UNITED STATES COMMISSION ON CIVIL RIGHTS

THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN

DATE AND TIME: Friday, August 12, 2011 at 9:30 a.m.

PLACE: U.S. Commission on Civil Rights
624 Ninth Street, NW
Room 540
Washington, DC 20425

BRIEFING AGENDA

I. Introductory Remarks by Chairman

II. Speakers' Presentations

- Ilya Somin, George Mason Law School
- J. Peter Byrne, Georgetown University Law Center
- Hilary O. Shelton, NAACP
- David T. Beito, Alabama State Advisory Committee

III. Questions by Commissioners and Staff Director

IV. Adjourn

Panelists' Biographies and Statements

For The Briefing On

The Civil Rights Implications of Eminent Domain Abuse

August 12, 2011

DAVID T. BEITO

David T. Beito is a Professor at the University of Alabama. He is the author of *Taxpayers in Revolt: Tax Resistance during the Great Depression* (Chapel Hill: University of North Carolina Press, 1989), *From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890-1967* (Chapel Hill: University of North Carolina Press, 2000); and *Black Maverick: T.R.M. Howard's Fight for Civil Rights and Economic Power* (Urbana: University of Illinois Press, 2009). The last book focuses on Dr. T.R.M. Howard who was not only one of the wealthiest blacks in Mississippi but was also the main early civil rights mentor to Medgar Evers and Fannie Lou Hamer.

Professor Beito edited *The Voluntary City: Choice, Community, and Civil Society* (Ann Arbor: University of Michigan Press, 2002). He has a book under contract with the University of Illinois Press entitled *"The Richer Gift of Individualism:" The Political Writings of Zora Neale Hurston.*

Professor Beito has published in the *Journal of Interdisciplinary History, Journal of Policy History, Journal of Southern History,* and *Journal of Urban History* among other scholarly journals. He has received fellowships from the Earhart Foundation, the Olin Foundation, and the Institute for Humane Studies. He has also published articles in *The Wall Street Journal, The Los Angeles Times, Reason,* and *American Enterprise*. His most recent articles (both in *The Wall Street Journal* in 2011) focused on the overlooked nationwide tax revolt of the 1930s and the provision of decentralized relief after the Tuscaloosa tornado of 2011.

Professor Beito edits the Liberty and Power Blog at the History News Network and is chair of the Alabama State Advisory Committee of the U.S. Commission on Civil Rights.

EMINENT DOMAIN THROUGH THE BACK DOOR IN MONTGOMERY, ALABAMA

By David T. Beito, Chair, Alabama State Advisory Committee

TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

August 12, 2011

Thank you for inviting me here today. Let me start by saying that I speak for myself in this testimony, not the Alabama State Advisory Committee which I chair. I have little to add to Ilya Somin's insightful and well-researched overview, and agree with the main thrust of his argument. As Somin points out, Americans into the early twentieth century greatly appreciated the link between civil rights and property rights. Civil rights champions ranging from the earliest abolitionists to the founders of the NAACP emphasized the constitutional protection of the right to acquire and hold property as essential to the economic progress of the poor and oppressed. In 1849, for example, Frederick Douglass declared that "civil government" should be "solemnly bound to protect the weak against the strong, the oppressed against the oppressor, the few against the many, and to secure the humblest subject in the full possession of his rights of person and of property." In defending property rights, of course, Douglass made a distinction between property originally acquired through mutual consent and homesteading, which he regarded as legitimate, and "property in man" which he viewed as "man-stealing."[1]

Rather than revisit these broader historical issues, or even eminent domain as conventionally understood, my testimony will

highlight a generally overlooked threat to the property rights of the poor and vulnerable. For lack of a better term, this threat can be called "eminent domain through the back door." I first encountered this phenomenon after becoming chair of the Alabama State Advisory Committee for the U.S. Commission on Civil Rights. Our Committee took seriously the mandate of the national Commission to look creatively and expansively at civil rights issues. One of our members, Margaret Brown, suggested that we examine the impact on state and local government policy on the property rights of minorities.

Not long before our Committee took on this issue, the U.S. Supreme Court had handed down its landmark decision in 2005 of *Kelo v. New London*. This ruling was highly permissive to local governments seeking to take property for economic development. In response to the "post-*Kelo* backlash," more than forty states enacted laws to protect property owners and narrow the discretion of governments. One of the first was Alabama's law of 2005 (followed up by another, more restrictive law, in 2006), which prohibited the use of conventional eminent domain for economic development. [2]

All of our members, regardless of partisanship, ideology, or race, agreed on the need to pursue the issue. As a result, the Advisory Committee convened two public forums. The first was in 2008 at the historic 16th Street Baptist Church in Birmingham Alabama. The church was an early meeting place for civil rights activists. In 1963, it was the scene of a tragic bombing which resulted in the deaths of four school children. During our meeting, several citizens

from around the state came forward to share their grievances about property rights abuse. One of these was Jim Peera, a developer in Montgomery, whose family had left Africa in the 1970s because of persecution of Asian minorities. Peera recounted disturbing examples of how blacks in Montgomery, a city often called the cradle of civil rights, were losing their property through an extensive application of Section 11-53B-1 et. seq. of the Alabama code. This provision leaves a major loophole for the indirect taking of property outside of conventional eminent domain. The legislature did not repeal it as part of its post-Kelo eminent domain reforms.[3]

The first two paragraphs of 11-53B-1 et. seq. gives some sense of its permissive nature: "It is estimated that within the municipalities of the state, there exist several thousand parcels of real property that due to poor design, obsolescence, or neglect, have become unsafe to the extent of becoming public nuisances. Much of this property is vacant or in a state of disrepair and is causing or may cause a blight or blighting influence on the city and the neighborhoods in which the property is located. Such property constitutes a threat to the health, safety, and welfare to the citizens of the state and is an impediment to economic development within the municipality....It is the intent of this chapter to authorize a municipality of the state to proceed with the demolition or repair of a structure based on its own findings, and to set out a method for collecting the assessment liens so imposed."[4]

In contrast to the standard eminent domain process, Montgomery property owners on the receiving end of Section 11-53B-1 et. seq. do not have any right to compensation, even in theory. Once declaring

the property a nuisance, the city typically demolishes the structure and then bills the owner, often by slapping a lien on the property, for the costs of demolition including the carting of away of the rubble. As Peera pointed out, because the owners are often poor, many cannot afford to pay and thus have to sell or abandon the land. He charged that the city was demolishing buildings which, by any reasonably objective standard, were neither blighted nor a nuisance. Of course, this point is somewhat academic since Alabama law gives governments maximum leeway to interpret the standards of blight and nuisance as well as to selectively apply them.[5]

Peera's information played a key role in convincing the Alabama State Advisory Committee to call a second public forum in April 2009 to focus on the situation in Montgomery. During that meeting, Peera showed the audience a map of demolitions in a single year. Most were in a small area in Montgomery's most heavily black areas, including Rosa Park's old neighborhood. There were more than fifty demolitions in 2008. The city council approved twenty nine more in 2009, sixty two in 2010, and eighteen by the end of March 2011. Most notably, at this meeting, Peera also told us about the case of Jimmie McCall who, as a result, testified.[6]

In his willingness to fight city hall, McCall was a rarity among Montgomery's property owners threatened with demolition of their homes. He has lived in the city for several decades. For years, he has scraped together a living by salvaging rare materials from historic homes and then selling them to private builders. Sometimes

months went by before he had a client. Finally, he had put aside enough to purchase two aces in Montgomery and started to build. He did the work himself using materials accumulated in his business including a supply of sturdy and extremely rare longleaf pine.[7]

McCall only earned enough money to build in incremental stages but eventually his "dream house" took shape. From the outset, however, the city showed unremitting hostility. He almost lost count of the roadblocks it threw up including a citation for keeping the necessary building materials on his own land during the construction process. More seriously, in 2007 he was charged under Section 11-B-1 et. seq. on the grounds that his home, then under construction, was a nuisance.[8]

The reaction of Montgomery's city fathers seemed strange to McCall. Wasn't he trying to fight blight by building a new home? McCall suspects that wealthy developers are trying to get their hands on the property: a rare two-acre parcel on a major thoroughfare. Unlike countless others in similar straits, McCall fought back and hired an experienced local lawyer. He negotiated a court-enforced agreement which gave him eighteen months to complete the home. Only a month after the agreement took effect in 2008, the city demolished the structure. Local bureaucrats, obviously in a hurry, did not give him notice when they sent in the bulldozers on the same day as the court order authorizing them. McCall appealed to the same judge who had allowed the demolition. Stating that she had been misled, she ordered the city to pay compensation. Montgomery has appealed and at this writing McCall has not received a cent. McCall thinks that the city

intends to drag it out until his money runs out.[9]

On April 15, 2010, I received a phone call from Karen Jones, another black property owner from Montgomery. She related a case which was no less compelling than that of McCall's. Only a day before she called me, the city had demolished her family home including furniture, a family bible, and old photographs. The authorities charged the property was a nuisance because the front porch was in disrepair. Although the city mailed out notices before sending out the bulldozers, none of them went to Jones. Instead they went to Forie Jones, her grandmother (deceased in 1989) and Matthew Jones, her uncle (deceased in 2000). [10]

The city claimed then, and now, that Karen Jones is not the owner although she pays the property taxes (which were not arrears) and has a warranty deed from 1982 indicating that she is an heir. Apparently, all of the other family members support her decision. Despite asserting that Jones is not the owner, the city has billed her more than 1200 dollars for the costs of demolition. Jones refused, and continues to refuse, to pay the lien on principle. In May of this year, the city tried to sell the property at auction, still naming the deceased Forie Jones as the owner in his official online information describing the property. According to Karen Jones, there were no bidders. She charges that the city has taken no action against other properties in the city which are in much greater states of disrepair. Partly as a result of the Jones case, the Castle Coalition of the Institute for Justice, a leading force against eminent domain abuse, has taken a special interest in the Montgomery situation. [11]

As Ilya Somin points out, many state laws, including that of Alabama, are still woefully inadequate in the protection of individual rights under eminent domain. I also second his emphasis on the need for local governments to work with property owners rather than adopt an adversarial relationship. Reforms will accomplish little, however, if they fail to address those abuses that occur outside of the conventional eminent domain framework. Under eminent domain through the back door, governments never actually try to take the land, at least at the beginning of the process, but the end result is often the same or worse for property owners. If they are poor and do not have access to good legal representation, they will often have either sell or abandon their property - that is after it has become nothing more than a vacant lot. As legal restrictions on conventional eminent domain become tougher, it becomes even more likely that governments will exploit this loophole.

Any reforms to eminent domain through the back door should start with the assumption that the property rights of the poor are just as worthy of protection as those of the rich. Put another way, it is essential that these individual rights be respected as ends in themselves not merely as a means to further the ends of another person or group. For this reason, these reforms should make it clear that the burden of proof is on local governments, not the property owner, to show that a genuine nuisance, which must be narrowly and specifically defined, exists.

Of course, any reforms should assume that the onus be placed on governments to fully inform the actual property owner of his or rights

prior to any demolition. There should be no more cases like those of Karen Jones and Jimmie McCall and, if there are, local governments should be required to pay for full compensation for any mistake and those responsible should be prosecuted. To put teeth in these reforms, each state could create a property rights ombudsperson in the attorney general's office. The role of the ombudsperson will be to provide owners with an informational brochure written in clear and concise language explaining their rights and, if necessary, recommend that the state bring charges against the local governments in cases of abuse.[12]

Lastly, I strongly recommend that this Commission call a special meeting to be devoted solely to the situation in Montgomery. In my view, unless this happens, the city will continue a policy of obfuscation and delay. I suggest that Mayor Todd Strange, who did not respond to invitations from the Commission to be here today, be at the top of any invitation list along with such alleged victims of property rights abuse via eminent domain through the back door as Karen Jones, Jim Peera, and Jimmie McCall.

Especially during a time of recession and tumbling home prices, local and state governments should regard the existing property owners in lower-income neighborhoods in Montgomery and elsewhere as their allies and assets to the community. They will have a great deal more success with economic development if they treat these owners as valuable urban pioneers who deserve praise and encouragement rather than as obstacles to be pushed out of the way if their rights conflict

with some broader social and economic agenda.

Margaret Brown, Farella Robinson, Shana Kluck, Christina Walsh, and Don Casey provided information which was extremely helpful in the preparation of this paper. Any errors, however, are those of the author.

Endnotes

[1] Paul D. Moreno, Black Americans and Organized Labor: A New History (Baton Rouge: Louisiana University Press, 2006), 12-14; David E. Bernstein, "Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective," Vanderbilt Law Review 51 (May 1998), 839-47; Frederick Douglass, "Comments on Gerrit Smith's Address," The North Star, March 30, 1849, (http://www.lib.rochester.edu/index.cfm?PAGE=4383, accessed July 20, 2011); Douglass, "Oration Delivered in Corinthian Hall, Rochester," July 5, 1852, http://www.lib.rochester.edu/index.cfm?PAGE=2945, accessed July 20, 2011); and Frederick Douglass to Henry C. Wright, The Liberator, 29 January 1847; reprinted in Philip Foner, ed., Life and Writings of Frederick Douglass, vol. 1 (New York: International Publishers, 1950), p. 199, (http://docsouth.unc.edu/neh/douglass/support9.html, accessed July 21, 2011).

[2] "Alabama Limits Eminent Domain," August 4, 2005, (http://www.washingtontimes.com/news/2005/aug/04/20050804-120711-4571r/, accessed July 20, 2011); and Ilya Somin, "Controlling the Grasping Hand: Economic Development Takings after Kelo," Supreme Court Economic Review 15 (2007), 245-47.

[3] Meeting, Transcript, Alabama Advisory Committee to the United States Commission on Civil Rights, April 29, 2008, 260-270, copy available from the U.S. Commission on Civil Rights.

[4] Code of Alabama, 1975, 11 53-B1, (http://alisondb.legislature.state.al.us/acas/CodeofAlabama/1975/coatoc.htm, accessed July 20, 2011).

[5] Radley Balko, "Blight Flight: Why is the City of Montgomery Condemning the Property of African Americans along a Civil Rights Trail?" Slate, September 17, 2010, (http://www.slate.com/id/2267743/, accessed July 20, 2011).

[6] Balko; and Sarah Netter, "Montgomery Residents Accuse City of Demolishing Homes to Sidestep Eminent Domain Laws," ABC News, August 26, 2010, (http://abcnews.go.com/US/montgomery-residents-accuse-city-demolishing-homes-sidestep-eminent/story?id=11470620&page=2, accessed July 20, 2011); and Brandon Pizzola, Maffucci Fellow at the Institute for Justice, "Authorized Demolitions Since 2010," copy in author's possession; and Meeting, Transcript, Alabama Advisory Committee to the United States Commission on Civil Rights, April 29, 2009, 22-35, copy available from the U.S. Commission on Civil Rights.

[7] Balko; Netter; and Benjamin Solomon, "How to Steal Land in Montgomery," False Magazine, January 2008,

(http://falsemagazine.org/content/montgomery_al.php, accessed July 20, 2011).

[8] Balko; Netter; and Solomon.

[9] Balko; Netter; and Solomon.

[10] Balko; Netter; and Karen Jones to Mayor Todd Strange, April 15, 2010, copy in possession of the author; Forie Jones, Certificate of Death, December 21, 1989, Alabama, Center for Health Statistics

[11] Montgomery County, Alabama, Online Property Detail Information, Owner Name: Jones Forie, C/O Matthew Jones, Parcel Number: 11-06-23-01-020-022.000, Date Extracted: June 8, 2011, copy in possession of the author; and "Eminent Domain Through the Backdoor in Montgomery," (2010) (http://www.castlecoalition.org/castlewatch/3508-eminent-domain-through-the-backdoor-in-montgomery, accessed July 21, 2011).

In reply to a letter from Farella Robinson, the Regional Director of the Central Region of the U.S. Commission on Civil Rights to Mayor Todd Strange, Kimberly O. Fehl, Montgomery's City Attorney, wrote that Jones and McCall "were not identified as owners of the property in which they claim their due process was denied. The records from the office of the Montgomery County Probate Court indicate that the property owner on the McCall property as Hannah McCall and on the Jones property as Forie Jones, c/o Matthew Jones." Fehl to Robinson,

June 23, 2010, copy in possession of the author. As already mentioned, Forie and Matthew Jones both died more than a decade ago. Hannah McCall is Jimmie McCall's wife, and they are not estranged or at odds on this issue.

[12] The author would like to thank Don Casey for some of these suggestions.

J. PETER BYRNE

J. Peter Byrne is Professor of Law at the Georgetown University Law Center. He teaches Property, Land Use, Historic Preservation, and Constitutional Law. Professor Byrne holds degrees from Northwestern University and from the University of Virginia School of Law. He was a law clerk to Chief Judge Frank Coffin of the U.S. Court of Appeals for the First Circuit and for Associate Justice Lewis F. Powell, Jr. of the U.S. Supreme Court; he practiced law with the DC firm of Covington and Burling. Professor Byrne has taught at Georgetown since 1985 and served as Associate Dean from 1997 until 2000. He currently is Faculty Director of the Georgetown Climate Center and of the Georgetown Environmental Law and Policy Program. Professor Byrne has published numerous law journal articles on Land Use and Property topics and. is currently writing a book on Historic Preservation Law.

Testimony Before the U.S. Civil Rights Commission
August 12, 2011

Eminent Domain and Racial Discrimination: A Bogus Equation

J. Peter Byrne
Georgetown University Law Center

This hearing addresses claims that the use of eminent domain for economic development unfairly and disproportionately harms racial and ethnic minorities. These claims draw on the history of urban renewal prior to the 1960's, when many African Americans and others were displaced by publicly funded projects that bulldozed their homes in largely failed attempts to modernize cities. Justice Clarence Thomas's dissent in *Kelo v. City of New London* further argued that the use of eminent domain for economic redevelopment would inevitably harm minorities and the poor.[i]

Such concerns in our time are seriously misplaced. Redevelopment projects using eminent domain continue to be an invaluable tool for maintaining the economic competitiveness and livability of urban areas where property ownership is fragmented and where minorities live in large numbers. The discriminatory elements of older urban renewal reflect the racism generally prevalent in political life in the 1940's and 50's, and have been largely eliminated by the growth of political power by African Americans and other urban minorities, as well as the changed fiscal relations between the federal and local governments, the effect of which has been to give greater control over redevelopment projects to local political leaders. Use of eminent domain, rarely now applied to residences, today requires political consent and community buy-in.

Eminent domain is a crucial legislative power exercised by governments around the world and dating back at least to Roman times. It empowers government to acquire property in specific locations for the construction of networks and the assembly of large tracts even when private owners do not wish to sell or holdout for excessive payment. Under our constitution, owners are protected by the requirement that government pay them "just compensation." The meaning of the Takings Clause of the Fifth Amendment relating to taking property for "public use" long has been controversial, but no U.S. Supreme Court decision contradicts the holding of Kelo that public use includes publicly approved condemnations for economic redevelopment of economically distressed areas. The quality of the redevelopment projects varies, but recent successful projects can be found from the Ferry Building in San Francisco to Times Square in New York.[ii] Economic revitalization of urban areas will tend to aid poor minorities who disproportionately dwell in cities, by increasing employment and tax revenues for education and other city services.

Political realities have changed dramatically since the urban renewal period. Minorities have secured significant political power in nearly every U.S. city, as well as increased influence in private real estate markets. Redevelopment projects have largely come under the control of local governments, as federal money and direction have disappeared. Local officials strive to

avoid displacement of homes because of negative political repercussions and expensive litigation. Federal and state statutes have in many instances increased the payments due property owners about what "just compensation" requires. In these circumstances, the condemnation of homes is rare and has little or no identifiable ethnic or racial character. The plaintiffs in Kelo were white, middle class people – which explains a good bit of the hysterical media reaction.

The changes in the political economy of economic development can be seen by comparing the urban renewal of Southwest Washington, DC, in the 1950's, approved by the Supreme Court in Berman v. Parker[iii], with the use of condemnation in DC today. The massive condemnations, bulldozing, and reconstruction of Southwest Washington comprised a complex episode with many facets, but poor African Americans residents seem to have suffered disproportionate displacement. At that time, there was no democracy or elected government at all in Washington; the statute authorizing the project was enacted by Congress, and the members of the Redevelopment Land Agency that carried out the project were appointed by the federal government or their DC appointees. The most controversial exercise of eminent domain in Washington D C in the past decade has been the condemnation of stores in the Skyland strip mall in Anacostia to permit the construction of a badly needed private supermarket for an underserved area. That action, although bitterly contested in court by some owners, was supported by many member of the local community, specifically approved by the D.C. Council, which was majority African American, and signed by Mayor Anthony Williams.[iv] Although specifically exercised in order to convey the land to a private developer, it would be absurd to suggest that the case presents a civil rights issue appropriate for consideration by the U.S. Civil Rights Commission. Similar observations can be made about the use of eminent domain by Dudley Street Neighborhood Initiative in Boston to assemble land for affordable housing.[v]

Nor is there reason to suppose that condemnations for economic development are more likely to harm minorities than condemnations for other traditional public uses. Many of the most brutal condemnations in the urban renewal period were accomplished for highways and public housing where the government would actually own the site. Government has the same general incentive to seek less expensive or flourishing lands for condemnation whatever the use to be made. If the goal really is to protect minorities, why are the proponents not seeking to constrain the uses of eminent domain that historically have been most harmful to minorities? Yet, legislation recently introduced in Congress, H.R. 1433, ignores these exercises of eminent domain for highway construction and other public projects, while prohibiting economic development that has the potential to aid low income people.

The case against eminent domain here has been advanced largely on the basis of advocacy by libertarian organizations, which broadly oppose the use of eminent domain because they value private property more highly than local democracy. The evidence that that they marshal, such as the lurid *Victimizing the Vulnerable*, presents ambiguous data in highly colored language. That study shows no more than that communities are somewhat more likely to pursue redevelopment in poorer areas than in more affluent areas. There is no consideration of the public benefits to be gained from these projects, the distribution of such benefits, or the scope or character of citizen participation in decision making. Nonetheless, the study leaps to the astounding conclusion that, "The only real solution is prohibiting the use of eminent domain for

private development to protect the constitutional rights of all citizens,...."[vi] Thus, they oppose condemnation of the property of our largest corporations as much as that of the most economically marginal minority individual. The concern for the latter seems frankly tactical, since they know that they would get little hearing in many quarters simply advocating to reduce the scope of state legislative power over private property.

If one were worried about disproportionate impacts of eminent domain on the poor or minorities, there are remedies that would address that directly. One might provide more procedural protections or compensation to residents than to commercial property owners. One could mandate minimum payments to tenants, who normally receive no compensation hen rental housing is condemned. The Fair Housing Act could be amended to clarify that it applies to condemnation of residences without regard to intent.[vii] These ideas are all worthy of study but have not been because they do not meet the agenda of the libertarian groups driving the issue, which is to limit further the powers of government in favor of private capital. Proponents rather would deprive the DC government of the power to use eminent domain to build a supermarket in Anacostia. In a world of growing economic inequality, in a political climate demanding cutting taxes as well as medical and pension benefits, it is unfortunate we are spending this time discussing the non-issue of the effects of eminent domain on minorities.

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[i] 545 U.S. 469, 521-22 (2005).

[ii] *See e.g.,* Marc B. Mihaly, Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment, 34 Ecology L. Q. 1 (2007); Robert G. Dreher and John D. Echeverria, *Kelo's* Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development (2006), at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 U.C.L.A. J. Envtl. L. & Pol. 131 (2005); Jeff Finkle, Eminent Domain and Economic Development, at http://law.case.edu/centers/business_law/eminent_domain/pdfs/Finkle_eminent_domain_pwrpt.pdf.

[iii] 348 U.S. 26 (1954).

[iv] See, e.g., Duk Hea Oh v. NCRC, 7 A. 3d 997 (D.C. 2010); Franco v. District of Columbia, 3 A.3d 300 (D.C. 2010); Rumber v. District of Columbia and NCRC, 487 F.3d 941 (D.C. Cir. 2007); Franco v. National Capital Revitalization Comm'n, 930 A.2d 160 (D.C. 2007).

[v] *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain,* 36 B.C.L. Rev. 1061 (1995).

[vi] DICK M. CARPENTER, PH.D. & JOHN K. ROSS, INSTITUTE FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 7 (June 2007).

[vii] Edward A. Imperatore, Discriminatory Condemnations and the Fair Housing Act, 96 GEO. L.J. 1027 (2008).

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HILARY O. SHELTON
Senior Vice President for Advocacy/
Director, NAACP Washington Bureau

Hilary 0. Shelton, presently serves as the *Vice President for Advocacy/Director to the NAACP's Washington Bureau.* The Washington Bureau is the Federal legislative and national public policy division of the over 500,000- member, 2,200-membership unit, national civil rights organization. In this capacity, Hilary is responsible for advocating the federal public policy issue agenda of the oldest, largest, and most widely recognized civil rights organization in the United States to the U.S. Government. Hilary's government affairs portfolio includes crucial issues such as affirmative action, equal employment protection, access to quality education, stopping gun violence, ending racial profiling, abolition of the death penalty, access to comprehensive healthcare, voting rights protection, federal sentencing reform and a host of civil rights enforcement, expansion and protection issues.

Prior to serving as director to the NAACP Washington Bureau, Hilary served in the position of *Federal Liaison/Assistant Director* to the Government Affairs Department of *The College Fund/UNCF*, also known as *The United Negro College Fund* in Washington, D.C. In this capacity, Hilary worked with Senate and House Members of the U.S. Congress, Federal Agencies and Departments, college and university presidents and faculty members, as well as the White House and various government agencies to secure the survival, growth and educational programming excellence of the 40 private historically black colleges and universities throughout the United States.

Prior to working for The College Fund/UNCF, Hilary served as the *Federal Policy Program Director* to the 8.5 million-member *United Methodist Churches'* social justice advocacy agency, *The General Board of Church & Society.* In this capacity, Hilary advocated for the national and international United Methodist Churches' public policy agenda affecting a wide range of civil rights and civil liberties issues including preserving equal opportunity programs such as affirmative action, securing equal high quality public education for all Americans, guaranteeing greater access to higher education and strengthening our nation's historically Black colleges and universities, abolition of the death penalty, reforming the criminal justice system, voting rights protection and expansion, gun control and a host of other social justice policy concerns.

Hilary serves on a number of national boards of directors including, The Leadership Conference on Civil Rights, The Center for Democratic Renewal, the Coalition to Stop Gun Violence, and the Congressional Black Caucus Institute among many others.

Playing an integral role in the crafting and final passage of such crucial federal legislation as the Civil Rights Act of 1991, Hilary was also instrumental in ushering through to passage, The Civil Rights Restoration Act, The Violence Against Women Act, The Hate Crimes Statistics

Act, The Native American Free Exercise of Religion Act, The National Voter Registration Act, The National Assault Weapons Ban, The Brady Handgun Law, Reauthorization of the Voting Rights Act, the Help America Vote Act and many other crucial laws and policy measures affecting the quality of our lives and equality in our society.

Hilary has humbly received a number of awards and recognitions for his unwavering dedication to the mission and goals of the NAACP. Among the many awards to which he is most grateful for receiving, Mr. Shelton is the proud recipient of the *National NAACP Medgar W. Evers Award for Excellence*, the highest honor bestowed upon a national professional staff member of the NAACP for Outstanding Service, Sincere Dedication and Commitment to the Mission of the NAACP, the *American Arab Anti-Discrimination Committee's Excellence in Advocacy Award*, the Religious Action Center's *Civil Rights Leadership Award* in honor of Dr. Martin Luther King Jr., the Religious Action Center awards the Civil Rights Leadership Award to outstanding leaders in the black and Jewish communities, 2006 *NCADP 30th Anniversary Award* as well as the *Congressional Black Caucus' Chairman's Award* In Recognition and Appreciation for Dedication, Leadership and Commitment to Advancing the Cause of Civil Rights for All Americans.

Born in St. Louis, Missouri, to a family of 6 brothers and sisters, Hilary holds degrees in political science, communications, and legal studies from Howard University in Washington, D.C., the University of Missouri in St. Louis, and Northeastern University in Boston, Massachusetts, respectively.

Hilary presently lives in Washington, D.C., with his wife Paula Young Shelton and their three sons, masters Caleb Wesley, Aaron Joshua, and Noah Ottis Young Shelton.

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STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR, NAACP WASHINGTON BUREAU &
SENIOR VICE PRESIDENT FOR ADVOCACY AND PPOLICY
BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

"The Civil Rights Implications of Eminent Domain Abuse"

August 12, 2011

Thank you, Chairman Castro and ladies and gentlemen of the Commission for inviting me here today to talk about property rights and the civil rights implications of eminent domain abuse.

My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau and the Senior VP for Advocacy and Policy. The NAACP is our Nation's oldest, largest and most widely recognized grassroots-based civil rights organization. We currently have more than 2,200 units in every state in our country. The NAACP Washington Bureau is our national public policy and federal legislative advocacy arm.

Given our Nation's sad history of racial prejudice, racism, bigotry, and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that eminent domain has been misused for centuries against African Americans and other racial and ethnic minorities, and the economically disadvantaged, at highly disproportionate rates.

Although nobody knows the exact numbers of people displaced through eminent domain across the nation, everyone seems to agree that African Americans are disproportionately affected. One source cites that since World War II, it is estimated that between 3 and 4 million Americans have been forcibly displaced from their homes as a result of urban renewal takings. It should surprise nobody that a vast majority of these people are racial and ethnic minorities[1]. Another says that

[1] *Battle Over Eminent Domain is Another Civil Rights Issue*, David Bieto and Ilya Somin, April 27, 2007, The Kansas City Star

""[b]etween 1949 and 1973 ... 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African American," making African Americans, "five times more likely to be displaced than they should have been given their numbers in the population[2]."

The NAACP has a deeply held concern that the newly sanctioned expansion of the use 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, as was approved by the US Supreme Court in its 2005 *Kelo v. City of New London* decision, will systemically sanction easier transfers of property, wealth and community stability from those with less resources to those with more.

The history of eminent domain is rife with abuse specifically targeting racial and ethnic minority and poor neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal." Sadly, racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are almost always affected differently and more profoundly.

The vast disparities of African Americans or other racial or ethnic minorities who have been removed from their homes due to eminent domain actions is well documented.

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles[3]. In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities[4]. In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township and nearly triple that of Burlington County.

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[2] *What is the Price of the Commons?*, Fullilove, Mindy (February, 2007)
[3] *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It* Mindy Thompson Fullilove, , p.17
[4] Derek Werner: Note: The Public Use Clause, Common Sense and Takings, pp 335-350), 2001

In 2004, the city of Alabaster, Ala., used "blight" as a pretext to take 400 acres of rural property, much of it owned by low-income African Americans, for a new super-sized mega department store. Many of the residents had lived there for generations, and two other super-sized mega department stores owned by the same company were located less than fifteen miles away. Several of the landowners, particularly those who lacked economic resources, political clout and legal aid, ended up selling out at an unfair discount. According to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore, Maryland were African Americans[5].

The motives behind the disparities are varied. Many of the studies I mentioned in the previous examples contend that the goal of many of these displacements is to segregate and maintain the isolation of poor, minority and otherwise outcast populations. Furthermore, condemnations in low-income or predominantly racial and ethnic minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to effectively contest the action either politically or in our nation's courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas of low property values with those with higher property values. Thus, even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the US Supreme Court in *Kelo* will clearly perpetuate, if not exacerbate, the disparate impact on African Americans and other racial and ethnic minorities, and the economically disadvantaged in our country.

As I said at the beginning of my testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much more severe.

First, the term "just compensation", when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for "economic development" almost

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[5] *How America Rebuilds Cities* Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: , p.29

certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their communities and find that they cannot afford to live in the "revitalized" neighborhoods; the remaining "affordable" housing in the area is almost certain to become less so. When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out not only by common sense, but also by statistics: one study from the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling[6].

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to destabilize organized minority communities. This dispersion both eliminates, or at the very least drastically undermines, established community support mechanisms and has a deleterious effect on these community's ability to exercise what little political power they may have established. In fact, the very threat of such takings will also hinder the development of stronger ethnic and racial minority communities. The incentive to invest in one's own community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts.

By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken. Individuals in those areas will thus have even less incentive to engage in community-building and improvement for fear that such efforts will be wasted.

In conclusion, allow me to reiterate that by allowing pure economic development motives to constitute public use for eminent domain purposes, state and local governments will now infringe on the property rights of those with less economic and political power with more regularity. And, as I have testified today, these groups, low-income

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[6] *The Urban Villagers: Group and Class in the life of Italian Americans* Herbert J. Gans, , p.380

Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

As I have discussed in my testimony, too many of our communities – racial and ethnic minority, the elderly, and the low-income - have witnessed an abuse of eminent domain powers that has too often been devastating. Given the numerous chronicles of abuse, it is the hope of the NAACP that all responses, legislative, administrative and other, to address eminent domain abuse be educated and well informed by our shared history. We need to ensure that certain segments of our population that have too long been muted in this takings issue have a voice. We need to understand how it has been too easy to exploit these communities by imposing eminent domain not only in the pursuit of economic development but also in the name of addressing "blight." We also need to make sure that any compensation is fair and will result in those being displaced are not forced to accept less than they had.

Historically and today, it has been too easy to characterize minority, elderly, or low-income communities as "blighted" for eminent domain purposes and subject them to the will of the government. If proposals contain language that could potentially exclude these communities from protection against eminent domain abuses, we have failed in our responsibility to serve and give a voice to this constituency which has already been, and continues to be, abused.

Additionally, in considering the interests of our communities, we raise a broader concern regarding the use of eminent domain for any purpose, including those purposes traditionally viewed as "public purposes," such as highways, utilities, and waste disposal. Even these more traditional uses of eminent domain have disproportionately burdened those communities with the least political power - the poor, minorities, and working class families. Furthermore, it is not only our owners that suffer, but our renters, whether they are residents or proprietors of small businesses, who are provided no protections and pay a heavy and uncompensated price when eminent domain is imposed.

For these reasons, as the majority in *Kelo* suggested, there must be sufficient process protections for minority communities, regardless of the purpose and however beneficial to the public. The process must be open and the participation of the potentially impacted community needs

to be guaranteed, as well as fair compensation. This is the voice that our communities, that all American communities, deserve.

Thank you again, Chairman Castro and Commission members, for allowing me to testify before you today about the NAACP position on the civil rights implications of eminent domain abuse.

The NAACP stands ready to work with federal, state and local municipality officials to develop policy and legislation to end eminent domain abuse while focusing on real community development concerns like building safe, clean and affordable housing in communities with good public schools, an effective accessible high quality health care system, small business development and growth, and an significant available living wage job pool.

Thank you very much and I look forward to your questions and our discussion.

ILYA SOMIN

Ilya Somin is an Associate Professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy. Somin currently serves as Co-Editor of the *Supreme Court Economic Review*, one of the country's top-rated law and economics journals. His work has appeared in numerous scholarly journals and popular press outlets, including the *Yale Law Journal*, *Stanford Law Review*, *Northwestern University Law Review*, *Los Angeles Times*, *National Law Journal* and *Reason*. His amicus brief on behalf of urban planning scholar Jane Jacobs was cited by the Supreme Court in its majority opinion in *Kelo v. City of New London*. In July 2009, he testified on property rights issues at the United States Senate Judiciary Committee confirmation hearings for Supreme Court Justice Sonia Sotomayor. Somin writes regularly for the popular Volokh Conspiracy law and politics blog.

During the Fall 2008 semester, he served as visiting professor of law at the University of Pennsylvania Law School. Somin has previously been a visiting professor at the University of Hamburg, Germany, and the University of Torcuato Di Tella in Buenos Aires, Argentina. Before joining the faculty at George Mason, he was the John M. Olin Fellow in Law at Northwestern University Law School in 2002-2003. In 2001-2002, he clerked for the Hon. Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit. Professor Somin earned his B.A., *Summa Cum Laude*, at Amherst College, M.A. in Political Science from Harvard University, and J.D. from Yale Law School.

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THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE

TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

August 12, 2011

INTRODUCTION

I am grateful for the opportunity to address the important issue of the impact of eminent domain on racial and ethnic minorities. I would like to thank Chairman Castro, Vice Chair Thernstrom, and the other commissioners for their interest in this vital question.

As President Barack Obama aptly put it, "[o]ur Constitution places the ownership of private property at the very heart of our system of liberty."[1] The protection of property rights was one of the main purposes for which the Constitution was originally adopted.[2] Unfortunately, the Supreme Court has often relegated property rights to second class status, giving them far less protection than that accorded to other constitutional rights.[3] And state and local governments have often violated those rights when it seemed politically advantageous to do so.

Americans of all racial and ethnic backgrounds have suffered from government violations of constitutional property rights. But minority groups have often been disproportionately

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[1] BARACK OBAMA, THE AUDACITY OF HOPE 149 (2006).

[2] *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (emphasizing centrality of property rights for the Founders); JAMES W. ELY, JR. THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 42-58 (3d. ed. 2008) (emphasizing centrality of property rights for the Founding generation); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (noting that "[p]erhaps the most important value of the Founding Fathers of the American constitutional period, 'was their belief in the necessity of securing property rights").

[3] I have summarized the second class status of property rights in current Supreme Court jurisprudence in Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law*, George Mason Univ. Law & Econ. Res. Paper No. 08-53 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854

victimized, sometimes out of racial prejudice and at other times because of their relative political weakness. Minorities are especially likely to be victimized by private to private condemnations that test the limits of the Public Use Clause of the Fifth Amendment, which requires that property can only be condemned for a "public use." These include takings allegedly justified by the need to alleviate "blight" and promote "economic development."

Part I of my testimony briefly surveys the constitutional law of eminent domain and public use. It documents the extent to which the Supreme Court has given condemning authorities a near-blank check to take property for whatever purposes they want.

Part II examines the impact of blight and economic development condemnations on minority groups. Both types of takings often victimize racial and ethnic minorities. Although such condemnations are defended on the grounds that they are needed to promote economic growth in poor communities, they often destroy far more wealth than they create. Economic development can be better promoted by other, less destructive means. African-Americans and Hispanics are targeted more often than other groups in large part because of their relative political weakness and comparatively high poverty rates. While, certainly, not all members of these groups are poor or politically weak, a disproportionately large number are.

Finally, in Part III I explain why the problem of abusive takings persists despite the wave of state reform laws adopted in response to the Supreme Court's unpopular decision upholding economic development takings in *Kelo v. City of New London*.[4] Many of the new laws actually impose little or no constraint on economic development takings. Even those that do impose meaningful restrictions usually still allow private-to-private condemnations in the types of "blighted" areas where many poor minorities live. Although post-*Kelo* reforms are a step in the right direction, much remains to be done before the property rights of poor minorities are anywhere close to fully protected.

I. THE CONSTITUTIONAL LAW OF PUBLIC USE.

The Fifth Amendment requires that property can only be condemned for a "public use."[5] Traditional public uses include those where the condemned land is actually "used" by the public, either by building a government-owned structure on it (such as a road or a bridge), or by constructing a privately owned facility that the owner is legally required to allow the general public to use, such as a public utility.

In *Kelo v. City of New London*, the Supreme Court ruled that the condemnation of private property for transfer to another private party in order to promote "economic development" was a permissible "public use"; indeed, it ruled that virtually any potential benefit to the public benefit or "public purpose" counts as a "public use."[6] The Court upheld the condemnation of land in New London for transfer to a private party despite the fact that the

[4] 545 U.S. 469 (2005).
[5] U.S. CONST. AMEND. V.
[6] *Kelo v. City of New London*, 545 U.S. 469, 473-78 (2005).

condemned property would not be owned by the government, the general public would have no right of access to it, and there was no legal requirement that the new private owners actually produce the promised "economic development" that supposedly justified the takings in the first place.

Kelo was largely consistent with two previous Supreme Court decisions that defined "public use" very broadly.[7] In the 1954 case of *Berman v. Parker*, the Court upheld the condemnation of "blighted" property for transfer to private developers and concluded that that the legislature has "well-nigh conclusive" power to define public use as it sees fit.[8] *Berman's* highly permissive approach was reaffirmed in *Hawaii Housing Authority v. Midkiff* in 1984.[9]

Whatever its basis in precedent, *Kelo* was at odds with the text and original meaning of the Fifth Amendment, which do not conflate "public use" with potential "public benefit," instead limiting "public use" to cases of actual government ownership of condemned property or at least a legal right of access by the public (as in the case of public utilities).[10] *Kelo* also placed undue faith in the willingness of government officials to protect the constitutional property rights of the poor and politically weak. As historian and law professor James W. Ely, Jr. has written, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" to the very government officials whose abuses of power it is meant to constrain.[11] There is little sense in recognizing a constitutional right for the purpose of curbing abuses of government power, and then leaving the definition of that right up to the discretion of the very officials whose power the right is supposed to restrict.

It should also be noted that the need to protect property rights against abusive state and local governments was one of the main reasons why the framers of the Fourteenth Amendment sought to apply the Bill of Rights to the states. Congressional supporters of the Amendment feared that southern state governments would threaten the property rights of African-Americans and those whites who had supported the Union against the Confederacy during the Civil War.[12] This objective cannot easily be reconciled with allowing those very same state governments to determine what qualifies as a public use, thereby giving them a blank check to expropriate the property of both African-Americans and white loyalists. The right to

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[7] *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (ruling that takings are for a public use if they are "rationally related to a conceivable public purpose"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that the legislature has "well-nigh conclusive" power to define public use as it sees fit).

[8] *Berman*, 348 U.S. at 32.

[9] *Midkiff*, 467 U.S. at 240-41.

[10] *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners,* 2005 CATO SUP. CT. REV. 39, 40-43 (describing early American jurists' rejection of the idea that eminent domain can be used to transfer property from one private party to another without giving the general public any right to use it). *See also* Eric R. Claeys, *Public Use Limitations and Natural Property Rights,* 2004 MICH .ST. L, REV. 877, 894–905 (2004) (symposium issue) (detailed discussion of limited eighteenth and nineteenth century conceptions of public use that banned most private-to-private takings);

[11] *Id.* at 62.

[12] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268-69 (1998).

private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[13]

Whether or not *Kelo* and *Berman* were correctly decided, their effect has been to eviscerate most federal judicial oversight of the use of eminent domain. Even after *Kelo*, federal courts may strike down "pretextual" condemnations whose official rationale is a mere pretext "for the purpose of conferring a private benefit on a particular private party."[14] For the last several years, state and federal courts have struggled over the question of what qualifies as a "pretextual" taking.[15] But this restriction is unlikely to greatly constrain the use of eminent domain in the long run, since, under *Kelo*, a state or local government can still condemn property for virtually any "public purpose" that might potentially create some sort of benefit.[16] Courts are not even allowed to consider whether the claimed benefits will actually materialize or not.[17] Even a relatively robust pretextual takings doctrine is therefore unlikely to give property owners more than marginal protection against abusive condemnations.[18]

Some state courts have taken a more restrictive approach in interpreting the public use clauses of their state constitutions than the federal Supreme Court has in regards to the Fifth Amendment. Eleven state supreme courts currently forbid *Kelo*-like economic development takings.[19] Nonetheless, most states permit a wide range of private-to-private condemnations.[20]

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[13] On the centrality of property rights in nineteenth century conceptions of civil rights, see, e.g., HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-75 395-97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s, along with the right to contract, the right to marry, and the right of access to the courts); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (describing how most nineteenth century jurists viewed property as a fundamental civil right).

[14] *Kelo*, 545 U.S. at 477–78.

[15] For a discussion of the relevant cases, see Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOVT. L. REV. 1 25-35 (2011) (Introduction to Symposium on Eminent Domain in the United States).

[16] *Kelo*, 545 U.S. at 469-78.

[17] *Id.* at 487-89 (rejecting property owners' argument that the government must prove a "reasonable certainty" that the development project will succeed, and refusing to "second-guess he City's considered judgments about the efficacy of its development plan).

[18] Somin, *Judicial Reaction* at 34-35.

[19] *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that "economic development" alone does not justify condemnation); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 653–54 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma State Constitution, and rejecting *Kelo* as a guide to interpretation of Oklahoma's state Public Use Clause); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota Constitution gives property owners broader protection than Kelo and requires "actual use" of the condemned property by the government or the public); *County of Wayne v Hathcock*, 684 NW2d 765 (Mich. 2004) (rejecting "economic development" rationale for condemnation); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 9, 11 (Ill. 2002) (holding that a "contribu[tion] to positive economic growth in the region" is not a public use justifying condemnation); *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 770, 778 (Mich. 2004) (invalidating economic development takings under the Michigan Constitution); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a private business is unconstitutional unless the transfer to the business is insignificant and incidental to a public project); *Ga. Dep't of Transp. v. Jasper Cnty.*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial "projected economic benefit . . . cannot justify a condemnation."). *Baycol, Inc v Downtown Development Authority*, 315 So. 2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *In re Petition of Seattle*, 638 P.2d 549, 556–57 (Wash 1981) (disallowing

Overall, there is currently very little federal judicial oversight of private-to-private condemnations. While some states have imposed more restrictive rules, the majority have not. Therefore, property rights in most of the country remain vulnerable to takings that transfer property from the politically weak to influential interest groups.

II. THE DISPLACEMENT OF MINORITIES BY EMINENT DOMAIN.

Private to private condemnations are often used for the benefit of the politically powerful at the expense of the politically weak.[21] For most of American history, African-Americans and other minority groups have fallen into the latter category. As a result, they have often been victimized by the use of eminent domain for "blight" and economic development takings.

A. The Historic Impact of Blight Condemnations.

Beginning in the 1930s, many states adopted laws and constitutional amendments allowing the condemnation of "blighted" property for transfer to private parties in order to alleviate "slum-like" conditions.[22] Over the next fifty years, as many as several million Americans were expelled from their homes as a result of blight and urban renewal condemnations.[23] Numerous businesses, churches, and other community institutions were also destroyed.

The vast majority of those uprooted from their homes have been poor minorities, primarily African-Americans.[24] The use of eminent domain to evict poor blacks during the post-World

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plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v McCormick*, 581 SW2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Karesh v City of Charleston*, 247 S.E. 2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); *City of Little Rock v Raines*, 411 S.W. 2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v Port of Seattle*, 341 P.2d 171, 181–191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use,"); *Opinion of the Justices*, 131 A. 2d 904, 905–06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *City of Bozeman v Vaniman*, 898 P2d 1208, 1214–15 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project).

[20] See discussion in Part III, *infra*.

[21] For a discussion of the reasons for this pattern see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 190-203 (2007).

[22] *See generally* Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (describing origins of these laws); Ilya Somin, *Blight*, ENCYCLOPEDIA OF HOUSING (forthcoming) (same); Amy Lavine, *From Slum Clearance To Economic Development: A Retrospective of Redevelopment Policies in New York State* 4 ALB. GOVT. L. REV. 212 (2011) (describing origins of New York's important early blight laws).

[23] Somin, *Grasping Hand* at 269-71.

[24] Id. For studies documenting the disproportionate impact of blight and urban renewal takings on minorities, see MARTIN ANDERSON, THE FEDERAL BULLDOZER 64-65 (1965); MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT ch. 4 (2004); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. L. & REFORM, 680, 740–41 (1994) (same);. Pritchett, *The "Public Menace" of Blight*; Mindy Thompson Fullilove, *Eminent Domain and African-Americans* (Institute for Justice, 2007).

