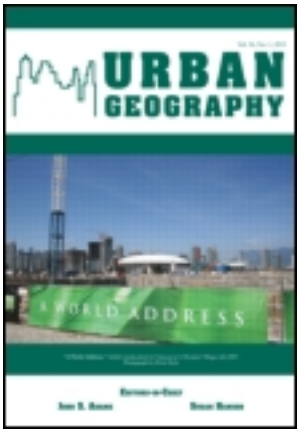

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LEGAL GEOGRAPHIES—THE POLITICS OF EMINENT DOMAIN: FROM FALSE CHOICES TO COMMUNITY BENEFITS

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Abstract: Large-scale urban redevelopment projects catalyze moments of peril and opportunity. In the wake of the United States Supreme Court's *Kelo v. New London* decision affirming economic development as a public use under the takings clause of the Constitution, these perils and opportunities have again become a site of major contestation. An unusual alliance of libertarian property-rights ideologues and civil-rights organizations has joined forces to challenge the use of eminent domain in urban economic development. In this article, I analyze the history of these alliances and their implicit reinforcement of deeply reactionary constructions of property. I conclude with an evaluation of two emergent models—community benefit agreements and community equity shares—that provide promising community tools for alternatives to homeowner rule and neoliberal urban renewal. [Key words: eminent domain, *Kelo v. City of New London*, property, redevelopment, urban renewal.]

INTRODUCTION

In Fall 2009, major news outlets reported a depressing update on the saga of New London, Connecticut, a city that had once been the center of a national debate on property rights. An old manufacturing center on the banks of the Thames River, New London had suffered from deindustrialization and job loss in the early 1990s. In early 1998, state-elected officials, working through the New London Development Corporation, convinced the pharmaceutical giant Pfizer to locate a new research facility in New London. The city offered to transfer a waterfront parcel to Pfizer at no cost, with the understanding that the NLDC would then use state funding to acquire and demolish a number of residences and industrial sites in the Fort Trumbull neighborhood. This would provide space for future expansions of the facility, and for a sweeping redevelopment of the surrounding area. The ambitious NLDC plans included a new state park, office and retail space, a hotel, a marina, and upscale housing. The development corporation would force any hold-out owners to sell by employing its power of eminent domain, by which government can force owners to sell property, provided the land thus "taken" is put to a "public use." Fort Trumbell resident Suzette Kelo refused to sell her soon-to-be-iconic "little pink house," and together with her neighbors, sought a court injunction against the city. Lawyers from

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a libertarian non-profit firm represented them, claiming that the local government was not taking land for a public use, but for a private one. In 2005, the United States Supreme Court heard the case of *Kelo v. City of New London* and decided against the petitioners, holding that economic development could (under these circumstances) be considered a "public use." By that point, Pfizer had already moved into its new complex, and the purchase, condemnation, and demolition of housing and businesses proceeded in anticipation of construction on the cleared sites. But, due to the recession's effects on financing, the waterfront project slowed and eventually stalled completely. The 2009 epilogue was that Pfizer, having recently merged with Wyeth, had decided to close its New London campus and move its operations—and 1,400 local jobs—back to an older facility across the Thames River. The move was completed in 2011, when Pfizer's local tax incentives expired (Benedict, 2009; McGeehan, 2009; Mosher, 2011).

There was something here for everyone to hate, and as the story was publicized, New London became an inkblot for failed redevelopment. Libertarians and conservatives condemned the heavy hand of Big Government for egregiously violating individual property rights. Those on the Left were disturbed by what appeared to be a land grab with deeply regressive implications. In the wake of *Kelo v. New London*, many across the political spectrum—including social scientists and planners—called for reform to prevent future cases like New London. Libertarian groups have taken up the cause, mobilizing communities and networks to limit eminent domain powers at the national, state, and local levels. They have begun to build alliances with civil rights groups, with some success.

Yet, for those who work towards more egalitarian, anti-racist, and environmentally sustainable cities and suburbs, the movement to restrict eminent domain is troubling for several reasons. Some of these relate to the movement's organizational links to conservative and libertarian networks that seek to circumscribe a wide range of state powers —e.g., to enforce environmental regulations, to require public benefits from developers, to tax, and to provide publicly funded welfare and services (Niedt and Weir, 2010). While the leading anti-eminent domain organization adopted a social and racial justice framing, its co-founder energetically opposed affirmative action policies during the 1990s (Bolick, 1996).

This article sets aside these networks, and instead probes the limits of libertarian anti-eminent domain activism. After a brief excursion into case law, I identify insights from Marxist and regulationist urban theory and critical theories of race that are relevant to eminent domain. I then use these theories to argue that libertarian activism has regressive (or at least ambiguous) implications, in light of the diminished capacity of the neoliberal state, the private functions of planning, and the racialization of property in communities of color. Most significantly, and most perilously, the anti-eminent domain movement has promulgated a dichotomy that pits individual homeowners against neoliberal local governments. Recently, social movements that represent workers and marginalized communities have begun using redevelopment as a lever to negotiate for public benefits, a strategy best represented by the growing use of community benefits agreements (CBAs). Categorically curtailing eminent domain powers may limit these emergent opportunities to demand privately and publicly funded community improvements.

The final section explores other options for making eminent domain more responsive to the goals of equity and community self-determination.

EMINENT DOMAIN CASE LAW AND THE POST-*KELO* BACKLASH

Despite its importance for urban development and redevelopment in the United States, urban scholars have generally studied particular cases of eminent domain use, rather than the institutional power of eminent domain *per se*. Law scholars, not surprisingly, have produced a larger literature, which has been expanding quickly ever since the *Kelo* case began rising through the courts. It may help to begin, then, by summarizing the common narrative of the Supreme Court jurisprudence that led to *Kelo* (see Merriam and Ross, 2006).

Legal scholars who write on eminent domain—especially originalists who place great stock in the intent of the Constitutional "Framers"—often emphasize its exceptionality. Drawing from Lockean visions of property, the Framers considered private property fundamental to individual liberty, economic growth, and republican virtue, and saw the defense of property as the first duty of government. Protections for property were therefore added to the United States Constitution in the Fifth Amendment, which ends with the "Takings Clause": "…nor shall private property be taken for public use[,] without just compensation." The legal sanction for eminent domain arises from both the interpretation of this passage and from the broader body of constitutional law. Over time, the courts have determined that:

- "public use" can include a broad range of public purposes;
- owners should be compensated at market value for taken property;
- some regulations on property constitute takings that governments must compensate;
- states are also bound by the Takings Clause; and
- courts should generally defer to state legislatures in establishing permissible applications of eminent domain (e.g., in their definition of "public use" and "blight").

