sup> Passage of the Housing Act of 1949<sup>13</sup> was secured by an amalgamation of disparate interests who saw what they wanted to see in the program.<sup>14</sup> More specifically, "[h]ousing advocates thought it would result in additional affordable housing, while developers saw it as an economic opportunity."<sup>15</sup> Local jurisdictions realized it would give them the tools to clear away blighted eyesores and to build preferred developments in their place with the Federal Treasury footing the bill.<sup>16</sup>

Over the years, much redevelopment has been sharply criticized for its displacement of the poor people who lived where local officials yearned to rebuild. The irony is that the plain purpose of the first national Housing Act was displacement of the poor.<sup>17</sup> The Act required that redevelopment occur in a "slum area or a deteriorated or deteriorating area which is predominantly residential in character," but did not require that any demolished housing be replaced.<sup>18</sup>

11. The relationships between local governments and development partners can become so close that at times it is the private developer, not the government, who initiates the redevelopment project and dictates the deal. *See, e.g., City of Norwood v. Horney*, 830 N.E.2d 381, 383-85 (Ohio Ct. App. 2005); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 336 (2006) (arguing that cities which stand to gain financially from joint development deals have an inherent conflict of interest in the exercise of the police power for the general welfare).

12. Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 138-39 (2004).

13. Pub. L. No. 81-171, 63 Stat. 413 (1949) (omitted by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (current version as amended at 42 U.S.C. § 1441 (2000))).

14. Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 700 (1994).

15. *Id.*

16. *Id.*

17. *Id.* at 701 n.26, 734.

18. *Id.* at 700-01 (quoting Housing Act of 1949, 63 Stat. 413).

Rather than reject outright the profiteering aspects and market dynamics of city life cycles—which no amount of enlightened public policy is likely to eliminate—this Article seeks an alternative mode of responsive policy. I propose to recognize the meaningful claims of residents displaced by changes in urban land use patterns, through the allocation of equity stakes in the wealth generated by such city-supported urban redevelopment.

Public/private redevelopment of urban community space must be controlled by, and directly benefit, the affected city residents so that the displaced population receives meaningful equity shares in the value added redevelopment. This approach would update resident participation strategies in urban land use planning and regulation, extant now for nearly sixty years,<sup>19</sup> by recognizing with market value the legitimate interests of residents in the space they co-inhabit. This view is justified on three grounds: (1) the legal framework offered by property law recognizes numerous rights of persons residing in the path of municipality-assisted redevelopment, which currently are destroyed,<sup>20</sup> without acknowledgement or compensation, in the exercise of urban redevelopment powers; (2) important community interests of persons and communities are similarly destroyed—although they have yet to be recognized as interests in property, they can and should be; and (3) equitable arguments of varying political stripes support claims for both recognition of property rights and development of appropriate remedies for the harms redevelopers inflict on present residents. Existing law has partially recognized aspects of these ideas and produced remedies for prospective displacees in the path of urban redevelopment, chiefly in the form of public participation rights in the decision-making process.<sup>21</sup> While such efforts to marshal the missing voices are appealing and expand the deliberation about these issues, the remedies are fundamentally flawed.

In this Article, I will first examine the legal rules that frame public/private redevelopment in America's cities. Part II reviews the current system of redevelopment laws and practice, which serve a narrowly described class of propertied citizens generously while

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19. See generally Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 868-91 (2001) [hereinafter McFarlane, *Inclusion*] (reviewing various government programs for urban redevelopment and some of the resulting case law from 1949 to present).

20. See discussion *infra* Part III.C.

21. See, e.g., Quinones, *supra* note 14, at 753-58, 767 (discussing the Dudley Street Neighborhood Initiative in Boston and mentioning other examples of resident-controlled redevelopment).

simultaneously sinking public subsidy into redevelopment. On the other side of the equation, however, the same system of laws in effect specially taxes urban community residents in the path of development by sweeping aside their tangible and intangible capital and connections, with the result that neighborhoods of low-income households are displaced and destroyed, rather than relocated and compensated. This is accomplished through the active participation of local governments participating in the urban real estate market, through PPPs rather than the exercise of constitutional police powers, with the purpose of engineering new urban territories and repopulating them with the wealthier classes. Although this social engineering is sometimes characterized, or justified, as a modern version of the pioneering that peopled the American plains with striving Europeans,<sup>22</sup> the public policy to so restructure the territories of the central city wrongly allocates the costs of revitalization to the current residents, and distributes the benefits to others. This is the antithesis of governance for the general welfare.

Part III briefly reviews familiar arguments to account for the class- and race-based inequities in the law and practice of redevelopment, and finds wanting their associated attempts to resolve the equity dilemmas through participatory processes, including the weak consultative forms required by contemporary federal community development laws and more robust forms being piloted in some locales, as well as distributional arguments. I argue instead for the opportunities presented by property law and theory for more analytically and pragmatically satisfactory solutions. After examining the utility and centrality of property rules to the problem, I explore ways that property rules can recognize and prevent the extinguishing of urban residents' well-being and relationships to inhabited locales overrun by redevelopment.<sup>23</sup> Ultimately I conclude that these dilemmas can be resolved best through reconceiving residents' legitimate interests in their community locale as an asset of value, and justifying their participation as decision-makers and beneficial owners of the redevelopment projects that displace them. Part IV proposes the creation of community equity shareholding to achieve community ownership, participation in decision-making, and

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22. See generally William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972) (tracing the origins of the doctrine of eminent domain in England and colonial America).

23. See generally Daphna Lewinsohn-Zamir, *The Objectivity of Well-being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003) (arguing for an objective theory of well-being for legal theory and developing an objective approach to property law).

material benefit from public/private urban redevelopment projects that displace long-term residents.

## II. THE DOCTRINAL FRAMEWORK OF REDEVELOPMENT LAW AND PRACTICE

### A. Introduction: Why Revitalize Cities?

Just a few short years ago, cities were deemed passé as places of residence because capitalism had demonstrably picked up and moved to the suburbs. But in the new millennium in the United States, only a few dying midwestern cities are still being “thrown away” wholesale.<sup>24</sup> We grapple with a new era of red-hot housing markets and hotly-pursued gentrification. It seems the right is pleased to make money selling high-end condos and townhouses, and the left is confused or splintered, with many hoping to “turn around” under-valued, low-income neighborhoods in ways almost certain to bring in gentrification and displacement. Others see urban redevelopment as an antidote to the environmental damage of suburban sprawl.<sup>25</sup> The contemporary movement to preserve central cities is informed by an array of research, rationales, and instructive observations. One view is that vibrant cities remain key elements of a nation’s economic life.<sup>26</sup> Jane Jacobs, for example, argues: “Societies and civilizations in which the cities stagnate don’t develop and flourish further. They deteriorate.”<sup>27</sup> Other commentators view cities as important sites for the practice of participatory democracy by people of diverse races, ethnicity, classes and interests;<sup>28</sup> as central hubs in the

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24. See Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. MICH. J.L. REFORM 813, 816 (1994) (chronicling the significant population decline in Detroit and other midwestern cities as compared with the rest of the United States). *But see* The Brookings Institution, Transcript of the Metropolitan Policy Program Forum, *Rebuilding After Katrina: Forming the Federal-State-Local Partnership for Southern Louisiana* (Feb. 21, 2006), available at <http://www.brookings.edu/comm/events/20060221.pdf> (discussing the massive scale of rebuilding efforts after Hurricane Katrina).

25. See, e.g., Bruce S. Katcher, *Is Brownfields Redevelopment a Partial Response to Suburban Sprawl in NJ?*, LEGAL INTELLIGENCER, Nov. 13, 2000, available at <http://www.mgkflaw.com/articles/isbrownfieldsredevelopmentapartialresponsetosuburbansprawlinnj.html>.

26. JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* 109 (1984).

27. *Id.* at 232.

28. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 396 (1990); Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1174 (1996).

economic and social well-being of metropolitan areas;<sup>29</sup> and as the space and context that provide us the opportunity for “surprise, tolerance, innovation, and participation.”<sup>30</sup> Still others argue for the preservation of cities in order to stanch the social inequalities that attend suburban sprawl,<sup>31</sup> and to redress the mounting inequalities of opportunity of the nation’s poor,<sup>32</sup> most of whom live in central cities.

### B. *Neighborhoods in the Path of Urban Redevelopment*

It is a familiar practice that development decisions impose burdens on persons who are excluded from the established decision-making process. In contemporary redevelopment, cities increasingly identify areas where they would like to support redevelopment in various ways. Cities may do so under formal urban renewal statutes, which make condemnation and government subsidies available after designation of an area as afflicted by “blight.”<sup>33</sup> States’ definitions of blight vary tremendously in scope and address intervention by state and local governments in the market for land titles and underutilization,<sup>34</sup> as well as powers to direct and manage growth within their borders.<sup>35</sup>

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29. ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 52-55 (1994); MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 28, 130-31 (2002); *see also* DAVID RUSK, *BALTIMORE UNBOUND: CREATING A GREATER BALTIMORE REGION FOR THE TWENTY-FIRST CENTURY*, at xxiii-xxvi (1996).

30. LARRY BENNETT, *FRAGMENTS OF CITIES: THE NEW AMERICAN DOWNTOWNS AND NEIGHBORHOODS* 13 (1990).

31. *See* SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 312-15 (2004); *see also* Sheryll D. Cashin, *Essay, Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 *VILL. L. REV.* 595, 598, 600, 601 (2002); Peter Dreier, *America’s Urban Crisis: Symptoms, Causes, and Solutions*, in *RACE, POVERTY, AND AMERICAN CITIES* 102, 105 (John Charles Boger & Judith Welch Wegner eds., 1996); Daniel J. Hutch, *The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Development Framework*, 20 *YALE L. & POL’Y REV.* 353, 359 (2002).

32. *See Inequality in America: The Rich, the Poor and the Growing Gap Between Them*, *ECONOMIST*, June 17-23, 2006, at 28, 28.

33. The most compelling study of the rhetorical power of “blight” as a legal concept and of the property-rights-limitation it effected in Public Use Clause jurisprudence is Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 1-3 (2003) (showing how renewal advocates created a discourse of blight as disease that endangers the future of the city to secure public and judicial support for the expansive use of eminent domain that resulted in federal and state urban renewal programs).

34. For example, New Jersey allows condemnation where an area suffers from:

[a] growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

*N.J. STAT. ANN.* § 40A:12A-5e (West Supp. 2006). Similarly broad powers are found in the redevelopment statutes of many states, including California, Delaware, Georgia, Illinois, Maine,



Entrepreneurial cities increasingly engage in land banking or old-fashioned land assembly, then issue requests for development proposals (“RFPs”) or requests for qualifications (“RFQs”) for the development of desired uses on specific sites.<sup>36</sup> Each of these processes contemplates an energetic level of communication and decisional participation between potential parties to the deal, but no more than statutorily required notice-participation by the public.<sup>37</sup> Residents whose interests will be profoundly affected by the replacement of nearby row homes with a stadium or big box store have no more right to notice or participation than do taxpayers across town. Notice is achieved by formal publication, or on the redevelopment agency’s website and by snail mail and email to those in the business who ask to be placed on the mailing list.<sup>38</sup>

At another level, the exclusion is achieved by the operative legal rules framing the interests and relationships recognized in redevelopment decision-making. These begin with property law. Owners of real property may sell it without consulting their neighbors due to the meanings engrafted on fee ownership. While these sales are also subject to doctrinal and contractual provisions as to others’ interests in the property, such as those of co-owners, mortgagees, lienors, leaseholders and common interest community residents, property sold to a new owner may be redesigned, demolished, rebuilt or used in ways that may be offensive or disturbing to the property’s remaining neighbors, provided the municipality’s zoning law is followed (or an exception is obtained) and the new use is not a legally cognizable public or private nuisance.<sup>39</sup>

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Massachusetts, Minnesota, Pennsylvania, Rhode Island, and Virginia. See CAL. HEALTH & SAFETY CODE § 33037(b) (West 1999); DEL. CODE ANN. tit. 31, § 4505 (1997); GA. CODE ANN. § 36-61-3(b)-(c) (2000); 65 ILL. COMP. STAT. ANN. 5/11-61-1 (West 2005); ME. REV. STAT. ANN. tit. 30-A, § 5104(2)(B) (1996); MASS. GEN. LAWS ANN. ch. 23G, § 16 (West 2002); MINN. STAT. ANN. § 469.028 (West 2001); 35 PA. STAT. ANN. § 1702 (West 2003); R.I. GEN. LAWS § 45-31.1-1 (1999); VA. CODE ANN. § 36-48 (2005 & Supp. 2006).

35. See, e.g., *Constr. Indus. Ass’n v. City of Petaluma*, 522 F.2d 897, 908-09 (9th Cir. 1975); *Golden v. Planning Bd.*, 285 N.E.2d 291, 300-05 (N.Y. 1972).

36. See, e.g., Kanner, *supra* note 11, at 340.

37. See McFarlane, *Inclusion*, *supra* note 19, at 880, 895.

38. See, e.g., Procurement FAQs, Maryland Department of Business and Economic Development, <http://www.choosemaryland.org/AboutDBED/statecontracting/ProcurementFAQs.html> (last visited Oct. 19, 2006) (describing Maryland law’s requirement that “all procurement opportunities with Maryland State agencies that are anticipated to exceed \$25,000 in cost must be advertised” and that “[s]olicitations for contracts valued between \$10,000 and \$25,000 must either be published in a newspaper or periodical of general circulation, or in an electronic media generally available to the business community, or posted on an agency bid board”).

39. See, e.g., Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 312 (2006).

This pattern among owners and occupants of adjacent parcels is parallel to the interlocal conflicts between jurisdictions. Local officials of one jurisdiction may make land use decisions to approve the development of commercial, residential or mixed uses within its borders—for example, a stadium or a shopping center—that will impose traffic and draw revenue away from the residents of the neighboring localities. The burdened community is not a party to the land-use decision process. All the benefit will flow to the developers, owners, and local government of the approving jurisdiction.

Many legal approaches have developed in recent years to address the problem of development's inequitable allocations of benefits and burdens in the context of intergovernmental conflict. As between cities and their wealthier suburbs, fairer allocations of the benefits and burdens of urban growth are promoted by growth management strategies, regional cooperation or governance, and various economic incentives.<sup>40</sup>

### C. Land Use Regulation

#### 1. From Comprehensive Planning and Zoning to Negotiated Deal-making

Local governments derive their power to regulate the use and development of land from the police power, that extremely broad power of government to protect the health, safety, morals, and general welfare of the people that is reserved to the states in the federal Constitution.<sup>41</sup>

The original template for modern land use regulation has undergone tremendous remodeling in the last sixty years. Today, it provides a highly flexible scaffold for public/private negotiation over profit-driven real estate development deals, from which the state actor is increasingly

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40. MAUREEN KENNEDY & PAUL LEONARD, THE BROOKINGS INST. CTR. ON URBAN AND METRO. POLICY, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 4, 12-14, 18-20, 28-39 (2001), available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf>; see also Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271, 271 (2002); see generally David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994) (discussing the use of growth management plans and local, regional, and state planning programs).

41. "The police power belongs to state governments, but all states have delegated the power to impose land use regulations to cities and counties," with the exception of Hawaii. PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW 5 (2d ed. 2003) (citing state statutes). The federal Constitution limits the exercise of the police power—the Fifth and Fourteenth Amendments prohibit the taking of private property for public use without just compensation, require due process prior to deprivations of property, and guarantee all persons the equal protections of the laws.

seeking income and an equity stake, as well as the traditional products of development. In the 1920s, the Supreme Court's approval of comprehensive zoning was tied to the notion of comprehensive planning for types of use that was implemented at the level of each parcel.<sup>42</sup> By the 1950s, the rigidity of this approach was eclipsed in popularity by regulatory approaches aimed at greater flexibility.<sup>43</sup> New forms of zoning evolved in already-built cities to encompass regulation of parcels larger than the individual lot; the basic planned unit development ("PUD") concept gave birth to special district zoning, overlay zones, floating zones, and transfer rights in density and development.<sup>44</sup> At the same time, subdivision regulations took shape to enable the subdivision of raw land for development in concert with publicly provided facilities such as roads, sewers, parks, and schools.<sup>45</sup>

Exactions augmented the land use regulatory tool kit in the boom and bust decade of the 1980s in the forms of required dedications of land, or lesser interests in real property, or of required payments of money, in the form of linkage fees, impact fees, and payments in lieu of taxes.<sup>46</sup> The utility and purpose of exactions is to spread the public costs of infrastructure to support a particular new land use onto the developers who would put the land into that new use.<sup>47</sup>

Today, urban land use decision-making is marked by negotiated public/private deal making.<sup>48</sup> This approach has eclipsed both the original methods of command-and-control regulation and public-regarding linkage ordinances, replacing these with the norms of private market transactions.<sup>49</sup> These negotiated deals are bilateral talks between

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42. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90 (1926).

43. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 785 (2003).

44. *Id.*

45. See Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 416-17 (2004).

46. See Derek J. Williams, *Rethinking Utah's Prohibition on School Impact Fees*, 22 J. LAND RESOURCES & ENVTL. L. 489, 491 (2002).

47. ALAN A. ALTSHULER ET AL., REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 3-4 (1993).

48. See ROSS MILLER, *HERE'S THE DEAL: THE BUYING AND SELLING OF A GREAT AMERICAN CITY* 207, 243 (1996). Carol M. Rose traces the origins and peculiar outcomes of piecemeal land controls in *Planning & Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983). See also Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347 (2002).

49. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 4, 15-16 (2005). Traditionally, zoning codes were intended to embody the community's vision for the locality, preserved by allowing only limited variances from that vision.

applicants and municipalities who exercise land use authority through a series of contract-like mechanisms that strive to emulate the efficiencies and efficacy of private business operations.<sup>50</sup> Local governments thus partner with private developers as co-investors, as much as they exercise the police power to promote the general welfare.

## 2. Municipal Powers Under the Federal Constitution and State Delegation

Even as the command-and-control regulations evolved, courts distinguished appropriate contracts between governments and private or public parties from those that would entail the intolerable sale of police power.<sup>51</sup> Courts recognized governments' ability to contract for an array of municipal functions provided they were ministerial, business-related or technical, such as the purchase, sale, or lease of government property, maintenance or establishment of public improvements, or hiring legal or financial counsel.<sup>52</sup>

Throughout the late 1980s and 1990s, courts imposed some limitations on the power to use exaction devices by imposing legal tests.

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This static character served the positive purposes of the zoning regime, by discouraging piecemeal changes and frequent revision, which have tendencies to undermine fairness and foment uncertainty. While administrative mechanisms for special permits, variances and rezonings were available, they were only meant to address exceptional, unforeseen, or otherwise essential modifications to the community's comprehensive plan. Thus, the traditional zoning process relied upon the expertise of local government's planning department as to appropriate uses and applicable requirements for each property, including approval of a development application. Developers would apply for particular development approvals, but rather than bargain, the local government would exercise its police powers to determine whether the application met the codified zoning requirements, and approve or deny the application on this basis alone.

50. *Id.* at 4, 16; *see also* MILLER, *supra* note 48, at 149-91.

51. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1140 n.359 (1980).

52. OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 670 n.2 (2d ed. 2001). Certain contracts are *ultra vires*, exceeding the locality's charter or statutory powers. *Id.* at 672. Contracts made in violation of public policy may include those made for an unreasonable length of time, as well as those that promise a particular governmental action or non-exercise of governmental power. *Id.* at 673. "Contracts to exercise governmental powers in particular ways are void as against public policy." *Id.* at 675. In the 1990s, states' adoption of acts enabling development agreements were a response to the strict rules propounded by state courts. Development agreements provide local governments with a revolutionary degree of flexibility. The agreements are long-term bilateral contracts, whose genius is to provide the applicant-developer with a vested right to develop a property that, in the absence of the development agreement, might violate generally applicable zoning regulations. The local government and developer-applicant negotiate over fees, conditions, regulatory coverage, and the lifetime of the agreement. *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 664-65, 671 (2001); *see also* Frug, *supra* note 51, at 1139.

Local governments had to show, by individualized determination, both an essential relationship and rough proportionality between the impact on the public of the proposed land use and the impact of the exaction on the landowner.<sup>53</sup> These doctrinal changes scarcely affect the urban land use contests discussed here. On the facts of *Dolan v. City of Tigard*,<sup>54</sup> and *Nollan v. California Coastal Commission*,<sup>55</sup> small towns' efforts to exact the creation of public greens or beach ways form a distinguishable category of contest from urban displacement near downtown growth.<sup>56</sup>

Traditionally, the public sector performed the functions of regulation and provision of "public works," such as roadways, water and sanitation, following the projections of planners for changes in population and citizen demand.<sup>57</sup> Funding of public works depended on the jurisdiction's capital budget, met through local revenues and state/federal intergovernmental transfers.<sup>58</sup> Although these public infrastructural investments clearly attract and support new development, the legal and fiscal arrangements were largely distinct. Private developers originated projects based on their own market information and project planning, without the public's involvement.<sup>59</sup> Under this division of effort, local governments deployed public process and public fisc without undertaking any of the entrepreneurial risks familiar to private sector developers.

Cutbacks in federal urban aid in the 1980s, however, impelled many local governments to improvise in order to meet their city planning and economic development objectives.<sup>60</sup> Tax cutting referenda put a political damper on raising public revenue through tax rate hikes or new bond issues.<sup>61</sup> Squeezed by fiscal restraints and rising land prices in the 1980s, local governments reshaped the traditional development process by expanding the sphere of public activity to better harness

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53. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

54. 512 U.S. at 374.

55. 483 U.S. at 825.

56. See *Dolan*, 512 U.S. at 379; *Nollan*, 483 U.S. at 827.

57. See Nicole Stelle Gamett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 459, 477 (2005) (reviewing RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005)); see also Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 179-80 (2006).

58. See Gamett, *supra* note 57, at 477; Rosenberg, *supra* note 57, at 187.

59. See generally PAUL C. BROPHY & JENNIFER S. VEY, *THE BROOKINGS INST., SEIZING CITY ASSETS: TEN STEPS TO URBAN LAND REFORM 5-6* (2002), available at <http://www.brookings.edu/es/urban/publications/brophyveyvacantsteps.pdf>.