War II era was so common that many, including famed African-American writer James Baldwin, referred to urban renewal as "Negro removal."[25] Similarly, "slum clearance" was sometimes dubbed "Negro clearance."[26] Between 1949 and 1973, some two-thirds of the over one million people displaced under takings sponsored by the Urban Renewal Act of 1949 were African-American.[27] This figure understates the total impact of blight takings on blacks, because many blight condemnations were also undertaken by state and local government without federal backing.[28] Hispanic groups, such as Puerto Ricans, were also commonly targeted.[29]

In many cases, the disproportionate impact on African-Americans was not merely an accidental byproduct of efforts to "clean up" bad neighborhoods. It was deliberately intended by local officials.[30] Local governments sometimes sought to rid themselves of what they called "niggertowns."[31] In most cases, those displaced by blight condemnations ended up worse off than they were before, and were not fully compensated for their losses.[32]

In 1954, the Supreme Court upheld the constitutionality of blight condemnations in *Berman v. Parker*.[33] Significantly, *Berman* upheld a blight condemnation that was part of a project that forcibly displaced over 5000 people in a poor Washington, D.C. neighborhood.[34] Some 97.5% of them were African-American.[35] Only about 300 of the 5900 housing units constructed on the site after the takings were affordable to the former residents of the area, most of whom ended up in worse conditions elsewhere.[36] By the 1960s, the neighborhood in question was majority white.[37]

As prominent legal scholar Wendell Pritchett points out, "[t]he irony is that, at the same time it was deciding *Berman*, the Court was deciding *Brown* [*v. Board of Education*], which reflects a distrust of government (particularly local government) to protect the interests of minority groups and to treat all citizens equally."[38] Unfortunately, the Supreme Court and most other legal elites failed to grasp the contradiction between aggressive judicial oversight

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[25] Pritchett, *The "Public Menace" of Blight*, at 47; FULLILOVE, ROOT SHOCK ch. 4. James Baldwin famously stated that "urban renewal ... means moving the Negroes out. It means Negro removal, that is what it means." Citizen King: Three Perspectives, PBS Transcript, available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04_tr_qry.html.

[26] Anderson, FEDERAL BULLDOZER at 65.

[27] Fullilove, *African-Americans and Eminent Domain,* at 2.

[28] Somin, *Grasping Hand*, at 269-71.

[29] Anderson, FEDERAL BULLDOZER at 64-65.

[30] BERNARD FRIEDEN & LYNN SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28-29 (1989) (noting role of "racism" in urban renewal and highway takings); Pritchett, *Public Menace*; at Herbert J. Gans, *The Failure of Urban Renewal*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, 539 (ed. James Q. Wilson, 1966) (noting that "the urban renewal program has often been characterized as Negro clearance, and in too many cities, this has been its intent.").

[31] Quoted in FRIEDEN & SAGALYN, DOWNTOWN at 28.

[32] Somin, *Grasping Hand*, at 269-71.

[33] 348 U.S. 26 (1954).

[34] *Id.* at 36.

[35] *Id.*

[36] HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163–64 (1995).

[37] Pritchett, *"Public Menace" of Blight* at 47.

[38] *Id.* at 47.

of school segregation on the one hand and giving local governments a blank check to use eminent domain to forcibly displace African-Americans on the other. For many years, *Berman's* permissive approach to blight takings set the pattern for both state and federal judicial decisions.

B. Recent Developments.

In more recent years, minority property rights continue to be threatened by blight and economic development takings, even though modern condemnations rarely approach the biggest ones of the 1950s in scale. The risk faced by property owners has been exacerbated by the advent of extremely broad definitions of blight that enable virtually any area to be declared blighted and condemned.

Originally, "blight" condemnations were limited to areas that fit the layperson's definition of the term: dilapidated, slum-like neighborhoods. For example, the 1938 amendment to the New York state Constitution that authorized blight condemnations was intended to limit them to "slums."[39] Over time, however, most states expanded the definition of "blight" to include virtually any area that might be considered underdeveloped in some way.[40]

State courts have ruled that even such areas as downtown Las Vegas and Times Square in New York can be declared "blighted" and condemned.[41] In two recent decisions, the New York Court of Appeals has upheld major blight condemnations based on a combination of extremely broad definitions of blight and a willingness to overlook flagrant possible bias on the part of condemning authorities in favor of powerful interest groups to which the condemned property was transferred.[42] Some states also permit pure "economic development" condemnations of the sort upheld in *Kelo v. City of New London,* where no showing of blight at all is needed.[43]

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[39] See Ilya Somin, *Let there Be Blight: Blight Condemnations in New York after* Goldstein *and* Kaur, FORDHAM URB. L. J. (forthcoming) (symposium on Eminent Domain in New York); Lavine, *From Slum Clearance To Economic Development.*

[40] *See* Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006, at 42; Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight,* 31 FORDHAM URB. L.J. 305, 307 (2004).

[41] *See City of Las Vegas Downtown Redev. Agency v. Pappas,* 76 P.3d 1, 12-15 (Nev. 2003) (holding that downtown Las Vegas is blighted); and *In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002) (holding that Times Square is blighted).

[42] *See Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010); and *Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009). For a detailed discussion of these two cases and the abuses involved, see Somin, *Let There be Blight.* Among the abuses overlooked by the New York Court of Appeals were that the firm conducting the "blight" study on behalf of the condemning authority was on the payroll of the private interests who would receive the condemned property, and the fact that those same interests may have been responsible for much of the "blight" in question. *Id.*

[43] *See Kelo,* 545 U.S. at 475 (noting that "[t]here is no allegation that any of these properties [that were condemned] is blighted or otherwise in poor condition").

Expansive definitions of blight and pure economic development takings put a wider range of properties at risk of condemnation than before, and further imperil politically weak property owners, including minorities.[44]

Today, blight and economic development takings are not as common as in the era of large-scale urban renewal projects in the 1950s and 1960s. But they nonetheless continue to disproportionately victimize the minority poor. Recent studies show that areas populated by poor minorities are far more likely to be targeted for condemnation than other neighborhoods.[45] These patterns led the NAACP and the Southern Christian Leadership Conference to file an amicus brief urging the Supreme Court to forbid economic development takings in *Kelo*.[46] The brief emphasized that economic development takings disproportionately target the minority poor, and cited a number of recent examples.[47]

In a particularly egregious 2010 case, the New York Court of Appeals allowed the use of eminent domain to transfer a large amount of property to Columbia University in the predominantly black Manhattanville neighborhood.[48] The condemnation went through despite the fact that the firm that conducted the "blight" study that justified the condemnation had been on Columbia's payroll, and much of the blight used to justify the takings was actually on land that Columbia already owned, thereby making it likely that Columbia itself had created the "blight" that justified the use of eminent domain.[49]

As in earlier decades, blight and economic development takings often destroy far more economic value than they create, thereby actually undermining their professed goals and inflicting serious long-term harm on the communities where they occur.[50] In the *Kelo* case, for example, nothing has been built on the site of the condemned property even six years after the end of litigation, and it is not clear whether anything will be built in the foreseeable future.[51]

Prior to *Kelo,* the most famous economic development taking in American history was the 1981 *Poletown* case, in which the Michigan Supreme Court upheld a condemnation that displaced some 4000 people in Detroit for the purpose of transferring the land to General

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[44] *See* Somin, *Grasping Hand* at 190-203, 267-69 (detailing these dangers).

[45] *See, e.g.,* DICK CARPENTER & JOHN ROSS, EMPIRE STATE EMINENT DOMAIN: ROBIN HOOD IN REVERSE (2010), available at http://www.ij.org/about/3045 (describing extensive use of eminent domain New York, especially against poor and minority neighborhoods); Dick Carpenter & John Ross, *Testing O'Connor And Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?* 46 URBAN STUD. 2447 (2009).

[46] *See* Brief for the National Ass'n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (2004) (No. 04 - 108), 2004 WL 2811057.

[47] *Id.* at 7-12.

[48] *Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

[49] *See* Somin, *Let There Be Blight* (describing the details of this case and its background).

[50] Somin, *Grasping Hand* at 192-99.

[51] JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE 377-78 (2009); Ilya Somin, *Stronger Protections Needed,* N.Y. TIMES ROOM FOR DEBATE BLOG: A TURNING POINT FOR EMINENT DOMAIN?, Nov. 12, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/11/12/a-turning-point-for-eminent-domain/#ilya.

Motors for the construction of a new factory.[52] In that case, too, the new use of the condemned property produced no more than a fraction of the promised economic growth – not enough to offset the losses caused by the destruction of numerous homes, businesses and schools, and the expenditure of some $250 million in public funds.[53]

The negative impact of eminent domain on minorities is partially offset by compensation payments. However, compensation often falls far short of fully making up for all the losses suffered by victims of eminent domain. Many studies find that property owners often do not even get the "fair market value"[54] compensation required by the Supreme Court.[55] Undercompensation is particularly likely in the case of "low value" properties of the kind often occupied by poor minority group members.[56] Even when fair market value compensation is paid, owners still are not compensated for the loss of the "subjective value" they attach to their property over and above its market valuation.[57] Subjective value includes such elements as community ties and business good will that are often lost when victims of eminent domain are forced to move their homes or businesses.

Today, the disproportionate targeting of minorities is less likely to be caused by old-fashioned racial prejudice than in the urban renewal era, and more likely to be the result of the political weakness of these groups.[58] That weakness is exacerbated by relatively high poverty rates. Some 25.8% of blacks and 25.3% of Hispanics have incomes below the poverty line, compared to 9.4% of whites and 12.5% of Asian-Americans.[59] Social science confirms the common sense view that the poor, on average, have far less political influence than more affluent citizens.[60]

Racial prejudice may still be at work in so far as public opinion is less inclined to oppose takings that harm people of different racial or ethnic groups. Ethnocentric bias influences public opinion on a variety of issues, and often affects the views of people who are not actively hostile to minorities but merely less concerned about their welfare than that of members of their own group.[61] There is a need for more research on the extent to which such "ethnocentrism" influences public opinion and policy on eminent domain. Even if present

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[52] *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457, 459 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

[53] For a detailed discussion of the costs and benefits of the Poletown takings, see Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1016-19 (2004) (symposium on *County of Wayne v. Hathcock*).

[54] *See, e.g., Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984).

[55] *See* Thomas Mitchell, et al., *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 630-38 (2010) (citing numerous studies showing undercompensation); Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990-2002*, 39 J. LEGAL STUD. 201 (2010) (finding systematic undercompensation in the majority of New York City cases).

[56] *See* Chang, *An Empirical Study of Compensation.*

[57] Somin, *Grasping Hand* at 215-16.

[58] *See id.* at 190-203 (explaining why the politically weak are likely to be targeted for condemnation).

[59] CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009 16 (Sept. 2010), available at http://www.census.gov/prod/2010pubs/p60-238.pdf.

[60] *See, e.g.,* LARRY BARTELS, UNEQUAL DEMOCRACY (2010); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778 (2005).

[61] *See generally* DONALD KINDER & CINDY KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN PUBLIC OPINION (2009).

racial bias plays relatively little role in selecting targets for condemnation, past racial injustice is undeniably one of the causes of the poverty and political weakness that make blacks and some other minorities vulnerable to takings.

C. Minorities and the Holdout Rationale for Eminent Domain.

Some scholars argue that the use of eminent domain is essential for the promotion of economic development in minority neighborhoods. They claim that it is needed to facilitate development projects that would otherwise be blocked by holdout problems.[62] If a developer needs to acquire property from many different owners in order to build his or her project, holdouts can potentially block it by refusing to sell unless they are paid a price so high as to make it unprofitable to proceed with the project.[63]

Holdouts are a genuine danger for some development projects. Fortunately, however, market participants have tools for preventing holdouts without resorting to the use of eminent domain. The most commonly used is secret assembly, under which developers purchase the property they need without revealing their purpose. This prevents potential strategic holdouts from realizing that there is a big development project that they can hold up in hopes of getting a payoff.

As a tool for preventing holdouts, secret assembly has two major advantages over eminent domain.[64] First, it incentivizes property owners to reveal their true valuation of the land they own, agreeing to sell to the would-be developer if they value the land less than he does and refusing to sell if they value it more. In this way, secret assembly helps sift out those projects that are genuinely more valuable than the preexisting uses of the property developers seek to acquire, from those that are not. If current owners value the land more than the developer does, the project will not go through, which is the correct outcome from the standpoint of economic efficiency. Even if the sole objective of public policy is to maximize economic development, it is still preferable to block projects that replace higher-value land uses with less valuable ones. By contrast, when the government uses eminent domain to acquire property, it has no way of determining whether its planned uses are more valuable than those of the current owners. Officials have no reliable means of estimating the subjective value the property has for its present users.

Second, unlike eminent domain, secret assembly cannot be "captured" by powerful interest groups for the purpose of acquiring property for themselves at the expense of the politically weak. In real-world politics, the use of eminent domain is more likely to be determined by

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[62] *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 72-81 (1986) (describing holdout rationale for eminent domain); Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URBAN L.J. 657 (2007) (arguing that eminent domain is needed to revitalize urban areas).

[63] For a good theoretical discussion of this problem, see Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991)

[64] For more detailed discussions of these advantages of secret assembly over eminent domain, Somin, *Grasping Hand* at 203-09, and Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006).

the relative power of the opposing interests than by the presence or absence of genuine holdout problems.

Secret assembly may not work well as a tool for acquiring land for government-owned projects. When government funds are spent, there is a strong case for transparency in order to facilitate public debate.[65] But it is generally effective for privately owned development projects of the sort at issue in *Kelo* and most other blight and economic development takings.

III. WHY POST-*KELO* EMINENT DOMAIN REFORM IS NOT ENOUGH.

The Supreme Court's controversial decision in *Kelo v. City of New London* generated a massive political backlash that some believe has greatly diminished the problem of eminent domain abuse. *Kelo* was one of the most unpopular Supreme Court decisions in history, with polls showing that over 80 percent of the public opposing the ruling.[66] As a result, forty-three states and the federal government enacted legislation intended to curb economic development takings in the years since *Kelo*.[67]

Unfortunately, the majority of the new reform laws are likely to be ineffective, imposing few or no meaningful constraints on the use of eminent domain.[68] Many of them forbid takings that transfer property to private parties for "economic development," but allow virtually identical condemnations to continue under other names. For example, numerous states continue to allow "blight" condemnations under definitions of blight so broad that virtually any area qualifies.[69]

Many of the states that have enacted ineffective post-Kelo reforms or no reforms at all are among those that make the most extensive use of eminent domain for the benefit of private interests.[70] They include such large states as California, New York, New Jersey, and Texas.[71] The ineffectiveness of many post-*Kelo* reforms is in part caused by public ignorance. Survey data shows that only about 13% of Americans know whether their state has enacted a post-*Kelo* eminent domain reform law and whether that law is likely to be effective or not.[72] Public ignorance enables state legislators to satisfy public demand for action on eminent

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[65] See Kelly, *The "Public Use" Requirement in Eminent Domain Law.*

[66] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108-14 (2009).

[67] *Id.* at 2101-02. For the most comprehensive analysis of post-Kelo reform legislation, see id. at 2114-53. See also Edward J. López et al., *Pass a Law, Any Law, State Legislative Responses to the* Kelo *Backlash*, 5 REV. LAW & ECON. 101, (2009), *available at* http://www.bepress.com/rle/vol5/iss1/art5/; Andrew Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237, (2009); James W. Ely, Jr., *Post-*Kelo *Reform: Is the Glass Half-Full or Half-Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006); Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URBAN L.J. 657 (2007).

[68] Somin, *Limits of Backlash*, at 2120-35.

[69] *Id.* at 2120-28. See also the discussion of blight condemnations in § II.B., *infra.*

[70] *Id.* at 2117-20.

[71] *Id.*

[72] *Id.* at 2154-70.

domain without adopting laws that genuinely constrain blight and economic development takings.

Some real progress has been made as a result of the *Kelo* backlash. Four states - most notably Florida - now forbid both "blight" and economic development condemnations completely, and about fifteen others have banned economic development takings and defined blight narrowly.[73] These are important gains. But they do not go far enough. Poor minorities are still vulnerable to eminent domain abuse in most states.

This is most clearly the case in those states where post-*Kelo* reform laws impose no meaningful constraints on the range of properties that can be condemned. But even those reform laws that define "blight" narrowly still leave many of the minority poor at risk. Even a narrow definition of blight – one that encompasses only areas with conditions that pose a genuine threat to public health or safety – would still encompass many inner city neighborhoods. And such areas are disproportionately inhabited by the minority poor. Professor David Beito's testimony at this hearing gives an indication of the sorts of abuses that can occur even in a state that has enacted a relatively strong post-*Kelo* reform law.[74]

The alleviation of genuine blight is a proper objective of public policy. But, in most cases, it does not require the use of eminent domain. We need not destroy blighted neighborhoods in order to save them. A much better approach is the use of nuisance law or targeted public health regulations to eliminate dangerous conditions without expelling the people who live in the area.[75] In the long run, the best solution to urban blight is economic growth. And such growth is more likely to occur if the authorities respect the property rights of the poor, thereby incentivizing productive investment.[76] Growth is unlikely to flourish in neighborhoods where residents live in fear of condemnation.

CONCLUSION.

For decades, eminent domain has been used and abused in ways that victimize minority groups, especially the minority poor. In recent years, state court decisions and eminent domain reform laws have partially addressed this longstanding problem. Nonetheless, much remains to be done before the property rights of minorities – and all Americans – are fully secure. Stronger eminent domain reform laws are needed at both the state and federal levels. For their part, the courts must give property rights protection equal to that afforded other constitutional rights.

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[73] Somin, *Blight* (forthcoming). The state of Utah banned blight condemnations even before *Kelo,* but partially rescinded the ban in 2007, allowing such takings to occur if approved by a supermajority of property owners in the affected area. Somin, *Limits of Backlash,* at 2138 & n. 176.

[74] Testimony of David Beito, Chair of the Alabama State Advisory Commission on Civil Rights, U.S. Commission on Civil Rights, hearing on "The Civil Rights Implications of Eminent Domain Abuse," Aug. 12, 2011.

[75] *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?* 39 URBAN LAWYER 833 (2007).

[76] *See* Ilya Somin, *Why Robbing Peter Won't Help Poor Paul: Low-Income Neighborhoods and Uncompensated Regulatory Takings*, 117 YALE L.J. POCKET PART 71 (2007)

The Civil Rights Implications of Eminent Domain Abuse

U.S. Commission on Civil Rights

Washington, DC

Friday, August 12, 2011

Briefing: The Civil Rights Implications of Eminent Domain Abuse

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Supreme Court of the United States
HAWAII HOUSING AUTHORITY et al.
v.
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KAHALA COMMUNITY ASSOCIATION, INC., et al.
v.
Frank E. MIDKIFF et al.
Nos. 83-141, 83-236 and 83-283.

Argued March 26, 1984.
Decided May 30, 1984.

Trustees of landholding estates sought judgment declaring Hawaii Land Reform Act of 1967 unconstitutional. The United States District Court for the District of Hawaii, Samuel P. King, Chief Judge, 483 F.Supp. 62, declared Act constitutional, and trustees appealed. The Court of Appeals, 702 F.2d 788, reversed and remanded. On remand, the District Court refused injunctive relief and issued only a declaration that Act was unconstitutional, and trustees appealed. The Court of Appeals, 725 F.2d 502, revised its mandate, holding that trustees were entitled to injunction against state condemnation actions in order to protect res judicata effect of decision that Act was unconstitutional. The Hawaii Housing Authority and certain private appellants who had intervened below appealed. The Supreme Court, Justice O'Connor, held that: (1) District Court was not required to abstain from exercising its jurisdiction, and (2) Act does not violate "public use" requirement of the Fifth Amendment for taking of private property.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ⇨43

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of State or Foreign Law Involved. Most Cited Cases
Federal courts need not abstain on grounds that difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided when a state statute is not fairly subject to an interpretation which will render unnecessary federal constitutional question.

[2] Federal Courts 170B ⇨41

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk41 k. Nature and Grounds in General. Most Cited Cases
Abstention from exercise of federal jurisdiction is the exception, not the rule.

[3] Federal Courts 170B ⇨43

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of State or Foreign Law Involved. Most Cited Cases
Relevant inquiry in determining whether federal courts should abstain on grounds that difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided is not whether there is a fair, though unlikely, possibility that state courts might render adjudication of federal question unnecessary, but rather whether statute is of an uncertain nature, and is obviously susceptible of a limiting construction.

[4] Federal Courts 170B ⇨47.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine.
170Bk47 Particular Cases and Subjects, Abstention
170Bk47.1 k. In General. Most Cited Cases
(Formerly 170Bk47)
In view of fact that the Hawaii Land Reform Act of 1967, which created a land condemnation scheme whereby title and real property is taken from lessors and transferred to lessees in order to reduce concentration of land ownership, was not of an uncertain nature and had no reasonable limiting construction since Act unambiguously provides that power to condemn is "for a public use and purpose," so that question, uncomplicated by ambiguous language, was whether Act on its face was unconstitutional, federal district court was not required to abstain from exercising its jurisdiction under *Pullman* doctrine, which requires abstention from decision when difficult and unsettled questions of state law must be resolved before substantial federal constitutional question can be decided. U.S.C.A. Const.Amends. 5, 14; HRS § 516-1 et seq.

[5] Federal Courts 170B ⚿47.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk47.1 k. In General. Most Cited Cases
(Formerly 170Bk47)
Where only the parallel requirement in Hawaii State Constitution that a taking be for a public use was at issue in challenge to constitutionality of Hawaii Land Reform Act of 1967, which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce concentration of land ownership, abstention was not required under *Pullman*-abstention doctrine, under which federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 20; HRS § 516-1 et seq.

[6] Federal Courts 170B ⚿42

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk42 k. Federal-State Relations in General. Most Cited Cases
(Formerly 106k508(1))
Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests.

[7] Federal Courts 170B ⚿42

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk42 k. Federal-State Relations in General. Most Cited Cases
(Formerly 106k508(1))
Younger-abstention is required only when state court proceedings are initiated before any proceedings of substance on the merits have taken place in the federal court.

[8] Courts 106 ⚿508(5)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court

106k508(2) Restraining Particular Proceedings

106k508(5) k. Condemnation Proceedings. Most Cited Cases

Federal district court was not required to abstain under *Younger*-abstention doctrine, which counsels abstention from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests, from deciding suit challenging constitutionality of Hawaii Land Reform Act of 1967, which created land condemnation scheme whereby title and real property is taken from lessors and transferred to lessees in order to reduce concentration of land ownership, where, by virtue of issuance of preliminary injunction before Hawaii Housing Authority filed its first state eminent domain suit in state court, state judicial proceedings, which, under terms of Act, do not include any administrative proceedings conducted before federal suit was filed, had not been initiated at time proceedings of substance took place in federal district court. U.S.C.A. Const.Amends. 5, 14; HRS §§ 516-1 et seq., 516-51(b).

[9] Courts 106 ⇐508(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(1) k. In General. Most Cited Cases

A federal court action in which a preliminary injunction is granted has proceeded well beyond the "embryonic stage" at that point, and considerations of economy, equity, and federalism would then counsel against abstention under *Younger*-abstention doctrine, which requires abstention from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests.

[10] Eminent Domain 148 ⇐13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

"Public use" requirement of Fifth Amendment for taking of private property is coterminous with scope of a sovereign's police powers. U.S.C.A. Const.Amend. 5.

[11] Eminent Domain 148 ⇐17

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k17 k. In General. Most Cited Cases

Hawaii Land Reform Act of 1967, which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce concentration of land ownership, does not violate "public use" requirement of the Fifth Amendment for taking of private property in view of facts that regulating oligopoly and evils associated with it is a classic exercise of a state's police powers, and that Act's approach to correcting land oligopoly problem, the redistribution of fees simple, was rational. U.S.C.A. Const.Amends. 5, 14; HRS § 516-1 et seq.

[12] Eminent Domain 148 ⇐17

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k17 k. In General. Most Cited Cases

Redistribution of fees simple to correct deficiencies in market determined by state legislature to be attributable to land oligopoly is a rational exercise of eminent domain power.

[13] Constitutional Law 92 ⇐2663

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2663 k. Application to State and Local Laws and Regulations. Most Cited Cases

(Formerly 92k154(1))

Constitutional Law 92 ⚿2754

92 Constitutional Law
92XXII Obligation of Contract
92XXII(C) Contracts with Non-Governmental Entities
92XXII(C)2 Particular Issues and Applications
92k2754 k. Real Property in General. Most Cited Cases
(Formerly 92k154(1))

Constitutional Law 92 ⚿2755

92 Constitutional Law
92XXII Obligation of Contract
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92k2755 k. Leases in General. Most Cited Cases
(Formerly 92k154(1))

Constitutional Law 92 ⚿4076

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4075 Eminent Domain
92k4076 k. In General. Most Cited Cases
(Formerly 92k281)

Eminent Domain 148 ⚿3

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k3 k. Constitutional and Statutory Provisions. Most Cited Cases
Hawaii Land Reform Act of 1967, which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce concentration of land ownership, does not violate either the due process or the contract clauses of the Constitution. U.S.C.A. Const. Art. 1, § 10, cl. 1; Amends. 5, 14; HRS § 516-1 et seq.

[14] Eminent Domain 148 ⚿61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases
Mere fact that property taken outright by eminent domain is transferred in first instance to private beneficiaries does not condemn that taking as having only a private purpose.

[15] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases
Government does not itself have to use property to legitimate taking; it is only taking's purpose, and not its mechanics, that must pass scrutiny under public use clause of the Fifth Amendment. U.S.C.A. Const.Amend. 5.

[16] Eminent Domain 148 ⚿67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
Fact that a state legislature, and not the Congress, made public use determination for exercise of taking power does not mean that judicial deference is less appropriate. U.S.C.A. Const.Amends. 5, 14.

[17] Eminent Domain 148 ⚿67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to

Validity of Exercise of Power

148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

If a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that taking will serve a public use. U.S.C.A. Const.Amends. 5, 14.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

To reduce the perceived social and economic evils of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act) which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership. Under the Act, lessees living on single-family residential lots within tracts at least five acres in size are entitled to ask appellant Hawaii Housing Authority (HHA) to condemn the property on which they live. When appropriate applications by lessees are filed, the Act authorizes HHA to hold a public hearing to determine whether the State's acquisition of the tract will "effectuate the public purposes" of the Act. If HHA determines that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set by a condemnation trial or by negotiation between lessors and lessees, the former fee owners' "right, title, and interest" in the land, and may then sell the land titles to the applicant lessees. After HHA had held a public hearing on the proposed acquisition of appellees' lands and had found that such acquisition would effectuate the Act's public purposes, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. When these negotiations failed, HHA ordered appellees to submit to compulsory arbitration as provided by the Act. Rather than comply with this order, appellees filed suit in Federal District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The court temporarily restrained the State from proceeding against appellees' estates, but subsequently, while holding**2324 the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, refused to issue a preliminary injunction and ultimately granted partial summary judgment to HHA and private appellants who had intervened, holding *230 the remainder of the Act constitutional under the Public Use Clause of the Fifth Amendment, made applicable to the States under the Fourteenth Amendment. After deciding that the District Court had properly not abstained from exercising its jurisdiction, the Court of Appeals reversed, holding that the Act violates the "public use" requirement of the Fifth Amendment.

Held:

1. The District Court was not required to abstain from exercising its jurisdiction. Pp. 2325-2328.

(a) Abstention under Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, is unnecessary. Pullman abstention is limited to uncertain questions of state law, and here there is no uncertain question of state law, since the Act unambiguously provides that the power to condemn is "for a public use and purpose." Thus, the question, uncomplicated by ambiguous language, is whether the Act on its face is unconstitutional. Pp. 2325-2326.

(b) Nor is abstention required under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669. Younger abstention is required only when state-court proceedings are initiated before any proceedings of substance on the merits have occurred in federal court. Here, state judicial proceedings had not been initiated at the time proceedings of substance took place in the District Court, the District

Court having issued a preliminary injunction before HHA filed its first state eminent domain suit in state court. And the fact that HHA's administrative proceedings occurred before the federal suit was filed did not require abstention, since the Act clearly states that those proceedings are not part of, or are not themselves, a judicial proceeding. Pp. 2326-2329.

2. The Act does not violate the "public use" requirement of the Fifth Amendment. Pp. 2329-2331.

(a) That requirement is coterminous with the scope of a sovereign's police powers. This Court will not substitute its judgment for a legislature's judgment as to what constitutes "public use" unless the use is palpably without reasonable foundation. Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking is not prohibited by the Public Use Clause. Here, regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers, and redistribution of fees simple to reduce such evils is a rational exercise of the eminent domain power. Pp. 2330-2331.

(b) The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under *231 the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate. Pp. 2331-2332.

702 F.2d 788 (CA9 1983), reversed and remanded.

Laurence H. Tribe, Special Deputy Attorney General of Hawaii, argued the cause for appellants. With him on the briefs for appellants in Nos. 83-141 and 83-283 were *Kathleen M. Sullivan* and *David Rosenberg*, Special Deputy Attorneys General, *Tany S. Hong*, Attorney General, *Michael A. Lilly*, First Deputy Attorney General, *Dennis E. W. O'Connor*, *James H. Case*, and *A. Bernard Bays*. *Richard J. Archer* and *Corey Y. S. Park* filed briefs for appellants in No. 83-236.

Clinton R. Ashford argued the cause for appellees. With him on the brief were *E. Barrett Prettyman, Jr.*, *B. Evan Bayh III*, *Rosemary T. Fazio*, *G. Richard Morry*, and *Earl T. Sato*.†

† Briefs of *amici curiae* urging affirmance were filed for the Office of Hawaiian Affairs by *H. K. Bruss Keppeler;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Harold J. Hughes;* and the the Queen Liliuonkalani Trust et al. by *Daniel H. Case.*

William A. Dobrovir and *Joseph D. Gebhardt* filed a brief for the Hou Hawaiians et al. as *amici curiae.*

Justice O'CONNOR delivered the opinion of the Court.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from *232 lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.

**2325 I

A

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned

it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land. See generally Brief for Office of Hawaiian Affairs as Amicus Curiae 3-5.

Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. See Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as Amici Curiae 32. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles. Id., at 32-33. The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

*233 To redress these problems, the legislature decided to compel the large landowners to break up their estates. The legislature considered requiring large landowners to sell lands which they were leasing to homeowners. However, the landowners strongly resisted this scheme, pointing out the significant federal tax liabilities they would incur. Indeed, the landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands. Therefore, to accommodate the needs of both lessors and lessees, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), Haw.Rev.Stat., ch. 516, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple. See Brief for Appellants in Nos. 83-141 and 83-283, pp. 3-4, and nn. 6-8.

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. Haw.Rev.Stat. §§ 516-1(2), (11), 516-22 (1977). When 25 eligible tenants,[FN1] or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. § 516-22. If HHA finds that these public purposes will be served, it is authorized*234 to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees,[FN2] the former **2326 fee owners' full "right, title, and interest" in the land. § 516-25.

FN1. An eligible tenant is one who, among other things, owns a house on the lot, has a bona fide intent to live on the lot or be a resident of the State, shows proof of ability to pay for a fee interest in it, and does not own residential land elsewhere nearby. Haw.Rev.Stat. §§ 516-33(3), (4), (7) (1977).

FN2. See § 516-56 (Supp.1983). In either case, compensation must equal the fair market value of the owner's leased fee interest. § 516-1(14). The adequacy of compensation is not before us.

After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership. HHA is authorized to lend these tenants up to 90% of the purchase price, and it may condition final transfer on a right of first refusal for the first 10 years following sale. §§ 516-30, 516-34, 516-35. If HHA does not sell the lot to the tenant residing there, it may lease the lot or sell it to someone else, provided that public notice has been given. § 516-28. However, HHA may not sell to any one purchaser, or lease to any one tenant, more than one lot, and it may not operate for profit. §§ 516-28, 516-32. In practice, funds to satisfy the condemnation awards have been supplied entirely by lessees. See App. 164. While the Act authorizes HHA to issue bonds and appropriate funds for acquisition, no bonds have issued and HHA has not supplied any funds for condemned lots. See ibid.

B

In April 1977, HHA held a public hearing concerning the proposed acquisition of some of appellees' lands. HHA made the statutorily required finding that acquisition of appellees' lands would effectuate the public purposes of the Act. Then, in October 1978, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. Those negotiations failed, and HHA subsequently ordered appellees to submit to compulsory arbitration.

Rather than comply with the compulsory arbitration order, appellees filed suit, in February 1979, in United States District*235 Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The District Court temporarily restrained the State from proceeding against appellees' estates. Three months later, while declaring the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, FN3 the District Court refused preliminarily to enjoin appellants from conducting the statutory designation and condemnation proceedings. Finally, in December 1979, it granted partial summary judgment to appellants, holding the remaining portion of the Act constitutional under the Public Use Clause. See 483 F.Supp. 62 (Haw.1979). The District Court found that the Act's goals were within the bounds of the State's police powers and that the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith.

FN3. As originally enacted, lessor and lessee had to commence compulsory arbitration if they could not agree on a price for the fee simple title. Statutory formulae were provided for the determination of compensation. The District Court declared both the compulsory arbitration provision and the compensation formulae unconstitutional. No appeal was taken from these rulings, and the Hawaii Legislature subsequently amended the statute to provide only for mandatory negotiation and for advisory compensation formulae. These issues are not before us.

The Court of Appeals for the Ninth Circuit reversed. 702 F.2d 788 (CA9 1983). First, the Court of Appeals decided that the District Court had permissibly chosen not to abstain from the exercise of its jurisdiction. Then, the Court of Appeals determined that the Act could not pass the requisite judicial scrutiny of the Public Use Clause. It found that the transfers contemplated by the Act were unlike those of takings previously held to constitute "public uses" by this Court. The court further determined that the public purposes offered by the Hawaii Legislature were not deserving of judicial deference. The court concluded that the Act was simply "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." Id., at 798. One judge dissented.

*236 On applications of HHA and certain private appellants who had intervened below, this Court noted probable jurisdiction. **2327 464 U.S. 932, 104 S.Ct. 334, 78 L.Ed.2d 304 (1983). We now re-

verse.

II

We begin with the question whether the District Court abused its discretion in not abstaining from the exercise of its jurisdiction. The appellants have suggested as one alternative that perhaps abstention was required under the standards announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). We do not believe that abstention was required.

A

[1][2] In Railroad Comm'n v. Pullman Co., supra, this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies...." Id., 312 U.S., at 500; 61 S.Ct., at 645. However, federal courts need not abstain on Pullman grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" adjudication of the federal constitutional question. See Harman v. Forssenius, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). Pullman abstention is limited to uncertain questions of state law because "[a] bstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976).

In these cases there is no uncertain question of state law. The Act unambiguously provides that "[t]he use of the power ... to condemn ... is for a public use and purpose." Haw.Rev.Stat. § 516-83(a)(12) (1977); see also §§ 516-83(a)(10), (11), (13). There is no other provision of the Act-or, for that matter, of Hawaii law-which would suggest that *237 § 516-83(a)(12) does not mean exactly what it says. Since "the naked question, uncomplicated by [ambiguous language], is whether the Act on its face is unconstitutional," Wisconsin v. Constantineau, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971), abstention from federal jurisdiction is not required.

[3][4][5] The dissenting judge in the Court of Appeals suggested that, perhaps, the state courts could make resolution of the federal constitutional questions unnecessary by their construction of the Act. See 702 F.2d, at 811-812. In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." Zwickler v. Koota, 389 U.S. 241, 251, and n. 14, 88 S.Ct. 391, 397, and n. 14, 19 L.Ed.2d 444 (1967). These statutes are not of an uncertain nature and have no reasonable limiting construction. Therefore, Pullman abstention is unnecessary.[FN4]

FN4. The dissenting judge's suggestion that Pullman abstention was required because interpretation of the State Constitution may have obviated resolution of the federal constitutional question is equally faulty. Hawaii's Constitution has only a parallel requirement that a taking be for a public use. See Haw. Const., Art. I, § 20. The Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions. See Examining Board v. Flores de Otero, 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976); see also Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

B

[6][7] The dissenting judge also suggested that abstention was required under the standards articulated in Younger v. Harris, supra. Under Younger-abstention doctrine, interests of comity and federalism**2328 counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern *238 important state interests. See Middlesex Ethics Committee v. Garden State Bar Assn., 457 U.S. 423, 432-437, 102 S.Ct. 2515, 2521-2524, 73 L.Ed.2d 116 (1982). Younger abstention is required, however, only when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." Hicks v. Miranda, 422 U.S. 332, 349, 95 S.Ct. 2281, 2291, 45 L.Ed.2d 223 (1975). In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

[8][9] In these cases state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court. Appellees filed their federal court complaint in February 1979, asking for temporary and permanent relief. The District Court temporarily restrained HHA from proceeding against appellees' estates. At that time, no state judicial proceedings were in process. Indeed, in June 1979, when the District Court granted, in part, appellees' motion for a preliminary injunction, state court proceedings still had not been initiated. Rather, HHA filed its first eminent domain lawsuit after the parties had begun filing motions for summary judgment in the District Court in September 1979. Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was. See Doran v. Salem Inn, Inc., 422 U.S. 922, 929-931, 95 S.Ct. 2561, 2566-2567, 45 L.Ed.2d 648 (1975). A federal court action in which a preliminary injunction is granted has proceeded well beyond the "embryonic stage," id., at 929, 95 S.Ct., at 2566, and considerations of economy, equity, and federalism counsel against Younger abstention at that point.

The only extant proceedings at the state level prior to the September 1979 eminent domain lawsuit in state court were HHA's administrative hearings. But the Act clearly states that these administrative proceedings are not part of, and are not themselves, a judicial proceeding, for "mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain." Haw.Rev.Stat. § 516-51(b) (1976). Since Younger is not a *239 bar to federal court action when state judicial proceedings have not themselves commenced, see Middlesex County Ethics Committee v. Garden State Bar Assn., supra, 457 U.S., at 433, 102 S.Ct., at 2522; Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100, 112-113, 102 S.Ct. 177, 184-185, 70 L.Ed.2d 271 (1981), abstention for HHA's administrative proceedings was not required.

III

The majority of the Court of Appeals next determined that the Act violates the "public use" requirement of the Fifth and Fourteenth Amendments. On this argument, however, we find ourselves in agreement with the dissenting judge in the Court of Appeals.

A

[10] The starting point for our analysis of the Act's constitutionality is the Court's decision in Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In Berman, the Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided both for the comprehensive use of the eminent domain power to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests. In discussing whether the takings authorized by that Act were for a "public use," id., at 31, 75 S.Ct., at 101, the Court stated:

"We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of **2329 legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it *240 be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs.... This principle admits of no exception merely because the power of eminent domain is involved...." Id., at 32, 75 S.Ct., at 102 (citations omitted).

The Court explicitly recognized the breadth of the principle it was announcing, noting:
"Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.... Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." Id., at 33, 75 S.Ct., at 102.

The "public use" requirement is thus coterminous with the scope of a sovereign's police powers.

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. Id., at 32, 75 S.Ct., at 102. The Court in Berman cited with approval the Court's decision in Old Dominion Co. v. United States, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The Berman Court also cited to United States ex rel. TVA v. Welch, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843 (1946), which emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view *241 on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937) . See, e.g., Cincinnati v. Vester, 281 U.S. 439, 447, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251-252, 25 S.Ct. 251, 255-256, 49 L.Ed. 462 (1905); Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896). Thus, in Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896), where the "order in question was not, and was not claimed to be, ... a taking of private property for a public use under the right of eminent domain," id., at 416, at 135 (emphasis added), the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be

proscribed by the **2330 Public Use Clause. See Berman v. Parker, supra; Rindge Co. v. Los Angeles, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921); cf. Thompson v. Consolidated Gas Corp., supra (invalidating an uncompensated taking).

[11] On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did,[FN5] to reduce the perceived social and economic evils of a *242 land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); Block v. Hirsh, supra; see also People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (CA1), cert. denied, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946). We cannot disapprove of Hawaii's exercise of this power.

> FN5. After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. See, e.g., Act of May 1779, 10 Henning's Statutes At Large 64, ch. 13, § 6 (1822) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa. Acts 258, ch. 139 (1782) (Pennsylvania statute). Courts have never doubted that such statutes served a public purpose. See, e.g., Wilson v. Iseminger, 185 U.S. 55, 60-61, 22 S.Ct. 573, 574-575, 46 L.Ed. 804 (1902); Stewart v. Gorter, 70 Md. 242, 244-245, 16 A. 644, 645 (1889).

Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signalled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure.

[12][13] Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if ... the ... [state] Legislature rationally could have believed that the [Act] would promote its objective." Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-672, 101 S.Ct. 2070, 2084-2085, 68 L.Ed.2d 514 (1981); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981); Vance v. Bradley, 440 U.S. 93, 112, 99 S.Ct. 939, 950, 59 L.Ed.2d 171 (1979). When the legislature's purpose is legitimate and its *243 means are not irrational, our cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.[FN6]

> FN6. We similarly find no merit in appellees' Due Process and Contract Clause arguments. The argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in New Motor Vehicle Board v.

Fox Co:, 439 U.S. 96, 108-109, 99 S.Ct. 403, 411-412, 58 L.Ed.2d 361 (1978). Similarly, the Contract Clause has never been thought to protect against the exercise of the power of eminent domain. See United States Trust Co. v. New Jersey, 431 U.S. 1, 19, and n. 16, 97 S.Ct. 1505, 1516, and n. 16, 52 L.Ed.2d 92 (1977).

B

The Court of Appeals read our cases to stand for a much narrower proposition. **2331 First, it read our "public use" cases, especially Berman, as requiring that government possess and use property at some point during a taking. Since Hawaiian lessees retain possession of the property for private use throughout the condemnation process, the court found that the Act exacted takings for private use. 702 F.2d, at 796-797. Second, it determined that these cases involved only "the review of ... congressional determination[s] that there was a public use, not the review of ... state legislative determination[s]." Id., at 798 (emphasis in original). Because state legislative determinations are involved in the instant cases, the Court of Appeals decided that more rigorous judicial scrutiny of the public use determinations was appropriate. The court concluded that the Hawaii Legislature's professed purposes were mere "statutory rationalizations." Ibid. We disagree with the Court of Appeals' analysis.

[14][15] The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private *244 purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use." Rindge Co. v. Los Angeles, 262 U.S., at 707, 43 S.Ct., at 692. "[W]hat in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair." Block v. Hirsh, 256 U.S., at 155, 41 S.Ct., at 459. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

[16][17] Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate.[FN7] Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. See Berman v. Parker, 348 U.S., at 32, 75 S.Ct., at 102. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

FN7. It is worth noting that the Fourteenth Amendment does not itself contain an independent "public use" requirement. Rather, that requirement is made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. See Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). It would be ironic to find that state legislation is subject to greater scrutiny under the incorporated "public use" requirement than is congressional legislation under the express mandate of the Fifth Amendment.

*245 IV

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii-a legitimate public purpose. Use of the condemnation power to achieve this purpose is **2332 not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied. Accordingly, we reverse the judgment of the Court of Appeals, and remand these cases for further proceedings in conformity with this opinion.

It is so ordered.

Justice MARSHALL took no part in the consideration or decision of these cases.
U.S.,1984
Hawaii Housing Authority v. Midkiff
467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, 14 Envtl. L. Rep. 20,549

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545 U.S. 469, 125 S.Ct. 2655, 60 ERC 1769, 162 L.Ed.2d 439, 73 USLW 4552, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437, 10 A.L.R. Fed. 2d 733
(Cite as: 545 U.S. 469, 125 S.Ct. 2655)

Supreme Court of the United States
Susette KELO, et al., Petitioners,
v.
CITY OF NEW LONDON, CONNECTICUT, et al.
No. 04-108.

Argued Feb. 22, 2005.
Decided June 23, 2005. Rehearing Denied Aug. 22, 2005. See 545 U.S. 1158, 126 S.Ct. 24.

Background: Owners of condemned property challenged city's exercise of eminent domain power on ground takings were not for public use. The Superior Court, Judicial District of New London, Corradino, J., granted partial relief for owners, and cross-appeals were taken. The Supreme Court, Norcott, J., 268 Conn. 1, 843 A.2d 500, upheld takings. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement.

Affirmed.

Justice Kennedy concurred and filed opinion.

Justice O'Connor dissented and filed opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.

Justice Thomas dissented and filed opinion.

West Headnotes

[1] Eminent Domain 148 ⇐61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases
Sovereign may not use its eminent domain power to take property of one private party for sole purpose of transferring it to another private party, even if first party is paid just compensation. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain 148 ⇐13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases
State may use its eminent domain power to transfer property from one private party to another if purpose of taking is future use by public. U.S.C.A. Const.Amend. 5.

[3] Eminent Domain 148 ⇐18.5

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k18.5 k. Urban Renewal; Blight. Most Cited Cases
City's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement, even though city was not planning to open condemned land to use by general public, where plan served public purpose. U.S.C.A. Const.Amend. 5.

[4] Eminent Domain 148 ⇐13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Eminent Domain 148 ⇐67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power

148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
Court defines "public purpose," needed to justify exercise of eminent domain power, broadly, reflecting longstanding policy of judicial deference to legislative judgments in this field. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain 148 ⇐18.5

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k18.5 k. Urban Renewal; Blight. Most Cited Cases
Economic development can qualify as "public use," for eminent domain purposes. U.S.C.A. Const. Amend. 5.

[6] Eminent Domain 148 ⇐65.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k65.1 k. In General. Most Cited Cases
No heightened standard of review is warranted when public purpose allegedly justifying use of eminent domain power is economic development.

[7] Eminent Domain 148 ⇐67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
Once court decides question of whether exercise of eminent domain power is for public purpose, amount and character of land to be taken for project and need for particular tract to complete integrated plan rests in discretion of legislative branch.

2656 *469 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia,* that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of some of the properties, but **2657 denying relief as to others. Relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, and *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held: The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 2661-2669.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, *e.g., Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid.* Moreover, while the city is not planning to open the condemned land-at least not in its entirety-to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the ... public." *Id.,* at 244, 104 S.Ct. 2321. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g., Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed.

369. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power. *Berman,* 348 U.S. 26, 75 S.Ct. 98; *Midkiff,* 467 U.S. 229, 104 S.Ct. 2321; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815. Pp. 2661-2664.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, *470 but not limited to, new jobs and increased tax revenue. As with other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. Pp. 2664-2665.

(c) Petitioners' proposal that the Court adopt a new bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long-accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, *e.g., Berman,* 348 U.S., at 33, 75 S.Ct. 98. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue: Such a rule would represent an even greater departure from the Court's precedent. *E.g., Midkiff,* 467 U.S., at 242, 104 S.Ct. 2321. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before**2658 new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman,* 348 U.S., at 35-36, 75 S.Ct. 98. Pp. 2665-2669.

268 Conn. 1, 843 A.2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 2669. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post,* p. 2671. THOMAS, J., filed a dissenting opinion, *post,* p. 2677.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUTInstitute for Justice, William H. Mellor, Scott G. Bullock, Counsel of Record, Dana Berliner, Steven Simpson, Washington, DC, Sawyer Law Firm, LLC, Scott W. Sawyer, New London, CT, Counsel for Petitioners.

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For U.S. Supreme Court briefs, see:2004 WL 2811059 (Pet.Brief)2005 WL 429976 (Resp.Brief)2005 WL 353691 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

*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." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[FN1]

FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

*473 I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. 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 **2659 particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[FN2] Upon obtaining state-level approval, the NLDC *474 finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

FN2. Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of Policy and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See App. 89-95.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A ped-

estrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create *475 leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See **2660Conn. Gen.Stat. § 8- 188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[FN3]

FN3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull-4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located*476 in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343-350.[FN4]

FN4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A.2d 500, 509-510, 540 (2004).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen.Stat. § 8-186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.,* at 82-84, 843 A.2d, at 552-553, and, second, whether the takings were for "reasonably**2661 foreseeable needs," *id.,* at 93-94, 843 A.2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently *477 definite and had been given "reasonable attention" during the planning process. *Id.,* at 120-121, 843 A.2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.,* at 144, 146, 843 A.2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U.S. 965, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004).

III

[1][2] Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

[3] As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *478*Missouri Pacific R. Co. v. Nebraska,* 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896).[FN5] Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A.2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.[FN6] Therefore, as was true of the statute**2662 challenged in *Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321, the City's development plan was not adopted "to benefit a particular

class of identifiable individuals."

> FN5. See also *Calder v. Bull,* 3 Dall. 386, 388, 1 L.Ed. 648 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.... A few instances will suffice to explain what I mean.... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them" (emphasis deleted)).