Much of the recent controversy surrounding the eminent domain has focused on which uses are sufficiently "public" to warrant government takings. Although the Supreme Court's earliest decisions supported a narrow reading of "public use," since the late 19th century, the Court has adopted a broader interpretation. Two landmark cases, *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984), gave states considerable latitude in establishing which "public uses" were acceptable. In *Berman*, the owners of a department store challenged its condemnation as part of the District of Columbia's slum clearance program; the petitioners argued that since the land would be privately developed, the slum clearance program was not a "public use." But, the Court held that "public uses" could include a broad range of "purposes." Thus, the government did not have to retain ownership and employ the property that it took, but could instead convey it for public purposes. The elimination of "not only slums […] but also the blighted areas that tend to produce slums" (348 U.S. 35) was judged to be such a public purpose; state legislatures, which usually delegate eminent domain power to local governments, could establish their own definitions of "blight" (Falls, 2004). The *Berman* decision thus gave a legal "green light" to local slum clearance projects across the United States (Angotti, 2008)

Community resistance and disillusionment drained support for federally funded urban renewal in the early 1970s. But, the validity of urban revitalization as a public use was nevertheless re-affirmed in the Michigan Supreme Court's 1981 decision in *Poletown Neighborhood Council v. Detroit*. The City of Detroit, in a bid to save about 6,000 jobs, condemned a residential neighborhood of 4,200 homes to clear land for a GM plant. Residents brought suit, but the Michigan Court supported the legality of using eminent domain for economic development. Though only seven states followed *Poletown*'s reasoning, it was "comforting […] to governments of ambitious intent in many states beyond those seven" (Eckhoff and Merriam, 2006, 33). According to Amanda Eckhoff and Dwight Merriam's analysis, *Poletown* inaugurated a second round of state-backed revitalization: "*Poletown* was the shot heard around the country. Municipalities, strapped for cash and tax revenues, saw the decision as sanctioning the use of eminent domain to lure businesses into their borders and to keep the ones that they had" (35).[2]

The United States Supreme Court's 1984 ruling in *Hawaii Housing Authority v. Midkiff* seemed to push the frontiers of eminent domain back further. *Midkiff* had arisen from a challenge to the Hawaii Legislature's 1967 Land Reform Act. At the time, the vast majority of residential land in the state was leased by a handful of landowners. The Act attempted to break up the oligopoly by allowing homeowners to buy the land that lay beneath their houses. A residential lessee could petition the Housing Authority, and through the condemnation process, the lessor would be forced to sell. The Court held that the public use requirement did not proscribe takings "where the exercise of the eminent domain power is rationally related to a conceivable public purpose" (467 U.S. 241). Moreover, as Justice O'Connor, writing for the Court, noted in her opinion, "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose" (467 U.S. 243–4). According to this logic, the Court's only role was to bar purely private takings with no conceivable public purpose.

With the elevation of William H. Rehnquist as Chief Justice in 1986, however, the Court turned more sympathetic to the rights of property owners. During the 1990s and 2000s, libertarian law firms and think tanks gradually expanded the rights of property owners to compensation when state actions (short of actual seizure) affected the use or value of their property. These categories of "regulatory" or "partial" takings were expanded through a series of favorable Supreme Court rulings and state legislation. Libertarian groups were heartened by their successes, and hoped to further strengthen property rights by limiting the "public uses" that could justify takings. Given this growing momentum for property-rights conservatism, the *Kelo* decision came as a stunning setback.

When the Court finally issued its opinion in June 2005, it found that economic development was an acceptable public use for eminent domain. Stevens wrote for the majority (joined by the liberals and Kennedy), while O'Connor wrote the dissent (for the conservatives); Kennedy and Thomas wrote separate concurring and dissenting opinions, respectively. The opinions, like the briefs, referred extensively to the *Berman* and *Midkiff* cases, but where Stevens saw precedents that established a broad definition of "public

[2]Michigan reversed *Poletown*, shortly before the Supreme Court heard arguments in *Kelo*.

use," O'Connor saw specific exceptions to a narrower definition. Even after *Berman* and *Midkiff*, it was possible, she wrote, "to imagine unconstitutional transfers from A to B. [… but after *Kelo*] nearly all real property is susceptible to condemnation on the court's theory." In a distressing parallel to the relegation of race to civil rights *amici* in the briefs, the only discussion of race in the Court's opinions appeared at the end of Thomas' dissent, following an extended originalist analysis of the Fifth Amendment. Yet, despite the petitioners' and O'Connor's warnings that no private property was safe in the wake of the *Kelo* ruling, most observers noted that the ruling largely validated *status quo* in the planning field. If it brought about any change, in fact, it would likely restrict local governments more than it would enable them (Blais, 2007).

More important for the immediate aftermath of the ruling, in fact, was the Court's assertion that, "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (545 U.S. 469). Immediately after the decision, property rights groups such as the Institute for Justice, its Castle Coalition, and Americans for Limited Government—with continued support from civil rights organizations—redoubled their legislative lobbying, particularly at the state level (Niedt and Weir, 2010). By early 2009, forty-three states had some form of restriction on the use of eminent domain for economic development, passed either through legislative action or ballot initiative (McGeehan, 2009).[3] At the same time, activists attempted to apply pressure at the national level, through lobbying and media work. President George W. Bush signed Executive Order 13406, barring federal takings for the purpose of "advancing the economic interest of private parties to be given ownership or use of the property taken," and Senator Arlen Spector held hearings on the use of eminent domain for economic development in Congress. Property rights groups have continued advocating new, stringent eminent domain restrictions to the present.