60. See Gamett, *supra* note 57, at 477-78; Rosenberg, *supra* note 57, at 180.

61. See Gamett, *supra* note 57, at 478.

development as a strategic opportunity.<sup>62</sup> If effectively deployed, this resource might recapture hidden land values, finance essential infrastructure, revitalize downtowns, stimulate economic growth, and generate jobs.<sup>63</sup>

The result is a sloppy stew of redevelopment policies administered by quasi-public agencies, exercising quasi-executive functions, with opportunities for patronage in the administration of these programs having significant real estate elements. The sweep of programs by which government engages in affordable housing, such as business recruitment, economic development, community revitalization, and development approvals and expenditures, has grown over the decades and the result is neither coordinated nor targeted or calibrated to the general welfare. Judicial deference ratifies the deal makers as the “interested parties” in analysis of the validity of land use regulation.<sup>64</sup> *Kelo*’s 5-4 decision, as a matter of the federal Constitution, eliminates the need for even a fig leaf of blight.<sup>65</sup>

The cornerstone of the American constitutional framework for the rights of the governed and the powers of government is the principle that individuals will not be asked to shoulder more than a reasonable share of the cost of public goods.<sup>66</sup> The bounded character of the doctrinal categories—here, “land use regulation”—coupled with the frank self-interest of the private sector and the intensifying entrepreneurship of the public agencies, operate to shrink consideration of redevelopment benefits to the economic use that can be made of the land, and the property rights of the landowner.

#### *D. Government’s Activist Hand in the Residential Landscape*

##### 1. Legal Policy Interventions in the Residential Market

The operation of market forces is the familiar basis for the argument that government action is unnecessary to redress the disproportionate burden on residents in most urban revitalization efforts. Only where the distribution of burdens and benefits is caused by identifiably unlawful, discriminatory or biased process should the law step in to regulate. The unequal allocation of redevelopment burdens on

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62. *See id.* at 482.

63. Brophy & Vey, *supra* note 59, at 5, 7-8, 18-20.

64. SALSICH & TRYNIECKI, *supra* note 41, at 81-83.

65. Kanner, *supra* note 11, at 343.

66. EZRA TAFT BENSON, THE PROPER ROLE OF GOVERNMENT (1968), available at <http://www.laissez-fairepublic.com/benson.htm>.

poor or minority communities might be lamentable but it is not legally cognizable since it is pinned not on intentional discrimination by identifiable actors but to the operation of faceless market forces such as land costs and comparative efficiencies.<sup>67</sup>

The market account masks the hefty hand that government has played in current land use allocations. The government, in fact, has played so pervasive a role in the land use regimes that shape neighborhoods that “it is simply impossible to imagine what neighborhoods would have looked like in a ‘free market’ that left residential choices up to consumers.”<sup>68</sup> Government policies profoundly shape who lives next to whom as a matter of current legal doctrine and policy, not history alone.<sup>69</sup> The indelible remaking of the landscape is now widely recognized as rooted in the massively funded federal policies of the twentieth century: the federal government’s unparalleled investment in interstate highways, the explicit racism of the Federal Housing Administration’s redlining that funded white flight from cities to suburbs, and the immense (and racially skewed) federal subsidy of homeownership through the federal mortgage interest deduction.<sup>70</sup>

Certain federal policy choices provided essential preconditions for the deconstruction of urban centers and subsequent growth of suburban areas. Foremost was the nation’s sustained commitment of public dollars to build highways. A federal trust fund, established in 1956, poured revenue into highway construction projects and was “continually replenished by specially designated tax collections . . . .”<sup>71</sup> In other industrialized nations, money for roads comes from general revenues and thus must compete with other priorities in national budgets.<sup>72</sup>

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67. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 13, 15-17 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

68. Vicki Been, *Residential Segregation: Vouchers and Local Government Monopolists*, 23 YALE L. & POL’Y REV. 33, 35-36 (2005).

69. *Id.* at 36.

70. For the most influential examination of the root causes of our existing land use patterns, see KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994); Howard P. Wood, *How Government Highway Policy Encourages Sprawl*, CATO INST., Sept. 18, 1998, available at <http://www.cato.org/dailys/8-18-98.html>.

71. PIETRO S. NIVOLA, LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA 13 (1999); see also Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC’Y 31, 32 (2002).

72. NIVOLA, *supra* note 71, at 13. The United States was not the only nation to plan a federal highway system; France did so at about the same time. Nonetheless, the size and scale of the U.S. undertaking differentiates it from European nations, in that it required transcontinental roads, as

Subsidies for automobile-accommodating development take several forms, including direct expenditures for roads,<sup>73</sup> developer exactions for roads and parking,<sup>74</sup> minimal taxation on automobiles and fuel, and beneficial tax treatment for automobiles.<sup>75</sup> These subsidies are a “reverse wealth redistribution,” whereby the suburban commuters are subsidized by the car-less poor, “those relegated to shelter in the poorest census tracts . . . .”<sup>76</sup> Roads in the United States continue to consume the preponderant share of public investment in all modes of transportation. In 1945, public transit accounted for over thirty percent of all urban passenger miles traveled, but fifty years later, the figure had dropped to barely two percent.<sup>77</sup> To an appreciable extent, density is determined by transit policy. Reducing urban density removes the critical mass of clustered population and workplaces that would support greater public transit investments while reinforcing the use of private automobiles. Fuel pricing policies are just one of the energy policies that encourage sprawl, auto-centric travel, and demand for spacious housing.<sup>78</sup> These complement the post-war housing policies most associated with white

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well as inter-city and intra-metropolitan connectors. In the 1950s, the Cold War was not merely pretext for the National System of Interstate and Defense Highways. However, federal direction of road-building resources began still earlier, in the 1930s, when federal grants for state highway building were conditioned on state governments limiting their own toll-road collections to road improvement. *Id.* at 13-14.

73. Eric A. Cesnik, *The American Street*, 33 URB. LAW. 147, 174-76 (2001) (2000 R. Marlin Smith Student Writing Competition Award Winner) (noting that federal funding for roads was expected to be \$40.4 billion in 2001, compared with just \$5 billion for all other public transit).

74. Communities vary widely as to whether the full cost of the automobile infrastructure is shifted or the developer (or its consumers) receives hidden subsidies. Where communities require developers to pay less than their fair share of infrastructure development, the cost is covered from the general revenues, including the car-less taxpayers. JAMES A. KUSHNER, *THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY* 15-17 (2004).

75. Those who use their vehicles for the business are permitted to write-off vehicle expenses from ordinary income. I.R.C. § 162(a) (2000). Suburban automobile users pay up to twenty-five percent of the true cost of their transportation, compared to transit users who pay eighty percent of the true costs. KUSHNER, *supra* note 74, at 22-23 n.82 (citing KATIE ALVORD, *DIVORCE YOUR CAR! ENDING THE LOVE AFFAIR WITH THE AUTOMOBILE* 104 (2000)).

76. KUSHNER, *supra* note 74, at 16-17; John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 TRANSP. Q. 49, 56 (2003). While 0.9% of households with incomes between \$75,000 and \$99,999 had no car, the proportion swells as incomes decrease. Of households with incomes between \$20,000 and \$39,999, 5% were without a car, and 26.5% of households with incomes less than \$20,000 had no car. *Id.*

77. See Urban Transport Fact Book, U.S. Urban Personal Vehicle & Public Transport Market Share from 1945, <http://www.publicpurpose.com/ut-usptshare45.htm> (last visited Jan. 25, 2007) (citing data from JAMES DUNN, NATIONAL TRANSPORTATION STATISTICS: DRIVING FORCES (2000)); see also PIETRO S. NIVOLA & ROBERT W. CRANDALL, *THE EXTRA MILE: RETHINKING ENERGY POLICY FOR AUTOMOTIVE TRANSPORTATION* 62 (1995).

78. NIVOLA, *supra* note 71, at 16-19.



flight and the rise of suburban sprawl.<sup>79</sup> The federal mortgage guarantees subsidized new housing and incorporated two far-reaching program preferences, the first for new construction over rehabilitation, and the second, for racial exclusion.<sup>80</sup> One little-cited consequence is the allocation of new housing types. While the federal government subsidized new single-family housing for white suburbs, it built blocks of public housing for the cities.<sup>81</sup> As a result, today's urban concentrations are some of the lowest-quality low-income housing, forming a disproportionate share of the affordable housing offered to low-income minority households. This contrasts starkly with Europe, where two-thirds of all housing is publicly funded.<sup>82</sup>

Tax policies and the methods of collecting public tax dollars continue to promote city residents' relocation to suburbs and have significant implications for urban land use. The homeowner's mortgage deduction is the best known and is just one of several features in the U.S. tax system that favors the growth of suburbs.<sup>83</sup> Local governments collect three-quarters or more of their revenues from taxes on property.<sup>84</sup> This gives each local jurisdiction a strong incentive to maximize the assessed value of its real estate and to attain the wherewithal to cover the expense of local services. Localities compete for business location, investment and retention, and for more well-heeled residents.<sup>85</sup>

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79. See Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 304-12 (2000) (discussing the white flight and the rise of the suburban sprawl).

80. See William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 FORDHAM URB. L.J. 197, 226-35 (1999).

81. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 765-73 (1993).

82. These comparisons to European policies shaping urban space are not intended to suggest that U.S. policy can or should be changed to Europeanize U.S. cities. Nivola argues that this would not be even faintly possible, since he attributes the more efficient and contained style of urban land use to conjoined policies of steep consumption taxes, broad rental housing subsidies, and local-business protectionism in Europe and Japan. NIVOLA, *supra* note 71, at 12-52.

83. *Id.* at 24-26.

84. *Id.* at 26 (observing that of the G-7 nations, "only Canada relies as much on the taxation of income [as the United States]" and only Japan compares to the United States in use of property taxes). *Id.* at 25. In other wealthy nations such as Germany, Japan, Italy and France, the percentages range from nineteen percent to forty-three percent. *Id.* at 26 (citing Organisation for Economic Co-operation and Development, *Revenue Statistics 1965-1996* (1997)).

85. Affluent communities intentionally, and rationally, engage in "fiscal zoning" to secure for themselves the highest tax base for the lowest services burden. The practices, and their wealth-concentrating effects, are delineated in Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2012-15 (2000). Competition for wealthier residents underlies a wide variety of exclusionary zoning practices, such as mandatory minimum lot size, prohibition of multi-family housing, and exclusion of mobile homes. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local*

Related policies of intergovernmental revenue sharing also perpetuate the divide. United States localities must raise and fund two-thirds of their own expenditures,<sup>86</sup> which fuels the inter-jurisdiction competition to bolster the local economic base. The relative poverty of cities is exacerbated by the volume of unfunded federal mandates. These mandates further advantage prosperous suburbs and disadvantage fiscally weak municipalities who must then seek to raise property taxes.<sup>87</sup>

State and local government policy likewise shapes the current structure of our patterns of housing location and segregation.<sup>88</sup> In conjunction with federal policies, cities and suburbs used their police powers to direct land uses, and more particularly the proximity of users, through tenement codes and municipal zoning.<sup>89</sup>

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*Government Law*, 90 COLUM. L. REV. 1, 39-58 (1990); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333 (1984); J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265 (1997) (reviewing DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995)). Legal scholars have paid considerably less attention to interlocal competition for business investment. See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); Clayton P. Gillette, *Regionalism and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001) (discussing the extant literature of interlocal economic competition).

86. NIVOLA, *supra* note 71, at 26.

87. *Id.* at 34. The United States is the only developed nation not to have a land bank, although a number of U.S. cities and states are beginning to establish their own. See BLAKELY, *supra* note 8, at 155-57. The U.S. form of zoning, which separates residential and commercial uses, is linked by some to the demise of small shops in urban neighborhoods; unlike European cities, most U.S. cities have no "High Street" where parking is disallowed to make pedestrian-friendly shopping spaces. NIVOLA, *supra* note 71, at 31-32; see also KUSHNER, *supra* note 74, at 48. Nor does the United States have laws similar to those in Europe and Japan that protect local distribution systems—including family-owned businesses—from inroads of mega-chains. NIVOLA, *supra* note 71, at 32.

88. "Prior to the turn of the twentieth century, worker housing was located near employer housing," and race was not the dominant residential divider that it is in the United States. Been, *supra* note 68, at 36. In fact, "[s]ome of the current separation of classes and races can be attributed to [the century's] changes in transportation." *Id.* For example, maids, gardeners, and nannies commonly commute to work rather than live in or near their wealthy employers' houses. *Id.* See generally DAVID RUSK, *INSIDE GAME, OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* (1999); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 566-609 (1979).

89. See Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1257 (2005); Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 308-09 (2004); KUSHNER, *supra* note 74, at 568-69, 571; Garrett Power, *Meade v. Dennistone: The NAACP's Test Case to ". . . Sue Jim Crow out of Maryland with the Fourteenth Amendment"*, 63 MD. L. REV. 773, 789 (2004); see generally Davison M. Douglas, *The Quest for Freedom in the Post-Brown South: Desegregation and White Self-interest*, 70 CHI.-KENT L. REV. 689 (1994).

Today, the law does not allow one to house her own grandmother, or nanny, in a granny flat. If one wants to live in a mixed use neighborhood, most jurisdictions simply do not provide them. If one wants to live in the center city, the tax ramifications of doing so make that “choice” unavailable for all but the wealthiest of families. Indeed, if one wants to live in any place other than the suburbs, the economics of doing so are daunting, not because of the market, but because of the myriad ways in which federal and state governments subsidize the cost of living in the suburbs.<sup>90</sup>

In other words, law constrains those choices in so many ways that the notion of “choice” is fantasy.

## 2. Opening the New Urban Territories: Public/Private Partnerships Serving Some of the Public

Government policy stacks the deck against low-wealth urban communities through the structures it requires for community involvement in development decision-making. These structures are inaccessible to residents of most communities that bear the brunt of redevelopment today. Much contemporary redevelopment policy implemented by U.S. cities focuses narrowly on restoring vibrancy and solvency to central cities through policies that inflict further harms on existing poor and working-poor residents.<sup>91</sup> The residential strategy features attracting middle and upper middle class residents back to city centers through a mix of housing types and amenities that appeal to young professionals and empty-nesters.<sup>92</sup> Cities also pursue business development strategies and engage in vigorous inter-jurisdictional

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90. Been, *supra* note 68, at 36; see generally Scott W. Allard & Sheldon Danziger, *Proximity & Opportunity: How Residence and Race Affect the Employment of Welfare Recipients*, 13 HOUSING POL'Y DEBATE 675 (2003), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_1304\\_allard.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1304_allard.pdf) (discussing the relationship between welfare recipients and their physical proximity and access to available jobs).

91. See Quinones, *supra* note 14, at 741.

92. See *id.* at 695-96 (arguing that this is transparently a class-based strategy, seeking to cater to the entertainment tastes of largely white middle class residents); see generally BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES (1989); JOHN KROMER, NEIGHBORHOOD RECOVERY: REINVESTMENT POLICY FOR THE NEW HOMETOWN (2000) (examining strategies used in Philadelphia); Chris Tilly et al., *Space as a Signal: How Employers Perceive Neighborhoods in Four Metropolitan Labor Markets*, in URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 304 (Alice O'Connor et al. eds., 2001) (examining the insulation of racially segregated neighborhoods from the hubs of job-growth used in Atlanta, Boston, Detroit and Los Angeles).

competition to create business locations offering employment or other boosts to the municipality's economy.<sup>93</sup>

As project complexity has increased, participation policies have not kept pace. Community development projects<sup>94</sup> are produced by a complex network—government policymakers, personnel in multiple departments, agencies, programs at federal, state and local levels, staff and directors of nonprofit organizations' foundations and their program managers, and an extensive array of for-profit and not-for-profit development partners—as well as lawyers, planners, architects and builders. These players then typically relate to each other as participants in (1) direct physical development of housing or of facilities to be leased to existing for-profit businesses or to start-up local businesses, (2)

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93. See Joshua P. Rubin, Note, *Take the Money and Stay: Industrial Location Incentives and Relational Contracting*, 70 N.Y.U. L. REV. 1277, 1299-1314 (1995) (discussing the impact of plant closings on local communities and the scale of the problem for localities); see also Christian Parenti, *Making Prison Pay: Business Finds the Cheapest Labor of All*, NATION, Jan. 29, 1996, at 11, 12 (discussing the profits being made by states from prison labor).

Increasingly, studies show that downtown development subsidies have "failed to benefit the neighborhoods that are home to the poorest residents of the cities." Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 331-32, 333 (1999) [hereinafter McFarlane, *Race, Space, and Place*] (observing that these strategies of "economic development promote[] capital accumulation and mobility that intentionally bypass[] poor neighborhoods"). See also GREG LEROY & TYSON SLOCUM, *ECONOMIC DEVELOPMENT IN MINNESOTA: HIGH SUBSIDIES, LOW WAGES, ABSENT STANDARDS 1* (1999) (finding that, despite very high public subsidies to support economic development in Minnesota, the subsidized corporations had created jobs with "surprisingly low" wages); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grass-roots Movement for Economic Justice*, 54 STAN. L. REV. 399, 449 nn.261 & 262 (2001) (noting that "although the Los Angeles Community Development Bank made \$97 million in loans to businesses within the Empowerment Zone (EZ), only 249 jobs were retained or created for EZ residents" (citing CTR. FOR CMTY. CHANGE, BRIGHT PROMISES; QUESTIONABLE RESULTS: AN EXAMINATION OF HOW WELL THREE GOVERNMENT SUBSIDY PROGRAMS CREATED JOBS 9-11 (1990) (analyzing the limited return on public subsidies to businesses, in the forms of enterprise zones, industrial revenue bonds, and Urban Development Action Grants) and James Sterngold, *A Grand Idea That Went Awry: Big Redevelopment Effort Falls Short in Los Angeles*, N.Y. TIMES, Nov. 14, 1999, at BU1)); *Downtown Redevelopment as an Urban Growth Strategy: A Critical Appraisal of the Baltimore Renaissance*, 9 J. URB. AFF. 103, 115 (1987).

94. See generally William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377. Federal programs typically define the activities that can be funded, and the entities that can receive funding, for program purposes. For example, the rules implementing the Community Reinvestment Act ("CRA") define community development to include the following types of activities that promote community welfare: "(1) affordable housing . . . for low or moderate income individuals; (2) community services targeted to low or moderate income individuals; (3) [certain] activities that promote economic development . . . ; and (4) activities that revitalize or stabilize low or moderate income geographies." Bennet S. Korn et al., *The New Regulations Implementing the Community Reinvestment Act*, 49 CONSUMER FIN. L.Q. REP. 29, 30 (1995).

technical and grant assistance or loans in connection with development projects, or (3) direct investments as partners in a joint venture.<sup>95</sup>

While a number of Community Development Corporations (“CDCs”) formed initially for the purpose of re-knitting the fabric of distressed neighborhoods,<sup>96</sup> they have evolved into crucial and capable providers of housing and other services, and are significant actors in widely varied aspects of community development. Few have managed to become economically self-sufficient, with the result that most depend on substantial investment of public and private resources.<sup>97</sup> This dependence is naturally compounded by the CDCs’ organizational interests to be a repeat player in the successive cycles of funding available from or through state and local development agencies.

Funding for community development in center cities is in limited supply. As a consequence controllers of the funding have the economic power to direct community development agendas, a form of top-down pressure that may distract community-located nonprofits from the consideration of local neighborhood initiatives.<sup>98</sup>

The procedures of public programs invite grass-roots input in theory, but the features of such systems are subject to the critique of being solely smoke and mirrors.<sup>99</sup> Federal urban policy has required cities to involve affected residents in development decisions since the community devastations of Urban Renewal in the 1950s. As a result traditional local land use planning, development and environmental management all include participatory mechanisms.<sup>100</sup> In practice,

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95. See generally Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 766-72 (1997) (giving a brief history and overview of CDCs and community-based economic development).

96. See *id.* at 766.

97. See *id.* at 766-68.

98. See Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 237 (1999) (discussing the tension many CDCs experience arising from their funding sources, which give them wider political and social legitimacy as players in urban development, but undermine incentives and opportunities to build grass-roots alliances and capacities; and put them at risk of narrowing their empowerment objectives to conform to their investors’ interests and views of the political and economic structures that resist social change).

99. See *id.* at 238. For a discussion of the political advocacy efforts of CDCs, see Quinones, *supra* note 14, at 753-58; Norman J. Glickman & Lisa J. Servon, *More than Bricks and Sticks: Five Components of Community Development Corporation Capacity*, 9 HOUSING POL’Y DEBATE 497, 504-12 (1998).

100. McFarlane, *Inclusion*, *supra* note 19, at 868-91 (discussing, *inter alia*, Housing Act of 1949 § 105(d), Pub. L. No. 81-171, 63 Stat. 413, 417 (1949) (requiring citizen participation through public hearings); Housing Act of 1954 § 221(a)(1), Pub. L. No. 83-560 68 Stat. 590, 600 (1954) (making citizen participation a mandated element of the “workable program” for community improvement for those communities or localities that requested provision of mortgage insurance)).

however, such requirements have tended to “‘rubber stamp’ . . . [those] urban redevelopment decisions that had already been made by the local government.”<sup>101</sup> Stronger participatory requirements arose as part of the War on Poverty in the 1960s and the creation of the federal Community Action Program, (“CAP”)<sup>102</sup> which required “maximum feasible participation of the poor in the program.”<sup>103</sup> Local resident participation particularly of the urban poor became a significant focus of the Community Action Program, as “[h]undreds of independent local organizations (community action agencies) were created to coordinate a variety of service programs including ‘neighborhood services, education, health, manpower, housing, social services, and economic development.’”<sup>104</sup> The direct funding of CAP agencies was not warmly welcomed by local politicians, and the successor federal urban program, Model Cities, instead provided for “widespread citizen participation” intended to minimize the level of neighborhood participation in comparison to CAP.<sup>105</sup> Participation was curtailed by ending direct funding of community action agencies, and instead “channeling funding of development through state and local governmental agencies instead of directly to community groups.”<sup>106</sup> When the Community Development Block Grant (“CDBG”) program replaced the Model Cities and other categorical grant programs in 1974, it sought to redress urban decay by providing block grant funding to all eligible cities for any of an extensive list of general activities.<sup>107</sup> CDBG replaced “the strong participatory mandates of the Great Society era with minimal citizen participation mechanisms.”<sup>108</sup> The participatory structures of the more recent Empowerment Zone program, like those of the Community

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101. McFarlane, *supra* note 100, at 870 (citing Arthur R. Simon, *New Yorkers Without a Voice: A Tragedy of Urban Renewal*, ATLANTIC MONTHLY, Apr. 1966, at 54 (providing firsthand account of the ineffective attempts by poor residents to participate in and impact the outcome of a New York City urban renewal program)) (“Citizen boards were convened but were often hastily assembled advisory committees that had a token representative of the communities (mostly poor, mostly black) on the board.”).