> FN6. See 268 Conn., at 159, 843 A.2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"). And while the City intends to transfer certain of the parcels to a private developer in a long-term lease-which developer, in turn, is expected to lease the office space and so forth to other private tenants-the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.

On the other hand, this is not a case in which the City is planning to open the condemned land-at least not in its entirety-to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers.*479 But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.,* at 244, 104 S.Ct. 2321. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.,* what proportion of the public need have access to the property? at what price?),[FN7] but it proved to be impractical given the diverse and always evolving needs of society.[FN8] Accordingly, *480 when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g., Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a **2663 universal test." *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906).[FN9] We have repeatedly and consistently rejected that narrow test ever since.[FN10]

> FN7. See, *e.g., Dayton Gold & Silver Mining Co. v. Seawell,* 11 Nev. 394, 410, 1876 WL 4573, *11 (1876) ("If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed com-

pensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad").

FN8. From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely. See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L.Rev. 615, 619-624 (1940) (tracing this development and collecting cases). For example, in rejecting the "use by the public" test as overly restrictive, the Nevada Supreme Court stressed that "[m]ining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valleys could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. .... The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." *Dayton Gold & Silver Mining Co.*, 11 Nev., at 409-410, 1876 WL, at *11

FN9. See also *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (upholding a statute that authorized the owner of arid land to widen a ditch on his neighbor's property so as to permit a nearby stream to irrigate his land).

FN10. See, *e.g.*, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916) ("The inadequacy of use by the general public as a universal test is established"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-1015, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public").

[4] The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

*481 The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. *Id.*, at 31, 75 S.Ct. 98. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. *Id.*, at 34, 75

S.Ct. 98. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building." *Id.*, at 35, 75 S.Ct. 98. The public use underlying the taking was unequivocally affirmed:

> "We do not sit to determine whether a particular housing project is or is not desirable. 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.*, at 33, 75 S.Ct. 98.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A *482 and **2664 transfer it to B solely for B's private use and benefit." *Id.*, at 235, 104 S.Ct. 2321 (internal quotation marks omitted). Reaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S., at 241-242, 104 S.Ct. 2321. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.*, at 244, 104 S.Ct. 2321.

In that same Term we decided another public use case that arose in a purely economic context. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, *id.*, at 1014, 104 S.Ct. 2862, but we nevertheless upheld the statute under *Berman* and *Midkiff*. We found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition. 467 U.S., at 1015, 104 S.Ct. 2862.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) *483 noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people").[FN11] For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the

takings power.

FN11. See also *Clark,* 198 U.S., at 367-368, 25 S.Ct. 676; *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906) ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong"); *O'Neill v. Leamer,* 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915) ("States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect").

IV

Those who govern the City were not confronted with the need to remove blight **2665 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 City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including but by no means limited to new jobs and increased tax revenue. As with other exercises in urban planning and development,[FN12] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate*484 this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

FN12. Cf. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[5] To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting 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 that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, *e.g., Strickley,* 200 U.S. 527, 26 S.Ct. 301; in *Berman,* we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33, 75 S.Ct. 98;[FN13] in *Midkiff,* *485 we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market;" 467 U.S., at 242, 104 S.Ct. 2321; and in *Monsanto,* we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U.S., at 1014-1015, 104 S.Ct. 2862. It would be incongru-

ous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic **2666 development from our traditionally broad understanding of public purpose.

FN13. It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. See Reply Brief for Petitioners 8. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U.S., at 34-35, 75 S.Ct. 98 ("It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums.... The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff's nonblighted department store.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff,* the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto,* we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U.S., at 1014, 104 S.Ct. 2862. FN14 The owner of the department store in *486 *Berman* objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, 75 S.Ct. 98, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. FN15 Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.,* at 33-34, 75 S.Ct. 98. FN16

FN14. Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties. See, *e.g., National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (provision of legal services to the poor is a valid public purpose). It is worth noting that in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), *Monsanto,* and *Boston & Maine Corp.,* the property in question retained the same use even after the change of ownership.

FN15. Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to

carry out the redevelopment plan. See 348 U.S., at 30, 75 S.Ct. 98.

FN16. Nor do our cases support Justice O'CONNOR's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." *Post,* at 2675 (dissenting opinion). There was nothing "harmful" about the nonblighted department store at issue in *Berman,* 348 U.S. 26, 75 S.Ct. 98; see also n. 13, *supra;* nothing "harmful" about the lands at issue in the mining and agriculture cases, see, *e.g., Strickley,* 200 U.S. 527, 26 S.Ct. 301; see also nn. 9, 11, *supra;* and certainly nothing "harmful" about the trade secrets owned by the pesticide manufacturers in *Monsanto,* 467 U.S. 986, 104 S.Ct. 2862. In each case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. See U.S. Const., Amdt. 5. ("[N]or shall private property be taken for public use, without just compensation"). Justice O'CONNOR's intimation that a "public purpose" may not be achieved by the action of private parties, see *post,* at 2675, confuses the *purpose* of a taking with its *mechanics,* a mistake we warned of in *Midkiff,* 467 U.S., at 244, 104 S.Ct. 2321. See also *Berman,* 348 U.S., at 33-34, 75 S.Ct. 98 ("The public end may be as well or better served through an agency of private enterprise than through a department of government").

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to *487 citizen *B* for the sole reason that citizen *B* will put the property to a more productive**2667 use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot,[FN17] the hypothetical cases posited by petitioners can be confronted if and when they arise.[FN18] They do not warrant the crafting of an artificial restriction on the concept of public use.[FN19]

FN17. Courts have viewed such aberrations with a skeptical eye. See, *e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F.Supp.2d 1123 (C.D.Cal.2001); cf. *Cincinnati v. Vester,* 281 U.S. 439, 448, 50 S.Ct. 360, 74 L.Ed. 950 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation). These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) *(per curiam).*

FN18. Cf. *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits").

FN19. A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Speaking of the takings power, Justice Iredell observed that "[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power,-such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by

> the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutory confidence." *Calder,* 3 Dall., at 400, 1 L.Ed. 648 (opinion concurring in result).

[6] Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from *488 our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts." *Midkiff,* 467 U.S., at 242-243, 104 S.Ct. 2321. [FN20] Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 544, 125 S.Ct. 2074, 2085, 161 L.Ed.2d 876 (2005) (noting that this formula "would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). The disadvantages of a **2668 heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

FN20. See also *Boston & Maine Corp.,* 503 U.S., at 422-423, 112 S.Ct. 1394 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives"); *Monsanto,* 467 U.S., at 1015, n. 18, 104 S.Ct. 2862 ("Monsanto argues that EPA and, by implication, Congress, misapprehended the true 'barriers to entry' in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry.... Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective").

[7] Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what *489 lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman,* 348 U.S., at 35-36, 75 S.Ct. 98.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. [FN21] We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitu-

tional law,[FN22] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.[FN23] As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.[FN24] This Court's authority, *490 however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

FN21. The *amici* raise questions about the fairness of the measure of just compensation. See, *e.g.*, Brief for American Planning Association et al. as *Amici Curiae* 26-30. While important, these questions are not before us in this litigation.

FN22. See, *e.g.*, *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

FN23. Under California law, for instance, a city may only take land for economic development purposes in blighted areas. Cal. Health & Safety Code Ann. §§ 33030-33037 (West 1999). See, *e.g.*, *Redevelopment Agency of Chula Vista v. Rados Bros.*, 95 Cal.App.4th 309, 115 Cal.Rptr.2d 234 (2002).

FN24. For example, some argue that the need for eminent domain has been greatly exaggerated because private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable projects. See Brief for Jane Jacobs as *Amicus Curiae* 13-15; see also Brief for John Norquist as *Amicus Curiae*. Others argue to the contrary, urging that the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly. See Brief for Connecticut Conference of Municipalities et al. as *Amici Curiae* 13, 21; see also Brief for National League of Cities et al. as *Amici Curiae*.

**2669 The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); see also *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, *e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

*491 A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection

Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-536, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). As the trial court in this case was correct to observe: "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose-economic advantage to a city sorely in need of it-is only incidental to the benefits that will be confined on private parties of a development plan." App. to Pet. for Cert. 263. See also *ante*, at 2661-2662.

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to ... the developer [*i.e.*, Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e.g.*, Pfizer], and in that regard, only of incidental benefit to the city." App. to Pet. for Cert. 261. The trial court considered testimony from government officials and corporate officers, *id.*, at 266-271; documentary evidence of communications between these parties, *ibid.*; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, *id.*, at 272-273, 278-279; the substantial commitment of public *492 funds by the State to the development project before most of the private beneficiaries were known, *id.*, at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, *id.*, at **2670 273, 278; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, *id.*, at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." *Id.*, at 276. Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." *Id.*, at 278. See also *ante*, at 2661-2662. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A.2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause.

Petitioners and their *amici* argue that any taking justified by the promotion of economic development must be treated by the courts as *per se* invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

*493 My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might

be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 549-550, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimis.* The identities of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private **2671 purpose, no such circumstances are present in this case.

* * *

For the foregoing reasons, I join in the Court's opinion.

*494 Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ....[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull,* 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded-*i.e.,* given to an owner who will use it in a way that the legislature deems more beneficial to the public-in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property-and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with *495 his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. to Pet. for Cert. 5..

Petitioners own properties in two of the plan's seven parcels-Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) **2672 though the homes of three plaintiffs in that parcel are to be demolished. Parcel 4A is slated, mysteriously, for " 'park support.' " *Id.,* at 345-346. At oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. Tr. of Oral Arg. 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not holdouts; they do not seek increased compensation, and *496 none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. United States,* 302 U.S. 583, 588, 58 S.Ct. 395, 82 L.Ed. 439 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "[T]he taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1911). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power-particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

*497 While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one indi-

vidual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893); see also *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 336, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("The concepts of 'fairness and justice' ... underlie the Takings Clause").

**2673 Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati v. Vester,* 281 U.S. 439, 446, 50 S.Ct. 360, 74 L.Ed. 950 (1930) ("It is well established that ... the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership-such as for a road, a hospital, or a military base. See, *e.g.,* *498*Old Dominion Land Co. v. United States,* 269 U.S. 55, 46 S.Ct. 39, 70 L.Ed. 162 (1925); *Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use-such as with a railroad, a public utility, or a stadium. See, *e.g., National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e.g., Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman,* we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U.S., at 30, 75 S.Ct. 98. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." *Id.,* at 34, 75 S.Ct. 98. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. *Id.,* at 28, 75 S.Ct. 98 (internal quotation marks omitted). Mr. Berman's department store was not itself blighted. Having approved *499 of Congress' decision to eliminate the harm to the public emanating from the blighted

neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. *Id.*, at 34-35, 75 S.Ct. 98; see also *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321 ("[I]t is only the taking's purpose, **2674 and not its mechanics, that must pass scrutiny").

In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232, 104 S.Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' " 'deciding on what is and is not a governmental function and ... invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' " *Id.*, at 240-241, 104 S.Ct. 2321 (quoting *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946)); see *Berman, supra*, at 32, 75 S.Ct. 98 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. *Midkiff, supra*, at 242, 104 S.Ct. 2321; *Berman, supra*, at 33, 75 S.Ct. 98.

*500 Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321; *id.*, at 241, 104 S.Ct. 2321 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid' " (quoting *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed. 510 (1937))); see also *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use ... [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff, supra*, at 240, 104 S.Ct. 2321 (quoting *Berman, supra*, at 32, 75 S.Ct. 98).

The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society-in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman, supra*, at 28-29, 75 S.Ct. 98; *Midkiff, supra*, at 232, 104 S.Ct. 2321. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in **2675 contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make

way for an apartment building, or any church *501 that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, 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 esthetic 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, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32, 75 S.Ct. 98. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33, 75 S.Ct. 98. Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240, 104 S.Ct. 2321. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is *502 constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee-without detailing how courts are to conduct that complicated inquiry. *Ante,* at 2661-2662. For his part, Justice KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take-without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. *Ante,* at 2669-2670 (concurring opinion). Whatever the details of Justice KENNEDY's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1025-1026, n. 12, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised **2676 public gains in taxes and jobs. See App. to Pet. for Cert. 275-277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given

condemnation, the effect is the same *503 from the constitutional perspective-private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade-not downgrade-property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See *Lingle,* 544 U.S. 528, 125 S.Ct. 2074. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. 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. Cf. *Bugryn v. Bristol,* 63 Conn.App. 98, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); *99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F.Supp.2d 1123 (C.D.Cal.2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council v. Detroit,* 410 Mich. 616, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne v. Hathcock,* 471 Mich. 445, 684 N.W.2d 765 (2004); Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 4-11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on facts peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent domain*504 for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even esthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, *e.g., ante,* at 2667 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). Justice KENNEDY, too, takes great comfort in these facts. *Ante,* at 2670 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose **2677 only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. *Ante,* at 2668. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action; no less) is not among them.

* * *

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown,* "[n]ow that we have authorized local le-

gislative *505 bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644-645, 304 N.W.2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." *Id.,* at 645, 304 N.W.2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own.*" For the National Gazette, Property (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds.1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. *506 Defying this understanding, the Court replaces the Public Use Clause with a " '[P]ublic [P]urpose' " Clause, *ante,* at 2662-2663 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, *ante,* at 2662 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," *ante,* at 2667 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague **2678 promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'CONNOR powerfully argues in dissent. *Ante,* at 2671, 2675-2677. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any *507 criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard v. United States,* 544 U.S. 13, 28, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power-for public or private uses-then it would be surplusage. See *ante,* at 2672 (O'CONNOR, J., dissenting); see also *Marbury v. Madison,* 1 Cranch 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers v. United States,* 272 U.S. 52, 151, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole v. La Grange,* 113 U.S. 1, 8, 5 S.Ct. 416, 28 L.Ed. 896 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of **2679 compensation.*508 This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); For the National Gazette, Property (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds.1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). FN1 The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

FN1. Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1056-1057, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited uncompensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.,* at 1028, n. 15, 112 S.Ct. 2886.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the Latin *utor,* which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that

might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually *509 "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L.Rev. 877, 897 (hereinafter Public Use Limitations). Article I, § 10, provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8, grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). **2680 The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L.J. 339, 367-368 (1999) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, *510 the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation) with 3 *id.*, at 216 (noting action to remedy "*public* ... nuisances, which affect the public, and are an annoyance to *all* the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great ... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing]

property from A. and *511 giv[ing] it to B." *Calder v. Bull,* 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also *Wilkinson v. Leland,* 2 Pet. 627, 658, 7 L.Ed. 542 (1829); *Vanhorne's Lessee v. Dorrance,* 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa.1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl v. United States,* 91 U.S. 367, 371-372, 23 L.Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise **2681 of Congress' enumerated powers, *Sabri v. United States,* 541 U.S. 600, 613, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, *Gonzales v. Raich, ante,* 545 U.S., at 65, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra,* at 2678. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice *512 concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 599-600, and nn. 3-4 (1949); *Barron ex rel. Tiernan v. Mayor of Baltimore,* 7 Pet. 243, 250-251, 8 L.Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, *e.g., id.,* § 178, at 245-246; *Head v. Amoskeag Mfg. Co.,* 113 U.S. 9, 16-19, and n. 2, 5 S.Ct. 441, 28 L.Ed. 889 (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head, supra,* at 18-19, 5 S.Ct. 441. They were common carriers-quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903 (common-carrier status traditionally afforded to "private beneficiar-

ies of a state franchise*513 or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.*, § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-**2682 carrier duties. See, *e.g.*, M. Horwitz, The Transformation of American Law 1780-1860, pp. 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see, *e.g., ante,* at 2662, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* 6-7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." [FN2] As noted above, *514 the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 370, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'être of chartered associations was their service to the public," Horwitz, *supra,* at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

FN2. Compare *ante,* at 2662, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the " 'use by the public' test" "eroded over time"), with, *e.g., Ryerson v. Brown,* 35 Mich. 333, 338-339 (1877) (holding it "essential" to the constitutionality of a Mill Act "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations"); *Gaylord v. Sanitary Dist. of Chicago,* 204 Ill. 576, 581-584, 68 N.E. 522, 524 (1903) (same); *Tyler v. Beacher,* 44 Vt. 648, 652-656 (1871) (same); *Sadler v. Langham,* 34 Ala. 311, 332-334 (1859) (striking down taking for purely private road and grist mill); *Varner v. Martin,* 21 W.Va. 534, 546-548, 556-557, 566-567 (1883) (grist mill and private road had to be open to public for them to constitute public use); *Harding v. Goodlett,* 11 Tenn. 41, 3 Yer. 41, 53 (1832); *Jacobs v. Clearview Water Supply Co.,* 220 Pa. 388, 393-395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co. v. Koochiching Co.,* 97 Minn. 429, 449-451, 107 N.W. 405, 413 (1906) (same); *Chesapeake Stone Co. v. Moreland,* 126 Ky. 656, 663-667, 104 S.W. 762, 765 (1907) (same); Note, Public Use in Eminent Domain, 21 N.Y.U.L.Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante,* at 2662-2664. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential *515 conception of "public use" adopted by this Court in *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and **2683*Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), cases that take center stage in the Court's opinion. See *ante,* 2663-2664. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff,* fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 161-162, 17 S.Ct. 56, 41 L.Ed. 369 (1896). *Ante,* at 2662-2663. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 17 S.Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Ibid.* That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.,* at 162, 17 S.Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public-those who owned lands irrigated by the ditch-had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.,* at 158, 17 S.Ct. 56; *supra,* at 2682, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general*516 scheme of irrigation can be formed or carried into effect." *Bradley, supra,* at 160-161, 17 S.Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante,* at 2662, the Constitution does not embody those policy preferences any more than it "enact [s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York,* 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting); but see *id.,* at 58-62, 25 S.Ct. 539 (Peckham, J., for the Court).

This Court's cases followed *Bradley's* test with little analysis. In *Clark v. Nash,* 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U.S., at 369-370, 25 S.Ct. 676. As in *Bradley,* use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error ... might share," 198 U.S., at 370, 25 S.Ct. 676, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley v. Highland Boy Gold*

Mining Co., 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark,* see **2684*Strickley, supra,* at 531, 26 S.Ct. 301. This case, too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 26 S.Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.,* at 531, 26 S.Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation. See, *517 *e.g., Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 707, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Block v. Hirsh,* 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.,* 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *O'Neill v. Leamer,* 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co.,* 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.,* at 679-680, 16 S.Ct. 427. Since the Federal Government was to use the lands in question, *id.,* at 682, 16 S.Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.,* at 680, 16 S.Ct. 427. As it had with the "public purpose" dictum in *Bradley,* the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e.g., United States ex rel. TVA v. Welch,* 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *Old Dominion Land Co. v. United States,* 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925).

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely *518 among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e.g., Payton v. New York,* 445 U.S. 573, 589-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e.g., Castle Rock v. Gonzales, post,* 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658, 2005 WL 1499788 (2005); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e.g., Goldberg, supra,* **2685* while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional

rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton, supra,* at 601, 100 S.Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante,* at 2668, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante,* at 2661, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

*519 C

These two misguided lines of precedent converged in *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 75 S.Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. *Id.,* at 31, 34, 75 S.Ct. 98. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.,* at 33, 75 S.Ct. 98. But the very point of the Public Use Clause is to limit that power. See *supra,* at 2679.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff, supra,* at 240, 104 S.Ct. 2321 ("The 'public use' requirement is ... coterminous with the scope of a sovereign's police powers"); *Berman, supra,* at 32, 75 S.Ct. 98. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas,* 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra,* at 2679, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, *e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *520*Mugler, supra,* at 668-669, 8 S.Ct. 273. In *Berman,* for example, if the slums at issue were truly "blighted," then state nuisance law, see, *e.g., supra,* at 2680; *Lucas, supra,* at 1029, 112 S.Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap**2686 with the States' police power conflates these two categories. FN3

FN3. Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i.e.,* long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, The Quest for Tenure in the United States, 33 Yale L.J. 248, 256-257, 260-263 (1923). In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court cited those state policies favoring the alienability of land as evid-

> ence that the government's eminent domain power was similarly expansive, see *id.*, at 241-242, and n. 5, 104 S.Ct. 2321. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff.* This mismatch underscores the error of conflating a State's regulatory power with its taking power.

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience ... we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & Hudson R. Co.,* 18 Wend. 9, 60-61 (N.Y.1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use-at least, none beyond Justice O'CONNOR's (entirely proper) appeal to the text of the Constitution itself. See *ante,* at 2671, 2675-2677 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante,* at 2666-2668. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. *521 *Ante,* at 2661-2662. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante,* at 2675-2676 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante,* at 2662. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"-unless the Court means to eliminate public use scrutiny of takings entirely. *Ante,* at 2661-2662, 2667-2668. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

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 **2687 communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *522*United States v. Carolene Products Co.,* 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), 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. *Ante,* at 2677 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In

the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman,* cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.,* at 28, 75 S.Ct. 98. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.,* at 28-29, 75 S.Ct. 98. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.' " Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30, 75 S.Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

*523 * * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante,* at 2662-2664. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra,* at 2683. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

U.S.Conn.,2005.
Kelo v. City of New London, Conn.
545 U.S. 469, 125 S.Ct. 2655, 60 ERC 1769, 162 L.Ed.2d 439, 73 USLW 4552, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437, 10 A.L.R. Fed. 2d 733

END OF DOCUMENT

Federal Register

Wednesday,
June 28, 2006

Part VII

The President

Federal Register
Vol. 71, No. 124
Wednesday, June 28, 2006

Presidential Documents

Title 3—

The President

Executive Order 13406 of June 23, 2006

Protecting the Property Rights of the American People

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen the rights of the American people against the taking of their private property, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.

Sec. 2. *Implementation.* (a) The Attorney General shall:

(i) issue instructions to the heads of departments and agencies to implement the policy set forth in section 1 of this order; and

(ii) monitor takings by departments and agencies for compliance with the policy set forth in section 1 of this order.

(b) Heads of departments and agencies shall, to the extent permitted by law:

(i) comply with instructions issued under subsection (a)(i); and

(ii) provide to the Attorney General such information as the Attorney General determines necessary to carry out subsection (a)(ii).

Sec. 3. *Specific Exclusions.* Nothing in this order shall be construed to prohibit a taking of private property by the Federal Government, that otherwise complies with applicable law, for the purpose of:

(a) public ownership or exclusive use of the property by the public, such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation;

(b) projects designated for public, common carrier, public transportation, or public utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity;

(c) conveying the property to a nongovernmental entity, such as a telecommunications or transportation common carrier, that makes the property available for use by the general public as of right;

(d) preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment;

(e) acquiring abandoned property;

(f) quieting title to real property;

(g) acquiring ownership or use by a public utility;

(h) facilitating the disposal or exchange of Federal property; or

(i) meeting military, law enforcement, public safety, public transportation, or public health emergencies.

Sec. 4. *General Provisions.* (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

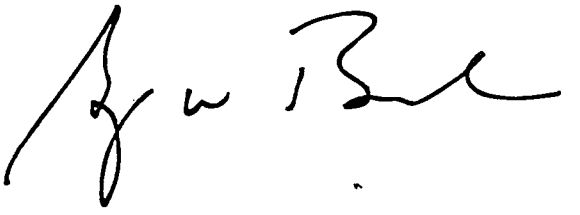
(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(c) This order shall be implemented in a manner consistent with Executive Order 12630 of March 15, 1988.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.



THE WHITE HOUSE,
June 23, 2006.

[FR Doc. 06–5828
Filed 6–27–06; 8:45 am]
Billing code 3195–01–P

Congressional Activities:

Proposed Bills and Resolutions, and Hearings and Testimony

- Sept. 20, 2005 Statement of Mr. Hilary O. Shelton, Director, NAACP Washington Bureau, Before the Senate Judiciary Committee, "The *Kelo* Decision: Investigating Takings of Homes and other Private Property"

- Proposed Bill: H.R. 1433, Private Property Rights Protection Act of 2011, introduced April 12, 2011

- Hearing: Private Property Rights Protection Act of 2011: Hearing on H.R. 1433, held April 12, 2011

- Proposed Resolution: H.Res. 329, 112th Congress, introduced June 23, 2011

United States Senate Committee on the Judiciary

< Return To Hearing

Testimony of

Hilary O. Shelton

Director
NAACP Washington Bureau
September 20, 2005

STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR
NAACP WASHINGTON BUREAU
BEFORE THE SENATE JUDICIARY COMMITTEE

"The Kelo Decision: Investigating Takings of Homes and other Private Property"

September 20, 2005

Thank you, Chairman Specter, Ranking Member Leahy and ladies and gentlemen of the panel for inviting me here today to talk about property rights in a post-Kelo world.

My name is Hilary Shelton and I am the Director of the Washington Bureau for the National Association for the Advancement of Colored People, our Nation's oldest, largest and most widely recognized civil rights organization. We currently have more than 2,200 units in every state in our country.

Given our Nation's sorry history of racism, bigotry, and a basic disregard on the part of many elected officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that the NAACP was very disappointed by the Kelo decision. In fact, we were one of several groups to file an Amicus Brief with the Supreme Court in support of the New London, Connecticut homeowners.

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.

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal." The vast disparities of African Americans or other racial or ethnic minorities that have been removed from their homes due to eminent domain actions are well documented.

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles . In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities . In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township and nearly triple that of Burlington County. Lastly, according to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore were African-Americans . For the committee's information, I am attaching to this testimony a document that outlines some of the higher-profile current eminent domain cases involving African Americans.

The motives behind the disparities are varied. Many of the studies I mentioned in the previous paragraph contend that the goal of many of these displacements is to segregate and maintain the isolation of poor, minority and otherwise outcast populations. Furthermore, condemnations in low-income or predominantly minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action either politically or in the courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas with low property values with those with

higher values. Thus, even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the US Supreme Court in Kelo will clearly have a disparate impact on African Americans and other racial and ethnic minorities.

As I said at the beginning of my testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much greater.

First, the term "just compensation", when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for "economic development" almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their neighborhoods and find that they cannot afford to live in the "revitalized" communities; the remaining "affordable" housing in the area is almost certain to become less so. When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out not only by common sense, but also by statistics: one study for the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling .

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates, or at the very least drastically undermines, established community support mechanisms and has a deleterious effect on those groups' ability to exercise that little political power they may have established. In fact, the very threat of such takings will also hinder the development of stronger ethnic and racial minority communities. The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken. Individuals in those areas will thus have even less incentive to engage in community-building for fear that such efforts will be wasted.

In conclusion, allow me to reiterate the concerns of the NAACP that the Kelo decision will prove to be especially harmful to African Americans and other racial and ethnic minority Americans. By allowing pure economic development motives to constitute public use for eminent domain purposes, state and local governments will now infringe on the property rights of those with less economic and political power with more regularity. And, as I have testified today, these groups, low-income Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

Thank you again, Chairman Specter, Ranking Member Leahy and members of the committee, for allowing me to testify before you today about the NAACP position on eminent domain and the post-Kelo landscape. The NAACP stands ready to work with the Congress and state and local municipalities to develop legislation to end eminent domain abuse.

I

112TH CONGRESS
1ST SESSION

H. R. 1433

To protect private property rights.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 2011

Mr. SENSENBRENNER (for himself, Ms. WATERS, Mr. JONES, Mrs. BONO MACK, Mr. DUNCAN of Tennessee, Mr. GRIMM, Mr. WESTMORELAND, Mr. SIMPSON, Mr. SMITH of Texas, Mr. BROUN of Georgia, Mr. THOMPSON of Pennsylvania, Mr. ROSS of Florida, Mr. GOWDY, Mr. GRIFFIN of Arkansas, Mr. FRANKS of Arizona, Mr. COBLE, Mr. GOODLATTE, and Mr. LONG) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect private property rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Protection Act of 2011".

SEC. 2. PROHIBITION ON EMINENT DOMAIN ABUSE BY STATES.

(a) IN GENERAL.—No State or political subdivision of a State shall exercise its power of eminent domain, or

allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is used for economic development within 7 years after that exercise, if that State or political subdivision receives Federal economic development funds during any fiscal year in which the property is so used or intended to be used.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) OPPORTUNITY TO CURE VIOLATION.—A State or political subdivision shall not be ineligible for any Federal economic development funds under subsection (b) if such State or political subdivision returns all real property the taking of which was found by a court of competent juris-

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(a) CAUSE OF ACTION.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may bring an action to enforce any provision of this Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. Any such property owner or tenant may also seek an appropriate

relief through a preliminary injunction or a temporary restraining order.

(b) LIMITATION ON BRINGING ACTION.—An action brought by a property owner or tenant under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of such property owner or tenant, but shall not be brought later than seven years following the conclusion of any such proceedings.

(c) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act, the court shall allow a prevailing plaintiff a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 5. REPORTING OF VIOLATIONS TO ATTORNEY GENERAL.

(a) SUBMISSION OF REPORT TO ATTORNEY GENERAL.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may report a violation by the Federal Govern-

ment, any authority of the Federal Government, State, or political subdivision of a State to the Attorney General.

(b) INVESTIGATION BY ATTORNEY GENERAL.—Upon receiving a report of an alleged violation, the Attorney General shall conduct an investigation to determine whether a violation exists.

(c) NOTIFICATION OF VIOLATION.—If the Attorney General concludes that a violation does exist, then the Attorney General shall notify the Federal Government, authority of the Federal Government, State, or political subdivision of a State that the Attorney General has determined that it is in violation of the Act. The notification shall further provide that the Federal Government, State, or political subdivision of a State has 90 days from the date of the notification to demonstrate to the Attorney General either that (1) it is not in violation of the Act or (2) that it has cured its violation by returning all real property the taking of which the Attorney General finds to have constituted a violation of the Act and replacing any other property destroyed and repairing any other property damaged as a result of such violation.

(d) ATTORNEY GENERAL'S BRINGING OF ACTION TO ENFORCE ACT.—If, at the end of the 90-day period described in subsection (c), the Attorney General determines that the Federal Government, authority of the Federal

Government, State, or political subdivision of a State is still violating the Act or has not cured its violation as described in subsection (c), then the Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act. In such a case, the Attorney General shall intervene if it determines that intervention is necessary in order to enforce the Act. The Attorney General may file its lawsuit to enforce the Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. The Attorney General may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(e) LIMITATION ON BRINGING ACTION.—An action brought by the Attorney General under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of an owner or tenant who reports a violation of the Act to the Attorney General, but

shall not be brought later than seven years following the conclusion of any such proceedings.

(f) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act brought by the Attorney General, the court shall, if the Attorney General is a prevailing plaintiff, award the Attorney General a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 6. NOTIFICATION BY ATTORNEY GENERAL.

(a) NOTIFICATION TO STATES AND POLITICAL SUBDIVISIONS.—

(1) Not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners and tenants under this Act.

(2) Not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet

website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

(b) NOTIFICATION TO PROPERTY OWNERS AND TENANTS.—Not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners and tenants under this Act.

SEC. 7. REPORTS.

(a) BY ATTORNEY GENERAL.—Not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate. The report shall—

(1) identify all private rights of action brought as a result of a State's or political subdivision's violation of this Act;

(2) identify all violations reported by property owners and tenants under section 5(c) of this Act;

(3) identify all lawsuits brought by the Attorney General under section 5(d) of this Act;

(4) identify all States or political subdivisions that have lost Federal economic development funds as a result of a violation of this Act, as well as describe the type and amount of Federal economic development funds lost in each State or political subdivision and the Agency that is responsible for withholding such funds; and

(5) discuss all instances in which a State or political subdivision has cured a violation as described in section 2(c) of this Act.

(b) DUTY OF STATES.—Each State and local authority that is subject to a private right of action under this Act shall have the duty to report to the Attorney General such information with respect to such State and local authorities as the Attorney General needs to make the report required under subsection (a).

SEC. 8. SENSE OF CONGRESS REGARDING RURAL AMERICA.

(a) FINDINGS.—The Congress finds the following:

(1) The founders realized the fundamental importance of property rights when they codified the Takings Clause of the Fifth Amendment to the Constitution, which requires that private property shall not be taken "for public use, without just compensation".

(2) Rural lands are unique in that they are not traditionally considered high tax revenue-generating properties for State and local governments. In addition, farmland and forest land owners need to have long-term certainty regarding their property rights in order to make the investment decisions to commit land to these uses.

(3) Ownership rights in rural land are fundamental building blocks for our Nation's agriculture industry, which continues to be one of the most important economic sectors of our economy.

(4) In the wake of the Supreme Court's decision in Kelo v. City of New London, abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.

(b) SENSE OF CONGRESS.—It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other

property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas. Property rights are central to liberty in this country and to our economy. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. The taking of farmland and rural property will have a direct impact on existing irrigation and reclamation projects. Furthermore, the use of eminent domain to take rural private property for private commercial uses will force increasing numbers of activities from private property onto this Nation's public lands, including its National forests, National parks and wildlife refuges. This increase can overburden the infrastructure of these lands, reducing the enjoyment of such lands for all citizens. Americans should not have to fear the government's taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse.

SEC. 9. DEFINITIONS.

In this Act the following definitions apply:

(1) ECONOMIC DEVELOPMENT.—The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, except that such term shall not include—

(A) conveying private property—

(i) to public ownership, such as for a road, hospital, airport, or military base;

(ii) to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;

(iii) for use as a road or other right of way or means, open to the public for transportation, whether free or by toll; and

(iv) for use as an aqueduct, flood control facility, pipeline, or similar use;

(B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;

(C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;

(D) acquiring abandoned property;

(E) clearing defective chains of title;

(F) taking private property for use by a public utility; and

(G) redeveloping of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601(39)).

(2) FEDERAL ECONOMIC DEVELOPMENT FUNDS.—The term "Federal economic development funds" means any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

SEC. 10. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—The provisions of this Act are severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

(b) EFFECTIVE DATE.—This Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

SEC. 11. SENSE OF CONGRESS.

It is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

SEC. 12. BROAD CONSTRUCTION.

This Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

SEC. 13. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

SEC. 14. RELIGIOUS AND NONPROFIT ORGANIZATIONS.

(a) PROHIBITION ON STATES.—No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) PROHIBITION ON FEDERAL GOVERNMENT.—The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain

over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto.

SEC. 15. REPORT BY FEDERAL AGENCIES ON REGULATIONS AND PROCEDURES RELATING TO EMINENT DOMAIN.

Not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

SEC. 16. SENSE OF CONGRESS.

It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others.

○

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2011

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 1433

APRIL 12, 2011

Serial No. 112–21

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APRIL 12, 2011

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2011

TUESDAY, APRIL 12, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, King, Conyers, and Nadler.

Staff Present: (Majority) Zachary Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Chief of Staff; and Veronica Eligan, Minority Professional Staff Member.

Mr. FRANKS. The Subcommittee will come to order. We want to welcome everyone to the Subcommittee on the Constitution, and particularly the witnesses we have here with us today. I'm going to recognize myself for 5 minutes for an opening statement.

I have called this hearing to examine the continuing need for Federal legislation to blunt the negative impact of the Supreme Court's decision in *Kelo v. City of New London*. That decision permits the use of eminent domain to take property from homeowners and small businesses and transfer it to others for private economic development. In Justice O'Connor's words, the *Kelo* decision pronounced that, quote, "Under the banner of economic development, all private property is now vulnerable to be taken and transferred to another private owner so long as it might be upgraded. Nothing is to prevent a State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."

The *Kelo* decision was resoundingly criticized from across all quarters. The House voted to express grave disapproval of the decision and overwhelmingly passed the private Property Rights Protection Act with 376 Members voting in favor and only 38 Members voting against. Unfortunately, the bill wasn't taken up in the Senate.

The Private Property Rights Protection Act prohibits States and localities that receive Federal economic development funds from using eminent domain to take private property for economic development purposes. States and localities that use eminent domain for private economic development are ineligible under the bill to receive Federal economic development funds for 2 fiscal years. I be-

lieve those protections are as needed today as when they passed the House 6 years ago.

Every day, cities and States in search of more lucrative tax bases take property from homeowners, small businesses, churches and farmers to give it to large corporations for private development or redevelopment.

Let me just give you a few examples. In National City California, a local community center for at-risk youth is currently threatened with condemnation to make way for luxury condominiums. In Brooklyn, New York, 330 residents, 33 businesses and a homeless shelter were threatened with condemnation because a private developer wanted to build a basketball arena and 16 office towers. In Rosa Parks' old community in Montgomery, Alabama, minority homeowners are being forced out of their homes for economic development purposes.

Now, in none of these cases were the homes and buildings blighted or causing harm to the surrounding community. And countless more examples of eminent domain abuse exist today, Unfortunately but predictably, it is usually the most vulnerable who suffer from economic development takings.

As Justice Thomas observed in his dissenting opinion in *Kelo*, "Extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. The deferential standard this Court has adopted for the public use clause encourages those citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak."

Now, I am encouraged that last week Mr. Sensenbrenner and Ms. Waters reintroduced the Private Property Rights Protection Act, which in my judgment will help end the eminent domain abuse ushered in by this *Kelo* decision. We must restore the property rights protections that were erased from the Constitution by the *Kelo* decision. Fortunately, they are not permanently erased. Let us hope.

John Adams wrote over 200 years ago that, "Property must be secured or liberty cannot exist." As long as the specter of condemnation hangs over all property, arbitrary condemnation hanging over all property, our liberty is threatened.

I look forward to the witnesses' testimony and recognize the Ranking Member, Mr. Nadler, for 5 minutes for his opening statement.

[The bill, H.R. 1433, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 1433

To protect private property rights.

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(c) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act, the court shall allow a prevailing plaintiff a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 5. REPORTING OF VIOLATIONS TO ATTORNEY GENERAL.

(a) SUBMISSION OF REPORT TO ATTORNEY GENERAL.—Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may report a violation by the Federal Govern-

ment, any authority of the Federal Government, State, or political subdivision of a State to the Attorney General.

(b) INVESTIGATION BY ATTORNEY GENERAL.—Upon receiving a report of an alleged violation, the Attorney General shall conduct an investigation to determine whether a violation exists.

(c) NOTIFICATION OF VIOLATION.—If the Attorney General concludes that a violation does exist, then the Attorney General shall notify the Federal Government, authority of the Federal Government, State, or political subdivision of a State that the Attorney General has determined that it is in violation of the Act. The notification shall further provide that the Federal Government, State, or political subdivision of a State has 90 days from the date of the notification to demonstrate to the Attorney General either that (1) it is not in violation of the Act or (2) that it has cured its violation by returning all real property the taking of which the Attorney General finds to have constituted a violation of the Act and replacing any other property destroyed and repairing any other property damaged as a result of such violation.

(d) ATTORNEY GENERAL'S BRINGING OF ACTION TO ENFORCE ACT.—If, at the end of the 90-day period described in subsection (c), the Attorney General determines that the Federal Government, authority of the Federal

Government, State, or political subdivision of a State is still violating the Act or has not cured its violation as described in subsection (c), then the Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act. In such a case, the Attorney General shall intervene if it determines that intervention is necessary in order to enforce the Act. The Attorney General may file its lawsuit to enforce the Act in the appropriate Federal or State court. A State shall not be immune under the 11th Amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development. The Attorney General may seek any appropriate relief through a preliminary injunction or a temporary restraining order.

(c) LIMITATION ON BRINGING ACTION.—An action brought by the Attorney General under this Act may be brought if the property is used for economic development following the conclusion of any condemnation proceedings condemning the property of an owner or tenant who reports a violation of the Act to the Attorney General, but

shall not be brought later than seven years following the conclusion of any such proceedings.

(f) ATTORNEYS' FEE AND OTHER COSTS.—In any action or proceeding under this Act brought by the Attorney General, the court shall, if the Attorney General is a prevailing plaintiff, award the Attorney General a reasonable attorneys' fee as part of the costs, and include expert fees as part of the attorneys' fee.

SEC. 6. NOTIFICATION BY ATTORNEY GENERAL.

(a) NOTIFICATION TO STATES AND POLITICAL SUBDIVISIONS.—

(1) Not later than 30 days after the enactment of this Act, the Attorney General shall provide to the chief executive officer of each State the text of this Act and a description of the rights of property owners and tenants under this Act.

(2) Not later than 120 days after the enactment of this Act, the Attorney General shall compile a list of the Federal laws under which Federal economic development funds are distributed. The Attorney General shall compile annual revisions of such list as necessary. Such list and any successive revisions of such list shall be communicated by the Attorney General to the chief executive officer of each State and also made available on the Internet

website maintained by the United States Department of Justice for use by the public and by the authorities in each State and political subdivisions of each State empowered to take private property and convert it to public use subject to just compensation for the taking.

(b) NOTIFICATION TO PROPERTY OWNERS AND TENANTS.—Not later than 30 days after the enactment of this Act, the Attorney General shall publish in the Federal Register and make available on the Internet website maintained by the United States Department of Justice a notice containing the text of this Act and a description of the rights of property owners and tenants under this Act.

SEC. 7. REPORTS.

(a) BY ATTORNEY GENERAL.—Not later than 1 year after the date of enactment of this Act, and every subsequent year thereafter, the Attorney General shall transmit a report identifying States or political subdivisions that have used eminent domain in violation of this Act to the Chairman and Ranking Member of the Committee on the Judiciary of the House of Representatives and to the Chairman and Ranking Member of the Committee on the Judiciary of the Senate. The report shall—

(1) identify all private rights of action brought as a result of a State's or political subdivision's violation of this Act;

(2) identify all violations reported by property owners and tenants under section 5(c) of this Act;

(3) identify all lawsuits brought by the Attorney General under section 5(d) of this Act;

(4) identify all States or political subdivisions that have lost Federal economic development funds as a result of a violation of this Act, as well as describe the type and amount of Federal economic development funds lost in each State or political subdivision and the Agency that is responsible for withholding such funds; and

(5) discuss all instances in which a State or political subdivision has cured a violation as described in section 2(c) of this Act.

(b) DUTY OF STATES.—Each State and local authority that is subject to a private right of action under this Act shall have the duty to report to the Attorney General such information with respect to such State and local authorities as the Attorney General needs to make the report required under subsection (a).

SEC. 8. SENSE OF CONGRESS REGARDING RURAL AMERICA.

(a) FINDINGS.—The Congress finds the following:

(1) The founders realized the fundamental importance of property rights when they codified the Takings Clause of the Fifth Amendment to the Constitution, which requires that private property shall not be taken "for public use, without just compensation".

(2) Rural lands are unique in that they are not traditionally considered high tax revenue-generating properties for State and local governments. In addition, farmland and forest land owners need to have long-term certainty regarding their property rights in order to make the investment decisions to commit land to these uses.

(3) Ownership rights in rural land are fundamental building blocks for our Nation's agriculture industry, which continues to be one of the most important economic sectors of our economy.

(4) In the wake of the Supreme Court's decision in Kelo v. City of New London, abuse of eminent domain is a threat to the property rights of all private property owners, including rural land owners.

(b) SENSE OF CONGRESS.—It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other

property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas. Property rights are central to liberty in this country and to our economy. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. The taking of farmland and rural property will have a direct impact on existing irrigation and reclamation projects. Furthermore, the use of eminent domain to take rural private property for private commercial uses will force increasing numbers of activities from private property onto this Nation's public lands, including its National forests, National parks and wildlife refuges. This increase can overburden the infrastructure of these lands, reducing the enjoyment of such lands for all citizens. Americans should not have to fear the government's taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse.

SEC. 9. DEFINITIONS.

In this Act the following definitions apply:

(1) ECONOMIC DEVELOPMENT.—The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, except that such term shall not include—

(A) conveying private property—

(i) to public ownership, such as for a road, hospital, airport, or military base;

(ii) to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;

(iii) for use as a road or other right of way or means, open to the public for transportation, whether free or by toll; and

(iv) for use as an aqueduct, flood control facility, pipeline, or similar use;

(B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;

(C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;

(D) acquiring abandoned property;

(E) clearing defective chains of title;

(F) taking private property for use by a public utility; and

(G) redeveloping of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601(39)).

(2) FEDERAL ECONOMIC DEVELOPMENT FUNDS.—The term "Federal economic development funds" means any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

SEC. 10. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—The provisions of this Act are severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

(b) EFFECTIVE DATE.—This Act shall take effect upon the first day of the first fiscal year that begins after the date of the enactment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

SEC. 11. SENSE OF CONGRESS.

It is the policy of the United States to encourage, support, and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government.

SEC. 12. BROAD CONSTRUCTION.

This Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

SEC. 13. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

SEC. 14. RELIGIOUS AND NONPROFIT ORGANIZATIONS.

(a) PROHIBITION ON STATES.—No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

(b) INELIGIBILITY FOR FEDERAL FUNDS.—A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated, and any Federal agency charged with distributing those funds shall withhold them for such 2-year period, and any such funds distributed to such State or political subdivision shall be returned or reimbursed by such State or political subdivision to the appropriate Federal agency or authority of the Federal Government, or component thereof.

(c) PROHIBITION ON FEDERAL GOVERNMENT.—The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain

over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto.

SEC. 15. REPORT BY FEDERAL AGENCIES ON REGULATIONS AND PROCEDURES RELATING TO EMINENT DOMAIN.

Not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

SEC. 16. SENSE OF CONGRESS.

It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others.

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Mr. NADLER. Thank you, Mr. Chairman. For once the Supreme Court defers to the elected officials, and Congress cries foul. The power of eminent domain is an extraordinary one and should be used with great care. All too often, it has been used for private gain or to benefit one community at the expense of another. It is, however, an important tool, making possible transportation networks, irrigation projects and other public purposes. To some extent, all of these projects are economic development projects. Members of Congress are always trying to get these projects for our districts and certainly the economic benefit to our constituents is always a consideration.

Has this bill drawn the appropriate line between permissible and impermissible uses of eminent domain? I think that is one of the questions we will really need to consider. We all know the easy cases, as the majority in *Kelo* said, "the city would no doubt be forbidden from taking petitioner's land for the purpose of conferring a private benefit on a particular private party, nor would the city be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit."

Which projects are appropriate and which are not can sometimes be a difficult call. Historically, eminent domain has sometimes been used to destroy communities for projects having nothing to do with economic development, at least as defined in this bill. For instance, highways have cut through urban neighborhoods, destroying them. Some of these communities are in my district and have yet to recover from the wrecking ball. Yet that would still be permitted by this bill. Other projects might have a genuine public purpose and yet be prohibited. The rhyme or reason of this bill is not clear.

I believe, as I did in 2005, that this bill is the wrong approach to a very serious issue. The bill will permit many of the abuses and injustices of the past while crippling the ability of State and local governments to perform genuine public duties. The bill would allow takings for private rights of way, pipelines, transmission lines, railroads, private rights of way. It would allow highways to cut through communities and all the other public projects that have historically fallen most heavily on the poor and powerless would still be permitted.

As Hilary Shelton of the NAACP testified when we last considered this legislation, these projects are just as burdensome as projects that include private development as part of them. The bill still allows the taking to give property to a private party, quote, "such as a common carrier that makes the property available for use by the general public as its right," closed quote. Does that mean the stadium? The stadium is privately owned. It is available for use by the general public as a right, at least as much as a railroad. You can buy a seat. Is it a shopping center? You don't even need a ticket. The World Trade Center could not have been built under this law. It was publicly owned but was predominantly leased for office space and retail. Neither could Lincoln Center have been built under this bill. Affordable housing like the HOPE VI and the fabled Nehemiah Program, a faith-based, affordable housing program in Brooklyn, could never have gone forward. Since 2005, there have been new developments that call into question whether Congress should even act at this point.

In response to the *Kelo* decision, the States have moved aggressively to reconsider and amend their own eminent domain laws. More than 40 States have acted in response to the *Kelo* decision. States have carefully considered the implications of this decision and the needs of their citizens. Many States have sharply restricted their use of eminent domain. Others have restricted them somewhat. I question whether Congress should now come charging in and presume to sit as a national zoning board deciding which types of projects are or are not appropriate.

