"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment

Michèle Alexandre
“LOVE DON’T LIVE HERE ANYMORE”: ECONOMIC INCENTIVES FOR A MORE EQUITABLE MODEL OF URBAN REDEVELOPMENT

MICHÈLE ALEXANDRE*

Abstract: The exclusion of poor, underprivileged people in urban renewal projects has been discussed in depth by a number of scholars. While this issue is far from resolved, the post-Katrina redevelopment plans provide an opportunity to re-evaluate notions of how to best redevelop urban spaces. In this Article, the author attempts to show that the interests of poor individuals can converge with those of city officials and developers in order to prevent the exclusion of the poor in post-Katrina New Orleans as well as future cities. To do so, the author relies on Law and Economics’ notion of the maximization of incentives and Critical Race Theory’s Interest Convergence Theory.

INTRODUCTION

Her story is all too common in contemporary urban life. For fifteen years, Sue Ann, a working-class mother, lived with her two children in a small two-bedroom apartment located in a mixed-use neighborhood in a large urban center. In the past five years, her neighborhood underwent dramatic change as eager developers and trendy young professionals flooded into the neighborhood. Their arrival was accompanied by internet cafes, coffee shops, and bookstores. To accommodate their upper-class demands, residential apartment buildings were gutted and transformed into new condos and lofts.

After watching these transformations take place around her, Sue Ann was notified one day that the developers set their sights on her

* Assistant Professor, University of Memphis Cecil C. Humphreys School of Law. B.A., Colgate University; J.D., Harvard Law School. The author thanks Imani Perry, Audrey McFarlane, Cassandra Havard, Odeana Neal, Gilda Daniels, Patience Crowder, Robin Malloy, and the participants of the Third Annual Property Citizenship and Social Entrepreneurism (PCSE) for their input. The author also thanks the University of Memphis School of Law and the University of Baltimore for their support as well as research assistants Tannera George and Melissa Raszewski.

1 Sue Ann is a fictional character used here to illustrate the plight and experiences of millions of individuals.
apartment building. Sue Ann’s landlord informed the building’s residents of her decision to sell the complex. Sue Ann must now find a new home for herself and her children. However, she has been priced out of her neighborhood, given the reality that the lowest rent in this “revitalized” community is seventy-five percent greater than her current rent. The closest affordable housing is in a remote area of town, which will increase her commute to work by forty-five minutes. Furthermore, the school system in the remote area leaves a lot to be desired.

This story of displacement is so recurring that it is fast becoming one of the formative experiences of America’s low-income, urban populations. There are increasing numbers of families in urban centers who are finding themselves physically excluded and economically marginalized from their long-time residences and communities as a result of urban renewal. Urban renewal refers to the process by which municipalities, in conjunction with developers, target sections of a city regarded as low-income, barren, and/or blighted and redevelop those areas in order to—among many reasons—increase property values and


4 See James Geoffrey Durham & Dean E. Sheldon III, Mitigating the Effects of Private Revitalization on Housing for the Poor, 70 MARQ. L. REV. 1, 13–14 (1986). The authors note that, “The incidence of displacement on a national level is significant . . . .” Id. at 13. There are 1.7 million people displaced every year. Id. at 14.


7 See Kelo v. City of New London, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (noting that mid-century development plans employed the Court’s expansive understanding of public use to displace significant numbers of non-white or low-income families).

attract higher-income individuals to the city.\textsuperscript{9} Among the problems caused by the displacement of low-income individuals is psychological strain on those residents who are emotionally attached and economically dependent on their homes and communities.\textsuperscript{10}

While the definition of urban renewal changed during the late twentieth and early twenty-first centuries, the effects of urban renewal have been the same for poor people living in the targeted neighborhoods because their interests and voices continue to be excluded\textsuperscript{11} from urban planning programs and development initiatives.\textsuperscript{12} In this

\textsuperscript{9} The City of New London represents a perfect example of the type of conditions that usually give rise to the implementation of urban renewal projects. According to the Court in \textit{Kelo}:

Decades of economic decline led a state agency in 1990 to designate the City [of New London] a “distressed municipality.” . . . In 1998, the City’s unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization.\textit{Kelo}, 545 U.S. at 473.

\textsuperscript{10} See \textit{Fullilove}, \textit{supra} note 5, at 3–4.

\textsuperscript{11} See \textit{Silkwood}, \textit{supra} note 6, at 521–22 (“Indeed, urban renewal, which over its sketchy past has displaced scores of African-Americans [sic], came to be called ‘Negro removal’ instead of urban renewal. Further, scholars have noted how governments have ‘implemented policies to segregate and maintain the isolation of the poor, minority, and otherwise outcast populations’ . . . .” (footnote omitted)).


In theory, land use decisions take place within a planning framework, done in accordance with a comprehensive plan. In practice, however, private market forces are more apt to directly influence land use decisions than any comprehensive public deliberative process that considers the larger social, economic, or environmental considerations that underlie land use within an urban area. Although there is some move toward stronger local planning requirements, the prevailing law and practice remains a highly atomized approach.

The atomization of urban space has fragmented urban communities in ways that make “bridging” social capital difficult, undermining the formation of socially and economically integrated urban communities. This has had the consequence of isolating certain populations in ways that render them vulnerable to larger structural forces that are difficult for them to overcome without either stronger social and economic resources or collective action on the part of interests who have very little incentive to assist socially isolated communities.

\textit{Id.} at 546; see also \textit{Fullilove}, \textit{supra} note 5, at 20, 242 n.14. Fullilove describes urban renewal projects in the 1960s and 1970s as:
Article, I consider these persistent effects as they have impacted both property owners and lessees. Primarily, this Article concentrates on how the scope of public purpose, as it is used in eminent domain standards, may be expanded in order to implement more equitable renewal plans. I argue that equity-based redevelopment plans can help prevent the displacement and future exclusion of traditionally disadvantaged residents of the low-income communities that are normally targeted by redevelopment plans. I suggest that a system of incentives that merges the interests of development planners with the interests of the urban poor be incorporated into all urban renewal plans so as to achieve more equitable results. In this way, I attempt to show that the interests of poor individuals can converge with those of city officials and developers. Derrick Bell’s Interest Convergence Theory inspires this incentive-based urban renewal plan. More specifically, this Article will show that the interests of poor individuals can converge with those of city officials and developers. It will explore the intersection of Interest Maximization and Interest Convergence Theory, and offer a modified defini-

[Programs] of the federal government that provided money for cities to clear “blight.” . . . By my estimate 1,600 black neighborhoods were demolished by urban renewal. This massive destruction caused root shock . . . First, residents of each neighborhood experienced . . . the loss of their life world. . . . Root shock, post urban renewal, disabled powerful mechanisms of community functioning, leaving the black world at an enormous disadvantage for meeting the challenges of globalization.

Id. at 220. Fullilove goes on to explain the reasons underlying her mathematical estimate:

This estimate is based on the following pieces of information. According to the final report on urban renewal, there were 2,532 urban renewal projects in 992 cities. A number of authors have reported that 75 percent of the people displaced were people of color and about 63 percent were African American.

Id. at 242 n.14 (citation omitted).

See generally Derrick A. Bell, Jr., Brown v. Board of Education and the Interest Convergence Dilemma, in Critical Race Theory: The Key Writings That Formed the Movement 20 (Kimberlé Crenshaw et al. eds., 1995) (introducing the Interest Convergence Theory).

See id. at 22; James Boyd White, Economics and Law: Two Cultures in Tension, in Economic Justice: Race, Gender, Identity and Economics 33, 33–34 (2005) [hereinafter Economic Justice]. White explains some of the assumptions of microeconomics are that:

The universe is populated by . . . human actors, each of whom is competent, rational, and motivated solely by self-interest. External to the human actors is a natural universe that affords what are called “resources,” which are acted upon by human actors to create something called “wealth.” . . . Each actor is assumed to be motivated by an unlimited desire to acquire or consume. Since each is interested only in its own welfare, each is in structural competition
tion of public purpose that precludes the exclusion of economically disadvantaged individuals.

The definition of public purpose that I propose for courts reviewing urban renewal projects is one that makes paramount the nondisplacement of poor residents. In addition, I argue that intangible contributions made by pre-redevelopment community residents to the redeveloped communities must be preserved and computed in the type of “just compensation” awarded to homeowners, as well in the types of amenities provided for low-income renters in the post-renewal community. The computation of intangible contributions of poor community members to the redeveloped communities would adequately acknowledge the role that the pre-redevelopment residents’ social capital plays in increasing the value of the community. That role is discussed in this Article when analyzing the proposed redefinition of public purpose. Furthermore, I borrow from international law’s recognition of indigenous populations’ right to return to their homeland, as well as the now established standards of environmental justice, to further support the basis for expanding the definition of public purpose to prevent the displacement of poor residents.

Part I of the Article discusses conventional notions of public purpose and explores incentives that local governments have traditionally offered to attract private developers. In Part I, I also propose a redefinition of public purpose that takes into account the intangible contributions and value of the residents/indigenous people of pre-redeveloped communities. Part II investigates the possibilities of a more egalitarian model of urban redevelopment by applying the Interest Convergence Theory to urban renewal plans. Part III proposes such an egalitarian redevelopment model using redevelopment plans in post-

with all the others. . . . The final ingredient is money, a medium in which surplus can be accumulated with convenience and, in principle, without limit.

*Id.*


16 *See* Foster, *supra* note 12, at 529.


19 *See infra* Part I.

20 *See infra* Part II.
Hurricane Katrina New Orleans as a promising example. Ultimately, the Article will explore the ways in which the interests of developers and politicians may converge with those of homeowners and renters in urban renewal cases.

I. Public Purpose and the Traditional Use of Incentives in Urban Renewal Projects

Eminent domain is the power of the government to expropriate private properties. The Constitution does not explicitly grant this power. Instead, the Constitution tacitly recognizes that the power to expropriate inheres in governments and requires, in the Takings Clause, that the government pay “just compensation” in exchange for an expropriation. “Just compensation” is interpreted as an attempt to balance a valued interest in property rights with the government’s need to sometimes appropriate private property for public benefit. Eminent domain continuously positions individuals’ sacrosanct rights to their property against the need of government to make decisions consistent with the welfare of the general public. The evidence of the sanctified nature of individual property rights lies in the very admonishment of the Framers of the Constitution that property shall

21 See infra Part III.
23 See U.S. Const. amend. V.
25 U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
not be taken without “just compensation.” Armed with such protection, it is no surprise that private property owners become incensed when those property rights become endangered by takings decisions that seem to fall beyond the scope of public welfare and seem to fit closer to that of private interests. In the early years of the United States, subsequent to the passage of the Bill of Rights, the Takings Clause served as a tool to achieve a proper structuring of cities and communities. At that time, the public use mandate of the Takings Clause was carried to its literal meaning in that it granted local government the right to use private property for the creation of items open to the general public.

