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UNINTENDED CONSEQUENCES: EMINENT DOMAIN AND AFFORDABLE HOUSING

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The continuing controversy1 regarding Kelo v. City of New London2 demonstrates that there are a number of problems and tensions associated with eminent domain that entice scholars. This article addresses one such problem: the singular link between eminent domain and affordable housing.3 Though rarely discussed, this link reveals a long

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3. Conventional wisdom in the real estate market dictates that housing is affordable when a family pays no more than thirty percent of its income on rent and utilities—if they are renting—or on mortgage, property taxes, insurance, and utilities if they own the home. However, affordable housing is also used to describe housing for low-income, very low-income, and extremely low-income renters or buyers. See infra note 18. In this article, I use the term “affordable housing” to refer to either privately owned housing made available only to those who meet a certain income threshold or to government-owned public housing. There are many other forms of affordable housing, such as federally subsidized mortgages and Section 8 housing. See Kristin A. Siegesmund, The Looming Subsidized Housing Crisis, 27 Wm. Mitchell L. Rev. 1123, 1127-31 (2000). At
history of cities' use of their eminent domain power to advance development projects that rarely include affordable housing. Moreover, when cities condemn property through eminent domain to further new development projects, they often do so in a manner that undermines many of the goals of building more affordable housing. As the need for affordable housing increases, cities' taking of private property for "public purposes" has helped decrease the number of affordable housing units instead of helping keep up with the demand. This interplay between eminent domain and affordable housing raises concerns from a social justice perspective as well as an economic perspective.

Part I of this article tells the story of the building of Dodger Stadium in Los Angeles. This example highlights the broken promises underlying the lofty rhetoric of "public
purpose," especially with regard to affordable housing. Part II discusses some of the problems associated with the link between eminent domain and affordable housing. This discussion includes the lack of affordable housing, the increased need for affordable housing, and the economic consequences stemming from this divide. Part III analyzes the ongoing debate regarding the proper definition of a constitutional "public use" and how competing views marginalize affordable housing. Part IV explores how cities' use of eminent domain for economic development projects actually thwart and undermine affordable housing efforts. Finally, Part V briefly highlights some potential solutions that address the need for affordable housing and mitigate against the current trends in cities' exercise of their eminent domain power that frustrate this goal.

I. CHAVEZ RAVINE, DODGER STADIUM, AND SOCIAL INEQUITIES

Although Kelo is the latest case to catch the public's attention, many others have spurred controversy regarding a city's use of eminent domain.7 One particularly compelling example that plainly and movingly illustrates some of the social justice issues surrounding eminent domain power used to displace members of poor, often ethnic minority, communities is the razing of Chavez Ravine—upon which Dodger Stadium was built—in the 1950s.

Dodger Stadium is located on a 300-acre parcel of land just north of downtown Los Angeles known as Chavez Ravine. Up until the 1950s, Chavez Ravine was home to generations of Mexican-Americans—a poor, though close-knit, community with homes, churches, schools, and even small farms.8


Spurred by the Federal Housing Act of 1949—which granted federal money for cities to build public housing—Mayor Fletcher Bowron and other elected officials in the City of Los Angeles voted to build thousands of affordable housing units in Chavez Ravine.9 Using the power of eminent domain, the City razed nearly the entire community over the period from 1952 to 1953. Many of the residents left voluntarily—the City bought their homes—with the promise that they would get their choice of homes in the new public housing community.10 However, other residents resisted the City's actions and were evicted from their homes—some with compensation, and others without.11

Despite this effort to clear the land, the public housing project never came to fruition.12 Norris Poulson was elected mayor in 1953, and with the new administration came a reversal in the City's position on the public housing project.13 Following Mayor Poulson's lead, the City negotiated a deal with the federal government to abandon the public housing project with the stipulation that the nearly-vacant land be used for a "public purpose."14 The City then coaxed the Brooklyn Dodgers to relocate to Los Angeles with the promise of a new stadium to be built on Chavez Ravine. Though the use of the land as a sports stadium and the City's deal with the Dodgers were challenged in court, the California Supreme Court ultimately concluded that both were legally tenable.15

9. Id. at 156. The City of Los Angeles secured federal funding for the construction of the public housing project under the Taft-Ellender-Wagner Bill of 1949.

10. See id. (Chavez Ravine residents were promised that "this project is going to be built for you, we'll give you temporary housing... Y]ou'll have first priority, you can have whatever you want" (quoting interview by Eric Avila with Frank Wilkinson, in L.A., Cal. (Jan. 24, 1996)).

11. See id. at 166.

12. Id. at 156-57.

13. Id.

14. See id. at 162 ("The city's deed to the land explicitly stated that the land was to be used 'for public purposes only.'"). For a discussion of the differing perspectives on the proper use of the term "public use" or "public purpose," see infra text accompanying notes 32-44.

15. City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 433-36 (1959) (holding that the building of a new sports stadium and the presence of a major league baseball team provided direct and legitimate public purposes and that benefits gained solely by the Dodgers were incidental and immaterial). Cities taking private property for one stated public purpose and then later switching the use of the property to a different public purpose continues today. See, e.g.,
Shortly thereafter, in 1962, the Dodgers' tenure at Dodger Stadium began.