The lawsuits permitted by this bill and the uncertainty of the bill's definitions would cast a cloud over legitimate projects. A property owner or a tenant would have 7 years after the condemnation before he would have to begin the litigation and the inevitable appeals. I wonder if the trial lawyers wrote this bill. The local government would risk all of its economic development funding for 2 years, even for unrelated projects, and face bankruptcy if it guesses wrong about a project. Rational bond underwriters would view the possibility that at some point in the future a city might guess wrong on a project and face municipal bankruptcy as an unreasonable risk. This could devastate the ability of State and local governments to float bonds, even if they never engaged in any prohibited conduct; because, after all, the bondholder looks to the stream of revenue the city will have in the future for the repayment of the bonds. And if based on some future act by some future official, that revenue stream or a good part of it could come to a screeching halt as a result of this bill, you're putting a real cloud—we are talking in real estate law about a cloud on title. Here we are putting a cloud on revenue, which would restrict the ability of State and local governments to issue bonds for any purposes, even if they never abuse the eminent domain laws. If you want to give someone the power to extort an entire city, this is it.

Mr. Chairman, this legislation goes well beyond the hypothetical taking of a Motel 6 to build a Ritz Carlton. It threatens communities with bankruptcy without necessarily protecting the most vulnerable populations. It comes after years of State action in which States have decided which approach would best satisfy their concerns and best protect their citizens. I think it may be that Congress should act in this area; but if so, this legislation is a bludgeon and is not the proper way to act.

I look forward to the testimony of today's witnesses who I hope can help us work through these difficult questions.

And before I yield back the balance of my time, I would like to comment that I understand that Professor Echeverria, who is here to testify today at the normal time of his property class, that his property class is watching our proceedings today. And I would like to welcome them, at least electronically, to our hearing. I yield back the balance of my time.

Mr. FRANKS. Thank you. I hope they are paying attention.

Mr. ECHEVERRIA. I hope so.

Mr. FRANKS. Thank you, Mr. Nadler. We have a very distinguished panel of witnesses today.

Our first witness is Ms. Lori Ann Vendetti. Ms. Vendetti is a homeowner from Long Branch, New Jersey, who along with a group of fellow homeowners fought their city's efforts to forcibly

take their homes and lands and hand it over to private developers who planned to make tens of millions of dollars building—excuse me.

By all means. Forgive me, Mr. Conyers. It is not that I didn't see you. We can back up real quick here. We are going to disengage and I will re-read my part of it. Mr. Conyers is recognized. By all means.

Mr. CONYERS. Thank you, Chairman. After all, I am Chairman emeritus of the full Committee, so I appreciate your consideration.

I think this is an interesting constitutional law question and I am proud of the fact that the Constitution Subcommittee is taking this matter up. I am interested in the witnesses' interpretations of where we are. I think it is very important.

It is not often that the Institute for Justice and the National Association for the Advancement of Colored People end up on the same position on a matter, and that seems to be the case today. On the other hand, the National League of Cities and the National Conference of State Legislators are not in favor of this legislation.

Now, it should be noted that these kinds of close questions have arisen in Detroit, Michigan, where through the process of eminent domain we have had land taken from citizens that resulted in casinos being built or where factories replaced people that were living in their homes.

So it is a very interesting question of where we go now that the Supreme Court has spoken in 2005. Those that support the legislation say that we need a Federal remedy. They also provide a private right of action and they also provide the right of action by tenants. And I think we need to look closely at what and how much of those goals are met.

On the other hand, there are those that say that this Federal remedy is extreme, that it deprives localities of development funds, and that a private right of action is already available under State law and, further, that the right of actions for tenants are legally questionable and may conflict with the rights of the property owner.

And so we gather here today to examine this important decision. And I think it will guide many Members in the Congress in terms of what comes out of this important hearing. And I thank you, Chairman, for this opportunity.

Mr. FRANKS. Thank you, Mr. Conyers.

And I will try this again. And I really apologize for overlooking Mr. Conyers.

We have, again, a very distinguished panel with us today and I'm going to start over, Ms. Vendetti, if it is all right with you.

Our first witness is Ms. Lori Ann Vendetti. Ms. Vendetti is a homeowner from Long Beach, New Jersey, who along with a group of fellow homeowners fought their city's effort to forcibly take their homes and hand the land over to private developers who planned to make tens of millions of dollars building upscale condos. Only after half-a-decade-long legal battle were Ms. Vendetti and her fellow homeowners able to reach a settlement to keep their homes.

Our second witness is Professor John Echeverria. Professor Echeverria is a professor at the Vermont Law School. He previously served for 12 years as executive director of the Georgetown

Environmental Law and Policy Institute at Georgetown University Law Center. Professor Echeverria has written extensively on takings and other aspects of environmental and natural resource law. He has frequently represented State and local governments, environmental organizations, planning groups and others in regulatory takings cases and other environmental litigation in both Federal and State courts.

Our third and final witness is Ms. Dana Berliner. Ms. Berliner serves as a senior attorney at the Institute for Justice where she has worked as a lawyer since 1994. She litigates property rights, economic liberty, and other constitutional cases in both Federal and State courts. Along with co-counsel, Scott Bullock—I know Scott—she represented the homeowners in *Kelo v. New London.* From 2008 through 2011, Ms. Berliner has been recognized as a best lawyer in eminent domain and condemnation law by the publication "Best Lawyers in America."

We welcome all of you here today. Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that that 5 minutes has expired.

Before I recognize the witnesses, it is a tradition of this Subcommittee that they be sworn in. So if you would please stand and be sworn.

[Witnesses sworn.]

Mr. FRANKS. Now, I know our first witness, Ms. Lori Vendetti, is beginning. So I recognize Ms. Vendetti for 5 minutes.

TESTIMONY OF LORI ANN VENDETTI, HOMEOWNER, LONG BRANCH, NJ

Ms. VENDETTI. Thank you for this opportunity——

Mr. FRANKS. Ms. Vendetti, you might pull that microphone and turn that one on there.

Ms. VENDETTI. Can you hear me now?

Mr. FRANKS. Yes, ma'am.

Ms. VENDETTI. There we go.

Thank you for this opportunity to testify about legislation to stop Federal funding to local governments that abuse eminent domain for private development. My name, again, is Lori Ann Vendetti and I live in the MTOTSA neighborhood of Long Branch, New Jersey. MTOTSA is an acronym for streets: Marine Terrace, Ocean Terrace and Seaview Avenue. I bought my home in 1995 across the street from my parents' home in hopes of living closer to them during their retirement years. My parents built their home in 1960 as a summer residence for themselves and their three children. My dad was a truck driver and my mom was a school aide/secretary. Dad woke up at 4 in the morning to go to work to pay for our beachside bungalow he built for his family so we would have something better than he ever had.

When my dad retired in 1989, it became my folks' year-round residence where they could cherish the memories of the times they

spent with their three children while making new memories with their grandchildren.

I bought my house from a family I had known all my life who lived across the street. The grandson and I were friends growing up. When his grandfather died, they couldn't keep his grandmother in the house anymore and had to sell it. I wasn't the highest bidder, but on a handshake deal they sold me the home with an understanding that she would be able to come back every summer and stay there for as long as she lived. So her life would be changed as little as possible. She had Alzheimer's and never knew about the arrangements and died believing that the house was still hers. I used to mow her lawn and she would say, Does my husband know you're mowing the lawn? And I would say yes, Mrs. Rossi, your husband knows and gave me permission. It made me feel great that her life didn't change at all and I was able to give something back to them.

That is just the kind of neighborhood we had. It is a neighborhood where houses are passed down from one generation to another. It is a quaint little beachside community of modest homes, moderate homes, not mansions, where people know each other. Just a little slice of the American dream.

When the city of Long Branch tried to put an end to that by taking away our homes for private condominium development, we came together and we fought for our rights, just like we would fight for any family member who was sick or in trouble. A few months after I bought my house, the city established a redevelopment zone. We watched as the neighborhood to the south became a sea of bulldozers as houses were demolished to make way for luxury apartments and condominiums, even though the original development plan said our neighborhood would not be seized using eminent domain.

We were lied to. The city quietly stopped giving building permits for home improvements in our neighborhood. Eventually we learned that the city wanted to raze our homes too. They said our properties were blighted, even though the mayor admitted that if other areas looked like our neighborhoods, the city wouldn't even be pursuing redevelopment. In New Jersey, perfectly fine homes like ours can be condemned for reasons like diversity of ownership, meaning each house is owned by a separate family. But every one owning a home of their own is a point of pride in America. It's what we all work so hard for. If owning a home means your home is blighted, then whose house isn't blighted? There is real blight in Long Branch, but the city didn't want to fix that up. They didn't want to fix the abandoned buildings near and around city hall. They wanted our well-kept modest homes so they could sell them to a developer who could build more expensive houses.

Mayor Adam Schneider told us that we had to make this incredible sacrifice for the good of the community. But we were the community. We built that community. It is not right for the government to take away what my family worked so hard for over so many years just to give it to someone else who can make a bigger profit and pay more taxes.

I helped start a citizens group aimed to fight this attack on our property rights. We started talking to the media, we staged a big

rally on the eve of the argument in the *Kelo* case. Lots of people were disheartened in our fight, especially after the Supreme Court handed down their decision ruling that officials in Connecticut could take homes and give them to a private developer with only a promise that there might be more tax revenue from it.

But we didn't give up. As a small token of defiance, I actually painted my house. I came to Long Branch so my parents could enjoy their retirement, with me living across the street. I meant to stay there. In November 2005, the city condemned 11 homes in our neighborhood. We challenged that condemnation in court; but in 2006, the superior court judge ruled that Long Branch was allowed to take our homes under the pretense of blight and give the land to a private developer who planned to make tens of millions of dollars building upscale condos for the wealthy. We appealed that decision and held onto our houses for another 2 years until 2008; a three-judge panel unanimously reversed that decision. We were ecstatic. After years of fighting, we were finally vindicated.

The city announced it would stop its eminent domain action against us and negotiated a settlement that allowed us to stay in Long Branch in the houses that were rightfully ours. As part of the agreement, the city was barred from wrongfully taking people's homes in the name of redevelopment. The city also gave us the same tax abatements that was being offered to the designated private developer so that we could reinvest in our own properties. When the city uses redevelopment area to threaten eminent domain to a whole neighborhood, people stop fixing their homes because the city just plans on bulldozing it.

The city and the developers also contributed to the deterioration of our neighborhood. They stopped paving the roads; the houses that the developers bought from other families were left abandoned and boarded up. They created the blight. As a part of our settlement, the city had to fix the long-neglected street lights, repave all the streets. The developers were forced to immediately demolish all the abandoned homes and the developer plans on building new homes. In fact, they are doing that now. And this time, without trying to clear us residents out without eminent domain.

Our neighborhood has a chance to renew now, but most stories of eminent domain don't end happily like ours did. People across the country lose their homes and their businesses after falling victim to redevelopers who use the same tricks and tell the same lies as our officials did in Long Branch.

This should not happen in America. Congress must send a message to local governments across the country that this abuse of power will not be tolerated.

My parents have since passed away, my mother just 2 months ago. But they were able to die in their dream home, knowing it was safe for their children and their grandchildren to enjoy forever. Everyone should have that right.

Passing this legislation would restore the sacredness and security of everyone's home, an American dream of homeownership. I thank you very much for your time.

Mr. FRANKS. Thank you, Ms. Vendetti. And I offer my own condolences to you.

[The prepared statement of Ms. Vendetti follows:]

Testimony of Lori Ann Vendetti
Before the House Judiciary Subcommittee on the Constitution
April 12, 2011

Thank you for the opportunity to testify about legislation to stop federal funding to local governments that abuse eminent domain for private development.

My name is Lori Ann Vendetti and I live in the MTOTSA neighborhood of Long Branch, New Jersey. MTOTSA is an acronym for the streets Marine Terrace, Ocean Terrace and Seaview Avenue. I bought my home in 1995 across the street from my parents' house in hopes of living closer to them during their retirement years.

My parents built their home there in 1960 as a summer residence for themselves and their three children. My dad was a truck driver and my mom a school secretary. Dad woke up at 4 in the morning to go to work to pay for the beachside bungalow he built for his family, so we'd have something better than he ever had. When my dad retired in 1989, it became my folks' year-round home, where they could cherish the memories of the times they spent there with their children while making new memories with their grandchildren.

I bought my house from a family I had known my whole life. The grandson and I were friends growing up. When his grandfather died, they couldn't keep his grandmother in the house anymore and had to sell it. I wasn't the highest bidder, but on a handshake deal they sold me the home with an understanding that she'd be able to come back every summer and stay there as long as she lived, so her life would be changed as little as possible. She had Alzheimer's and never knew about the arrangement and died believing that the house was still hers. I used to mow the lawn and she'd say, "Does my husband know you're mowing the lawn?" and I'd say, "Yes Mrs. Rossi, you know your husband gave me permission." It made me feel great that her life didn't change, that I was able to give back something to them, though it wasn't monetary—just the way they gave something to me.

That's just the kind of neighborhood we have. It's a neighborhood where houses are passed down from one generation of a family or friends to the next. It's a quaint little beachside community of moderate homes, not mansions, where people know each other—just a slice of the American dream. When the City of Long Branch tried to put an end to that by taking away our homes for a private condominium development, we came together and fought for our rights just like we would fight for any family member who was sick or in trouble.

A few months after I bought my house, the city established a redevelopment zone. We watched as the neighborhood to the south became a sea of bulldozers as houses were demolished to make way for luxury apartments and condominiums. Even though the original redevelopment plan said our neighborhood would not be seized using eminent domain, we were lied to. The city quietly stopped giving building permits for home

improvements. Eventually we learned that the city wanted to raze our homes, too. They said our properties were "blighted," even though the mayor admitted that if other areas looked like ours, the city wouldn't be pursuing redevelopment. In New Jersey, perfectly fine homes like ours can be condemned for reasons like "diversity of ownership," meaning each house is owned by a separate family. But everyone owning a home of their own is a point of pride in America; it's what we all worked so hard for. If owning a home means your house is blighted, then whose house isn't blighted?

There is real blight in Long Branch, but the city didn't want to fix up the abandoned buildings across from city hall. They wanted our well-kept but modest beachside homes so they could sell them to a developer who could build more expensive houses. Mayor Schneider told us that we had to make this "incredible sacrifice" for the good of the community.. But we built this community. It's not right for the government to take away what my family worked so hard for over so many years just to give it to someone who could make a bigger profit and pay more in taxes.

I helped start a citizens group aimed to fight against this attack on our property rights. We started talking to the media. We staged a big rally on the eve of the arguments in the *Kelo* case. Lots of people were disheartened in our fight, especially after the Supreme Court handed down their decision, ruling that officials in Connecticut could take homes and give them to a private developer with only a promise that there might be more tax revenue from it. But we did not give up. As a small token of defiance, I painted my house. I came to Long Branch so my parents could enjoy their retirement with me living across the street, and I meant to stay there.

In November 2005, the city condemned 11 homes in our neighborhood. We challenged the condemnations in court, but in 2006 a Superior Court judge ruled that Long Branch was allowed to take our homes under a pretense of "blight" and give the land over to a private developer who planned to make tens of millions of dollars building upscale condos for the wealthy. We appealed that decision and held onto our homes for two more years until in 2008 a three-judge panel unanimously reversed that decision. We were thrilled. After years of fighting, we were finally vindicated.

The city announced it would stop its eminent domain actions against us, and we negotiated a settlement that allowed us to stay in Long Branch in the houses that were rightfully ours. As part of the agreement, the city was barred from wrongfully taking people's homes in the name of redevelopment. The city also had to give us the same tax-abatements it was offering to its designated private developer, so that we could reinvest in our properties.

When a city uses a redevelopment area to threaten eminent domain to a whole neighborhood, people stop fixing up their homes because the city just plans on bulldozing it anyway. The city and the developers also contributed to the deterioration of the neighborhood. The city stopped paving the roads, and the houses the developers bought from other families were left abandoned and boarded up, creating the blight they said they were addressing by taking our homes. As part of our settlement, the city had to fix

the long-neglected street lights and repave all the streets. The developers were forced to immediately demolish the abandoned homes. The developer plans on building new houses in the area, this time without trying to clear out the current residents with eminent domain.

Our neighborhood now has the chance to renew. But most stories of eminent domain abuse don't end happily. People across the country lose their homes or their businesses after falling victim to redevelopers who use the same tricks and tell the same lies as our officials did in Long Branch. This should not happen in America. Congress must send a message to local governments across the country that this abuse of power will not be tolerated.

My parents have since passed away, but they were able to die in their dream home knowing it was safe for their children and grandchildren to enjoy forever. Everyone should have that right. Passing this legislation would restore the sacredness and security of everyone's home.

Thank you very much for your time.

Mr. FRANKS. I now recognize Professor Echeverria for 5 minutes.

TESTIMONY OF JOHN D. ECHEVERRIA, PROFESSOR, VERMONT SCHOOL OF LAW

Mr. ECHEVERRIA. Thank you for the opportunity to testify today to express my opposition to the Private Property Rights Protection Act of 2011. I am a professor of law at Vermont Law School where I teach property law—so this is a good preparation.

Mr. FRANKS. Sir, could you pull your mic a little closer to you and turn it on? I think it may not be on.

Mr. ECHEVERRIA. Should I restart?

Mr. FRANKS. If you wish, that would be great. We will start your time over.

Mr. ECHEVERRIA. Thank you for the opportunity to testify today and to express my opposition to the Private Property Rights Protection Act of 2011. I'm a professor of law at Vermont Law School where I teach property, and in a week or so we are going to take up the *Kelo* case. So this testimony will be good preparation for that. However, I am obviously here expressing my personal and professional opinion today.

If this hearing were about whether the use of eminent domain for economic development is a good idea or a bad idea, I would be happy to engage in that discussion. I have referenced in my testimony a 2006 study I co-authored in which we sought to analyze objectively the arguments for the use of eminent domain for economic development, as well as the objections to the use of that power. In the course of our research, we found examples of the use of eminent domain that appeared problematic and others that appear very positive. One overriding conclusion was that in many instances, especially in urban areas and in heavily built-up inner suburbs, eminent domain appears to be a valuable tool to accomplish important redevelopment goals in the face of highly fragmented landownership patterns and recurring holdout problems.

We also found a number of examples where, despite the picture painted by advocates of this legislation, the use of eminent domain enjoyed significant support within the community involved, and even among property owners whose property was subject to eminent domain proceedings.

But the issue before the Committee, I submit, is not whether the use of eminent domain for economic development is a good idea or a bad idea. Instead, the question before the Committee is whether the Congress at this moment in time should consider national legislation dramatically limiting the use of eminent domain for economic development that would constrain every State and local jurisdiction in the country.

The answer to that question, I submit, is "no," and the reason is that in the wake of the much-debated *Kelo* decision, virtually every State legislature in the country studied proposals, studied the *Kelo* decision, debated the *Kelo* decision, studied reform proposals, held hearings, and in many cases enacted legislation limiting the use of eminent domain in some fashion. In addition, in several States in the aftermath of *Kelo*, ballot measures addressing eminent domain reform were submitted to voters.

All told, over 40 States, 43 Sates according to some estimates, over four-fifths of all the States in the Nation, have adopted some kind of post-*Kelo* reform measure. Some applaud these reforms and some criticize them. Some think they have gone too far, while others believe the States have not gone far enough.

The critical bottom line, however, is the State legislatures, as well as the voters themselves in some States, have fully and completely engaged on this issue. Given that the States have acted, or in some instances made a very conscious decision not to act, congressional intervention in this issue at this time is unnecessary, would be unwise as a matter of policy and would be highly destructive of the recent efforts by the States to address this issue. It is unnecessary because the States have fully considered this issue. And as I say, more than four-fifths of the States have adopted changes in their eminent domain laws. So in effect, the message of the States to Congress on this issue is: Been there, done that.

It would be unwise for Congress to act because the very different responses of the States to this issue demonstrate that one size does not fit all. Given the wide differences between the States—for example, in terms of population density, the age of the communities, the building stock, redevelopment objectives within each jurisdiction—different States should and do approach the eminent domain issue differently. Some States have adopted severe restrictions on eminent domain, some States have not. Some have focused on providing more procedural protections for landowners, while others have placed substantive limitations on the power of eminent domain. Some have redefined what constitutes a public use, others have not. And so on and so on. When it comes to eminent domain, New York is truly not like South Dakota, and Ohio is truly not like Montana.

Finally, congressional intervention by way of this proposed legislation in particular would be highly destructive of the efforts that States have already made on this issue. The restrictions in this proposed bill are relatively radical, going beyond the steps most States have adopted. Thus the bill would severely interfere with State policy judgments on this issue by imposing, again, a one-size-fits-all solution that would trump, conflict with, and effectively preempt many State laws.

Only the most compelling national interest could justify such a massive, untimely interference with State legislative judgments. And the case for such an intrusion cannot be made here and has not been made here.

I could say a great deal more in opposition to this bill, but I believe my time has run out. So I will reserve my additional points for the Q&A. Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, Professor.

[The prepared statement of Mr. Echeverria follows:]

Testimony of John D. Echeverria
Professor, Vermont Law School
South Royalton, Vermont

Hearing on H.R. 1443,
The Private Property Rights Protection Act of 2011

before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

April 12, 2011

My name is John D. Echeverria. I am a Professor at Vermont Law School where I teach property law, including the law of eminent domain, and frequently write on the topic of takings and property rights. I have represented state and local governments and public interest organizations in judicial proceedings around the country in cases arising under both the federal and state takings clauses. I had the privilege of filing a brief in the U.S. Supreme Court on behalf of the American Planning Association and other organizations in the case of Kelo v. City of New London. Finally, I have followed federal and state legislative debates about potential responses to the Kelo decision over the nearly six years since the decision was issued. I appreciate the opportunity to appear before the Subcommittee this afternoon to express my strong personal opposition to the Private Property Rights Protection Act of 2011.

In my view, reasonable minds can differ about the public value of relying on the eminent domain power to promote economic development and whether state and local officials utilize this tool in a fair and effective fashion. I was the co-author of a report published in 2006, which sought to analyze objectively the arguments for the use of eminent domain for economic development as well as the objections to the use of this power. See Kelo's Unanswered Questions: the Policy Debate Over the Use of Eminent Domain for Economic Development (*available* at http://forms.vermontlaw.edu/gelpi/current_research/documents/GELPI Report_Kelo.pdf). One conclusion of that report is that eminent domain is, in many instances, an important tool to accomplish redevelopment objectives in the face of highly fragmented land ownership patterns and recurring holdout problems. Another finding is that the use of eminent domain, though rarely completely free from controversy, often enjoys deep and widespread

community support, including in several illustrative cases we discovered within a few miles of the U.S. Capitol.

But the issue before the Committee is not whether the use of eminent domain for economic development is a good or a bad idea. Instead, the issue is whether the U.S. Congress, at this moment in time, should consider *national* legislation limiting the use of eminent domain for economic development that would be binding on every State and local jurisdiction in the country. I submit that that such legislation is unnecessary, unwise as a matter of policy, and would be highly destructive of the recent efforts by the States to address this specific issue.

The basis for these conclusions is that, in the six years since the Kelo decision was handed down, every or virtually every state legislature in the country has studied proposed reforms on this subject, held hearings on the use of eminent domain, and in many cases enacted new legislation limiting the use of eminent domain. In addition, in several States ballot measures addressing eminent domain reform have been submitted to the voters. All told, approximately 40 States, four-fifths of all the States in the nation,[1] have now adopted some kind of post-Kelo reform measure. Some applaud the reform steps adopted, while others believe that some of these steps have been misconceived. Some believe certain state legislatures have gone too far in curtailing the power of eminent domain, while others believe some States have not gone far enough or have abdicated their responsibility by not imposing any new constraints on this governmental power. The bottom line, however, is that the state legislatures, as well as the voters themselves in some States, have fully engaged on this issue.

[1] Those who closely track state legislative activity in response to Kelo report slightly divergent figures. The National Conference of State Legislatures reports that 39 States enacted legislation or passed ballot measures during 2005 - 2007 in response to the Kelo decision. (See http://www.ncsl.org/ default.aspx?tabid=13252). Professor Ilya Somin reports that 43 States have enacted post-Kelo reform legislation. See *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2101 (2009).

Furthermore, in several States the state courts have placed new restrictions on the use of eminent domain for economic development. As I explained in the brief I filed in the Supreme Court in the Kelo case, there has been a long history of state courts imposing additional limitations on the eminent domain power beyond those mandated by the federal constitution; thus, the recent state court cases imposing new post-Kelo limitations are consistent with the historic pattern in this area of law.

Significantly, the States have adopted very different positions on how far they wish to go in curtailing use of the eminent domain power and what kinds of procedural and/or substantive limitations they wish to impose. The National Conference of State Legislatures explains that recently enacted state laws and ballot measures fall into different categories:

> Restricting the use of eminent domain for economic development, enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes).
>
> Defining what constitutes public use.
>
> Establishing additional criteria for designating blighted areas subject to eminent domain.
>
> Strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property.
>
> Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.

Http://www.ncsl.org/IssuesResearch/EnvironmentandNaturalResources/EminentDomainmainpage/tabid/13252/Default.aspx

Looking at the different state responses to Kelo in more detail, the state measures can be divided into three categories made up of roughly equal numbers of States: those that have essentially abolished the use of eminent domain for economic development or at least placed very strong limitations on its use; those that have enacted significant reforms while still allowing

for the continuing use of eminent domain in some circumstances; and those that have adopted no new legislation or adopted only minor changes. I will offer a few examples of each type of reform to illustrate the range of state responses to the Kelo issue.

Strong Limitations: In Florida, legislation enacted in 2006 generally prohibits the taking of land through eminent domain for transfer to private parties except in the case of common carriers, utilities, infrastructure provision, or leases of otherwise public space. See Fla. Stat. Ann §73.013(1) (a – e) (West 2010). The legislation eliminates government's power to take property to remove blight; instead it requires the government to determine that an individual property poses a danger to public health or safety before exercising eminent domain. See Fla. Stat. Ann §73.014. (West 2010). The Florida reform effort, which is widely viewed as one of the most restrictive in the country, is duplicated in several provisions of H.R. 1443.

South Dakota adopted reform legislation that prohibits the use of eminent domain to "take" property "for transfer to any private person, nongovernmental entity or other public – private business entity," see S.D. Codified Laws § 11-7-22 (2010), and specifically outlaws condemnations "primarily for enhancement of tax revenues." See S.D. Codified Laws § 11-7-22.1 (2010). Furthermore, in Benson v. State, 710 N.W. 2d 131, 146 (S.D. 2006), the Supreme Court of South Dakota affirmed that the state constitution provides landowners greater protection against eminent domain than the federal constitution; specifically, the Court said that the state constitution "requires that there be a use or right of use on the part of the public or some limited portion of it."

Moderate Limitations. Minnesota has adopted legislation that restricts municipalities from using eminent domain to transfer property from one owner to another for private commercial development, specifying that "[t]he public benefits of economic development,

including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose." See Minn. Stat. Ann. § 117.025(11). The effect of this restriction is moderated by inclusion of the phrase "by themselves," which presumably indicates that a locality can take a property to further economic development if it also has other valid reasons for doing so. Moreover, the statute authorizes the taking of non-"blighted" properties if they are in an area where a majority of properties are blighted, and no feasible alternative solution exists to remediate the blighted properties." See Minn. Stat. Ann. § 117.027.

Utah adopted several post-Kelo measures that are essentially procedural in nature. For example, a 2007 measure requires approval of a proposed condemnation by two-thirds of the condemning agency's board, and imposes new, more elaborate public notice requirements on condemning authorities. See Utah Code Ann. § 17C-2-601 (West 2010). In 2008, the Utah legislature adopted a bill which provides a right to repurchase if the condemning authority sells the condemned property and creates a cause of action whereby condemnees can "set aside condemnation for failure to commence or complete construction within a reasonable time." See Utah Code Ann: § 78B-6-521. Yet another piece of legislation adopted in 2008 prescribes detailed pre-condemnation notice requirements. See H.B. 78, 2008 Leg. Reg. Sess. (Utah 2008).

Modest or No Limitations. In Connecticut, the site of the Kelo case, the State has adopted some relatively limited constraints on the use of eminent domain for economic development. The Connecticut law bars condemnation of private property "for the primary purpose of increasing local tax revenue," and requires a supermajority vote in municipalities planning to condemn private property. See Conn. Gen. Stat. §§ 8-193(b)(1), 8-127(b)(6)(D) (West 2010). *Id.* § 8-127(b)(6)(D). This obviously allows eminent domain to proceed so long as

enhanced tax revenues is only a secondary purpose of the project, and the super-majority requirement should not be an obstacle to a project that enjoys widespread public support.

Finally, in Texas, although the legislature and the voters have expended a good deal of energy addressing the eminent domain issue, the new laws include so many limitations and qualifications that the net effect is not likely to be a substantial constraint on eminent domain. The Texas legislature enacted a law that prohibits condemnation if the taking "confers a private benefit on a particular private party through the use of the property; is for a public use that is merely a pretext to confer a private benefit on a particular private party; or is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas..." Tex. Gov't Code Ann. § 2206.001 (b) (Vernon 2008).. The third criterion's explicit exceptions for municipal community development and for urban renewal in the face of blight indicate that this measure does not, as the first criterion might suggest, ban use of eminent domain to promote private economic development. Subsequently, Texas voters adopted a constitutional amendment which, among other things, altered the definition of "public use," mandating that condemnations only proceed for "ownership, use and enjoyment of the property" by the public. H.R.J. Res. 14 81st Leg. Reg.Sess (Tex. 2009). However, the amendment allows condemnations with incidental private use, prohibiting only the taking of private land for the *primary* purpose of economic development or an increase in tax revenue, which seems to implicitly allow the continued use of eminent domain so long as these are not the primary purposes. Finally, and most recently, the Governor of Texas vetoed legislation that would have eliminated the so-called blight exception.

These examples obviously provide only a sampling of how different States across the country have approached the use of eminent domain for economic development. But these examples should be sufficient to illustrate the widely differing perspectives on eminent domain that exist across the country and the divergent ways that States that have opted for reform have pursued this agenda.

In light of the extensive policy debates and legislative activity at the state level, it is unnecessary for Congress to enact legislation addressing the use of eminent domain for economic development. The States have responded forcefully (if not in uniform fashion) to public concerns about the potential for abuse of the eminent domain power. Many of these state measures have clearly accomplished dramatic change. The social and economic consequences of some measures, as well as their effects on individual landowners, remain to be determined based on experience. Given this flood of activity at the state level on the eminent domain issue, now is not the time for Congress to intervene.

Moreover, in light of the diversity of attitudes and strategies on eminent domain in the different States, it would be unwise for Congress to attempt to enact national legislation on this issue. Thoughtful policy-making on the eminent domain issue calls for balancing the value and importance of the eminent domain tool in pursuing vitally important economic development with land owners' understandable desires to use and dispose of their property with as little government interference as possible. Given the wide differences between the States – in terms of population density, the age of communities and building stocks, and redevelopment objectives, among other things – it stands to reason that different States will and should approach the eminent domain issue differently. When it comes to eminent domain, New York is not like

South Dakota, and Ohio is not like Montana. National legislation on this subject would be unwise because it would disregard and override the differences within our federal system.

Finally, it would be an extreme intrusion on the States for Congress to legislate at this time on the subject of the use of eminent domain for economic development by States and localities. Over the last half dozen years every or virtually every state legislature has either adopted post-Kelo reform measures or made the affirmative decision not to do so. One-size-fits-all national legislation would, in most cases, contradict and preempt these recently concluded state deliberations, substituting Congress's view on how eminent domain should be pursued for the highly varied and carefully considered views of the States. Only the most compelling national interest could justify such a massive, untimely intrusion into state policy-making, and the case for such an intrusion cannot be made here.

One additional note. It is hardly an accident that the States have taken the lead in determining what reforms are needed to the eminent domain process. The Supreme Court in Kelo rejected the argument that the use of eminent domain to promote economic development violates the federal Constitution. But, at the same time, the Court explicitly invited the States to decide whether they wished to provide protections for property owners against eminent domain that went beyond the federal Constitution:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the ground upon which takings may be exercised.

545 U.S. at 489. In the wake of the decision, state legislators and policy advocates obviously took up the Supreme Court's invitation. In particular, the Institute for Justice, following Kelo,

launched what it describes on its website (see http://www.castlecoalition.org/ about) as "an aggressive initiative to effect significant and substantial reforms of state and local eminent domain laws." In light of the enormous attention state legislators have given this issue over the last half-dozen years, and the Institute for Justice's not inconsiderable success in achieving its policy objectives at the state level, one wonders what the Institute's rationale is for now supporting action at the national level. Is it that not every State has gone as far as the Institute thinks they should, and therefore Congress needs to step in with national legislation that would preempt the recent State efforts and trump the policy judgments so recently made at the state level? Apparently so. The better conclusions to draw from the recent spate of state policy-making on eminent domain are that the States have already responsibly addressed the eminent domain issue, they have done so in a way that achieves a different balance in each State, time will tell how some of these reforms will work out, and Congress should not seek to intervene in this issue now.

Given my position that Congress should refrain from attempting to craft national legislation that would attempt to impose a one-size-fits-all solution on the States and localities, I have little to offer in the way of detailed commentary on the language of the bill itself. I will observe, however, that the restrictions on eminent domain in the bill are relatively radical, going far beyond the steps most States have adopted, perhaps most closely rivaling the restrictions adopted in Florida. Thus, it is clear that the interference with state policy judgments if this bill were adopted would be extensive. Another noteworthy feature of the bill is that it would not directly restrict the States and localities from exercising the eminent domain power, but instead would subject them to the punitive *post hoc* penalty of losing two years of federal economic development funding if it turns out they have run afoul of the bill's general and sometimes

vague prohibitions. This indirect approach is arguably mandated by the limited constitutional power of the federal government to instruct the States and theirs subdivisions on how to conduct their business. But it certainly produces an awkward piece of proposed legislation that could have disastrous fiscal consequences for State and localities, most of which are now facing financial challenges that rival if they do not surpass those facing the national government. The bill provides that a State or locality could "cure" a violation after the fact, but it is unclear how effective that cure could be if the development has already gone forward and/or if the condemnee has reinvested the compensation proceeds in another property. Ultimately, the effect of the bill, given the difficulty of predicting the outcome of litigation, and the severity of the potential penalties, might be to simply freeze a great deal of proposed redevelopment activity across the country, imposing yet another burden on States and localities and creating an additional drag on our struggling economy.

Thank you for the opportunity to present this testimony. I will be pleased to respond to any questions that members of the Committee may have.

Mr. FRANKS. And now I recognize Ms. Berliner for 5 minutes.

TESTIMONY OF DANA BERLINER, INSTITUTE FOR JUSTICE

Ms. BERLINER. Thank you, Mr. Chairman. I'm very happy to be testifying before the Subcommittee today. I testified before the same Subcommittee when the bill was first introduced and first

passed in 2005. And some things have changed since then, as we have heard today, and some things haven't changed since then.

The main thing that has not changed since then is that this proposed law is still needed to remedy the abuse of eminent domain that was made possible and even encouraged by the *Kelo* decision. When the Supreme Court decided *Kelo*, it decided that even the mere possibility of more jobs and more taxes was a good enough reason under the U.S. Constitution to take someone's home away from them and give it to a private party. That is what happened in the *Kelo* case. That project got Federal money. Since then—and it is now 6 years later—nothing has been built there. That project did not result in economic development. It resulted in economic destruction. Those people lost their homes for nothing and they lost their homes, again with the assistance of Federal funds. The court decided that there would be no Federal constitutional protection essentially against eminent domain abuse and therefore no floor of protection, no consistency among the States.

Now, what you have heard today is that a lot of States changed their laws. And that is true, a lot of States did; some to a greater extent, some to a lesser extent. If you live in one of the 20 or so States that passed strong protections, that's great. And if you don't, you still don't have any Federal rights protection at all against eminent domain abuse.

What that means is it depends on your State line. If you live in New Hampshire, your home is pretty safe. If you live in New Jersey, not so much. Maybe if you fight for 5 to 10 years in court, you might get to keep your home. Maybe, maybe not. It depends. If you live in New York, you don't have a prayer. Neither New Jersey nor New York changed their laws. California, which also is a huge abuser of eminent domain, changed their laws only a little bit. And they have so many procedural barriers to suit that, again, it is very difficult to have any protections there.

So the goal of this proposed law is to do what is in the power of Congress to establish minimum standards nationwide, and that is something that is still lacking, that exists for virtually every other constitutional right but not for this.

Even after *Kelo*, Federal money continues to be used to support projects that use eminent domain for private development. It certainly supports the agencies that engage in these takings. The money usually comes in the form of either Department of Transportation or HUD, although there are other kinds of economic development funding as well.

And Congress has previously attempted to limit the use of Federal funds for eminent domain abuse through what was called the Bond amendment. And that was just a spending limitation. The problem is, if it is violated there is nothing you can do. So people have tried to bring this up in court. There is no right of action. People call us and say, hey, the project is taking our property for another private use, it has got Federal money, what can we do? And the answer is, Call the agency. But as far as we know, nothing has ever happened. There has never been an investigation. There has never been a consequence.

This bill on the other hand does several very important things. It cuts off funding to agencies that abuse eminent domain. It does

that in a way that complies with constitutional precedent. It has to be done through the spending power.

The bill also gives guidance about what uses of eminent domain are permitted and what uses aren't permitted, so that agencies will have rules to apply. It provides for reporting, which is very important. It is very difficult to figure out where the Federal money is going when you attempt to research this. And it gives an avenue for enforcement. So this bill contains all the elements it needs to be effective and to stay within constitutional limits.

It is within the power of Congress to remove or substantially diminish the specter of condemnation for private development in this country. This bill is necessary to protect thousands of citizens from losing their homes and their businesses for private gain. And it has been inspiring to work with both parties on this important issue.

I want to thank this Committee for its leadership and for its efforts on this issue.

Mr. FRANKS. Well, thank you, Ms. Berliner.

[The prepared statement of Ms. Berliner follows:]

Testimony of Dana Berliner
Senior Attorney, Institute for Justice
United States House Judiciary Subcommittee on the Constitution
April 12, 2011

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that has received significant national attention in the wake of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee is to be commended for responding to the American people by examining this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Arlington, Virginia, that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes and small businesses are taken by the government through the power of eminent domain and transferred to another private party for private development. I have represented property owners across the country fighting eminent domain for private gain, and I am one of the lawyers at the Institute who represented the homeowners in *Kelo v. City of New London*, the case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue. I also authored two reports about the use of eminent domain for private development throughout the United States (available at http://www.castlecoalition.org/312 and http://www.castlecoalition.org/189).

The *Kelo* case was the final signal that the U.S. Constitution simply provides no protection for the private property rights of Americans. Indeed, the Court ruled that under the U.S Constitution, it is okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land, as long as the project is pursuant to a development plan. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory." One Institute for Justice study found that eminent domain disproportionately impacts minorities, the less educated, and the less well-off. That report, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, can be found at http://www.ij.org/1621 and is the subject of "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?" (*Urban Studies*, October 2009, vol. 46, no. 11, at 2447-2461).

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every poll taken after the *Kelo* decision have condemned the result (see http://www.castlecoalition.org/43). Several bills have been introduced in both the House and Senate over the past six years to combat the abuse of eminent domain, with significant bipartisan support. The original version of the bill, H.R. 4128 in the 109th Congress, passed the House by a vote of 376 – 38.

The use of eminent domain for private development has become a nationwide problem, and the Court's decision encouraged further abuse in its wake.

Eminent domain, called the "despotic power" in the early days of this country, is the power to force citizens from their homes, small businesses, churches and farms. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use without just compensation."

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 60 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores.

The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. Urban renewal wiped out entire communities, typically African American, earning eminent domain the nickname "negro removal." (See "Eminent Domain & African Americans: What is the Price of the Commons?" by Dr. Mindy Fullilove at http://www.castlecoalition.org/187.) This "solution," which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora's box, and in the wake of that decision properties are routinely taken pursuant to redevelopment statutes when there is absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development is widespread. We documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnation and threatened condemnations. For example, in Connecticut, we found 31, while the true number of condemnations was 543.

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued (see *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World*, available at http://www.castlecoalition.org/189). With the high court's blessing, local government became further emboldened to take property for private development. For example:

- Freeport, Texas: Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).
- Oakland, Calif.: A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had owned

since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the city, "We thought we'd win, but the Supreme Court took away our last chance."

- Sunset Hills, Mo.: Less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- Mount Holly, N.J.: For the past decade, township officials have been using the threat of eminent domain to buy up and tear down over 300 row homes in the Gardens, a predominantly African American and Hispanic community that was home to elderly widows and first-time homebuyers. The township wants to transfer the land to a private developer for luxury townhomes and apartments.
- New York, N.Y.: Last year, the New York Court of Appeals—the state's highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.

In the immediate wake of *Kelo*, courts used the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours." On August 19, 2005, a court in Florida, without similar reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for a newer, more expensive boardwalk development.

Despite the nationwide revolt against *Kelo*, federal action is still needed, as federal law and funds currently support eminent domain for private development.

In the wake of the *Kelo* decision, 43 states enacted reforms that to varying degrees restrict the power of the government to seize for private development. 22 states passed legislation that effectively prevents the abuse of eminent domain for private gain, while 21 states still have more progress that needs to be made legislatively to effectively protect private property owners from this abuse of power. Seven states have yet to do anything in the past six years since *Kelo* to stop the abuse of eminent domain.

Federal agencies themselves rarely if ever take property for private projects, but federal funds support condemnations and support agencies that take property from one person to give it to another. There has been some improvement from state legislative reform, but not enough. Although eminent domain for private development is less of a problem in nearly half of the states in the wake of *Kelo*, it remains a major problem in many other states. Unfortunately, some of the states that were the worst before *Kelo* in terms of eminent domain abuse did little or nothing to reform their laws. New York remains the worst state in the country, and it has gotten even worse since *Kelo*. California did pass reform, but California cities have virtually ignored the new law, relying on the astonishing difficulty of bringing legal action to challenge redevelopment designations. Missouri, also a major abuser, passed only weak reform, as did Illinois. In other

states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation). Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority—and ultimately failed.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least $400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.
- Garden Grove, Calif.: Garden Grove has used $17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city "blighted," a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which receives significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area "blighted." One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. The gym (represented by my organization, the Institute for Justice) has been challenging that eminent domain authorization ever since.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least $2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer $400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn about 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development would contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a $21.2 million loan to the city. Many projects in Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including

approximately 200 unites of housing, some run by local non-profits. The older housing was to be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.

- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house and the former Hygeia Refrigerating Co.---were condemned and six were purchased under the threat of eminent domain for Elmira's South Main Street Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- New Cassell, N.Y.: St. Luke's Pentecostal Church saved for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and the Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including $650 million in the form of Liberty Bonds—and a $1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that it could be replaced with mall stores and upscale apartments. The project received $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would be complicit in the destruction of successful, family-owned small businesses.

Congress can and should take steps to ensure that federal funds do not support the abuse of eminent domain.

The *Kelo* decision continues to cry out for Congressional action, six years later. Even Justice Stevens, the author of the opinion, stated in a speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution.

Some states did, but those reforms not embedded in state constitutions will always be subject to repeal or exception whenever a pie-in-the-sky project catches the eye of state legislators or local officials. Congress needs to finally make its opposition heard on this issue, and the sponsors of this bipartisan legislation are all to be commended for their efforts to provide protections that the Supreme Court denied in 2005.

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of

enforcement, whether through an agency or court, so that the home or small business owners or, importantly, tenants that are affected by the abuse of eminent domain, or any other interested party like local taxpayers, can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy—especially in the absence of substantive eminent domain reform that effectively protects property owners.

This legislation also allows cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about "redevelopment," it is most concerned with the ability to deal with abandoned property. With this legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Additionally, the clear and limited exception for taking property to remove "harmful uses of land provided such uses constitute an immediate threat to public health and safety" will discourage cities from taking perfectly fine homes and businesses as is common practice under many state's vague blight laws.

Congress's previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury and/or Housing and Urban Development) have unfortunately been ineffective. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these departments have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

Given the climate in the states as a result of *Kelo*, congressional action would do even more to both discourage the abuse of eminent domain nationwide and encourage sensible state-level reform. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

It should also be noted that development is not the problem—it occurs everyday across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not public force and that the federal government will not be a party to private-to-private transfers of property. As we demonstrate in a recent study, restricting eminent domain to its traditional public use in no ways harms economic growth. (See report at http://ij.org/1618, and Carpenter, D.M. and John K. Ross. "Do Restrictions on Eminent Domain Harm Economic Development?" *Economic Development Quarterly*, 24(4), 337-351.) Indeed, congressional action will not stop progress.

Conclusion

In this economy, Congress does not need to be sending scarce economic development funds to projects that not only abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, but projects that may ultimately fail. Let New London be a lesson: After $80 million in taxpayer money spent, years tied up in litigation and a disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood is now a barren field home to nothing but feral cats. The developer balked and abandoned the project, and Pfizer—for whom the project was intended to benefit—also left New London.

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because local governments prefer the taxes generated by condos and malls to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

Again, thank you for the opportunity to testify before this subcommittee.

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Mr. FRANKS. I'm going to recognize myself for 5 minutes for questions. And I will begin with you, Ms. Berliner, if I can.

Professor Echeverria argues that we should leave it to the States to decide what restrictions they want to place on the use of eminent domain. However, this argument seems, in my mind, to ignore the Congress' role in deciding how Federal tax dollars are spent,

because the bill simply declares that Federal economic development money will not be spent in States and localities that use eminent domain for private economic development. If States and localities want to use eminent domain for economic development purposes, even under the bill they are still free to do so. They simply must forego receiving Federal economic development funds.

So my question, Ms. Berliner, in your mind, is there a federalism problem with the legislation?

Ms. BERLINER. There isn't. The reason that the bill was designed in the way that it is designed is that it complies with the U.S. Supreme Court's decision in *South Dakota v. Dole* about the way that Congress can do these kinds of restrictions, and it is indeed through the spending power. So Congress can't order a locality not to use eminent domain for economic development, but it can withhold its funds. So there is not a federalism problem—there is not a constitutional problem in that way. And again, what this bill does is it creates consistency across the States, which is indeed the role of Congress.

Mr. FRANKS. Well, some opponents to the legislation expressed concerns that if we restrict the ability of States and localities to take private property for private economic development purposes, that we will unduly stifle economic growth. And I would like to hear your response to that argument.

Ms. BERLINER. Well, there's a couple of answers to that. One is we actually did a study, and it has been published now in a peer-reviewed journal as well, showing that among the States that did restrictions—and some of those did very minor restrictions that didn't really do anything, some did serious restrictions—there was no difference in the rate of economic growth based on the changes in eminent domain.

It is also true that there are ways to do economic development locally without using eminent domain. And a good example of that actually is the city of Anaheim instituted a program for its redevelopment area that was quite significant, resulted in huge economic development increases, but did not use eminent domain. So there are tools available to cities to do development without eminent domain.

And what this bill would mean is that cities would have to either—if they really wanted to use eminent domain for economic development, do it without Federal funding. Or much more likely, they would find a way to do economic development without using eminent domain. It is perfectly possible. But despite the fact that every city in the country will tell you they only use it as a last resort, that is not true. And this would mean it would not get used nearly as much as it does now.

Mr. FRANKS. Ms. Berliner, some, of course, argue that the Private Property Rights Protection Act will make private economic development more difficult because without eminent domain, some property owners within a proposed redevelopment zone will just hold out and hold onto their property and not sell it.

I guess my question is do we generally ignore constitutional protections such as free speech simply because enforcement would make things more difficult?

Ms. BERLINER. Well, we certainly don't. The point of constitutional rights is they protect everyone. And that means with speech, sometimes the speech that is protected is undesirable speech, sometimes it is wonderful speech. And that is going to be true of every constitutional right. They protect everyone. And in this case, it is possible that some people will hold out.

But, I mean, you could say that Ms. Vendetti held out. She actually didn't want to go and she got to stay. It took her years to do it. Susette Kelo didn't want to move. And what happens is a lot of people don't want to move either, but under the kind of pressure that is excerted during these projects, some of them give up. A lot of the people are elderly, a lot of them are not very educated and they are not able to go through the stress of facing that sort of condemnation. But this will enable them to stay in their homes if they want to do so.