LAW, PLANNING, AND STATE THEORY: FOUR POINTS OF DEPARTURE

Given the choice presented by *status quo* eminent domain use and an oppositional libertarian/civil rights alliance, it is helpful to step back and consider eminent domain's structural relationship to urban political economy. Eminent domain is employed by a state that faces multiple and conflicting imperatives—key among them maintaining capitalist accumulation, reproducing particular racial orders, and ensuring its own legitimacy.[4] These are the central concerns of Marxist-influenced state and urban theories, and of the growing scholarship that integrates Marxist theory with critical theories of race and ethnicity. Any comprehensive intellectual history or synthesis of these vast literatures is well beyond this article's scope and its author's ken. Instead, I choose four insights—the relative autonomy of law, the relative autonomy of planning, the racialization of property, and the contradictions of neoliberalism—that correspond to critiques of anti-eminent domain activism presented in the next section. Anti-eminent domain activists foreground

[3]Anti-*Kelo* ballot initiatives in Arizona (passed) and California (failed) pursued a more expansive libertarian agenda, requiring states to compensate owners for regulatory takings as well (Niedt and Weir, 2010).

[4]This list could be extended to include, for example, the defense of territory and the biopolitical control of bodies and households.

cases where local governments abandon their responsibility to respect private property rights and balance private interests, and through law and planning, transfer property from working-class homeowners, especially working-class people of color, to large business and development interests. By contrast, the four points explored here challenge the neat division of public and private, the reduction of race to class relations, and the compatibility of expansive property rights with capitalism.

All four points also challenge the claim that capitalist states consistently, explicitly, and successfully act at the behest of capitalists. Many Marxist state theorists have observed that capitalist states and legal systems possess some degree of autonomy—that is, they have "their own distinctive forms and modes of self-reference, self-organization, and self-reproduction" (Jessop, 1990, 83)—and thus may deviate from the desires of individual capitalists or the imperatives of capitalist production and circulation. This "relative autonomy" has the potential to undermine the state's capitalist character, particularly in the short term, during periods when circumstances require state institutions to privilege other objectives above the maximization of capital accumulation. On the other hand, by providing various kinds of distance (institutional, class, etc.) between the economic and political spheres, this relative autonomy can play a key role in the legitimation of the capitalist state (O'Connor, 1973; Offe, 1975). The "degree" of autonomy and the forces that limit it have been a subject of extended debate among Marxist state theorists (see Althusser and Balibar, 1970; Miliband, 1973; Poulantzas, 1973). But, many have posited that interactive, structural conditions—the form of the capitalist state; its dependence on particular rhythms of capitalist production, profitability, and circulation; and its permeation by class conflict—sustain institutional and political constraints that "select" state actions supportive of long-term accumulation. Theorists variously describe this process of "structural selectivity" or "strategic selectivity" as either strongly determinant of the state's relationship with capital, or as shaping a political field of active contestation and uncertain outcomes (Collinge, 1999; Jessop, 1990; Offe, 1974).[5]

The concepts of relative autonomy and selectivity can also be used to examine the logics of branches and institutions within the state, and to identify the internal contradictions that result when those logics do not cohere. The first and second theoretical points described below briefly consider the logics of capitalist law and planning through this lens, while the third and fourth examine the importance of race and neoliberalism for the understanding of property rights—and by extension, eminent domain—within the capitalist state.

Relative Autonomy, the Legal System, and Private Property

The legal system in a capitalist society can be considered relatively autonomous in several respects; most notably, it purports to identify individual juridical subjects who are formally equal before the law, independent of their class position within capitalist production or circulation. Law also reifies a public/private divide that protects some

[5]As with so many debates related to the power of capitalism versus class struggle, the abstract question of strategic versus structural selectivity may have the greatest practical value as a check on undue privileging of structure or agency at the moment of concrete analysis.

"bundle" of individual property rights that is central to both the accumulation of capital and class hegemony. The blindness of legal formalism towards unequal access to private property thereby plays a role in reproducing capital and capitalist class relations (Balbus, 1977; Hall et al., 1978; Poulantzas, 1973; Thompson, 1975).[6] Yet, state-enforced private property rights are perpetually in tension with the public sphere and public property, and with the state that polices the public/private boundary (Mitchell, 2003; Poulantzas, 1973). Complex systems of property law develop around these tensions between private and public purposes—where public purposes include both sustaining accumulation and satisfying popular demands that may threaten accumulation. These systems affect which "sticks" are included in the property rights bundle.

Libertarians advocate a strong version of the "ownership model" of property that gives precedence to unitary private owners, who may defend the full bundle of property rights —use, exclusion, transfer, and some protection from state seizure—against the state, and particularly against state actions that benefit other private property owners (Blomley, 2004; Singer, 2000). In this way, the libertarian approach reflects a belief in the autonomy of law, in its role as guarantor of private property rights, even when the selective violation of those rights would, under certain conditions, maximize capital accumulation. But, if the strong ownership model subordinates (some) short-term accumulation opportunities to protect individual private property, it also undermines any challenges to capital accumulation that depend on collective rights to property or space—thereby strengthening the long-term "co-evolution" of capitalist law and economy (Harvey, 2011, 123ff).

Relative Autonomy, Planning, and "Highest and Best Use"

The planning of urban space—and not just by urban planners *per se*, but by the broader group of public and private actors who are able to regulate space through state police powers—must be relatively autonomous in two respects. First, planners reorganize space in ways that sustain accumulation, but which are beyond the means or the interests of individual capitalists. This includes coordinating investments in fixed capital, such as infrastructure, as well as allocating urban space (through zoning), balancing land uses set aside for production and circulation of commodities, ensuring the reproduction of labor power, and designing space to maintain social order and contain conflict. Most importantly for our purposes here, planners must contend with capitalism's dynamic nature, in the form of built environments that perpetually become obsolescent (Harvey, 1985, 25–26).

At the same time, the process of urban planning must maintain a degree of formal autonomy when publicly employed planners are accountable to elected officials, and by extension, to voters. This can conflict with the role of planners in sustaining accumulation (Foglesong, 1986; cf. Offe, 1975). Community activism may press planners to pay greater attention to meeting a variety of needs—open space and recreation, parks, community centers, mass transit, hospitals, food production, and so on. Sometimes community

[6]See also Bob Jessop's summary of Burkhard Tuschling's approach to this question. In the United States, this parallels a series of challenges to the supposed neutrality of legal formalism that have run from Progressive-era Legal Realism's critique of property rights to Critical Race Studies' attack on color-blindness (Bell, 1992).

activists and radical planners can transform the built environment in ways that do not primarily serve accumulation, and may even impede it (Angotti, 2008; Brahinsky et al., forthcoming). If community planning is not co-opted or disciplined, this may in turn lead to calls for broader political and economic restructuring. Nevertheless, planning—as well as the partially autonomous realm of policing through which short-term property rights conflicts are adjudicated (Blomley, 2012, 932)—usually acts to facilitate the reproduction of capital, not disrupt it. Periodic crises can strengthen the political power of capital and return planners to ensuring an environment designed for accumulation. Over time, this structural selectivity focuses planning practice on finding "best and highest uses" for space in ways that support the reproduction of capital, even if justifications of best use seldom satisfy those who are negatively affected (Blomley, 2004; Harvey, 1985).