The Chavez Ravine story is one of gentrification and economic revitalization and raises questions about social justice. The City originally used its eminent domain power to replace the poor Mexican-American community's existing housing with thousands of affordable housing units that would have resulted in a net increase in the number of low-income housing units. The backers of this project envisioned a public housing community that served the poor, working-class Mexican-American families that had been displaced, along with others similarly situated. The City thus initially used its eminent domain power for the public purpose of providing affordable housing to the City's working poor.

However, the wealthy elite in the City—developers and other politically powerful insiders—instead saw an opportunity for their own financial gain and the City's vitality through a different use of the property, and launched the crusade that ultimately killed the project. They eventually settled upon a sports stadium with the purpose of luring the Brooklyn Dodgers to Los Angeles. By attracting the Dodgers, City leaders believed that Los Angeles would attract more businesses and raise its profile nationally by becoming a "big league" city. For the City's decision-makers, this goal superseded the vision of providing more affordable housing opportunities for Los Angeles's working poor.

Patrick McGreevy, Land Seized for Animal Shelter May Be Sold to Developer-Donor, L.A. TIMES, Jan. 14, 2006, at A1 (noting that the City of Los Angeles initially condemned three acres of land in South Los Angeles from a private company for the purpose of building a new animal shelter, but one year later, the City is considering selling the property to two private furniture manufacturing companies).

16. See AVILA, supra note 8, at 156.
17. See id. at 156-57. Mayor Poulson and the wealthy elite went on a McCarthyesque witch hunt, branding supporters of the public housing project as Communists—indeed, even blacklisting thirty Housing Authority officials—and casting a stigma on the project and those advocating for it. Even the Los Angeles Times got in on the action: "The Times is proud of its part in crying the alarm against this creeping socialism and in supporting the Mayor who found the way to stop the creep." Id. at 156.
18. See id. at 160. This quest "to enter the big league of American cities" coincided with Mayor Poulson and the "downtown establishment" aggressively pursuing a large-scale redevelopment of downtown Los Angeles. Id. at 155-56. Up until this point, the City had failed to land a professional sports team.
Dodger Stadium was built, and with it came the reality that the City would not build the low income housing for those displaced by the City's exercise of its eminent domain power. Residents from the former Chavez Ravine community had to find alternative accommodations which included living in over-crowded living quarters, illegal dwellings, and even transient housing. This influx of new low-income purchasers and renters strapped an already tight affordable housing market for the poor in Los Angeles. What started as the City's crusade to reshape a run-down neighborhood into an exemplary public housing community turned into a quintessential example of how cities can use their power of eminent domain at the expense of poor, and often ethnic minority, communities for the interests of private developers or the city as a whole.

II. THE NEED FOR AFFORDABLE HOUSING AND THE UNLEARNED LESSONS OF CHAVEZ RAVINE

On the one hand, the story of Chavez Ravine is not a unique one. As many commentators have noted, cities have long used their eminent domain powers in such a way as to benefit private interests. On the other hand, the story of Chavez Ravine is notable because it highlights the striking disjunction between the dire need for affordable housing within cities and the legal doctrines and financial incentives that render addressing this need impracticable.

With the gradual decentralization of urban revitalization and economic development efforts from the U.S. Department of Housing and Urban Development to the local level, the burden to provide more affordable housing has fallen

21. See infra text accompanying notes 22-73.
increasingly on cities. However, cities' efforts in creating affordable housing have lagged woefully behind demand. It is widely recognized that the need for affordable housing—particularly in major metropolitan areas—has reached a critical juncture. For example, between 1973 and 1995, more than 2 million affordable housing units were taken off the rental market. During that same period, the number of low-income renters increased. Moreover, by 1999, there were only 4.9 million affordable rental housing units available for the 7.7 million extremely low-income renter households seeking them. These figures demonstrate that at a time when the affordable housing stock should increase to accommodate the rising numbers of low-income renters,


26. The income definition levels for affordable housing are based on the U.S. Department of Housing and Urban Development's Area Median Income determination that varies for each county and by household size. See HUD User, FY 2006 Income Limits (Mar. 8, 2006), http://www.huduser.org/DATASETS/il/il06/index.html (last visited Aug. 23, 2006). The income definition levels are based on the following calculations: low-income is defined as 80% of the county's median income; the very low-income level is 50% of the county's median income; and the extremely low-income level is 30% of the county's median income. U.S. DEP'T OF HOUS. AND URBAN DEV., FY 2006 HUD INCOME LIMITS BRIEFING MATERIAL 1, 4-7 (2006), available at http://www.huduser.org/datasets/il/il06/BRIEFING-MATERIALS.pdf. The federal and state governments use these income definitions in offering financial and other incentives to developers to build housing for these different groups. See, e.g., id. at 8.

cities are actually experiencing a loss of affordable housing.