Mr. FRANKS. Well, would you parse, just for the Committee, sort of the new definition between public use and kind of the way that they twist it around to be private economic development? That's my last question.

Ms. BERLINER. Well, of course, originally eminent domain was used for public uses, meaning at that time, really, public ownership almost entirely and sometimes things that served as public utilities. That changed significantly with the decision in *Berman v. Parker* when the U.S. Supreme Court upheld eminent domain for what was called slum removal, now universally recognized as a complete disaster that basically destroyed inner-city neighborhoods and resulted in not the kind of development they were expecting. That is something actually Mr. Nadler was referring to. That was a huge problem. But it has now gradually evolved, and with *Kelo*, really reached the bottom of—anything is supposedly a public use, any supposed public benefit is a public use. I know the Supreme Court said that it wouldn't be a public use if it were taking from A to B. But that's what it means when you say you can take someone's house and give it to a private developer to put in a private project. It is the taking from A to B and that is, unfortunately, where we are now with the Supreme Court's decision.

Mr. FRANKS. Well, thank you, Ms. Berliner. And I now recognize Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you. I must admit I'm somewhat ambivalent about this bill. I think, on balance, the bill does a lot of harm. But we have obviously seen abuses of eminent domain over the years. And one of the problems with this bill is that it doesn't really stop a lot of that abuse. You see neighborhoods in the South Bronx, for instance, destroyed by putting a highway through the middle of it because they didn't have the political power to stop it. This wouldn't change that.

We've seen railroads—not so many in recent years, but in earlier years—given huge tracts of land, seized by eminent domain in some cases—in order to get them to build the line.

One of the problems, it seems to me, with this bill is the structure of the remedy. It is one thing to say—and it might be a good thing to say—to establish the right of action, to go into court and get an injunction. But to say to a local government or a State government, if you take a property by eminent domain and later, 7

years later, or an action is brought up to 7 years later—and maybe the action takes 2 years—so 9 years later a court decides that this was improper, that this was private, even though you may have thought it was public, it was private, then you lose 2 years of all economic development aid.

This seems to me—and I would like to ask Ms. Berliner this question. It seems to me—we talk about a cloud on entitlement in property law. This puts a cloud on revenue. How does the State—which has no intention of, and maybe it never does abuse eminent domain—float bonds if its future revenue streams are subject to unpredictable revocation?

Ms. BERLINER. Well, I think there were two questions in there. One was about if there is a way to include in the bill something that would deal with the situations where perhaps the construction of a highway destroys a residential neighborhood——

Mr. NADLER. No. That wasn't my real question. The question is—I'm saying that happens. I don't know how you write a bill to stop that. My real question is, the basic structure of this bill, using the spending power it seems to me, puts a cloud on revenue on any State or local government that will make it very difficult or much more costly to float bonds because of the possibility that 10 years later or 5 years later, if the bond is for 30 years let us say, during the lifetime of the bond, some future official will do something wrong and some part of the revenue stream on which you generally relied as your backstop for the bonding would suddenly go up in smoke.

Ms. BERLINER. Okay. Well, there's two—I guess I have two responses to that. One would be there is a cure provision, which is you give the property back. The second is this wouldn't arise unless there was eminent domain going on.

Mr. NADLER. No. On the contrary. The possibility that that might happen in the future would be enough, I think, to cloud the revenue.

Ms. BERLINER. I don't——

Mr. NADLER. I think the bond rating agencies would certainly—let me ask Professor Echeverria. Would you comment on that? You've done property.

Mr. ECHEVERRIA. I think it is a very serious problem because it will be hard for a community to know, based on the very vague and general terms of the statute, whether or not a private party—any private party—tenent, landowner, or the Attorney General—could bring an action challenging an eminent domain project that is long completed, at which point presumably the project might have to be upended. If that risk were out there, it seems very hard to know how a community could get a project underway to begin—how they could get——

Mr. NADLER. I will go even further. If the State wanted to borrow money having nothing do with that project for something else, the very possibility—and if no one had thought of that project yet, but the possibility that someone in the future may think of that project, and the State may fall afoul of this law in a completely unpredicted project, simply by introducing that uncertainty would cloud the revenue stream and increase the cost of borrowing the money and making it impossible to borrow the money for a legitimate project.

Mr. ECHEVERRIA. For the entire community. For all purposes.

Mr. NADLER. Right. That is my point.

Ms. BERLINER. I don't think that it would work like that. There's a couple of different issues. One is that States are virtually never the abusers. It is almost always the city.

Mr. NADLER. It is the local government. Same question. The problem is if this ever occurred in a local government, if it was big enough it could easily send the local government into bankruptcy, even if they didn't—if you got bonds out there and now you lose your revenue because you made the wrong decision on a given project, that could easily send the local government into bankruptcy.

Ms. BERLINER. It just wouldn't arise, though, without eminent domain. So I think what you are asking is, is there a way to achieve a determination of the validity of the eminent domain under this bill prior to 7 years, which, I mean, there may be, especially through the Attorney General. That seems to me like a way that you could address this without getting rid of the bill but just having an easier way that the determination can be made.

Mr. NADLER. My time has expired. Thank you.

Mr. FRANKS. Thank you, Mr. Nadler. And I now recognize the distinguished gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses for your testimony. A few questions come to mind as I listen to the testimony. And I would turn first to Professor Echeverria. And I know you had more to say, so I will give you some opportunity to do that. But I would like if you could target it on this. Looking at the Fifth Amendment—and could you tell me your understanding of why the phrase "for public use" exists in the Fifth Amendment? And under the result that I think you've advocated, wouldn't that Fifth Amendment function just as well without that phrase, for public use?

Mr. ECHEVERRIA. I think the Supreme Court has said, and has said for 100 years, long before *Berman*, that the public use phrase imposes an obligation on the government to use the eminent domain power for a reasonable, rational, public purpose. And some people object to the idea that the term "use" can mean purpose. But I always say, when my children are making a lot of noise, I tell them, you know, be quiet. And sometimes it is just no use telling them to be quiet. In other words, it serves no purpose to tell them to be quiet. It is a perfectly plausible interpretation of the term "public use" that it means public purpose.

Mr. KING. Taking that argument then that you make, what do you make of the argument that it was a given that the Federal Government—or let us say all political divisions, subdivisions and otherwise—it was a given that they would respect the private property rights that might otherwise be taken for private use? Did they contemplate, do you think, that there would be people well enough positioned with their economic development influence and dollars, that they would be advocating to government that private property should be confiscated and given to other private interests? Or do you think—obviously I believe it was outside the scope of the thinking of our Founding Fathers when they drafted the Fifth Amendment. I would ask how you respond to that.

Mr. ECHEVERRIA. The U.S. Constitution has never been interpreted to prohibit the taking of private property for economic development.

Mr. KING. I might argue that that is what happened.

Mr. ECHEVERRIA. I'm just going to say that in the 19th century, when the Supreme Court focused in on this issue and said how do we interpret this phrase, they weren't focusing on urban redevelopment projects, obviously. They weren't focusing on *Berman*-type projects. They were dealing with claims that States could allow mining companies or irrigation companies to acquire access across private lands and that allowing private people to take private property in order to promote that kind of economic development.

Another good example that goes even further back is the so-called Mills Act, under which people who were trying to build old-fashioned mills wanted to place the mills at propitious sites along the rivers, and State law allowed them to do that. And people were allowed to seize those sites because placing those very valuable, early manufacturing——

Mr. KING. Were those acts litigated, the Mills Act, for example, to the Supreme Court?

Mr. ECHEVERRIA. Oh, yes. There is a whole library——

Mr. KING. That is the component I'm not familiar with. I will take your heads-up on that, Professor, and go back and review that for my own edification. But I would take you also to the statement that you made in your testimony. Congress—I'm reading from your text. "Congress should refrain from attempting to craft national legislation that would attempt to impose a one-size-fits-all solution on States and localities. But isn't that what the Constitution of the United States actually is, is a one-size-fits-all document, and our legislation that is before us is a direct response to a decision made by the Supreme Court to alter the interpretation of the Constitution itself?

So I will just make the point that the Constitution itself is a one-size-fits-all document. It protects rights and liberties specifically, so that all Americans live under the same standard. And I would open up for that response.

Mr. ECHEVERRIA. I'm second to none in my defense of the Constitution. *Kelo* changed nothing. *Kelo* reaffirmed 100 years of U.S. Supreme Court precedent.

Mr. KING. That would be the majority opinion, but not the dissenting opinion.

Mr. ECHEVERRIA. Well, it is the view of a majority of the Supreme Court; I think the overwhelming view of the majority of scholars. I think the argument was thoughtfully laid out in the brief I filed in the U.S. Supreme Court that was embraced by a majority of the court.

Mr. KING. As my clock ticks, Professor——

Mr. ECHEVERRIA. This legislation is a radical departure from the Constitution. This legislation does not see——

Mr. KING. Thank you. I would provide my own rebuttal, but I would like to offer Ms. Berliner an opportunity to do that since we are down to the yellow light. Thank you.

Mr. ECHEVERRIA. Thank you.

Ms. BERLINER. Well, *Kelo* did change the law. Up until then, there was still some attempt to adhere to a concept of public use that was certainly dented after *Berman*. But some attempt was made. But what happened in *Kelo*, it is almost as if the court was heading in the wrong direction. It was heading like this. But *Kelo* went from here to here. And it made a huge difference. Because in that case, instead of being about an area which I will never defend—so I am clear—but the area there was certainly in very bad shape and it was causing actual public health harms. In *Kelo*, there wasn't any claim there was anything wrong with this area. They didn't even bother to claim that. They just said we can make more money off of it if it was something else.

Mr. KING. I would just say when I see a residential home sticking up in the middle of an asphalt parking lot, I see that as a monument to the Fifth Amendment. I think property rights are so valuable a foundation for the economic development that this country has had, that when they are threatened and when they are damaged, it threatens our long-term development as well. Thank you. And I would yield back.

Mr. FRANKS. Thank you, Mr. King. I would concur with your thoughts completely. I recognize now the former distinguished Chairman of the Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Franks.

Ms. Vendetti, I wanted to join those that have applauded your strategies and courage and welcome you here as well.

What do you think of what you have heard here with all these lawyers and one very successful businessman today? How does this affect your feeling about what happened to you and what we are thinking about doing here?

Ms. VENDETTI. I am from New Jersey and there is no legislation to stop eminent domain from being used again the way it was in Long Branch. In Long Branch, the municipality blighted acres and acres of oceanfront. I mean, there were hundreds and hundreds of homes there. We have to have something in place to stop that—not in New Jersey, but all throughout the country. I think this is a step in the right direction. I mean, you can keep some Federal funds from municipalities.

I know when this was first thought about, our mayor and our city council almost—you know, well, they freaked out basically. They were nervous. You can't keep taking people's homes to give to someone else to build bigger homes. It just can't happen in the United States. And when I was doing the rallying and going across New Jersey and parts of the country too, people still to this day say, That can't happen in America.

Well, it can happen in America and we have to put a stop to it. I mean, if this is a drastic change, then maybe that is what we need in America. I mean, we need to put our foot down and say—you know, my father was a truck driver. How did he have a summer home? And he worked his rear end off, excuse me, but to have that home. And for someone just to come in to say, you know, he is no longer going to have it because we want to put something else better there, we need drastic means to stop that.

Mr. CONYERS. Thank you.

Professor Echeverria, is it accurate to say that this is something that has just started? Or maybe this has been going on longer than you knew about, Ms. Vendetti, because there have been a lot of eminent domain takings along this way for a long time. And I am not sure if the proposal before us is really going to correct what maybe you think it corrects. And I would like to ask the professor to join us in this conversation.

Mr. ECHEVERRIA. Thank you Chairman Conyers. If I could just join everyone in commending Ms. Vendetti in her successful struggle; it displays an enormous amount of courage and energy. I do just want to point out that thankfully she won. She won under New Jersey law by enforcing her rights to proper application of the New Jersey statutes. So the good news is that other people in New Jersey in similar circumstances won't face the threat that she faced, because the appellate courts in New Jersey and the Supreme Court of New Jersey have clarified what the standards are.

In response to your question, eminent domain has been with us for a long time. It is with us today. One of the ironies of this legislation, I find, is that it talks a great deal about rural landowners and rural landownership. But I don't know what it does for rural landowners, with respect to eminent domain, if anything.

To my understanding, there are two big issues with respect to eminent domain that face rural landowners in the United States as we speak. One is large pipeline developments, particularly the Keystone pipeline that is coming from Canada through the Dakotas through Nebraska through Wyoming.

If you Google Keystone and landowners, you will find innumerable articles about the controversies that are going on in those States about the use of eminent domain to take property for those pipelines. That is not part of this bill, even though it purports to protect rural property owners.

The other controversy has to do with transmission lines for the transport of electricity, an enormous issue in Virginia and other States. Landowners have been embroiled in very contentious controversies over the siting of those facilities, and the use of eminent domain for that purpose. Again, not within the scope of this bill.

If there is another eminent domain controversy where the use of eminent domain is being used in a way that threatens rural landownership that is within the scope of this——

Mr. CONYERS. Chairman Franks, might I get an additional minute?

Mr. FRANKS. Absolutely.

Mr. CONYERS. Please continue.

Mr. ECHEVERRIA. I was essentially done. I just said that the threats that rural landowners face as a result of eminent domain are types of eminent domain that are not addressed at all in this bill. And if there are other threats that are within the scope of this bill that do face rural landowners, I don't know what they are.

Mr. CONYERS. Well, the reason I needed a minute more is that I wanted to ask you about the problem of minorities being removed through abusive condemnation actions. There is so much urban renewal that has gone on historically that it is called "black removal."

And I am wondering what the effects of the Supreme Court decision and this bill have on that general consideration because, after all, Mr. Chairman, the real problem for many of us is that this will not guarantee—this will not help that removal of poor people who can't go into court, can't go through long battles, legal battles to win, as our distinguished witness did. Could you comment on that, please?

Mr. ECHEVERRIA. Well, I think that the larger issue is that taking away the eminent domain power would be a threat to urban America. The reality is that in urban areas, landownership is very fragmented. It is very hard to get housing built, to get commercial redevelopment done, without using the eminent domain power.

An example that I am very familiar with is the Skyland Mall in Anacostia, across the river from here. If you walk around that neighborhood and you quiz people, as I have done, and ask, "Would you support the use of eminent domain so that we can rehabilitate this shopping center?" The people you will meet on the street, who, as you know, are by a vast majority African Americans, will say, Yes, indeed, we want this shopping center rehabilitated. And we want that done.

It has not been done because there has been endless litigation in the D.C. courts trying to challenge the use of eminent domain to get that accomplished. So that is an example where I think African Americans seeking redevelopment of their communities, in fact, support the use of eminent domain.

Mr. NADLER. Mr. Chairman could I ask unanimous consent to ask one question?

Mr. FRANKS. Yes. Without objection.

Mr. NADLER. Thank you. Professor, we are aware obviously of the problem that the distinguished former Chairman was talking about. It certainly occurred in New York years ago. My impression—and I want to ask if this is the correct impression—is that really since the seventies, since large-scale construction of public housing and subsidies were replaced by section 8 and other things, that that really hasn't happened in the last 30 or 40 years; am I correct or not?

Mr. ECHEVERRIA. That's my general impression, that you have to go back to the days of Robert Moses if you want to see real eminent domain abuse. And that, in a sense, we are in a much better environment. And the worst abuses I think as you indicated, were associated with highway construction.

Mr. NADLER. But could it happen again? Under the current state of the law—I haven't seen it happen for a long time. I mean I certainly know of instances in New York history where it did 40 or 50 years ago, and it was called Negro removal and so forth. But could the city of New York or the city of Chicago or wherever condemn an entire neighborhood in order to put up an—I don't know, a new Lincoln Center or something today?

Mr. ECHEVERRIA. Well, I think there are a couple of answers to that. I think as a matter of constitutional law, to contradict Ms. Berliner, *Kelo* actually places some additional constraints relative to *Berman* and clearly to the Midkiff precedent which was, ironically enough, written by Justice O'Connor, which was sort of the high watermark of the use of eminent domain. The Supreme Court

in *Kelo* emphasized the need for an inclusive public planning process where the people have an opportunity to comment, in which there was democratic participation, in which the public authorities lay out what they intend to do in the form of a comprehensive plan, and there is a full back-and-forth. So I think that offers some protection.

But I think the more important answer to your question is really a change in social attitudes, that we value communities more than we used to, we respect the rights of minorities more than we used to. And I just think it is hard to imagine in this day and age those kinds of abuses occurring again.

Mr. FRANKS. Let me if I could go ahead, since we extended the questioning here a little bit, and ask Ms. Berliner to comment on Mr. Nadler's question related to the notion that there is a potential of black removal. I am trying to use that——

Ms. BERLINER. I mean, that is still perfectly possible under the law as it stands now, under the Supreme Court law. And this bill would actually do something to stop it. That is something that continues to happen. Again, there is a peer-reviewed article that came out recently showing that even within cities, the areas designated for eminent domain are the ones that are more minority areas than the rest of the city. And in fact, this bill does provide an avenue other than bringing a lawsuit, which I agree most people can't do, which is you can call the AG. You can call the Attorney General, tell them what is happening, and the Attorney General can figure out if something has happened.

So there is an avenue built into this bill that doesn't require years of litigation by individuals who can't afford it. And that is one of the things about the bill that is extremely helpful.

Mr. FRANKS. I want to thank the witnesses for coming today. And I especially wanted to suggest that Professor Echeverria, you mentioned that some of the neighbors there, some of the African American neighbors there, wanted the mall refurbished; and that if it hadn't been for so many of them fighting it in court, which occurs to me that maybe some of them are hesitant to let go of their rights——

Mr. ECHEVERRIA. It is not them fighting in court.

Mr. FRANKS. But in any case, let the record also reflect that someone had told me that when I called on the former Chairman, I called him the distinguished former Chairman. Somebody said I got those words a little bit wrong. I did not mean to suggest that he was formerly distinguished. Not at all. And in fact I think he distinguished himself very well today.

So, again, I would like to thank all the witnesses for their testimony today. And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to us as promptly as possible so that their answers can be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that, again, I thank the witnesses and the Members. And this hearing is adjourned.

[Whereupon, at 5:19 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement by Rep. Jerrold Nadler
Hearing on the Private Property Rights Protection Act
April 11, 2011

Thank you, Mr. Chairman.

For once the Supreme Court defers to the elected officials, and Congress cries foul.

The power of eminent domain is an extraordinary one, and should be used with great care. All too often, it has been abused for private gain, or to benefit one community at the expense of another.

It is, however, an important tool making possible transportation networks, irrigation projects, and other public purposes. To some extent, all of these projects are "economic development projects." Members of Congress are always trying to get these projects for our districts, and certainly the economic benefit to our constituents is always a consideration.

Has this bill drawn the appropriate line between permissible and impermissible uses of eminent domain? I think that is one of the questions we will really need to consider. We all know these easy cases. As the majority in Kelo said, "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." But which projects are appropriate and which are not can sometimes be a difficult call.

Historically, eminent domain has been used to destroy communities for projects having nothing to do with economic development, at least as defined in this bill. For example, highways have cut through neighborhoods, destroying them. Some of these communities are in my district, and have yet to recover from the wrecker's ball. Yet that would still be permitted by this bill. Other projects might have a genuine public purpose, and yet be prohibited. They rhyme or reason of this bill is not clear.

I believe, as I did in 2005, that this bill is the wrong approach to a very serious issue.

It will permit many of the abuses and injustices of the past, while crippling the ability of state and local governments to perform genuine public duties.

The bill would allow takings for private rights of way: pipelines, transmission lines, railroads.

It would allow highways to cut through communities and all the other public projects that have historically fallen most heavily on the poor and powerless. As Hilary Shelton of the NAACP testified when we last considered this legislation, these projects are just as burdensome as projects that include private development.

It allows a taking to give property to a private party "such as a common carrier, that makes the property available for use by the general public as of right ...."

Does that mean a stadium? It is privately owned, "available for use by the general public as of right" at least as much as a railroad: you can buy a seat. Is it a shopping center? You don't even need a ticket.

The World Trade Center could not have been built under this law. It was publically owned, but was predominantly leased office space and retail. Neither could Lincoln Center.

Affordable housing, like the Hope VI or the fabled Nehemiah program, a faith-based affordable housing program in Brooklyn, could never have gone forward.

Since 2005, there have been new developments that call into question whether Congress should even act at this point. In response to the Kelo decision, states have moved aggressively to reconsider and amend their own eminent domain laws. More than 40 states have acted. States have considered carefully the implications of this decision, and the needs of their citizens. I question whether Congress should now come charging in and presume to sit as a national zoning board, deciding which projects are or are not appropriate.

The law suits permitted, and the uncertainty of the bill's definitions, would cast a cloud over legitimate projects. A property owner or tenant has seven years *after* the condemnation before the litigation and appeals even begin.

Did the trial lawyers write this?

The local government would risk all of its economic development funding for two years, even for unrelated projects, and face bankruptcy if it guesses wrong about a project.

If you want to give someone the power to extort an entire city, this is it.

Mr. Chairman, this legislation goes well beyond the hypothetical taking of a Motel 6 to build a Ritz Carlton. It threatens communities with bankruptcy without necessarily protecting the most vulnerable populations. It comes after years of state action in which states have decided which approach would satisfy their concerns, and protect their citizens, the best.

I look forward to the testimony of today's witnesses who I hope can help us work through these difficult questions, and I yield back the balance of my time.

Statement of Congressman John Conyers, Jr.
Hearing on H.R. 1433, Private Property Rights Protection Act
April 12, 2011

Today the Subcommittee returns its attention to the issue of private property rights and eminent domain . When this legislation was introduced in 2005, I was an original cosponsor due to my concerns about how the practice of condemnation for economic development purposes have impacted minority communities. However, with the passage of time and legislative actions by the states to limit the practice, I have concerns about the necessity for federal action. I believe that this hearing will be important to updating the current state of affairs around the issue. Looking forward, I hope to work with my colleagues on both sides of the aisle to achieve a proper response to the Kelo decision.

In June 2005, the Supreme Court reached a decision in Kelo v. City of New London (545 U.S. __(2005) that shocked and outraged some Americans. If state and local governments can transfer property from one private owner to another based on their judgment of which uses will produce the most taxes and jobs, *it is not unreasonable to believe that no one's property is safe.*

As we explore this issue, I raise three primary concerns: (1) First, I would like to discuss the impact eminent domain and the Kelo decision have had on our minority, elderly, and poor communities. (2) Second, we should focus on how we

might define *"public use"* so that we protect property interests, as well as meet contemporary challenges. (3) Third, recognizing the complexity of this issue, I caution us to be thoughtful and prudent as we proceed in discussing potential remedies, given the particularly severe impact that any loss of economic development funds could have on poor and minority communities.

More than two dozen individuals and organizations filed briefs with the U.S. Supreme Court in support of the homeowners in Kelo v. City of New London. These "friends of the court," including the NAACP and the Southern Christian Leadership Conference, urged the justices to use the case of Kelo to end eminent domain abuse.

As the NAACP articulated in its brief, eminent domain has historically been used to target the poor, the elderly, and people of color. In this current era of gentrification and urban renewal efforts, these populations continue to suffer disproportionately. Even well cared for properties owned by minority and elderly residents risk being replaced with superstores, casinos, hotels, and office parks.

The financial gain that comes with replacing low property tax value areas with high property tax value commercial districts is too attractive for many state and local governments to resist. Such condemnations in predominantly minority and elderly neighborhoods are often easier to accomplish than they are elsewhere

because such communities often lack the political and economic clout necessary to contest these development plans.

Absent a more narrowly defined public use requirement, the takings power will continue to be abused and our most vulnerable citizens – racial and ethnic minorities, the elderly, and the economically disadvantaged – will disproportionately be affected and harmed. As we work to better define "public use," we must also consider what "economic development" should mean in this context.

Increasingly, governments across this country are taking private property for public use in the name of "economic development." Under the guise of economic development, private property is being taken and transferred to *another private owner*, so long as the new owner will use the property in a way that the government deems more beneficial to the public.

In my district of Detroit, Michigan, we have faced the same kinds of issues that arose in this case: the taking, through eminent domain, of private property for the so-called higher economic purpose of casino development. Perhaps, Justice O'Connor articulated it best when she wrote in her dissent: "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."

Many of us share Justice O'Connor's sentiment and feel like Kelo may run the risk of trampling the Constitutional guarantees provided by the Takings Clause of the Fifth Amendment – that "private property shall not be taken for *public use*, without *just compensation*." However, we must also be thoughtful and prudent as we take on this issue by obtaining a better sense of how states and cities will address Kelo.

It is important to point out that the Majority admitted that state courts are free to interpret their own provisions in a manner that's more protective of property rights. Thankfully, every state Constitution has prohibitions against private takings and a requirement that takings be for public use. To date, I believe that 43 states have taken some steps to address the issue of eminent domain abuse. So, there is an ample record for us to examine as we consider the need for federal action.

I look forward to exploring the issues I have just identified at today's hearing. Thank you.

1212 12th Street, N.W. - 4th Floor - Washington, D.C. 20005 - +1.202.290-7646 - http://www.propertyrightsalliance.org

April 12, 2011

To: All Members, House Subcommittee on the Constitution
Re: "Private Property Rights Protection Act"

Dear Representative:

On behalf of the Property Rights Alliance (PRA), I am writing today to urge you support the "Private Property Rights Protection Act of 2011" co-sponsored by Rep. James Sensenbrenner (R-WI) and Rep. Maxine Waters (D-CA). Eminent domain abuse continues to be a serious concern for private property owners across the United States and warrants your help once again.

As a result of the Supreme Court's 2005 ruling in *Kelo v. City of New London*, the government's power of eminent domain has become almost limitless, providing victimized citizens with few means to protect their property. This legislation will suspend Federal economic development funds for a period of two fiscal years to any state that takes property through eminent domain for a private purpose. It will also allow private property owners legal recourse to fight private property takings by state and local governments that are used for private purposes.

Several states have independently passed legislation to limit their power to eminent domain, and the Supreme Courts of Illinois, Michigan, and Ohio have barred the practice under their state constitutions. This bill will provide American citizens in every state with the means to protect their private property from exceedingly unsubstantiated claims of eminent domain.

Your strong leadership and efforts to correct the abusive use of eminent domain is needed at a time when government continues to leave the door wide open to these egregious takings. Although many states have already acted, Congress must play a pivotal role in reforming the use and abuse of eminent domain. On behalf of the property rights community, we thank you for your leadership on this issue and look forward to your continued efforts to protect private property.

Sincerely,

Kelsey Zahourek
Executive Director

112TH CONGRESS
1ST SESSION

H. RES. 329

Expressing support for the private property rights protections guaranteed by the 5th Amendment to the Constitution on the 6th anniversary of the Supreme Court's decision of Kelo v. City of New London.

IN THE HOUSE OF REPRESENTATIVES

JUNE 23, 2011

Mr. GINGREY of Georgia (for himself, Mr. KING of Iowa, Mr. BROUN of Georgia, Mr. WESTMORELAND, Mr. CULBERSON, Mr. THOMPSON of Pennsylvania, Mr. JONES, Mrs. BONO MACK, Mr. BARTLETT, Mr. MACK, and Mr. WEBSTER) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Expressing support for the private property rights protections guaranteed by the 5th Amendment to the Constitution on the 6th anniversary of the Supreme Court's decision of Kelo v. City of New London.

Whereas, on June 23, 2005, the Supreme Court issued a 5–4 decision in the case of Kelo v. City of New London;

Whereas the Takings Clause of the 5th Amendment states, "nor shall private property be taken for public use, without just compensation";

Whereas the majority opinion in Kelo v. City of New London significantly expanded the scope of the public use provision in the Takings Clause of the 5th Amendment;

Whereas the majority opinion in Kelo v. City of New London provided for the taking of a person's private property through eminent domain for the benefit of another private entity;

Whereas the dissenting opinion in Kelo v. City of New London affirmed that "the public use requirement imposes a more basic limitation upon Government, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person";

Whereas the dissenting opinion in Kelo v. City of New London expressed concern that the beneficiaries of this decision were "likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms" and "the Government now has license to transfer property from those with fewer resources to those with more"; and

Whereas all levels of government have a constitutional responsibility and a moral obligation to always defend the property rights of individuals and to only execute their power of eminent domain when necessary for public use alone, and with just compensation to the individual property owner: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that—

(1) State and local governments should only execute the power of eminent domain for those purposes that serve the public good in accordance with the 5th Amendment to the Constitution;

(2) State and local governments must always justly compensate those individuals whose property is taken through eminent domain in accordance with the 5th Amendment to the Constitution;

(3) any execution of eminent domain by State and local governments that does not comply with paragraphs (1) and (2) constitutes an abuse of government power and a usurpation of the individual property rights, as defined in the 5th Amendment to the Constitution;

(4) eminent domain should never be used to advantage one private party over another;

(5) no State or local government should construe the holdings of Kelo v. City of New London as justification to abuse the power of eminent domain; and

(6) Congress maintains the prerogative and reserves the right to address, through legislation, any abuses of eminent domain by State and local governments in light of the ruling in Kelo v. City of New London.

○

- Brief in Opposition Attorneys for Respondents, *Tuck-It-Away, Inc. v. New York State Urban Development Corporation, d/b/a Empire State Development Corporation* (2010)

G. Social Science, Legal, and Policy Research and Articles

1. Dick M. Carpenter II, and John K. Ross, Institution for Justice, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* (2007)
2. Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?* NORTHWESTERN UNIVERSITY SCHOOL OF LAW (2007)
3. John K. Ross and Dick Carpenter, *Robin Hood in Reverse: New York's Eminent Domain Policies Rob the Vulnerable to Reward the Powerful,* CITY JOURNAL (2010)
4. David T. Beito and Ilya Somin, *Battle Over Eminent Domain is Another Civil Rights Issue*, Cato Institute (2008)
5. Ilya Somin, *David Beito on Eminent Domain Abuse in Alabama* (2009)
6. Mindy Thompson Fullilove, M.D., *Eminent Domain & African Americans: What is the Price of the Commons?* v. 1, PERSPECTIVES ON EMINENT DOMAIN ABUSE, Institute for Justice (no date)
7. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and Private Uses of Eminent Domain*, YALE LAW & POLICY REVIEW (2003)
8. Castle Coalition, *50 State Report Card: Tracking Eminent Domain Reform Legislation Since* Kelo (2009)
9. Amanda W. Goodin, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, NEW YORK UNIVERSITY LAW REVIEW (2007)
10. J. Peter Byrne, Georgetown University Law Center, *Condemnation of Low Income Residential Communities Under the Takings Clause,* UCLA J. ENVTL. L. & POL'Y (2005)
11. Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Redevelopment,* ECOLOGY L.Q. (2007)
12. Douglas R. Porter, *Eminent Domain: An Important Tool for Community Revitalization,* Urban Land Institute (2007)

The Civil Rights Implications of Eminent Domain Abuse: A Briefing Proposal
Commissioner Kirsanow

The Fifth Amendment to the U.S. Constitution states that government shall not take private property except for "public use" without "just compensation."[1] In *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court held that eliminating blight qualifies as a permissible "public use" under the Fifth Amendment. In so doing, the *Berman* Court permitted Washington, D.C. to take a department store that was itself in good condition and transfer it to a private development corporation for the purpose of curing blight in the surrounding neighborhood, in which most of the residences were considered uninhabitable and beyond repair. Pursuant to that decision, the District of Columbia was able to expel some 5,000 low-income blacks from their homes in the name of "urban renewal."[2] Critics argue that the decision opened the door to the use (or abuse) of eminent domain by untethering it from its constitutional moorings to expand the terms "public use" to mean "public purpose."

Subsequent state court decisions further expanded the definition of "public use" by declaring that the possible "public benefits" from the hypothetical increased tax revenues or job creation that could flow from a more desirable private owner (such as a large business) justified the transfer of private property from one owner to another through eminent domain, regardless of the property's condition.

Some civil rights advocates have argued that the urban renewal condemnations permitted by *Berman* have been historically used to target racial and ethnic minorities. "Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that 'urban renewal' was often referred to as 'Negro removal.'"[3] Too often, "blight" was the facially neutral code word asserted to mask the discriminatory motives behind certain takings.[4] Today, some critics claim that officials often declare areas blighted and therefore in need of redevelopment that are not actually blighted, and the owners seldom receive just compensation. Critics also charge that the burden falls disproportionately on those lacking the money, political power and influence needed to rebuff attempted takings, with the deck stacked against property owners.

The Court's controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), took *Berman* further still. In *Kelo*, a divided (5-4) Court upheld the use of eminent domain by local governments to take individuals' private property and transfer it to others for the purpose of private economic redevelopment. Where eminent domain was once only permitted for clear-cut public uses, such as roads, bridges, parks, public buildings or other infrastructure, *Kelo* now sanctioned "private economic development" as a permissible "public use."

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[1] "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
[2] David Beito and Ilya Somin, *Battle Over Eminent Domain is Another Civil Rights Issue*, KANSAS CITY STAR, Apr. 27, 2008, available at http://www.cato.org/pub_display.php?pub_id=9361.
[3] Amicus Brief of the NAACP in *Kelo v. New London* at 7 (internal citations omitted), available at http://www.ij.org/images/pdf_folder/private_property/kelo/naacp02.pdf.
[4] *Id.* (citing Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003)).

In their separate dissents in *Kelo,* Justices O'Connor and Thomas derided the majority's expansion of the concept of "public use" and predicted that communities with less power than the business interests seeking their property, such as poor and minority communities or those populated by some other historically disenfranchised groups would be disproportionately harmed by eminent domain abuse.[5] A 2007 study commissioned by the Institute for Justice, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* appears to confirm the Justices' concerns, finding a disparate impact on the communities least capable of defending themselves against takings. "Taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and significantly more of them live at or below the federal poverty line."[6]

Today, forty-three states have enacted laws attempting to limit the scope of eminent domain power sanctioned by *Kelo*, but some scholars argue that those laws contain loopholes that "continue to permit the exact same kinds of condemnations under the guise of alleviating "blight"—a concept defined so broadly that virtually any property the government covets can be declared "blighted."[7]

This briefing would consist of two panels. The first would include scholars who have written on the topic to testify about the history of eminent domain abuse, its impact on poor and minority communities and implications for civil rights, as well as efforts by federal or state legislatures to curb the practice. A second panel might focus on one or more particular localities where eminent domain abuse has been alleged and allow the Commission to hear testimony from affected residents and small businesses in those areas. Because the problem and impacts of eminent domain abuse vary state by state, this briefing might also be used as a starting point for a joint national-state advisory committee project in which the SACs conduct similar briefings at the state level to inform a joint report on eminent domain abuse around the country.

[5] "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." *Kelo,* 545 U.S. at 521 (Thomas, J., dissenting).

[6] DICK M. CARPENTER, PH.D. & JOHN K. ROSS, INSTITUTE FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 7 (June 2007).

[7] *See, e.g.*, Beito and Somin, *supra* note 2.

Panelists' Biographies and Written Statements

David T. Beito, Chair, Alabama State Advisory Committee

J. Peter Byrne, Professor of Law, Georgetown University Law Center

Hilary O. Shelton, Senior Vice-President for Advocacy, NAACP

Ilya Somin, Associate Professor of Law, George Mason Law School

DAVID T. BEITO

David T. Beito is a Professor at the University of Alabama. He is the author of *Taxpayers in Revolt: Tax Resistance during the Great Depression* (Chapel Hill: University of North Carolina Press, 1989), *From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890-1967* (Chapel Hill: University of North Carolina Press, 2000); and *Black Maverick: T.R.M. Howard's Fight for Civil Rights and Economic Power* (Urbana: University of Illinois Press, 2009). The last book focuses on Dr. T.R.M. Howard who was not only one of the wealthiest blacks in Mississippi but was also the main early civil rights mentor to Medgar Evers and Fannie Lou Hamer.

Professor Beito edited *The Voluntary City: Choice, Community, and Civil Society* (Ann Arbor: University of Michigan Press, 2002). He has a book under contract with the University of Illinois Press entitled *"The Richer Gift of Individualism:" The Political Writings of Zora Neale Hurston.*

Professor Beito has published in the *Journal of Interdisciplinary History, Journal of Policy History, Journal of Southern History,* and *Journal of Urban History* among other scholarly journals. He has received fellowships from the Earhart Foundation, the Olin Foundation, and the Institute for Humane Studies. He has also published articles in *The Wall Street Journal*, *The Los Angeles Times*, *Reason*, and *American Enterprise*. His most recent articles (both in *The Wall Street Journal* in 2011) focused on the overlooked nationwide tax revolt of the 1930s and the provision of decentralized relief after the Tuscaloosa tornado of 2011.

Professor Beito edits the Liberty and Power Blog at the History News Network and is chair of the Alabama State Advisory Committee of the U.S. Commission on Civil Rights.

EMINENT DOMAIN THROUGH THE BACK DOOR IN MONTGOMERY, ALABAMA

By David T. Beito, Chair, Alabama State Advisory Committee

TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

August 12, 2011

Thank you for inviting me here today. Let me start by saying that I speak for myself in this testimony, not the Alabama State Advisory Committee which I chair. I have little to add to Ilya Somin's insightful and well-researched overview, and agree with the main thrust of his argument. As Somin points out, Americans into the early twentieth century greatly appreciated the link between civil rights and property rights. Civil rights champions ranging from the earliest abolitionists to the founders of the NAACP emphasized the constitutional protection of the right to acquire and hold property as essential to the economic progress of the poor and oppressed. In 1849, for example, Frederick Douglass declared that "civil government" should be "solemnly bound to protect the weak against the strong, the oppressed against the oppressor, the few against the many, and to secure the humblest subject in the full possession of his rights of person and of property." In defending property rights, of course, Douglass made a distinction between property originally acquired through mutual consent and homesteading, which he regarded as legitimate, and "property in man" which he viewed as "man-stealing."[1]

Rather than revisit these broader historical issues, or even eminent domain as conventionally understood, my testimony will

highlight a generally overlooked threat to the property rights of the poor and vulnerable. For lack of a better term, this threat can be called "eminent domain through the back door." I first encountered this phenomenon after becoming chair of the Alabama State Advisory Committee for the U.S. Commission on Civil Rights. Our Committee took seriously the mandate of the national Commission to look creatively and expansively at civil rights issues. One of our members, Margaret Brown, suggested that we examine the impact on state and local government policy on the property rights of minorities.

Not long before our Committee took on this issue, the U.S. Supreme Court had handed down its landmark decision in 2005 of *Kelo v. New London*. This ruling was highly permissive to local governments seeking to take property for economic development. In response to the "post-*Kelo* backlash," more than forty states enacted laws to protect property owners and narrow the discretion of governments. One of the first was Alabama's law of 2005 (followed up by another, more restrictive law, in 2006), which prohibited the use of conventional eminent domain for economic development. [2]

All of our members, regardless of partisanship, ideology, or race, agreed on the need to pursue the issue. As a result, the Advisory Committee convened two public forums. The first was in 2008 at the historic 16th Street Baptist Church in Birmingham Alabama. The church was an early meeting place for civil rights activists. In 1963, it was the scene of a tragic bombing which resulted in the deaths of four school children. During our meeting, several citizens

from around the state came forward to share their grievances about property rights abuse. One of these was Jim Peera, a developer in Montgomery, whose family had left Africa in the 1970s because of persecution of Asian minorities. Peera recounted disturbing examples of how blacks in Montgomery, a city often called the cradle of civil rights, were losing their property through an extensive application of Section 11-53B-1 et. seq. of the Alabama code. This provision leaves a major loophole for the indirect taking of property outside of conventional eminent domain. The legislature did not repeal it as part of its post-Kelo eminent domain reforms.[3]

The first two paragraphs of 11-53B-1 et. seq. gives some sense of its permissive nature: "It is estimated that within the municipalities of the state, there exist several thousand parcels of real property that due to poor design, obsolescence, or neglect, have become unsafe to the extent of becoming public nuisances. Much of this property is vacant or in a state of disrepair and is causing or may cause a blight or blighting influence on the city and the neighborhoods in which the property is located. Such property constitutes a threat to the health, safety, and welfare to the citizens of the state and is an impediment to economic development within the municipality....It is the intent of this chapter to authorize a municipality of the state to proceed with the demolition or repair of a structure based on its own findings, and to set out a method for collecting the assessment liens so imposed."[4]

In contrast to the standard eminent domain process, Montgomery property owners on the receiving end of Section 11-53B-1 et. seq. do not have any right to compensation, even in theory. Once declaring

the property a nuisance, the city typically demolishes the structure and then bills the owner, often by slapping a lien on the property, for the costs of demolition including the carting of away of the rubble. As Peera pointed out, because the owners are often poor, many cannot afford to pay and thus have to sell or abandon the land. He charged that the city was demolishing buildings which, by any reasonably objective standard, were neither blighted nor a nuisance. Of course, this point is somewhat academic since Alabama law gives governments maximum leeway to interpret the standards of blight and nuisance as well as to selectively apply them.[5]

Peera's information played a key role in convincing the Alabama State Advisory Committee to call a second public forum in April 2009 to focus on the situation in Montgomery. During that meeting, Peera showed the audience a map of demolitions in a single year. Most were in a small area in Montgomery's most heavily black areas, including Rosa Park's old neighborhood. There were more than fifty demolitions in 2008. The city council approved twenty nine more in 2009, sixty two in 2010, and eighteen by the end of March 2011. Most notably, at this meeting, Peera also told us about the case of Jimmie McCall who, as a result, testified.[6]

In his willingness to fight city hall, McCall was a rarity among Montgomery's property owners threatened with demolition of their homes. He has lived in the city for several decades. For years, he has scraped together a living by salvaging rare materials from historic homes and then selling them to private builders. Sometimes

months went by before he had a client. Finally, he had put aside enough to purchase two aces in Montgomery and started to build. He did the work himself using materials accumulated in his business including a supply of sturdy and extremely rare longleaf pine.[7]

McCall only earned enough money to build in incremental stages but eventually his "dream house" took shape. From the outset, however, the city showed unremitting hostility. He almost lost count of the roadblocks it threw up including a citation for keeping the necessary building materials on his own land during the construction process. More seriously, in 2007 he was charged under Section 11-B-1 et. seq. on the grounds that his home, then under construction, was a nuisance.[8]

The reaction of Montgomery's city fathers seemed strange to McCall. Wasn't he trying to fight blight by building a new home? McCall suspects that wealthy developers are trying to get their hands on the property: a rare two-acre parcel on a major thoroughfare. Unlike countless others in similar straits, McCall fought back and hired an experienced local lawyer. He negotiated a court-enforced agreement which gave him eighteen months to complete the home. Only a month after the agreement took effect in 2008, the city demolished the structure. Local bureaucrats, obviously in a hurry, did not give him notice when they sent in the bulldozers on the same day as the court order authorizing them. McCall appealed to the same judge who had allowed the demolition. Stating that she had been misled, she ordered the city to pay compensation. Montgomery has appealed and at this writing McCall has not received a cent. McCall thinks that the city

intends to drag it out until his money runs out.[9]

On April 15, 2010, I received a phone call from Karen Jones, another black property owner from Montgomery. She related a case which was no less compelling than that of McCall's. Only a day before she called me, the city had demolished her family home including furniture, a family bible, and old photographs. The authorities charged the property was a nuisance because the front porch was in disrepair. Although the city mailed out notices before sending out the bulldozers, none of them went to Jones. Instead they went to Forie Jones, her grandmother (deceased in 1989) and Matthew Jones, her uncle (deceased in 2000). [10]

The city claimed then, and now, that Karen Jones is not the owner although she pays the property taxes (which were not arrears) and has a warranty deed from 1982 indicating that she is an heir. Apparently, all of the other family members support her decision. Despite asserting that Jones is not the owner, the city has billed her more than 1200 dollars for the costs of demolition. Jones refused, and continues to refuse, to pay the lien on principle. In May of this year, the city tried to sell the property at auction, still naming the deceased Forie Jones as the owner in his official online information describing the property. According to Karen Jones, there were no bidders. She charges that the city has taken no action against other properties in the city which are in much greater states of disrepair. Partly as a result of the Jones case, the Castle Coalition of the Institute for Justice, a leading force against eminent domain abuse, has taken a special interest in the Montgomery situation. [11]

As Ilya Somin points out, many state laws, including that of Alabama, are still woefully inadequate in the protection of individual rights under eminent domain. I also second his emphasis on the need for local governments to work with property owners rather than adopt an adversarial relationship. Reforms will accomplish little, however, if they fail to address those abuses that occur outside of the conventional eminent domain framework. Under eminent domain through the back door, governments never actually try to take the land, at least at the beginning of the process, but the end result is often the same or worse for property owners. If they are poor and do not have access to good legal representation, they will often have either sell or abandon their property - that is after it has become nothing more than a vacant lot. As legal restrictions on conventional eminent domain become tougher, it becomes even more likely that governments will exploit this loophole.

Any reforms to eminent domain through the back door should start with the assumption that the property rights of the poor are just as worthy of protection as those of the rich. Put another way, it is essential that these individual rights be respected as ends in themselves not merely as a means to further the ends of another person or group. For this reason, these reforms should make it clear that the burden of proof is on local governments, not the property owner, to show that a genuine nuisance, which must be narrowly and specifically defined, exists.

Of course, any reforms should assume that the onus be placed on governments to fully inform the actual property owner of his or rights

prior to any demolition. There should be no more cases like those of Karen Jones and Jimmie McCall and, if there are, local governments should be required to pay for full compensation for any mistake and those responsible should be prosecuted. To put teeth in these reforms, each state could create a property rights ombudsperson in the attorney general's office. The role of the ombudsperson will be to provide owners with an informational brochure written in clear and concise language explaining their rights and, if necessary, recommend that the state bring charges against the local governments in cases of abuse.[12]

Lastly, I strongly recommend that this Commission call a special meeting to be devoted solely to the situation in Montgomery. In my view, unless this happens, the city will continue a policy of obfuscation and delay. I suggest that Mayor Todd Strange, who did not respond to invitations from the Commission to be here today, be at the top of any invitation list along with such alleged victims of property rights abuse via eminent domain through the back door as Karen Jones, Jim Peera, and Jimmie McCall.

Especially during a time of recession and tumbling home prices, local and state governments should regard the existing property owners in lower-income neighborhoods in Montgomery and elsewhere as their allies and assets to the community. They will have a great deal more success with economic development if they treat these owners as valuable urban pioneers who deserve praise and encouragement rather than as obstacles to be pushed out of the way if their rights conflict

with some broader social and economic agenda.

Margaret Brown, Farella Robinson, Shana Kluck, Christina Walsh, and Don Casey provided information which was extremely helpful in the preparation of this paper. Any errors, however, are those of the author.

Endnotes

[1] Paul D. Moreno, Black Americans and Organized Labor: A New History (Baton Rouge: Louisiana University Press, 2006), 12-14; David E. Bernstein, "Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective," Vanderbilt Law Review 51 (May 1998), 839-47; Frederick Douglass, "Comments on Gerrit Smith's Address," The North Star, March 30, 1849, (http://www.lib.rochester.edu/index.cfm?PAGE=4383, accessed July 20, 2011); Douglass, "Oration Delivered in Corinthian Hall, Rochester," July 5, 1852, http://www.lib.rochester.edu/index.cfm?PAGE=2945, accessed July 20, 2011); and Frederick Douglass to Henry C. Wright, The Liberator, 29 January 1847; reprinted in Philip Foner, ed., Life and Writings of Frederick Douglass, vol. 1 (New York: International Publishers, 1950), p. 199, (http://docsouth.unc.edu/neh/douglass/support9.html, accessed July 21, 2011).

[2] "Alabama Limits Eminent Domain," August 4, 2005, (http://www.washingtontimes.com/news/2005/aug/04/20050804-120711-4571r/, accessed July 20, 2011); and Ilya Somin, "Controlling the Grasping Hand: Economic Development Takings after Kelo," Supreme Court Economic Review 15 (2007), 245-47.