Planning's efforts to socialize land use—whether on behalf of capital or community activists—can collide headlong with the strong ownership model of property (Blomley, 2004; 2007; Foglesong, 1986). This occurs in a particularly dramatic fashion when planners are unable to use private purchase to clear obsolescent built environments, and must resort to eminent domain in order to "rework entitlements in the name of 'highest and best use'" (Blomley, 2007, 198). But, any bright line between public and private property also dims when we consider the public investments that are directed partly or wholly towards sustaining accumulation and enhancing property values, though such "givings" (as opposed to "takings"; Bell and Parchomovsky, 2001; Chen, 2008) seldom provoke the same protest from private owners.

Race, Property, and Planning

If relative autonomy marked a conceptual step away from narrow functionalism, several theoretical developments in the 1970s and 1980s developed Marxist state theory by recognizing the historical specificity of the relationship between state and capital. Stuart Hall drew upon Althusser and Gramsci to argue that race is articulated with class in historically specific ways within capitalist societies; that accumulation often depends on the "work" that race does; and that the state, broadly understood, plays a vital role in reproducing these structures in dominance (Hall, 1996 [1980]). At the same time, racism introduces new tendencies towards instability and crisis. Capitalist states struggle to reconcile the imperatives of accumulation, the relatively autonomous logics of state institutions, and the tasks of defining and governing racial populations (Gilmore, 2002; Goldberg, 2002, 109–112). Historians and social scientists have examined this complexity in the United States, building upon the foundational work of W. E. B. Du Bois and others to understand how race cross-cuts class politics, capitalist development, and state policy (Du Bois, 1983 [1935]; Robinson, 2000; see, e.g., Omi and Winant, 1994; Roediger, 1999).

Concrete examples exist in law and planning, and in both, property is centrally important. In an influential piece, Cheryl I. Harris argues that whiteness itself has acted as a form of property in the present-day and historical racial formations of the United States (Harris, 1992). Race and whiteness are also central to the ownership and valuation of real property. Four points about the racialization of homeownership in the United States are particularly relevant: first, throughout the 20th century, financial institutions systemically denied mortgage capital to non-white households and

neighborhoods, practices that were encouraged by the federal government (Jackson, 1985; Massey and Denton, 1993). This history was complicated by intermittent periods of enforcement of the Community Reinvestment Act and fair lending statutes in the 1990s, and by the more recent expansion of high-risk, high-cost lending that temporarily boosted homeownership rates; the collapse of securitization circuits that had flourished on abusive transactional fees and speculative accumulation, however, has quickly reverted to historically entrenched racial inequalities in credit (Aalbers, 2012). Second, in the early post-war period, white residents and realtors adopted the belief that their property values depended on segregation and that in-migration of people of color would lower property values; this racialized market ideology was promulgated by the federal government, and incited widespread legal and extra-legal resistance to suburban integration (Freund, 2007). Third, the accumulated historical legacies of segregation and discrimination resulted in the crowded, substandard housing conditions that justified urban renewal plans using eminent domain to clear communities of color disproportionately; this is the process of "Negro removal" condemned by scholars (Fullilove, 2004) as well as Justice Thomas in his *Kelo* dissent.[7] Lastly, exclusionary constraints channeled people of color into areas that were exposed to environmental risks or adjacent to locally undesirable land uses (LULUs); low property values in these communities encouraged further concentration of LULUs and environmental harms over time (Pulido, 2000). These processes of discrimination, exclusion, and undervaluation have contributed to environmental vulnerability and low rates of homeownership in communities of color, and collectively reproduce an enduring interdependency between racialized urban morphology and broader processes of racial state formation (Schein, 2012).

Neoliberalism, Property, and Urban Entrepreneurialism

Another strand of Marxist political economy, drawing heavily from regulation theory, specifies the relationship between state and capital by tracing changes in capitalist modes of regulation to the neoliberal present (e.g., Brenner and Theodore, 2002). As an ideology, neoliberalism denotes a faith in the power of markets to produce growth and efficiency in an expanding capitalist economy, and defines the state's normative role as guaranteeing private property rights and facilitating accumulation, usually to the exclusion of its welfare functions. Neoliberalism became increasingly hegemonic within many states—from the global to the local scales—beginning in the 1970s (Harvey, 2005). During the same period, capital and workers abandoned many cities, which were caught between depleted tax revenues and rising costs. When little help came from the federal government, many urban governments teetered on the brink of insolvency. In this climate, lenders and bond rating agencies were able to dictate neoliberal policy to local governments, inaugurating an era of neoliberal urbanism marked by the mutually reinforcing intensification of neoliberal discipline and inter-urban competition (Hackworth, 2007). These policies varied across time and place, and ranged from a "roll-back" of the welfare

[7]This is not to suggest that urban renewal and the use of eminent domain was not, in some cases, actively supported by some members of affected communities (Connolly, 2008; Highsmith, 2009).

state intended to let markets function, to a "roll-out" of new government initiatives to create new commodified market relations to expand accumulation opportunities (Brenner and Theodore, 2002). Roll-back and roll-out neoliberalism are roughly parallel to the two approaches to property described in the earlier discussion of relative autonomy: the libertarian one that draws rigid lines around private property, and a more flexible one that allows violations of private property to sustain accumulation.