102. During the 1960s, the federal government declared a “War on Poverty” and adopted a number of social service and development programs containing relatively strong participatory requirements to address the problems of black poverty in northern city ghettos. *See generally* Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

103. McFarlane, *Inclusion*, *supra* note 19, at 872.

104. *Id.* at 873 (quoting ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 91 (1995)).

105. *Id.* at 874-76.

106. *Id.* at 876.

107. *Id.* at 880.

108. *Id.*

Action and Model Cities era, are facially robust.<sup>109</sup> To receive Empowerment Zone designation, a city's application had to contain a "process by which the affected community is a full partner in the process of developing and implementing the plan and the extent to which local institutions and organizations have contributed to the planning process," as part of a strategic plan to mobilize and coordinate state, local, private, and community resources.<sup>110</sup> After the application process ended, however, federal oversight ceased.<sup>111</sup>

The eclipse of traditional land use planning procedures by cities' wholehearted embrace of development agreements and similar bilateral negotiated approaches leaves next to no room for the public. State enabling statutes eliminate substantive restrictions that previously applied to negotiations between cities and developers, in order to provide exceptional bargaining flexibility.<sup>112</sup> Public participation is perfunctory and futile: By design it is too little and too late, disproportionate to the complexity of the undertaking and to the preferential access of bidding developers. The negotiated processes of most states utilizing development agreements are not covered by due process requirements of a public hearing, findings of fact, or prohibitions on ex parte communications between developer applicants and local officials.<sup>113</sup> As a consequence, current procedures allow officials to relegate affected community members to after-the-fact comments, the timing of which precludes meaningful exchange of information between the public and local government officials. Conversely, the bilateral negotiation model accords to developers early, active and substantively significant opportunity for preliminary negotiation within the project approval process, wherein the developer applicant's input is both critical to the local government actors' decision-making, and analogous to the negotiation of private real estate deals.<sup>114</sup>

The bilateral negotiation model grants to developers "wide latitude to prenegotiate the extensive and intricate terms of their agreements outside of public forums, excluding affected third parties from the

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109. *Id.* at 885.

110. 26 U.S.C. § 1391(f)(2)(B) (2000); McFarlane, *Inclusion*, *supra* note 19, at 885-86.

111. McFarlane, *Inclusion*, *supra* note 19, at 891-92.

112. Camacho, *supra* note 49, at 39.

113. *Id.* at 36-37. Public input is a required element of quasi-judicial municipal land use decisions, and trigger the due process requirements of state and federal constitutions. Thus most states' zoning laws require a public hearing, as does the Standard State Zoning Enabling Act. This is also the case for the negotiated processes Planned Unit Developments ("PUDs") and contract zoning as well as development agreements. *Id.* at 36-37.

114. *Id.* at 43.

extensive information exchanges and substantive trading that occur during negotiations.”<sup>115</sup> It is little wonder, then, that “local officials often treat public participation as if it obstructs . . . the decision process.”<sup>116</sup> No state statutes or local enabling ordinances allow, much less require, neighboring property owners or other concerned residents or community organizations to be parties to the agreement.<sup>117</sup>

Not only do bilateral land deals evade constitutional due process requirements, but further, no other effective accountability mechanisms are available to those most impacted by the land use decision.<sup>118</sup> Many states do not require their development agreements to be consistent with comprehensive plans or zoning codes. The American Planning Association’s new Model Code takes this position, and allows development agreements to “address any issue that local land development regulations can cover,”<sup>119</sup> specifically allowing an agreement to depart from applicable zoning code regulations as long as it remains consistent with the broad policies of the comprehensive plan.<sup>120</sup> Excluded third parties, seeking to gain judicial review of the agreements or the process by which they are negotiated, find that even lawsuits offer scant relief. Because “[development agreement acts] and other state laws governing [the] bilateral negotiated approaches afford substantial discretion to local governments, courts often are unable to scrutinize the substance of development agreements.”<sup>121</sup>

This depiction underscores the wildly lopsided terrain on which “public participation” is to take place when local governments engage in development agreements. The procedures on the books in most states omit community residents from the processes that fashion the objectives

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115. *Id.* at 37.

116. *Id.* at 38. Hearings, when held, are conducted in some states and under the model code by a hearing examiner who may not be an official or employee of the local government, and who collects comments for delivery to the legislative body. *E.g.*, MD. CODE ANN., HEALTH-GEN. § 13.01(e) (LexisNexis 2003 & Supp. 2005) (allowing legislative body to delegate all or part of its authority to enter into agreements, including holding public hearings, to a possibly unelected “public principal”); AM. PLAN. ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 10-201(3) (3d ed. 2002) [hereinafter APA MODEL CODE]; *see also* Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 646 (2003) (recommending a single hearing because the “two-hearing procedure is wasteful and unnecessary”).

117. Camacho, *supra* note 49, at 39.

118. *Id.* at 35.

119. APA MODEL CODE § 10-504 cmt.; *see also id.* § 8-701(1) (allowing local governments to enter into agreements “concerning the development and use of real property”); *id.* § 8-701(2), (3) (defining and identifying purposes of development agreements).

120. *Id.* § 10-503.

121. Camacho, *supra* note 49, at 44.



and assess the outcomes of redevelopment projects. These processes are instead forged by the profoundly asymmetric public/private development partnerships that predominate today. The bartering nature of the contemporary development process causes public officials to “behave like developers rather than guardians of the public interest.”<sup>122</sup> Not surprisingly, this profound asymmetry of access to official decision-makers has produced widespread accounts of corruption and patterns of favoritism,<sup>123</sup> and enervates the legitimacy of land use decision-making through negotiated development agreements.

*E. Redevelopment Costs and Benefits: Unaccountable Calculation, Inequitable Allocation*

The public/private funding of real estate development activity consists substantially of public transfers to private developers. This transfer was quite frank under the federal Urban Renewal Program, and although the modes and transparency of transfer have changed over the years, transfer of public value from displaced urban dwellers to other private persons remains a central feature of redevelopment. Today a host of financing devices is deployed to attract developers to state-favored projects, including tax exempt development bonds, public finance and mixed-public/private finance ventures, as well as condemnation.<sup>124</sup> City centers are remade, and former residents' losses are uncompensated. The promised benefits beguile, yet the costs to residents and to the public weal are not benign.

1. The Cautionary Lessons of Urban Renewal

In considering the costs and benefits of redevelopment, we have the instructive history of Urban Renewal. During the redevelopment of

122. *Id.* at 49 (quoting Douglas R. Porter, *The Relation of Development Agreements to Plans and Planning*, in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS 148, 150 (Douglas R. Porter & Lindell L. Marsh eds., 1989)).

123. See Camacho, *supra* note 49, at 42-43 (“[I]t is not uncommon for developers to attempt to pay off elected officials in exchange for favorable decisions . . .”); see also ALTSHULER ET AL., *supra* note 47, at 59 (discussing the potential for corruption in land use regulation); Denis Binder, *The Potential Application of RICO in the Natural Resources/Environmental Law Context*, 63 DENV. U. L. REV. 535, 560 (1986) (noting that “fraud, kickbacks, and corruption are very common in land development” and therefore make land use regulation a likely area for RICO prosecutions); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272-74 (1997) (discussing accounts of bribery, favoritism, and developers' influence in local government); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 588 (1990).

124. Jodi Wilgoren, *Detroit Urban Renewal Without the Renewal: Derelict Houses Razed But Not Replaced*, N.Y. TIMES, July 7, 2002, § 1, at 10.

southwest Washington, D.C., approved by the Supreme Court in *Berman v. Parker*,<sup>125</sup> public expenditures in a project in which “private enterprise . . . shall be given a preference over any public redevelopment company” in the transfer of development parcels equaled eighty-seven percent of the private investment.<sup>126</sup> Moreover, the increase in tax receipts attributable to redevelopment from 1953 through 1973, was less than \$5 million.<sup>127</sup>

Under the land-claiming strategy enacted in the Housing Act of 1949, an interested city first identified “blighted” areas.<sup>128</sup> Under the Housing Act of 1954, the city was required to present its intended new use for the site in a “workable program” and submit it for review to the regional urban renewal office for federal approval.<sup>129</sup> Once approved, the area could be seized by the agency under the governmental power of eminent domain. The people and businesses who occupied the land were compensated and sent packing. The seized land was cleared, and then sold to developers at bargain prices written down through substantial federal subsidies.<sup>130</sup>

The process was aided by a concept of blight invented specifically for the purpose of enabling the reconstruction of aging downtowns. Critics and proponents alike describe the effect, with different intonation, as applying to buildings that had lost their sparkle and most importantly, their profit margin.<sup>131</sup> Urban renewal policy boldly reallocated privately held land and the public fisc to engineer the post-World War II retooling of the American city. It was sought by American business leaders and big-city mayors to respond to the spatial reorganization of U.S. cities, which mushroomed during the war years, and to the powerful people and institutions—“downtown merchants,

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125. 348 U.S. 26 (1954).

126. See District of Columbia Redevelopment Act § 7(g), Pub. L. No. 79-592, 60 Stat. 790, 796 (1946); *Berman*, 348 U.S. at 30; see generally Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685 (1992); *Hoeber v. D.C. Redev. Land Agency*, 483 F. Supp. 1356, 1367 (D.D.C. 1980) (under the redevelopment plan over \$265 million had been invested by private developers as compared to the less than \$230 million invested by the government).

127. See *Hoeber*, 483 F. Supp. at 1367 n.37. Even adjusted to 1973 dollars, this is a paltry rate of return on \$230 million.

128. McFarlane, *Inclusion*, *supra* note 19, at 869.

129. *Id.* at 870.

130. *Id.* at 869; Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 215-16 (1978).

131. ROBERT M. FOGELSON, DOWNTOWN: ITS RISE AND FALL, 1880-1950, at 346 (2001) (providing an extended discussion of the invention of the concept of “blight”); see also Pritchett, *supra* note 33, at 16-18.

banks, large corporations, newspaper publishers, realtors, and other institutions with substantial business and property interests in the central part of the city.”<sup>132</sup> “Urban renewal agencies in many cities demolished whole communities inhabited by low income people in order to provide land for private development of office buildings, sports arenas, hotels, trade centers, and high income luxury dwellings.”<sup>133</sup>

The result was not decent housing and suitable living environments for the displaced, or for those in the second great migration from farm to city continuing after the war. Instead, urban renewal created a massive housing crisis and dramatically worsened the conditions of the poor.<sup>134</sup> The legacies of urban renewal are multiple, and for some, cruel: Cities increased their tax base; developers profited; the financial, real estate and insurance industries whose fortunes rise on renewed downtowns, benefited; yet African-American communities were dismantled, and the economic development that replaced them was largely in the hands of white owners of new businesses, clubs, and restaurants.<sup>135</sup>

Three lessons of Urban Renewal apply in assessing contemporary urban redevelopment. The actual benefits of redevelopment may be significantly smaller than forecasted. The costs may be greater, and of more kinds, than city leaders commonly acknowledge.<sup>136</sup> The costs and the benefits are allocated as if by centripetal force; benefits flow in one direction, to favored developers constructing islands of affluence intended for new arrivals,<sup>137</sup> while the costs are redirected, generically to

132. Marc A. Weiss, *The Origins and Legacy of Urban Renewal*, in FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT 253, 254 (J. Paul Mitchell ed., 1985).

133. *Id.* at 253.

134. Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 LAW REV. MICH. ST. U.-DETROIT C.L. 901, 939; see also McFarlane, *Inclusion*, *supra* note 19, at 869-70.

135. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 15-21 (2006) [hereinafter McFarlane, *New Inner City*].

136. The critique is raised at local levels that many of these publicly subsidized deals would have gone forward without the commitment of public resources, or that the projects prove not lucrative, despite the city's initial projections. See Wilgoren, *supra* note 124, at 10; Vivien Lou Chen, *The Deal is Off for Burbank, Mall Developer*, L.A. TIMES, Nov. 13, 1994, at A1 (reporting that the city of Burbank invested over \$120 million in Burbank Media City Center redevelopment project but that the project “won’t produce a dime in profit for the foreseeable future”).

137. See Andrew MacLaran, *Master of Space: The Property Development Sector*, in MAKING SPACE: PROPERTY DEVELOPMENT AND URBAN PLANNING 7, 42 (Andrew MacLaran ed., 2003) (discussing the tendency of redevelopment to follow a luxury formula in order to make projects economically viable and potentially contribute to city property and sales taxes); see also McFarlane, *New Inner City*, *supra* note 135, at 21-25 (arguing that contemporary urban redevelopment’s reliance on concentrating affluence manifests discrimination in its displacement of households who are planned out, as well as priced out, of the amenities of city living).

“the public,” and particularly to the present occupants of the targeted city neighborhood.

Displacement’s damage to residents in the path of redevelopment projects may be the same whether by public or by private means, but the possibilities for remedy differ. Where displacement is compelled by government through condemnation, some of its effects may be avoided or lessened through governmental decision making—as to site selection, notice, public participation, and compensation offers. When gentrification produces displacement, this is commonly understood as the operation of a free marketplace, thus identifying an appropriate governmental intervention is problematic.<sup>138</sup> When PPPs target, take, or forego taxes and select the redeveloper for tracts of residential terrain, the impacts on the social community may be as relentless and ineluctable as they are on the built environment. The process whereby the city permits large-scale revitalization involving the relocation of residents and significant demolition of existing properties—predicated on eminent domain and a reallocation to other uses of the land, indicated quite literally by tearing down what was, and wiping clean the former map—requires legal regulation to restore a measure of public serving reciprocity.

Some redevelopment impact on the city and its residents may be incremental and absorbable, such as where revitalization turns primarily on residential rehabilitation that is mainly financed privately by new homebuyers.<sup>139</sup> In today’s urban boom cycle, however, much of the change in neighborhoods is created not by homesteaders but by private developers anointed by local government, which assembles land not to build roads or stadia, but to offer to private developers in a frank bid to remake space in its preferred, high-end vision. This is no unfettered market; this is Urban Renewal Reprised.

## 2. The Customary Calculus of Benefits

### a. Benefits Anticipated by Local Governments

Since the “back to the city” movement in the 1970s, gentrification has been welcomed by local governments as a cure for the ills of central city pockets of poverty. Many cities’ economic development strategies are premised on the rationale that attracting capital investment to low-

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138. Hellegers, *supra* note 134, at 937 n.248.

139. These can price out previous residents as property values and taxes rise, as evidenced in the substantial literature on gentrification, and municipal policies to respond to those forces.

wealth city neighborhoods will mitigate the decline in their industrial base.<sup>140</sup> Local governments believe they have direct economic incentives for pursuing revitalization strategies that attract middle class and higher-earning residents.<sup>141</sup> Increased property values may lead to increased property tax revenues, which local governments sorely need as they bear growing portions of the burdens of government, from street-sweeping to homeland security.<sup>142</sup> However, this benefit may not be fully realized, as where the city adopts a policy to delay reappraisals,<sup>143</sup> or where local government understaffs its appraisal office as it strives for operational savings.<sup>144</sup> Nonetheless, declining tax delinquencies and tax foreclosures may be expected in areas undergoing residential renewal, and should have a positive effect on the city's ability to collect property taxes.

As I discuss in Part IV, these anticipated benefits are enjoyed more often in the abstract, rather than reliably accounted for as receivables or

140. See, e.g., MARTIN O'MALLEY, BALTIMORE CITY ECONOMIC GROWTH STRATEGY: BUILDING ON STRENGTH 4 (2002), available at <http://www.ci.baltimore.md.us/images/EconGrowthStrategy.pdf> (describing the city's need to stem the departure of the African American middle class); Charles Leroux & Ron Grossman, *Putting the 'Chic' Back in Chicago*, CHI. TRIB., Feb. 4, 2006, (Magazine), at 10; City of Boston, <http://www.cityofboston.gov> (last visited Oct. 19, 2006) (providing businesses the option of viewing descriptions of economic development initiatives); City of Philadelphia: Neighborhood Transformation Initiative, <http://www.phila.gov/nti/agencies.htm> (last visited Oct. 19, 2006) (detailing partnerships essential to revitalize the neighborhoods as the city has done with its downtown); Office of Housing and Community Development: Developer Incentives, <http://www.phila.gov/ohcd/devincent.htm> (last visited Oct. 19, 2006) (offering package incentives for developers); see also THE COUNCIL FOR INVESTMENT IN THE NEW AMERICAN CITY: A REPORT ON THE CHANGING REALITIES OF CITIES 5-15 (2002), available at [http://www.usmayors.org/uscm/news/press\\_releases/documents/mba/full\\_report.pdf](http://www.usmayors.org/uscm/news/press_releases/documents/mba/full_report.pdf) (highlighting renewal efforts of several cities).

141. See Roberto G. Quercia & George C. Galster, *Threshold Effects and the Expected Benefits of Attracting Middle-income Households to the Central City*, 8 HOUSING POL'Y DEBATE 409, 432 (1997), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0802\\_quercia.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0802_quercia.pdf) (discussing the perceived social and economic benefits of middle class presence for cities and observing that concentration in exclusive neighborhoods is optimal for retail); see generally NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 51-116 (1996) (discussing gentrification as an amelioration of the loss of affluent residents by many cities in the 1980s); FRIEDEN & SAGALYN, *supra* note 92 (examining the role city governments play in attracting upper middle class residents).

142. According to a study published by The Brookings Institution, the two biggest sources of additional revenue raised to replace the drastically diminished federal funds to cities have been the local property tax (for cities with that taxing power, which are not prevented by voters from raising the property tax), and the introduction of new fees and increased charges for services such as code inspections, tree removal, and sidewalk maintenance. See BRUCE A. WALLIN, *THE BROOKINGS INST., BUDGETING FOR BASICS: THE CHANGING LANDSCAPE OF CITY FINANCES* 1-6, 14-15, 31-33 (2005). Some cities raised revenue through the sale of city-owned properties. *Id.* at 34.

143. Frank F. DeGiovanni, *An Examination of Selected Consequences of Revitalization in Six U.S. Cities*, 21 URB. STUDIES 245, 251, 253 (1984).

144. See FRIEDEN & SAGALYN, *supra* note 92, at 133-71; REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 269-90 (Mike E. Miles et al. eds., 3d ed. 2004).

fairly distributed. While the new middle-class migrants may be expected to pay more to the city in income tax, and owners of high-end housing may be expected to pay property and recordation taxes, these gains may be offset by their greater likelihood to itemize and take advantage of tax deductions and credits to reduce their tax liability. Business displacement costs are imposed, which may be felt by the city as well as by business owners, since businesses that fold or move out of the city are lost to the municipal tax base.<sup>145</sup>

#### b. Revitalization Benefits to Non-displaced Residents

Neighborhood redevelopment on an incremental scale may be thought to provide significant, if less tangible benefits. By reversing the physical indicators of decline, it stands to reason that more taxpayers stay in the city,<sup>146</sup> and more deteriorated properties are brought into compliance with building code standards of safety and habitability. Where truly private redevelopment takes place house by house, rather than on a large scale, that investment may well preserve an existing housing stock that is architecturally interesting and historically significant. The local residents as well as the city may generally benefit from the preservation of a physical link with its past without the direct expenditure of public funds to achieve that purpose—a benefit which cannot be delivered by new construction. Landlord-owners of properties on the intended site of redevelopment may be able to raise the rents required from tenant-residents of the neighborhood, which in turn makes the analysis of value to a private individual potentially a matter of public policy.

The calculus of “improvement” for current residents who do not relocate is complex and cannot be reduced to a net change in dollar value of their interests in real property. Whether the improvement of neighboring parcels that impact resident homeowners by increasing their properties’ market values is indeed a “benefit” to the long-time residents must be analyzed through that matrix of values that comprise urban residence. These include not only the economic values of place, but also the personhood elements of property, the well-being of the affected

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145. A 1960 Small Business Administration Report noted that 756 of nearly 3000 firms displaced by urban renewal went out of business or otherwise disappeared. MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962*, at 69 (1964).

146. Whether or not this is demonstrably true, it is an articulated belief. *See, e.g.*, J. Peter Byrne, *Two Cheers for Gentrification*, 46 *HOW. L.J.* 405, 415 (2003) (noting that neighborhood improvements may provide an incentive for residents to stay).

individuals, and the social capital/community aspects of the neighborhood.

Benefits, if they come, do not generally flow to all residents. Poor residents in the path of urban redevelopment do not share in any significant ownership opportunities flowing from development of the area. Massive infusions of new capital typically take place.<sup>147</sup> Potentially, redevelopment activities bring new private-sector jobs: paying better than minimum wage, increasing access to additional consumer credit, enhancing the ability to purchase, to accumulate assets, and perhaps to save. Redevelopment entails redistribution of the ownership of private and public real estate, and creates new assets. Whether the residents in place participate in fact in these collateral effects of redevelopment depends, not primarily upon location, but upon the matrix of public policies and local political action to direct their distribution. Enhancements to this matrix are discussed in Part IV.

### 3. Revitalization Costs Imposed on Displaced Residents

#### a. Housing Costs

One's housing represents an economic interest—a location in the shelter market, as well as the locus of a person's important familial, social and other relationships. The eradication of rental housing that is affordable to low and moderate income people is arguably the most significant economic and social cost of neighborhood revitalization. When the neighborhood converts to ownership property from rental property, or the neighborhood undergoes gentrification, from low to moderate income residents to professional and other social elites, the former tenants must find somewhere else to live. If rents rise throughout the revitalizing area, or if the redevelopment area requires the relocation of residents, these residents leave not only the familiar roofs but also

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147. Case studies suggest that very high levels of public money are invested, as well as private capital. See *Hoerber v. D.C. Redev. Land Agency*, 483 F. Supp. 1356, 1367 (D.D.C. 1980) (observing that private investment in the redeveloped area of southwest Washington totaled "over \$265 million" and that public expenditures totaled "less than \$230 million"). Denis Brion concludes, as to the redevelopment of southwest D.C., that this nearly-equivalent public expenditure was a problem of local government's vulnerability to the development industry. Developers were permitted to control their costs and maximize their profitability by exporting much of the physical and fiscal work of the redevelopment onto government, which then became unable to recapture the costs it incurred (for example, by selling prepared development sites at a price that reflected acquisition and preparation expenses). Some of these costs were recaptured through increased property tax revenues. See Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 694-98 (1992).

streets, friends, neighbors, churches, child care arrangements, schools and transit routes. Poverty in neighborhoods in the centers of the largest cities remains significant at the same time that the total population of central cities has been declining. In several big cities, one in five people is poor.<sup>148</sup>

Evidence of the huge loss in number and affordability of units to working and poor households is a cost imposed with little in-kind benefit returned to society. During the first decade of Urban Renewal, just one-quarter of the thousands of units demolished were replaced<sup>149</sup>—at much higher rents and housing wealthier residents.<sup>150</sup> The displacees almost always incurred higher shelter costs and increased cost burdens relative to their ability to pay.<sup>151</sup>

Citywide impact of displacing redevelopment is hard to assess because tracking out-moving residents is difficult. Several displacement studies have reported “consistent negative citywide effects on affordable housing markets and neighborhood stability.”<sup>152</sup> The third or so of center city rental units in “poor” or “fair” condition<sup>153</sup> may be exacerbated in gentrifying neighborhoods by landlords who decline to make building repairs in anticipation of a coming rebuilding boom.