A. Kelo v. City of New London and the Evolution of Public Purpose

The tension between the sanctity of property rights and the government’s need to sometimes limit property rights—either through regulatory taking or expropriation—has given rise to substantial litigation. Over time, the U.S. Supreme Court has developed a robust interpretation of the Takings Clause and the meaning of “just compensa-

28 See U.S. Const. amend. V.
29 See Ashley J. Fuhrmeister, In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City Of New London, 54 Drake L. Rev. 171, 220–21 (2005) (discussing the impact of takings that do not have a direct effect on public welfare). Fuhrmeister states:

Although municipalities and developers often have nothing to lose under these economic development schemes, the private property owners located in the midst of an economic development area have everything to lose . . . .

. . . . Such is the case of economic development takings in which the anticipated benefits are only indirectly related to the taking itself and are dependent upon the financial health of an independent, private entity that cannot guarantee a certain amount of jobs or tax dollars.

Id.

30 See Donald L. Beschle, The Supreme Court’s IOLTA Decision: Of Dogs, Mangers, and the Ghost of Mrs. Frothingham, 30 Seton Hall L. Rev. 846, 890–91 (2000) (discussing the weight of individual interests against the goal of a city in that “[t]he Takings Clause . . . limit[s] both the owner’s power to frustrate the community and the community’s power through the requirement of just compensation”).

31 See Silkwood, supra note 6, at 502–22. “The interpretation of public use as public purpose endured as the method of determining proper and improper takings into the mid 1900’s.” Id. at 502 (citing Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 80 (1937)).

tion” under the Constitution.33 I will examine three important Supreme Court cases, Berman v. Parker, Hawaii Housing Authority v. Midkiff, and Kelo, to analyze the evolution of public purpose.34

Eminent domain triggers controversies because many perceive it as an extreme form of governmental intrusion.35 The government, in turn, usually argues that eminent domain is necessary to solve holdout problems that market inefficiencies create.36 Further, the government often argues that most public use or redevelopment projects acquire private properties through ordinary means.37 The use of eminent domain is designed to be a tool of last resort, to be used only in the case of holdout by one or more property owners.38 In this context, eminent domain is believed to be useful in preventing a few property owners

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34 See Kelo, 545 U.S. 469; Midkiff, 467 U.S. 229; Berman, 348 U.S. 26.


[I]t is now the widespread and not unjustified popular perception that the Court de facto declared economic war on people’s most cherished possessions—their homes that are not merely their “property,” but also are traditionally thought of as places of security and repose, as well as places of family refuge that is [sic] secure from government intrusion.

Id.; see also Dennis J. Coyle, Takings Jurisprudence and the Political Cultures of American Politics, 42 Cath. U. L. Rev. 817, 848 (1993). Coyle writes:

The courts’ confusion of takings doctrine with substantive due process has lessened the effectiveness of federal and state takings clauses as shields against government intrusion. When these two concepts are treated as one, with a single, rational basis standard so watered down as to permit virtually anything to pass, these protections of rights become empty shells.

Id.


37 See id. at 61–62, 64.

from thwarting the intended public benefit that the government anticipates will flow from the taking.\footnote{See Posner, Economic Analysis, supra note 36, at 64–68 (making efficiency and public benefit arguments for takings).}

In the early period of takings jurisprudence, traditional eminent domain cases, mostly state cases, involved disputes over the taking of private properties to build highways and public roads.\footnote{See Dickey v. Maysville, W.P. & L. Tpk. Rd. Co., 37 Ky. (7 Dana) 113, 113 (1838); Katherine M. McFarland, Note, Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain, 14 B.U. Pub. Int. L.J. 142, 142–43 (2004) (“The practice of eminent domain—the government’s power to take private property for public use—was recognized by common law and originally used to facilitate the buildings of public roads, schools, and post offices.” (citing United States v. Chicago, 48 U.S. 185, 194 (1849))).} In 1875, the Supreme Court confirmed the state courts’ interpretations by limiting the use of eminent domain to “forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses.”\footnote{Kohl v. United States, 91 U.S. 367, 371 (1875); see McFarland, supra note 40, at 147.} The Supreme Court did not deviate from this limitation until the middle of the twentieth century.\footnote{See Scott P. Ledet, Comment, The Kelo Effect: Eminent Domain and Property Rights in Louisiana, 67 La. L. Rev. 171, 181 (2006) (“A narrow construction of the public use provision of the takings clause was all but destroyed in the United States Supreme Court case of Berman v. Parker.”).}

In recent years, the Supreme Court has embraced the more expansive notion of takings for public use purposes, culminating in a broader notion of public purpose announced in \textit{Kelo}.\footnote{See generally Kelo v. City of New London, 545 U.S. 469 (2005) (announcing an increasingly broad definition of public purpose).} The Supreme Court decided \textit{Berman} in 1954, finding the type of taking under review to be within the public use language of the Fifth Amendment.\footnote{348 U.S. 26, 33–34 (1954).} \textit{Berman} involved private owners challenging the condemnation of their property under the District of Columbia Redevelopment Act of 1945.\footnote{Id. at 28.} The Act allowed the use of eminent domain to redevelop slums and blighted areas and the sale or lease of condemned lands to private buyers.\footnote{Id. at 29–31.} The private owners argued that their properties could not be taken because they were commercial properties, because the properties were not in a slum, and because the government would transfer their properties to private interests.\footnote{Id. at 31.} The \textit{Berman} Court rejected the private owners’ argument, holding that:
The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.\textsuperscript{48}

The Court denied the private owners’ challenge and found the taking to be lawful.\textsuperscript{49}

The \textit{Berman} Court rejected the invitation to second-guess the legislature’s determination that the use of eminent domain would benefit the public.\textsuperscript{50} The Court embraced the notion of public purpose as the constitutional prerequisite for the exercise of eminent domain power.\textsuperscript{51} This expanded view of public use—public purpose, in particular—is far removed from the Court’s early views that eminent domain should only be exercised when the use is one that is specifically open to the public.\textsuperscript{52}

The Court revisited eminent domain thirty years later in \textit{Midkiff}, where it held that the government may condemn private land to break up a land ownership oligopoly in order to reestablish a free market.\textsuperscript{53} The Court again followed \textit{Berman}’s flexible interpretation of the public use/public purpose doctrine.\textsuperscript{54} Adopting the deference-to-legislature approach in \textit{Berman}, Justice O’Connor argued in \textit{Midkiff} that the role of the Court in determining public purpose is very narrow and should be invoked only when absolutely necessary.\textsuperscript{55} Justice O’Connor stated that, “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”\textsuperscript{56} The Court continued:

\textsuperscript{48} \textit{Id.} at 33 (citation omitted).
\textsuperscript{49} \textit{Id.} at 36.
\textsuperscript{50} \textit{Berman}, 348 U.S. at 33.
\textsuperscript{51} \textit{See id.}
\textsuperscript{52} \textit{See} \textit{Kelo} v. City of New London, 545 U.S. 469, 479–80 (2005); \textit{Berman}, 348 U.S. at 33. Prior to 1875, the federal government did not make any definitive statements on the scope of the public use admonishment of the Takings Clause. The state courts tackled taking for public purpose, approving uses such as the building of a university, a road, and a bridge. \textit{See generally} Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344 (1829) (bridge); Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821 (Cir. Ct. D.N.J. 1830) (road); Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (1805) (university).
\textsuperscript{54} \textit{Id.} at 239–41; \textit{Berman}, 348 U.S. at 33.
\textsuperscript{55} \textit{Midkiff}, 467 U.S. at 240–41; \textit{see} \textit{Berman}, 348 U.S. at 32–33.
\textsuperscript{56} \textit{Midkiff}, 467 U.S. at 240.
There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is “an extremely narrow” one. The Court in *Berman* cited with approval the Court’s decision in *Old Dominion [Land] Co. v. United States*, which held that deference to the legislature’s “public use” determination is required “until it is shown to involve an impossibility.”

The debate surrounding the definition of public purpose reached its peak in the *Kelo* decision in 2005. In further broadening the public purpose doctrine, the Court argued that public purpose extended beyond public use. In 1990, the City of New London was classified by a

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57 Id. (citations omitted) (quoting Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).


> Several recent law journal articles have critiqued the current interpretations of the doctrine. These scholars argue that eminent domain is used by “rent seeking” groups that want to avoid private market negotiations. They also claim that eminent domain is abused by public authorities that are controlled by private developers, and they argue for a stricter application of the [Public Use] Clause.

*Id.* at 50; see also *Rindge Co. v. County of L.A.*, 262 U.S. 700, 705–06 (1923). The Court stated:

> The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State.

*Id.* at 705–06 (stating that the use of eminent domain for a public highway qualifies as public use); see Bruce A. Ackerman, *Private Property and the Constitution* 190 n.5 (1977); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161–62 (1985); Margaret Jane Radin, *Reinterpreting Property* 136–37 (1993).

59 *Kelo*, 545 U.S. at 479 (“[T]his ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” (quoting *Midkiff*, 467 U.S. at 244)). Rather, the Court “embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Id.* at 480 (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896)).
state agency as a distressed city. In 2000, the city approved a development plan that would create 1000 jobs, raise revenue, and renew the city. Having acquired most of the land needed for the renewal, the city developers instituted condemnation proceedings to acquire remaining land through eminent domain. The Supreme Court was asked to determine whether the city’s economic rejuvenation scheme served a public purpose within the meaning of the Takings Clause.

Among other arguments, petitioners contended that economic development should not serve as the basis for a taking, nor should the city be able to use eminent domain to take nonblighted areas. Petitioners asked the Court “to adopt a new bright-line rule that economic development does not qualify as a public use.” The Court rejected the invitation, arguing that “[p]romoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes [the Court has] recognized.” Kelo completed the public purpose expansion, permitting the taking of private properties for economic rejuvenation absent any blight. The Court admitted that “[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.” The Court sanctioned the power of government to allow private developers to take private properties for redevelopment under the eminent domain power.