Affordable housing units are eliminated from the rental housing market for a variety of reasons, but it is clear that a significant portion of them are converted into market-rate dwellings by private owners.\textsuperscript{28} For example, since it started collecting such data, the Fannie Mae Foundation approximates that private owners have converted more than 150,000 previously United States Department of Housing and Urban Development–assisted or –insured apartments into market-rate units.\textsuperscript{29} In fact, the Fannie Mae Foundation estimates that 2,000 affordable housing units are lost every month, with forty-five percent of such losses occurring by conversion to market-rate housing.\textsuperscript{30}

Price increases in the sale and rental markets have also caused declines in the number of affordable housing units.\textsuperscript{31} As housing prices and rents have increased at astronomical rates in the past six years, the income levels of low-income households have not kept up proportionately, thus making private sector, non-government subsidized rental units less affordable. Although many states have adopted statutes that attempt to maintain existing levels of affordable housing—by offering first rights of refusal to tenant or homeowners associations or to non-profit organizations when owners of federally assisted affordable housing developments intend to sell or discontinue participation in the affordable housing program\textsuperscript{32}—such efforts have not bridged the gap between the number of affordable housing units lost in the past three decades and the growing need for such housing.

In any case, successful state efforts to maintain existing affordable housing stock would represent a partial solution at

\begin{itemize}
\item[28.] See Michael Bodaken, Fannie Mae Found., The Increasing Shortage of Affordable Rental Housing in America: Action Items for Preservation, www.fanniemaefoundation.org/programs/hff/v4i4-preservation.shtml.
\item[29.] Id.
\item[30.] Id.
\item[31.] See, e.g., Lori Montgomery, Number of D.C. Affordable Housing Units Plunge, WASH. POST, Sept. 13, 2005, at B1.
\item[32.] See, e.g., CAL. GOV'T CODE §§ 65863.11(c), (d)(1)-(4), (e)(2) (West 2004) (providing tenant associations and non-profit organizations the right of first refusal, as long as they agree to maintain the housing as affordable for a thirty-year period); R.I. GEN. LAWS § 34-45-8 (2004) (ensuring a first right of refusal to the tenant association, local housing authority, or municipal government when an owner of federally subsidized affordable housing development intends to sell or discontinue participation the affordable housing program).
\end{itemize}
best, as the number of low-income renters continues to rise in
the United States.33 Increasing unemployment, as well as the
failure of minimum wage and other hourly wage jobs to keep
up with inflation and standards-of-living in large
metropolitan regions, are sure to exacerbate the shortage in
affordable housing.34

The failure of cities to provide housing to its poor raises
obvious social justice issues.35 But even if cities do not
recognize a moral obligation to house their poor, they should
be mindful of the impact that the affordable housing shortage
can have on the economic vitality of a city—namely,
disruptions in the labor pool. Shifts in the economy have
moved many unskilled jobs farther away from the low-wage
income earning pool.36 As the cadre of low-income workers
cannot afford to live in a metropolitan area, their meager
wages will be insufficient to attract them to cities to work in
jobs such as janitors, couriers, and the like. Commuting by
car or taxi can be too costly for these workers, particularly
with the recent rise in gas prices. The use of public
transportation, if available, may also prove untenable from
both time- and money-management perspectives. In this
regard, the geographic distance between low-wage workers
and the unskilled jobs in cities may preclude these workers
from taking such jobs and thus cause significant disruptions
in the job market.37

Whether cities will be able to solve this dilemma with the
intelligent use of eminent domain is uncertain. As with so
many social policy issues, there are many perspectives and
complexities involved in housing the poor and providing
access to living wage jobs. What is certain is that neither the

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33. DASKAL, supra note 25, at 31.
34. See JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED
35. For a compelling description of a community's obligation to share the
responsibility of meeting the housing needs of the poor, see South Burlington
NAACP v. Township of Mt. Laurel, 336 A.2d 713, 726-28 (N.J. 1975) (noting
cities' general welfare obligation to provide affordable and "decent housing" for
the poor in the community).
36. See Thomas A. Brown, Democratizing the American Dream: The Role of
a Regional Housing Legislature in the Production of Affordable Housing, 37 U.
37. See David Fink, Driving Our Workers Out, HARTFORD COURANT (Conn.),
doctrine of eminent domain, nor the practical incentives for its use, makes it likely that cities will choose eminent domain as a tool to address these problems.

III. THE EMINENT DOMAIN DOCTRINE: "PUBLIC USE" OR "PUBLIC PURPOSE," AND WHERE DOES AFFORDABLE HOUSING FIT?

The ongoing debate about the proper definition of a constitutional "public use" for the purposes of eminent domain provides a relevant context within which to understand the state of affordable housing. Over the past 150 years, the Takings Clause jurisprudence of the United States Supreme Court has vacillated between narrow and broad views of the term "public use," which conditions the government's use of eminent domain power.

The property rights, or natural law view of "public use," asserts that the federal, state, or local government can constitutionally condemn property only when the general public actually has direct access to and use of the property once it is redeveloped. This narrow view argues that property rights are fundamental rights afforded constitutional protection and that such rights should not be easily abrogated by a legislative determination that the taking furthers some "public purpose." Thus, the narrow view interprets the Takings Clause of the Fifth Amendment as limiting a government's ability to take property by eminent domain to only those instances where the public can access and use the property.