The latter was exemplified when local governments, facing crisis, began to act as "entrepreneurs" that attempted to attract capital by spearheading redevelopment (Harvey, 1989). Public–private partnerships, special authorities, and investment districts proliferated in various forms. City governments began to see gentrification as a key strategy for recovery and growth, and as property in readily gentrified areas appreciated, they took a more active role in mitigating risk for potential investors in less-appealing neighborhoods (Hackworth, 2007; Smith, 2002). In the 2000s, planners pursued large-scale "megaprojects"—including sports stadia, conference centers, and mixed-use projects—with renewed enthusiasm (Fainstein, 2008). They were able to rely on eminent domain to speed land assembly, as even the threat of takings could depress land values and pressure owners to sell (Angotti, 2008). Eminent domain thus eased property redevelopment, and provided a more flexible, agile "spatial fix" to complement the deeper structural circuit-switching processes that encourage speculative capital investment in the built environment (Hackworth, 2007; Harvey, 1985). In the neoliberal city, this assistance to capital was often explicit, and justified by the realities of built-out urban space and fears of intercity competition. The "roll-back" of government welfare functions, which often took place simultaneously, only intensified in the recent recession as the financial crisis depressed revenues, roiled municipal bond markets, and pushed many cities towards bankruptcy and extreme austerity.

Neoliberalism also entered the world of housing finance, where government and industry embraced risk-based pricing. This was an ideological development as much as a technical one (enabled by decades of deregulation). The G. W. Bush-era promotion of the "ownership society," together with readily available adjustable-rate mortgages and promises of ever-rising property values raised the desire for homeownership, already a signal characteristic of American culture and politics, to the level of a fetish. This process was deeply racialized: communities of color that had long been excluded from credit markets suddenly gained access to mortgage capital, though it was unclear (as one activist put it) "whether they had gained access to capital or capital had gained access to them" (Newman, 2009). In this political climate, citizenship had become all the more tightly linked to investing in property, using it as a springboard to upward mobility, and defending it against violation.

Yet, this product of neoliberal policy—with its ideological affinity to the libertarian celebration of property ownership—stood in contradiction to the imperatives of neoliberal urbanism's large-scale redevelopment. This was clear in *Kelo*, as Blomley (2007) points out: "[T]he contemporary sanctity accorded to private property, and the intense policing (and frequent transgression) of the dividing line between public and private in the current neoliberal moment makes the contradiction between private property rights and capitalist creative destruction all the sharper" (see also Christophers, 2010). The parties debated whether eminent domain for economic development blurred the line between public and private takings, even though public–private partnerships of various forms had become the

hallmark of neoliberal urban governance. The petitioner's *amici*—including New Urbanist John Norquist—attacked takings for "speculative" urban development, while the respondent's *amici*—including the Cities of New York and Baltimore—emphasized the absolute necessity of eminent domain as an instrument for revitalization. The problem of racial and demographic inequality was conspicuously absent from the petitioner's and respondent's briefs, but the NAACP, the AARP, and a number of smaller civil rights groups filed a brief that noted the disproportionate impact of eminent domain on racial minorities and the elderly. These alliances have been sustained in subsequent rounds of anti-eminent domain activism at the national, state, and local levels.

THE LIBERTARIAN RESPONSE TO *KELO*: FOUR CRITIQUES OF "NEOLIBERALISM FROM BELOW"

In some respects, anti-eminent domain activism represents a backlash against neoliberal urbanism that critical urbanists of various stripes might celebrate. Yet, the limitations of the anti-eminent domain movement—essentially a "neoliberalism from below"—are many. In this section, I use each of the theoretical developments described above (swapping the order of the first and the last) to critique common anti-eminent domain arguments, which (1) insist that takings be limited to purely public uses, (2) condemn eminent domain as a means of transferring property from one private party to another, (3) advocate for racial justice in eminent use, while allowing exceptions for "blight", and (4) privilege the unitary rights of the homeowner (and business owner) over other potential property rights.[8]

Limiting Takings to Public Uses

In the simplest model of eminent domain, the government takes a piece of private property, compensates an individual owner at a fair market value, retains ownership and control over the property, and puts it to use for the good of "the public." For many libertarian activists and law scholars, most cases of this sort would pass constitutional muster.

But, this constitutionally acceptable transaction rests on local government's capacity to retain and manage the property for the public good. This capacity, at least in the United States, is doubtful for familiar reasons. Roll-back neoliberalism has limited local-level budgets for acquiring and retaining public property. Governments may also lack political support: the United States' citizens have become less trusting of government during the last several decades (Nye et al., 1997).[9] Falling tax revenues, however, are not simply the results of fluctuating property markets, and public support is not a frail flower merely because it grows from Jeffersonian political soil. For more than 40 years now, a number of

[8]These positions are reflected in the mission and publications of the Institute for Justice's Castle Coalition (castlecoalition.org; Berliner, 2003), as well as in the writings of some legal scholars (see, e.g., contributions to Merriam and Ross, 2006 by James W. Ely, Jr., Steven Eagle, and others).

[9]It should be noted, however, that most of the relevant research focuses on national rather than local government. A recent National Center for Suburban Studies poll revealed higher degrees of confidence in local government than in federal government.

conservative and libertarian networks have organized to undermine public support for government taxation and social expenditures (especially social welfare; Diamond, 1995; Martin, forthcoming; Stankiewicz, 2005). In this light, the libertarian legal movement's insistence that takings should only be for "pure" public property, owned and managed by the government, appears quite cynical, given the role that conservative and libertarian organizations have played in reducing state capacity (Niedt and Weir, 2010).

Restricting "Private-To-Private" Transfers

At the other end of the spectrum, opposite "purely" public uses, we find the uses that many find most objectionable and least constitutionally defensible: takings from an individual private owner that are then conveyed to another private owner. These include cases of outright corruption, in which favoritism or a conflict of interest is involved in a property transfer, with a specious appeal to the public good as justification. When exposed, such transfers have few defenders.

Private-to-private transfers can also be motivated by a desire for economic and community development: by acquiring and clearing land, urban planning attempts to eliminate the causes of social and economic distress, prepare sites for private actors, or both. New construction, it is hoped, will generate additional taxes, jobs, housing, shopping opportunities, services, or other benefits for "the public." Such takings for development have been used to justify slum clearance from the 1940s through the 1970s, and various revitalization plans since the 1980s.

Attacking the "private" nature of these transfers diverts attention from the fact that nearly *all* takings support the private use of capital, in whole or in part, whether or not they are publicly owned and managed. Government investments facilitate private accumulation, whether more directly through infrastructural improvements, or indirectly, through the provision of educational services that supply a skilled workforce or health services that effectively subsidize wages. The structural selectivity described above—which limits investments to those supportive of accumulation—has only intensified during the era of recessionary austerity. Planning cities and suburbs that are unbeholden to capitalist interests would require collective rights that are not recognized by a narrow reading of the Constitution, and libertarian activists would be unlikely to advocate for them.