The Court’s expansion of public use is helpful to support the arguments for extending the meaning of public purpose that I pro-

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60 See id. at 473.
61 Id. at 472 (“In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.’” (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004))).
62 Id.
63 Id.
64 Kelo, 545 U.S. at 484–85.
65 Id. at 484.
66 Id.
67 Id. at 483.
68 Id.
69 See id. at 483–86.
70 See Silkwood, supra note 6, at 503. Silkwood states:

The United States Supreme Court’s decisions in Berman v. Parker and Hawaii Housing Authority v. Midkiff, two seminal cases in the development of eminent
pose in this Article. If, as stated in *Berman*, public purpose can represent values that are “spiritual as well as physical,” 71 intangibles such as social capital 72 should be considered in the implementation of urban renewal plans.

II. INTEREST CONVERGENCE AND PUBLIC PURPOSE REDEFINED: A UTILITARIAN JUSTIFICATION FOR REFORMS IN URBAN REDEVELOPMENT CASES

A. Interest Convergence Defined and a Consideration of Ways of Converging Economic Interests for the Public Good

In his seminal article, *Brown v. Board of Education* and the Interest Convergence Dilemma, Derrick Bell discussed the import of interest convergence in civil rights cases:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites. 73

Bell specifically referred to the events that culminated in *Brown* and demonstrated that the Supreme Court’s decision in *Brown* correlated with the interest of the United States at the time. 74 As demonstrated

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72 See *Foster*, *supra* note 12, at 529. Social capital refers to the value that the intangible contributions of individuals, such as cooperation, camaraderie, and a sense of unity, add to a particular community. This idea is explored in further detail at the end of Part II of this Article. *See infra* Part II.
73 Bell, *supra* note 13, at 22; see also Derrick Bell, *Remembrances of Racism Past: Getting Beyond the Civil Rights Decline*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 73–82 (Herbert Hill & James E. Jones eds., 1993).
74 Bell, *supra* note 13, at 22–23. According to Bell:

First, the decision helped to provide immediate credibility to America’s struggle with communist countries to win the hearts and minds of emerging third world people. At least this argument was advanced by lawyers for both the NAACP and the federal government. . . .
in the case of desegregation, a coalescence of interests across sectors can aid in the protection of marginalized individuals.\textsuperscript{75}

In the urban renewal context, the interests converging are typically those of city officials and developers in order to accomplish the designated projects.\textsuperscript{76} Unfortunately, the city officials and developers’ perception of public good often fails to consider the interest of economically marginalized residents.\textsuperscript{77} Urban renewal projects not only attract new businesses to poor neighborhoods, but also often result in

Second \textit{Brown} offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination but also violent attacks in the South which rivaled those that took place at the conclusion of World War I. . . .

Finally, there were whites who realized that the South could make the transition from a rural plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization . . . .

Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. As with abolition, though, the number who would act on morality alone was insufficient to bring about the desired racial reform.

\textit{Id.} at 23. Another scholar has also supported the Interest Convergence Theory in her historical analysis of the events that culminated to desegregation. \textit{See generally} Mary L. Dudziak, \textit{Brown as a Cold War Case}, 91 J. Am. Hist. 32 (2004) (describing the impact historical events surrounding the \textit{Brown} decision, such as the Cold War). According to Dudziak, the United States was under such international scrutiny at the time, that the \textit{Brown} decision was an opportune and important moment to clean up the United States’s image and show the world that America’s propaganda about democracy was a reality on America’s soil. \textit{See id.} at 32, 38.

\textsuperscript{75} See Daniel H. Cole, \textit{Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis}, 15 Sup. Ct. Econ. Rev. 141, 153–54 (2007) (discussing the power of citizens with respect to the protection of property rights and noting that “[t]o the extent that the ‘interests of the common citizen’ include private property, it follows that sensitivity to the property rights of the common citizen is crucial to a government’s political survival and prosperity”).

\textsuperscript{76} \textit{See}, \textit{e.g.}, Silkwood, \textit{supra} note 6, at 523 (showing the interplay of the city’s interest and private investors in Mississippi). Silkwood relates:

The executive director of the Mississippi Development Authority explained, in an attempt to justify the takings, “It’s not that Nissan is going to leave if we don’t get the land. What’s important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through.” Clearly, the corporate dollars meant more to the Mississippi Development Authority than the Constitutional rights of the minority homeowners whom they sought to uproot and displace.

\textit{Id.} (footnotes omitted).

\textsuperscript{77} \textit{See id.} at 521–23.
substituting the low-income residents and buildings formerly in that neighborhood with professional, middle class commercial and residential edifices. These projects are popular and can be very successful as formerly poor and isolated neighborhoods, over a period of five to ten years, become coveted by affluent developers. These changes can also contribute to more stable economies and provide opportunities for city officials to receive accolades.

Judge Richard Posner proposed “that people are rational maximizers of their satisfactions” and “nothing they do is motivated by the public interest.” He further asserted that market inequities should be resolved by market participants’ own motivations and not by external regulations. In redevelopment cases, the maximization of satisfactions, in the form of incentives, is not a new phenomenon. In fact, local governments and private developers regularly develop incentives to attract the services and attention of one another.

The current market for inner city space coincides quite evenly with a decades-old policy of cities trying to attract the upper-middle class to the city. Arguably, the discovery has been partially fostered and guided by the deliberate intervention of state and local governments through an explicit and pointed policy to attract affluent residents. This intervention by state and local governments has taken many forms: incentives to urban professionals to locate in certain neighborhoods such as first-time homebuyers programs, settlement cost forgiveness programs, other incentive grants and loans for purchasing residential real estate within the city, and favorable re-zonings of industrial property to facilitate residential occupancy.

Id.

See James A. Kushner, Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations, 21 UCLA J. ENVTL. L. & POL’Y 45, 61 (2002–03) (discussing developer-created movements toward urban revitalization: “The young and old are attracted to New Urbanist communities, and developers are attracted to what could result in better communities, urban revitalization, and higher profits from increased density”).


See generally id. at 351–92 (chapter discussing an economic approach to law).

See Pritchett, supra note 58, at 29–30 (discussing the government’s use of eminent domain coupled with redevelopment incentives to encourage private investment).

quid pro quo relationship between private developers and city officials is illustrated in the following:

Cities aid in redevelopment by entering into public-private partnerships to write down land acquisition and development costs by using regulatory freezes and eminent domain power, and by providing a number of business incentives to companies willing to relocate and participate in residential and commercial (entertainment and retail) development projects. This is done with geographically targeted commercial tax incentives such as enterprise zones, creative financing techniques such as tax increment financing, favorable taxing policies such as under-assessment of commercial property values, or even the waiver of taxes through nominal payments-in-lieu-of-taxes (PILOTS).

In these examples, developers and city officials maximize their satisfaction by finding common points of interest. In the last example, the converging interest between the city officials and the private developers was the desire to attract lucrative business to the particular neighborhood. In light of that common interest, private developers and city officials had great incentives to collaborate. Each party

85 McFarlane, New Inner City, supra note 78, at 7. See generally Audrey G. McFarlane, Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space, Stanford Agora: Online J. Legal Persp. 2003, http://agora.stanford.edu/agora/volume4/articles/mcfarlane/mcfarlane.pdf (discussing Business Improvement Districts as used by developers to further segregate affluent neighborhoods from poor, minority ones).

86 See McFarlane, New Inner City, supra note 78, at 6–7, 15–17.

87 See Barbara L. Bezdek, To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization, 35 Hofstra L. Rev. 37, 39 (2006) (“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.”); McFarlane, New Inner City, supra note 78, at 15–17.

88 See Bezdek, supra note 87, at 40. Bezdek states:

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. Passage of the Housing Act of 1949 was secured by an amalgamation of disparate interests who saw what they wanted to see in the program. More specifically, “[h]ousing advocates thought it would result in additional affordable housing, while developers saw it as an economic opportunity.” Local jurisdictions realized it would give them the
could use their status to place the other in a better position.\textsuperscript{89} City officials use eminent domain to acquire needed property and private developers acquire funding to implement development plans.\textsuperscript{90} In the context of urban renewal, it is clear that the perennial “invisible hand” described by Judge Posner, traditionally believed to be at play in all market transactions, cannot be relied on to redress all inequities.\textsuperscript{91}

In a society where supply and demand provide a major motivation, economically marginalized individuals lack bargaining power.\textsuperscript{92} They are consequently unable to participate in the market and become unfortunate casualties.\textsuperscript{93} As a result, economically marginalized individuals have fewer ways to maximize their interests.\textsuperscript{94} Taking these limitations into consideration, how then do we proceed to include the interests of the nonmarket participants—those economically incapable of participating—in order to prevent their marginalization? Judge Posner concedes that nonmonetary and intangible incentives can be a considerable force in the market and that they can create palpable shifts in the conduct of business.\textsuperscript{95} The concerns generated by the post-Hurricane Katrina redevelopment efforts encapsulate the potential effects of nonmonetary incentives in redevelopment cases.\textsuperscript{96} The displacement faced by many of the hurricane victims is an example of what can happen when the interests of nonmarket participants are tools to clear away blighted eyesores and to build preferred developments in their place with the Federal Treasury footing the bill.


\textsuperscript{89} See id. at 40–41.

\textsuperscript{90} See id.


\textsuperscript{94} See \textit{Fullilove}, \textit{supra} note 5, at 11–17.

\textsuperscript{95} \textit{Id.}; see Posner, \textit{Problems of Jurisprudence}, \textit{supra} note 81, at 354. Posner asserts that “nonmonetary as well as monetary satisfactions enter into the individual’s calculus of maximizing.” \textit{Id.}

\textsuperscript{96} See Bezdek, \textit{supra} note 87, at 38–39 (“The victims least able to escape [Hurricane Katrina] and last to be remembered in emergency planning and evacuation were predominantly poor, black, elderly, and disabled.”).
overlooked.\textsuperscript{97} The redevelopment issues facing post-Hurricane Katrina New Orleans should not be viewed as exceptions to the issues usually present in urban renewal projects.\textsuperscript{98} The underlying threat of excluding disenfranchised individuals is integral to urban renewal, and palpable in post-Hurricane Katrina redevelopment efforts.\textsuperscript{99} It is commonly the case, however, that marginalized individuals are overlooked when points of interest convergence are not identified.\textsuperscript{100}

Rather than exhaust efforts to change individuals’ motivations, it is useful to investigate how to capitalize on merged interests. While self-motivated actions are arguably the ideal form of altruism, it is probably more realistic and, perhaps more productive, for advocates of economically marginalized individuals to concentrate post-

\textit{Brown} strategic energy on providing utilitarian incentives for change.\textsuperscript{101} If we are to

\textsuperscript{97} Id.