A government's exercise of eminent domain to build a public school, a highway, or a public hospital likely meets this narrow definition of public use. Kohl v. United States provides an example of eminent domain used for narrow public use. In Kohl, the United States Supreme Court held

38. The Fifth Amendment of the Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. art. V.
40. See Kochan, supra note 39, at 54-65.
that the federal government's taking of private property for the purpose of building a post office was a valid public use.\textsuperscript{42} Pacific Railroad Co. v. Nebraska\textsuperscript{43} further demonstrates the narrow view that governments should not take private property for other private uses, regardless of the public benefit. In Pacific Railroad Co., the United States Supreme Court held that the State of Nebraska could not condemn a railroad's property in order to convey it to farmers who needed it for a grain elevator.\textsuperscript{44} The Court held that this instance of taking private property for the private use of another was unconstitutional.\textsuperscript{45}

In contrast, a broader view of "public use" encompasses not only the taking of private property for use by the public, but also for purposes that benefit the public, even if the public cannot actively access or use the property. The United States Supreme Court endorsed this broader view in Berman v. Parker,\textsuperscript{46} Hawaii Housing Authority v. Midkiff,\textsuperscript{47} and, most recently, in Kelo. Under this broader view, the government may take private property and transfer it to another private party as long as the use of the property will serve a "public purpose."\textsuperscript{48} Such public purposes can include economic development, the creation of jobs, and revitalization of blighted areas, to name but a few.\textsuperscript{49}

Unfortunately, both the narrow and broad views of the takings doctrine marginalize affordable housing in the debate

\textsuperscript{42} Id. at 373-74.
\textsuperscript{43} Pac. R.R. Co. v. Nebraska, 164 U.S. 403 (1896).
\textsuperscript{44} Id. at 417.
\textsuperscript{45} Id.
\textsuperscript{46} Berman v. Parker, 348 U.S. 26 (1954). In Berman, the United States Supreme Court upheld the condemnation of a department store pursuant to a redevelopment plan that targeted a blighted area of Washington, D.C. Despite the fact that the department store itself was not blighted, the Supreme Court gave deference to the legislative determination that the area as a whole was blighted and that the use of eminent domain to further the redevelopment plan was necessary to improve the community. Id. at 31-35.
\textsuperscript{47} Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). In Midkiff, the United States Supreme Court upheld a State of Hawaii statute that divested fee simple title interest from lessors and transferred title to lessees in order to break up the land oligopoly in Hawaii. Id. In finding that such a purpose constituted a public use, the Supreme Court again granted great deference to the legislative determination that deconstructing the land oligopoly advanced the public good. Id. at 241-42.
\textsuperscript{48} See Kelo v. City of New London, 125 S. Ct. 2655, 2661-62.
\textsuperscript{49} Id. at 2665-67.
over the proper use of eminent domain. Government-owned affordable housing appears to meet the narrow view of public use, much like a public school or a government-owned hospital. In order to use a public school or a government-owned hospital, a member of the public must meet certain criteria. For a public school, the criteria usually include residence in the designated geographic area served by the public school and having a school-aged child. For a government-owned hospital, the primary criterion is that the member of the public be sick or otherwise in need of medical care and attention. In addition, for both a public school or a government-owned hospital, there must be availability at the facility in order for a member of the public to use it. Similarly, to use government-owned affordable housing, a member of the public must meet the criteria set forth by the city—e.g., having an income level below the poverty level—and there must also be availability in the housing facility.

Assuming that government-owned affordable housing fits within the narrow view of public use, and the government seeks to implement such a program, it is still unlikely to lead to growth of affordable housing. This is because cities need the private sector’s assistance in building and managing such housing projects, and, unfortunately, affordable housing owned and operated by private parties would run afield of the narrow view of public use. Accordingly, the narrow view of public use would mandate that a city could only condemn private property to build government-owned affordable housing, but not to transfer such property to a private developer who can more effectively build and operate an affordable housing complex. It is not surprising, then, that cities opt to use their eminent domain power toward other types of projects.

On the other hand, both government-owned and privately owned affordable housing would meet the requirement of

50. Cities simply do not have the capacity or the personnel to meet the growing demand for affordable housing by themselves. See Cesar E. Torres, The Housing Crisis Facing Low Income Families, 29 SETON HALL L. REV. 1498, 1502 (1999) (detailing the need for public incentives for private developers to build, operate, and maintain affordable housing units to keep up with the growing demand for such units); Note, When Hope Falls Short: HOPE VI, Accountability, and the Privatization of Public Housing, 116 HARV. L. REV. 1477, 1488 (2003) (explaining the need for both public and private efforts to build affordable housing in order to meet the demand for such rental units).
public purpose under the broad definition of "public use." Similar to benefits garnered by other types of economic redevelopment projects, cities could argue—and courts would likely agree—that the exercise of eminent domain power to provide more affordable housing to city residents, whether government-owned and operated or not, advances a permissible public purpose under this broader view. In fact, in *New York City Housing Authority v. Muller*, a state court upheld as constitutional the New York housing law allowing cities to use the power of eminent domain to clear blighted areas and build low-income housing. The court determined that such action was not a constitutionally impermissible taking of private property for a private interest because the proliferation of affordable housing advanced a genuine public purpose.