[3] Meeting, Transcript, Alabama Advisory Committee to the United States Commission on Civil Rights, April 29, 2008, 260-270, copy available from the U.S. Commission on Civil Rights.

[4] Code of Alabama, 1975, 11 53-B1, (http://alisondb.legislature.state.al.us/acas/CodeofAlabama/1975/coatoc.htm, accessed July 20, 2011).

[5] Radley Balko, "Blight Flight: Why is the City of Montgomery Condemning the Property of African Americans along a Civil Rights Trail?" Slate, September 17, 2010, (http://www.slate.com/id/2267743/, accessed July 20, 2011).

[6] Balko; and Sarah Netter, "Montgomery Residents Accuse City of Demolishing Homes to Sidestep Eminent Domain Laws," ABC News, August 26, 2010, (http://abcnews.go.com/US/montgomery-residents-accuse-city-demolishing-homes-sidestep-eminent/story?id=11470620&page=2, accessed July 20, 2011); and Brandon Pizzola, Maffucci Fellow at the Institute for Justice, "Authorized Demolitions Since 2010," copy in author's possession; and Meeting, Transcript, Alabama Advisory Committee to the United States Commission on Civil Rights, April 29, 2009, 22-35, copy available from the U.S. Commission on Civil Rights.

[7] Balko; Netter; and Benjamin Solomon, "How to Steal Land in Montgomery," False Magazine, January 2008,

(http://falsemagazine.org/content/montgomery_al.php, accessed July 20, 2011).

[8] Balko; Netter; and Solomon.

[9] Balko; Netter; and Solomon.

[10] Balko; Netter; and Karen Jones to Mayor Todd Strange, April 15, 2010, copy in possession of the author; Forie Jones, Certificate of Death, December 21, 1989, Alabama, Center for Health Statistics

[11] Montgomery County, Alabama, Online Property Detail Information, Owner Name: Jones Forie, C/O Matthew Jones, Parcel Number: 11-06-23-01-020-022.000, Date Extracted: June 8, 2011, copy in possession of the author; and "Eminent Domain Through the Backdoor in Montgomery," (2010) (http://www.castlecoalition.org/castlewatch/3508-eminent-domain-through-the-backdoor-in-montgomery, accessed July 21, 2011).

In reply to a letter from Farella Robinson, the Regional Director of the Central Region of the U.S. Commission on Civil Rights to Mayor Todd Strange, Kimberly O. Fehl, Montgomery's City Attorney, wrote that Jones and McCall "were not identified as owners of the property in which they claim their due process was denied. The records from the office of the Montgomery County Probate Court indicate that the property owner on the McCall property as Hannah McCall and on the Jones property as Forie Jones, c/o Matthew Jones." Fehl to Robinson,

June 23, 2010, copy in possession of the author. As already mentioned, Forie and Matthew Jones both died more than a decade ago. Hannah McCall is Jimmie McCall's wife, and they are not estranged or at odds on this issue.

[12] The author would like to thank Don Casey for some of these suggestions.

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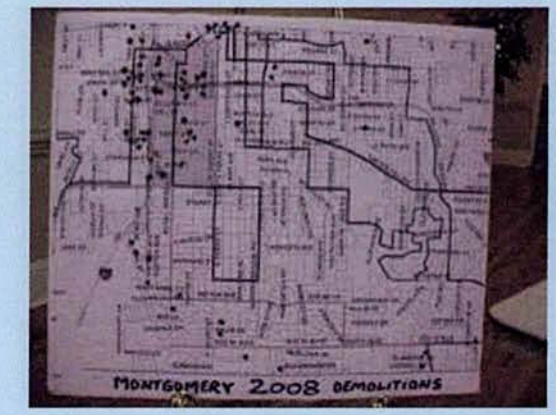
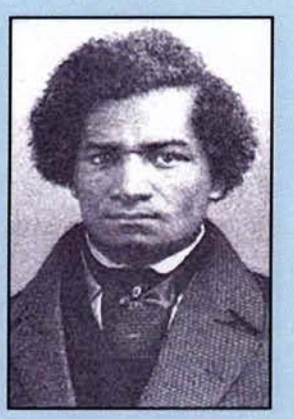


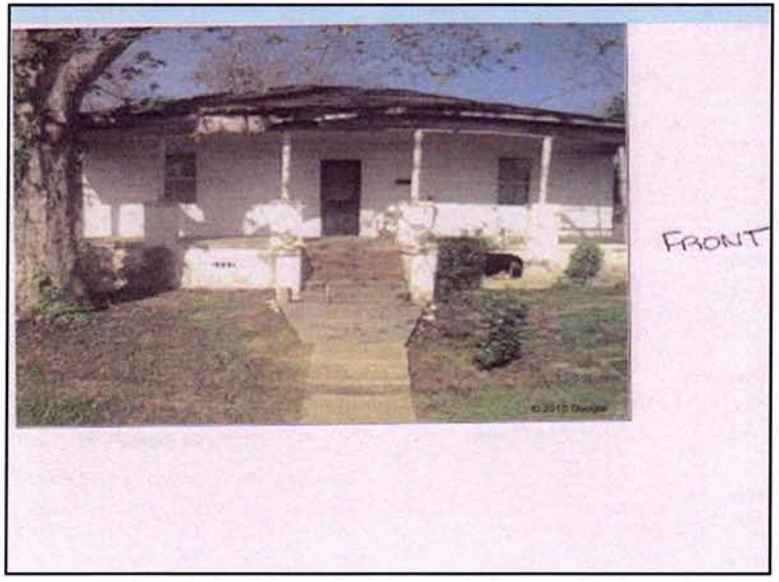
Map of 2008 Demolitions prepared by Jim Peera



Frederick Douglass

"we hold that civil government to be solemnly bound to protect the weak against the strong, the oppressed against the oppressor, the few against the many, and to secure the humblest subject in the full possession of his rights of person and of property." (1849)

Jimmie McCall's Unfinished House, Prior to Demolition



Family Home of Karen Jones
Prior to Demolition

J. PETER BYRNE

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Testimony Before the U.S. Civil Rights Commission
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Eminent Domain and Racial Discrimination: A Bogus Equation

J. Peter Byrne
Georgetown University Law Center

This hearing addresses claims that the use of eminent domain for economic development unfairly and disproportionately harms racial and ethnic minorities. These claims draw on the history of urban renewal prior to the 1960's, when many African Americans and others were displaced by publicly funded projects that bulldozed their homes in largely failed attempts to modernize cities. Justice Clarence Thomas's dissent in *Kelo v. City of New London* further argued that the use of eminent domain for economic redevelopment would inevitably harm minorities and the poor.[i]

Such concerns in our time are seriously misplaced. Redevelopment projects using eminent domain continue to be an invaluable tool for maintaining the economic competitiveness and livability of urban areas where property ownership is fragmented and where minorities live in large numbers. The discriminatory elements of older urban renewal reflect the racism generally prevalent in political life in the 1940's and 50's, and have been largely eliminated by the growth of political power by African Americans and other urban minorities, as well as the changed fiscal relations between the federal and local governments, the effect of which has been to give greater control over redevelopment projects to local political leaders. Use of eminent domain, rarely now applied to residences, today requires political consent and community buy-in.

Eminent domain is a crucial legislative power exercised by governments around the world and dating back at least to Roman times. It empowers government to acquire property in specific locations for the construction of networks and the assembly of large tracts even when private owners do not wish to sell or holdout for excessive payment. Under our constitution, owners are protected by the requirement that government pay them "just compensation." The meaning of the Takings Clause of the Fifth Amendment relating to taking property for "public use" long has been controversial, but no U.S. Supreme Court decision contradicts the holding of Kelo that public use includes publicly approved condemnations for economic redevelopment of economically distressed areas. The quality of the redevelopment projects varies, but recent successful projects can be found from the Ferry Building in San Francisco to Times Square in New York.[ii] Economic revitalization of urban areas will tend to aid poor minorities who disproportionately dwell in cities, by increasing employment and tax revenues for education and other city services.

Political realities have changed dramatically since the urban renewal period. Minorities have secured significant political power in nearly every U.S. city, as well as increased influence in private real estate markets. Redevelopment projects have largely come under the control of local governments, as federal money and direction have disappeared. Local officials strive to

avoid displacement of homes because of negative political repercussions and expensive litigation. Federal and state statutes have in many instances increased the payments due property owners about what "just compensation" requires. In these circumstances, the condemnation of homes is rare and has little or no identifiable ethnic or racial character. The plaintiffs in Kelo were white, middle class people – which explains a good bit of the hysterical media reaction.

The changes in the political economy of economic development can be seen by comparing the urban renewal of Southwest Washington, DC, in the 1950's, approved by the Supreme Court in Berman v. Parker[iii], with the use of condemnation in DC today. The massive condemnations, bulldozing, and reconstruction of Southwest Washington comprised a complex episode with many facets, but poor African Americans residents seem to have suffered disproportionate displacement. At that time, there was no democracy or elected government at all in Washington; the statute authorizing the project was enacted by Congress, and the members of the Redevelopment Land Agency that carried out the project were appointed by the federal government or their DC appointees. The most controversial exercise of eminent domain in Washington D C in the past decade has been the condemnation of stores in the Skyland strip mall in Anacostia to permit the construction of a badly needed private supermarket for an underserved area. That action, although bitterly contested in court by some owners, was supported by many member of the local community, specifically approved by the D.C. Council, which was majority African American, and signed by Mayor Anthony Williams.[iv] Although specifically exercised in order to convey the land to a private developer, it would be absurd to suggest that the case presents a civil rights issue appropriate for consideration by the U.S. Civil Rights Commission. Similar observations can be made about the use of eminent domain by Dudley Street Neighborhood Initiative in Boston to assemble land for affordable housing.[v]

Nor is there reason to suppose that condemnations for economic development are more likely to harm minorities than condemnations for other traditional public uses. Many of the most brutal condemnations in the urban renewal period were accomplished for highways and public housing where the government would actually own the site. Government has the same general incentive to seek less expensive or flourishing lands for condemnation whatever the use to be made. If the goal really is to protect minorities, why are the proponents not seeking to constrain the uses of eminent domain that historically have been most harmful to minorities? Yet, legislation recently introduced in Congress, H.R. 1433, ignores these exercises of eminent domain for highway construction and other public projects, while prohibiting economic development that has the potential to aid low income people.

The case against eminent domain here has been advanced largely on the basis of advocacy by libertarian organizations, which broadly oppose the use of eminent domain because they value private property more highly than local democracy. The evidence that that they marshal, such as the lurid *Victimizing the Vulnerable*, presents ambiguous data in highly colored language. That study shows no more than that communities are somewhat more likely to pursue redevelopment in poorer areas than in more affluent areas. There is no consideration of the public benefits to be gained from these projects, the distribution of such benefits, or the scope or character of citizen participation in decision making. Nonetheless, the study leaps to the astounding conclusion that, "The only real solution is prohibiting the use of eminent domain for

private development to protect the constitutional rights of all citizens,...."[vi] Thus, they oppose condemnation of the property of our largest corporations as much as that of the most economically marginal minority individual. The concern for the latter seems frankly tactical, since they know that they would get little hearing in many quarters simply advocating to reduce the scope of state legislative power over private property.

If one were worried about disproportionate impacts of eminent domain on the poor or minorities, there are remedies that would address that directly. One might provide more procedural protections or compensation to residents than to commercial property owners. One could mandate minimum payments to tenants, who normally receive no compensation hen rental housing is condemned. The Fair Housing Act could be amended to clarify that it applies to condemnation of residences without regard to intent.[vii] These ideas are all worthy of study but have not been because they do not meet the agenda of the libertarian groups driving the issue, which is to limit further the powers of government in favor of private capital. Proponents rather would deprive the DC government of the power to use eminent domain to build a supermarket in Anacostia. In a world of growing economic inequality, in a political climate demanding cutting taxes as well as medical and pension benefits, it is unfortunate we are spending this time discussing the non-issue of the effects of eminent domain on minorities.

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[i] 545 U.S. 469, 521-22 (2005).

[ii] *See e.g.,* Marc B. Mihaly, Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment, 34 Ecology L. Q. 1 (2007); Robert G. Dreher and John D. Echeverria, *Kelo's* Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development (2006), at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 U.C.L.A. J. Envtl. L. & Pol. 131 (2005); Jeff Finkle, Eminent Domain and Economic Development, at http://law.case.edu/centers/business_law/eminent_domain/pdfs/Finkle_eminent_domain_pwrpt.pdf.

[iii] 348 U.S. 26 (1954).

[iv] See, e.g., Duk Hea Oh v. NCRC, 7 A. 3d 997 (D.C. 2010); Franco v. District of Columbia, 3 A.3d 300 (D.C. 2010); Rumber v. District of Columbia and NCRC, 487 F.3d 941 (D.C. Cir. 2007); Franco v. National Capital Revitalization Comm'n, 930 A.2d 160 (D.C. 2007).

[v] *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain,* 36 B.C.L. Rev. 1061 (1995).

[vi] DICK M. CARPENTER, PH.D. & JOHN K. ROSS, INSTITUTE FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 7 (June 2007).

[vii] Edward A. Imperatore, Discriminatory Condemnations and the Fair Housing Act, 96 GEO. L.J. 1027 (2008).

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avoid displacement of homes because of negative political repercussions and expensive litigation. Federal and state statutes have in many instances increased the payments due property owners about what "just compensation" requires. In these circumstances, the condemnation of homes is rare and has little or no identifiable ethnic or racial character. The plaintiffs in Kelo were white, middle class people – which explains a good bit of the hysterical media reaction.

The changes in the political economy of economic development can be seen by comparing the urban renewal of Southwest Washington, DC, in the 1950's, approved by the Supreme Court in Berman v. Parker[iii], with the use of condemnation in DC today. The massive condemnations, bulldozing, and reconstruction of Southwest Washington comprised a complex episode with many facets, but poor African Americans residents seem to have suffered disproportionate displacement. At that time, there was no democracy or elected government at all in Washington; the statute authorizing the project was enacted by Congress, and the members of the Redevelopment Land Agency that carried out the project were appointed by the federal government or their DC appointees. The most controversial exercise of eminent domain in Washington D C in the past decade has been the condemnation of stores in the Skyland strip mall in Anacostia to permit the construction of a badly needed private supermarket for an underserved area. That action, although bitterly contested in court by some owners, was supported by many member of the local community, specifically approved by the D.C. Council, which was majority African American, and signed by Mayor Anthony Williams.[iv] Although specifically exercised in order to convey the land to a private developer, it would be absurd to suggest that the case presents a civil rights issue appropriate for consideration by the U.S. Civil Rights Commission. Similar observations can be made about the use of eminent domain by Dudley Street Neighborhood Initiative in Boston to assemble land for affordable housing.[v]

Nor is there reason to suppose that condemnations for economic development are more likely to harm minorities than condemnations for other traditional public uses. Many of the most brutal condemnations in the urban renewal period were accomplished for highways and public housing where the government would actually own the site. Government has the same general incentive to seek less expensive or flourishing lands for condemnation whatever the use to be made. If the goal really is to protect minorities, why are the proponents not seeking to constrain the uses of eminent domain that historically have been most harmful to minorities? Yet, legislation recently introduced in Congress, H.R. 1433, ignores these exercises of eminent domain for highway construction and other public projects, while prohibiting economic development that has the potential to aid low income people.

The case against eminent domain here has been advanced largely on the basis of advocacy by libertarian organizations, which broadly oppose the use of eminent domain because they value private property more highly than local democracy. The evidence that that they marshal, such as the lurid *Victimizing the Vulnerable*, presents ambiguous data in highly colored language. That study shows no more than that communities are somewhat more likely to pursue redevelopment in poorer areas than in more affluent areas. There is no consideration of the public benefits to be gained from these projects, the distribution of such benefits, or the scope or character of citizen participation in decision making. Nonetheless, the study leaps to the astounding conclusion that, "The only real solution is prohibiting the use of eminent domain for

private development to protect the constitutional rights of all citizens,...."[vi] Thus, they oppose condemnation of the property of our largest corporations as much as that of the most economically marginal minority individual. The concern for the latter seems frankly tactical, since they know that they would get little hearing in many quarters simply advocating to reduce the scope of state legislative power over private property.

If one were worried about disproportionate impacts of eminent domain on the poor or minorities, there are remedies that would address that directly. One might provide more procedural protections or compensation to residents than to commercial property owners. One could mandate minimum payments to tenants, who normally receive no compensation hen rental housing is condemned. The Fair Housing Act could be amended to clarify that it applies to condemnation of residences without regard to intent.[vii] These ideas are all worthy of study but have not been because they do not meet the agenda of the libertarian groups driving the issue, which is to limit further the powers of government in favor of private capital. Proponents rather would deprive the DC government of the power to use eminent domain to build a supermarket in Anacostia. In a world of growing economic inequality, in a political climate demanding cutting taxes as well as medical and pension benefits, it is unfortunate we are spending this time discussing the non-issue of the effects of eminent domain on minorities.

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[i] 545 U.S. 469, 521-22 (2005).

[ii] *See e.g.,* Marc B. Mihaly, Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment, 34 Ecology L. Q. 1 (2007); Robert G. Dreher and John D. Echeverria, *Kelo's* Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development (2006), at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 U.C.L.A. J. Envtl. L. & Pol. 131 (2005); Jeff Finkle, Eminent Domain and Economic Development, at http://law.case.edu/centers/business_law/eminent_domain/pdfs/Finkle_eminent_domain_pwrpt.pdf.

[iii] 348 U.S. 26 (1954).

[iv] See, e.g., Duk Hea Oh v. NCRC, 7 A. 3d 997 (D.C. 2010); Franco v. District of Columbia, 3 A.3d 300 (D.C. 2010); Rumber v. District of Columbia and NCRC, 487 F.3d 941 (D.C. Cir. 2007); Franco v. National Capital Revitalization Comm'n, 930 A.2d 160 (D.C. 2007).

[v] *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain,* 36 B.C.L. Rev. 1061 (1995).

[vi] DICK M. CARPENTER, PH.D. & JOHN K. ROSS, INSTITUTE FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 7 (June 2007).

[vii] Edward A. Imperatore, Discriminatory Condemnations and the Fair Housing Act, 96 GEO. L.J. 1027 (2008).

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THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE

TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

August 12, 2011

INTRODUCTION

I am grateful for the opportunity to address the important issue of the impact of eminent domain on racial and ethnic minorities. I would like to thank Chairman Castro, Vice Chair Thernstrom, and the other commissioners for their interest in this vital question.

As President Barack Obama aptly put it, "[o]ur Constitution places the ownership of private property at the very heart of our system of liberty."[1] The protection of property rights was one of the main purposes for which the Constitution was originally adopted.[2] Unfortunately, the Supreme Court has often relegated property rights to second class status, giving them far less protection than that accorded to other constitutional rights.[3] And state and local governments have often violated those rights when it seemed politically advantageous to do so.

Americans of all racial and ethnic backgrounds have suffered from government violations of constitutional property rights. But minority groups have often been disproportionately

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[1] BARACK OBAMA, THE AUDACITY OF HOPE 149 (2006).

[2] *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (emphasizing centrality of property rights for the Founders); JAMES W. ELY, JR. THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 42-58 (3d. ed. 2008) (emphasizing centrality of property rights for the Founding generation); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (noting that "[p]erhaps the most important value of the Founding Fathers of the American constitutional period, 'was their belief in the necessity of securing property rights").

[3] I have summarized the second class status of property rights in current Supreme Court jurisprudence in Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law*, George Mason Univ. Law & Econ. Res. Paper No. 08-53 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854

victimized, sometimes out of racial prejudice and at other times because of their relative political weakness. Minorities are especially likely to be victimized by private to private condemnations that test the limits of the Public Use Clause of the Fifth Amendment, which requires that property can only be condemned for a "public use." These include takings allegedly justified by the need to alleviate "blight" and promote "economic development."

Part I of my testimony briefly surveys the constitutional law of eminent domain and public use. It documents the extent to which the Supreme Court has given condemning authorities a near-blank check to take property for whatever purposes they want.

Part II examines the impact of blight and economic development condemnations on minority groups. Both types of takings often victimize racial and ethnic minorities. Although such condemnations are defended on the grounds that they are needed to promote economic growth in poor communities, they often destroy far more wealth than they create. Economic development can be better promoted by other, less destructive means. African-Americans and Hispanics are targeted more often than other groups in large part because of their relative political weakness and comparatively high poverty rates. While, certainly, not all members of these groups are poor or politically weak, a disproportionately large number are.

Finally, in Part III I explain why the problem of abusive takings persists despite the wave of state reform laws adopted in response to the Supreme Court's unpopular decision upholding economic development takings in *Kelo v. City of New London*.[4] Many of the new laws actually impose little or no constraint on economic development takings. Even those that do impose meaningful restrictions usually still allow private-to-private condemnations in the types of "blighted" areas where many poor minorities live. Although post-*Kelo* reforms are a step in the right direction, much remains to be done before the property rights of poor minorities are anywhere close to fully protected.

I. THE CONSTITUTIONAL LAW OF PUBLIC USE.

The Fifth Amendment requires that property can only be condemned for a "public use."[5] Traditional public uses include those where the condemned land is actually "used" by the public, either by building a government-owned structure on it (such as a road or a bridge), or by constructing a privately owned facility that the owner is legally required to allow the general public to use, such as a public utility.

In *Kelo v. City of New London*, the Supreme Court ruled that the condemnation of private property for transfer to another private party in order to promote "economic development" was a permissible "public use"; indeed, it ruled that virtually any potential benefit to the public benefit or "public purpose" counts as a "public use."[6] The Court upheld the condemnation of land in New London for transfer to a private party despite the fact that the

[4] 545 U.S. 469 (2005).
[5] U.S. CONST. AMEND. V.
[6] *Kelo v. City of New London*, 545 U.S. 469, 473-78 (2005).

condemned property would not be owned by the government, the general public would have no right of access to it, and there was no legal requirement that the new private owners actually produce the promised "economic development" that supposedly justified the takings in the first place.

Kelo was largely consistent with two previous Supreme Court decisions that defined "public use" very broadly.[7] In the 1954 case of *Berman v. Parker*, the Court upheld the condemnation of "blighted" property for transfer to private developers and concluded that that the legislature has "well-nigh conclusive" power to define public use as it sees fit.[8] *Berman's* highly permissive approach was reaffirmed in *Hawaii Housing Authority v. Midkiff* in 1984.[9]

Whatever its basis in precedent, *Kelo* was at odds with the text and original meaning of the Fifth Amendment, which do not conflate "public use" with potential "public benefit," instead limiting "public use" to cases of actual government ownership of condemned property or at least a legal right of access by the public (as in the case of public utilities).[10] *Kelo* also placed undue faith in the willingness of government officials to protect the constitutional property rights of the poor and politically weak. As historian and law professor James W. Ely, Jr. has written, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" to the very government officials whose abuses of power it is meant to constrain.[11] There is little sense in recognizing a constitutional right for the purpose of curbing abuses of government power, and then leaving the definition of that right up to the discretion of the very officials whose power the right is supposed to restrict.

It should also be noted that the need to protect property rights against abusive state and local governments was one of the main reasons why the framers of the Fourteenth Amendment sought to apply the Bill of Rights to the states. Congressional supporters of the Amendment feared that southern state governments would threaten the property rights of African-Americans and those whites who had supported the Union against the Confederacy during the Civil War.[12] This objective cannot easily be reconciled with allowing those very same state governments to determine what qualifies as a public use, thereby giving them a blank check to expropriate the property of both African-Americans and white loyalists. The right to

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[7] *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (ruling that takings are for a public use if they are "rationally related to a conceivable public purpose"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that the legislature has "well-nigh conclusive" power to define public use as it sees fit).

[8] *Berman*, 348 U.S. at 32.

[9] *Midkiff*, 467 U.S. at 240-41.

[10] *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners,* 2005 CATO SUP. CT. REV. 39, 40-43 (describing early American jurists' rejection of the idea that eminent domain can be used to transfer property from one private party to another without giving the general public any right to use it). *See also* Eric R. Claeys, *Public Use Limitations and Natural Property Rights,* 2004 MICH .ST. L, REV. 877, 894–905 (2004) (symposium issue) (detailed discussion of limited eighteenth and nineteenth century conceptions of public use that banned most private-to-private takings);

[11] *Id.* at 62.

[12] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268-69 (1998).

private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[13]

Whether or not *Kelo* and *Berman* were correctly decided, their effect has been to eviscerate most federal judicial oversight of the use of eminent domain. Even after *Kelo*, federal courts may strike down "pretextual" condemnations whose official rationale is a mere pretext "for the purpose of conferring a private benefit on a particular private party."[14] For the last several years, state and federal courts have struggled over the question of what qualifies as a "pretextual" taking.[15] But this restriction is unlikely to greatly constrain the use of eminent domain in the long run, since, under *Kelo*, a state or local government can still condemn property for virtually any "public purpose" that might potentially create some sort of benefit.[16] Courts are not even allowed to consider whether the claimed benefits will actually materialize or not.[17] Even a relatively robust pretextual takings doctrine is therefore unlikely to give property owners more than marginal protection against abusive condemnations.[18]

Some state courts have taken a more restrictive approach in interpreting the public use clauses of their state constitutions than the federal Supreme Court has in regards to the Fifth Amendment. Eleven state supreme courts currently forbid *Kelo*-like economic development takings.[19] Nonetheless, most states permit a wide range of private-to-private condemnations.[20]

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[13] On the centrality of property rights in nineteenth century conceptions of civil rights, see, e.g., HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-75 395-97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s, along with the right to contract, the right to marry, and the right of access to the courts); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (describing how most nineteenth century jurists viewed property as a fundamental civil right).

[14] *Kelo*, 545 U.S. at 477–78.

[15] For a discussion of the relevant cases, see Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALBANY GOVT. L. REV. 1 25-35 (2011) (Introduction to Symposium on Eminent Domain in the United States).

[16] *Kelo*, 545 U.S. at 469-78.

[17] *Id.* at 487-89 (rejecting property owners' argument that the government must prove a "reasonable certainty" that the development project will succeed, and refusing to "second-guess he City's considered judgments about the efficacy of its development plan).

[18] Somin, *Judicial Reaction* at 34-35.

[19] *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that "economic development" alone does not justify condemnation); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 653–54 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma State Constitution, and rejecting *Kelo* as a guide to interpretation of Oklahoma's state Public Use Clause); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota Constitution gives property owners broader protection than Kelo and requires "actual use" of the condemned property by the government or the public); *County of Wayne v Hathcock*, 684 NW2d 765 (Mich. 2004) (rejecting "economic development" rationale for condemnation); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 9, 11 (Ill. 2002) (holding that a "contribu[tion] to positive economic growth in the region" is not a public use justifying condemnation); *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 770, 778 (Mich. 2004) (invalidating economic development takings under the Michigan Constitution); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a private business is unconstitutional unless the transfer to the business is insignificant and incidental to a public project); *Ga. Dep't of Transp. v. Jasper Cnty.*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial "projected economic benefit . . . cannot justify a condemnation."). *Baycol, Inc v Downtown Development Authority*, 315 So. 2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *In re Petition of Seattle*, 638 P.2d 549, 556–57 (Wash 1981) (disallowing

Overall, there is currently very little federal judicial oversight of private-to-private condemnations. While some states have imposed more restrictive rules, the majority have not. Therefore, property rights in most of the country remain vulnerable to takings that transfer property from the politically weak to influential interest groups.

II. The Displacement of Minorities by Eminent Domain.

Private to private condemnations are often used for the benefit of the politically powerful at the expense of the politically weak.[21] For most of American history, African-Americans and other minority groups have fallen into the latter category. As a result, they have often been victimized by the use of eminent domain for "blight" and economic development takings.

A. The Historic Impact of Blight Condemnations.

Beginning in the 1930s, many states adopted laws and constitutional amendments allowing the condemnation of "blighted" property for transfer to private parties in order to alleviate "slum-like" conditions.[22] Over the next fifty years, as many as several million Americans were expelled from their homes as a result of blight and urban renewal condemnations.[23] Numerous businesses, churches, and other community institutions were also destroyed.

The vast majority of those uprooted from their homes have been poor minorities, primarily African-Americans.[24] The use of eminent domain to evict poor blacks during the post-World

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plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v McCormick*, 581 SW2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Karesh v City of Charleston*, 247 S.E. 2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); *City of Little Rock v Raines*, 411 S.W. 2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v Port of Seattle*, 341 P.2d 171, 181–191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use,"); *Opinion of the Justices*, 131 A. 2d 904, 905–06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *City of Bozeman v Vaniman*, 898 P2d 1208, 1214–15 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project).

[20] See discussion in Part III, *infra*.

[21] For a discussion of the reasons for this pattern see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 190-203 (2007).

[22] *See generally* Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (describing origins of these laws); Ilya Somin, *Blight*, ENCYCLOPEDIA OF HOUSING (forthcoming) (same); Amy Lavine, *From Slum Clearance To Economic Development: A Retrospective of Redevelopment Policies in New York State* 4 ALB. GOVT. L. REV. 212 (2011) (describing origins of New York's important early blight laws).

[23] Somin, *Grasping Hand* at 269-71.

[24] Id. For studies documenting the disproportionate impact of blight and urban renewal takings on minorities, see MARTIN ANDERSON, THE FEDERAL BULLDOZER 64-65 (1965); MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT ch. 4 (2004); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. L. & REFORM, 680, 740–41 (1994) (same);. Pritchett, *The "Public Menace" of Blight*; Mindy Thompson Fullilove, *Eminent Domain and African-Americans* (Institute for Justice, 2007).

War II era was so common that many, including famed African-American writer James Baldwin, referred to urban renewal as "Negro removal."[25] Similarly, "slum clearance" was sometimes dubbed "Negro clearance."[26] Between 1949 and 1973, some two-thirds of the over one million people displaced under takings sponsored by the Urban Renewal Act of 1949 were African-American.[27] This figure understates the total impact of blight takings on blacks, because many blight condemnations were also undertaken by state and local government without federal backing.[28] Hispanic groups, such as Puerto Ricans, were also commonly targeted.[29]

In many cases, the disproportionate impact on African-Americans was not merely an accidental byproduct of efforts to "clean up" bad neighborhoods. It was deliberately intended by local officials.[30] Local governments sometimes sought to rid themselves of what they called "niggertowns."[31] In most cases, those displaced by blight condemnations ended up worse off than they were before, and were not fully compensated for their losses.[32]

In 1954, the Supreme Court upheld the constitutionality of blight condemnations in *Berman v. Parker*.[33] Significantly, *Berman* upheld a blight condemnation that was part of a project that forcibly displaced over 5000 people in a poor Washington, D.C. neighborhood.[34] Some 97.5% of them were African-American.[35] Only about 300 of the 5900 housing units constructed on the site after the takings were affordable to the former residents of the area, most of whom ended up in worse conditions elsewhere.[36] By the 1960s, the neighborhood in question was majority white.[37]

As prominent legal scholar Wendell Pritchett points out, "[t]he irony is that, at the same time it was deciding *Berman*, the Court was deciding *Brown* [*v. Board of Education*], which reflects a distrust of government (particularly local government) to protect the interests of minority groups and to treat all citizens equally."[38] Unfortunately, the Supreme Court and most other legal elites failed to grasp the contradiction between aggressive judicial oversight

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[25] Pritchett, *The "Public Menace" of Blight*, at 47; FULLILOVE, ROOT SHOCK ch. 4. James Baldwin famously stated that "urban renewal ... means moving the Negroes out. It means Negro removal, that is what it means." Citizen King: Three Perspectives, PBS Transcript, available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04_tr_qry.html.

[26] Anderson, FEDERAL BULLDOZER at 65.

[27] Fullilove, *African-Americans and Eminent Domain,* at 2.

[28] Somin, *Grasping Hand*, at 269-71.

[29] Anderson, FEDERAL BULLDOZER at 64-65.

[30] BERNARD FRIEDEN & LYNN SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28-29 (1989) (noting role of "racism" in urban renewal and highway takings); Pritchett, *Public Menace*; at Herbert J. Gans, *The Failure of Urban Renewal,* in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, 539 (ed. James Q. Wilson, 1966) (noting that "the urban renewal program has often been characterized as Negro clearance, and in too many cities, this has been its intent.").

[31] Quoted in FRIEDEN & SAGALYN, DOWNTOWN at 28.

[32] Somin, *Grasping Hand*, at 269-71.

[33] 348 U.S. 26 (1954).

[34] *Id.* at 36.

[35] *Id.*

[36] HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163–64 (1995).

[37] Pritchett, *"Public Menace" of Blight* at 47.

[38] *Id.* at 47.

of school segregation on the one hand and giving local governments a blank check to use eminent domain to forcibly displace African-Americans on the other. For many years, *Berman's* permissive approach to blight takings set the pattern for both state and federal judicial decisions.

B. Recent Developments.

In more recent years, minority property rights continue to be threatened by blight and economic development takings, even though modern condemnations rarely approach the biggest ones of the 1950s in scale. The risk faced by property owners has been exacerbated by the advent of extremely broad definitions of blight that enable virtually any area to be declared blighted and condemned.

Originally, "blight" condemnations were limited to areas that fit the layperson's definition of the term: dilapidated, slum-like neighborhoods. For example, the 1938 amendment to the New York state Constitution that authorized blight condemnations was intended to limit them to "slums."[39] Over time, however, most states expanded the definition of "blight" to include virtually any area that might be considered underdeveloped in some way.[40]

State courts have ruled that even such areas as downtown Las Vegas and Times Square in New York can be declared "blighted" and condemned.[41] In two recent decisions, the New York Court of Appeals has upheld major blight condemnations based on a combination of extremely broad definitions of blight and a willingness to overlook flagrant possible bias on the part of condemning authorities in favor of powerful interest groups to which the condemned property was transferred.[42] Some states also permit pure "economic development" condemnations of the sort upheld in *Kelo v. City of New London,* where no showing of blight at all is needed.[43]

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[39] See Ilya Somin, *Let there Be Blight: Blight Condemnations in New York after* Goldstein *and* Kaur, FORDHAM URB. L. J. (forthcoming) (symposium on Eminent Domain in New York); Lavine, *From Slum Clearance To Economic Development.*

[40] *See* Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006, at 42; Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight,* 31 FORDHAM URB. L.J. 305, 307 (2004).

[41] *See City of Las Vegas Downtown Redev. Agency v. Pappas,* 76 P.3d 1, 12-15 (Nev. 2003) (holding that downtown Las Vegas is blighted); and *In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002) (holding that Times Square is blighted).

[42] *See Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010); and *Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009). For a detailed discussion of these two cases and the abuses involved, see Somin, *Let There be Blight.* Among the abuses overlooked by the New York Court of Appeals were that the firm conducting the "blight" study on behalf of the condemning authority was on the payroll of the private interests who would receive the condemned property, and the fact that those same interests may have been responsible for much of the "blight" in question. *Id.*

[43] *See Kelo,* 545 U.S. at 475 (noting that "[t]here is no allegation that any of these properties [that were condemned] is blighted or otherwise in poor condition").

Expansive definitions of blight and pure economic development takings put a wider range of properties at risk of condemnation than before, and further imperil politically weak property owners, including minorities.[44]

Today, blight and economic development takings are not as common as in the era of large-scale urban renewal projects in the 1950s and 1960s. But they nonetheless continue to disproportionately victimize the minority poor. Recent studies show that areas populated by poor minorities are far more likely to be targeted for condemnation than other neighborhoods.[45] These patterns led the NAACP and the Southern Christian Leadership Conference to file an amicus brief urging the Supreme Court to forbid economic development takings in *Kelo*.[46] The brief emphasized that economic development takings disproportionately target the minority poor, and cited a number of recent examples.[47]

In a particularly egregious 2010 case, the New York Court of Appeals allowed the use of eminent domain to transfer a large amount of property to Columbia University in the predominantly black Manhattanville neighborhood.[48] The condemnation went through despite the fact that the firm that conducted the "blight" study that justified the condemnation had been on Columbia's payroll, and much of the blight used to justify the takings was actually on land that Columbia already owned, thereby making it likely that Columbia itself had created the "blight" that justified the use of eminent domain.[49]

As in earlier decades, blight and economic development takings often destroy far more economic value than they create, thereby actually undermining their professed goals and inflicting serious long-term harm on the communities where they occur.[50] In the *Kelo* case, for example, nothing has been built on the site of the condemned property even six years after the end of litigation, and it is not clear whether anything will be built in the foreseeable future.[51]

Prior to *Kelo,* the most famous economic development taking in American history was the 1981 *Poletown* case, in which the Michigan Supreme Court upheld a condemnation that displaced some 4000 people in Detroit for the purpose of transferring the land to General

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[44] *See* Somin, *Grasping Hand* at 190-203, 267-69 (detailing these dangers).

[45] *See, e.g.,* DICK CARPENTER & JOHN ROSS, EMPIRE STATE EMINENT DOMAIN: ROBIN HOOD IN REVERSE (2010), available at http://www.ij.org/about/3045 (describing extensive use of eminent domain New York, especially against poor and minority neighborhoods); Dick Carpenter & John Ross, *Testing O'Connor And Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?* 46 URBAN STUD. 2447 (2009).

[46] *See* Brief for the National Ass'n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (2004) (No. 04 - 108), 2004 WL 2811057.

[47] *Id.* at 7-12.

[48] *Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

[49] *See* Somin, *Let There Be Blight* (describing the details of this case and its background).

[50] Somin, *Grasping Hand* at 192-99.

[51] JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE 377-78 (2009); Ilya Somin, *Stronger Protections Needed,* N.Y. TIMES ROOM FOR DEBATE BLOG: A TURNING POINT FOR EMINENT DOMAIN?, Nov. 12, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/11/12/a-turning-point-for-eminent-domain/#ilya.

Motors for the construction of a new factory.[52] In that case, too, the new use of the condemned property produced no more than a fraction of the promised economic growth – not enough to offset the losses caused by the destruction of numerous homes, businesses and schools, and the expenditure of some $250 million in public funds.[53]

The negative impact of eminent domain on minorities is partially offset by compensation payments. However, compensation often falls far short of fully making up for all the losses suffered by victims of eminent domain. Many studies find that property owners often do not even get the "fair market value"[54] compensation required by the Supreme Court.[55] Undercompensation is particularly likely in the case of "low value" properties of the kind often occupied by poor minority group members.[56] Even when fair market value compensation is paid, owners still are not compensated for the loss of the "subjective value" they attach to their property over and above its market valuation. [57] Subjective value includes such elements as community ties and business good will that are often lost when victims of eminent domain are forced to move their homes or businesses.

Today, the disproportionate targeting of minorities is less likely to be caused by old-fashioned racial prejudice than in the urban renewal era, and more likely to be the result of the political weakness of these groups.[58] That weakness is exacerbated by relatively high poverty rates. Some 25.8% of blacks and 25.3% of Hispanics have incomes below the poverty line, compared to 9.4% of whites and 12.5% of Asian-Americans.[59] Social science confirms the common sense view that the poor, on average, have far less political influence than more affluent citizens.[60]

Racial prejudice may still be at work in so far as public opinion is less inclined to oppose takings that harm people of different racial or ethnic groups. Ethnocentric bias influences public opinion on a variety of issues, and often affects the views of people who are not actively hostile to minorities but merely less concerned about their welfare than that of members of their own group.[61] There is a need for more research on the extent to which such "ethnocentrism" influences public opinion and policy on eminent domain. Even if present

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[52] *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457, 459 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

[53] For a detailed discussion of the costs and benefits of the Poletown takings, see Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1016-19 (2004) (symposium on *County of Wayne v. Hathcock*).

[54] *See, e.g., Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984).

[55] *See* Thomas Mitchell, et al., *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 630-38 (2010) (citing numerous studies showing undercompensation); Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990-2002*, 39 J. LEGAL STUD. 201 (2010) (finding systematic undercompensation in the majority of New York City cases).

[56] *See* Chang, *An Empirical Study of Compensation.*

[57] Somin, *Grasping Hand* at 215-16.

[58] *See id.* at 190-203 (explaining why the politically weak are likely to be targeted for condemnation).

[59] CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009 16 (Sept. 2010), available at http://www.census.gov/prod/2010pubs/p60-238.pdf.

[60] *See, e.g.,* LARRY BARTELS, UNEQUAL DEMOCRACY (2010); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778 (2005).

[61] *See generally* DONALD KINDER & CINDY KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN PUBLIC OPINION (2009).

racial bias plays relatively little role in selecting targets for condemnation, past racial injustice is undeniably one of the causes of the poverty and political weakness that make blacks and some other minorities vulnerable to takings.

C. Minorities and the Holdout Rationale for Eminent Domain.

Some scholars argue that the use of eminent domain is essential for the promotion of economic development in minority neighborhoods. They claim that it is needed to facilitate development projects that would otherwise be blocked by holdout problems.[62] If a developer needs to acquire property from many different owners in order to build his or her project, holdouts can potentially block it by refusing to sell unless they are paid a price so high as to make it unprofitable to proceed with the project.[63]

Holdouts are a genuine danger for some development projects. Fortunately, however, market participants have tools for preventing holdouts without resorting to the use of eminent domain. The most commonly used is secret assembly, under which developers purchase the property they need without revealing their purpose. This prevents potential strategic holdouts from realizing that there is a big development project that they can hold up in hopes of getting a payoff.

As a tool for preventing holdouts, secret assembly has two major advantages over eminent domain.[64] First, it incentivizes property owners to reveal their true valuation of the land they own, agreeing to sell to the would-be developer if they value the land less than he does and refusing to sell if they value it more. In this way, secret assembly helps sift out those projects that are genuinely more valuable than the preexisting uses of the property developers seek to acquire, from those that are not. If current owners value the land more than the developer does, the project will not go through, which is the correct outcome from the standpoint of economic efficiency. Even if the sole objective of public policy is to maximize economic development, it is still preferable to block projects that replace higher-value land uses with less valuable ones. By contrast, when the government uses eminent domain to acquire property, it has no way of determining whether its planned uses are more valuable than those of the current owners. Officials have no reliable means of estimating the subjective value the property has for its present users.

Second, unlike eminent domain, secret assembly cannot be "captured" by powerful interest groups for the purpose of acquiring property for themselves at the expense of the politically weak. In real-world politics, the use of eminent domain is more likely to be determined by

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[62] *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 72-81 (1986) (describing holdout rationale for eminent domain); Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URBAN L.J. 657 (2007) (arguing that eminent domain is needed to revitalize urban areas).

[63] For a good theoretical discussion of this problem, see Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991)

[64] For more detailed discussions of these advantages of secret assembly over eminent domain, Somin, *Grasping Hand* at 203-09, and Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006).

the relative power of the opposing interests than by the presence or absence of genuine holdout problems.

Secret assembly may not work well as a tool for acquiring land for government-owned projects. When government funds are spent, there is a strong case for transparency in order to facilitate public debate.[65] But it is generally effective for privately owned development projects of the sort at issue in *Kelo* and most other blight and economic development takings.

III. WHY POST-*KELO* EMINENT DOMAIN REFORM IS NOT ENOUGH.

The Supreme Court's controversial decision in *Kelo v. City of New London* generated a massive political backlash that some believe has greatly diminished the problem of eminent domain abuse. *Kelo* was one of the most unpopular Supreme Court decisions in history, with polls showing that over 80 percent of the public opposing the ruling.[66] As a result, forty-three states and the federal government enacted legislation intended to curb economic development takings in the years since *Kelo*.[67]

Unfortunately, the majority of the new reform laws are likely to be ineffective, imposing few or no meaningful constraints on the use of eminent domain.[68] Many of them forbid takings that transfer property to private parties for "economic development," but allow virtually identical condemnations to continue under other names. For example, numerous states continue to allow "blight" condemnations under definitions of blight so broad that virtually any area qualifies.[69]

Many of the states that have enacted ineffective post-Kelo reforms or no reforms at all are among those that make the most extensive use of eminent domain for the benefit of private interests.[70] They include such large states as California, New York, New Jersey, and Texas.[71] The ineffectiveness of many post-*Kelo* reforms is in part caused by public ignorance. Survey data shows that only about 13% of Americans know whether their state has enacted a post-*Kelo* eminent domain reform law and whether that law is likely to be effective or not.[72] Public ignorance enables state legislators to satisfy public demand for action on eminent

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[65] See Kelly, *The "Public Use" Requirement in Eminent Domain Law.*

[66] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108-14 (2009).

[67] *Id.* at 2101-02. For the most comprehensive analysis of post-Kelo reform legislation, see id. at 2114-53. See also Edward J. López et al., *Pass a Law, Any Law, State Legislative Responses to the* Kelo *Backlash*, 5 REV. LAW & ECON. 101, (2009), *available at* http://www.bepress.com/rle/vol5/iss1/art5/; Andrew Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237, (2009); James W. Ely, Jr., *Post-*Kelo *Reform: Is the Glass Half-Full or Half-Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006); Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URBAN L.J. 657 (2007).

[68] Somin, *Limits of Backlash*, at 2120-35.

[69] *Id.* at 2120-28. See also the discussion of blight condemnations in § II.B., *infra.*

[70] *Id.* at 2117-20.

[71] *Id.*

[72] *Id.* at 2154-70.

domain without adopting laws that genuinely constrain blight and economic development takings.

Some real progress has been made as a result of the *Kelo* backlash. Four states - most notably Florida - now forbid both "blight" and economic development condemnations completely, and about fifteen others have banned economic development takings and defined blight narrowly.[73] These are important gains. But they do not go far enough. Poor minorities are still vulnerable to eminent domain abuse in most states.

This is most clearly the case in those states where post-*Kelo* reform laws impose no meaningful constraints on the range of properties that can be condemned. But even those reform laws that define "blight" narrowly still leave many of the minority poor at risk. Even a narrow definition of blight – one that encompasses only areas with conditions that pose a genuine threat to public health or safety – would still encompass many inner city neighborhoods. And such areas are disproportionately inhabited by the minority poor. Professor David Beito's testimony at this hearing gives an indication of the sorts of abuses that can occur even in a state that has enacted a relatively strong post-*Kelo* reform law.[74]

The alleviation of genuine blight is a proper objective of public policy. But, in most cases, it does not require the use of eminent domain. We need not destroy blighted neighborhoods in order to save them. A much better approach is the use of nuisance law or targeted public health regulations to eliminate dangerous conditions without expelling the people who live in the area.[75] In the long run, the best solution to urban blight is economic growth. And such growth is more likely to occur if the authorities respect the property rights of the poor, thereby incentivizing productive investment.[76] Growth is unlikely to flourish in neighborhoods where residents live in fear of condemnation.

CONCLUSION.

For decades, eminent domain has been used and abused in ways that victimize minority groups, especially the minority poor. In recent years, state court decisions and eminent domain reform laws have partially addressed this longstanding problem. Nonetheless, much remains to be done before the property rights of minorities – and all Americans – are fully secure. Stronger eminent domain reform laws are needed at both the state and federal levels. For their part, the courts must give property rights protection equal to that afforded other constitutional rights.

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[73] Somin, *Blight* (forthcoming). The state of Utah banned blight condemnations even before *Kelo,* but partially rescinded the ban in 2007, allowing such takings to occur if approved by a supermajority of property owners in the affected area. Somin, *Limits of Backlash,* at 2138 & n. 176.

[74] Testimony of David Beito, Chair of the Alabama State Advisory Commission on Civil Rights, U.S. Commission on Civil Rights, hearing on "The Civil Rights Implications of Eminent Domain Abuse," Aug. 12, 2011.

[75] *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?* 39 URBAN LAWYER 833 (2007).

[76] *See* Ilya Somin, *Why Robbing Peter Won't Help Poor Paul: Low-Income Neighborhoods and Uncompensated Regulatory Takings*, 117 YALE L.J. POCKET PART 71 (2007)

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STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR, NAACP WASHINGTON BUREAU &
SENIOR VICE PRESIDENT FOR ADVOCACY AND PPOLICY
BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

"The Civil Rights Implications of Eminent Domain Abuse"

August 12, 2011

Thank you, Chairman Castro and ladies and gentlemen of the Commission for inviting me here today to talk about property rights and the civil rights implications of eminent domain abuse.