\textsuperscript{98} See generally Lolita Buckner Inniss, \textit{A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina}, 27 B.C. THIRD WORLD L.J. 325 (2007) (discussing the overall effects of revitalization generally and in post-Katrina New Orleans).

\textsuperscript{99} See Bezdek, supra note 87, at 40–41. Bezdek states:

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. 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.

\textit{Id.} (footnote omitted) (quoting Quinones, supra note 88, at 700 (quoting the Act)).

\textsuperscript{100} See Inniss, supra note 98, at 357–58, (discussing the effect on marginalized individuals when the greater community is distanced by the differences in their identities, and fails to find a common interest in protecting those disenfranchised citizens). Inniss states:

These identities may be based on a variety of factors such as race, ethnicity, or religion, any one of which may effectively serve as “identity cleavages.” Identity cleavages sever members of the differentiated group from the dominant group in a society. When these persons also happen to be members of a marginalized or disfavored group already in conflict with the dominant group, the rights of citizenship are rarely fully available to them during a crisis of displacement. In such a case, displaced persons are not “protected and assisted” as mainstream citizens during a crisis, but instead are “identified as part of the enemy, neglected and even persecuted.”


remain true to the legal realism that forms the basis of the Interest Convergence Theory, it is unlikely that social change will result solely from the sheer good will of people.\textsuperscript{102} Consequently, it might be more effective to focus on strategies that maximize incentives for these changes to occur.

Economic strategizing has been used in other spheres to explain or to affect market forces.\textsuperscript{103} Recently, for example, many companies changed their hiring practices through interest convergence.\textsuperscript{104}

\textsuperscript{102} See R. H. Coase, \textit{Adam Smith’s View of Man}, 19 J.L. & Econ. 529 (1976), \textit{reprinted in Emma Coleman Jordan \& Angela P. Harris, Economic Justice: Race, Gender, Identity and Economics} 144–45 (2005) (discussing Adam Smith’s view on the dangers of relying on benevolence alone as a source of change). Coase states: “The great advantage of the market is that it is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served.” \textit{Id.}

\textsuperscript{103} See Steven A. Ramirez, \textit{Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What To Do About It}, 61 Wash. \& Lee L. Rev. 1583, 1596–97 (2004). Ramirez states:

\textquote{E}conomic theory can nevertheless help explain the strategic behavior of CEOs in this context. Game theory suggests that much behavior can be explained by substituting strategic behavior (where actors have knowledge of and are influenced by the expected behavior of others) for mere rational maximization in the context of impersonal markets. This strategic behavior is a function of each actor’s expected payoffs, determined in light of the expected behavior of other actors. A fundamental heuristic of game theory is the Prisoner’s Dilemma. The Prisoner’s Dilemma illustrates how two parties striving to maximize their payoffs will conduct themselves in a way that may not maximize their joint welfare, once they take into account the behavior of others. Assume two individuals are in custody for suspicion of a crime. If they cooperate and agree not to testify against each other, they would serve two-year sentences as the result of a plea bargain. If one confesses and testifies against the other at trial, the confessor will receive a one-year sentence, and the other will receive a ten-year sentence. If both confess, they will receive sentences of five years. Obviously, the best option is for neither to confess, for they would then only serve a combined four years. Nevertheless, if they do not know what the other will do, they are each best served by confessing, which eliminates the worst outcome and creates an opportunity for the confessor to serve only one year. If both do this, which they rationally may, they jointly serve ten years instead of four. Simply stated, their strategic behavior will prevent both from rationally maximizing their utility. \textit{Id.} (footnotes omitted)

\textsuperscript{104} See Angela Brouse, \textit{Comment, The Latest Call for Diversity in Law Firms: Is It Legal?}, 75 UMKC L. Rev. 847, 850–52 (2007) (discussing the converging interests that are prompting law firms to create a diverse work environment). Brouse states:

It is generally accepted that diversity promotes equal opportunity and social justice in the world of employment. “Many corporate executives and hu-
these companies, diversity became a business decision because several of their consumers and clients were people of color. Continued growth meant hiring and promoting traditionally underrepresented persons. From the consumers and clients’ perspectives, they would only support businesses with a diverse workforce. Many of the consumers and clients had a vested interest in diverse workforces because they were people of color themselves. Others had a social interest—perhaps a business interest—in doing business with companies concerned with diversity. Therefore, a common interest in diversity is forged between companies and their consumers and clients.

Tax deductible donation is another form of interest convergence. Institutions often seek large donations from individuals or companies

man relations managers are motivated by a desire to do right (and perhaps by a desire to be seen as doing right) in giving an edge to individuals from groups long marginalized and excluded from positions of authority and privilege in society.”

Id. at 850–51 (footnote omitted) (quoting Cynthia Estlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, 26 Berkeley J. Emp. & Lab. L. 1, 7 (2005)).

105 See id. at 848–50 (discussing how clients pressure law firms to staff minority attorneys on the clients’ matters).


“[A]ffects a business' performance of virtually all of its major tasks: (a) identifying and satisfying the needs of diverse customers; (b) recruiting and retaining a diverse work force, and inspiring that work force to work together to develop and implement innovative ideas; and (c) forming and fostering productive working relationships with business partners and subsidiaries around the globe.”


107 See id.

108 See generally Kelly McMurry, Balancing the Scales: Small Firms Seek Diversity, TRIAL, Jan. 1998, at 12, available at 34-JAN Trial 12 (Westlaw) (discussing moves toward diversity in a legal context where one firm partner is a black male and the other a white female, and both the positive and negative effects that their diverse workplace has had with diverse clients).

109 See id. at 12 (McMurry quotes Margaret Lack, a Vice President and diversity facilitator with Career Partners, International/The Chesapeake Group, in McLean, Virginia, stating: “[D]iverse clients want diverse lawyers representing them”).

110 See Brouse, supra note 104, at 850–52; Wilkins, supra note 106, at 1576; McMurry, supra note 108, at 12.
in exchange for both tax deductions and social or public recognition for the donor.\textsuperscript{111} For example, universities regularly name buildings after their benefactors who also get to deduct the donation from their taxes, in addition to having their names on an edifice.\textsuperscript{112} Such exchanges are mutually beneficial to both parties because they have found ways to bring together disparate or previously unknown interests. The institutions amass the donations they need to complete a beneficial project while the benefactors receive social or public recognition for their altruism.\textsuperscript{113}

The foregoing examples are analytically useful for post-Hurricane Katrina redevelopment projects in New Orleans. Through interest convergence, these examples are paradigmatically useful in bringing together traditionally conflicting interests and protecting disadvantaged persons.\textsuperscript{114}

The redemptive power of interest convergence already manifested itself after \textit{Kelo v. City of New London}. Following public uproar against the \textit{Kelo} decision, local legislators have enacted legislation attempting to counter and limit its impact.\textsuperscript{115} Some states have reacted to \textit{Kelo} by


Professor Bittker notes that according to statistical studies “rich taxpayers contribute heavily to private colleges and universities [whose students] are likely to be drawn . . . from families with less income than their benefactors. [Also] gifts to community chests, the Red Cross, hospitals and similar social welfare agencies probably generate an even greater degree of redistribution.”

\textit{Id.} (alterations in original) (quoting Boris I. Bittker, \textit{Charitable Contributions: Tax Deductions or Matching Grants?}, 28 Tax L. Rev. 37, 56 (1972)).


\textsuperscript{113} See id. at 947–49 (discussing the ease with which an institution will give a benefactor public recognition when his or her donations are sizeable). Bartow states an example: “Senator Mitch McConnell steered $14.2 million in federal funding toward the University of Louisville to build a new library wing, the university magnanimously named the new auditorium after U.S. Labor Secretary Elaine Chao, McConnell’s wife.” \textit{Id.} at 947.

\textsuperscript{114} See Sheryll D. Cashin, \textit{Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence}, 79 St. John’s L. Rev. 253, 278–79 (2005) (discussing the power that minorities wield against the conflicting interests of the greater community when their collective interests are either represented by organized coalitions or they have political power). The ongoing debate triggered by \textit{Kelo} renders this a ripe time to re-evaluate implementation of renewal projects. See Andrew Schouten, Recent Development, \textit{Clear as Mud: Chapter 98 and California’s Community Redevelopment Law}, 38 McGeorge L. Rev. 216, 226 (2007) (noting that five policy committees in the California Legislature held joint hearings on redevelopment reform proposals in 2005, in response to concerns over \textit{Kelo}).

\textsuperscript{115} See Will Lovell, Note, \textit{The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Mi-
prohibiting the use of eminent domain when the property is to be transferred to private parties. Others have specified that eminent domain should be restricted to blighted communities. Nationwide, activists across the political spectrum have joined together to share concerns about the impact of *Kelo*. The collaboration has provided a space for the activists to find a common ground for the protection of property rights and fear of abuse of power by the state.

*nority Property Owners*, 68 Ohio St. L.J. 609, 610–11 (2007). Referring to public reaction to *Kelo*, Lovell notes:

> To . . . property owners, their government had betrayed them by authorizing governments to take their own homes and businesses and transfer that very same property to private developers under the guise of “economic development.” Following a strong public reaction after *Kelo*, state legislatures began to enact new laws to tighten the restrictions against such abuses.

*Id.* at 610.

116 *See id.* at 616–17 (detailing the reaction to *Kelo* as one that successfully pushed for legislation that would restrict the government’s ability to take private property for private development).

117 *See id.* at 619–22 (discussing the restrictions adopted by many states that allowed the taking of private property for private development, only if the property taken was blighted).

118 *See* Bezdek, *supra* note 87, at 38 (comparing the perceived pre-*Kelo* apathy towards individuals displaced by urban renewal to “the outrage that followed the Supreme Court’s *Kelo v. City of New London* decision” (footnote omitted)).