Today, one-third of the nation is unable to afford the cost of rental housing in the United States.<sup>154</sup> Millions are paying more than thirty percent of their income for housing, which is the long-standing benchmark for housing affordability.<sup>155</sup> This includes homeowners as well as the vast majority of low wage earners and the elderly or disabled

148. See TODD SWANSTROM ET AL., THE BROOKINGS INST., PULLING APART: ECONOMIC SEGREGATION AMONG SUBURBS AND CENTRAL CITIES IN MAJOR METROPOLITAN AREAS 1-2 (2004), available at [http://www.brookings.edu/metro/pubs/20041018\\_econsegregation.pdf](http://www.brookings.edu/metro/pubs/20041018_econsegregation.pdf).

149. SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (“At a cost of three billion dollars the Urban Renewal Agency . . . has succeeded in materially reducing the supply of low-cost housing in American cities.”). Of 126,000 homes destroyed between 1950 and 1960, displacing hundreds of thousands of people at a cost of billions of dollars, just 28,000 were replaced. While over 100,000 of these homes had been deemed substandard, some 25,000 were not. *Id.*; see also ANDERSON, *supra* note 145, at 65.

150. Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 791 (1971).

151. See Isis Fernandez, Note, *Let's Stop Cheering and Let's Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409, 409-10, 418 (2005).

152. Hellegers, *supra* note 134, at 938.

153. U.S. DEP'T OF COM. & U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL HOUSING SURVEY: 1983, CURRENT HOUSING REPORTS, H-150-83 tbl.A-2 (1985).

154. DANILO PELLETTIERE ET AL., NAT'L LOW INCOME HOUS. COAL., WHO'S BEARING THE BURDEN?: SEVERELY UNAFFORDABLE HOUSING 6 (2005).

155. *Id.* at 2.



who rely on public income benefits.<sup>156</sup> Half of the households with “very low income,” pay fifty percent of their income for housing.<sup>157</sup> As outmovers’ shelter costs increase, the burden is heaviest for households that lack financial reserves for moving expenses, deposits, and increased rent. The sheer loss of units affordable to people earning the minimum wage is staggering. Some 200,000 units are being removed from the rental market every year, significantly impairing the ability of displaced tenants to find affordable replacement housing. Between 1993 and 2003, the number of units renting for \$400 or less in inflation-adjusted terms fell by thirteen percent—a loss of more than 1.2 million units.<sup>158</sup>

#### b. Dislocation and Loss of Disbanded Communities

Those constituents of the old neighborhood who are involuntarily displaced may experience significant hardships in economic terms, and in emotional and psychological distress as well.<sup>159</sup> The social costs of gentrification-caused displacement have been studied for decades, from

156. See generally JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION’S HOUSING 3* (2005) [hereinafter JCHS, *NATION’S HOUSING 2005*], available at <http://www.jchs.harvard.edu/publications/markets/son2005/son2005.pdf>; DANILO PELLETIERE ET AL., NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH 2005* (2005) [hereinafter NLIHC, *OUT OF REACH 2005*], available at <http://www.nlihc.org/oor2005>.

157. “Very low income” is defined by HUD to mean families (including single persons) whose incomes do not exceed fifty percent of the median family income for the area. 42 U.S.C. § 1437a(b)(2) (2000). “Low-income” is defined as families having incomes below eighty percent of the area median income. *Id.* Cost burden is the most severe housing problem experienced in the United States. JCHS, *NATION’S HOUSING 2005*, *supra* note 156, at 24-25; see also PELLETIERE ET AL., *supra* note 154, at 1. Whereas “affordability” is customarily pegged at thirty percent of household income, in 2005 “over one in three American households spent more than [thirty] percent of income on housing.” JCHS, *NATION’S HOUSING 2005*, *supra* note 157, at 3. In no U.S. jurisdiction can a fulltime worker earning minimum wage for fifty-two weeks of the year make enough for thirty percent of earnings to pay the HUD Fair Market Rate for a two-bedroom apartment. NLIHC, *OUT OF REACH 2005*, *supra* note 156. The National Coalition for Low-Income Housing calculates the “housing wage”—the wage one must earn in order to secure affordable housing—in 2005 to be three times the minimum wage, or \$15.78 an hour. *Id.*

158. Some 2 million low-cost units were razed or withdrawn from the rental housing inventory between 1993 and 2003. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA’S RENTAL HOUSING: HOMES FOR A DIVERSE NATION* (2006), available at [http://www.jchs.harvard.edu/publications/rental/rh06\\_americas\\_rental\\_housing.pdf](http://www.jchs.harvard.edu/publications/rental/rh06_americas_rental_housing.pdf). Since 1996, rents have climbed more rapidly than the inflation rate, and now stand at an all-time high. *Id.*; see also JCHS, *NATION’S HOUSING 2005*, *supra* note 157, at 4, 22-23.

159. See Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 359, 359-61 (James Q. Wilson ed., 1966). This occurs in rural as well as urban settings. See, for example, KAI T. ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD 183-203* (1976), which studies the survivors of the Buffalo Creek mine-related flood in Appalachia.

the Urban Renewal era<sup>160</sup> to the present.<sup>161</sup> Gentrification may eliminate stable poor neighborhoods entirely, depriving the poor of vital support structures, in the sense of social networks<sup>162</sup> and of personal psychological ties, related to long-term physical location of one's home.<sup>163</sup> It is this effect of revitalization projects that underscores the essential distinction between place and community. "While the community is both a social and material entity, the neighborhood is a purely material (spatial) product of the land and housing markets."<sup>164</sup>

### c. Residents' Property Rights Destroyed by Displacement

"Property" under the Fourteenth Amendment is broader than the technical property under the rules of state law. Residents of redeveloped neighborhoods are deprived of dozens of legally cognizable rights in property, which are destroyed along with the homes and streets of the old neighborhood, as the redevelopment designations proceed and the investors and wrecking crews line up. Although these are not the ownership rights featured in land use decisions, to be fair, a reckoning of the costs transferred onto residents of the targeted terrain must take these

160. See generally Fried, *supra* note 159; MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2004) [hereinafter FULLILOVE, *ROOT SHOCK*]; HAROLD A. MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* 81-83 (1993) (recounting the decimation of the once thriving community of Harlem Park).

161. See KENNEDY & LEONARD, *supra* note 40, at 14-24; AUDREY T. MCCOLLUM, *THE TRAUMA OF MOVING: PSYCHOLOGICAL ISSUES FOR WOMEN* 15-24 (1990); James Geoffrey Durham & Dean E. Sheldon III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1 (1986) (describing the social costs of gentrification-caused displacement and suggesting limited rent control, tax relief and payments to displaced tenants as mitigating responses); Peter Marcuse, *To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, 931 (1985) (describing the effects of gentrification in New York City, and proposing "anti-displacement zoning" as a solution).

162. See William Michelson, *Residential Mobility and Urban Policy: Some Sociological Considerations*, in *RESIDENTIAL MOBILITY AND PUBLIC POLICY* 79, 83-85 (W.A.V. Clark & Eric G. Moore eds., 1980).

163. See Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions from the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516, 1517 (1996) ("[T]he sense of belonging, which is necessary for psychological well-being, depends on strong, well-developed relationships with nurturing places . . . [D]isturbance in these essential place relationships leads to psychological disorder."). Cf. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 279-280 (2006) (discussing differences among individuals' psychological attachments to place, and arguing that for some people, certain components of "the psychology of home" may move with an individual to a new home).

164. Neil Smith & Michelle LeFaivre, *A Class Analysis of Gentrification*, in *GENTRIFICATION, DISPLACEMENT, AND NEIGHBORHOOD REVITALIZATION* 43, 45 (J. John Palen & Bruce London eds., 1984) (citation omitted).

rights into account. Indeed, the protection of persons' liberty is a central aspect of western theories of "property."<sup>165</sup>

Not the least of these interests is the home, the modern idea of which developed symbiotically with the modern concept of privacy.<sup>166</sup> A resident's interest in her home—for privacy, liberty, or security—is the same whether the home is rented or owned. Tenants of federally subsidized housing have property rights in their tenancies and are entitled to due process prior to ejection and effective loss of their homes.<sup>167</sup> The same is true for private-market tenants.<sup>168</sup> A staggering and little remarked-on loss of housing affordable to low and very low income families has attended the HOPE VI program throughout U.S. cities.<sup>169</sup> As a formal matter, thousands of tenants displaced by the demolition of distressed public housing were given Section 8 vouchers requiring them to seek a physically qualified and fiscally affordable apartment in the private rental market.<sup>170</sup> Yet the market is so tight in many cities that many vouchers cannot be applied within their period of validity.

Contracts form the basis for property rights for many residents in poor communities. One example is government-paid child care. The contract signed between the government entity and a private day care operator can create a property interest under certain circumstances.<sup>171</sup> Similarly, contracts between service providers and low-wealth residents

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165. See Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890 n.1 (2005) (giving examples of liberal theories of property).

166. See Barros, *supra* note 163, at 269-72 (tracing the historical development of both concepts); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982) (discussing the importance of the home and its relation to privacy, personhood and autonomy).

167. *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 184-85 (6th Cir. 1984); *Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 925, 927 (11th Cir. 1982); *Swann v. Gastonia Hous. Auth.*, 502 F. Supp. 362, 365 (W.D.N.C. 1980). Moreover, tenants also have a property interest in subsidized housing payments, if mandated by law. *Holbrook v. Pitt*, 643 F.2d 1261, 1265, 1277-78 (7th Cir. 1981); see also *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (holding that section 8 applicants have protected property interests). Further, tenants have a cause of action if rent ceilings established by the Brooke Amendment to the Housing Act are exceeded. *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 429 (1987).

168. See *Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1530 (11th Cir. 1986) (declaring that a tenancy-at-will was a protected property interest).

169. Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 387 (2003) (discussing the history of the HOPE VI program). One goal of the program was to fund the demolition of 100,000 or more units of distressed public housing. See *id.* at 391-94.

170. *Id.* at 429-30.

171. See, e.g., *Mother Goose Nursery Sch., Inc. v. Sendak*, 591 F. Supp. 897, 903-04 (N.D. Ind. 1984) (finding that a contract between childcare center and state agency can create a "property" interest).

of a community—such as medical, social work, or legal services—may also be recognized as property rights.<sup>172</sup> Residents of low-income communities are also sometimes holders of professional licenses and state-issued licenses that grant residents protected property interests in certain types of businesses.<sup>173</sup> Employment contracts are recognized as property rights in limited circumstances,<sup>174</sup> and while they do not typify the work circumstances of most U.S. workers, they do include unionized service workers and school teachers.

Pension and insurance payments are additional forms of income-based wealth and constitute property in low-income communities. Because these payments are largely private and delivered by the quasi-governmental U.S. Postal Service, redevelopers may think that they will not be disrupted by displacement. The assumption is supported only for recipients who know where they will relocate in time to avoid disrupted delivery. The current accounts of Hurricane Katrina, of HOPE VI displacements, and of urban revitalization “success” stories from cities around the country serve to remind us that many families, once ejected from their homes and kin networks, cannot find a roof together.<sup>175</sup>

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172. See *Hixon v. Durbin*, 560 F. Supp. 654, 661 (E.D. Pa. 1983) (holding that contract for counseling services creates property); *N. Pa. Legal Servs., Inc. v. County of Lackawanna*, 513 F. Supp. 678, 683 (M.D. Pa. 1981) (holding that contract to permit legal aid group to represent indigent juveniles creates a “property” right). Compare *Uptown People’s Cmty. Health Servs. v. Bd. of Comm’rs*, 647 F.2d 727, 734-36 (7th Cir. 1981) (observing that contract with county to establish clinic did not create property right in that particular group as contract did not contain guarantee of future ownership), with *Robinson v. Houston-Galveston Area Council*, 566 F. Supp. 370, 376 (S.D. Tex. 1983) (observing that the designation as regional Health Systems Agency under HHS regulations does create a “property” right).

173. See *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992) (noting that a doctor has constitutionally protected property right to practice medicine); *Beauchamp v. Luisa de Abadia*, 779 F.2d 773, 775 (1st Cir. 1985) (noting that a doctor’s license is property); *Roy v. City of Augusta*, 712 F.2d 1517, 1522 (1st Cir. 1983) (noting that license to operate pool hall is property); *Reed v. Vill. of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) (noting that the renewal of a liquor license is property); *Herz v. Degnan*, 648 F.2d 201, 208 (3d Cir. 1981) (noting that a psychologist’s license is property); *Sisk v. Tex. Parks & Wildlife Dep’t*, 644 F.2d 1056, 1059 (5th Cir. 1981) (noting that a fishing license is property); *Bier v. Fleming*, 538 F. Supp. 437, 447 (N.D. Ohio 1981) (noting that a harness race driver’s license is property).

174. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (observing that, in the teaching context, “[a] written contract with an explicit tenure provision” is sufficient to establish a property right).

175. See FULLILOVE, ROOT SHOCK, *supra* note 160, at 216-22. This implicates liberty interests as well as property. Liberty interests that may also be destroyed or impaired by displacement include a parent’s right to make decisions regarding child-rearing and a right to continued association with child. See *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (disallowing the State to impede on “the fundamental right of parents to make child rearing decisions”); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923-24 (5th Cir. 2000) (explaining that a mother has a constitutional right to continued association with her child, even if she is not the child’s primary care giver).

Rights in social insurance proceeds, such as unemployment, Social Security disability, retirement and survivors' benefits count among protected "property" interests.<sup>176</sup> An individual who receives checks through the U.S. Postal Service faces disruption and delay as he or she attempts to line up a forwarding address. Receipt of Medicaid and Medicare are property rights which, while not destroyed by the destruction of one's home and neighborhood, may certainly be impaired by displacement. The spatial element in gaining access to medical treatment arguably gives weight to a related interest in continued treatment by particular medical professionals with personal knowledge. Applicants for food stamps who are qualified based on need have statutory rights to food stamps.<sup>177</sup> On this measure, 37 million Americans qualify for food support although fewer enroll.<sup>178</sup> Yet households relying on food stamps can be expected to lose them during a period of displacement.<sup>179</sup>

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176. *Berg v. Shearer*, 755 F.2d 1343, 1345 (8th Cir. 1985) ("Unemployment benefits are a property interest protected by the due process requirements of the fourteenth amendment.")

177. *Villegas v. Concannon*, 742 F. Supp. 1083, 1087 (D. Or. 1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1974); *Atkins v. Parker*, 472 U.S. 115, 128 (1985)) (expounding that "[f]ood stamps are a . . . statutory entitlement" and that "entitlement to food stamps constitutes a property interest"); see also *Chu Drua Cha v. Noot*, 696 F.2d 594, 607 (8th Cir. 1982) (stating that benefits provided under the Refugee Act of 1980 constitute property). Moreover, to the extent that food stamp applicants have property interests in the allotments, it is well-settled that the allotments cannot be reduced without advance notice. *Foggs v. Block*, 722 F.2d 933, 940 (1st Cir. 1983); see also *Alexander v. Polk*, 750 F.2d 250, 260-61 (3d Cir. 1984) (noting that the government cannot reduce supplementary food program funds). It is also important to note that these property rights oftentimes expire. See *Shvartsman v. Apfel*, 138 F.3d 1196, 1197 (7th Cir. 1998) (opining that "[t]he Food Stamps program entitles qualified recipients to benefits for a specified period of time, known as a 'certification period,'" and that "[b]enefits terminate automatically at the end of the certification period"); see also *Banks v. Block*, 700 F.2d 292, 297 (6th Cir. 1983) (recognizing that "a household has no protectable property interest in the continuous entitlement to food stamps beyond the expiration of its certification period").

178. Only fifty-six percent of people who are eligible for food stamps nationwide receive benefits, according to the most recent estimate from the USDA. See KAREN CUNNINGHAM, U.S. DEP'T OF AGRIC., FOOD STAMP PROGRAM PARTICIPATION RATES: 2003, at 1, 9 tbl.1 (2005), available at <http://www.fns.usda.gov/oane/menu/Published/FSP/FILES/Participation/FSPPart2003.pdf>.

179. Food Stamps are administered by local governments and the program's decentralization can impede continuous receipt, even without the disruption of losing one's home to a redevelopment project. As a practical matter applications must be made in person and require periodic reporting of household membership and income.

### III. ENTITLED TO PROSPERITY

#### A. *Why Property?*

In the particular context of contests over urban space between low-wealth communities and municipality-encouraged redevelopment poised to displace them, the conception of property incorrectly super-licenses the owner-takes-all strand of property-talk and disenfranchises innumerable recognized property interests held by community residents as persons and as community members.<sup>180</sup> This is a curable harm. State and local governments can enfranchise their citizens by modifying existing property concepts and by enacting correlative changes in their rules and practices for urban redevelopment that recognize residents' legitimate interests as property rights in their home neighborhoods.

#### 1. Property Law as Social Infrastructure: Essential Nexus Between Citizens' Well-being and Their Liberty

Property rules form a foundational system for society. They help us structure our interactions as individuals, as family members, as neighbors, and in markets for goods and services. Thus property rules constitute a system of coincident individual rights and social relations.<sup>181</sup> As a system of legal rules, property is a creature of society which can be changed.<sup>182</sup> Despite rhetoric of hallowed and hoary eternal verities associated with property law, the Anglo-American law of property has changed significantly over time and indeed continues to be reformulated as the role of land in wealth changes in human history and as new forms

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180. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631-32 (1998); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280-95 (1998). This disconnect between rhetoric and conceptual or consequentialist probing, mirrors the disjuncture between folks on the street and lawyers. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 1-2 (2000) (noting that while most people think of property as "things," lawyers define property as "rights among people").

181. See JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 18-37 (2000) [hereinafter SINGER, EDGES]; JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 13-15 (2000) [hereinafter SINGER, ENTITLEMENT]. Many other theorists view property not merely as that bundle of rights, but as a social institution, although they do so differently than Singer. See, e.g., HANOCH DAGAN, CRAFTING PROPERTY FORMS BY THE BUNDLE 37-39 (U. Mich. Pub. L. & Legal Theory Research Paper No. 17, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=331201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=331201) (discussing "Property as Institutions").

182. The systemic aspects of property reflect the social purposes that under-gird societal recognition of private property—protect the ability to obtain material security; decentralize power; and to promote individual autonomy.

of property are recognized and their regulatory regimes devised and revised to suit societal needs.<sup>183</sup>

Property lies at the foundation of American law and society. A number of thoughtful people believe property is the cornerstone to every other right<sup>184</sup> or even the mother of liberty.<sup>185</sup> Economist Milton Friedman argued famously that economic freedom, in the form of private property, is necessary for individual and political freedoms.<sup>186</sup> In the international development context, experts extol the importance of land-holding in developing countries on the grounds that wide distribution of land is democratizing and is observed to be an important predicate to civic engagement, to household wealth-building, and to the healthy growth of local, state and national economies.<sup>187</sup> The “new property” of the 1960s shared this refrain. Charles Reich put forward the view that “[c]ivil liberties must have a basis in property, or bills of rights will not preserve them.”<sup>188</sup>

Classifying an interest as a property right has far-flung consequences in our legal system as well as in urban communities. Contract rights depend upon mutuality and consent, and thus have effect only against other parties to an agreement. Property rights are comparative blockbusters—they operate against the rest of the world with or without affected others’ consent.<sup>189</sup>

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183. See generally Symposium, *The Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002); see also Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 202-03 (2000) (arguing for regulating markets in human tissue, rather than avoiding them altogether); Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL’Y F. 45, 46-47 (1999).

184. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 332-33 (1996) [hereinafter Rose, *Keystone Right*] (reviewing literature on the centrality of property).

185. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964).

186. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962).

187. Eric A. Kades, *Foreword: Property Rights and Economic Development*, 45 WM. & MARY L. REV. 815, 820-21 (2004).

188. Reich, *supra* note 185, at 771.

189. The importance of categorizing an interest as one in property or one in contract is illustrated by the purchase and sale of an ambiguous item, such as a mobile home. If this is treated as the conveyance of goods, then a contract can express the legal rights between the buyer and seller, and no third parties have rights as a consequence of that contract. Property rules play no role. Suppose however that the buyer dies shortly after purchase and long before paying in full. The buyer is survived by his adult son, who lives elsewhere. Whether he can move in, or pay under the contract, turns now on property rules, not the contract to which the son is a stranger. It is here, where people are not in contractual relation with one another, that property is key in legal relations. Property is that system of legal rules that determines most of the lawful interactions people have with one another regarding assets. Ralph Nader’s Mobile Home Project in the 1960s demonstrated a modern instance of re-categorization through legal reform, from mobile homes as neither a

## 2. Ownership Model's Incoherence for Urban Land Disputes

Recently, the complex characteristics of property have been referenced in a reductive rhetoric of "ownership" that threatens to eclipse the long-standing if imperfect metaphor of the bundle of sticks as a way to depict and analyze the nature of property, especially land.

As signified by the bundle, ownership of land does not so much indicate title to a physical portion of earth as it does the power to enforce certain rights in the land. Collectively these rights make up the bundle—the sum total of rights one can have with respect to a parcel of land.<sup>190</sup>

The bundle metaphor says that the various constituent rights—the sticks in the bundle—can be disaggregated, with each stick standing for a conceptually separate property right. The Supreme Court has referenced the bundle metaphor for more than sixty years.<sup>191</sup>

The metaphor has holes. Property in land is intensely contextual and does not exist in the abstract as the "bundle" does. An individual's interest in land cannot be defined without taking into account the interests of neighbors. Moreover, one cannot identify all relevant neighbors within the larger human community or environment. Environmentalists, for example, increasingly add to the panoply of interests and interactions in land with respect to water and other migrating resources, toxins, wildlife, and so forth.<sup>192</sup> Yet in our cities,

warranted vehicle or product, nor real property, to a hybrid per state laws, following the lengthy investigation of the need for consumer protection regulation by the Federal Trade Commission.