With the Supreme Court's recent preference for the broader view as evidenced by the *Kelo* decision, one might expect to see more examples of cities taking private property to meet the demand for affordable housing units. Ironically, the broader and more flexible definition of public purpose has pushed affordable housing further by the wayside. Cities now have more choices than ever before to use their eminent domain power to pursue developments that will generate property or sales tax revenue. Such developments are likely to take the shape of sports stadiums, corporate headquarters, and manufacturing plants rather than affordable housing, which will not garner the same kind of revenue or prestige. As explained below, the public purpose justification for takings encourages exercises of eminent domain power that not only stymie efforts to increase affordable housing, but that actually reduce existing affordable housing stock.

**IV. EMINENT DOMAIN IN PRACTICE: BLIGHT, REDEVELOPMENT, AND REVENUE REALITIES**

Given the critical need for more affordable housing among the poor and the negative economic consequences that
are likely to result from its dearth, it is both regrettable and short-sighted that cities have yet to focus on this issue. This inattention is especially surprising given the various financial incentives and land use tools, such as density bonuses, offered to both cities and private developers by federal, state, and local governments to build more affordable housing. The reason for this state of affairs may be a perverse funding incentive system that causes cities to use their land use and eminent domain powers to further development projects other than affordable housing.

Cities in many states receive a significant portion of their budget through sales and property tax revenues. As a result, many cities use their land use and eminent domain powers to advance projects that will increase such revenue. Ann O'Malley Bowman and Michael A. Pagano refer to such cities as "Survivalist Cities." Survivalist Cities face budgetary deficits due to increased social service needs and corresponding expenditures. Accordingly, these cities

55. States such as California and New Jersey lead the country in adopting the most pro-affordable housing statutes that provide monetary and land use decision-making incentives to build more affordable housing. See, e.g., CAL. GOV'T CODE § 65915 (West 2004) (expanding the density bonus and other incentives—such as reductions in site development standards, modifications of zoning code requirements, or architectural design requirements—available to developers of affordable housing); CAL. HEALTH & SAFETY CODE § 33334.2(2) (West 2004) (requiring that not less than twenty percent of gross tax increment generated from a redevelopment project area must be used by the redevelopment agency to increase and improve the community’s supply of affordable housing); CAL. HEALTH & SAFETY CODE § 33413(b)(1) (West 2004) (requiring that at least thirty percent of all new and rehabilitated units developed by a redevelopment agency be affordable units). California also requires every local government to adopt a housing element in its general plan to help with the development of housing for all income levels, including low-income. CAL GOV'T CODE §§ 65302(c), 65580(d), 65581(a), 65583(a)(3) (West 2004). For a detailed account of New Jersey's extensive efforts to require cities and developers to build more affordable housing, see generally John M. Payne, Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix, 22 W. NEW ENG. L. REV. 365 (2001).

56. See Laurie Reynolds, Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government, 56 FLA. L. REV. 373, 377-82 (2004). These cities also receive substantial monies from their respective state governments. However, such funds are often susceptible to the budgetary constraints experienced by states in our ever-changing economy.


58. Id.
strategically use their land use power—oftentimes including the exercise of eminent domain—to maximize their tax revenues in order to decrease their budget deficits and provide the goods and services that their residents and businesses expect.\(^{59}\)

With many states cutting their yearly budgetary allocations to local governments in recent years, many cities that typically do not face such budgetary strains have also turned to leveraging new development in this manner. To the degree that other cities are not so financially constrained and can use their land use and eminent domain powers for purposes other than tax revenue generation, they often use such powers to raise their profile or reputation.\(^{60}\) Such "Expansionist Cities"\(^{61}\) improve their image and visibility by, for example, drawing a major employer to the area or by building a new sports facility to garner the image or label of a "major league city."\(^{62}\)

This trend has decreased the opportunities to create affordable housing because such projects tend not to create new sales tax revenue,\(^{63}\) and they do not maximize the

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59. Accordingly, these cities must attempt to maximize opportunities for existing income streams such as sales taxes and property taxes, rather than simply create new ones. Even if such additional revenue streams are or were within most cities' powers, it is questionable whether the implementation of, for example, a local income tax would be politically palatable. Cities' existing use of their land use powers to increase sales and property tax revenue may spark political opposition for other reasons—such as creating undesirable externalities like traffic, congestion, pollution, etc.—but such opposition is usually limited to the immediate neighborhood in which the proposed development project resides. The existing scheme may be more politically accepted because new residential and commercial developments that spark an increase in sales and property taxes are more indirect and site specific in their revenue generation than a direct tax that would subject the general city population to increased taxation. Increases in direct taxes such as income taxes often meet intense public opposition. See, e.g., Susan P. Schoettle & David G. Richardson, Nontraditional Uses of the Utility Concept to Fund Public Facilities, 25 URB. LAW. 519, 519 (1993) (noting the difficulty local governments confront in meeting increased demands for social and governmental services, while facing "local opposition to and revolt against increased taxes").

60. See Bowman & Pagano, supra note 57, at 4-5.

61. See id.


63. The possible exception being mixed-use developments with affordable housing units being built above ground-floor commercial space.
potential property taxes that can be generated from a new development. For example, on the same parcel, a commercial or industrial building may be assessed at a higher value than market-rate apartments, which in turn will have a greater value than an affordable housing development (especially if it is government-owned public housing, which generates no property tax revenue at all).