Framing Anti-Eminent Domain as Racial Justice

The libertarian framing of eminent domain as a racial justice issue reflects both its past and present use. Urban renewal gutted many urban and suburban neighborhoods during the 1950s, 1960s, and 1970s, and eminent domain was frequently employed in such projects, as it was in the *Berman* case described above. Critiques of urban renewal as a fundamentally white supremacist project contributed to the program's termination in the early 1970s, especially after the Kerner Commission concluded that urban renewal, inadequate housing, and lack of community input had contributed to urban rebellion (National Advisory Commission on Civil Disorders, 1968; Fullilove, 2004). African American, Asian American, and Latino community

leaders often denounced elite-driven renewal programs as racist or capitalist in character, though their opposition reflected different positions within the United States racial formation, as well as class and generational fractures at the community level (Lai, 2012, 2013; Cavin, 2013).

Today, it is hard to measure who is and who is not losing property to eminent domain, how much property they are losing, and according to what justifications (Government Accountability Office, 2006). Those who have spearheaded recent large-scale clearances often claim that they "have learned" from the mistakes of urban renewal, and that political and cultural changes have made eminent domain more equitable and democratic (McCollough, 2005; Dreher and Echeverria, 2006).

Property rights activists counter that the racially disparate impacts of eminent domain use have continued to the present. One major study, published in *Urban Studies*, examined 184 redevelopment areas "targeted by eminent domain for private redevelopment" between 2003 and 2007; these areas included disproportionately more poor and minority residents than surrounding communities (Carpenter and Ross, 2009). There are many reasons to be skeptical of this particular analysis. The study's authors are employed by the Institute for Justice, which litigates eminent domain takings cases; their eminent domain database is proprietary and incomplete; and their analysis is not stratified to show the demographics of homeowners (Niedt, 2011).

Still, there are also reasons to believe that disparate impacts might in fact exist. The neighborhoods of color that are segregated, disinvested, and close to LULUs can become appealing areas for redevelopment if local rent gaps are large enough, and if public investment can reduce risk through environmental remediation or other incentives (Angotti, 2008). This has allowed local governments and elites to adopt "color-blind" discourses for the practices of redevelopment. For if planning practice—based on "highest and best uses"—follows and facilitates high-value private reinvestment, then redevelopment can appear to be based on purely economic logics, even if it takes place within a landscape of white privilege and produces racially disparate impacts with dismaying regularity. It is thus little wonder that libertarian activists have been successful in building alliances with civil rights groups.

Yet, it is doubtful that the resulting reforms will ameliorate the racially disparate effects of redevelopment, at either the community or household scale. As David Dana has observed, many pieces of late-2000s state-level eminent domain legislation included exceptions for "blighted areas" as eventually adopted (Blais, 2007; Dana, 2007; for a critical response, see Somin, 2007). The Institute for Justice and others see the elimination of these blight exceptions as part of their ongoing work. Nevertheless, in the short term, these exceptions raise the possibility that the use of eminent domain will remain steady or intensify in communities disadvantaged by race or class (Dana, 2007).

More significantly, the common cause between civil rights and anti-eminent domain groups may divide communities with large tenant populations. This includes majority–minority areas which often have low levels of homeownership for reasons described earlier. Eminent domain reform protects tenants from displacement when their landlord is a hold-out, but not when she is a willing seller. In fact, the same ownership theory of property that motivates the drive to limit eminent domain powers generally supports the landlord's right to do as she pleases with her property, beyond the obligations established in a lease. A focus on defending homeowners excludes renters from the politics of

redevelopment, even though they are more vulnerable to displacement. The political economy of tenure is likely to be especially divisive in communities of color that are undergoing redevelopment and/or gentrification, as well as in places where investors are now quickly buying properties on the cheap in the wake of the foreclosure crisis (Akers, 2013).

Privileging Individual Homeowner Interests and the Household Scale

The case of renters brings us back to the discussion of formal autonomy, the law, and private property. To the degree that the legal institutions that create and govern private property are relatively autonomous from capitalist production, the result is an evolving, unstable tension between the prerogatives of the individual property owner, group interests in capital accumulation, and collective/community demands for social goods. In the present urban context, the first two are exemplified by the libertarian defense of broad private property rights and the practices of urban development that prioritize accumulation. Neither neoliberalism from below nor neoliberalism from above allow much room for community demands on property—specifically demands for redistributive justice. For those who support alternatives to capitalist production and circulation, the legal system's failure to recognize community interests in property constitutes a stubborn institutional obstacle to meeting social needs and reclaiming space (Blomley, 2004). In response, they have innovated other models, often involving social movement-led political struggles for state, non-profit, and/or collective/community control of property (DeFilippis, 2004; Stone, 2006).

Applying this type of community needs lens to the use of eminent domain would require evaluation of eminent domain's costs to both individuals and communities. Mass clearance, through eminent domain or otherwise, can destroy the fabric of community life, and may be reckoned as more than the sum of individual displacements. It can exert an atomizing effect on the community's social, economic, and political relationships, and scar the individuals who contributed to and drew upon the community's interdependencies (see Berman, 1982; and Fullilove, 2004 among others).

On the other hand, this approach would recognize the groups and communities who would receive benefits from eminent domain takings. Aside from capitalists, these beneficiaries could include communities that would benefit from, for example, new energy infrastructure, jobs, shopping or recreation opportunities, non-profit organization offices, community meeting places, or public services and spaces. These benefits are not incidental. Many marginalized communities have experienced abandonment that has been as decimating as urban renewal, and they have unmet needs that require resources from some mix of the public, non-profit, and private sectors.[10] Broad limitations on eminent domain powers elevate the rights of property owners and may preclude a right to housing or jobs (with distributional effects that will vary by case). It is hard to see why homeowners' rights should reflexively trump every other community need, and why being

[10]Often disinvestment has been closely related to the process of urban renewal and redevelopment (see Fullilove, 2004, among others).

forced to sell one's home should be considered more devastating than long-term unemployment.

Any understanding of costs and benefits must necessarily be multiscalar, and any attempt to improve the condition of marginalized communities must recognize that neighborhoods are interdependent. To remain vital, they must supply a mix of housing, jobs, and amenities to local residents as well as to residents of other neighborhoods. This may mean that marginalized populations who might prospectively benefit from a particular project are often not as well-organized as those who might suffer (for an extended consideration of how scale is invoked in a United Kingdom case study of "compulsory purchase," see Christophers, 2010). But, eminent domain must be situated within the messy politics and difficult choices of community improvement, and within the constraints of severe, neoliberalized austerity urbanism (Peck, 2012). Protecting homeowners from displacement, although important, can obscure the need for strategic thinking about how to fight for particular kinds of reinvestment, on the community's terms.

