Abstract: In the Sesette Kelo et al. v. City of New London, Connecticut, et al. decision of 2005, a majority of the U.S. Supreme Court held that the use of eminent domain by the New London Development Corporation, a nonprofit organization charged with redeveloping a depressed site in New London, Connecticut, was not a violation of the Fifth Amendment, which prevents the taking of private property for “public use” without just compensation. Unlike prior eminent domain decisions, the immediate beneficiaries in Kelo were private interests: the public benefit was simply the localized trickle-down effects of economic redevelopment. This short commentary argues that Kelo offers an instructive window into the contradictory geographies of property under urban neoliberalism. While neoliberal redevelopment frequently invokes and mobilizes private property, it may also dispossess owners and rework entitlements in the name of “highest and best use,” as in New London. The social geographies of dispossession, however, are not equitable: smaller and otherwise marginalized interests may suffer disproportionately, despite ideological assurances to the contrary. [Key words: ]
on an adjacent site. Following a planning process, the NDLC finalized a development plan for 90 acres of the Fort Trumbell area. Seven parcels were identified for various new developments, including a waterfront conference hotel at the center of a “small urban village” to include: restaurants, shopping, and marinas; 80 new residences; a U.S. Coast Guard Museum’s 90,000 square feet of R&D office space; and a pedestrian “riverwalk.” The NDLC intended the Fort Trumbell development to benefit from the Pfizer facility, and associated positive externalities. By 2004, it trumpeted its role in “creating hope and confidence that has transformed New London’s investment climate. Today, new London is the place to be” (New London Development Corporation, 2004, p. 4). City council approved the plan in January 2000, authorizing NDLC to purchase or acquire property through the exercise of eminent domain.

The development site comprised 115 privately owned properties, as well as the 32 acres formerly occupied by the Navy. The NDLC successfully negotiated the purchase of most of the properties, but nine property owners, who collectively owned 15 parcels in Fort Trumbell, declined to sell. Susette Kelo had lived in Fort Trumbell since 1997, making extensive improvements to her heritage house (which she described as her “little pink cottage”) that she reportedly valued for its water view. Another petitioner, Wilhelmina Dery, was born in her Fort Trumbell house in 1918 and had lived there ever since. Their son, who joined in the suit, lived next door with his family in a house he was given as a wedding present. Their properties were to be demolished, and used for office space or parking lots.

Condemnation proceedings were initiated: the nine owners petitioned the New London Superior Court to invalidate these proceedings, arguing that the taking of the properties would violate the Fifth Amendment (of which more below). Partial success at this level lead to an appeal to the Supreme Court of Connecticut, which held, over a dissent, that all the City’s takings were valid. The U.S. Supreme Court granted certiorari to determine whether a city’s decision to take property for the purpose of economic development fell within the bounds of the Fifth Amendment. A majority of the court ruled that it did.3

The so-called Takings Clause of the Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.” This, of course, has proved something of a lightning rod in a number of high profile U.S. cases (notably Lucas v. South Carolina Coastal Council, 1992). What then is a “public use”? The U.S. Supreme Court has previously identified three existing categories of takings that conform to “public use.” The state may transfer private property to public ownership (e.g., for the building of a road). The state may also transfer private property to private parties when they make the property available for the public’s use, such as with a railroad. However, in the present case, the City was not planning to open the condemned land to public use, nor was it requiring the new owners to operate like common carriers. In certain circumstances, however, the Court has allowed takings even when a property has been subsequently designated for private use. However, in these cases, the Court identified some clear public good that was served. In Berman v. Parker (1954), the Court upheld the

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3Stevens delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer joined. Kennedy filed a concurring opinion. O’Connor filed a dissenting opinion, in which Rehnquist, Scalia, and Thomas joined. Thomas filed a dissenting opinion.
taking of Mr. Berman’s department store in a poor neighborhood in Washington, DC, justifying it as part of a wholesale urban renewal project. In *Hawaii Housing Authority v. Midkiff* (1984), the Court upheld the transfer of title from lessors to lessees, deferring to the judgment of the Hawaii Legislature that the prevailing oligopoly in land ownership had skewed the land market and inflated prices.

In *Kelo*, however, the “public use” seemed unclear, given that the obvious beneficiaries were private interests. Nevertheless, the City’s plan, the majority confidently found, “unquestionably serve[d] a public purpose” and satisfied the public use requirement of the Fifth Amendment (p. 13). The majority wished to continue its tradition of deference to legislatures; promoting economic development, it noted, is a traditional and long accepted function of government. Though it did not dwell on this, it also was comfortable with the notion that “economic rejuvenation” (p. 13) constituted a valid public use, in that it brings appreciable benefits to a community, including new jobs and increased tax revenue. Justice Anthony Kennedy, in concurrence, characterized the taking as part of a “comprehensive development plan meant to address a serious city-wide depression…. [T]he projected economic benefits of the project cannot be characterized as *de minimus*” (p. 4). Economic development, the majority argued, cannot be distinguished from other public purposes that the Court has upheld. Granted, the taking will benefit private parties. However, this is often the case when the state pursues the public purpose. Clearly, close scrutiny is needed. However, noted Kennedy, this is not required simply because the purpose of the taking is economic development.