Nor do affordable housing developments bring the national attention and recognition that the relocation of a professional sports team or a major employer does. Therefore, unless citizens place a premium on affordable housing and thus make it a politically necessary issue for cities to address, cities will rarely prioritize affordable housing projects above other development projects. Of course, such prioritization by cities is perfectly consistent with the broader view of public purpose under the Supreme Court's eminent domain jurisprudence. Indeed, in light of their settled incentive structure, cities can plausibly claim that they are maximizing utility by favoring revenue-generating development over affordable housing.

The picture becomes more bleak. Not only do cities fail to use their eminent domain power to build more affordable housing units, but they often use their power to raze them.

Cities often take property that has existing affordable housing units owned and operated by private owners. These units are oftentimes inexpensive, private-sector housing that do not have ties to government-subsidy programs. They are, nevertheless, "affordable" housing units in the sense that low-income residents can afford to rent them and live within the city. By taking such affordable housing units off the market by their exercise of eminent domain power, cities reduce the available housing stock for low-income residents as such units

64. The plight of affordable housing in this regard may be compounded by what some scholars argue is a judicial bias toward zoning for single family housing. See, e.g., Paul Boudreaux, Eminent Domain, Property Rights, and the Solution of Representation Reinforcement, 83 DENV. U. L. REV. 1, 17 (2005).

are usually replaced by new high-end commercial, residential, and mixed-use projects.

This phenomenon occurs because cities tend to target so-called "blighted" areas for redevelopment. This practice also

66. Blight is usually comprised of one or more of the following conditions: high unemployment rates; declining tax bases; dilapidated buildings and infrastructure; buildings in violation of the building code; high vacancy rates for commercial, residential, or office buildings; and high crime. However, definitions vary by state.

For example, Maryland defines blight as an area in which a majority of buildings have declined in productivity by reason of obsolescence, depreciation, or other causes to an extent they no longer justify fundamental repairs and adequate maintenance. MD. CONST. art. III, § 61 (LexisNexis 2006). In Maryland, if a municipal bond is used for urban renewal, the city must also consider five other factors in making a finding of blight: "(1) excessive vacant land on which structures were previously located; (2) abandoned or vacant buildings; (3) substandard structures; (4) delinquencies in the payment of real property taxes; or (5) similar factors that the local governing body determines to be indicative of blight." MD. ANN. CODE art. 41, § 14-805 (LexisNexis 2006).

Colorado defines blight as an area "that, in its present condition and use and, by reason of the presence of at least four of the following factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing . . . or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare." COLO. REV. STAT. ANN. § 31-25-103(2) (West 1996). Those factors considered in Colorado are: (1) presence of slum, deteriorated, or deteriorating structures; (2) predominance of defective or inadequate street layout; (3) faulty lot layout such as size; (4) deterioration of site or other improvements; (5) unusual topography or inadequate public improvements or utilities; (6) defective conditions of title rendering title nonmarketable; (7) conditions posing a danger to life or property by fire or other causes; (8) buildings that are unsafe for persons to live or work in because of building code violations, defective design, physical construction, etc.; (9) environmental contamination of buildings or property; and (10) the existence of health, safety, or welfare factors requiring high levels of municipal services; or (11) substantial physical underutilization or vacancy of sites, buildings, or other improvements. Id. at § 31-25-103(2)(a)-(k.5).

Ohio defines blight as follows:

[An area within a municipality containing a majority of structures that have been extensively damaged or destroyed by a major disaster, or that, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, unsafe and unsanitary conditions or the existence of conditions which endanger lives or properties by fire or other hazards and causes, or that, by reason of location in an area with inadequate street layout, incompatible land uses or land use relationships, overcrowding of buildings on the land, excessive dwelling unit density, or other identified hazards to health and safety, are conducive to ill health, transmission of disease, juvenile delinquency and crime and are detrimental to the public health, safety, morals and general welfare.

OHIO REV. CODE ANN. § 1728.01(E) (West 2004).

Missouri defines a blighted area as an area that,

by reason of the predominance of defective or inadequate street layout,
has a long history driven by federal, state, and local government efforts to revitalize economically distressed areas, particularly in the inner city. Governments have endeavored in such revitalization efforts under the guiding principle that without help, private developers, businesses, and even homeowners would not locate to such areas. In fact, to focus cities’ efforts in this regard, some states restrict city redevelopment agencies to condemning property only in blighted areas.

There are both optimistic and cynical ways to view these issues. On the positive side, there are some obviously benign motives for the redevelopment of blighted areas. Many believe that redevelopment of economically distressed areas can correct cycles of crime and poverty that often plague the inner city and harm its residents. From a moral rights perspective, if a person has allowed his or her property to become blighted, they are blameworthy and thus there is a

unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.