PROGRESSIVE VISIONS FOR EMINENT DOMAIN

As described in the previous section, there are many reasons to reject the libertarian approach. Restricting eminent domain to narrow "public uses" disregards diminished state capacity. Condemning "private takings" ignores the "private" character of planning generally. Permitting exceptions for blight in practice may make eminent domain's usage more, rather than less, inequitable. Prioritizing the rights of owners divides communities, and leaves renters (and small businesses) vulnerable. Relying on the ownership model of property undermines alternative forms of ownership and control, and ignores multiscalar and group interests in property.

These limits of the libertarian approach have become even more striking in the wake of the housing bust and the recession. Now that millions have faced displacement at the hands of loosely regulated lenders and investors, the call to protect homeowners from the state seems almost quaint. Tax revenues have plummeted, and local and state governments have flirted with bankruptcy. Neoliberalism as an ideology is in crisis, as economic elites reassess the wisdom of the minimal state and populist resistance to austerity gathers strength. Property rights advocates have thus lost both their foil—assertive local governments, working at the behest of developers—and two key articles of faith—that homeownership is always desirable, and that it is always *economically* secure when given *legal* protection under government authority. As neoliberal urbanism and the property rights movement totter on shaky ground, we should refuse the false choice between them—neoliberalism from above and neoliberalism from below—and instead use this opportunity to explore new approaches to eminent domain and equitable redevelopment.

It is clear that eminent domain can be used creatively for progressive ends. The *Midkiff* case mentioned above, for example, arose from the state of Hawaii's attempt to break up a land oligopoly; although some authors have criticized the eventual reform as benefitting merely well-off homeowners at the expense of the extremely wealthy, it is noteworthy that the Supreme Court affirmed that addressing "perceived evils of concentrated property ownership in Hawaii" was a valid public purpose for takings (467 U.S. 245; see also La Croix et al., 1995). Eminent domain can also be used to deconcentrate power at the local level. In Boston, the widely cited Dudley Street Neighborhood Initiative convinced the

local redevelopment authority to delegate eminent powers, which it used to take the abandoned property and redevelop it as attractive and affordable housing (Medoff and Sklar, 1994). Since the onset of the foreclosure crisis, a growing number of cities have purchased foreclosed properties and resold them to mitigate the effects of vacant housing on neighborhoods (Bajaj, 2008). Provided the political and legal support, other local governments could use Neighborhood Stabilization Program and similar monies to mitigate the foreclosure crisis by condemning vacant homes and conveying them to land trusts or even to displaced homeowners. Social movements and community organizations can consider eminent domain as one of the several tactical tools for specific goals in local contexts. At this writing, officials in San Bernardino County and the Cities of Fontana and Ontario have explored plans to seize mortgages from lenders using eminent domain, refinancing them to protect homeowners; though embryonic, the plans have attracted the interest of jurisdictions around the country, and incensed the representatives of the banking sectors and the libertarian right, who have denounced the rescue plan.[11]

In the long-term, activists (and supra-local networks) may also benefit from integrating eminent domain into broader strategies for equitable redevelopment. The general principles of broad participation and equity—or more ambitiously, sustained community control, and ownership—are fundamental to progressive redevelopment strategies. Community control of redevelopment is important not only as a general democratic value, but also as an explicit political redress for marginalized communities that justifiably associate eminent domain with shared histories of disempowerment and displacement (cf. Angotti, 2008, 164).[12] At the same time, we should not fetishize participation at the expense of equity considerations. Establishing the balance between objectives of participation and equity, individual and community autonomy, involves innovating a challenging deliberative process (see, e.g., Fung and Wright, 2001). But, it is more likely to mesh with a broad progressive politics than following the prerogatives of either entrepreneurial city governments or resistant homeowners.

Many strategies for equitable redevelopment will face institutional constraints. Since the 1980s, a string of Supreme Court rulings have limited the state's power over landowners by restricting exactions and uncompensated "partial takings." There are jurisdictional limits as well: states usually grant eminent domain powers to local governments, and localities cannot easily force their neighbors to "take" property and put it to particular uses, limiting eminent domain's potential to promote equity among places. Nor does the law provide much structure for community ownership and control. As Joseph Sax writes, "the interests of a community have no formal status; they are not, for example, property rights. In the law's eye, they are only sentiment" (quoted in Blomley, 2004, 11). On the other hand, there may be the makings of legal support for community planning in the *Kelo* decision: the majority opinion's support for New London's takings—especially Kennedy's concurrence—rests on the comprehensive planning and community review that the city

[11]See the CATO Institute's Mark Calabria on FOX News' Willis Report, available at www.cato.org. The plan has also been critiqued, from the left, for its reliance upon private venture capital in the property selection and refinancing process (Kuttner, 2012).

[12]Certain procedural restrictions advanced by property rights advocates may prove useful in providing a degree of participation.

conducted prior to redevelopment. While limited in their scope, these opinions may provide a legal lever for advocates of broader community control.

Two recent approaches to redevelopment—community benefits agreements (CBAs) and community equity shares (CES)—pursue equity and participation while adroitly avoiding institutional pitfalls. CBAs, originally developed by Los Angeles Alliance for a New Economy (LAANE) in the late 1990s, are contractual agreements made between developers and an alliance of community representatives (especially neighborhood and labor organizations; for general discussion of CBAs, see Gross et al., 2005; Parks and Warren, 2009). Developers agree to provide some combination of community benefits that can include job training, local hiring, living-wage and/or union jobs, affordable housing, infrastructure improvements, and community amenities such as green space. In exchange, the community coalition pledges its political support for the project. CBAs are often included in development agreements made between developers and local governments (at least in states where development agreements exist by statute); in theory, CBAs are contractually binding without constituting unconstitutional state exactions against developers, as the agreements are made between developers and community organizations, not developers and the state (Frank, 2009).