119 *See* Bernard W. Bell, *Legislatively Revising Kelo v. City Of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. Legis. 165, 166–67 (2006) (noting that the desire to find a means to protect property interests has been a common thread among Americans). Bell states:

> Reaction to the Court’s decision has been swift and sharp. Opinion polls have shown a public sharply critical of the decision. Many states have enacted or are considering legislation restricting the use of eminent domain for economic revitalization. Several states have created commissions to study the use of eminent domain for economic redevelopment. Indeed, legislation restricting the use of eminent domain for economic development has even been considered in Connecticut, the state from which *Kelo* arose. On the federal level, the United States House of Representatives almost immediately passed both a resolution of disapproval and an appropriations rider prohibiting the use of funds to enforce the decision. Both the House and the Senate have introduced legislation to reverse *Kelo*. Indeed, the decision seems to have united members of Congress from across the political spectrum, including, for example, conservative former Republican House Majority Leader Tom DeLay and liberal Democrat Representatives John Conyers and Barney Frank.

*Id.* (footnotes omitted).
B. Redefining Public Purpose

A mere interest in protecting traditionally recognized property rights is insufficient to address the needs of people marginalized by inequitable urban renewal plans.\textsuperscript{120} In addition, such a narrow view consistently undervalues the nonpecuniary investments that all individuals make in a community.\textsuperscript{121} The displacement of the poor members of redeveloped communities still remains a problem.\textsuperscript{122} Those displaced range from individuals whose houses are destroyed in anticipation of the redevelopment—if public housing—to those who have unequal bargaining power with the city and developers and are subsequently forced to sell their property below fair-market value.\textsuperscript{123} Others, unable to afford the rent in the newly developed neighborhoods, are forced to find lodging in more remote neighborhoods or even in other cities or states.\textsuperscript{124}

We can equitably implement urban renewal plans by redefining public purpose.\textsuperscript{125} As discussed above, an adequate definition of public purpose should include protecting poor residents and preventing their displacement.\textsuperscript{126}

While the majority in \textit{Kelo} contends that “the achievement of a public good often coincides with the immediate benefiting of private

\textsuperscript{120} See Keasha Broussard, Note, Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause, 24 LAW \& PSYCHOL. REV. 99, 107–12 (2000) (discussing the “human costs” of urban revitalization and the effects on those displaced by redevelopment).

\textsuperscript{121} See id. at 104–06 (discussing the psychological effects of “revitalization” on displaced residents).

\textsuperscript{122} See id.

\textsuperscript{123} See Lance Freeman \& Frank Braconi, Gentrification and Displacement: New York City in the 1990s, 70 J. AM. PLAN. ASS’N 39, 50 (2004). The authors note:

\begin{quote}
[D]isadvantaged households who wish to move into these neighborhoods may not be able to find an affordable unit, as may disadvantaged households in gentrifying neighborhoods who wish to move within their neighborhood. Moreover, if gentrification occurs on a sufficiently wide scale, it could result in a gradual shrinking of the pool of low-cost housing available in a metropolitan area.
\end{quote}

\textsuperscript{124} See id.


\textsuperscript{126} See Gideon Kanner, The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”? 33 PEPP. L. REV. 335, 365–67 (2006) (arguing that the present definition of public use is so broad that it may apply to any private “profit-making” use, but nonetheless does not encompass the needs of those that may fall victim to urban revitalization due to the fact that the process of “urban redevelopment has been one of discrimination against, and oppression of, politically powerless urban ethnic and economic minorities”).
parties," the reality still remains that the interests of the public often conflict with the interests of private developers. As it stands, the current application of the public purpose standard is so broad that it is subject to manipulation. A redefinition of public purpose should include a protection against displacement of economically marginalized individuals.

In order to test whether a redefined public purpose has been applied, the following factors should be considered. First, whether developers and decisionmakers maximized the intangible value and contribution created by the social capital present in the preblighted community and took specific steps to preserve the human capital-based value. Social capital has been defined as "the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals." The capacity for social capital to provide, then add, an invaluable quality to a neighborhood is described

127 Kelo, 545 U.S. at 485 n.14.
128 See Carol Necole Brown & Serena M. Williams, The Houses that Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans, 34 FORDHAM URB. L.J. 689, 699 (2007). The authors note the often opposing views of private developers and the public:

"[T]here are two seemingly opposing points of view about how to rebuild destroyed communities. On one hand, urban planners, real estate developers and architects tend to see solutions mainly in terms of demolition and large-scale redevelopment projects. On the other hand, property owners look at the wreckage . . . and ask, ‘How can I fix this?’"


Kelo has inspired a widespread and vigorous reaction by the public and press primarily because it is a case of reductio ad absurdum, meaning that its premise is flawed in that it deems almost everything to be a “public use.” So long as developers and municipal functionaries predict that more money will be made from the subject property in the developers’ hands than its present owner’s then the “public use” requirement is said to be met. This amounts to a sort of municipal do-it-yourself constitutional imprimatur because all the condemning municipality needs to do now is proffer self-manufactured plans for the proposed taking, even though . . . condemners are not obliged to carry out their plans and are free to engage in intrinsic fraud to take private property but then not use it as planned.

Id. (footnote omitted).

130 Foster, supra note 12, at 529.
as a community’s purchasing power.\textsuperscript{131} Second, whether the community’s input was solicited and considered during the planning of the renewed neighborhood.\textsuperscript{132} Forms of community participation should include the election of community-based unions\textsuperscript{133} to the renewal planning team with full voting powers and a mandate that all decisions be made only after full transparent disclosure to the community residents. Third, whether the prevention of displacement was one of the stated goals of the renewal plans and whether specific and concrete steps were taken to prevent the displacement of low-income residents. If, as stated in\textit{Berman v. Parker}, public purpose can represent values that are “spiritual as well as physical,”\textsuperscript{134} intangibles such as social capital,\textsuperscript{135} the prevention of displacement, and mandatory community involvement are all values that should be reflected in any definition of what constitutes appropriate use of property for public purpose under the Fifth Amendment.

Nondisplacement can be achieved by offering incentives for developers and city officials to work together to craft protections for vulnerable members of society in addition to their other goals.\textsuperscript{136} One manner in which incentives can be created is to organize a bottom-up movement where citizens put pressure on local officials through grassroots organizations.\textsuperscript{137} A bottom-up movement can serve as a check on

\textsuperscript{131} \textit{Id.} at 543.

\textsuperscript{132} The Environmental Justice Small Grants Program provides financial assistance to eligible organizations to build collaborative partnerships, to identify the local environmental and/or public health issues, and to envision solutions and empower the community through education, training, and outreach. City officials and urban developers could also work in conjunction with grassroots community organizations to avail themselves of the support and organizational framework that this program provides.


\textsuperscript{134} 348 U.S. 26, 33 (1954).

\textsuperscript{135} Social capital refers to the value that the intangible contributions of individuals such as cooperation, camaraderie, and a sense of unity, add to a particular community. \textit{See Foster, supra} note 12, at 529–31. This idea is explored in further detail at the end of this Part.


\textsuperscript{137} \textit{See id.} at 381 (describing the smart growth movement that has been endorsed by the American Planning Association). Though Eagle notes that the success of the smart growth movement will not be apparent for some time, a similar movement may prove
city officials who, in turn, will have to include the community’s interests in their negotiations with developers. The private developers, needing support from city officials for licenses and land acquisition, will have an incentive to cooperate with the city and the public’s wishes. As a result, the interests of city officials, private developers, and the public can all converge.

This convergence of interests is being played out in the redevelopment of New Orleans after Hurricane Katrina. The redevelopment plan exposed the inadequacy of the present public purpose doctrine and a need for redefinition. The local government issued its initial plan for redevelopment and received nationwide criticisms. In the past year, it has become clear that solutions that exclude the masses of displaced individuals will not be tolerated locally or nationally.

New Orleans provides a perfect example of how a traditional application of public purpose can disenfranchise large numbers of indi-

beneficial in motivating developers to consider poor residents in revitalization schemes. See id.

138 See id. (describing smart growth, a similar program concerning urban sprawl).

139 See Mark W. Zimmerman, Note, Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 41 DePaul L. Rev. 1271, 1301–02 (1992) (noting a U.S. Court of Appeals for the Second Circuit decision in Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), where the City would deny building permits in certain areas in order to force developers to build in urban renewal areas, the Court held that the City could accomplish its goals by adopting incentives for developers).


141 See Brown & Williams, supra note 128, at 701–02 (“Presently, most of the housing policy efforts by federal, state, and local actors have focused on owner-occupied housing needs, leaving many concerned that rental housing and renters will not receive adequate consideration in the rebuilding process.”).

142 See Parlow, supra note 140, at 860–64 (noting the marginalization caused by the current definition of public use of those who are at the mercy of the government for affordable housing).


individuals. Justice Thomas addressed the potential negative effects of *Kelo*’s definition of public purpose in his dissenting opinion. He argued:

The consequences of today’s decision are not difficult to predict, and promise to be harmful. So-called “urban renewal” programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. . . . If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities,” . . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages “those citizens with disproportionate influence and power in the political process, including large corporations and development firms,” to victimize the weak.

The rebuilding of New Orleans should force governmental entities to determine how to balance their economic interests and the needs of the poor populations in the areas subject to redevelopment. *Kelo* ex-

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145 See Brown & Williams, supra note 128, at 701–02. Providing an example of the inequity that may result from the use of an overly broad definition of public use, Brown and Williams state:

The Urban Land Institute has recommended that New Orleans delay redeveloping many of the most severely impacted areas of the City. Some African-American leaders object to the Institute’s recommendation and are concerned that the minority neighborhoods could be negatively impacted in a disproportionate manner by condemnation and, relatedly, eminent domain. If residents are discouraged by these prospects of long-term displacement, they may be more inclined to sell land to speculators at suppressed prices and, in so doing, miss out on the actual condemnation of their property.

*Id.* (footnotes omitted).


147 *Id.* (citations omitted).
tends public purpose beyond the broad scope contemplated by the Berman Court.\footnote{See id. at 484–85 (majority opinion).} While Berman conceded that public purpose was not limited to a strict public use only, Berman did not stretch public purpose to allow transfer to another private interest.\footnote{See Berman v. Parker, 348 U.S. 26, 33–34 (1954).} Kelo’s extension of public purpose has some redeeming potentials.\footnote{See J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 UCLA J. Env’tl. L. & Pol’y 131, 153–56 (2005).} It gives cities the flexibility to decide how to carry out the interests of all members of the community.\footnote{See id. (discussing at length the necessity of a city’s ability to exercise eminent domain without great difficulty, in order to effect changes that benefit both the wealthy and the poor).} City decisions that impose substantial burdens on some members of the community should fall outside of what should be considered public good.