190. Myrl Duncan, Essay, *Reconceiving the Bundle of Sticks: Land as a Community-based Resource*, 32 ENVTL. L. 773, 774 (2002).

191. See, e.g., *United States v. Craft*, 535 U.S. 274, 278-79 (2002); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937).

192. Myrl Duncan offers this example:

[F]illing (or draining) a wetland might be considered a property interest belonging to the owner of tract on which it lays—a stick in his bundle. Yet in wiping out the wetland the owner affects drainage on the rest of his land—his whole bundle of sticks—and may well affect the drainage of his neighbors' lands, represented by their bundles. He also harms the public and the larger environment by impairing nature's water filtration system and destroying wildlife habitat.

Duncan, *supra* note 190, at 775-76 (citing NAT'L ACAD. OF SCIS., *WETLANDS: CHARACTERISTICS AND BOUNDARIES* 36-41 (1995)). Eric Freyfogle is the keenest advocate among legal scholars of the perspective that the law should embody and express the idea that the prerogatives of landowners are secondary to ecological health. The primary object of property and land-use law is to specify duties to "the land community." See Eric T. Freyfogle, *Community and Market in Modern American Property Law*, in *LAND, PROPERTY, AND THE ENVIRONMENT* 382, 382-414 (John F. Richards ed., 2002) (tracing the mutability of property law in U.S. history); see also Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L.Q.* 631 (1996); Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L.Q.* 574 (1999). Outside the legal academy, K.A. Dixon recounts important



particularly in land use regulatory and public financing practices, the multidimensional and relational understanding of property is practiced in a one-sided way, where “property means ownership, and . . . ownership means power without obligation.”<sup>193</sup>

The overuse of the property-as-ownership model in discussions of property obscures a more accurate understanding of property as a system of social relations in conjunction with the rights of persons.<sup>194</sup> The powerful effects of constitutive rhetoric on understanding requires searching attention to the full meaning rather than reductionism of the language we use in expressing legal relationships.<sup>195</sup> A more extensive account of the social consequences of displacement by redevelopment is needed, cognizable within familiar property rules. Also needed is a modification of the legal rules for claim-privilege and remedy in light of the full social consequences of displacement.

Talking about property through the essential image of unfettered ownership is misleading. It suggests that in the ordinary case, one person controls all the rights in a particular parcel. What is worse for low-wealth urban communities is the seemingly endless capacity to identify new sticks in the bundle *qua* ownership of land with no conceptual stopping point. This is exemplified by Justice Scalia’s suggestion, writing for the Supreme Court in *Lucas v. South Carolina Coastal Council*, that the ability to develop land is a property right “categorical in nature and constant over time.”<sup>196</sup>

This picture of the social world on the ground is deceptive because it obscures the fact that, as Joseph Singer observed, “a legal system that

theoretical and practical work on reclaiming brownfields in ways to convert them into “community assets” in K.A. Dixon, *Reclaiming Brownfields: From Corporate Liability to Community Asset* (Univ. of Mass. Amherst Political Econ. Res. Inst., Working Paper Series No. 10, 2000), available at [http://www.peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_1-50/WP10.pdf](http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP10.pdf).

193. SINGER, ENTITLEMENT, *supra* note 181, at 6.

194. Analogous arguments are made in other legal contexts. See, e.g., Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045-48 (1996) (discussing a variety of contexts, including environmental law).

195. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688-92 (1985) (describing the law as “constitutive rhetoric” because it “operates through speakers located in particular times and places speaking to actual audiences about real people; its language is continuous with ordinary language; it always operates by narrative; it is not conceptual in its structure; it is perpetually reaffirmed or rejected in a social process; and it contains a system of internal translation by which it can reach a range of hearers”).

196. Duncan, *supra* note 191, at 782 n.22 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

protects property rights is not the state of nature.”<sup>197</sup> Property owners do not live in individualistic, unaccountable isolation. They are fundamentally in social relation with all others in the society through the rules of property. These rules include doctrines of trespass and nuisance, which “delegate to owners the power to call on state officials to prevent others from taking or harming” owners’ property.<sup>198</sup>

Property law entwines the often conflicting values of freedom (for some actors) and security (for affected others). Property doctrine amply illustrates this inherent dynamic tension. Within servitudes, the owner secures his freedom only by constraining that of subsequent owners who were not party to the original agreement. Estates doctrines allow present owners to control future owners’ use of the property. A fee owner’s power to exclude limits a non-owner’s freedom to be or go where he chooses. Though less apparent but no less the law, property doctrine also protects others’ security interests from harm at the hand of property owners. Public accommodations law limits some owners’ freedom to exclude non-owners so that they will not be excluded from the markets for goods and services. Estates law tempers “dead hand control” with several doctrines that protect current owners from their predecessors in title—in particular the doctrines against waste and against unreasonable restraints on alienation, and the rule against perpetuities.<sup>199</sup> Servitudes law protects owners’ established interests against the harm of new owners who wish to disrupt existing restrictions through doctrines that create reciprocal negative easements or that govern termination.<sup>200</sup>

### 3. The Meaning of the State’s Role in Property Rights

The state is the maker of property rights. The state must intervene and resolve disputes between competing claimants. In the urban development context, often the dispute is not just a clash of rights, but a

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197. SINGER, ENTITLEMENT, *supra* note 181, at 68.

198. *Id.*

199. Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 215 (2002) (reviewing SINGER, EDGES; *supra* note 181; SINGER, ENTITLEMENT, *supra* note 181).

200. *Id.* Singer underscores the conflicting values of freedom and security inherent in property case law in Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1453-66 (1996) (discussing property-as-regulation and property-as-system). Themes of the conflicts between freedom and security, between powers to exclude and rights to be included, which characterize his works, are joined and extended in SINGER, EDGES, *supra* note 181, and SINGER, ENTITLEMENT, *supra* note 181, by claims that these instantiate conflicts between self-regarding and other-regarding rules internal to property. *See, e.g.*, SINGER, ENTITLEMENT, *supra* note 181, at 167 (arguing that property theory and the historical practice of property law include principles that “promote the norms of decentralization and distributive justice within the concept and institution of property itself”).

clash of the same right—the right to private property. The state—through its courts or its legislatures—has to resolve the clash by privileging one right over the other.

The roles of courts and legislatures in replenishing the well of property doctrine is centuries old. Renewing legal doctrine is a familiar and essential process. For all the constancy of property doctrine, it embodies a tremendous history of momentous change, particularly in the recognition of new forms of property. Obvious examples that predate the twentieth century range from the fundamental transformation of persons from property to agents—reflected in the change from status of serf and slave—to contract and the development of the system of estates in land from the Middle Ages forward. More contemporary illustrations include the changing character of servitude and covenant regimes to a nation of homeowner associations wielding substantial legal, aesthetic, and economic powers over co-residents.<sup>201</sup> This change is strikingly at odds with the “castle” metaphor of private homeownership. Titans of industry surely recognize the utility of transferable development rights and transferable pollution rights.<sup>202</sup> In recent decades, U.S. legal institutions have joined significant societal disputes over commodification of the human body and ownership of genetic material.<sup>203</sup> Where real property once formed the primary source of wealth, today wealth accumulates as commercial paper and other forms deemed personal property, where the rules have shifted altogether away from title to contract and its polestar of mutual assent.<sup>204</sup>

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201. More than thirty million Americans, or twelve percent of the U.S. population, live in common interest communities. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 12 (1994). See EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 1-3 (1997) (identifying a constellation of concerns about exclusion and the social fabric by the rapid growth of gated communities); Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1183 (1999) (characterizing common interest communities as “perhaps the most significant form of social reorganization of late twentieth-century America”).

202. See Rose, *Keystone Right*, *supra* note 185, at 340-48.

203. See Mahoney, *supra* note 183, at 200-15.

204. The Uniform Commercial Code expressly rejected title theory even for transactions in goods. See U.C.C. § 2-401 (2004); K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 *N.Y.U. L.Q. REV.* 159, 165-69 (1938).

## B. Property in Personhood and Place

### 1. Property and Place

The legal arguments for greater resident control and benefit in redevelopment constitute a complex claim—emotional and political—about the status of the local in our complex society. It resists the view of urban spaces as mere commodities. My aging row home is no mere site for the accumulation of capital-based wealth, whether bought by an enterprising renovator, a speculating landlord, or taken by eminent domain for downtown parking or a PUD. It is invested with other significant centers of value, what the critical geographer Lucy Lippard calls “multicentered.”<sup>205</sup> A “place,” like property, is both a material form and a set of lived relationships, simultaneously material and representative of those relationships. Places and the people who live in those places are not fungible despite the efforts of post-industrial capitalist strategies to treat them as if they are, such as when automakers shut plants and move “the jobs” to Mexico and cities contrive urban rebirth out of neighborhood death.<sup>206</sup>

Property doctrine is an essential tool in defining places. One of the functions of property doctrine in land is to establish the baseline for who is permitted to be in a place and who is not. A jurisdiction is divided into spatially defined areas commonly called “places.” To wit:

[I]f a place is governed by a private property rule, then there is a way of identifying an individual whose determination is final on the question of who is and who is not allowed to be in that place. Sometimes that individual is the owner of the land in question, and sometimes (as in a landlord-tenant relationship) the owner gives another person the power to make that determination (indeed to make it, for the time being, even as against the owner). Either way, it is characteristic of a private ownership arrangement that some individual (or some other particular legal person) has this power to determine who is allowed to be on the property.<sup>207</sup>

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205. LUCY R. LIPPARD, *THE LURE OF THE LOCAL: SENSE OF PLACE IN A MULTICENTERED SOCIETY passim* (1997).

206. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981); see also THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005); Fran Ansley, *Inclusive Boundaries and Other (Im)Possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353 (2001).

207. Jeremy Waldron, *Essay, Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

Property rules define the relationships of people to places and of places to people, on axes of private/public ownership, use/control, acquisition/disposition, and present/future. We think we know what property is and yet no satisfactory succinct definition for it exists.<sup>208</sup> Indeed, the more social consequences we try to articulate as to the import of property, the more “property” morphs into proxies for wealth and the means to well-being—more contiguous with or analogous to premises of capital accumulation—and thus, more plainly do property rules figure in understanding urban poverty’s relationships to urban redevelopment, residents’ displacement, and the future of equitable development in U.S. cities.

Property theory is in ferment today, enlivened by renewed scholarly interest primarily in takings. This welcome attention is not likely to reach the fundamental concerns of those of us who live in distressed urban neighborhoods. This is because of distortions created by the conventionally narrowing views afforded by a doctrinal analysis that is insufficiently cognizant of law’s operations on the street. Takings issues posit the dyad of owner versus state; land use questions feature the legitimate exercise of properly delegated authority; the law framing real estate transactions addresses contractual parties and financial interests secured by property. Missing from these renditions are the roles of highly mobile capital, and the entities who wield it for purposes and under legal models scantily acknowledged by the laws of property or land use or finance of urban disinvestment and redevelopment. While not new phenomena, the pace and scale at which these features of the legal landscape operate to destroy or remake local urban communities without regard to the interests of their residents is accelerated by the dramatic rise in “public/private” real estate partnerships in cities across the nation.

The laws that govern “place”—that effect or impede communities’ ability to exert control over their economic livelihood, the resources vital to the community and its continued existence—are intimately connected with notions of property. Yet our notions of “property” are too small to render social reality. Institutionalized banking, lending, and redlining practices are facially neutral. Communities are legally labeled distressed, hence valueless, through redevelopment acts and government appointed actors.<sup>209</sup> These policies together channel investment capital away from

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208. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533 (2005).

209. Even the mortgage money that makes homeownership possible for working Americans is no longer lent by the local bank, a nationalization aspect of the restructuring “real estate market”

urban, largely minority communities into higher profit-lower risk investment opportunities. One of the most dramatic and best documented consequences has been the creation of white suburbs beginning in the 1950s that produce racialized geographic separation (“donut cities”).<sup>210</sup> This pattern repeats as a perpetual-motion machine, in which redevelopment powers invite today’s development-industry complex to benefit from “development opportunities” generated by the government’s exercise of its police powers. Together these forces justify repeating cycles of destruction, dispossession, and disruption through redevelopment projects that masquerade as discretionary and rational decisions by private capital.<sup>211</sup>

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that facilitated the equity stripping of many thousands of homeowners and billions of dollars, through flipping and predatory lending. *See, e.g.*, U.S. DEP’T OF HOUS. & URBAN DEV., *UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA* (2001), available at <http://www.knowledgeplex.org/kp/report/report/relfiles/usdhdud.pdf>. For more sources on predatory lending, see Center for Responsible Lending, *Predatory Mortgage Lending Bibliography*, <http://www.responsiblelending.org/issues/mortgage/briefs/page.jsp?itemID=28012195> (last visited Jan. 17, 2007).

210. For a discussion of “donut cities,” see generally Jessica Elizabeth Davenport, *The Donut Hole: Re-envisioning the City Center* (May 16, 2003) (unpublished M.Arch. thesis, Univ. of Cincinnati), available at [http://www.ohiolink.edu/etd/send-pdf.cgi?acc\\_num=ucin1053530776](http://www.ohiolink.edu/etd/send-pdf.cgi?acc_num=ucin1053530776).

211. In the early years of U.S. history, government policy transformed a nation of largely poor people scraping to get by, with a small class of wealthy aristocrats and merchants, into today’s middle class nation. This legacy of public social investments began in the late 1700s under the tutelage of John Adam and Benjamin Franklin, during Thomas Jefferson’s presidency, through land laws intended to settle the expanding western territories. Land grants continued well into the 1800s, and benefited railroads as well as householders and yeoman farmers. The Freedmen’s Bureau was created by Congress in 1865 to distribute land to the penniless and landless freed slaves, for the purpose of economically enfranchising the millions of new citizens. President Andrew Johnson highjacked this plan by pardoning Confederate soldiers and giving the land to them instead. The Federal Housing Administration, created in 1934, provided a path to homeownership for millions of low to moderate income households through the long-term self-amortizing mortgage, federal mortgage insurance, and the secondary mortgage market that these policies made possible. J. LARRY BROWN, ROBERT KUTTNER & THOMAS M. SHAPIRO, *BUILDING A REAL “OWNERSHIP SOCIETY”* 7-10 (2005), available at <http://www.tcf.org/publications/retirementsecurity/ownershipsociety.pdf> (charting the array of asset policies that have made the uniquely broad middle class of the United States).

The theory that the efficient market is a matter of neutral, value-free laws is central to orthodox liberal capitalism. *See* Joel F. Handler, *The “Third Way” or the Old Way?*, 48 U. KAN. L. REV. 765, 796-800 (2000); *see also* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 786 (2003) (observing that “neoliberalism claims to trim the role of government so that the state functions primarily as a value-neutral facilitator of individual choices”). Nineteenth century “laissez-faire” liberalism, resurgent today in the guise of neoliberalism, advanced the primacy of “the market” over government regulation. *See, e.g.*, DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 15-16 (2002) (favorably presenting this new “liberalism” as a reassertion of nineteenth century ideas about the primacy of the market and the importance of property rights). For examples of neoliberal legal arguments, see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); and John O. McGinnis & Mark L. Movsesian,

It is the law of property that effectively eliminates the affected community from the frame of the problem. Because ownership changes increasingly through local government incentives or by the exercise of eminent domain or tax delinquency procedures, the law of property is invoked to substantiate the owner's nearly absolute right to "use" the property as the owner chooses. The legal dimensions of the urban redevelopment conflict, however, are fragmented and comprised of no one doctrinal category alone. Rather, certain rules of property and land use regulation are privileged by the ease with which they dovetail with contracts and elicit deeper questions of justice in the allocation of landed interests in the urban centers of the United States. Complexity is compounded by property's functionality in building wealth and liberating poor people from poverty, and the rules of business, property transfer, and taxation which license the legal entities that invest highly mobile private capital in land deals while undoing vital communities.

How should the law respond? A critical gap in the current system exists where the rules for property and the rules for capital create opposing force fields. The twin characteristics of property as enduring societal feature yet evolving in its particular rules compels the consideration of the possibilities of property law in constructing more equitable solutions.

## 2. Property and Personhood: Ackerman's Citizen or Molloy's Serf?

Where "home" is in contested city space, it is at once home and a site of struggle.<sup>212</sup> In an urban neighborhood, the space of the locality is

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Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521-30 (2000) (asserting as a "well established" principle that neoliberal "free trade" as propounded by the World Trade Organization promotes nations' general social welfare in the long run, despite harms to "special interests").

These ideas are examined in the context of residential diversity in PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 203-60 (2003) (emphasizing the role that "classism" plays in American residential segregation by race). Professor Schuck provides a nuanced analysis of the three landmark cases in which judges found an affirmative obligation on government to increase demographic diversity in housing. He argues that the preferred tool for achieving greater racial and economic integration is a market-based remedy of vouchers, rather than the mandated fair shares of New Jersey's Mount Laurel decisions, *S. Burlington County NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975); inclusionary zoning as in Chicago's Gautreaux litigation, *Hills v. Gautreaux*, 425 U.S. 284 (1976); or bricks and mortar programs as ordered in New York's Yonkers case, *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *aff'g* 635 F. Supp. 1538 (S.D.N.Y. 1986), and 624 F. Supp. 1276 (S.D.N.Y. 1985).

212. See LIPPARD, *supra* note 206, at 201-14.

shared, never solely the property of one individual, it is the product of relations of power, property and control. These ideas are infused by the rich idea of the sanctity of the home. Radin reminds that “[t]he home is a moral nexus between liberty, privacy, and freedom of association.”<sup>213</sup> Liberty comprises the core rationale for legal protection of the home from government intrusion, at least when melded with the privacy attached to property. People do not have sufficient liberty unless they have a realm shielded from the domination and interference of others. But this does not sufficiently construct the “sanctity of the home” rationale recognized by courts.<sup>214</sup> The “property for personhood” insight augments the notion that liberty requires some form of sanctuary. The home is a logical choice; by incorporating the recognition that one’s home is “the scene of one’s history and future, one’s life and growth . . . The home is affirmatively part of oneself—property for personhood . . . .”<sup>215</sup>

The personhood theory of property Radin proposed was premised on some control over resources in a person’s external environment, as necessary to proper self-development.<sup>216</sup> Radin noted how such a theory is often implicit in court opinions and commentaries—although ignored in legal thought.<sup>217</sup> For example, applying the analysis in landlord-tenant doctrine underscores the leasehold as a form of property for personhood rather than a redistributive device *because* the tenants’ rights recognized by the revolution in landlord-tenant law of the 1970s are accorded to all tenants, not just poor ones. Thus title to the property in which the tenant makes her home is not the source of the tenant’s interest. Still, that interest in residence is entitled to greater protection from the law than the contract might provide.

Radin’s thesis is reminiscent of Bruce Ackerman’s argument that decent housing ought to be recognized as a right “based upon the tenant’s ‘dignity as a person,’” not so much based on a “‘just wants’” theory, but on a recognition of some property rights as expressing personhood: Private law should no longer allow “some people’s fungible property rights to deprive other people of important opportunities for personhood.”<sup>218</sup>

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213. Radin, *Property*, *supra* note 166, at 991.

214. *Id.* at 991-92 (discussing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

215. *Id.* at 992.

216. *Id.* at 957.

217. *Id.*

218. *Id.* at 995-96 (discussing Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971)).



In *Planning for Serfdom*, Robin Malloy argues vigorously that the widespread redevelopment of disinvested city centers through PPPs delivering large-scale redevelopment projects functions to destroy the fundamental political values of classic liberalism.<sup>219</sup> Redevelopment by government in this way surrenders the polity's capacity to seek maximization of individual liberty, human dignity, and personal freedom through free-market capitalism. Malloy argues that these values must be incorporated for the city to achieve its twin potentials: a physically desirable habitat and a milieu that catalyzes the creative capacities of the widest spectrum of its residents.<sup>220</sup>

Yet Malloy's focus on the values of classic liberalism has the disconcerting effect of obscuring the harms that urban redevelopment practice imposes on individuals and their communal bonds. The losses incurred in the cores of our cities are not irrelevant to his project. Because legal doctrine currently gives little recognition to communities as bearers of rights or responsibilities,<sup>221</sup> it tends to ratify the individual's subordinated and powerless position in society who, in theory, is endowed with liberty and rights within the United States. Members of a community facing displacement by public/private development projects are members of the public, and democratic society is advanced by protecting the security of individuals in their community membership on the theory that this membership strengthens individuals' stakes in society more generally.<sup>222</sup> Community, as an expression and creation of rights-bearing individuals, is itself a source of value in and for our political order. In an important sense, the law puts the lie to this fine theory. It provides vehicles for moneyed communities to acquire rights and responsibilities by organizing themselves into business improvement districts, common interest communities, and the like. It provides no comparable means for less affluent communities to organize into legally cognizable entities to assert their concerns as propertied interests.

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219. ROBIN PAUL MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* 14 (1991).

220. *Id.* at 49-50.

221. Frug, *supra* note 51, at 1062-67.

222. Brion, *supra* note 126, at 706-09 (arguing that community is a symptom of a political process, and for that reason alone is of constitutional importance—both derivatively because it is necessary to the realization of individualist values in classic liberalism, and directly important in the substance and process of values community can generate within the polity).

### 3. Personhood and Community: Local, Collectively Inhabited Space

“Home”—one’s abode, one’s home streets and associations—is an experience of place that is both individualizing and collectivizing. The very sharing of an urban space by its residents can make it a site of affirmation of individual and collective identity: these are *our* streets, *our* world.<sup>223</sup>

Thus we can identify two opposing notions of “local” that are relevant to the conflicting claims to control urban redevelopment. On the one hand, there is a historically authentic identity of a place, for example, a formerly industrial working-class neighborhood imbued with its residents’ remembered lives and struggle. This locality is pitted against a planned or proposed reconstruction of the same urban space during the present era of deindustrialization to offer a revised story of “capitalist heroism.” This is intended to appeal to footloose capital, in order to lure it to the locale, along with tourists and new renovating residents, with the hope of reversing the indicators of deepening decline.<sup>224</sup>

The case for resident-controlled redevelopment recognizes local people’s claim for space. It offers a brake on the primacy given by urban redevelopment to the element of “property” as commodified and alienable, by countering the heavy hand of government on the scale in the urban redevelopment calculus. It does this through recognition of the values and meanings that are acquired by real property through

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223. For accounts of community building in the form of such collective identity-making, see generally ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (1990); FULLILOVE, ROOT SHOCK, *supra* note 160; PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE RISE AND FALL OF AN URBAN NEIGHBORHOOD* 69-74 (1994) (describing the origin of the Dudley Street Neighborhood Initiative in community anti-dumping projects that eventually grew into resident-controlled comprehensive redevelopment of housing, commercial space and community facilities); Avis C. Vidal, *Reintegrating Disadvantaged Communities into the Fabric of Urban Life: The Role of Community Development*, 6 HOUSING POL’Y DEBATE 169, 207, 212-15 (1995), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0601\\_vidal.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0601_vidal.pdf) (discussing community building); *What Good is Community Greening?*, <http://www.communitygarden.org/whatgood.php> (last visited Jan. 9, 2007).