If CBAs are a promising approach to equitable redevelopment, they also illustrate its thorniest challenges. The saga of Atlantic Yards in Brooklyn, though sometimes seen as an ersatz CBA, in fact reveals several potential hazards, particularly with regard to eminent domain. I can only tell the story in brief here (see Angotti, 2008, 215–222; Fainstein, 2008; and the documentary *Brooklyn Matters*). In 2003, the real estate investment trust Forest City Ratner (FCR) made a proposal to redevelop the Vanderbilt railyards in Brooklyn. The city and state planned to subsidize the project, and by using the state-level Empire State Development Corporation (ESDC), bypass city land use review. The ESDC would then acquire residential and commercial parcels through voluntary sale or eminent domain. FCR planned a new New Jersey Nets basketball stadium for the site, along with high-rise mixed-use towers that originally included 4,500 apartments and over 1,000,000 ft^2 of office space. Some residents and businesses in the redevelopment footprint—together with others in the area who objected to the buildings' design, likely adverse effects, and lack of community input—organized against the project. But, FCR had anticipated resistance, and had already conducted exclusive negotiations with the local ACORN chapter and BUILD (a newly formed organization of unionized minority construction workers). The developers had signed a CBA, with the city's blessing, that provided union construction jobs and significant affordable housing set-asides. The leading anti-FCR group, Develop Don't Destroy Brooklyn (DDDB), continued to fight the project tenaciously with the help of their local supporters and national libertarian groups, delaying the project through the courts and developing an alternative UNITY plan. As the economy cooled, FCR repeatedly revised its plans, reducing the percentage of affordable units by replacing planned office space with condominium units. Nevertheless, construction eventually moved forward, if slowly; residents lost their final legal appeal in November 2009, the last holdout (and former DDDB spokesman) agreed to sell his unit in April 2010, and the stadium was complete by late 2012.

Many supporters of equitable redevelopment have misgivings about the CBA model that are illustrated by the Atlantic Yards case (for general critiques, see Angotti, 2008; Bezdek, 2009; Frank, 2009). The enforceability of CBAs as contracts is debatable, and

given FCR's changing plans for the site, it does not appear that the CBA was fully binding in this case. There have been doubts about whether groups in most communities would have the capacity to execute a CBA; even in the Atlantic Yards case, one major signatory was partly funded by FCR (BUILD), while the other—part of a nationwide network—was destroyed by a national media furor and strategic right-wing assault (ACORN). CBA coalitions have also been faulted for their lack of representativeness: in New York City, Atlantic Yards seems to have initiated a pattern of top-down selection of "community representatives," as indicated by more recent Yankee Stadium CBA, which was signed with little community input.

Barbara Bezdek (2009) seeks to develop a different strategy in her proposal for community equity shares. Bezdek's approach would assign limited property rights in the form of "shares" to those living in (or immediately adjacent to) redevelopment areas. As shareholders, residents—whether owners, renters, or homeless—would both have a decision-making vote and a real monetary stake in any redevelopment: "their residency [would not be] terminated by local government land use practices that transfer public resources into largely private redevelopment of residences for others, unless and until residents have approved the redevelopment; and [received] shares in the economic value of the project" (115). Moreover, by providing an actual property interest, CES could build upon the foundations of property law.

The CES model is an innovative and ambitious step towards full community control and ownership in the field of equitable redevelopment, and remedies some of CBA's shortcomings. But, the key problem with CES is that it only includes the neighborhood's residents, and not its workers, service users, or others whose lives and livelihoods may hinge on the community's future. In part, these exclusions reflect hopes that a formal CES system, based upon a new recognition of individual property rights, would be more readily integrated into a standard planning process. Even residents in areas without existing organizational capacity could thereby receive property rights and participate in redevelopment planning. But, the model trades off other non-resident interests in the process. It expands the circle of individuals with a legally defensible private property right, without asserting a collective right in property as such.

This is not to say that CBAs represent any easy resolution to the often contested politics of redevelopment, or any neat remediation of longstanding racial inequalities in the planning of urban space. In the case of Atlantic Yards, opponents denounced FCR for crassly dividing residents along racial lines, even though the developers' closest allies claimed to represent the interests of minority workers and working-class residents. Even grassroots-driven CBAs must contend with similar tensions, such as those between racial and class equity, within progressive community coalitions.

Finally, both the CBA and CES models entail that communities negotiate with developers, and directly or indirectly with the state—in other words, that they "bargain" with neoliberalism. To the extent that these negotiations produce compromises with long-lasting, institutional legacies, CBAs and CES raise the specter of social movement co-optation (much as another CBA, the collective bargaining agreement, so often has for labor). Atlantic Yards and Yankee Stadium have already demonstrated that developers and the state can use CBAs as an instrument to evade community input; as Parks and Warren (2009) point out, "CBAs are only as good as the organizing behind them" (101). CES, by contrast, would not require engagement of community organizations if it were integrated

into a standard planning process; this could be beneficial if it spurs activism in communities that lack advocates, but detrimental whenever and wherever it diverts incipient community activism.

Even when these models deliver benefits, some argue that bargaining may generate weaker outcomes than confrontation. Angotti (2008) suggests that developers have begun to make proposals that they plan to scale back or otherwise modify in negotiations (221). Both models may also have deeper consequences for how social movements approach the state's role in providing for human needs. If social movements turn to CBAs as a long-term adaptation to a neoliberal state that cannot or will not meet social needs, will they overlook opportunities to expand state capacity (though some CBAs have led to movements for state regulation; see Parks and Warren, 2009)? If CES makes shareholders out of residents, how might it be implicated in the production of neoliberal subjects, and will this have long-term effects on social movements?

TOWARDS COMMUNITY BENEFITS

Despite these open questions, CBAs, CES, and project-specific eminent domain takings are promising community tools for creating a more equitable city. They represent alternatives to homeowner rule and neoliberal redevelopment, existing in an uneasy space between destroying government and destroying communities. Anti-eminent domain activism answers the daunting problem of revitalization with simple answers that are rooted in a deeply reactionary approach to property rights. It is an approach that undermines the capacity of communities to meet their needs by foreclosing the possibility of using an important government tool in progressive ways.

Large-scale redevelopment is not only a moment of peril, but one of opportunity. In the lull provided by the flagging economic recovery, communities need to organize themselves, analyze the political economy of redevelopment, and form coalitions that support participation and equity. By doing so, they will reject the false choice presented by post-*Kelo* property rights activism and instead fight for communities where residents and workers have a voice in their shared futures.

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