A consideration of what constitutes public purpose is incomplete without computing the intangible investments that people make in their communities.\footnote{See Broussard, supra note 120, at 104–11 (discussing the failure of cities and developers to consider the emotional ties that displaced residents have with their homes and the nonmonetary investments that many residents have made in their homes and communities).}

For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid aesthetic that covets urban life while implicitly rejecting some of its “grittier” aspects (read: diversity and certain inconveniences). For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent. All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of foreboding as residents who have experienced displacement or understand that rising rents will force them out and change the complexion of the neighborhood hold their breath or worry. Worse, the changes signal ominously that the residents’ departure from the community is imminent.\footnote{McFarlane, New Inner City, supra note 78, at 5. McFarlane states: Although many old central cities continue to experience overall population loss from the now decades-old middle and upper-middle class exodus to the suburbs, the loss masks a dramatic, yet paradoxical, counter-trend. Since the}
The displacement of former residents triggers a loss for those displaced as well as for the neighborhood at large.\textsuperscript{154} Individuals invest their time and energy into shaping the identity of their particular geographic areas.\textsuperscript{155} These investments create an intangible value that renders the area more attractive to residents and nonresidents alike.\textsuperscript{156} This intangible quality is, as previously stated, referred to as social capital.\textsuperscript{157} Pur-

\textit{late 1960’s and 1970’s, the number of upper-income professionals in centrally located inner city neighborhoods, usually accessible from, if not close to, central business districts, has been slowly increasing as succeeding waves of urban middle class people are willing to breach the boundaries of the formerly taboo “inner city.” The nature and pace of such repopulation during each period has varied, but the common characteristic has been the ongoing reconfiguration of the central city as a space for the affluent. As the single yuppie, the childless couple, and the empty nester in search of a newly valuable way of life continue to “discover” and claim new territory within the city, they are part of a complex process that is causing the transformation of urban space to suit their social needs and consumption tastes. Urban places that were once racialized as Black and classified as poor, dangerous, and off-limits to anyone of affluence and with choices, have taken on new meaning today. These places are now suppliers of housing that is relatively cheap, centrally located, and often architecturally rich. They are open territories for investment speculators, redevelopment agencies, and affluent professionals who reject the suburban form of living, but demand, and can easily pay for, luxury residential, commercial retail, entertainment, and other intangible spatial amenities.}

\textit{Id. at 3–5 (footnotes omitted).}

\textsuperscript{154} See \textit{Fullilove}, supra note 5, at 14.

\textsuperscript{155} See id. at 10–11.


\textsuperscript{157} See Foster, supra note 12, at 529–31 (illustrating how urban renewal often diminishes the social capital of a neighborhood). Foster states:

\textit{Strong social networks can produce significant economic and social welfare gains for geographically defined communities, as numerous studies have documented. This capital can also be enhanced or diminished by land use and development decisions. Some decades ago the critic of modern urban planning, Jane Jacobs, famously stood up (at least intellectually) to urban renewers in protest because they were destroying the “irreplaceable social capital” which constitutes the lifeblood of cities. She described this “social capital” as comprising the web of relationships and cooperative action between people who share a geographic space in big cities and/or an interest in maintaining a healthy neighborhood. What emerges from these relationships over time are estab-}
chasing power is the capacity for social capital to provide an invaluable quality to a neighborhood. Social capital can:

[B]e a critical resource in urban communities, especially in large cities where people can lead fairly atomized lives and in vulnerable neighborhoods where residents can only meet their economic and social needs through cooperation with others. Thus, where a community has sufficient amounts of social capital it can also “purchase” many other social (and economic) resources that create and sustain healthy neighborhoods and, ultimately, healthy cities.

Characteristics like collective cooperation, shared goals, and shared values make up many poor communities’ social capital. When renewal plans are implemented, community members are dispersed, and

lished networks of “small-scale, everyday public life and thus of trust and social control” necessary to the “self-governance” of urban neighborhoods.

Cities are thus constituted of neighborhoods and communities which come to manage themselves via networks of interested individuals who build and strengthen working relationships over time through trust and voluntary cooperation. This social capital is the “civic fauna” of urbanism, making the successful governance of cities possible. Once this social capital is lost, Jacobs argued, “the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated.”

Id. at 530–31 (footnotes omitted).

See id. at 543.

Id. at 543. Foster uses studies conducted by sociologist Eric Klinenberg comparing:

[H]ow two very similar adjacent Chicago neighborhoods, one African-American and one Latino, of roughly equal size fared in one week of extremely hot weather in Chicago in July 1995 that left over 700 dead. The two neighborhoods, North Lawndale and Little Village, had similar numbers and proportions of senior citizens living alone and in poverty. Yet the two communities experienced very different outcomes during the heat wave: while North Lawndale endured nineteen fatalities, Little Village suffered only three deaths. Klinenberg illustrates how the vibrant street life and plentiful commercial activity of Little Village contributed to the safety of the elderly residents who matched the general profile of heat wave victims. Not only were low-income senior citizens in Little Village more likely to receive visits from concerned friends and neighbors than their counterparts in North Lawndale, even those seniors without social networks were more likely to venture out to air-conditioned stores or other public places, thanks to the busy streets and a greater sense of safety. In North Lawndale, by contrast, the rampant crime, proliferation of vacant lots and abandoned buildings—and general absence of any activities indicating a functional, safe community—imposed upon area seniors the brutal choice between staying inside to face the heat alone or going out to risk intimidation, robbery, or worse.

Id. at 543–44 (footnotes omitted).

Foster, supra note 12, at 542–43, 569–70.
these intangible valuables completely disappear. Currently, the preservation of a neighborhood’s social capital is not computed into developers’ equations when making renewal decisions. The displacement from renewed neighborhoods, consequently, causes a reduction in the original value of the neighborhood and emotional trauma to its economically displaced former residents.

III. Proposal for A More Egalitarian Redevelopment Model

While some jurisdictions have attempted to curb the exclusionary effects of using eminent domain for private development, there still remain a number of factors that have inhibited creation of egalitarian redevelopment plans. Maryland provides a good demonstration of the challenges in public land use reform. The Maryland Legislature created a task force to study the effects of eminent domain on small businesses and develop policies to protect small businesses from the

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161 See Fullilove, supra note 5, at 14.
162 See Foster, supra note 12, at 545–46 (describing the fact that social scientists are now realizing that social capital is undervalued). Foster states:

Even though many sociologists have traditionally assumed, based in part on William Julius Wilson’s work, that poor communities lack adequate social capital and related resources, contemporary social scientists are beginning to question that assumption. Recent scholarship and empirical evidence is beginning to illustrate the “ecological fallacy” that equates high levels of poverty with social dysfunction and frayed community ties. For instance, a recent study by geographers at the University of Southern California provides evidence that the landscape of concentrated poverty can differ dramatically depending upon place-specific local and regional forces, as well as broader economic forces. As we see increasing levels of differentiation among impoverished communities, we need to rethink the equation of low levels of social functionality and capital with poverty.

Id. at 542–43 (footnotes omitted); see also Eric Klinenberg, Heat Wave: A Social Autopsy of Disaster in Chicago 104–05, 116–17 (2002) (demonstrating that a community’s reputation as poor and blighted does not mean that it lacks value; such value should be maintained when making renewal decisions).
163 See Fullilove, supra note 5, at 11–12, 14.
165 See Audrey G. McFarlane, Redevelopment and the Four Dimensions of Class in Land Use, 22 J.L. & Pol. 33, 45–46 (2006) [hereinafter McFarlane, Redevelopment] (discussing a variety of factors that perpetuate the class-based nature of land use).
arbitrary use of eminent domain.\textsuperscript{167} This initiative was prompted by a concern that the broad public purpose notion reiterated in \textit{Kelo v. City of New London} does not truly consider the needs of all segments of the public.\textsuperscript{168} At the time the task force was created, Maryland law did not provide property owners with compensation for the value of closed businesses or lost revenue during transition periods as a result of eminent domain.\textsuperscript{169} The task force was directed to study:

(1) the concept of business goodwill and whether a business owner should be entitled to compensation for loss of goodwill, (2) the feasibility of requiring a condemning authority to study the impact of condemnation on businesses in the proposed area where condemnation will occur, and (3) the feasibility of a shorter condemnation process to lessen the uncertainty that the process creates for businesses.\textsuperscript{170}

The task force was also to outline more generally the conditions that must be present before a public entity can attempt eminent domain proceedings in Maryland.\textsuperscript{171} While the task force did not recommend a ban on the use of eminent domain to further private development plans, it did make some suggestions geared towards protecting small businesses.\textsuperscript{172} Some of the protections suggested included: requiring a condemning authority to demonstrate that it considered whether alternative plans might avoid the acquisition of businesses or incorporate them in the redevelopment project; compensating business owners for lost assets of closed businesses or lost income during periods of business interruption as a result of condemnation; and providing relocation assistance to businesses affected by eminent domain rulings.\textsuperscript{173}

Furthermore, recent Maryland cases have limited the government’s power to use eminent domain on an emergency basis.\textsuperscript{174} Despite this progress, however, Maryland has not yet amended its rules to prevent use of eminent domain for private development or to mandate the nondisplacement of low-income residents.\textsuperscript{175} A redefinition of public

\begin{footnotesize}
\begin{enumerate}
\item Id. at 16.
\item Id.
\item See id.
\item Id.
\item Id.
\item Fischer & Mackiewicz, \textit{supra} note 166, at 14, 16.
\item Id. at 16, 22–23.
\item Mayor & City Council of Balt. v. Valsamaki, 916 A.2d 324, 327 (Md. 2007).
\item See American Planning Association, \textit{supra} note 164 (providing a survey of state actions regarding eminent domain).
\end{enumerate}
\end{footnotesize}
purpose is especially needed in such a state, in which cities like Baltimore are undergoing constant renewal.\textsuperscript{176}