My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau and the Senior VP for Advocacy and Policy. The NAACP is our Nation's oldest, largest and most widely recognized grassroots-based civil rights organization. We currently have more than 2,200 units in every state in our country. The NAACP Washington Bureau is our national public policy and federal legislative advocacy arm.

Given our Nation's sad history of racial prejudice, racism, bigotry, and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that eminent domain has been misused for centuries against African Americans and other racial and ethnic minorities, and the economically disadvantaged, at highly disproportionate rates.

Although nobody knows the exact numbers of people displaced through eminent domain across the nation, everyone seems to agree that African Americans are disproportionately affected. One source cites that since World War II, it is estimated that between 3 and 4 million Americans have been forcibly displaced from their homes as a result of urban renewal takings. It should surprise nobody that a vast majority of these people are racial and ethnic minorities[1]. Another says that

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[1] *Battle Over Eminent Domain is Another Civil Rights Issue*, David Bieto and Ilya Somin, April 27, 2007, The Kansas City Star

""[b]etween 1949 and 1973 ... 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African American," making African Americans, "five times more likely to be displaced than they should have been given their numbers in the population[2]."

The NAACP has a deeply held concern that the newly sanctioned expansion of the use 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, as was approved by the US Supreme Court in its 2005 *Kelo v. City of New London* decision, will systemically sanction easier transfers of property, wealth and community stability from those with less resources to those with more.

The history of eminent domain is rife with abuse specifically targeting racial and ethnic minority and poor neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal." Sadly, racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are almost always affected differently and more profoundly.

The vast disparities of African Americans or other racial or ethnic minorities who have been removed from their homes due to eminent domain actions is well documented.

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles[3]. In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities[4]. In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township and nearly triple that of Burlington County.

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[2] *What is the Price of the Commons?*, Fullilove, Mindy (February, 2007)
[3] *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It* Mindy Thompson Fullilove, , p.17
[4] Derek Werner: Note: The Public Use Clause, Common Sense and Takings, pp 335-350), 2001

In 2004, the city of Alabaster, Ala., used "blight" as a pretext to take 400 acres of rural property, much of it owned by low-income African Americans, for a new super-sized mega department store. Many of the residents had lived there for generations, and two other super-sized mega department stores owned by the same company were located less than fifteen miles away. Several of the landowners, particularly those who lacked economic resources, political clout and legal aid, ended up selling out at an unfair discount. According to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore, Maryland were African Americans[5].

The motives behind the disparities are varied. Many of the studies I mentioned in the previous examples contend that the goal of many of these displacements is to segregate and maintain the isolation of poor, minority and otherwise outcast populations. Furthermore, condemnations in low-income or predominantly racial and ethnic minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to effectively contest the action either politically or in our nation's courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas of low property values with those with higher property values. Thus, even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the US Supreme Court in *Kelo* will clearly perpetuate, if not exacerbate, the disparate impact on African Americans and other racial and ethnic minorities, and the economically disadvantaged in our country.

As I said at the beginning of my testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much more severe.

First, the term "just compensation", when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for "economic development" almost

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[5] *How America Rebuilds Cities* Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: , p.29

certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their communities and find that they cannot afford to live in the "revitalized" neighborhoods; the remaining "affordable" housing in the area is almost certain to become less so. When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out not only by common sense, but also by statistics: one study from the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling[6].

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to destabilize organized minority communities. This dispersion both eliminates, or at the very least drastically undermines, established community support mechanisms and has a deleterious effect on these community's ability to exercise what little political power they may have established. In fact, the very threat of such takings will also hinder the development of stronger ethnic and racial minority communities. The incentive to invest in one's own community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts.

By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken. Individuals in those areas will thus have even less incentive to engage in community-building and improvement for fear that such efforts will be wasted.

In conclusion, allow me to reiterate that by allowing pure economic development motives to constitute public use for eminent domain purposes, state and local governments will now infringe on the property rights of those with less economic and political power with more regularity. And, as I have testified today, these groups, low-income

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[6] *The Urban Villagers: Group and Class in the life of Italian Americans* Herbert J. Gans, , p.380

Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

As I have discussed in my testimony, too many of our communities – racial and ethnic minority, the elderly, and the low-income - have witnessed an abuse of eminent domain powers that has too often been devastating. Given the numerous chronicles of abuse, it is the hope of the NAACP that all responses, legislative, administrative and other, to address eminent domain abuse be educated and well informed by our shared history. We need to ensure that certain segments of our population that have too long been muted in this takings issue have a voice. We need to understand how it has been too easy to exploit these communities by imposing eminent domain not only in the pursuit of economic development but also in the name of addressing "blight." We also need to make sure that any compensation is fair and will result in those being displaced are not forced to accept less than they had.

Historically and today, it has been too easy to characterize minority, elderly, or low-income communities as "blighted" for eminent domain purposes and subject them to the will of the government. If proposals contain language that could potentially exclude these communities from protection against eminent domain abuses, we have failed in our responsibility to serve and give a voice to this constituency which has already been, and continues to be, abused.

Additionally, in considering the interests of our communities, we raise a broader concern regarding the use of eminent domain for any purpose, including those purposes traditionally viewed as "public purposes," such as highways, utilities, and waste disposal. Even these more traditional uses of eminent domain have disproportionately burdened those communities with the least political power - the poor, minorities, and working class families. Furthermore, it is not only our owners that suffer, but our renters, whether they are residents or proprietors of small businesses, who are provided no protections and pay a heavy and uncompensated price when eminent domain is imposed.

For these reasons, as the majority in *Kelo* suggested, there must be sufficient process protections for minority communities, regardless of the purpose and however beneficial to the public. The process must be open and the participation of the potentially impacted community needs

to be guaranteed, as well as fair compensation. This is the voice that our communities, that all American communities, deserve.

Thank you again, Chairman Castro and Commission members, for allowing me to testify before you today about the NAACP position on the civil rights implications of eminent domain abuse.

The NAACP stands ready to work with federal, state and local municipality officials to develop policy and legislation to end eminent domain abuse while focusing on real community development concerns like building safe, clean and affordable housing in communities with good public schools, an effective accessible high quality health care system, small business development and growth, and an significant available living wage job pool.

Thank you very much and I look forward to your questions and our discussion.

Relevant Case Law

- *Berman v. Parker* (1954)
- *Hawaii Housing Authority v. Midkiff* (1984)
- *Kelo v. City of New London* (2005)

Supreme Court of the United States
Samuel BERMAN and Solomon H. Feldman, Executors of the State of Max R. Morris, Deceased, Appellants,
v.
Andrew PARKER, John A. Remon, James E. Colliflower, et al.
No. 22.

Argued Oct. 19, 1954.
Decided Nov. 22, 1954..

Owners' action to enjoin condemnation of their property pursuant to the District of Columbia Redevelopment Act of 1945. The United States District Court for the District of Columbia, Prettyman, Circuit Judge, 117 F.Supp. 705, dismissed the complaint and an appeal was taken. The Supreme Court, Mr. Justice Douglas, held, in effect, that it was within the power of the legislative branch, notwithstanding the Fifth Amendment, to take into account, in enacting redevelopment legislation, aesthetic considerations as well as considerations of health.

Affirmed.

West Headnotes

[1] District of Columbia 132 ⇐3

132 District of Columbia
132k3 k. Legislative Power of Congress. Most Cited Cases
Power of Congress over District of Columbia includes all legislative powers which a state may exercise over its affairs.

[2] States 360 ⇐21(2)

360 States
360II Government and Officers
360k21 Government Powers
360k21(2) k. Police Power. Most Cited Cases
(Formerly 92k1066, 92k81)

United States 393 ⇐22

393 United States
393I Government in General
393k22 k. Legislative Power and Exercise Thereof in General. Most Cited Cases
(Formerly 92k1066, 92k81)
Each case involving issue of constitutionality of exercise of police power by Congress or by a state must turn on its own facts.

[3] United States 393 ⇐22

393 United States
393I Government in General
393k22 k. Legislative Power and Exercise Thereof in General. Most Cited Cases
(Formerly 92k1066, 92k81)
Subject to specific constitutional limitations, when legislature has spoken, public interest has been declared in terms well-nigh conclusive.

[4] Constitutional Law 92 ⇐2500

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2500 k. In General. Most Cited Cases
(Formerly 92k70.3(9.1), 92k70.3(9), 92k70(3))
Legislature or Congress, as case may be, and not judiciary, is main guardian of public needs to be served by social legislation.

[5] Eminent Domain 148 ⇐67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to

Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
(Formerly 149k67)
Principle that Congress or Legislature, as case may be, and not judiciary, is main guardian of public needs to be served by social legislation, admits of no exception merely because power of eminent domain is involved, and role of judiciary in determining whether that power is being exercised for public purpose is extremely narrow one.

[6] Municipal Corporations 268 ⚖589

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k589 k. Nature and Scope of Power of Municipality. Most Cited Cases
Public safety, public health, morality, peace and quiet and law and order do not constitute the entire scope of the police power.

[7] Eminent Domain 148 ⚖274(1)

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k272 Injunction
148k274 Restraining Taking of or Injury to Property
148k274(1) k. In General. Most Cited Cases
(Formerly 92k47)
In determining constitutionality of housing redevelopment legislation, in action to enjoin condemnation of property, Supreme Court would not pass upon issue whether particular housing project was or was not desirable. 28 U.S.C.A. § 1253; D.C.Code 1951, §§ 5-701 to 5-719, 5-704a.

[8] United States 393 ⚖22

393 United States
393I Government in General
393k22 k. Legislative Power and Exercise Thereof in General. Most Cited Cases
(Formerly 92k1066, 92k81)
Concept of public welfare is broad and inclusive, and represents spiritual values as well as physical, and aesthetic values as well as monetary.

[9] United States 393 ⚖22

393 United States
393I Government in General
393k22 k. Legislative Power and Exercise Thereof in General. Most Cited Cases
(Formerly 92k1066, 92k81)
It is within legislative power to determine that community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

[10] Constitutional Law 92 ⚖4321

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4321 k. Woods and Forests. Most Cited Cases
(Formerly 92k278.1, 92k278(1))
Fifth Amendment to the Federal Constitution does not prohibit Congressional legislation to make Nation's capital beautiful as well as sanitary. D.C.Code 1951, §§ 5-701 to 5-719; U.S.C.A.Const. Amend. 5.

[11] Eminent Domain 148 ⚖1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and Source of Power. Most Cited Cases
Power of eminent domain is merely means to an end and once an object has been determined to be within authority of Congress, Congressional authority to realize such object through exercise of eminent domain is thereby established.

[12] Constitutional Law 92 ⚿2497

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2497 k. Use of Best Means Available. Most Cited Cases
(Formerly 92k70.1(1), 92k70(1))
If an object is within Congressional authority, or if a public purpose has been established, means by which such object is to be attained is for Congress alone to determine.

[13] Eminent Domain 148 ⚿17

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k17 k. In General. Most Cited Cases
Congressional legislation authorizing community redevelopment in the District of Columbia was not unconstitutional as taking from one business man for the benefit of another, though it authorized condemnation of commercial structures and use of private enterprise for redevelopment, and permitted certain property owners in area to repurchase their property for development in harmony with overall plan. D.C.Code, 1951, §§ 5-701 to 5-719, 5-704(a), 5-706(a, b, d, f, g), 5-710; U.S.C.A.Const. Amend. 5.

[14] Eminent Domain 148 ⚿58

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k58 k. Extent of Appropriation. Most Cited Cases

Health 198H ⚿358

198H Health
198HII Public Health
198Hk355 Constitutional, Statutory, and Regulatory Provisions
198Hk358 k. Validity. Most Cited Cases
(Formerly 199k21 Health and Environment)
Congress had power, in enacting housing legislation applicable to District of Columbia, to provide that whole area should be redesigned, notwithstanding contention of owner of commercial structure sought to be condemned that his particular building did not imperil health or safety nor contribute to making of slum or blighted area. D.C.Code 1951, §§ 5-701 to 5-719, 5-702(r), 5-704(a), 5-705(a, b, d).

[15] Health 198H ⚿358

198H Health
198HII Public Health
198Hk355 Constitutional, Statutory, and Regulatory Provisions
198Hk358 k. Validity. Most Cited Cases
(Formerly 199k21 Health and Environment)
Diversification in future use of entire area for new homes, schools, churches, parks, streets and shopping centers was relevant to maintenance of desired housing standards and was therefore within congressional power in enactment of redevelopment legislation applicable to District of Columbia. D.C.Code 1951, §§ 5-701 to 5-719, 5-705(a, b)5-710.

[16] Constitutional Law 92 ⚿2437

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2434 To State and Local Authorities
92k2437 k. Municipalities and Municipal Employees and Officials. Most Cited Cases
(Formerly 92k63(1))

Municipal Corporations 268 ⚿266

268 Municipal Corporations
268IX Public Improvements

268IX(A) Power to Make Improvements or Grant Aid Therefor
268k266 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 199k21 Health and Environment)
Standards contained in District of Columbia Redevelopment Act of 1945 were sufficiently definite and adequate to sustain delegation of authority, to agencies concerned, for execution of plan to eliminate not only slums but also blighted areas which tend to produce slums. D.C.Code 1951, §§ 5-701 to 5-719, 5-702(r), 5-703, 5-705(a, b, d), 5-706(a, b, d, f, g).

[17] Eminent Domain 148 ⇐58

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k58 k. Extent of Appropriation. Most Cited Cases
(Formerly 149k58)
Property which, standing by itself, is innocuous and unoffending may be taken for redevelopment pursuant to District of Columbia Redevelopment Act of 1945. D.C.Code 1951, §§ 5-701 to 5-719, 5-704(a).

[18] Constitutional Law 92 ⇐2510

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2510 k. Eminent Domain. Most Cited Cases
(Formerly 92k70:3(14), 92k70(3))
Once question of public purpose has been decided in passing upon constitutionality of redevelopment legislation, amount and character of land to be taken for project and need for particular tract to complete integrated plan rests in discretion of legislative branch.

[19] Eminent Domain 148 ⇐58

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k58 k. Extent of Appropriation. Most Cited Cases
Under District of Columbia Redevelopment Act of 1945, the redevelopment land agency created by the act had right and power to take full title to realty involved in all cases in which it considered such acquisition necessary to carry out project. D.C.Code 1951, §§ 5-701 to 5-719, 5-703, 5-704(a).

[20] Eminent Domain 148 ⇐68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
Whether acquisition of full title to real property involved in condemnation proceedings was necessary to carry out project was a question for the redevelopment land agency created by the District of Columbia Redevelopment Act of 1945, and it was not within the province of the courts to determine such necessity. D.C.Code 1951, §§ 5-701 to 5-719, 5-703, 5-704(a).

[21] Eminent Domain 148 ⇐266

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k266 k. Nature and Grounds in General. Most Cited Cases
Rights of property owners who were defendants in condemnation proceedings instituted pursuant to District of Columbia Redevelopment Act of 1945 were satisfied upon receipt of just compensation for the taking, as required by the Fifth Amendment to the Federal Constitution. D.C.Code 1951, §§ 5-701 to 5-719, 5-704(a); U.S.C.A.Const. Amend. 5.
**100 Messrs. *27 James C. Toomey and Joseph H. Schneider, Washington, D.C., for appellants.

Mr. Simon E. Sobeloff, Sol. Gen., Washington, D.C., for appellees.

*28 Mr. Justice DOUGLAS delivered the opinion of the Court.

This is an appeal, 28 U.S.C. s 1253, 28 U.S.C.A. s 1253, from the judgment of a three-judge District Court which dismissed a complaint seeking to enjoin the condemnation of appellants' property under the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D.C.Code 1951, ss 5-701 to 5-719. The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property. The District Court sustained the constitutionality of the Act. 117 F.Supp. 705.

By s 2 of the Act, Congress made a 'legislative determination' that 'owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose'.[FN1]

FN1. The Act does not define either 'slums' or 'blighted areas.' Section 3(r), however, states:

"Substandard housing conditions' means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.'

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

*29 Congress further finds in s 2 that these ends cannot be attained 'by the ordinary operations of private enterprise alone without public participation'; that 'the sound replanning and redevelopment of an obsolescent or obsolescing portion' of the District 'cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs'; and that 'the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan * * * is hereby declared to be a public use.'

Section 4 creates the District of Columbia Redevelopment Land Agency (hereinafter called the Agency), composed of five members, which is granted power by s 5(a) to acquire and assemble, by eminent domain and otherwise, real property for 'the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, **101 or elimination of blighting factors or causes of blight'.

Section 6(a) of the Act directs the National Capital Planning Commission (hereinafter called the Planning Commission) to make and develop 'a comprehensive or general plan' of the District, including 'a land-use plan' which designates land for use for 'housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private uses of the land.' Section 6(b) authorizes the Planning Commission to adopt redevelopment plans for specific project areas. These plans are subject to the approval of the District Commissioners after a public hearing; and they prescribe the various public and private land uses for the respective areas, the

'standards of population density and building intensity', and 'the amount or character or class of any low-rent housing'. s 6(b).

*30 Once the Planning Commission adopts a plan and that plan is approved by the Commissioners, the Planning Commission certifies it to the Agency. s 6(d). At that point, the Agency is authorized to acquire and assemble the real property in the area. Id.

After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools, s 7(a), and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership. s 7(b), (f). The leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that 'no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon' which does not conform to the plan. ss 7(d), 11. Preference is to be given to private enterprise over public agencies in executing the redevelopment plan. s 7(g).

The first project undertaken under the Act relates to Project Area B in Southwest Washington, D.C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

The plan for Area B specifies the boundaries and allocates the use of the land for various purposes. It makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent *31 housing with a maximum rental of $17 per room per month.

After a public hearing, the Commissioners approved the plan and the Planning Commission certified it to the Agency for execution. The Agency undertook the preliminary steps for redevelopment of the area when this suit was brought.

Appellants own property in Area B at 712 Fourth Street, S.W. It is not used as a dwelling or place of habitation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that their property may not to taken constitutionally for this project. It is commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. That is the argument; and the contention is that appellants' private **102 property is being taken contrary to two mandates of the Fifth Amendment-(1) 'No person shall * * * be deprived of * * * property, without due process of law'; (2) 'nor shall private property be taken for public use, without just compensation.' To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community. The District Court, while agreeing in general with that argument, saved the Act by construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of 'slum' being the existence of conditions 'injurious to the public health, safety, morals and welfare.' 117 F.Supp. 705, 724-725.

[1][2][3][4][5] The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See *32District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108, 73 S.Ct. 1007, 1011, 97 L.Ed. 1480. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is

fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, see Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, or the States legislating concerning local affairs. See Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; California State Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162; United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843.

[6] Public safety, public health, morality, peace and quiet, law and order-these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See Noble State Bank v. Haskell, 219 U.S. 104, 111, 31 S.Ct. 186, 188, 55 L.Ed. 112. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, *33 which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

[7][8][9][10] We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469. 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 **103 well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

[11][12][13] Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See Luxton v. North River Bridge Co., 153 U.S. 525, 529-530, 14 S.Ct. 891, 892, 38 L.Ed. 808; United States v. Gettysburg Electric R. Co., 160 U.S. 668, 679, 16 S.Ct. 427, 429, 40 L.Ed. 576. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See Luxton v. North River Bridge Co., supra; cf. Highland v. Russell Car Co., 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688. The public end may be as well or better served through an *34 agency of private enterprise than through a department of government-or so the Congress might con-

clude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.

[14][15] In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums-the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes *35 but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 141-144, 104 A.2d 365, 368-370; Hunter v. Norfolk Redevelopment Authority, 195 Va. 326, 338-339, 78 S.E.2d 893, 900-901. Such diversification in **104 future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

[16][17] The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. 117 F.Supp. 705, 721. We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.

[18] It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular*36 tract to complete the integrated plan rests in the discretion of the legislative branch. See Shoemaker v. United States, 147 U.S. 282, 298, 13 S.Ct. 361, 390, 37 L.Ed. 170; United States ex rel. Tennessee Valley Authority v. Welch, supra, 327 U.S. at page 554, 66 S.Ct. at page 718; United States v. Carmack, 329 U.S. 230, 247, 67 S.Ct. 252, 260, 91 L.Ed. 209.

[19][20] The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F.Supp. 705, 715-719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

[21] The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

The judgment of the District Court, as modified by this opinion, is affirmed.

Affirmed.

U.S.,1954.
Berman v. Parker
348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27

END OF DOCUMENT

Supreme Court Briefs

- Brief of Amici Curiae National Association for the Advancement of Colored People, et al. in Support of Petitioners, *Kelo v. City of New London* (2004)

- Brief of Amicus Curiae the Becket Fund for Religious Liberty in Support of Petitioners, *Kelo v. City of New London* (2004)

- Brief of Amici Curiae The Institute For Justice in Support of Petitioners, *Tuck-It-Away, Inc. v. New York State Urban Development Corporation, d/b/a Empire State Development Corporation* (2010)

- Brief in Opposition Attorneys for Respondents, *Tuck-It-Away, Inc. v. New York State Urban Development Corporation, d/b/a Empire State Development Corporation* (2010)

For Opinion See 125 S.Ct. 2655 , 125 S.Ct. 1241 , 125 S.Ct. 27

U.S.,2004.

Supreme Court of the United States.
Susette KELO, Thelma BRELESKY, Pasquale CRISTOFARO, Wilhelmina and Charles DERY, James and Laura GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and William Von WINKLE, Petitioners,
v.
CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION, Respondents.
No. 04-108.
December 3, 2004.

On Writ Of Certiorari To The Supreme Court of Connecticut

Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners

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*1 INTEREST OF *AMICI CURIAE*

The National Association for the Advancement of Colored People ("NAACP"), AARP, Hispanic Alliance of Atlantic County, Inc. ("Hispanic Alliance"), Citizens in Action ("CIA"), Cramer Hill Resident Association, Inc. ("CHRA"), and the Southern Christian Leadership Conference ("SCLC") submit this brief as *amici curiae*.[FN1]

FN1. Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* state that all parties have given written consent to the filing of this brief. Copies of the consent letters are on file with the Clerk. Further, pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* also state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members or counsel, made a monetary contribution to the preparation or submission of this brief.

The NAACP, established in 1909, is the nation's

oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

AARP is a nonpartisan, nonprofit membership organization of more than 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity, and purpose. Livable communities and economic security are two of the key social impact goals for AARP. AARP is deeply concerned with the preservation of home equity, the availability of affordable, safe, decent and stable housing and the elimination of discrimination in housing. In addition, AARP supports the ability of older people to receive the services they need in their homes and to age with dignity in their community. AARP is deeply committed to ensuring that its members are not forced out of their homes and communities except as a means to remove blight or for a needed traditional public *2 use and to ensuring that when such displacement must occur that older homeowners receive compensation that recognizes the unique costs of their dislocation. AARP's advocacy on behalf of its members has included representing through AARP Foundation Litigation (AFL) low income and minority individuals and community groups challenging redevelopment plans that would result in the taking of their homes. AFL is currently engaged in litigation challenging as racially discriminatory a redevelopment plan that uproots hundreds of residents, many of whom are elderly.

The Hispanic Alliance is a New Jersey corporation with offices located in Atlantic City, New Jersey. The Hispanic Alliance engages in educational, charitable and advocacy activities on behalf of and to further the interests of the Hispanic community within Atlantic County. Representing the Hispanic community of Ventnor, New Jersey, the Hispanic *Alliance* is challenging that city's targeting of a 26-block neighborhood with a highly concentrated Hispanic population which, if allowed to proceed, will result in the displacement of 332 households. That suit is pending before the Law Division of the Superior Court of New Jersey.[FN2]

> FN2. *Hispanic Alliance of Atlantic County v. City of Ventnor,* Superior Court Docket No. ATL-C-136-03. Ventnor's redevelopment plan is also pending judicial review in the matter of *Richard Gober v. City of Ventnor,* sustained by the Law Division and the Appellate Division of the Superior Court of New Jersey at Docket Nos. ATL-L-3367-01 and A-2837-0T2, respectively. A petition for certification is currently pending before the New Jersey Supreme Court at Docket No. 56,525.

CIA is an unincorporated community organization composed of residents of the Mt. Holly Gardens neighborhood of Mt. Holly Township, New Jersey. CIA is challenging a redevelopment plan adopted by Mt. Holly Township which calls for the demolition of all homes in the cohesive, racially and ethnically diverse neighborhood.[FN3]

> FN3. *Citizens in Action, et al. v. Township of Mt. Holly,* Superior Court Docket No. BUR-L-003027-03.

*3 CHRA is a non-profit corporation founded for the purpose of improving the quality of life in the Cramer Hill neighborhood in Camden, New Jersey, uniting and involving residents in community activities and decisionmaking, engaging in neighborhood planning and revitalization, and defending the Cramer Hill community against unjust use of eminent domain, and forced displacement of Cramer Hill residents. The membership of the Association is comprised of residents of the Cramer Hill neighborhood. The CHRA is currently challenging a redevelopment plan adopted by city and state officials which, if implemented, would require displacement

of more than 1,000 households living in Cramer Hill by eminent domain.[FN4]

FN4. *Cramer Hill Residents' Association v. Melvin R. "Randy" Primas,* Superior Court Docket No. ___ (not yet assigned).

The Southern Christian Leadership Conference ("SCLC") is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other civil rights ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country.

SUMMARY OF ARGUMENT

The Connecticut Supreme Court has interpreted the Fifth Amendment's requirement that any taking be for a "public use" in a way that renders those very words meaningless. Its holding that government may take property from a private citizen for the purpose of giving it to another private party purely for "economic development" is both inconsistent with the language of the Constitution and dangerous. Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly. Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development on those least able to bear it, exacting economic, psychic, political and social costs.

The Constitution requires that any taking pursuant to the state's eminent domain power be for a "public use." Although this Court has not had cause to delineate the limits of permissible "public uses," state court decisions addressing similar provisions of state constitutions have held that something more than the mere possibility of future economic benefits is necessary to justify the exercise of eminent domain power.

Expanding eminent domain such that a stated desire for "economic development" alone satisfies the public use requirement would grant government a power that is not merely different in scope but different in kind from traditional eminent domain authority. It would remove what few checks there are on that power, virtually eliminate judicial review and fail to protect the rights of already disadvantaged groups from majoritarian pressures.

ARGUMENT

I. The Fifth Amendment Specifically Requires That Any Taking Be for a Public Use.

The power of the state to compel the sale of individual property, while long recognized and necessary under certain circumstances, is among the greatest intrusions permitted by our Constitution. It often requires individuals or families to give up their most valuable and important possessions - their homes - and even to leave lifelong communities.

The Framers created a government of limited powers, with the essential purpose of protecting private property *5 as well as persons.[FN5] The right to own and use private property is both fundamental to liberty[FN6] and a tangible expression thereof.[FN7] This Court has recognized the central and fundamental role of such rights in our system of ordered liberty.[FN8]

FN5. "[G]overnment is instituted no less for the protection of property than of the persons of individuals." The Federalist No. 54, at 370 (Jacob E. Cooke ed., 1961) (James Madison); *see also* James Madison, Property, National Gazette (Mar. 27, 1792), *reprinted in* 14 The Papers of James

Madison 266 (Robert Rutland, et al. eds., 1983) ("Government is instituted to protect property of every sort ... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

FN6. "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America (4th Ed., New York 1775).

FN7. "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993).

FN8. "The right to enjoy property without unlawful deprivation ... is, in truth a 'personal' right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Because the eminent domain power does such violence to this fundamental right, the Fifth Amendment to the United States Constitution allows such a taking only where it is demonstrated that taking is for a "public use."[FN9] The public use requirement is the only true limit on the eminent domain authority.[FN10] Thus, the breadth or narrowness of the definition of "public use" dictates the permissible scope of the eminent domain power.

FN9. "Nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

FN10. The only other requirement, that the private party from whom property is taken be given "just compensation," may limit the attractiveness of certain takings, but does not determine whether a taking is permissible.

*6 In this case, "public use" has been defined so broadly that eminent domain authority has no practical limits. The Connecticut Supreme Court held that the use of eminent domain to transfer property from one private party to another purely because the transfer is likely to lead to greater "economic development" satisfies the public use requirement. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). To hold that the public use requirement is satisfied wherever there are potential economic benefits to be realized is to render the public use requirement meaningless.[FN11] Allowing a taking simply because the party to whom the state wishes to transfer the property has a greater ability to maximize the value of that property fails to account for the rights of the individual property owners and would systematically sanction transfers from those with less resources at their disposal to those with more.

FN11. Not only does such a reading fail to protect vital rights, it also is contrary to the venerated canon of construction that provisions are interpreted in a fashion that gives meaning to all terms. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77 (1946); *Wright v. United States*, 302 U.S. 583, 588 (1938).

Moreover, expanding the scope of "public use" to include "potential for economic development that may ultimately benefit the public" would arguably include virtually any use and thus render meaningless the judicial review of takings cases. Such a rule would leave this important fundamental right subject to the unrestrained will of the majority.[FN12] Absence of judicial protection from *7 majoritarian impulses is especially troubling to *amici*, who represent the interests of groups that are targets of the overuse and abuse of the power in question.

FN12. As Justice Story explained, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829); *see also Calder v. Bull*, 3 U.S. 386, 388 (1798) (There "are acts which the Federal, or State Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments which will determine and overrule an apparent and flagrant abuse of legislative power" such as "a law that takes property from A and gives it to B: it is against all reason and justice, for a people to entrust a Legislature with such powers.").

II. The Burden of Eminent Domain Has and Will Continue to Fall Disproportionately upon Racial and Ethnic Minorities, the Elderly, and the Economically Disadvantaged.

Absent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly. These groups have been targeted for the use and abuse of the eminent domain power in the past and there is evidence that, if use of the eminent domain power for pure "economic development" is permitted, these groups will be both disproportionately and specially harmed by the exercise of that expanded power.

A. Eminent Domain Power Has Historically Been Used to Target Racial and Ethnic Minorities.

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro removal." 12 Thompson on Real Property 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin); *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

*8 One commentator has described how "a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations." Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. Soc'y 31, 53 (2002). Ninety percent of the 10,000 families displaced by such projects in Baltimore were African-American. Bernard J. Frieden & Lynne B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 29 (1989). Los Angeles eviscerated a Mexican neighborhood with freeway projects. *Id.* Another scholar has estimated that 1,600 African-American neighborhoods were destroyed by similar projects. Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It 17 (2004).

This was no accident or oversight. The former Attorney General of Minnesota recounted his work on a Minneapolis highway project in the 1950s:

We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose on society.

Frieden & Sagalyn, Downtown, Inc. at 28-29.

This phenomenon does not exist exclusively in the past. *See, e.g.*, Charles Toutant, *Alleging Race-Based Condemnation*, New Jersey Law Journal, Aug. 2, 2004 (discussing litigation alleging that cit-

ies and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); Erik Schwartz, *Progress or Discrimination? Facing Displacement, Minorities Battle Towns' Eminent Domain*, Courier-Post, July 30, 2004.

*9 B. Even Absent Abuse, Takings for "Economic Development" Will Disproportionately Affect Neighborhoods with Relatively High Concentrations of Racial and Ethnic Minorities and the Elderly.

Even absent illicit motives, eminent domain power has affected and will disproportionately affect racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels and office parks. *See* Dana Berliner, *Condemnations for Private Parties Destroy Black Neighborhoods and Out with the Old: Elderly Residents are Prime Targets for Eminent Domain Abuses in* Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain 102, 185 (April 2003).

For example, four siblings in their seventies and eighties were forced to leave their homes and Christmas tree farm to enable the city of Bristol, Connecticut to erect an industrial park. *Bugryn v. City of Bristol*, 774 A.2d 1042 (Conn. App. Ct. 2001), *appeal denied*, 776 A.2d 1143 (Conn. 2001), *cert. denied*, 534 U.S. 1019, 122 S. Ct. 544 (2001). [FN13] Several African-American families in Canton, Mississippi were similarly forced to leave the homes they had lived in for over sixty years to clear land for a Nissan automobile plant. *See* David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sept. 10, 2001, at A20.[FN14]

FN13. In permitting the taking, the court observed that "the state had recognized the city as an economically disadvantaged community and that the industrial park would serve the public good by creating or retaining manufacturing jobs, creating additional industrial land in the city and increasing the tax base." *Id.* at 1049. Neither the legislature nor the court made any finding of blight.

FN14. Again, the taking was not justified on the basis of blight or necessity. As the executive director of the Mississippi Development Authority explained:

It's not that Nissan is going to leave if we don't get that 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.

Id. The trial court nonetheless ruled in favor of the taking. *Mississippi Major Impact Authority v. Archie*, No. Co-2001-0082 (Madison Cty., Miss. Spec. Ct. July 26, 2001). Upon motion of the families, the Supreme Court of Mississippi stayed the condemnations until it could consider the families' appeal. Once the stay was granted the state gave up its fight and dismissed its eminent domain actions.

*10 Statistics confirm that takings for economic development disproportionately impact these groups. In San Jose, California, ninety-five percent of the properties targeted for economic redevelopment are Hispanic or Asian-owned, even though only thirty percent of businesses are owned by minorities. Derek Werner, *Note: The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 350 (2001) ("Between 1949 and 1963, sixty-three percent of all the families displaced by urban renewal were non-white."); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455, 464 (Mich. 1981) (City of Detroit condemned the homes of approximately 3,438 persons, most of whom were elderly, retired, Polish-American immigrants, to build a General Motors plant). *See also*

Who Feels Renewal Most? Silicon Valley/San Jose Business Journal, Sept. 20, 2002, at 1. Similarly, near Atlantic City in Ventnor, New Jersey, forty percent of the city's Latino community lives in a zone targeted for economic redevelopment. *See* Schwartz, *supra.* In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African-American residents (44%) is twice that of the entire Township and nearly triple that of Burlington County, and in which the percentage of Hispanic residents (22%) is more than double that of all of Mt. Holly Township, and more than five times that of the county. *Id.*; U.S. Census of Population and Housing, 2000: Tables for Blocks 1000, 1001, 1003 and 1009: (a) Vacancy Status, (b) Tenure by *11 Race of Householder, and (3) Tenure by Household Size (Hispanic or Latino Householder): Mt. Holly, New Jersey.[FN15] These statistics confirm that if eminent domain can be exercised for the purported public use of "economic development," the displacement of the poor, minorities and the elderly will only become more commonplace. [FN16]

FN15. In both the Ventnor and Mt. Holly cases there were pretextual findings of blight, but the condemning authorities did not adhere to the applicable standards. Were "economic development" a public use and a finding of blight unnecessary, it would be substantially more difficult - if not impossible - for plaintiffs to stop such condemnations.

FN16. As discussed in subsection C below, renters are, in some senses, placed in an even more difficult position than homeowners when their residence is taken by eminent domain. In New London, a disproportionate percentage of renters come from minority groups. New London is a racially and ethnically diverse community: 56.1% of its residents are white, 19.7% are Hispanic and 18.6% are African-American. U.S. Census of Population and Housing, 2000: Summary Population and Housing Characteristics: New London, Connecticut. But whereas 49.6% of New London's white population rent their homes, 70.9% of the city's African-American population and 75.7% of its Hispanic population are renters. *Id.*; Total Population in Occupied Housing Units by Tenure, 2000: New London, Connecticut.

The reason these groups are disproportionately affected is that they are palatable political and economic targets. Condemnations in predominately minority or elderly neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action. *See* Laura Mansnerus, *Note: Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 409, 435-436 (1983) (discussing the difficulty of opposing condemnation proceedings). Condemning authorities target areas with low property values because it costs the condemning authority less (as market value is the measure of the "just compensation") and the state and/or local governments gain financially when they replace areas with low property values with those with higher values. Even assuming non-discriminatory motives, cities like New London have and will continue to target these areas. *See, e.g., Kelo*, 843 A.2d at 509 (Conn. 2004) *12 (citing adding jobs and tax revenue as motivation for the taking); *Bailey v. Myers,* 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (same).

C. The Impact of Takings on the Elderly, Minorities and the Economically Disadvantaged is Different in Kind from Their Impact on Other Populations.

The very circumstances that put minorities and the elderly at increased risk of being subjected to eminent domain power also leave those groups less able to deal with the consequences when such takings occur. Thus, it is not simply that the exercise of eminent domain, particularly when the purpose is "economic development," affects the elderly,

minorities, and the economically disadvantaged more often than it does those with more political and economic power, but that it affects those groups in different and more profound ways.

Eminent domain law does not truly offer "just compensation" in the economic development context. "Just compensation" is generally defined as the fair market value of the property at the time of the taking. *See, e.g., Tandet v. Urban Redev. Comm'n,* 426 A.2d 280, 298 (Conn. 1979). The fact that particular property is identified and designated for "economic development," however, almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not currently recognizing. In addition, determination of just compensation is limited by the "project influence doctrine," which prevents the court's consideration of the likely change in market value as a result of the actual project for which the property is being condemned. *See, e.g., City of San Diego v. Rancho Penasquitos P'shp,* 130 Cal. Rptr. 2d 108, 119 (Cal. App. 2003); *Kansas City Power & Light Co. v. Jenkins,* 648 S.W.2d 555, 560-61 & n.6 (Mo. App. 1983) (collecting cases). Thus, those displaced by eminent domain exercised for the purpose of "economic development" are systematically undercompensated.

*13 Moreover, when an area is taken for "economic development," the underprivileged, racial and ethnic minorities, and the elderly are driven out of their own neighborhoods, unable to afford to live in the "revitalized" community.[FN17] Because the neighborhoods chosen are (in large part) selected because of the low market value of the properties therein, these displaced individuals will typically have a difficult time finding adequate replacement housing.

FN17. *See generally* Pritchett, *supra* p. 7; John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two:" Gentrification and The K.O. of Impoverished Urban Dwellers of Color,* 46 How. L.J. 433 (2003).

This phenomenon is clearly present in the case at hand. As of the most recent census, the median residential property value for owner-occupied residences in the City of New London is $107,900, whereas the value for such properties in the county is $142,200 and $166,000 statewide.[FN18] Moreover, in such economically disadvantaged areas, a disproportionately large percentage of the residents are renters rather than owners. New London is no exception,[FN19] and those renters may have an even more difficult time finding adequate replacement housing than do those who own their home.[FN20]

FN18. U.S. Census of Population and Housing, 2000: Median Value of Specified Owner-Occupied Housing Units: Connecticut.

FN19. Over 62% of New London residents rent their homes as compared to the statewide average of 33.2%. U.S. Census of Population and Housing 2000: General Housing Characteristics: Connecticut.

FN20. Many of New London's renters struggle to pay their rent. As of the most recent Census, New London's per capita yearly income was $18,437. U.S. Census of Population and Housing, 2000: Connecticut. According to the U.S. Department of Housing and Urban Development (HUD), a household in New London earning $19,620 per year in 2003 could afford a maximum monthly rent of $491, whereas the Fair Market Rent (FMR) in New London for a one-bedroom household is $654 per month, and a two-bedroom household is $797 per month. 68 Fed. Reg. 56713 (October 1, 2003). State-wide, the FMR for a one-bedroom household is $752 per month, and a two-bedroom household is $936. *Id.*

*14 Not only are other areas less likely to be affordable than that from which victims of eminent domain power for "economic development" are displaced, but the remaining "affordable" housing in the area is almost certain to become less so. Such takings invariably take lower cost housing and replace it with either business(es) or higher cost housing in order to achieve the goal of increasing the tax base and/or number of jobs. This reduces the supply of affordable housing in the area and drives up prices. Indeed, one study indicates that 86 percent of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling. Herbert J. Gans, The Urban Villagers: Group and Class in the Life Of Italian-Americans 380 (2d ed. 1982); *see also* Scott A. Greer, Urban Renewal and American Cities: The DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (citing multiple studies and concluding that "[a]ll ten ... indicate substantial increases in housing costs").

Displacement presents a particular burden for the elderly Over one-third of New London's homeowners are aged 65 or older. Overwhelmingly, the elderly strongly prefer independent living in their own homes to other alternatives. Not only is remaining in one's own home the vast preference of older people, *see, e.g.*, Housing Assistance Council, Federal Programs and Local Organizations: Meeting the Housing Needs of Rural Seniors (2001), home ownership is associated with a reduced risk of entering a nursing home, as well as a greater likelihood of exiting if admitted. Vernon L. Greene and Jan I. Ondrich, *Risk Factors for Nursing Home Admissions and Exits: A Discrete-Time Hazard Function Approach* 45 J. Gerontol. Soc. Sci. S250-S257 (1990). The risk of not being able to afford adequate replacement housing is particularly acute as New London residents aged 65 or over earn significantly less income per year than working *15 adults and 11.4% of the city's elderly population live below the poverty line.[FN21]

FN21. U.S. Census of Population and Housing, 2000: Connecticut.

In addition to the increased risk of institutionalization, there is the considerable psychic harm that affects those dislocated from their homes and communities, particularly among the elderly. For example, one of the plaintiffs in this action, Wilhelmina Dery would, under the New London development plan, be removed from a home she was born in over 85 years ago and a community which her family settled upon their arrival from Italy in the early 1880s. Trial Tr., Vol. 1, 40-53 (July 23, 2001). Her husband has lived in their house with her for the past 59 years and their son and his family have lived in the house next door since he married. *Id.* The deleterious psychological effects of such upheaval have been studied and recorded. *See, e.g.*, Fullilove, Root Shock at 11-20; Frieden & Sagalyn, Downtown, Inc. at 34; Gans, The Urban Villagers at 379. Indeed, studies have found tangible effects from such dislocation including increased risk from stress related diseases, such as depression and heart attack. Fullilove, Root Shock at 14.

Like the elderly, racial and ethnic minorities will suffer special harm from takings for the purpose of "economic development." To the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates (or severely undermines) established community support mechanisms and has a deleterious effect on those groups' ability to exercise what little political power they may have established as a community.[FN22]

FN22. The very threat of such takings will also hinder the development and improvement of strong minority communities. Enforcement of the constitutional limits on eminent domain power embodied in the Fifth Amendment "protects private expect-

> ations to ensure private investment." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria many minority neighborhoods will be at increased risk of having their property taken. Individuals in those areas will thus have less incentive to engage in community-building for fear that such efforts will be wasted.

*16 III. While This Court Has Permitted Use of the Eminent Domain Power to Remedy Blight, It Has Never Endorsed Taking Purely for Economic Development.

Permitting exercise of eminent domain power to transfer property from one private party to another for its anticipated "economic development" both fails to protect a fundamental individual right from majoritarian impulses, and places the burden of economic development most heavily upon those who are least able to bear it. Such a result is unjust and is in no way compelled by this Court's jurisprudence.

The Connecticut Supreme Court's conclusion that pure economic development constitutes a valid public use under the federal constitution relies primarily on a mis-reading of this Court's decisions in *Berman v. Parker,* 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984). In *Berman,* the District of Columbia Redevelopment Land Agency acquired a stretch of land by eminent domain "for the redevelopment of blighted territory in the District of Columbia and the prevention, reduction or elimination of blighting factors or causes of blight." 348 U.S. at 29 (citation omitted). A department store in the blighted area challenged the taking. The Supreme Court allowed it, finding that blight could reasonably be addressed "on an area rather than on a structure-by-structure basis." *Id.* at 34. *Berman* found the District of Columbia Redevelopment Act constitutional, *as* *17 *applied.* It did not address the Act's facial constitutionality. [FN23]

> FN23. "The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property." *Berman,* 348 U.S. at 28.

As applied, the redevelopment in *Berman* was fundamentally different than the activity in New London. The redevelopment was the *means* to solve the urban problem of blight, not the *purpose* or *end* of the exercise of eminent domain. In *Berman,* the purpose of the exercise of eminent domain was to eliminate slums and urban blight:

In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community.... It was important to redesign the whole area so as to eliminate the conditions that cause slums.... In this way *it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.*

Id. at 34-35 (emphasis supplied). The motivation for the takings in New London are entirely different:

In its preface to the development plan, the development corporation stated that *its goals were to* create a development that would complement the facility that Pfizer was planning to build, *create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront,* and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

Kelo, 843 A.2d at 509 (Conn. 2004) (emphasis supplied). This difference is crucial because in *Berman* , the Court evaluated the propriety of the eminent domain *for the purpose of eliminating blight.* It *then* asked whether redevelopment was an acceptable use for the land. In the case at bar, the question is whether economic improvement *itself* is a valid reason for exercise of eminent domain power.

*18 Hence, *Berman* stands only for the proposition that, once the *purpose* behind the eminent domain has been deemed a "public use," the transfer of the land to private parties for economic development may be appropriate. "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman*, 348 U.S. at 33. It does not hold that economic development alone is a proper public use.

The assault on private property rights occurs at the taking, not upon the redeveloping of the property. The focus of eminent domain analysis thus must remain on the end accomplished by taking the property rather than how the property is to be used after the taking.

The Connecticut Supreme Court's reliance on *Hawaii v. Midkiff* is similarly misplaced. That case contained two peculiar circumstances. First, it dealt with rectifying historical inequities enforced by the state legislature in the 1960s, a concern not present in this case. Second, it contemplated the public value of land redistribution to the less wealthy. The public value of such purposeful land redistribution is a fundamentally different public question than the economic development in question here. The unique facts of *Midkiff* render its holding inapplicable to the present controversy.

As explained above, these *amici* oppose the extension of the eminent domain jurisprudence to cases of pure economic development because the eminent domain power has traditionally been used (and abused) to the detriment of those with less economic and political power, particularly minority racial and ethnic groups, the economically disadvantaged and the elderly. It would be cruelly ironic if permitting a single taking to rectify historical inequities under the unique circumstances present in *Midkiff* was used to justify expansion of eminent domain power in such a way that will have a disproportionate negative impact on other historically discriminated-against and disadvantaged groups.

*19 IV. Some States Have Recognized That Economic Development Alone Cannot Constitute a Public Use.

Unlike this Court, several state courts have been squarely faced with the issue of whether economic development alone constitutes a public use. One of the seminal cases relied upon by the Connecticut courts is the Michigan case *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (Mich. 1981). That case, however, was recently overruled, *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), and the experience of Michigan should counsel this Court against repeating the mistake of *Poletown*.[FN24]

FN24. Although *Hathcock* concerned the interpretation of the public use requirement of the Michigan Constitution, the language of the relevant clause is almost identical to that in the Federal Constitution. *Compare* Mich. Const. Art. X, § 2 ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.") *with* U.S. Const. Amend. 5 (quoted *supra* note 9).

In *Poletown*, the Michigan Supreme Court permitted the city of Detroit, at the time financially strapped and desperate for economic recovery, to condemn private property in a neighborhood of Polish immigrants (called Poletown) in order to transfer the property to General Motors for the building of an assembly plant. 304 N.W. 2d at 457-58. Poletown had not been found to be blighted, nor was it necessary for GM to locate in that particular neighborhood. Rather, GM approached the city about using its eminent domain power to acquire parcels to GM's specifications, to which the city readily agreed in hopes of creating jobs and increasing the tax base. *Id.* at 466-67. The Michigan Supreme Court equated "public use" with "public purpose," and found this sort of "economic development" to be a public use or purpose, even though there was no blight to be cleared. *Id.* at 457.

Justice Ryan wrote a vigorous and insightful dissent in which he explained how the majority's holding was *20 inconsistent with Michigan's prior caselaw. He further pointed out that eminent domain "can entail, as it did in this case, intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Id.* at 481.

Justice Ryan went on to describe precisely the scenario that troubles *amici* in this case when eminent domain is used for the purpose of "economic development" like in *Poletown* and in *Kelo*:

What has been done in this case can be explained by the overwhelming sense of inevitability that has attended this litigation from the beginning.... The justification for it, like the inevitability of it, has been made to seem more acceptable by the "team spirit" chorus of approval of the project which has been supplied by the voices of labor, business, industry, government, finance, and even the news media. Virtually the only discordant sounds of dissent have come from the miniscule minority of citizens most profoundly affected by this case, the Poletown residents whose neighborhood has been destroyed.

Id. at 81-82.