67. See, e.g., CAL. HEALTH & SAFETY CODE § 33037(b) (West 2004) (stating "that whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefore, it is in the public interest to employ the power of eminent domain, to advance or to expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated").


justification for taking their property for redevelopment to reverse its negative impact on the community. At the same time, redevelopment of such areas goes hand-in-hand with the aforementioned drive by cities to maximize their sales and property tax revenues to serve "public purposes" that benefit the city as a whole as well as its residents, businesses, and visitors.\(^7\) Moreover, courts have consistently upheld condemnation of blighted property or of non-blighted property in a blighted area under the rationale that alleviating poverty and other social ills through economic development cannot be successfully accomplished on a structure-by-structure basis.\(^7\) Rather, such change occurs by targeting blighted areas as a whole, even if they include a building that does not pose a health or safety risk or that is not a blight to the community.\(^7\)

These are legitimate reasons for taking property, but we must also recognize that cities' use of eminent domain primarily in blighted areas raises serious concerns from a social justice perspective, similar to the concerns raised in the Chavez Ravine example. Blighted areas are almost always poor neighborhoods, many of which are populated by ethnic minority groups.\(^7\) So the property taken by cities is likely to be owned or used by the poor, and in those states that limit eminent domain to only blighted areas, this is the only property being taken. Use of eminent domain in this manner directly benefits the wealthy and powerful at the expense of poor and often ethnic minority communities, exacerbating the concern that eminent domain will become an even more powerful land use tool of the elite at the expense of the poor. This more cynical perspective suggests that the city's land use decision-making process—including decisions related to eminent domain—may be subject to capture by powerful special interests. The reality is probably somewhere in between, particularly given the perverse incentive system created by the funding mechanisms of local governments.

\(^{70}\) See supra text accompanying notes 57-59. 
\(^{72}\) See id. at 34-36; Dornan v. Phila. Hous. Auth., 200 A. 834, 842 (Pa. 1938); N.Y. City Hous. Auth. v. Muller, 1 N.E. 2d 153, 156 (1936). 
\(^{73}\) See generally Pritchett, supra note 20.
V. POSSIBLE SOLUTIONS

With the Supreme Court's decision in *Kelo*, it is unlikely that there will be a jurisprudential shift in redefining "public purpose" in a manner that would stem the tide of affordable housing casualties of eminent domain. Neither *Kelo*'s endorsement of "public purpose" over traditional "public use," nor states' reactions to that decision, offer much hope for growth in affordable housing. On the contrary, many states have responded to *Kelo* by introducing blight-only legislation that will ultimately reduce the availability of affordable housing.75

Congress's proposed responses to *Kelo* could also potentially undermine affordable housing efforts. Senate Resolutions 1704 and 1313 and House Resolutions 4128 and 3135 propose prohibiting the use of federal funds for any development project in which private property is taken by eminent domain for the purpose of economic development.76 House Resolution 3405—also known as the Strengthening the Ownership of Private Property (STOPP) Act—would bar federal financial assistance for economic development to a state or local government that used eminent domain to take property for private commercial development.77 House Resolution 3315 withholds community development block grant funds from states and cities that do not prohibit the use of eminent domain for economic development purposes.78 As many affordable housing projects are made possible by federal funds, these bills would severely retard affordable housing efforts if not amended to exempt expressly the

74. In *Kelo*, the Supreme Court noted that nothing in its opinion prevents a state from providing additional protections to private property owners. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005). The Court's decision merely provided the base level protection articulated by the Fifth Amendment. See id.


development of affordable housing units.

It is clear that the current thinking among state and federal legislatures about the doctrine and practice of eminent domain does not include serious consideration of the affordable housing problem. Instead, solutions that move beyond the debate over “public use” versus “public purpose” must be studied if cities are to address the need for affordable housing and stop the current trends that frustrate this goal. One measure may be legislation, either at the local or state level, that would require private developers who gain land from a city’s exercise of its eminent domain power to provide, at a minimum, the same number of affordable housing units—either at the same site or elsewhere in the city—that were eliminated due to the condemnation. Such a law would force developers to replace affordable housing units on a one-to-one basis and prevent a reduction in the supply of affordable housing, although it would not, by itself, keep up with increasing demand.

Another, perhaps more promising, solution may be the wider adoption of inclusionary housing or inclusionary zoning laws. These “inclusionary” laws require developers to build and offer a certain percentage of affordable housing units when they build a particular number of market-rate homes in a redevelopment area, whether the city uses eminent domain or not to advance the project.79 In this way, whether or not affordable housing units are taken off the market through the exercise of eminent domain—as described above—a developer receiving condemned property would have to build a certain percentage of housing units at an affordable level. Inclusionary zoning laws would require a developer to replace the number of affordable housing units lost by the city’s exercise of eminent domain through such a mandated percentage applicable to the new development.80 More importantly, in addition to maintaining the level of affordable housing units, such inclusionary zoning laws would require a developer—who received property from the city through eminent domain—to build additional affordable housing units at the required percentage, even if no affordable housing

80. See id. at 997, 1001.
units existed on the property previously. In this regard, inclusionary zoning laws could both maintain and increase the number of affordable housing units in a city if properly crafted.

To better effectuate the goal of increased affordable housing units, governments should disallow any "in-lieu" fee exemption under these two types of laws articulated above. Many existing inclusionary zoning or inclusionary housing laws contain provisions that permit developers to pay fees to the city—for use towards building affordable housing elsewhere—in lieu of actually building the required affordable housing on-site. However, it is questionable how well these "in lieu" fee exemptions work. The responsibility for building affordable housing units shifts from the developer—who has an incentive to build the units in order to build their market-rate housing units and other non-residential portions of the development—to the city. And cities' efforts to build affordable housing units on their own have had mixed results.