Other commentators have expressed concern with the broad reach of \textit{Kelo} and have encouraged limiting statutes similar to the efforts made by Maryland.\textsuperscript{177} However, a number of issues remain to be resolved to ensure egalitarian redevelopments.\textsuperscript{178} As in Maryland, very few redevelopment laws address the difficulties that urban renewal causes to poor individuals, especially lessees.\textsuperscript{179} If the need to protect small businesses has proved compelling enough to induce legislative action, the need to protect low-income communities against the inequitable use of eminent domain should be even clearer. The plight of the poor was revealed in graphic and disturbing detail in the wake of Hurricane Katrina.\textsuperscript{180} As a consequence, the post-Katrina era is ripe for ad-

\begin{itemize}
\item \textsuperscript{176} See Amanda J. Crawford, \textit{Residents Call for Fair Play as Renovation Plan Proceeds; Neighbors Voice Concerns About Loss of Homes}, BALT. SUN, Aug. 20, 2002, at 3B (public protest in regards to Johns Hopkins’s appropriation of property to redevelop the Middle East neighborhood of Baltimore).
\item \textsuperscript{177} See Kanner, supra note 129, at 201. Kanner states:
\begin{quote}
[Kelo] has precipitated a great deal of controversy. Large numbers of Americans were dismayed and angered to find that anyone’s unoffending home may be seized and razed to convey the site to a municipally favored redeveloper, on the theory that redevelopment will increase revenues and wages, thus tending to revitalize the community. Public opinion polls indicate that Kelo’s broad reading of the Public Use Clause has left the great majority of Americans gasping with disbelief. Kelo has precipitated a flood of proposed (and in some cases enacted) legislation to curb this breathtaking expansion of unreviewable and unaccountable government power. A strong public reaction to a Supreme Court ruling is hardly a new phenomenon, but in this case its intensity and its ability to stir legislatures into immediate corrective action are, at least in my experience, unprecedented.
\end{quote}
\item \textsuperscript{178} See McFarlane, \textit{Redevelopment}, supra note 165, at 45–46 (discussing unresolved class issues in land use).
\item \textsuperscript{179} See Bezdek, supra note 87, at 67–68 (“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.”).
\item \textsuperscript{180} See Michèle Alexandre, \textit{At the Intersection of Post-911 Immigration Practices and Domestic Policies: Can Katrina Serve as a Catalyst for Change?}, 26 CHICANO-LATINO L. REV. 155, 157–59 (2006). The article states:
\begin{quote}
The events surrounding the Katrina disaster in September 2005 . . . highlighted the race/class based hierarchy existing in the United States . . .
\end{quote}
\item . . . . Overnight, New Orleans metamorphosed from one of the most cherished cities of the United States to being described as “third world-like,” a term which is usually charged with contempt and condescension. Time and
vocating for changes that will protect the rights of the poor in redevelopment cases. One way to create such change is by showcasing the incentives that would convince developers and cities to adopt such changes. One such incentive is that the nondisplacement of the poor in redevelopment cases can help alleviate the existing racial/economic tension in the United States. Since displaced individuals are disproportionately poor non-Whites, carving out protections for these groups sends a message that poor non-Whites and poor individuals are valued members of our citizenry. Promoting such value would, in turn, benefit the elected officials who sponsor these initiatives. When successful, elected officials can benefit from such efforts by garnering the votes of members of the poor communities, as well as the votes of others who share the same values.

While most individuals would probably not have denied the existence of poverty in America before Hurricane Katrina, few were probably ready to face the reality of its ugly, nefarious consequences on the lives of America’s poor. This reality reinvigorated discourse concerning the role of government policy in the creation and alleviation of poverty in America. Decisions such as budget cuts for education and Medicaid programs have historically adversely impacted the lives of poor Americans, without the rest of the country experiencing their disastrous effects or the complete vulnerability in which poor Americans find themselves.181

Because of the dynamics produced by Hurricane Katrina, post-Katrina New Orleans has become the focal point for many advocates of equitable urban planning.182 While Hurricane Katrina placed redevelopment issues in New Orleans in a unique setting, the underlying issues of displacement remain the same.183

Id. (footnote omitted).

181 See Peter Dreier, America’s Urban Crisis: Symptoms, Causes, Solutions, 71 N.C. L. Rev. 1351, 1383–86 (1993) (discussing the disparate impact of federal budget cuts on programs designed to assist poor individuals).


183 See McFarlane, New Inner City, supra note 78, at 18–19. As McFarlane points out:

Typically this devalued land is in Black and Latino inner city neighborhoods, and to a certain extent, in working class White neighborhoods. The difference between the two is that there may be a higher percentage of
Though, in many cities, the areas targeted for renewal are often disenfranchised neighborhoods, as indicated earlier, low-income dwellers are not included when designing new spaces and communities.\textsuperscript{184} In the case of New Orleans, the threshold requirement that the targeted area has experienced a blighted economy can easily be met in many areas of the region.\textsuperscript{185} Since most of the city’s neighborhoods are still in poor shape, there exists a dangerous propensity to replace current communities with more upscale neighborhoods.\textsuperscript{186} This trend is commonly seen in the renewal process.\textsuperscript{187} As space will be needed to construct renovated homes and businesses, some residents’ neighborhoods may be sacrificed or life in the new neighborhoods will simply become too costly.

This danger still lurks beneath proposed plans for rebuilding New Orleans. Among the plans for rebuilding, the Bring New Orleans Back Commission proposed: (1) “Parks in every neighborhood”; (2) “Multi-functional parks and open spaces connect neighborhoods and employment”; (3) “Identify properties that can become part of the system [of redevelopment]”; (4) “Secure funding for park restoration”; (5) “Complete acquisition of necessary properties”; (6) “Consolidate public and private ownership”; (7) “Issue developer requests for proposals and select developers”; (8) “Buy and sell property for redevelopment, including use of eminent domain as a last resort”; and (9) “Aggressively

owner-occupied housing in the White working class neighborhoods and more rental properties in Black and Latino neighborhoods.

. . . As a result, the private real estate market was depressed, and the visible signifier of this depression and disinvestment was race.

\textit{Id.} (footnote omitted).

\textsuperscript{184} \textit{Fullilove, supra} note 5, at 59–60; \textit{Bezdek, supra} note 87, at 64. \textit{Bezdek} states:

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.

\textit{Id.}


\textsuperscript{186} \textit{See} James J. Kelly, Jr., “\textit{We Shall Not Be Moved}: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, \textit{80 St. John’s L. Rev.} 923, 961–62 (2006) ("Re-development experts offer little more comfort to residents of poor neighborhoods when they tell them that they are being displaced to make way for new and beautiful homes for others . . . .")

support a modified Baker bill to accommodate buy-out of homeowners in heavily flooded and damaged areas for 100% of pre-Katrina market value, less insurance recovery proceeds and mortgage.”\textsuperscript{188} For those skeptical of traditional urban renewal plans, the New Orleans rebuilding plans raise a number of red flags. Among those are: (1) the proposed use of eminent domain; (2) the designation that a park be placed in every neighborhood (which implies that some prior property will be used); and (3) the proposal that property owners be awarded compensation based on pre-Katrina property value.\textsuperscript{189} These items are red flags because they presuppose alterations of neighborhoods to formulations much different than those in existence before Hurricane Katrina. Displaced New Orleanians considering returning home will be offered accommodations in neighborhoods that no longer reflect their previous lives, thereby continuing their feelings of displacement. Furthermore, individuals often witnessed, after selling their property, that in newly redeveloped areas property value increased upwards of five to ten times the purchase amount.\textsuperscript{190} Thus, having been reimbursed only the pre-Hurricane Katrina market value for their property, many homeowners might not be able to afford any property in their converted, post-renewal neighborhood.\textsuperscript{191} Some equity-based percentage must be computed in the compensation package.

Finally, the proposal for redevelopment does not provide any compensation or housing allocation for residents who were renters and not property owners.\textsuperscript{192} Their displacement and inability to afford lodg-

\begin{footnotesize}
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\item \textsuperscript{188} Urban Planning Comm., supra note 84.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See Peter W. Salsich, Jr., Displacement and Urban Reinvestment: A Mount Laurel Perspective, 53 U. Cin. L. Rev. 333, 370 (1984). Salsich states:

\begin{quote}
The conventional wisdom is that property values have to be raised above minimum code standards to attract the type of persons who will stimulate revitalization. Substantial rehabilitation of a neighborhood’s housing stock raises property values, but it also forces up the cost of that housing and contributes to the ultimate displacement of long-term residents who cannot afford the increased costs.
\end{quote}

\textit{Id.} (footnote omitted); see Christian Harris, Recent Development, Constitutional Amendments, 24 U. Ark. Little Rock L. Rev. 635, 636 (2002) (noting that increased property values naturally flow from redevelopment).
\item \textsuperscript{191} See Brown & Williams, supra note 128, at 701–02 (discussing that residents are generally compensated only for their property’s predevelopment worth, despite the near inevitability of an increase in value postdevelopment).
\item \textsuperscript{192} See id. at 706–07 (noting that the renewal process will focus on providing residential homes, and that developers would have to be given special incentives to participate in the redevelopment of rental housing “affordable to returning residents”).
\end{itemize}
\end{footnotesize}
ing in the new neighborhood will be just as real as for property owners. Consequently, renters must be compensated in some form for the value of intended use or for the projected difference between new rents and old rents. Advocates for New Orleans residents should insist that city officials make their approval of development plans contingent on developers reserving units for poorer renters at affordable rates.

While there does not yet exist an exact numerical figure for returning New Orleanians, such uncertainty should not be deemed an impediment to an equitable implementation of renewal plans. Whether or not New Orleans residents choose to come back, they have an equitable interest in their neighborhoods that deserves protection from economic displacement and undercompensation. These individuals have made an emotional and social contribution to the city and thereby should be considered as having property rights in the community. Their social contributions—i.e., community developments, collective work, coalition building, protection of families and their neighborhoods—facilitated the reputation of New Orleans before the Hurricane, which many were eager to visit multiple times a year.