For more scholars calling attention to the character of city neighborhood as “a lived space,” see McFarlane, *Race, Space, and Place*, *supra* note 93; and IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

224. See, e.g., Don Mitchell, *The Lure of the Local: Landscape Studies at the End of a Troubled Century*, 25 *PROGRESS IN HUM. GEOGRAPHY* 269, 272 (2001) (citing Jeff R. Crump, *What Cannot Be Seen Will Not Be Heard: The Production of Landscape in Moline, Illinois*, 6 *ECUMENE* 295 (1999)).

community use and the particular struggles of households dealing daily with the externalities of disinvested areas of U.S. cities.<sup>225</sup>

Communities are valuable to people,<sup>226</sup> as is well documented in numerous ethnographic accounts of community preservation, renewal<sup>227</sup> and loss.<sup>228</sup> This is a popularly resonant understanding.<sup>229</sup> Community in the sense I mean is community of place, distinct from community of interest.

Communities are also valuable to their members and to the larger society as a source of norms that work to sustain trustworthy conduct when legal sanctions fail or are unavailable—although communities may also enforce bad norms. Furthermore, community is a special sort of asset, the value of which depends on the contributions of each of the individuals in it.<sup>230</sup>

225. *Id.* at 274.

226. See, e.g., Jack L. Nasar & David A. Julian, *The Psychological Sense of Community in the Neighborhood*, 61 J. AM. PLAN. ASS'N 178, 181 (1995); see also David M. Chavis & Abraham Wandersman, *Sense of Community in the Urban Environment: A Catalyst for Participation and Community Development*, 18 AM. J. COMMUNITY PSYCHOL. 55, 55-61 (1990); Thomas J. Glynn, *Neighborhood and Sense of Community*, 14 J. COMMUNITY PSYCHOL. 341, 349, 351 (1986) (discussing the values of length of residency, knowing people by name, and ability to have community actions such as electing caring officials); Thomas J. Glynn, *Psychological Sense of Community: Measurement and Application*, 34 HUM. REL. 789, 790, 793 (1981); David W. McMillan & David M. Chavis, *Sense of Community: Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 6 (1986) (measuring neighborhood sense of community); Stephanie Riger & Paul J. Lavrakas, *Community Ties: Patterns of Attachment and Social Interaction in Urban Neighborhoods*, 9 AM. J. COMMUNITY PSYCHOL. 55, 55-57 (1981). See also AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA passim* (1993); Oddvar Skjaeveland et al., *A Multidimensional Measure of Neighboring*, 24 AM. J. COMMUNITY PSYCHOL. 413, 422-25 (1996).

227. JACQUELINE LEAVITT & SUSAN SAEGERT, *FROM ABANDONMENT TO HOPE: COMMUNITY-HOUSEHOLDS IN HARLEM* 12-31 (1990); LEAH MAHAN ET AL., *HOLDING GROUND: THE REBIRTH OF DUDLEY STREET* (New Day Films 1996).

228. See ERIKSON, *supra* note 159, at 186-203 (discussing the destruction of the mining community of Buffalo Creek, West Virginia, by flood); see also FULLILOVE, *ROOT SHOCK*, *supra* note 161, at 216-22.

229. Robert D. Putnam's *BOWLING ALONE* (2000), regarded as documenting the decline in civic engagement, has remarkable appeal. See *id.* 277-84. There is also a great deal of literature about urban ennui, and the significance of collective undertakings to redress social ills. See, e.g., HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 302-15 (1996); LISBETH B. SCHORR, *COMMON PURPOSE: STRENGTHENING FAMILIES AND NEIGHBORHOODS TO REBUILD AMERICA* 304-08 (1997).

230. Gideon Parchomovsky and Peter Siegelman characterize this aspect of community as a positive externality that can profoundly affect the outcomes of economic transactions, in *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 79, 81-82 (2004), where they describe the errors derived from the failure of standard law and economics to account for and incorporate the importance of community in a pollution control conflict in a small town faced with a buy-out offer by a coal-fired power plant.

In its physical aspect, a community provides benefits to persons that they otherwise could not enjoy alone: Amenities such as schools, stores, transit, and other public goods or privately provided services are only available because of the sufficient demand in the area.<sup>231</sup> Social interactions are another set of important benefits—friendships and interpersonal networks of all kinds that are possible because of physical proximity and common experiences of place and connection that endure over time.<sup>232</sup>

Denis Brion reminds:

Especially among the poor, the existence of a matrix of mutually shared values and . . . concern and support is a necessary condition, not just to psychic well-being, but to physical survival itself. . . . The poor must often depend on a web of mutual support . . . with each individual contributing to the others whatever . . . special talents he might have. [Such] exchanges . . . reinforce [each other], creating a milieu the value of which far exceeds what the physical reality might suggest. When this milieu is destroyed and its members scattered, it is irretrievably lost.<sup>233</sup>

Community in this sense is a form of social capital, a non-market relationship of collective risk-facing. Most of the burgeoning literature about social capital features the collective dimensions of the concept, which seeks to identify the bonds within viable communities.<sup>234</sup> Social capital is constituted by the presence of informal networks of people (family, friends, neighbors) who can collaborate to address shared problems and gain access to city political power.<sup>235</sup> Social capital can inhere in and be enhanced by urban design that enables residents to meet and be with a variety of people, discourages crime, and expresses neighborhood heritage.<sup>236</sup> It is expressed and leveraged as well by the presence of functioning formal networks of people in interest groups and community-based organizations.<sup>237</sup> To this calculus, some would add

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231. *Id.* at 113. This concept can be viewed as the “joint defrayal of fixed costs in providing essential amenities.” *Id.* at 116.

232. *Id.* at 114; see also Edward Glaeser, *The Future of Urban Research: Nonmarket Interactions*, 1 BROOKINGS-WHARTON PAPERS ON URB. AFF. 101, 101-04 (2000), available at [http://muse.jhu.edu/demo/brookingswharton\\_papers\\_on\\_urban\\_affairs/v2000/2000.1glaeser.pdf](http://muse.jhu.edu/demo/brookingswharton_papers_on_urban_affairs/v2000/2000.1glaeser.pdf).

233. Brion, *supra* note 126, at 702. Personal recollections of such webs of mutual support are related by Dr. Fullilove in ROOT SHOCK, *supra* note 160.

234. ELISE M. BRIGHT, REVIVING AMERICA’S FORGOTTEN NEIGHBORHOODS: AN INVESTIGATION OF INNER CITY REVITALIZATION EFFORTS 13 (2000).

235. *Id.* at 8.

236. *Id.*

237. *Id.*

regular contact with people of other incomes, races, ethnicities, and education levels.<sup>238</sup>

Individuals gain access to social capital where it is stored in the community's human relationships. Social capital is that which persons draw on when they enlist the aid of others to solve problems, seize opportunities, or accomplish objectives, as well as to cope.<sup>239</sup> An essential underpinning is the norm of generalized reciprocity. One scholar distinguishes *social leverage* that helps one get ahead or improve one's opportunities, as through access to job information or scholarship recommendation, from *social support* that may come in myriad forms—help with a flat tire, a ride, a small loan.<sup>240</sup> Briggs suggests that coping capital is especially important for people who are chronically poor because it takes the place of services that money otherwise would buy.<sup>241</sup>

In very poor communities, there may be plenty of coping capital to help members get by, but insufficient social leverage to help individuals get ahead. There is wide and longstanding agreement that the social capital stored in job networks, for example, is enormously important to job seekers including the urban poor, and furthermore, that it matters in ways that vary by neighborhood composition, ethnicity, gender, job types, career stage, and local industry base.<sup>242</sup>

Thus, we see the intimate connection between community<sup>243</sup> and the well-being of individual persons.<sup>244</sup> Neighborhood is a necessity for

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238. *Id.*; Xavier de Souza Briggs, *Brown Kids in White Suburbs: Housing Mobility and the Many Faces of Social Capital*, 9 HOUSING POL'Y DEBATE 177 (1999), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_0901\\_briggs.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0901_briggs.pdf); Pindell, *supra* note 169, at 404 (discussing the literature propounding and contesting the benefits of mixed-income housing). Cf. John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 188, 190-94 (2003).

239. Briggs, *supra* note 238, at 178.

240. *Id.*

241. *Id.*

242. *Id.* at 180 (citing Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105 (1991)). Interest in this form of social inquiry was spurred by William J. Wilson's influential work on social isolation of minority poor in high-poverty city centers. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987). He extended his work by explicitly examining the impacts of spatial segregation and labor market structures on social capital available to individuals. See Loïc J.D. Wacquant & William Julius Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, in *THE GHETTO UNDERCLASS: SOCIAL SCIENCE PERSPECTIVES* 25, 25-42 (William Julius Wilson ed., 1993); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

243. "Community," as used here, refers to those in community development, urban redevelopment, real estate rhetoric and practices. For a cogent consideration of the implications for community well-being within the vibrant discourses of communitarianism, see Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT.

urban living.<sup>245</sup> Urban renewal and gentrification, which clear out the old residents of stable yet poor neighborhoods, deprive the poor residents of a vital support structure.<sup>246</sup>

*C. Property Theory Supports a Remedy Where Recurrent Critiques of the Inequities in Urban Redevelopment Do Not*

This section briefly restates familiar explanations for the underrepresentation of neighborhood influence in redevelopment policy, arguments for greater social equity in the redevelopment context and for attributing legal significance to residents' interests in the redevelopment of the space they occupy.

1. Political Economy of the City: Business Influence on Local Development Decisions

For the last half century, much political science research has sought to classify and assess the role of business interests on local development decision-making. Mid-century, the sources of community power were debated—were wealthy elites, or structures such as interest groups and political parties, directing process and policy? In the early 1980s, the competition of “limited cities” to attract and retain capital investment reemphasized the dominance of business groups. Since cities are limited in their ability to control capital and labor for production, they focus on

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L. REV. 721 (2005). See generally Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 75 (1998) (discussing the formation of a “Block Improvement District” to rejuvenate inner-city residential areas); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 405-15 (2001) (discussing community mediation, community policing and prosecution, and restorative justice).

244. Indicators of well-being have received limited direct attention in law thus far. See, e.g., Lewinsohn-Zamir, *supra* note 23, 1714-21 (arguing for an objective theory of well-being for legal theory and developing an objective approach to property law). Several methods have been devised to measure and compare individuals' well-being across nations. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE WELL-BEING OF NATIONS: THE ROLE OF HUMAN AND SOCIAL CAPITAL* 17-62 (2005). In the United States, thoughtful arguments are offered to protect a minimal quantum of material goods for the poor. Arguments have been made on the basis of constitutional claims and social rights, and more recently, distributive justice. See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (discussing “the derivation of a constitutional right to a decent material basis for life”); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) (“[M]inimum protections’ for the necessities of life . . . are preconditions for civic republican citizenship.”).

245. See Peter L. Berger & Richard John Neuhaus, *Neighborhood*, in *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 165, 165-76 (Michael Novak ed., 2d ed. 1996); see also PUTNAM, *supra* note 229, at 18-26.

246. See Michelson, *supra* note 162, at 83-85; see also Briggs, *supra* note 238, at 187.

land-related development activities, which are more popular than redistributive policies because development appears to bring additional revenues to the city and can be argued to pay for themselves.<sup>247</sup> A more calculating capital-owning class was contemplated by the growth machine arguments of the late 1980s, in which “property entrepreneurs” pressed for development policies that would increase the value of their investments. On this theory, those who stand to benefit from local, especially land-based, growth, include financial institutions, realtors, lawyers, and institutions such as universities, foundations, and media.<sup>248</sup> Local government officials become cogs in the growth machine because they need campaign contributions from property developers and speculators; although most presumably accept the ideology of growth and some may personally benefit from increases in land values.<sup>249</sup>

The dominance within cities’ redevelopment practices of economic and growth-related concerns does not necessarily make local government officials mere pawns of these interest holders. Theories of systemic power can recognize that sources of power such as capital and influence are not equally distributed in free-market economies. Thus, while some groups hold resources that are particularly desired by political leaders in localities (resources for campaigns, capital investments, and jobs for constituents), local government officials have independent powers and can act independent of purely economic interests. Citizen input through democratic processes still arguably matters in the interplay of these interests. In other words, economic interests may be preeminent but are not the exclusive arbiters of local development decisions.<sup>250</sup>

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247. Laura A. Reese & Raymond A. Rosenfeld, *Reconsidering Private Sector Power: Business Input and Local Development Policy*, 37 URB. AFF. REV. 642, 644 (2002) (discussing PAUL E. PETERSON, *CITY LIMITS* (1981)).

248. See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 62, 66-84 (1987) (describing various actors who participate in the “growth machine”).

249. *Id.* at 62; Harold Wolman & David Spitzley, *The Politics of Local Economic Development*, 10 ECON. DEV. Q. 115, 118-19 (1996).

250. Reese & Rosenfeld, *supra* note 249, at 645 (discussing CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-1988* (1989); Clarence N. Stone, *Systemic Power in Community Decision Making: A Restatement of Stratification Theory*, 74 AM. POL. SCI. REV. 978 (1980)). Stone has illustrated four distinct regime types, describing the coalition of local government officials with other interests, in order to govern, marshal resources, enact and implement policies. In *corporate* regimes, government officials join in coalition with the growth-machine interest holders: bankers, realtors, developers, and seek to attract business through incentives and land-based strategies. *Caretaker* regimes involve neighborhood groups and citizen interests and often small local businesses, with the overriding goal of limiting initiatives and thus, taxes. *Progressive* regimes require substantial citizen involvement, higher educational levels and

### a. Equity Arguments from Market-oriented Liberalism

Market-oriented liberal critiques of current redevelopment policies emphasize many U.S. cities' narrow focus on attracting middle and upper middle class residents back to city centers, and on competing for certain employers' relocation with tax and infrastructure giveaways. The arguments most frequently made are the lack of accountability to citizens/taxpayers/residents in the exercise of municipal powers,<sup>251</sup> and that officials deprive the poor of resources in so acting.<sup>252</sup> Political economy and urban-populist critiques are also raised, arising from the long-term policies that have concentrated poverty in center cities and the disproportionate burden imposed by displacing the poor through the destruction of housing.<sup>253</sup>

### b. Lack of Accountability to Residents

All the important elements of redevelopment projects are made through opaque decisional processes. The initiation of projects is often out of sight, negotiations of projects are typically conducted in secret, and the sheer complexity of public financing nixes the ability of the public to know either the amount of tax dollars or the opportunity costs expended by their government. This forecloses the requisite degree of legitimate critical evaluation by the affected communities of the government's use of public money.<sup>254</sup>

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often include local educational institutions in the governing coalition, and support policies that increase amenities and redistribute the benefits of development. Stone refined this typology to divide progressive regimes into two types, *middle class progressive* and *lower class opportunity expansion* regimes. *Id.* at 645-46. See also Clarence N. Stone, *Urban Regimes and the Capacity to Govern: A Political Economy Approach*, 15 J. URB. AFF. 1 (1993).

251. See Quinones, *supra* note 14, at 721.

252. See LOGAN & MOLOTCH, *supra* note 248, at 166-67.

253. While not developed here, we can observe that a strong libertarian position would argue that all property should be privately held, i.e., "Sell the streets!" See, e.g., MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* 201-02 (1973). Rothbard discussed the ultimate libertarian program:

The ultimate libertarian program may be summed up in one phrase: the *abolition* of the public sector, the conversion of all operations and services performed by the government into activities performed voluntarily by the private-enterprise economy. . . . Abolition of the public sector means, of course, that *all* pieces of land, all land areas, including streets and roads, would be owned privately, by individuals, corporations, cooperatives, or any other voluntary groupings of individuals and capital. . . . What we need to do is to reorient our thinking to consider a world in which all land areas are privately owned.

*Id.*

254. MALLOY, *supra* note 219, at 93, 108-15.



### c. Economic Power Trumps Democratic Process

Given the relative political powerlessness of impoverished communities, the absence of government accountability negates the theoretical ability of the political process to trigger a correction. Urban redevelopment substitutes political values and imperatives for those of a genuinely unfettered market in the location decisions for redevelopment. This tendency could operate to promote people-focused development rather than merely profit-focused development. Arguably that is the point of government engaging in public/private development partnerships; using public revenue and incurring debt to achieve enhanced general welfare, in circumstances where the private market is not otherwise self-interested to do so.<sup>255</sup>

Market-oriented liberalism criticizes this result as a market-distorting and inequitable means of allocating scarce resources. It produces inefficient development decisions since developers would build the project anyway if it made economic sense, although they should not be building where that justification is absent.<sup>256</sup> Malloy, and others, would limit government's role in development to those projects that are strictly necessary to serve the public good, which the private market will not produce (dams or airports, but not hotels, office buildings, shopping centers, etc.).<sup>257</sup>

The corollary dynamic is the corruption of democratic process by power and privilege. Local political power is readily abused for personal gain by a wealthy and favored few, and their access to the redevelopment trough reinforces the market power of the privileged participants. On this theory, local governments risk perilous ideological confusion between city-boosterism and government free market entrepreneurship. In its most vigorous form, this produces, in effect, a private-sector driven development process that is deeply subsidized by the public fisc, channels the work to the well connected, and returns scant benefit to the public generally, and to those directly in the path of new projects.

### d. Officials Deprive the Poor of Resources

Redevelopment decision-making that excludes the many and privileges a few is a denial not merely of procedural rights or

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255. *Id.* at 99-115, 134 (citing examples of some at least arguably successful projects in this vein).

256. *Id.* at 54, 74, 124.

257. *Id.* at 124-25.

opportunities. It allocates public resources to serve participants in a process from which the most affected residents are fundamentally removed and expends resources that can not be shown to return even an attenuated benefit to the displacees as members of the general public. In effect it expropriates the property and liberty interests of the displacees without due process and without compensation.

The theoretical justification of redevelopment policies to stake otherwise reluctant private capital obscures the economic interdependence of the locality's existing owners. The redevelopment, planned without them, will benefit other well-connected wielders of capital but not those who have stuck it out in an under-serviced and declining part of the city, contributing social capital and the stability of neighbors in place. It is wrong to allocate scarce tax revenues to well-heeled developers on both a process and outcome view of equality. The end results harm the poor.<sup>258</sup>

## 2. Left Critiques

The essential criticism from the left is that redevelopment serves to funnel resources from the lowest-income households to those who are well-off. As theory, it seeks to explain the allocation of the observable benefits of urban redevelopment to repeat-player developers, real estate investors and lenders, and to patrons of downtown development, many of whom live in the surrounding suburbs. In other words, the combination of "blight" clearance definitions, public money, and eminent domain align to target low-income communities while others reap the profits of forced transition.<sup>259</sup>

Political-economic analysis seeks the causal connections between economic structure, urban development, and social injustice.<sup>260</sup> It views

258. Quinones, *supra* note 14, at 734. Gary Gately, *Two Views of Baltimore Compete for Public Money*, N.Y. TIMES, July 6, 2005, at A1.

259. Distrust of the blight license may take various forms, including: (1) the blight requirement is irrational, that is, rather than serving a compelling public purpose, it is a convenient charade invoked to justify redevelopment subsidies that are paid to powerful interests; (2) there may be real blight in poor neighborhoods, but blight findings are not made to spare residents suffering, and the unnecessarily extensive clearance both blames and further punishes them. *See* Quinones, *supra* note 14, at 731-33.

260. In the United States, attention to economic structures and their differential outcomes for social groups is often resisted and demeaned on the ground that "socialist" parties around the world conflate injustice with economic exploitation and justice with economic equality. Yet, the recurring potent grass-roots forces in popular movements for economic inclusion—justice under law—have been religious leaders and congregants. *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988); CHARLES MARSH, GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS (1997); FREDELLE ZAIMAN SPIEGEL, WOMEN'S WAGES, WOMEN'S

urban development as a set of essentially “economic processes . . . which criticize capitalist outcomes primarily on the basis of their impacts on the welfare of relatively deprived groups” of people.<sup>261</sup>

The approach can distract from the reality that people’s interests are not defined by their economic position alone. Furthermore, additional features of people’s lives may determine aspects of their economic position or interact with their economic interests.

Networks of influence, based on ethnicity, lineage, gender, or some other “traditional” relationship combine with the relations of production to generate structures of domination regardless of the mode of property ownership. . . . [M]ost contemporary political economists simply ignore the question of the noneconomic bases of economic power.<sup>262</sup>

“Urban populism starts with democracy as its value,” yet encompasses a particular sense of “bringing down plutocratic elites” from the upper economic class that “uses its control over wealth to manipulate government for its own selfish purposes.”<sup>263</sup> Writers in this vein “tend to see wealth arising from power rather than vice versa.”<sup>264</sup> Herbert Gans and other writers in the urban populist tradition “emphasize the elitism of planners and intellectuals in disregarding the traditional affiliations and desires of ordinary people,” and criticize as antidemocratic their willingness to impose on others their own desire for diverse and Bohemian urban streetscapes, thereby diminishing the important contributions of religion and family to persons’ senses of well-

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WORTH: POLITICS, RELIGION, AND EQUITY (1994) (discussing poor people’s movements, welfare rights movement, civil rights and freedom rides, women’s and GLBT rights movements); WHAT’S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT? (E.J. Dionne, Jr. & J. Dilulio, Jr. eds., 2000); GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS (1990); National Conference of Catholic Bishops, *Economic Justice for All: Catholic Social Teaching and the U.S. Economy* (1986), reprinted in THE CATHOLIC CHALLENGE TO THE AMERICAN ECONOMY 297 (Thomas M. Gannon ed., 1987).

261. Susan S. Fainstein, *Justice, Politics, and the Creation of Urban Space 2* (Ctr. for Urban Pol’y Res., Working Paper No. 71, 1994).