Justices Clarence Thomas and Sandra Day O’Connor, however, provided stinging dissents. For Thomas, a devout originalist, the court had departed radically from the original intent of the Fifth Amendment. Public use, he argued, requires the actual public use of a property. For O’Connor, economic development constitutes an unconstitutional taking: the effect of the majority decision is to “wash out any distinction between private and public use of property” (p. 2). As a result, “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded” (p. 1).

The “specter of condemnation” (p. 10) now stalks the land, she feared. Subsequent observers have concurred. For Pitney (2006), *Kelo* has rendered the protections of the Fifth Amendment “virtually meaningless” (p. 324). In testimony to the Senate Judiciary Committee on *Kelo*, law professor Steven Eagle describes the majority decision as an affront to an American heritage of private property and liberty in which feudal traditions of tenure were rejected by early settlers, drawn by the lure of fee simple title. “Under *Kelo,*” however, “Americans who assumed that their homes and shops were indeed their castles find that, once again, they ‘hold of’ the government” (Ref. B).

*Kelo* offers a fascinating window on the messy and contradictory urban geographies of property in contemporary capitalism. New London, like many other cities, is deep in the embrace of neoliberalism. Its use of public–private partnerships, cross-subsidies, and faith in the redemptive power of private capital reflect the prevailing orthodoxy. Market solutions, facilitated by the state, will, they hope, lead to a rising tide that will lift all ships. “Economic development” claims Michael Joplin, President of the NDLC, “is a community’s best opportunity to create wealth and expand the tax base” (this is the banner for their website at www.ndlc.org).

Neoliberalism is not simply an economic ideology. It is also, of course, deeply political and legal. Private property, in particular, is seen as the foundation for individual
self-interest and optimal social good. In this, it could be said to be conservative and regressive. Yet neoliberal urban development is also expansionary and revolutionary. When wedded to capitalist urbanization, it requires the constant creative destruction of the urban landscape. Devalued assets, such as Fort Trumbull’s “depressed” landscape of single-family homes and abandoned military installations, are to be sacrificed on the altar of “highest and best use.” The economic impetus provided by Pfizer must be capitalized upon in order, it seems, to attract a new clientele of middle-class owners, attracted by the same river view that Ms. Kelo enjoys, to the promised riverwalks, restaurants, and marinas.

Neoliberalism entails a complicated redrawing of the public–private divide. On the one hand, the distinction, long central to liberal legalism, must be sharpened. The state must withdraw from “interventions” into the private domain. Yet, in other ways, neoliberalism requires the mobilization of the state for private ends. For the power of private property and rugged individual entrepreneurialism to be unleashed, however, requires—as always—the state. The NDLC, in a report, outlines several justifications for state intervention via eminent domain. This includes “boosting value,” creating civic pride, and building competitive advantage. Indeed, the NLDC (2005) goes so far as to warn that without eminent domain, Connecticut will be at a “severe, if not hopeless disadvantage” compared to other states. Eminent domain, it argues, “is a good thing when it serves a good purpose such as economic development.” Without the power of eminent domain, “cities will become more dependent on state dollars and less likely to attract the economic capital required to sustain themselves. Our state and nation will be worse off if we abdicate our responsibility to revitalize dying and distressed communities and dash the hopes of their citizens for jobs, education, and a better life” (no page). The heavy hand of the state, much maligned by neoliberals, appears here as an essential tool for the entrepreneurial city. The Wall Street Journal noted that local and state governments have increasingly embraced eminent domain as an essential marketing tool to lure footloose capital (Starkman, 1998).

But clearly there’s a problem here. Urban policy—frequently enacted in order to protect private property, sustained according to the logic of private property, or entailing the extension of private property to the public domain—must, on occasion, dispossess. This requires some ideological legerdemain. Marx noted the “stoical peace of mind with which the political economist regards the most shameless violation of the ‘sacred rights of property’ and the grossest acts of violence to persons, as soon as they are necessary to lay the foundations of the capitalistic mode of production” (Marx, 1975, pp. 717–718). Similarly, notes the NLDC (2005, no page), optimistically: “While the use of eminent domain might force a few property owners to shift their investments, the rising tide of a successful municipal development project lifts the values of many home and business owners who benefit from increased investment.” Ideally, the NDLC notes, even those whose properties are condemned will recognize these benefits, and selflessly relinquish their title in the name of “state and nation” (their website grumbles about those too short-

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sighted and selfish to not do this). For law and economics guru, Richard Posner, they are “holdout owners,” who serve to undermine economic efficiency (Ref. C).