Cities can also provide more incentives for private developers to build affordable housing—in addition to tax increment financing, density bonuses, and other such development tools—by starting housing trust funds. With dwindling federal funding for low-income housing, cities have looked to establish housing trust funds, which raise money through various measures—e.g., tax increment financing, ticket surcharges to entertainment events, and issuance of bonds. These funds are then used as financial incentives for private developers to build new affordable housing units and to preserve existing ones. This approach has had some traction as there are 350 cities in thirty-seven states that have created housing trust funds to address their residents' growing need for affordable housing.

81. See id. at 1011.
82. See id. at 981.
83. See supra note 48 and accompanying text.
84. See generally MARY E. BROOKS, HOUSING TRUST FUNDS: A NEW APPROACH TO FUNDING AFFORDABLE HOUSING: AFFORDABLE HOUSING AND URBAN REDEVELOPMENT IN THE UNITED STATES 229-245 (Willem Van Vliet ed., 1997); see also Joe Hirsh, Housing Trust Funds: Addressing America's Affordable Housing Crisis, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 218, 218-23 (2005).
85. See Georgia Pabst, Housing Campaign Breaks Ground, MILWAUKEE J.
Community benefit agreements may provide another avenue to ensure that developers who gain property for development through a city's exercise of eminent domain also build affordable housing. While community benefit agreements do not inherently encourage the proliferation of affordable housing, such agreements could be a useful tool for a community in need of affordable housing. Community benefit agreements are legally binding contracts between a developer and a coalition of community representatives, typically comprised of church, labor, environmental, affordable housing, and other neighborhood-based groups. The developer negotiates with these community representatives to identify a series of concessions that the developer will provide to the community—jobs, environmental mitigation measures, various infrastructure improvements, building affordable housing units, etc.—in exchange for the community's support for the project as it goes through the political and land use approval process. Community benefit agreements are legally binding contracts, so the community can sue the developer if he or she does not follow through on the promised benefits contained in the agreement. Through these agreements, communities in need of more affordable housing units can prioritize this type of concession in negotiating with developers and can even actively enforce the building of such units.

Finally, and most radically, states may want to consider changing the financing system for local governments from the current system, which causes cities to be overly reliant on sales tax dollars for their funding. As a result of sales tax


87. See id. at 10-11.

88. See id. at 9. The community also waives its right to sue regarding the development, with the exception of enforcement of rights under the agreement. _Id._ at 92.

dependence, cities favor retail development over residential development—leading to some of the aforementioned problems when cities exercise their eminent domain power. By changing the funding system for cities—perhaps to more of a property tax or state block grant system—states may be able to provide incentives for cities to build more affordable residential units and thus possibly alter the current use of eminent domain power, which leads to the elimination of low-income housing in favor of sales tax-generating projects.

These solutions raise other questions and obstacles and may be flawed, but they at least provide the fodder necessary for a meaningful conversation about how to address some of the problems raised by the problematic link between the eminent domain doctrine and affordable housing.

VI. CONCLUSION

The problems with the link between eminent domain and affordable housing become clearer with a better understanding of the different factors involved in the complex web of property rights and competing interests detailed above. There is the obvious quandary of whether taking the property owned and used by the poor in favor of the more affluent or the community as a whole is justified. The poor who are displaced by such exercises of eminent domain power have oftentimes—as demonstrated by the Chavez Ravine example—lived in a community for generations. With the dearth of affordable housing, the recently displaced may find themselves forced to move outside of the city—indeed sometimes to such a prohibitive distance that they must cease their ties to the city for practical reasons. Though these residents had a stake and place in the city predating such economic revitalization efforts, the “first in time” rule in property law and other concepts of prior ownership rights as a protection from the taking of one’s property have been intermittently and selectively applied to favor those in power or with political influence, providing no recourse or protection.
to the displaced.\textsuperscript{90} This obvious dilemma raises the question of whether cities are open to the poor or whether cities are transforming into havens only for the rich or tax-revenue generating developments.

We must move away from the trend of judging the success of condemnation and redevelopment projects by the economic stimulus—specifically, sales tax and property tax revenue generation—for the formerly blighted area. Instead, we must consider less obvious market-value factors like the unintended consequences of a reduction in affordable housing and the attendant potential impacts on the low-wage labor pool. Part of this paradigm shift may also require rethinking how local governments are funded. Moreover, we must also adopt new laws and policies that ensure that cities and private developers, at the very least, replace the affordable housing that once stood on properties that were condemned for new, upscale developments. Solutions will not come from the judiciary, as \textit{Kelo} has—perhaps unintentionally—set the target for eminent domain directly on the poor, further exacerbating the problems facing affordable housing. The proposed responses to \textit{Kelo} by Congress and many state legislatures compound the problem. When all the posturing and positioning from the post–\textit{Kelo} fallout has subsided, we must have an honest discussion about how to unravel some of the problems stemming from the link between affordable housing and eminent domain.

\textsuperscript{90} See, e.g., Johnson v. M'Intosh, 21 U.S. 543 (1823).