262. *Id.* at 8. Yet these forces, as well as ordinary corruption, endure tenaciously within both socialist and capitalist societies and seem more dependent on culture and political process than on an economic system.

263. *Id.* at 16-17 (quoting TODD SWANSTROM, THE CRISIS OF GROWTH POLITICS: CLEVELAND, KUCINICH, AND THE CHALLENGE OF URBAN POPULISM (1985)).

264. *Id.* at 17.

being and security as well as many parents' desire for low-density neighborhoods or the ordinary person's drive for homeownership.<sup>265</sup>

Urbanism's post-structuralist philosophy regards culture rather than economics as the root of political identity. The urban post-structuralists seek to map "the ways in which spatial relations represent modes of domination" of less powerful social groups.<sup>266</sup> The approach identifies the "'silences' and exclusions in the practices of planners and developers," thus uncovering "how urban form functions to manipulate consciousness."<sup>267</sup> Where political economists foresee the end of divisive-isms, post-structuralist urban studies celebrate cities for their diversities.<sup>268</sup> Individuals exist as members of socio-cultural groups from which they draw their identities, derive key aspects of their welfare, and deploy strategies of resistance and purposeful action. The political aim within the post-structuralist tradition is the empowerment of the least powerful, which may coincide with economic betterment but is by no means limited to it.<sup>269</sup>

Equity claims are made in each of these analytic modes. They align in one sense, in the view that public policy is inextricably bound up in constructing the urban arrangement. It is essential that it be recast in order to cease the inequities in redevelopment's allocations of wealth, power, privilege and substantive outcome. The disproportionate burden

265. *Id.* at 18. Fainstein detects forms of "democratic authoritarianism" in Gans and other urban populist writers. *Id.* at 19-20 (defending homeowner privileges and seeking to justify communal exclusionism).

266. *Id.* at 10.

267. *Id.*

268. *Id.* at 11 (noting that post-structuralist urbanism finds its genesis in JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) and RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE* (1970)). The post-structuralist view is captured well by Iris Marion Young. She states:

An alternative to the ideal of community [as a vision of democratic polity is] an ideal of city life as a vision of social relations affirming group difference. As a normative ideal, city life instantiates social relations of difference without exclusion. Different groups dwell in the city alongside one another, of necessity interacting in city spaces. If city politics is to be democratic and not dominated by the point of view of one group, it must be a politics that takes account of and provides voice for the different groups that dwell together in the city without forming a community.

YOUNG, *supra* note 223, at 227.

269. Audrey McFarlane similarly illuminates the interwoven yet independent elements of participation and African-American empowerment in the political economy of urban redevelopment, in McFarlane, *Inclusion*, *supra* note 19, at 866-85. As a strategy this fits into the American pluralist framework where interest group politics, including appeals to ethnic identity, provide a longstanding pattern for political activity in U.S. cities, and where freedom from others' powers has been the dominant value. Historically, it reflects the experience of black protest movements in American cities as well as subsequent civil rights movements. *Id.*

imposed by displacing the poor through the destruction of housing, whether resulting from local indifference or hostility to low income residents and their needs for affordable housing, must be remedied.

The foregoing critiques state claims on society, and on government charged with the welfare of the entire public, but do not suffice to yield pragmatic remedies for the inequitable practices and outcomes they name. The proposal set forth in Part IV proposes relief using the more satisfactory framing of property law to channel the “new” economic opportunities of revitalization to long-term residents of those low-wealth neighborhoods slated for redevelopment, into joint ownership of wealth-enhancing assets that are legally secure.

#### IV. RESIDENT EQUITY SHARES: PROPERTY FOR PROSPERITY AND PARTICIPATION

##### *A. Resident Equity in Redevelopment*

Real resident benefit from urban redevelopment requires three things: (1) recognition of the significant socioeconomic investments of the residents of poor communities, examined in Part III, which stake them in their collectively inhabited neighborhood space; (2) expression of residents’ stakes in the form of correlative claims on the public resources associated with redevelopment; and (3) a pragmatic means for crediting residents’ claims within the relevant time frames of decision and benefit. Benefits should be harnessed with respect to the land use planning, public funding and decision-making processes from which the present legal arrangements effectively exclude residents, through public/private partnership negotiations and public participation paradigms that have not kept pace. Residents require equity participation in the deal that threatens them with displacement.

##### 1. Residents’ Stakes

Residents’ stakes in public/private redevelopment ought to be protected as property. Legal security is essential within our system of rights over the control of resources. The assets discussed here should be viewed as property in order to protect them from expropriation by public agencies for transfer to private developers or as part of PPPs for urban revitalization projects.

Protection of residents’ interests by property rules, rather than the liability rules of contract or tort, is appropriate to afford residents the necessary sphere of choice not to be dispossessed and disintitled to the

community that they have staked with such resources as they have mustered in their shared location.<sup>270</sup> A resource or material opportunity may be viewed in more specific legal or fiscal terms as an “asset” to the degree that it possesses asset-like qualities. Is it generative of more resources? How readily can it be exchanged or converted into money? Greater liquidity and generative capability confer greater choice and autonomy on the asset’s holder. To the extent the holder can parcel it out—subdivide its uses spatially or in time (as by renting or co-owning)—choice is wider still.<sup>271</sup> Resources are more like assets to the extent they are durable and foster reliance: that is, to the extent they are secure in a physical or legal sense. Applying these principles to the contested urban neighborhood, the “social capital” that entwines viable neighborhoods can be rendered cognizable in these respects by allocating shares in the targeted redevelopment enterprise.

## 2. Essential Elements of a Responsive Framework

Recent scholarship has posed some new responses to the inequities of forced displacement. These approaches separately are insufficient but each embraces a crucial element of a responsive framework.

### a. Fair Shares

One straightforward approach is to increase the payments made to displaced homeowners by monetizing the subjective value of property taken by eminent domain (“homeowner surplus”) to deal with the obvious problem that forced sales at fair market value in severely disinvested neighborhoods fail to compensate displaced long-term owners for “the subjective element.” While legal determinations of just compensation almost universally reject paying for the subjective value attributed by the owner, in some circumstances this seems particularly

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270. In contrast to property rules, which confer upon the holder of a property right the power to determine whether to transfer the protected asset and at what price, liability rules do not give the holder injunctive relief, but only the remedy of damages for a nonconsensual transfer, typically at a price set by a third party such as a court or legislature. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

271. The feature of divisibility is a creature of the legal system’s property law regime. For discussion of the significance of subdividing within the property regime, see generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000). See also Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society”*, 79 S. CAL. L. REV. 45, 76 (2005); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 788 (2001).

unjust. Some legal scholars have developed proposals for the award of supplemental damages to long-term owners according to a legislated schedule reflecting length of tenure,<sup>272</sup> and programs for self-assessed valuation.<sup>273</sup> These analytic developments are important for the subset of residents in disinvested/development-targeted neighborhoods whom they reach. Yet they do not reach non-title owners, and thus, provide no remedy for substantial numbers of persons, households and their communal interests, which will be destroyed by redevelopment projects that uproot them.

#### b. Governance

A second approach looks to governance principles as a means to enhance community control over redevelopment decisions in their backyards. Over a decade ago, Benjamin Quinones proposed resident representation on the redevelopment agency board.<sup>274</sup> Recently, Michael Heller and Roderick Hills proposed to make land assembly the proper subject of the consent of the residents whose neighborhoods were in need of redevelopment, through Land Assembly Districts.<sup>275</sup> The model of governance they envision is direct control by referendum. Pursuant to local legislation, the local government would construct consent to the land assembly by declaring a proposed Land Assembly District, and putting the detailed purchase proposal to a referendum of the intended condemnees.<sup>276</sup>

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272. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736 (1973).

273. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995-1002. Fennell limits her proposal for such landowner protection to instances of public taking for private transfer where the public use is unclear. *Id.* at 995.

274. Quinones, *supra* note 14, at 698 (advocating supermajority resident representation on the board). For a related discussion of two case studies of “community-sponsored” planning in New York City, see Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL’Y 135, 150-73 (2002) (proposing legislative change to equalize the necessary resources and negotiating power among communities and encourage inclusive processes).

275. Michael A. Heller & Roderick M. Hills, Jr., *The Art of Land Assembly* 3 (Jan. 28, 2004) (unpublished draft), available at <http://www.law.uchicago.edu/Lawecon/workshop-papers/Heller.pdf>.

276. *Id.* at 2. While this process could be imposed upon the residents who may not have sought this particular redevelopment, the collective decision-making is similar to that within condominium associations, and labor unions. Heller & Hills are not entirely clear as to whether they would limit the procedure to landowners, homeowners, or “neighbors”; and in the event the Land Assembly District were rejected, since the rest of the eminent domain process would still be available, they structure a procedural opportunity that could be very important to communities that avail themselves of it, but not an absolute bar to redevelopment. *Id.* at 2-3.

### c. Collective Action

An alternative approach seeks to reconnect disinvested communities to thriving realty markets, by addressing the interrelated problems of land assembly and cost posed to development-seeking cities by fragmented and diversely held titles. Collective action and community consent might be fostered through voluntary land assembly, particularly if practiced by communities as a strategy to coordinate with, and benefit from, market-based redevelopment that threatens to overtake severely deteriorated, underinvested neighborhoods.<sup>277</sup>

Separately these approaches are important advances for instantiating the equities of long-time residents of the islands of disinvestment in our comeback cities. Still, each is insufficient to protect community residents' interests delineated in Part II from destruction by public/private redevelopment projects. Community members ought not lose their substantial investments in their place, nor have their residency terminated by local government land use practices that transfer public resources into largely private redevelopment of residences for others, until they have approved the redevelopment, or agreed to exchange their community residency interests for an equity stake in the benefits generated by the new development. Such an equity stake could take the form of an alienable right to comparable replacement housing in the new development, or to shares in the increased economic value justifying the public participation in the project and generated by it over time, or both.

This set of property interests can be effectuated through reforms of the redevelopment planning requirements of state enabling statutes, so as to invest residents with rights to consent to development beforehand, and to a share in the benefits of the deal in which the locality partnered.

### B. Community Shareholding: Reverse Homesteading

Establishment of the residency values discussed here could take one or more forms. Most important is the issuance of shares, attributable to the land area targeted for development, or in the value-generating project itself, or both. Secondly, creation of a separate Community Equity Corporation, funded comparably to an employee stock ownership plan, in which affected community residents would own shares and be capable

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277. James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV 923 (2006). For the community use of nuisance abatement provisions in local building codes, see James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 210 (2004).



of independent action. A third albeit much narrower expression of the resident benefit principle that might advance independent of the shareholding and self-governance principles could be the establishment of a constructive trust on the PPP's gains from the project in lieu of beneficial ownership of shares in the profit-making entity.

Direct shareholding reflects community residents' steadfastness in their home space. In effect this is homesteading in reverse. Under the Homestead Acts of the nineteenth and twentieth centuries, the federal government sought to jumpstart the productive use of raw land; in the contemporary urban context, the government seeks the surrender of urban land from its occupants.

### 1. Proposed: Homestead Stakes and Community Equity Shares

The elements of fair share, governance and collective action can be unified and reinvigorated in the form of two new reifications of residents' interests: the Community Homestead Stake, and the Community Equity Share. Shares could be held either in an autonomous Community Equity Company ("CEC"), or in the project development entity itself.

At the core of the CEC would be the Community Homestead Stake, created by reforms to existing statutory structures. The Homestead Stake would give its owner specific rights to participate in the development decision-making, most importantly, to vote on the constitutive question of the proposed redevelopment plan. State and local redevelopment statutes would require the redevelopment agency to submit proposed redevelopment for vote by the affected Community Homestead Stakeholders—effectively conducting a localized referendum on redevelopment proposals, initiated either by the government agency or the subject of an application by private developers. The legal right to vote on the question would likely enhance opportunities for the community to bargain with the public/private development partners for particular community benefits. Efforts to forge agreements between affected residents and developers or public development agencies have been undertaken from Seattle to New York in order to mitigate the harmful effects of aggressive developments and secure specific concessions.<sup>278</sup> However, many communities are unable to muster in

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278. See Sheila Muto, *Residents Have Their Say on LAX Expansion Plans*, WALL ST. J., Dec. 15, 2004, available at <http://www.laane.org/pressroom/stories/lax/lax041215wsj.html> (discussing the community benefit agreement with the Los Angeles airport which provides for environmental mitigation, noise reduction, and airport related work; negotiations in Seattle between a public-interest coalition, city officials, and a company planning the downtown development of a

time to get to the bargaining table. The Homestead Stake would correct this inequity.

A well-organized community may form a “community equity company,” in which every resident of the targeted development area would own shares.<sup>279</sup> The CEC would provide a community-controlled vehicle to create and hold residents’ equity shares in the value generated by the physical and economic redevelopment of their community, and provide the voting rights that accompany ownership in business entities. The CEC would reconfigure the “community interest corporation” demonstration program introduced in the Housing and Urban-Rural Recovery Act of 1983, modeled on employee stock ownership corporations,<sup>280</sup> and retooled in the 1992 federal housing legislation to foster “indigenous community-based financial institutions.”<sup>281</sup>

Under this proposal local jurisdictions would recognize rights of residents facing redevelopment displacement, in effect permitting them to exchange their legitimate interests in the community for shares in the equity and profit from the redevelopment deal that displaces them. This new right would be created by statute, authorizing the formation of a CEC, establishing minimum requirements for shares, and identifying the

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biotechnology hub over affordable housing, employment, and environmental issues; and the pressure on Columbia University in New York by neighborhood, business, and civic leaders to “help create low-income housing in the West Harlem area where [it] has proposed to expand”). Community Benefits Campaigns are currently underway in Denver, Miami, Milwaukee, New Haven, San Diego, and San Jose. See JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 5 (2005).

279. The stakes would differ slightly depending on which form of organization is used for the company. If organized as a corporation, residents would own shares. If the limited liability company form were used, then residents would be members and own an interest.

280. Pub. L. No. 98-181, 97 Stat. 1153, 1172 (1983) (codified as amended at 42 U.S.C. § 5318 (2000)) (creating the Neighborhood Development Demonstration, requiring the Secretary of Housing and Urban Development to “provid[e] Federal matching funds . . . to [local] organizations on the basis of the monetary support such organizations have received” from neighborhood sources); see also Harold A. McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. J.L. REFORM 727, 785-86 (1987).

281. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672, 3859 (codified at 42 U.S.C. § 5305 (2000)). The aim of the demonstration program was to replicate the success of community development capital intermediaries such as South Shore Bank in Chicago and the Center for Community Self Help in Durham, North Carolina, to “improve access to capital for initiatives which benefit residents and businesses in targeted geographic areas.” *Id.* § 853(b)(2), 106 Stat. 3860. “Community investment corporations” were entities organized either as a depository institution of a nonprofit organization affiliated with a non-depository lending institution or regulated financial institution, whose primary mission was to revitalize a targeted geographic area, maintain “accountability to community residents” “through significant representation on its governing board and otherwise.” *Id.* § 853(b)(3)(D). The board would engage in development services, and have principals “who possess[ed] significant experience in lending and . . . development . . .” *Id.*

terms of residence that qualify householders within the area targeted for redevelopment as Community Equity Shareholders. The Community Equity Shares are conceptually distinct from rights in real property or condemnation awards that owners of businesses or others in the neighborhood may have. While this right may be conceptualized as individual in the way that shares in corporations are personal property, the essential interest it expresses is the joint interest in determination and benefit in the collectively inhabited geographic space.

The share would give its owner specific rights to participate in the development decision-making and in distributions of profits. Its holder would have the right, with all others holding similar Community Equity Shares, to participate as a member in the development owner entity, as one of the class of members holding Community Equity Shares in the increased value generated as equity shareholders. Redevelopment of the site would be contingent upon an exchange of equity shares in the increased values being brought to market. The issuance of such shares could readily be facilitated by amendment to state and local procurement statutes that would condition the selection of private developer partners in PPPs to engage the targeted community residents in this way; included as a criterion in requests for proposals, development agreements and regulatory agreements; and incorporated into the legal documentation of each partnership deal.<sup>282</sup>

## 2. Recognizing Capital's Rise and Land's Denouement

The creation of residents' community stakes in the realty through the vehicle of corporate shares is not as odd or awkward as it may seem on first blush. For most of U.S. history, land was the ultimate asset and primary root of wealth. It was durable physically and financially in the sense that land retained its value, it was legally secured by "property rules" and by due process, and it could generate wealth. Land in the

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282. Many states allow certain public contracts to be awarded based on "best value," a concept which is evolving beyond traditional concerns for low price and responsible bidders to allow public contracting agencies to consider additional factors. Dean B. Thomson & Michael J. Kinzer, *Best Value in State Construction Contracting*, 19 CONSTRUCTION LAW., Apr. 1999, at 31. States' best value procurement rules are variously named "innovative procurement," "negotiated procurement," "performance-based procurement," and "competitive negotiation." *Id.* at 32 (quotations and citations omitted). In fact, some states specifically exclude cost as a consideration in the initial stage of the process. *Id.* A procurement rule requiring bidders to "deal local" is in some sense analogous to the familiar examples of "Buy America" and "Buy In-State" preferences, which many states have enacted in their design-build procurement laws. *See id.* (noting that in some jurisdictions locality of the vendor should be a factor in the best value equation).

Homesteading Acts era<sup>283</sup> was the most highly generative asset, the source of political power in the early republic, and of self-sufficiency for households and economic development for communities.<sup>284</sup> But in today's economy, corporate capital has eclipsed land as the asset that confers autonomy, given its characteristics as highly generative,<sup>285</sup> highly liquid and thus more disposable than real estate. Arguably it is even more legally secure than land, because business capital is not generally subject to comparable restrictions on alienability or specific use, or to eminent domain.

### 3. Recognizing the Equity in Social Capital

While gaining proponents among scholars and community development practitioners, "social capital" continues to sit a bit awkwardly in economic thinking despite its powerful intuitive appeal. This proposal reifies aspects of the social capital of the community facing displacement. into a cognizable form of property that can add value in low-income communities which are disadvantaged in the public/private redevelopment dance. The assets in social capital have heretofore been intangibles, comprised of potentially productive networks like churches, fraternities and sororities, ethnic lending organizations, and sports leagues. "Capital" traditionally has referred to tangible, solid, durable things like buildings, roads, and raw materials.<sup>286</sup>

Researchers are endeavoring to put social capital to work, to leverage it in communities where it is weak. While social capital is formed over time, it can be compounded in the short run.<sup>287</sup> Facilitating collective action by the community group by constituting them as owners of a capital asset in the fiscal sense is one means to achieve that compounding effect.

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283. See generally Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862), *repealed by* Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2787 (1976).

284. Hockett, *supra* note 271, at 99-104 (parsing early American land laws, from the Land Act of 1796 through the Homestead Acts of the nineteenth and early twentieth centuries, for their wealth-building import).

285. *Id.* at 140 ("[H]istoric average annual returns on equity cluster around 6.6%-7.2%." (citing JEREMY J. SIEGEL, *STOCKS FOR THE LONG RUN* 11 (2d ed. 1998))).

286. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 169 (10th ed. 1996) (defining capital as "a stock of accumulated goods" as well as "the value of these accumulated goods").

287. Lisa J. Servon, *The Value of Social Capital in Emerging Communities* 14 (New Sch. Univ. Cmty. Dev. Research Ctr., Working Paper No. 2002-005, 2002), *available at* <http://www.newschool.edu/Milano/cdrc/pubs/wp/wp.2002.05.pdf>.

### C. *Predicates in U.S. Property Law and Community Development Practice*

#### 1. Capital “Homesteading”

In retooling the legal regime for urban redevelopment in this way, we do have predicates to draw upon for transforming association and democratic participation into ownership-spreading equity-like participations. Examples can be found within and outside of real estate contexts. These include: financial institutions with resident ownership (community development credit unions),<sup>288</sup> several forms of home-equity cooperative ventures,<sup>289</sup> a long history of agricultural cooperatives,<sup>290</sup> producer and consumer cooperatives,<sup>291</sup> employee ownership in the forms of Employee Stock Ownership Plans (“ESOPs”)<sup>292</sup> and worker owned cooperatives,<sup>293</sup> public mechanisms to

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288. See, e.g., National Federation of Community Development Credit Unions—About Us, <http://www.natfed.org/i4a/pages/index.cfm?pageid=256> (last visited Oct. 19, 2006) (describing the history and purpose of Community Development Credit Unions).

289. See 42 U.S.C. § 12773(f) (2000) (defining community land trusts); see generally Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85 (2002) (discussing the limited equity housing co-op as an alternative form of property and comparing it to the leasing cooperative and community land trust).

290. See Thomas Broden, Note, *Co-operatives—A Privileged Restraint of Trade*, 23 NOTRE DAME LAW. 110, 114-19 (1947) (describing the history of agricultural cooperatives).

291. See JOSEPH G. KNAPP, *THE RISE OF AMERICAN COOPERATIVE ENTERPRISE: 1620-1920*, at 418-30 (1969) (discussing the spread of the cooperative from agriculture into other areas, including telephone service, mutual insurance, and mutual savings banks).

292. “An ESOP is a kind of employee benefit plan . . . . In an ESOP, a company sets up a trust fund, into which it contributes new shares of its own stock or cash to buy existing shares. Alternatively, the ESOP can borrow money to buy . . . shares.” National Center for Employee Ownership, *How an Employee Stock Option Plan (ESOP) Works*, <http://www.nceo.org/library/esops.html> (last visited Oct. 16, 2006). The ESOP can make tax deductible contributions to the plan with which to repay the loan. “Shares in the trust are allocated to individual employee accounts.” *Id.* Plans specify the employee categories that participate in the plan, and the formula for the allocations. “In private companies, employees must be able to vote their allocated shares on major issues, such as closing or relocating [the company],” and the company can accord voting rights on additional issues (including the board of directors). *Id.* About 10,000 companies now have employee stock ownership plans, up from 200 in 1974. Crystal Detamore-Rodman, *Branching Out: An Employee Stock Ownership Plan is More than Just a Great Way to Boost Morale*, ENTREPRENEUR, Apr. 1, 2004, at 61.