The concerns faced by communities in New Orleans are consistent with those faced by other communities experiencing the results of renewal plans. Urban centers subject to renewal commonly struggle to balance the interests of builders with concerns that homeowners are undercompensated for taken property. The award of market value buy-outs to low-income homeowners is insufficient both to cover the predicted costs these homeowners will face, discussed above, and to compensate for the intangible value of the property to the individual homeowner. Considering the lack of bargaining power between low-

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193 Id.
194 See Joe Gyan Jr., Much Has Changed Since Katrina—and Much Hasn’t *** Two Years Later *** Some Areas Seem Stuck in Time, ADVOC. (Baton Rouge, LA), Aug. 26, 2007, at A1 (“[M]ore than 27,000 FEMA trailers still dot the landscape in the southeastern tip of Louisiana.”); Rick Jervis, 66% Are Back in New Orleans, but Basic Services Still Lag, USA TODAY, Aug. 12, 2007, at A3 (noting that the current number is in line with the mayor’s forecast, but the number is neither final nor definite being that it is based on postal service records of people actively receiving mail in the area).
195 See McFarlane, New Inner City, supra note 78, at 57.
196 See Bezdek, supra note 87, at 94.
197 See id. at 94, 98.
198 See Marc B. Mihaly, Living in the Past: The Kelo Court and Public-Private Economic Redevelopment, 34 ECOLOGY L.Q. 1, 15 (2007) (“Recent studies have concluded that relocation compensation is higher than actual relocation cost, and that in many cases governments utilize the relocation assistance as a de facto surrogate for addressing intangible costs.” (footnote omitted)).
income homeowners and commercial developers, low-income homeowners are often not in a position to negotiate the best price possible.\footnote{See Brown & Williams, supra note 128, at 701–02.} In the valuation of property, developers often overlook “the pesky question of the subjective understandings of the value and nature of property harbored by the owners of property. . . . In short, sterile formulations of fair-market value often do not satisfy landowners who are losing their land to the forces of condemnation.”\footnote{See James S. Burling, Do Economic Results of a Transfer To a Private Developer Constitute “Public Use?”, 2006 A.L.I.-A.B.A. COURSE OF STUDY 679, 681–82, available at SL049 ALI-ABA 679 (Westlaw).}

Instead of merely awarding the market value to low-income owners, city redevelopment plans should require that developers provide one of two alternatives: (1) the approximation of the value of property post redevelopment, or (2) the value of the property predevelopment plus a percentage of any future profits.\footnote{See Bezdek, supra note 87, at 97–99.} City officials can be forced to include these terms as part of the negotiation package if adequate public pressure is used.\footnote{See Anastasia C. Sheffler-Wood, Comment, Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to Kelo, 79 TEMP. L. REV. 617, 637–38, 642–43 (2006). “The public outcry has turned into action as homeowners form grassroots campaigns to express their views to state legislators.” Id. at 637–38. For example, “Nevada enacted statutory amendments that provide that government cannot exercise eminent domain for redevelopment purposes unless it has negotiated in good faith with the property owner, provided a written compensation offer, and supplied an appraisal report corresponding to the compensation offer.” Id. at 643.} In turn, private developers desirous to attract more contracts will eventually come to view such concessions as the least costly alternative.\footnote{This cost-benefit analysis is a calculation that corporate entities often have to make in the face of public outrage. The recent Imus controversy, is one of the many examples of corporate entities deciding to minimize future loss by making decisions that might appear costly in the present. This balancing act is yet another example of the Interest Convergence Theory at play. See Bell, supra note 13, at 22.} This standard would be consistent with principles of fairness and justice and in accord with the spirit of the Takings Clause of the Fifth Amendment.\footnote{See Sheffler-Wood, supra note 202, at 618.}

Moreover, a more equitable solution for renters would be to condition building permits with requirements to designate specific affordable housing units to low-income individuals who stand to be displaced. As the level of accountability placed on New Orleans city officials illustrates, local governments have great incentives to encourage a fairer
fractioning of property. In New Orleans, the pressure from grassroots activists and private individuals has forced the local government to be of the utmost transparency in redeveloping New Orleans. This type of accountability requires ongoing activism by invested parties to ensure that residents of low-income communities remain involved in developing and implementing the plans to rebuild their neighborhoods.

One positive outgrowth of the efforts to rebuild New Orleans is the demonstration that political incentives are not yet obsolete tools of change. For example, when New Orleans officials announced plans for rebuilding in January 2006, overwhelming outcry from local and national advocates forced the city to delay proposals that called for unilateral decisions on which areas would be rebuilt. “The 17-member Bring New Orleans Back commission largely side-stepped that issue . . . [by creating] 13 districts where residents will work with planners to explore opportunities for rebuilding and work to determine how many people ultimately [will return to the region].” New Orleans officials, aware of the pressures of accountability to the public, were deliberate in their plan to include New Orleans residents in the decisionmaking process. This situation highlights Derrick Bell’s Interest Convergence Theory.

Without constant supervision, the egalitarian solution proposed in this Article will not be successful.

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205 See Scott L. Cummings, *The Trickle After the Flood*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 12, 12–13 (2005), available at 15-FALL JAHCDL 12 (Westlaw) (noting the importance of the community’s voice in assuring accountability with “what will amount to $200 billion in disaster relief”).


207 See Cummings, *supra* note 205, at 13 (“[M]arket-driven efforts without adequate opportunities for community participation typically result in the massive displacement of poor residents of color.”).

208 Id.; Joyce, *supra* note 144; see also WDSU New Orleans, *supra* note 144.


210 See id.

211 See Bell, *supra* note 13, at 22.

212 See William L. Waugh Jr., *The Political Costs of Failure in the Katrina and Rita Disasters*, 604 ANNALS AM. ACADEM. POL. & SOC. SCI. 10, 19–21 (2006), available at http://ann.sagepub.com/cgi/content/abstract/604/1/10 (discussing the failures of the government to act in
The pressure for accountability can also motivate local governments to require that local developers designate units for low-income renters and potential homeowners. Since developers potentially will reap the most profits from redevelopment, and thus the displacement, city leaders have good reason to require developers to shoulder more of the costs related to displacement. The post-Katrina Gulf Coast is pregnant with possibilities for producing a model of more fruitful and nonexclusionary redevelopment.\(^{214}\) Katrina revealed that many white Americans have vested interests in making sure that economic measures benefit a larger group of Americans rather than a smaller number.\(^{215}\) There might be a vested interest for groups to ally themselves, not only along racial lines, but also economic lines and commonalities. Applying Bell’s Interest Convergence Theory, many affluent Americans might now find that their interest in governmental transparency and efficiency converge with poor individuals’ interest in being protected.\(^{216}\) The new awareness and visibility that media coverage brought to New Orleans caused everyone to feel invested in the success of New Orleans.\(^{217}\) The slow response to help New Orleanians during the hurricane generated national sympathy for the region.\(^{218}\) Much like the international coverage of the brutality of seg-

the wake of Hurricane Katrina, and the damage control that governmental officials have attempted to affect with regard to housing, education and the like).

\(^{215}\) A number of local organizations, such as the People’s Organizing Committee, an organization dedicated to helping New Orleans residents with housing issues and with educating them about their legal rights and remedies, organize at a grassroots level to compensate for shortcomings in government services and bring these shortcomings to the public’s attention. See People’s Organizing Committee, http://www.peoplesorganizing.org (last visited Dec. 10, 2007).

\(^{214}\) New Orleans demonstrated that a huge number of the American population lives well below the poverty level and that, more than ever, race and class are tightly linked. In the surge of generosity that followed the disaster, one hopes that the old tendency to view the victims of poverty as irresponsible, lazy, and deserving of their fate will now be seen as flawed. Post-Katrina discussions of poverty should center on the elements that contribute to the disenfranchisement of the poor and on how those elements can be defeated. See Alexandre, supra note 180, at 165–66.


\(^{218}\) See id.
regation provided an opportunity for disparate interests to converge in the 1950s, a window now exists for socially diverse contingencies with interrelated interests to ally themselves with each other.

Due to public demand for accountability by New Orleans officials, the city’s government has been compelled to consider inclusive redevelopment plans.219 In the face of marches and protests by residents, covered by the national media, the city officials have had to reassure residents that their concerns will be considered.220 The redevelopment plans are still tentative, but if the public pressure remains, city officials will have to alter noninclusive proposals. Hurricane Katrina not only accelerated the need for development, which was long overdue in many New Orleans neighborhoods, but also placed considerations of equity at the forefront of the redevelopment debate.221

**Conclusion**

When the effects of redevelopment decisions on the lives of the poor are examined, it becomes clear that “just compensation” and public purpose must be reassessed to prevent exclusion of the poor from their life-long residences and communities or, at least, to provide sufficient compensation for their displacement.222 Although courts have allowed eminent domain to be used for the benefit of private developers if the land is used for public use, “beyond [this] general rule there is little or no agreement as to what constitutes public use.”223 Many have expressed that the term “is ‘elastic.’”224

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219 See Allen, *supra* note 209.


221 See Marcia Johnson, *Addressing Housing Needs in the Post Katrina Gulf Coast*, 31 T. MARSHALL L. REV. 327, 329–30 (2006). Johnson provides statistics demonstrating that, in the years before Hurricane Katrina, “a third of New Orleans’s population paid 35% or more of their annual incomes for housing,” and “almost 15% of the people in New Orleans lived in poverty before Katrina. Moreover, 37.3% of New Orleans’s poor lived in concentrated poverty neighborhoods.” *Id.* (footnote omitted). Thus, many lived beyond the Department of Housing and Urban Development’s recommended affordability index. *See id.* at 329.


223 *Id.* at 201.

I maintain that public purpose should be defined based on equitable considerations that incorporate the interests of economically vulnerable members of the community. The new definition not only benefits low-income residents by incorporating their predominant interests into the actual development plans, but would also provide long-term benefits to local officials by maintaining their political integrity and public accountability. These new urban redevelopment models will help provide a modicum of confidence and satisfaction in local officials’ commitment to poor communities and communities of color and might help create pecuniary resources that help curtail resorts to violent crimes—this reduction would directly benefit wealthier members of a community.

Additional broad scale benefits of interest convergence that developing communities would likely manifest would include lowered crime rates, as a greater population experiences the various gains that come with rising property values. This interest is not only a local interest, but a national interest, as well. Expanding the definition of public purpose to include the interests of low-income community members promotes the establishment of stable communities among mixed-income constituents, accomplishing a fundamental incentive to redevelopment.

The proposed redefinition of public purpose would not only honor the contributions made by residents via social capital and help prevent displacement, but would also ensure that city officials and private developers become more mindful of the need to make sure that all development decisions are in compliance with established standards of environmental justice. The patterns of displacement that have constantly resulted from the implementation of urban renewal plans, as well as the psychological trauma and the loss of income that often result from the displacement, cause a grave disproportionate injustice to disempowered members of these communities. This injustice violates the tenets of the goals of federal environmental statutes geared toward preventing environmental injustice against minority and poor populations. The creation of the aforementioned incentives, as well as the

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broadening of the definition of public purpose to prevent displacement of poor populations, consequently, not only allows city officials and developers to achieve their political and economic goals, but also ensures that economic and environmental justice remain a paramount focus in all urban renewal decisions.\textsuperscript{227} In adopting the above proposals, developers and city officials would serve their respective interests and those of economically marginalized individuals, as well as ensure that they remain compliant with the mandates of federal environmental laws.