It has ever been thus. Rural enclosure, urban renewal, colonial dispossession, and contemporary gentrification all entail the massive reworking of property relations, frequently justified according to imperatives of improvement, productivity and higher and better uses (Harvey, 2003). This may entail the enclosure of assets held in common (Blomley, in press), or, as here, the revalorization of private assets. Yet while Kelo must be seen in historical context, the contemporary sanctity accorded to private property, and the intense policing (and frequent transgression) of the dividing line between public and private in the current neoliberal moment makes the contradiction between private property rights and capitalist creative destruction all the sharper. The upheaval along this ideological faultline has thrown together strange bedfellows. Amici curiae in support of Susette Kelo included libertarian and “property-rights” organizations such as the Property Rights Foundation, the Cascade Policy Institute, the Cato Institute, the Tidewater Libertarian Party and the Mountain States Legal Foundation and the Institute for Justice. Yet supporting briefs were also filed by the Congress for New Urbanism, Jane Jacobs, the National Association for the Advancement of Colored People, and the American Association of Retired People. The decision caused considerable controversy. Libertarians proposed seizing Justice Souter’s home in Weare, New Hampshire, via eminent domain to build a “Lost Liberty Hotel,” featuring a “Just Desserts Café” (Ref. D). In January 2006, BB&T Corporation, a large bank, announced that it would not lend to developers for private projects on land taken by private citizens using eminent domain, holding that the Kelo ruling was morally objectionable and a violation of basic rights (Ref. E). A number of states have subsequently passed laws limiting eminent domain, and proposals have been made for changes to federal law.

For the dissenting justices, the majority are undoing three centuries of American liberalism in what O’Connor, quoting Justice Chase, terms a denial of the “great first principles of the social compact.” The limits on state takings—now effaced—serve to protect the security of property, which, she notes, Hamilton characterized at the Philadelphia Convention as one of the “great objects of Government.” That taking be for a “public use,” and that “just compensation” be paid ensures, she argues, “stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power” (p. 4). Thomas quotes Blackstone against the majority: “the law of the land,” they both thunder, “postpone[s] even public necessity to the sacred and inviolable rights of private property” (p. 1). Yet some defenders of Kelo see it as advancing private property. Eddie Perez, testifying before the Senate Judiciary Committee on behalf of the National League of Cities, characterized eminent domain as “a powerful economic development tool.” Congressional limitations on eminent domain would, he feared, mean that “we would have fewer people becoming homeowners, which means fewer participants in the Administration’s concept of an “ownership society” (Ref. F).

The decision in Kelo is instructive in another way: The liberal world of property is, in theory, a flat one. There is a putative equality among property owners, despite social differences: “The poorest man may in his cottage bid defiance to all the forces of the Crown,” claimed Lord Carrington in 1765: It may be frail, but as long he owns, “the King of England cannot enter—all his force dares not cross the threshold” (Entick v.
Carrington, 1765). O’Connor emphasizes this imagined equality, quoting James Madison: “That alone is a just government which impartially secures to every man, whatever is his own” (p. 13). Both O’Connor and Thomas argue that the Kelo taking fails this test. And, in so doing, they begin to demonstrate another interesting contradiction to neoliberal property. As we have seen, property is at the core of neoliberalism, yet is itself vulnerable. This vulnerability, however, is not general, but socially asymmetric. Property owners are not treated impartially under neoliberalism. For O’Connor, an acceptance of economic development [or perhaps gentrification] means that:

[T]he sovereign may take private property currently put to ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude any takings. (Pp. 8–9)

“Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory” (pp. 10–11), she worries. But the social geographies of dispossession have always been uneven. Susette Kelo, in testimony before the Senate Judiciary Committee on the case, noted that the effect of the redevelopment was that the “poor and middle class had to make way for the rich and politically connected” (Ref. A). Hilary Shelton of the NAACP noted the racial inequalities of eminent domain:

Racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but they are almost always affected differently and more profoundly. The expansion of eminent domain to allow the government or its designee to take property simply by asserting that it can put the property to a higher use will systemically sanction transfers from those with less resources to those with more. (Ref. G)

Take, for example, the case of the West End, a depressed neighborhood within Lakewood, Ohio. In 2003, the city developers approved a proposal to build a new shopping center, movie theater and upscale townhouse complex, proposing to raze homes or purchase them through eminent domain. To facilitate this, the city designated the West End as blighted. Council and private business supported the redevelopment, arguing that it would enhance the tax base and the quality of life. Residents bitterly opposed the plan, characterizing it as a form of class-based gentrification. The proposal was subsequently defeated by referendum (Salkin and Lucero, 2005).

One could almost pity the members of the Supreme Court. Put simply, their choice was stark: economy or property.\(^5\) The contradictory relation between the two is far from

\(^5\)Or, perhaps, the choice is between the different ends of property: capital investment and development, or home-ownership. Interestingly, these are often imagined as homologous, such that the figure of the single-family home often stands in for private property tout court (Blomley, 2004).
unusual in other social fields. We see it played out, for example, in local struggles around
gentrification or battles around intellectual property. What is perhaps more unusual is to
see the contradiction made so nakedly manifest within the hallowed halls of the Supreme
Court. It may sound old fashioned to talk of the “functions” of law within capitalism,
wherein law serves to sustain both accumulation and legitimation, while also noting the
“inherent contradictions” of such interventions. Yet as we watch the judiciary tie them-
selves in liberal knots in the Kelo case, such arguments seem once again instructive.

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