293. See LOUIS O. KELSO & PATRICIA HETTER KELSO, *DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION* 52 (1986); LOUIS O. KELSO & PATRICIA HETTER, *HOW TO TURN EIGHTY MILLION WORKERS INTO CAPITALISTS ON BORROWED MONEY* 84 (1967); see also Hockett, *supra* note 271, at 102-04; Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1897 (1993) (proposing the use of “[c]hild care enterprise [as] a vehicle for community-based economic development”).

support resident investment,<sup>294</sup> and state recognition of the shared-holding aspect of citizens in an exhaustible natural resource.<sup>295</sup>

U.S. policy has been extremely successful in ownership-spreading with the important and enduring success of the federal home finance structure developed through the 1930s and 1940s.<sup>296</sup> That innovation has been paralleled in the case of “human capital” spreading through public provision of primary and secondary education; the land grant acts of the nineteenth century by which federal land “staked” the perpetual endowments for state colleges and universities; the G.I. Bill following World War II that united in one program both loan guarantees and education as an asset; and direct and indirect loans, grants, and subsidies for higher education.<sup>297</sup>

The Community Equity Corporation proposed here fits neatly within the framework of the general stock ownership corporation (“GSOC”) envisioned by Louis Kelso, the inventor of the now widely used employee stock ownership plan.<sup>298</sup> The Kelsonian GSOC was devised intentionally as a highly adaptable device to “ownerize” on a regional or community-based scale, for example to create community-wide ownership of local business.<sup>299</sup> The Community Equity Corporation, like the GSOC, is premised on connecting the citizenry of a geographic place to the economic generative opportunities of that place. In fact, Congress authorized a GSOC in 1978<sup>300</sup> at the behest of Senator

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294. 42 U.S.C. § 604(h) (2000) (defining individual development accounts); *see also* Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221 (discussing theoretical framework of individual development accounts and their availability, usage, and success).

295. Alaska’s Permanent Fund Dividend Program pays each qualified resident of the state an annual dividend from the Alaska Permanent Fund. ALASKA ADMIN. CODE tit. 15, § 23.103 (2006). The Fund, created by the state constitution in 1977, invests one quarter of all revenue the state receives from the sale or rental of its mineral resources. ALASKA CONST. art. IX, § 15. Since 1982, when the current version of the program was enacted, the dividends have averaged more than \$1000. *See* Alaska Permanent Fund Corp., *The Permanent Fund Dividend*, <http://www.apfc.org/alaska/dividendprgrm.cfm> (last visited Oct. 19, 2006).

296. Hockett, *supra* note 271, at 104-17.

297. *Id.* at 143-53.

298. *See* JEFF GATES, *THE OWNERSHIP SOLUTION: TOWARD A SHARED CAPITALISM FOR THE TWENTY-FIRST CENTURY* 20 (1998).

299. *Id.* at 55-58 (1998). Gates suggests that municipalities that use buy-lease arrangements to finance large land acquisitions could readily restructure such acquisitions as GSOCs to achieve broadly diversified individual ownership by community residents. Likewise, metropolitan area transit authorities that lease commercial space associated with their rail stations could restructure these dealings as Community Equity Corporations and achieve shared ownership by community residents. *Id.* at 76-77.

300. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2762, 2893 (1978) (adding subchapter U to the Internal Revenue Code); *see* GATES, *supra* note 300, at 76.

Mike Gravel of Alaska for the purpose of enabling Alaska's citizens to acquire a stake in the TransAlaska Pipeline Service Corporation.<sup>301</sup>

## 2. Public Value Recapture

The concept of public value recapture is to recoup a portion of the public fisc that is transferred to private interests through the vague and opaque processes of public/private real estate development partnerships. As we have seen, in much urban redevelopment, the way is paved (sometimes literally) by the local government's aid to private developers through an array of forms including infrastructure inducements, foregone taxes, deferred taxes, land clearance and assembly, and the exercise of eminent domain.<sup>302</sup>

Community Benefits Agreements ("CBA") are a self-help version of value recapture theory, effectuated by community coalitions through direct negotiation of detailed agreements with the developers. The landmark CBA in Los Angeles secured a local-hire-first agreement, living wage jobs, and affordable housing commitments from a development team that included media mogul Rupert Murdoch, but only after community opposition coalesced over a planned city subsidy of over \$75 million, in the billion dollar project viewed by the city and its redevelopment agency as essential to the revitalization of downtown Los Angeles.<sup>303</sup>

The doctrine of unjust enrichment and its correlative remedy of a constructive trust offer further doctrinal predicates for the recapture of public investment in some circumstances. Where there actually has been wrongdoing in the usual sense, a constructive trust may be imposed on the property or the increase in its value. Courts of equity create constructive trusts "whenever title to property is found in one who in

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301. GATES, *supra* note 300, at 75. That GSOC was never implemented, however, because Alaskan voters agreed to establish the Alaska Permanent Fund instead, which receives oil related lease payments and mineral royalties, invests them, and pays dividends to each state citizen. *Id.* at 76.

302. Quinones, *supra* note 14, at 710. William A. Doebele, *The Recovery of "Socially Created" Land Values in Colombia*, LAND LINES (Lincoln Inst. of Land Pol'y, Cambridge, Mass.), July 1998, at 5, available at <http://www.lincolninst.edu/pubs/publ-detail.asp?id=406> (observing that Colombia's law provides for determination of the property value before and after specified municipal actions to modify land use or densities of a parcel; and on that basis, the municipality may recapture from thirty to fifty percent of the increase in value and designate the revenues for specific purposes, such as acquisition of land for affordable housing or open space, or for mass transit).

303. Lee Romney, *Community, Developers Agree on Staples Plan*, L.A. TIMES, May 31, 2001, at A1.

fairness ought not to be allowed to retain it.”<sup>304</sup> While such trusts are often imposed to capture the fruits gained through disloyalty or other breaches of trust by an express trustee, they are “also created where no express trust is involved but property is obtained or retained by other unconscionable conduct.”<sup>305</sup> The court merely uses the constructive trust to treat the defendant “as if he had been an express trustee from the date of his unlawful holding.”<sup>306</sup> The purpose of the trust is to avoid unjust enrichment. An example in the urban redevelopment context that invites application of this theory is favoritism in the sale of public lands.<sup>307</sup> At least one court recognized a third circumstance in which imposition of a constructive trust is appropriate, even absent any wrongdoing by the defendant—where the plaintiff has a “higher equitable call” on the property.<sup>308</sup>

It is possible that some jurisdictions’ political culture might not be as welcoming to Community Shares in ownership of the benefits of redevelopment projects, but would embrace an entirely public process instead. Such a jurisdiction could pursue a public-value-recapture strategy and form a Community Building Trust or real estate investment trust, in which the public could receive shares and periodic dividends.

### 3. CDC Practice

Community development corporations have been an important engine of community-based self-help for thirty years, and numerous CDCs have managed to scrap their way further into market-based practices in service of their community stakeholders, in innovative and effective ways. One particularly notable path is the creation of enterprises formed with equity interests. Examples include: the New Community CDC of Newark, New Jersey, which developed a

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304. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS 287 (5th ed. 1973).

305. *Id.*

306. *Id.*

307. Favoritism and bribery in the sale of public lands are discussed in Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and the Devolution of U.S. Federal Environmental Programs*, 40 NAT. RESOURCES J. 157, 182 (2000). “[F]ew areas of local government administration have been skewered by charges of cronyism and corruption as have local land use decisions.” See also David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272-74 & 1272 n.134 (1997) (referencing anecdotal accounts of developer power, favoritism, and bribery, and analyses of this aspect of the “developer influence” model).

308. *Starleper v. Hamilton*, 666 A.2d 867, 871 (Md. Ct. Spec. App. 1995).



supermarket;<sup>309</sup> the Kansas City CDC that owns a cement block factory;<sup>310</sup> and finally, child care centers and health care facilities.<sup>311</sup> Capital-intensive undertakings by community development corporations raise important questions of corporate allegiance even for a nonprofit. Does it engage the CDC in potentially conflicting interests between the community served by the enterprise, and the management interest in investment return? Will the CDC move its capital, as have factories, store owners, and middle class residents who have fled urban communities in the last several decades? Community-rooted corporations, formed as nonprofits, are importantly not as nimble as private companies, and their capital is less mobile, due to CDC corporate missions and internal governance procedures. In this way they may be distinguished from private companies, and even from community lenders and private foundations that are more likely to have the freedom to realign their program objectives.<sup>312</sup>

#### D. Resident Equity in Redevelopment Distinguished from Enhanced Community Participation

A remedy premised on equity participation reconfigures the ubiquitous yet vague aspects of prior efforts to articulate communities' rightful roles in the community development field—participation, empowerment, and stakeholding—into ownership shares. *Participation* of residents in land use planning and redevelopment occurs along a continuum of “weak” to less so. Despite extensive literature and practice among land use planners to involve the public in planning and zoning, and the process's invitation for community comment, these checks rarely

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309. Schill, *supra* note 95, at 771-72 (discussing how, in this example, the CDC leases the land and provides a share of the capital; day-to-day management of the company is by a separate supermarket corporation, with the CDC providing support services to augment hiring, product selection and security; and how members of the CDC sit on the board of the store corporation).

310. *Id.* at 772.

311. *Id.*; GROSS ET AL., *supra* note 278, at 60; Pitegoff, *supra* note 293, at 1918.

312. CDCs are sometimes criticized for being unaccountable to the communities where they engage in revitalization. Their dependence on a mix of public and foundation contracts, grants, and loans can lead CDCs to direct unproductive energies to self-preservation, with the potential consequence that the most grass-roots level of the community development infrastructure becomes more responsive to funders' views than to their purported community base. Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URBAN AFF. 1, 1-4 (1997); cf. Rachel G. Bratt, *CDCs: Contributions Outweigh Contradictions, a Reply to Randy Stoecker*, 19 J. URBAN AFF. 23, 23-28 (1997). See also Nancy Nye & Norman J. Glickman, *Working Together: Building Capacity for Community Development*, 11 HOUSING POL'Y DEBATE 163, 186-87 (2000), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_1101\\_nye.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1101_nye.pdf); Shah, *supra* note 98, at 237.

accord any real advisory, investigative or decisional roles.<sup>313</sup> *Empowerment* of poor people is a much-articulated objective, from grass-roots claims through the federal and state Empowerment Zone programs enacted in the 1990s.<sup>314</sup> Its meanings vary greatly in practice.<sup>315</sup>

### 1. Stakeholding

Stakeholder theory arose in the context of the business corporation; its inquiry into whether the organization owes a duty of responsibility or trusteeship to other societal interests beyond shareholders has been taken up by innumerable foundations that fund community development activities.<sup>316</sup> The theory posits that decision makers do owe duties to several constituencies, because many sectors have a stake in the outcome of a decision. Stakeholders are defined by their legitimate interest in the decision to be made (or in the corporation making them) rather than by the corporation's interest in them.<sup>317</sup> Nonprofit funders of community-based development and action agencies value stakeholder theory on the view that a process that forces the decision-maker to consider all the stakes produces defensible decisions, and reduces the risk that those decisions will politically alienate those left out of the process, and arouse opposition.

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313. Camacho, *supra* note 49, at 5-6; McFarlane, *Inclusion, supra* note 19, at 868-92.

314. See, e.g., U.S. DEP'T OF HOUS. & URB. DEV., BUILDING COMMUNITIES TOGETHER: A GUIDEBOOK FOR COMMUNITY BASED STRATEGIC PLANNING FOR EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES 6 (1994). This participatory mandate evidenced three dimensions: stakeholder theory, participatory theory, and planning theory. *Id.*

315. Empowerment can be weak and short-lived, unless embodied in institutions. The need for organizations at the level of the group or community is well-recognized by NGOs in development and by governments, for their ability to perform critical functions that enhance the well-being of people, including to maintain group solidarity and negotiate power in the face of threats, and in managing resources (community gardens) or income-generating activities (markets). Peoples' organizations can empower their members by providing a means to deal with other community-based organizations, and can mobilize countervailing power to meet that of large NGOs and the state.

316. See, e.g., THOMAS E. BACKER ET AL., WHO COMES TO THE TABLE? STAKEHOLDER INTERACTIONS IN PHILANTHROPY, 9-10 (2004) (proposing that the philanthropic community create standards of practice for the involvement of stakeholders by grantees, for purposes of improving grant-making, increasing accountability and transparency, and empowering communities, among others), available at <http://www.humaninteract.org/images/insp-paper.rft.pdf>.

317. Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 67 (1995); see also Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 54 (1991).

## 2. Social Cost Accounting and Public Benefit Requirements

One partial remedy to residents' exclusion, responsive to the critique of government's non-accountability for its redevelopment calculus, is to legislate new accounting duties. While citizens ought to be able to get an accounting from their local government of the amount of public subsidy funneled into public/private redevelopment projects, an effective remedy is elusive in the circumstances when government fails to give an account, or renders one that is inadequate.

New, well-crafted accounting requirements could respond in important part to the critique that local governments are unaccountable to the polity for their redevelopment decisions, deals, and expenditures. Accounting models may be tailored to serve the affected community specifically, or the taxpaying public generally, by compelling local government to give a prior accounting of the anticipated fiscal and social costs of proposed redevelopment, as a prerequisite check on the rosy projections that customarily attend each project's announcement. Post-hoc accounting of the public expenditure, and the gains returned, is also appropriate. The aftermath of *Kelo* demonstrated just how widespread citizens' concerns are, in light of sweetheart deals by politicians and developer darlings.<sup>318</sup> No doubt this fear is fanned by a number of studies showing that convention hotels and sports stadia have promised great returns, but have not delivered projected revenue and jobs despite massive public expenditures.<sup>319</sup>

One proposal for equitably allocating the benefits and burdens of urban redevelopment is to engage in a fuller cost-benefit analysis. This requires some means to measure community loss. Various means of social cost accounting exist, the most familiar in the United States being

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318. See *Hands Off Our Homes*, *supra* note 4, at 21.

319. JOHN B. O'DONNELL, THE ABELL FOUNDATION, BALTIMORE'S CENTER OF CONTROVERSY (2005), available at [www.abell.org/pubsitems/ec\\_hotel\\_605.pdf](http://www.abell.org/pubsitems/ec_hotel_605.pdf) (challenging the need for a publicly financed convention hotel); Heather Harlan, *City Says New Hotel Would Pay for Itself*, BALT. BUS. J., June 24, 2005, available at <http://baltimore.bizjournals.com/baltimore/stories/2005/06/27/story4.html> (reporting that the president of Baltimore's Development Corporation "would bring extra revenue to the city, rather than drain the city of funding"); Heywood Sanders, *Space Available: The Realities of Convention Centers as Economic Development Strategy* (Jan. 2005), [http://www.brookings.edu/metro/pubs/20050117\\_conventioncenters.pdf](http://www.brookings.edu/metro/pubs/20050117_conventioncenters.pdf). One favorite reuse of land taken for redevelopment, the shopping mall, has turned out to be a shaky investment for several jurisdictions, improperly putting public funds at risk. See Timothy Egan, *Retail Darwinism Puts Old Malls in Jeopardy*, N.Y. TIMES, Jan. 1, 2000, at A20; Peter T. Kilborn, *An Enormous Landmark Joins Graveyard of Malls*, N.Y. TIMES, Dec. 24, 2003, at A12; Peter H. King, *Dream Unravels; Fresno: Rise and Fall of Urban Mall*, L.A. TIMES, Apr. 28, 1988, § 1, at 1; Morris Newman, *In Rise and Fall of Malls, Weaker Ones Get 'Demolled'*, L.A. TIMES, Dec. 14, 1999, at A1.

the environmental impact statement (“EIS”).<sup>320</sup> To date the most complete effort to operationalize social cost accounting for redevelopment is Adam Helleger’s proposal of an “SIS” or socioeconomic impact statement which, like an EIS, would be generated by local government, undertaken with duties of good faith and of substantial investigation, and published for public review.<sup>321</sup> Helleger proposes that such an accounting entail, at a minimum, two key property-based qualitative indicators: (1) multipliers to estimate the percentage of displaced businesses likely to fail or move outside the city; and (2) a statistical comparison of the city’s affordable housing need with condemnation’s effect on the area’s affordable housing stock.<sup>322</sup> To recognize the home and communality effects of the redevelopment, he proposes qualitative accounting as well—arguing that to bring into the assessment the ways that the proposed displacement will “tear at a city’s social fabric,” the method must necessarily seek to register subjective elements, including length of residence, role of the neighborhood as the locus of employment for residents, and the social capital indicated by the number of functioning community organizations and institutions.<sup>323</sup>

Evaluating the benefits returned to an impacted community requires tracking outcomes, publicly available information, and meaningful assessment.<sup>324</sup> In the last decade there has been an explosion of interest in geographic information systems (“GIS”) technology as an extraordinarily powerful tool in urban planning.<sup>325</sup> GIS prepares excellent graphics, most obviously maps relating sets of census demographic and other data, in a robust medium. Neighborhood indicators consortia have developed around the nation with the intention

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320. See 42 U.S.C. § 4332(2)(C)(i) (2000); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-control*, 22 HARV. ENVTL. L. REV. 103, 141-46 (1998); see also SEBASTIAN MOFFATT, INTEGRATED RESOURCE PLANNING AND FULL COST ACCOUNTING OF HOUSING (1996), available at <http://www.sheltair.com/library/Externalities.pdf> (reviewing various models and efforts to utilize resource-conscious planning techniques in delivery of housing; reviewing computer programs available to assist in such planning; and including an extensive bibliography of Canadian and U.S. sources).

321. Hellegers, *supra* note 134, at 956-57.

322. *Id.* at 953-54.

323. *Id.* at 954. Hellegers’s list includes: “average length of residence and/or business operation in the displacement area”; “percentage of area residents who work in the neighborhood”; the number of community organizations and institutions functioning in the neighborhood; interviews regarding community life with residents and business owners; whether the community supports a particular industry or retail sector; the dominant racial, ethnic, cultural composition; and “whether a similar enclave exists elsewhere in the city.” *Id.* at 954-55.

324. See MOFFATT, *supra* note 322, at 86-89.

325. See Patricia E. Salkin, *GIS in an Age of Homeland Security: Accessing Public Information to Ensure a Sustainable Environment*, 30 WM. & MARY ENVTL. L. & POL’Y REV. 55, 55-56 (2005).

of putting into communities' hands the basic ability to measure outcomes for community-impacting programs.<sup>326</sup> This mapping process offers communities and their advocates important tools to make visible to community residents the layers of significance that render community features as "assets."<sup>327</sup> It has the potential to aid communities to gain reforms in their housing structures, mainly through targeting absentee landlords and disinvestment processes.<sup>328</sup>

However, as with any technology, the public's ability to use it effectively lags far behind the capacities of the market actors who can buy and expense the latest data and software.<sup>329</sup> Concern is rising that individuals and community groups without access to this cartographic capability will be further disadvantaged in their ability to challenge official or developer reports, and this has prompted a growing public participation GIS literature.<sup>330</sup>

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326. See, e.g., ASS'N FOR CMTY. HEALTH IMPROVEMENT, A COMMUNITY INDICATORS REPORT 2 (2005), available at [http://www.communityhlth.org/communityhlth/files/files\\_resource/CommunityIndicatorsReport\\_1-05.pdf](http://www.communityhlth.org/communityhlth/files/files_resource/CommunityIndicatorsReport_1-05.pdf) (reporting on the development of community indicators from a conference with "more than 400 attendees from around the United States, Canada, and the world"); Baltimore Neighborhood Indicators Alliance, About the Alliance, <http://www.bnia.org/about/index.html> (last visited Oct. 19, 2006).

327. JOSH KIRSCHENBAUM & LISA RUSS, POLICY LINK, COMMUNITY MAPPING: USING GEOGRAPHIC DATA FOR NEIGHBORHOOD REVITALIZATION 5, 7 (2002), available at <http://www.policylink.org/pdfs/Mapping.pdf>.

328. One successful example of negotiating with large-scale developers to secure community benefits is the achievement of the Figueroa Corridor Coalition for Economic Justice in Los Angeles. When a four million square foot expansion was proposed for the Staples Center sports arena with \$75 million in public subsidies, the surrounding community groups, churches, tenants and labor unions secured a package of benefits for the community residents, including a local-hire agreement and commitments for living wages jobs, hundreds of affordable housing units, and specific investments in parks and resident parking. Seventy percent of the 5500 permanent jobs at the development would be union jobs or would pay living wage or better. Local hiring would be facilitated by a new first-source hiring program set up by the Coalition with seed money from the development. JUDITH BELL ET AL., POLICY LINK, ADVOCATING FOR EQUITABLE DEVELOPMENT 22 (2004), available at <http://www.policylink.org/pdfs/AdvocatingForED.pdf>.

329. Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1150 (2003) (discussing the importance of information costs in the property regime).

330. See MARK MONMONIER, HOW TO LIE WITH MAPS 71-86 (1991) (discussing the use and manipulations of maps in development planning); Stuart C. Aitken & Suzanne M. Michel, *Who Contrives the "Real" in GIS? Geographic Information, Planning and Critical Theory*, 22 CARTOGRAPHY & GEOGRAPHIC INFO. SYS. 17, 17 (1995); Nancy J. Obermeyer, *The Hidden GIS Technocracy*, 22 CARTOGRAPHY & GEOGRAPHIC INFO. SYS. 78, 78 (1995); John Pickles, *Representations in an Electronic Age: Geography, GIS, and Democracy*, in GROUND TRUTH: THE SOCIAL IMPLICATIONS OF GEOGRAPHIC INFORMATION SYSTEMS 1, 20 (John Pickles ed., 1995).

## V. CONCLUSION: THE SUM OF THE MEANINGS OF EQUITY

Resident-benefiting redevelopment through stock ownership and shared governance is feasible and just. In the forms I suggest here, resident participation in ownership of the redevelopment would accord some measure of equity, in the senses in which “equity” is recognized in the context of housing markets. First, ownership shares would afford residents in the new territories opened by local government for publicly assisted high-end redevelopment “equity” in the finance sense, meaning shares of stock in the corporate entity, which pay the holder a portion of the company’s profits. In addition, where the redevelopment indeed creates edifices and locales of value, ownership shares held by residents would give them a share in that value—in short, that “equity” understood in the context of real estate, as the value held by the owner of property, over and above indebtedness relating to it.

To recognize long-term residents’ extant stakes in their communities through participatory and profit shares in the redevelopment that will uproot them honors three bedrock principals in law that apply to the claims of residents displaced by public/private redevelopment: Equity as that system of jurisprudence that developed interstitially with the common law, when legal remedies are inadequate in the attainment of justice; equity as the justice applied in conformity with the law, seasoned under principles of ethics and fair play; and, last but not least, equity as recognition through the State’s legal apparatus of the justice and fairness of a claim.