The Michigan Supreme Court recently had cause to reconsider *Poletown*, and determined that the decision's expansive definition of "public use" was inconsistent with Michigan's caselaw and its constitution.[FN25] At issue in *21 *Hathcock* was the condemnation of land for the creation of a business and technology park. The Michigan Supreme Court agreed that the business park would help the local economy and that, if *Poletown* were to remain good law, it would have to affirm the county's determination that this was a constitutional "public use." However, the court overruled *Poletown* and adopted Justice Ryan's dissent. The court found that only three more limited situations qualified as "public use" in the context of eminent domain, observing that:

> FN25. It is also worth noting that the *Poletown* development fell well short of expectations in terms of economic impact. After the city of Detroit spent over $200 million acquiring and preparing a site for General Motors (in the process displacing 600 businesses and demolishing 1400 residential structures), it took GM two years longer than scheduled to finally open its plant (seven years after the condemnations) and the plant only employed a little more than half of the workers originally promised. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, Dollars & Sense, July 2001; *cf. Poletown*, 304 N.W. 2d at 471.

Every business, every productive unit in society, does ... contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Hathcock, 684 N.W. 2d at 786.

Several other states have also explicitly rejected the slippage of public use to the point where potential "economic development" alone will satisfy the requirement. *See, e.g., Georgia Dept. of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1 (Ill. 2002); *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985);

Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003); *cf. City of Midwest City v. House of Realty, Inc.*, 100 P.3d ___, Nos. 100,064, 100,065, 2004 WL 1446925 (Okla. June 29, 2004); *22 *Eighth & Walnut Corp. v. Public Library of Cincinnati*, 385 N.E.2d 1324 (Ohio 1977).

While some states other than Connecticut have accepted the use of eminent domain for purely economic development purposes,[FN26] many of these cases relied upon the now-overruled *Poletown* case. The fact that some states are effectively reading out the United States Constitution's public use requirement, coupled with the deleterious impact that this has on various socially and economically disadvantaged groups as described above, makes it vital that this Court hold that economic development alone does not constitute a public use for eminent domain purposes.

FN26. *See, e.g., City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004); *City of Jamestown v. Leevers Supermkts.*, 552 N.W. 2d 365, 372-73 (N.D. 1996); *Duluth v. State*, 390 N.W. 2d 757, 763 n.2 (Minn. 1986).

V. "Economic Development" Is Not Amenable to Standards Enabling Judicial Review.

Allowing "public use" to include "economic development" renders the eminent domain power open to abuse - to the particular disadvantage of those, such as *amici*, who lack economic or political power. It is a fundamental principle of our government that the judiciary functions as a check on the potential for tyranny of the majority.[FN27] In *23 order for the judiciary to perform this function, the laws must be subject to judicial review.[FN28] And in order for that judicial review to be effective, there must be standards to govern the judiciary's decisions. Unlike the "public uses" that have previously been allowed by this Court, the limits on a public use of "economic development" are not susceptible of easy definition, and thus the judiciary is unable to rein in potential abuses of the eminent power by reference to those limits.

FN27. [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.... Th[e] independence of the judges is ... requisite to guard the Constitution and the rights of individuals.... [T]he firmness of the judicial magistracy ... serves to moderate the immediate mischiefs of those [laws] which may have been passed, [and] it operates as a check upon the legislative body in passing them.

The Federalist No. 78, at 525, 527-28 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961); *see also* The Federalist No. 47, at 326 (James Madison) (Jacob E. Cooke, ed., 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control ....") (quoting Montesquieu).

FN28. *See* The Federalist No. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) ("Laws are a dead letter without courts to expound and define their true meaning and operation.").

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them...." The Federalist No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). Courts have recognized that specific and objective standards can prove a useful check on what might otherwise be unlimited government power, or in areas where the court is particularly concerned about abuse (as the history of eminent domain demonstrates the Court should be here, *see* Section II.A *supra*) which infringes on fundamental individual rights. For instance, this Court has long recognized the usefulness of standards as guideposts

to check government power and guard against abuse of that power in the area of First Amendment prior restraints:

The absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far *24 too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988). Likewise, standards in the area of eminent domain can allow courts to check whether the power is indeed being used for a permissible public purpose. Although the analysis of eminent domain cases is admittedly different from First Amendment cases, the underlying point - that specific, objective standards provide a means of checking against infringement on important constitutional rights - remains valid, and should inform the Court's approach to this case.

In *Hathcock*, the Michigan Supreme Court case overruling *Poletown*, the court retreated from the amorphous "economic development" justification for use of eminent domain and instead set out three situations in which "public use" would justify its application: (1) construction of roads and the like, which requires collective action; (2) where the property remains subject to public oversight; and (3) "where the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred." 684 N.W. 2d at 783. The first two situations - where its use is necessary to allow construction of roads and other instrumentalities of commerce, and where the public retains some measure of control over the use of the property - are not only reasonably limited, these traditional uses of eminent domain are also well-defined by years of precedent.

Even the third "public use," which is essentially the equivalent of what this Court in *Berman* termed "blight" and is admittedly less limited, is still reasonably susceptible of definition.[FN29] For instance, in *City of Midwest City v.* *25 *House of Realty, Inc.*, Oklahoma defined blight as requiring the presence of certain specific conditions, including "a substantial number of deteriorated or deteriorating structures," or "unsanitary or unsafe conditions," under two statutes where the state's eminent domain power had been delegated to the local government, whereas in a statute that did not delegate eminent domain power, blight was defined by somewhat broader standards. 2004 WL 1446925, at *8-11 (Okla. June 29, 2004). The Oklahoma Supreme Court found it unnecessary to address the plaintiff's argument that the latter broader standards failed to provide adequate guidelines to local governments, and thereby rendered the local government's use of the eminent domain power unconstitutional, because it held that the latter statute simply did not authorize local governments to exercise eminent domain power. Other states have been able to define "blight" in similar ways. *See Hardwicke v. City of Lubbock*, ___ S.W.3d ___, No. 0704-0097-CV, 2004 WL 2051823, at *1, 3-4 (Tex. App. Sept. 3, 2004); *Concerned Citizens of Princeton, Inc. v. Mayor & Council of the Borough of Princeton*, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004), *certification denied*, No. 56,750, ___ A. ___, 2004 WL 2713995 (N.J. Oct. 6, 2004).

FN29. This is not to say that the "blight" rationale has not proven problematic in practice. *See* discussion of "Negro removal" *supra* pp. 7-8. Indeed, *Berman* itself had a distinct racial overtone that is largely ignored in the opinion. The "renewal district" in *Berman* was 97.5% "Negroes." 348 U.S. at 36. Of the 5,900 units of housing that were ultimately constructed on

> that site, only 310 could be classified as "affordable" to former residents of the area. Howard Gilette, Jr., Between Justice and Beauty: Race, Planning and the Failure of Urban Policy in Washington, D.C. 163-64 (1995). This resulted in the area being transformed from almost entirely African-American to majority white in less than a decade. *Id.* at 164.

By contrast, when economic improvement is the public purpose, there is *no natural limit* to government takings. "Economic development" can be as bread as any "higher" or "better" use that the local government or redevelopment agency can imagine, and can be used to justify the taking *26 of virtually any property.[FN30] As the *Hathcock* court observed, the " 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." 684 N.W. 2d at 786 (emphasis in original).[FN31]

> FN30. While the elimination of blight also impacts economically poor areas, blighted areas are (or, at least, should be) chosen because of genuine public safety and welfare problems, like structurally unsound homes or neighborhoods rife with crime. *See Berman*, 348 U.S. at 31. On the contrary, areas targeted for redevelopment are frequently well-maintained, untroubled neighborhoods - if they weren't, cities would assert the *permissible* public use of eliminating blight.

> FN31. *See also Chesapeake Stone Co. v. Moreland,* 104 S.W. 762, 765 (Ky. 1907): If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

In this case, the Connecticut legislature determined that acquisition and redevelopment of private property was justified for the purpose of fostering "continued growth of industry and business within the state," because "such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost." Conn. Gen. Stat. § 8-186. In other words, the state legislature declared it "necessary" to use the extraordinary power of eminent domain to foster business simply because it believed that the market for private property was often inefficient.[FN32] Yet, the market may be inefficient for *27 good reason: Individuals develop personal connections to the places they live, and those personal connections inform their decisions whether to sell their property as much, or more than, the market value of the property. The Constitution allows the individual property owner to decide, in most cases, that his property is more valuable to him than the market dictates by placing limitations on the circumstances for which private property must be given up in exchange for "just compensation."

> FN32. The affected neighborhoods were not shown to be "blighted areas"; although New London was designated a "distressed municipality," the designation as a "distressed municipality" was not a requirement for allowing the use of eminent domain for the project, but only for obtaining special grants for the development.

Even assuming that extending the meaning of "public use" to include "economic development" provides some limit on the government's eminent domain power,[FN33] the fact that "economic development" is not easily defined inexorably leads to

one of two results, neither of which adequately protects the fundamental right of individuals to retain the property they own absent an overriding public interest. First, and at best, judicial decisions as to whether the promise of "economic development" justifies the use of eminent domain in particular cases will be inconsistent, leaving governments unsure of the extent of their power, and individuals likewise unsure of the extent of their *28 property rights. Second, and more likely, the courts, unable to ascertain a clear limit on permissible "economic development," will be reluctant to interfere with a legislative decision that a given development is a "public use," eliminating the ability of the judiciary to function as a check on the legislature in precisely the setting where, as discussed in Part II, *supra*, certain historically discriminated-against groups are at a systematic disadvantage.[FN34]

FN33. The dissent in the Connecticut Supreme Court proposes a three-part test that purports to give objective standards by which to assess whether a particular taking for "economic development" constitutes a public use. 843 A.2d at 587-88. Because of the inherent breadth of the term "economic development," the standards proposed by the dissent will do little to inform or constrain exercise of eminent domain power. For example, one of the prongs of the test proposed by the dissent is whether the public benefit sought is likely to be achieved. *Id.* at 588. Determining *ex ante* whether a business venture is likely to be successful is a highly inexact determination and most instances either answer is nearly equally likely to be correct. Moreover, "public benefit" is not achieved merely if the project is successful from the perspective of the private developers, it requires further guesswork as to whether any such success is likely to trickle down and result in the creation of more jobs than previously existed and significant expansion of the tax base. While *amici* do not believe that "economic development" by private parties should or can constitute a public use, *see* Part I *infra*, the attempt to craft a workable standard for determining, case-by-case, if such a taking constitutes a public use is preferable to the majority position, which would result in no meaningful review at all.

FN34. Indeed, the courts below deferred to the legislative determination, finding that, in this case, the legislature could rationally have determined that economic development was a public use, 843 A.2d at 528, and that there was no evidence of bad faith, *id.* at 533. The Connecticut Supreme Court based its deference to the legislative determination that "economic development" was a public use on *Berman*. Specifically, the Connecticut Supreme Court quoted that portion of *Berman* that stated, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 260 Conn. 1, 36 (quoting *Berman*, at 32). But the deference to legislative purpose discussed there assumes that there are "specific constitutional limitations" on the legislature's determination of "public use." If the Constitution's "public use" clause does not admit of a limitation narrower than the whole field of "economic development," then there is effectively no "specific constitutional limitation" on the legislature's determination of the public interest.

Deference to that legislative determination in such a case is a complete license to the legislature to adjust private property rights in whatever way it sees fit, offering no protection for the rights of individual property owners from majoritarian overreaching. This potential for overuse should be checked by refusing to expand the definition of public use in the eminent domain context and limiting public uses to

the three categories identified in the *Poletown* dissent and adopted in *Hathcock*. *See* 304 N.W. 2d at 476.

The lack of meaningful review and of clear standards for that review is particularly troubling in the eminent domain context, where the authority to take property is often delegated local governments. *See, e.g., Eighth & Walnut Corp.*, 385 N.E.2d at 1326. Local governments are *29 particularly prone to capture by private, politically influential and economically powerful interests. Pritchett, *supra* p. 7, at 2 ("Several studies have shown how urban elites promoted redevelopment to ... protect and enhance their real estate investments")[FN35]

FN35. In fact, the delegation of the eminent domain power does not end at local governments, who are accountable to the public in at least some minimal way. The authority is commonly delegated to utilities, redevelopment agencies and the like. *See, e.g., Concerned Citizens, United v. Kansas Power & Light,* 523 P.2d 755 (Kan. 1974) (noting that the power of eminent domain is delegated by statute to electric utility, which is "vested with reasonable discretion to determine the necessity of taking land for its lawful corporate purposes," and that discretion is subject to review only for abuse of discretion); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk,* 631 N.W. 2d 131, 137 (Neb. 2001) (noting that "[a]lthough railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain"); *Balsamo v. Providence Redevelopment Agency,* 124 A.2d 238 (R.I. 1956) (noting redevelopment agency was delegated authority to exercise eminent domain authority). Without standards governing the permissible uses of eminent domain authority, overuses and abuses of the authority by private or semi-private companies will be difficult to combat.

The ability of the public to obtain meaningful review and to hold the government to specific standards for use of its eminent domain power is thus particularly important to *amici*, who represent groups that are typically less politically and economically powerful. As Justice Ryan observed in *Poletown*, these groups are often the ones who bear the brunt of the effect of the condemnation, but their dissent will be unpopular when the rest of the community believes they stand in the way of "economic development." Having specific, objective and verifiable standards against which the public can measure the use of eminent domain - in the political process, and if necessary, in the courts - is an important check on the potential for abuse.

*30 CONCLUSION

The Fifth Amendment's public use requirement is a specific textual limitation on the government's power to take privately held property. Should this Court affirm the Connecticut Supreme Court's holding that pure "economic development" constitutes a public use for eminent domain purposes, legislative majorities will be able to infringe on the property rights of minorities and allocate the burdens of economic development to less politically and economically powerful groups - those least able to bear this burden. Shorn of the textual limitation embodied in the Fifth Amendment and absent meaningful judicial review of majoritarian legislative enactments to protect this important individual right against wrongful takings, the eminent domain power becomes little more than "a license for government to coerce individuals on behalf of society's strongest interests."[FN36]

FN36. George F. Will, *Despotism in New London*, Washington Post, Sept. 19, 2004, at B7.

Kelo v. City of New London
2004 WL 2811057 (U.S.) (Appellate Brief)

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For Opinion See 125 S.Ct. 2655 , 125 S.Ct. 1241 , 125 S.Ct. 27

U.S.,2004.

Supreme Court of the United States.
Susette KELO, Thelma BRELESKY, Pasquale CRISTOFARO, Wilhelmina and Charles DERY, James and Laura GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and William Von WINKLE, Petitioners,
v.
CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION, Respondents.
No. 04-108.
December 3, 2004.

On Writ of Certiorari to the Supreme Court of Connecticut

Brief of Amicus Curiae the Becket Fund for Religious Liberty in Support of Petitioners

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*1 INTEREST OF THE *AMICUS*

Under Rule 37.5 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief as *amicus curiae* in support of Petitioners.[FN1] The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people and institutions in public life and public benefits. It shares a common interest with religious organizations nationwide in assuring that rights to religious exercise are not infringed by land-use laws and policies.

FN1. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contribution to the preparation and submission of this brief.

The Becket Fund represents plaintiffs in a host of land-use cases across the country.[FN2] In addition, we have filed a series of *2 *amicus curiae* briefs in cases involving the rights of religious land owners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[FN3]

FN2. *See, e.g., United States v. Maui County,* 298 F. Supp. 2d 1010, (D. Haw. 2003; *Hale O Kaula v. Maui Planning Comm'n,* 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown,* 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also*

Castle Hills First Baptist Church v. City of Castle Hills, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Redwood Christian Schs. v. County of Alameda,* Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles,* Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield,* Cir. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township,* No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Temple B'nai Sholom v. City of Huntsville,* Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church v. City of Greenwood Village,* Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield,* Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare v. Village of Franklin Park,* Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park,* Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn,* Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Community Church v. City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

FN3: *See, e.g., Midrash Sephardi v. Town of Surfside,* 366 F.3d 1214 (11th Cir. April 21, 2004) (*amicus* brief filed Nov. 21, 2003); *Fifth Avenue Presbyterian Church v. City of New York,* 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir. March 8, 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

This *amicus curiae* brief presents a unique perspective on the actual, and substantial, burdens suffered by religious institutions when the government relies on the asserted purpose of generating more economic development and tax revenue as a basis for taking private property and giving it to another private party. *Amicus* believes that its experience in this area of the law will assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Petitioners are being forcibly evicted from their homes in an eminent domain action by the city of New London, Connecticut, even though the condemned area is not blighted, the homes are structurally sound, and no highway or other public works project is being constructed. Instead, New London is destroying Petitioners' homes in order to transfer land to private parties who promise to develop commercial office space and perhaps generate tax revenue for the city. Petitioners' constitutional objections to these takings were rejected by the Connecticut Supreme Court.[FN4] In doing so, the lower court granted municipalities unprecedented power to take and condemn private property under a novel conception of public purpose - that of potential private economic development and increased tax revenue.[FN5]

FN4. *Kelo v. City of New London,* 843 A.2d 500 (Conn. 2004).

FN5. *Id.* at 528.

To affirm this broad expansion of eminent domain power is to grant municipalities a special license to invade the autonomy of and take the property of religious institutions. Houses of worship and other religious institutions are, by their very nature, nonprofit and almost universally tax-exempt. These

fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the lower court. Religious institutions will *always* be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes *precisely because* they are deemed to be "beneficial and stabilizing influences in community life." *Walz v. Comm'r,* 397 U.S. 664, 673 (1970).

In short, affirming the decision below would both declare open season on the taking of religious institutions of all faiths and functions (houses of worship, schools, hospitals, and soup kitchens, to name just a few), and turn the Fifth Amendment's "public purpose" requirement for takings squarely on its head.

*4 ARGUMENT

I. RELIGIOUS INSTITUTIONS SUFFER SPECIAL DISADVANTAGE FROM GOVERNMENT ABUSE OF EMINENT DOMAIN POWERS IN THE NAME OF ECONOMIC DEVELOPMENT AND GENERATING TAX REVENUE.

The exercise of eminent domain power is often particularly destructive when applied to religious institutions.[FN6] When religious land uses such as houses of worship, schools, cemeteries, and soup kitchens are condemned, religious expression is unavoidably burdened.[FN7] In many instances, this burden arises because religious institutions have specifically dedicated their property to sacred use that is irreversibly *5 destroyed when their property is taken and put to another use.[FN8]

FN6. As one court has noted, because "[c]hurches are central to the religious exercise of most religions," preventing a church from maintaining its chosen "worship site fundamentally inhibits its ability to practice its religion." *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002).

FN7. Indeed, this Court has recognized that converting property devoted to religious use to an alternative use favored by the government imposes a substantial burden on religious adherents. *See Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451 (1988) (government decision to log land that was sacred to Native American plaintiffs would "have devastating effects on traditional Indian religious practices.") Nonetheless, this Court denied the Free Exercise claim in *Lyng* because the land that the plaintiffs sought to preserve for religious use was owned by the government. *See id.* (holding that a "devastating" burden on the plaintiffs' religious practice "do[es] not divest the Government of its right to use what is, after all, *its* land" because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government") (citation omitted). But, of course, the situation is quite different - and the implications for treading on the autonomy of a religious institution far graver - when it is the *government* that seeks to exact the property that the religious institution itself owns and sets aside for sacred use.

FN8. For example, a church may specially set aside and bless certain land as a religious cemetery and take extraordinary measures to preserve that land as holy and undefiled.

Taking a religious institution's property also burdens religious exercise because these institutions generally select and maintain their properties for specific religious ends - ends that are inextricably intertwined with the chosen location of the prop-

erty.[FN9] Accordingly, when the government seeks, through exercise of eminent domain, to dictate where a religious institution may or may not exist, it inevitably treads on that religious institution's autonomy and expression. For if the government can control where a religious institution may locate, the government inevitably comes to control the *kind* of mission a religious institution may pursue. Conforming religious institutions to the government's vision of the "proper place" for such institutions, in effect, imposes the government's vision of their "proper role."[FN10]

FN9. For example, an Orthodox Jewish synagogue will choose to locate in an area in which it is readily accessible to its congregants; an urban, storefront church will locate in the downtown business district near the people it seeks to serve and reach with its message; and a religious shelter will seek to locate in an area accessible to the homeless people to whom it seeks to minister.

FN10. Precisely because takings of religious institutions' property do burden religious exercise, courts must carefully scrutinize the inherently discretionary decisions that are involved when the government seeks to condemn religious property. *See, e.g., Yonkers Racing Corp. and St. Joseph's Seminary v. City of Yonkers,* 858 F.2d 855 (2d Cir. 1988), *cert. denied by Yonkers Racing Corp. v. City of Yonkers,* 489 U.S. 1077 (1989) (applying strict scrutiny to City's condemnation of seminary's property); *Keeler v. Mayor & City Council of Cumberland,* 940 F. Supp. 879 (D. Md. 1996), *motion to vacate denied,* 951 F. Supp. 83 (D. Md. 1997) (regulatory taking substantially burdened free exercise and was not justified by compelling governmental interest); *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.,* 527 P.2d 804, 805 (Colo. 1974) (Colorado Supreme Court vacated trial court's order of immediate possession because City could not meet strict scrutiny standard).

*6 The condemnation at issue in the case at bar does not directly involve a religious institution. However, a judgment affirming the lower court's holding - that potential economic development and tax revenue growth concerns justify forced property transfers from one private owner to another - would place religious institutions at special risk of eminent domain actions. This risk is not merely hypothetical. Examples abound in recent years of municipalities expanding the notion of a taking for "public use" in order to justify the condemnation and transfer of religious institutions' property to for-profit companies that will purportedly generate more tax revenue.

For example, in *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* a church spent over five years acquiring property that was both centrally located to its congregants and sufficient in size to build a sanctuary that allowed the entire church body to assemble for worship together in accordance with the church's beliefs.[FN11] However, once the City discovered the church's intent to build a place of worship, it suddenly swept in and initiated eminent domain proceedings in order to transfer the church's property to a Costco. The City sought to justify the taking by asserting that Costco would bring more economic development and tax dollars than the proposed tax-exempt church.[FN12] Ultimately, the court held that the Fifth Amendment could not sustain this "naked transfer of property from one private property to another."[FN13] Moreover, the court found "significant" evidence that the City's asserted tax and economic justifications were cover for a "discriminatory intent" *7 aimed at "trying to keep [the church] out of the City."[FN14]

FN11. 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002).

FN12. *Id.*

FN13. *Id.* at 1229.

FN14. *Id.* at 1225.

Another notorious example of how religious institutions are acutely vulnerable to takings based on tax revenue concerns is the landmark, but now discredited, case of *Poletown Neighborhood Council v. City of Detroit.*[FN15] In *Poletown*, politically powerful General Motors sought to build an assembly plant on a 465-acre Detroit neighborhood through eminent domain. The *Poletown* court asked, "[c]an a municipality use the power of eminent domain ... to condemn property for transfer to a private corporation ... thereby adding jobs and taxes to the economic base of the municipality and state," and answered in the affirmative.[FN16] That answer instantly condemned *twelve* neighborhood churches over extraordinary protest,[FN17] without a word of concern from the court.

FN15. 304 N.W.2d 455 (1981). The lower court in this case relied in part on the *Poletown* precedent yet the Michigan Supreme Court recently overruled it emphatically. *See County of Wayne v. Hathcock,* 471 Mich. 445 (Mich. 2004).

FN16. *Id.* at 457.

FN17. Jeanie Wylie, Poletown: Community Betrayed (1989). *See also* Derek Shearer, *Poletown: Community Destroyed,* 11 Multinational Monitor (Jan.-Feb. 1990) (book review) ("When their efforts to preserve the community failed, the residents attempted to at least save Father Karasiewicz's Immaculate Conception Church, a community centerpiece. When their legal initiatives failed there too, dozens of residents, including many elderly women, occupied the church. They were eventually arrested, and the church, like the rest of Poletown, was razed.").

For municipalities that lack the self-control to raise taxes or cut spending to balance budgets, a rule that allows them to transfer the tax-exempt property of religious institutions to a private business that will immediately add to the tax rolls is often too tempting to pass up - especially in times of municipal budget deficits and recession. A good example of this *8 phenomenon at work occurred in East Saint Louis, Illinois. Though a mosque had purchased property to develop a worship center that would minister to the poor in a depressed area of the city, the city government preferred the immediate tax revenues that would be generated by a for-profit developer. Accordingly, it condemned the mosque's property and transferred it to a private rental housing developer.[FN18] Simply put, cities like East Saint Louis view religious institutions as a fiscal drain on city tax revenues during tough economic times. One court has even gone as far as to hold that the more religious institutions are attracted to a city (by low real estate prices) during economic downturns, "the more compelling the City's need to exclude them if it is to have any chance to succeed."[FN19]

FN18. *See Southwestern Ill. Dev. Auth. v. Al-Muhajinum,* 744 N.E. 2d 308, 312 (Ill. App. 2001) (rejecting challenge by mosque to the condemnation of its property in order to transfer the property to a private rental housing developer).

FN19. *International Church of the Foursquare Gospel v. City of Chicago Heights,* 955 F. Supp. 878, 881 (N.D. Ill. 1996) (upholding the city's denial of a special use permit for a church seeking to occupy an abandoned commercial building).

Numerous other examples similarly illustrate that religious institutions are consistently targeted for condemnation and property transfer (to for-profit entities) by municipalities asserting economic development and tax revenue concerns.[FN20] *10 Such high frequency of attacks gives testimony to the special *11 disadvantage religious institutions

face under the broad reading of "public use" implemented by the court below. Because religious institutions are overwhelmingly non-profit and tax-exempt, they will generate less in tax revenues than virtually *any* proposed commercial or residential use. Accordingly, when a municipality considers what properties should be included under condemnation plans designed to increase for-profit development and increase taxable properties, the non-profit, tax-exempt property of religious institutions will by definition *always* qualify and *always* be vulnerable to seizure.[FN21]

FN20. The following sampling of cases demonstrates the widespread threat facing religious institutions across the country from revenue hungry municipalities.

• As part of a downtown revitalization plan, the city of Boynton Beach, Florida openly sought to transfer the Jesus House of Worship Church's property to private retail developers. The city declared it would rely on its eminent domain powers if the church remained unwilling to sell. *See* Gariot Louima, *Boynton Officials Ready to Buy, Raze Businesses*, Palm Beach Post, Dec. 11, 2002 at 1B.

• In Normandy, Missouri, the Sisters of the Good Shepherd own a large parcel that serves as a convent, retirement home for aged sisters, and a shelter for drug-addicted women. The city, however, was not content with the good deeds of the sisters and instead sought to take the religious complex and replace it with a $53 million retail and commercial development. *See* D. Paul Harris, *Nuns in Normandy Get Ready for Fight Over Redevelopment; Sisters Say Their Area Is Lovely and City's Plan Seems "Ill-Conceived,"* St. Louis Post- Dispatch, July 29, 2002 at 1

• After City Chapel church converted a downtown four-story retail building into a church for its 100 members, the city of South Bend, Indiana condemned the building for private redevelopment. *See City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443, 454 (Ind. 2001); Terrence Bland, *Church Site is "One More Piece of the Puzzle,"* South Bend Tribune, Aug. 4, 2001, at A4.

• The city of New Rochelle, New York targeted two local churches for eminent domain actions in order to make way for a 309,000 square foot IKEA store. *See* Debra West, *IKEA Wants to Move In, but Neighbors Fight Moving Out*, N.Y. Times, Mar. 7, 2000, at B1; Lynn Cascio, *Protestors March to Embarrass IKEA*, Journal News, (Westchester Cty., NY), May 25, 2000, at 5B.

• In February 2002, the City of North Hempstead, New York moved for a surprise condemnation of St. Luke's Pentecostal Church after St. Luke's had completed an arduous permitting process to acquire the land, including litigation to acquire a parking variance. Unbeknownst to St. Luke's, its land had been slated for condemnation back in 1994, well before they applied for a single permit. Yet the city failed to inform St. Luke's of its demolition plans at any time before the actual condemnation and St. Luke's lost their church. *See* Stewart Ain, *Of Spiritual vs. Urban Renewal*, N.Y. Times, Apr. 16, 2000, at 14LI3; *In the Matter of the Application of North Hempstead Community Redev. Agency*, 2002 N.Y. Misc. LEXIS 1488, at *1-*2 (Aug. 29, 2002). Marni Soupcoff, *North Hempstead Bulldozes Constitutional Rights*, The Westbury Times (Mineola, NY), Feb. 22, 2002. Victor Manuel Ramos, *In North Hempstead: A Spiritual Homecoming Deferred; Redevelopment Claims Dream of Church's Building*, Newsday, Feb. 4, 2001, at G17.

• In September 2002, the city of Hillsboro, Oregon voted to condemn a Christian Science Reading Room in order to use the

property for a private commercial and residential development to support a planned civic center. *See* William E. Dunn, *My Turn; Condemnation for City Building Bad Policy*, Oregonian (Portland, OR), Oct. 11, 2001, at West Zones 13; David R. Anderson, *Hillsboro Negotiates Deal to Build Civic Center*, Oregonian (Portland, OR), Sept. 4, 2002, at C2.

- In 2002 the city of Memphis designated a 15.5-acre parcel of land as the site for a new basketball stadium for use by private NBA teams. The area chosen for condemnation included churches that agreed to vacate after the city raised the threat of condemnation. *See* Deborah M. Clubb, *City Pays COGIC $1.8 Million for Lots Near Arena*, Commercial Appeal (Memphis, TN), Mar. 7, 2002, at B1.
- Two Atlantic City, New Jersey churches were forced to sell their properties under threat of condemnation in order to give the property to the MGM Grand Casino. The churches were both destroyed, yet the MGM eventually chose to locate elsewhere. *See* Bill Kent, *Real-Life Monopoly: MGM Bids on the Boardwalk*, N.Y. Times, July 14, 1996, at 13NJ-6.
- In May 2001, the San Jose Redevelopment Agency targeted several churches for condemnation in order to secure land for a proposed 40 parcel high-density housing redevelopment plan. *See* Edwin Garcia, *Remaking Downtown San Jose; City Targets 40 Properties for Development as Housing, Landowners Who Refuse Plan Could Be Forced to Sell Sites*, San Jose Mercury News, May 12, 2001, at 1A.
- The Venture City Council has targeted the property of a religious fraternal organization for condemnation in order to build a new cultural arts center. *See* John Scheibe, *City Council to Study Proposal for Arts Center; New 600-Seat Building Could Cost $21.8 Million to $26.7 Million*," Ventura County Star, August 4, 2003, at B01.

FN21. It is also significant that takings for traditional "public uses" such as building a road, constructing a government building, or providing a public right-of-way are *categorically* different from the types of takings that would be permitted in the name of generating more tax revenue. *All* private property, regardless of its present use and owner, is owned subject to the possibility that the government might one day need it for the traditional category of public purposes. In contrast, the class of properties eligible for being taken in the name of generating additional tax revenue is more limited and *is* dependent on the nature of the present use of the property, the identity of the owner, or both. Property that is already being put to uses that contribute to the government's desired level of tax revenue will not be subject to takings, whereas properties that do not (like religious institutions) will be.

Thus, should this Court affirm the lower court's weakening of the "public use" requirement, municipalities will have permission to declare open season on the property of religious institutions of all faiths and functions in the name of padding the public purse. Moreover, the religious organizations most at risk under such a regime are those small groups of believers, those minority faiths, those poor religious institutions, that cannot hope stand up to the power of large commercial enterprises aided and abetted by municipal governments. [FN22]

FN22. It bears noting that while religious institutions face additional eminent domain risks stemming from religious discrimination, many other charitable organizations will face similar dangers because of their tax-exempt status alone. Indeed, several charitable organizations have faced con-

demnation threats in recent years to satisfy municipal appetite for more tax revenue. *See, e.g.,* Sue Britt, *Moose Lodge Set for Court Fight; Group to Fight Home Depot Land Takeover,*" Belleville News-Democrat (Missouri), April 1, 2002, at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, *Hudson, American Legion Closer on Hall; City Wants Building to Demolish for Project,*" Plain Dealer (Cleveland), March 8, 2003, at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, *Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization*? Tallahassee Democrat, July 13, 2003, at A1 (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, *Vote on Land Confiscation,* Daily Journal (Illinois), October 6, 2004, at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center).

*12 II. RELIGIOUS LAND USE INHERENTLY SERVES THE PUBLIC INTEREST, YET CONNECTICUT'S EMINENT DOMAIN STANDARD WOULD ENABLE FORCIBLY UPROOTING IT IN FAVOR OF PURELY PRIVATE INTERESTS.

Because religious institutions "uniquely contribute to the pluralism of American society by their religious activities," *Walz,* 397 U.S. at 689, society protects and encourages their activities through law and policy - most especially in the land use context.[FN23] Religious institutions' quintessential public *13 mission makes them dependent on the general public's donations instead of profits. This dependence makes them highly sensitive to the power of taxation. Recognizing this truth, governments at all levels[FN24] exempt these inherently *14 charitable organizations from taxation to avoid undercutting their general goal of furthering the public interest.[FN25]

FN23. *See Texas Monthly v. Bullock,* 489 U.S. 1, 12 (1989) (property tax exemption for churches "possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity"); *Boyajian v. Gatzunis,* 212 F.3d 1, 9 (1st Cir. 2000), *cert. denied by Boyajian v. Gatzunis,* 531 U.S. 1070 (2001) (recognizing that "religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood."); *Concerned Citizens of Carderock v. Hubbard,* 84 F.Supp.2d 668, 674-75 (D. Md. 2000) ("It is certainly also reasonable to presume that 'churches ... and other places of worship' properly belong among this category of uses as wholly compatible with single family home life."; *Congregation Dovid Ben Nuchim v. Oak Park,* 199 N.W.2d 557, 559 (Mich. Ct. App. 1972) (holding that houses of worship bear "a real, substantial, and beneficial relationship to the public health, safety and welfare of the community."); *Bd. of Zoning Appeals v. Schulte,* 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); *Am. Friends of Soc'y of St. Pius v. Schwab,* 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979), *appeal denied by Am. Friends of the Soc'y of St. Pius v. Schwab,* 425 N.Y.S.2d 1027 (N.Y. 1980) (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community."); *Bright Horizon House, Inc. v. Zoning Bd. of Appeals,* 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (affirming that "religious institutions, by their very nature, are beneficial to the public welfare."); *Board of Zoning Appeals v. Schulte,* 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that

churches and schools promote the common welfare and the general public interest."); *Young Israel Organization v. Dworkin,* 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) ("To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society."); *Congregation Comm. v. City Council,* 287 S.W.2d 700, 705 (Tex. Civ. App. 1956) ("The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals."); *Yanow v. Seven Oaks Park,* 94 A.2d 482, 491 (N.J. 1953) ("the welfare of the residential community demands [] inclusion [of houses of worship] in that area"). *See also* Rathkopf & Rathkopf, The Law of Zoning and Planning § 20.01, at 20-24 (recognizing that the exclusion of churches "either from the community as a whole or from a residential district therein - has no reasonable relationship to the public health, safety, morals, or general welfare."); Kenneth H. Young, Anderson's American Law of Zoning § 12.22, at 578 (4th ed. 1996) ("[R]eligious uses contribute to the general welfare of the community...."); Terry Rice, *Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses,* 8 Pace L. Rev. 1, 3 (1988) (The "dominant status" of churches and schools "is based on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare.").

FN24. "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches - over 75 years - religious organizations have been expressly exempt from the tax." *Walz,* 397 U.S. at 676.

FN25. "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 672.

The notion that religious institutions provide necessary public goods and should therefore be encouraged is as old as the founding itself.[FN26] Congress reaffirmed this commonsense policy when enacting the Revenue Act of 1938,[FN27] by stating that,

FN26. "The absence of concern about [religious tax] exemptions could not have resulted from failure to foresee the possibility of their existence, for they were widespread during colonial days." *Id.* at 682. "Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation." *Id. See also* 9 Va. Stat. at Large 200 (1775-1778, Hening) (exempting from taxation "any ... houses for divine worship, or seminary of learning."); N.Y. Laws of 1797-1800, c. 72, at 414 (exempting from taxation any "house or land belonging to ... any church or place of public worship [or] alms house").

FN27. Revenue Act of 1938, ch. 289, 52 Stat. 447.

"[t]he exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare."[FN28]

FN28. H. R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938).

The lower court's decision, however, turns this longstanding, axiomatic truth on its head. Under its permissive reading of the *15 "public use" requirement, that which makes religious institutions worthy of government praise makes them doubly vulnerable to government avarice. Municipalities will *always* be able to gain short-term tax revenues by tearing down religious institutions and handing the land over to private businesses instead.[FN29] The lower court's standard requires no balancing whatsoever of the competing public goods that religious institutions are universally recognized to provide as a matter of law.[FN30] The court did not circumscribe its rationale or limit its holding strictly to the facts. In fact, all the lower court requires is that municipalities *intend* to take religious institutions' land for tax and economic development purposes.[FN31] These institutions will therefore be at the mercy of any municipality that merely claims that increased tax collection is in the public interest. Yet, as discussed *supra* § I, tax and economic concerns are often pretexts for outright discrimination against religious institutions.

FN29. "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock,* 471 Mich. 445, 482 (Mich. 2004 While *amicus* concurs with this theoretical assessment, it believes that in practice, tax-exempt property owned by religious institutions will be one of the *primary* targets for municipal bulldozers, with minority faiths bearing the brunt of the discrimination.

FN30. *See supra* n.23.

FN31. *Kelo,* 843 A.2d at 541.

In sum, the lower court does not acknowledge the serious, long-term, and (in many cases) irreversible damage to the general welfare that will result from its sweeping deference to municipalities that do more than mouth the mantra of more economic development and tax revenue. To affirm the lower *16 court's ruling would place the "benevolent neutrality toward churches and religious exercise" [FN32] traditionally shown by governments to religious institutions at grave risk.

FN32. *Walz,* 397 U.S. at 676.

CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be reversed.

Kelo v. City of New London
2004 WL 2787141 (U.S.) (Appellate Brief)

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No. 10-402

In The Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR JUSTICE, THE BECKET FUND FOR RELIGIOUS LIBERTY, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnations where the official stated purpose of alleviating "blight" is a pretext for the true purpose of benefiting a private party?

2. Does the Public Use Clause of the Fifth Amendment permit the use of eminent domain to take property for transfer to a known private entity that will get the vast majority of the benefit from the taking?

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ is the nation's leading legal advocate against eminent-domain abuse. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005), and in many other federal and state eminent-domain cases throughout the country. This case presents constitutional issues at the core of property-rights protection in the wake of *Kelo*.

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward

[1] In accordance with Supreme Court Rule 37, counsel for all parties received notice at least 10 days before the due date of *amici's* intention to file this brief and have consented to the filing. No party's counsel authored this brief in whole or in part and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

those ends; Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth and Fourteenth Amendments provide to prevent eminent-domain abuse.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation across the country and around the world. It frequently represents houses of worship whose religious freedom has been violated under the guise of land use regulation, including eminent domain.

The Becket Fund submits this brief because it is concerned that the New York Court of Appeals' decision would, if left uncorrected, add to the already potent threat that eminent domain poses to the religious liberty of Americans of all faith traditions.

STATEMENT OF THE CASE

Amici incorporate by reference the description of the facts in the petition for writ of certiorari. Pet. at 5-16.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to clarify the definition of a "pretextual taking" under the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, 545 U.S. 469, 479-85 (2005), this Court ruled that "economic development" is a public purpose justifying the use of eminent domain. But the Court also emphasized that government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. In his concurrence, Justice Kennedy noted that a taking characterized by "impermissible favoritism" would be unconstitutional if the government cannot prove that it served a non-pretextual public purpose. *Id.* at 491 (Kennedy, J., concurring). More generally, although public purpose is defined broadly, this "Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (internal citation omitted).

Unfortunately, *Kelo* provided only limited guidance on what counts as a pretextual taking. *See, e.g.*, *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (EDNY 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) (noting that "[a]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext'").

As a result, lower courts have applied different standards.[2] Several state supreme courts look to the motives of the condemnor. Others focus on whether the new private owner captures most of the benefits of the condemnation. A third group focuses on the extent of the planning process preceding the taking. Finally, the New York Court of Appeals and the United States Court of Appeals for the Second Circuit essentially ignore all these considerations. They define pretext so narrowly that even the most blatant favoritism will escape judicial scrutiny. This confusion calls out for resolution by this Court.

The Court should also address the question of pretextual takings because it is substantively important. Since World War II, hundreds of thousands of Americans have been forcibly displaced from their homes or businesses as a result of economic-development and blight condemnations. Most of those displaced are poor or ethnic minorities with little political influence.[3] Judicial enforcement of constitutional property rights is often their only hope for protection against pretextual takings.

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[2] For detailed discussions of the widely-divergent post-*Kelo* case law on pretext, see Kelly, *Pretextual Takings,* and Ilya Somin, *The Judicial Reaction to Kelo*, ___ ALB. GOVT. L. REV. ___ (forthcoming 2011), at 22-30.

[3] *See* Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

The present case is a particularly flagrant example of the abuse of eminent domain. It includes all four factors that this Court and lower courts have identified as indications of pretext: evidence of pretextual intent, benefits that flow predominantly to a private party, haphazard planning, and a readily identifiable private beneficiary. It therefore gives the Court an excellent opportunity to clarify the importance of each factor in adjudicating pretextual takings.

I. STATE SUPREME COURTS AND LOWER FEDERAL COURTS DISAGREE OVER THE DEFINITION OF A PRETEXTUAL TAKING.

In deciding whether to grant *certiorari*, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). There are few more confused splits than the division over pretextual takings after *Kelo*.

Two state supreme courts interpret *Kelo* as requiring a focus on the actual intentions of the condemning authority. The District of Columbia Court of Appeals focuses instead on the magnitude of the expected public benefits from the taking. Two other high courts emphasize the extent of the planning process behind a condemnation. Finally, the

Second Circuit, and the New York Court of Appeals in the present case, define pretextual takings so narrowly that it becomes virtually impossible to invalidate even the most abusive condemnations.

A. State Supreme Courts and Federal Courts Emphasizing the Actual Intentions of Condemning Authorities.

Two state supreme courts interpret *Kelo*'s pretextual-taking inquiry as focusing primarily on the actual intentions of condemning authorities and the plausibility of the condemning authority's asserted purpose. In *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court interpreted *Kelo* as requiring it to examine "the real or fundamental purpose behind a taking ... the true purpose must primarily benefit the public." 939 A.2d 331, 337 (Pa. 2007); *see also In re O'Reilly,* No. 10 WAP 2009, 2010 WL 3810005 at *2 (Pa. Sept. 30, 2010) (quoting *Lands of Stone*, 939 A.2d at 337). *O'Reilly* also noted the crucial factor: "the public must be the primary and paramount beneficiary of the taking." *Id.* at *10.

The Hawaii Supreme Court also focuses on motive. It held in *County of Hawaii v. C&J Coupe Family Ltd. Partnership* that *Kelo* requires courts to look for "the actual purpose" of a taking to determine whether the official rationale was "a mere pretext." *See* 198 P.3d 615, 647-49 (Haw. 2008). However, Hawaii and Pennsylvania differ in that the latter

relies far more on the distribution of benefits to determine purpose.

Several pre-*Kelo* federal decisions take a similar approach. *See Armendariz v. Penman,* 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a pretext for "a scheme ... to deprive the plaintiffs of their property ... so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual").[4]

A lower court in the present case also focused on evidence showing that the condemnation's actual motive was to benefit Columbia. *See Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8,

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[4] *See also Kelo*, 545 U.S. at 487 n.17 (favorably citing *99 Cents Only*).

18-20 (N.Y. App. Div. 2009), *rev'd* 15 N.Y.3d 235 (N.Y. 2010).

B. Courts Emphasizing the Magnitude and Distribution of Expected Benefits.

In contrast to the Hawaii and Pennsylvania supreme courts, the Court of Appeals of the District of Columbia emphasizes the magnitude of the public benefits of the taking relative to the private ones: "If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007). The court remanded *Franco* with instructions to "focus primarily on the benefits the public hopes to realize from the proposed taking." *Id.* at 173. This approach builds on Justice Kennedy's concurring opinion in *Kelo*, which suggested that a taking might be invalidated if it has "only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

In *MHC Financing Ltd. Partnership v. City of San Rafael,* the Northern District of California also interpreted *Kelo* as requiring "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer ... [and] only incidental benefit to the City.'" No. C 00-3785VRW, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

A pre-*Kelo* Seventh Circuit case also emphasizes the distribution of the benefits of a taking. *See Daniels v. Area Plan Comm'n,* 306 F.3d 445, 456-66 (7th Cir. 2002) (holding that the takings' true purpose was "to confer a private benefit" because "any speculative public benefit would be incidental at best.")[5]

C. Courts Focusing on the Extent of the Pre-Condemnation Planning Process.

The Maryland, Pennsylvania, and Rhode Island supreme courts have relied on the absence of extensive planning to indicate a pretextual taking. *See Middletown,* 939 A.2d at 338 (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City Council of Balt. v. Valsamaki,* 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property, and contrasting with *Kelo*); *R. I. Econ. Dev. Corp. v. The Parking Company,* 892 A.2d 87 (R.I. 2006) (emphasizing difference between condemnor's approach and the "exhaustive preparatory efforts that preceded the takings in *Kelo*"). These decisions

[5] While *Daniels* differs slightly from the present case because the alleged public purpose claimed by the government was not pursuant to a specific "legislative determination," the court's analysis also focused on the importance of the distribution of benefits from a taking as an independent factor weighing against the government. *Id.* at 465-66.

build on *Kelo*'s emphasis on the presence of an "integrated development plan" behind the takings upheld in that case. *Kelo,* 545 U.S. at 488.

D. The Presence of a Known Private Beneficiary.

Both the majority and concurrence in *Kelo* note that there is a greater risk of a pretextual taking when the taking's private beneficiary is known in advance. *See Kelo,* 545 U.S. at 478 n. 6; *id.* at 491-92 (Kennedy, J., concurring). Most lower courts either ignore this aspect of *Kelo's* analysis or, in the case of the Second Circuit, give it little weight. *See Goldstein v. Pataki*, 516 F.3d 50, 55-56 (2d Cir. 2008) (dismissing the significance of the "acknowledged fact that [a private developer] was the impetus behind the project ... and that it was his plan for the Project that [was] ... eventually adopted without significant modification"). The absence of this factor from lower-court analyses further indicates confusion about *Kelo*'s meaning.

E. Courts That Virtually Define Pretextual Takings Out of Existence.

The Second Circuit and the New York Court of Appeals have defined pretextual takings so narrowly that it is virtually impossible to challenge a condemnation on that basis. As discussed above, that conclusion places them at odds with the Seventh and Ninth Circuits and the highest courts of the District of

Columbia, Hawaii, Maryland, Pennsylvania, and Rhode Island.

1. The Atlantic Yards Cases.

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), the Second Circuit held that so long as a taking is "rationally related to a classic public use," it is impermissible to "give close scrutiny to the mechanics of a taking ... to gauge the purity of the motives of various government officials who approved it." *Id.* at 62.

The Second Circuit also rejected claims that the takings should be invalidated because most benefits would flow to developer Bruce Ratner or because any benefits to the community would be "dwarf[ed]" by the project's costs. *Id.* at 58. Similarly, the court rejected the idea that any significant scrutiny was required because Ratner was the originator of the project and his status as the main private beneficiary of the takings was known from the start. *Id.* at 55-56.

Finally, both the Second Circuit and a later decision by the New York Court of Appeals upholding the same takings failed to seriously consider evidence that the planning process was deliberately skewed to benefit Ratner. As Judge Robert Smith pointed out in his dissenting opinion in the state case, the original rationale for the condemnation was "economic development—job creation and the bringing of a professional basketball team to Brooklyn." *In re Goldstein v. N. Y. State Urban Dev. Corp.*, 921 N.E.2d 164,

189 (N.Y. 2009) (Smith, J., dissenting). Apparently, "nothing was said about 'blight' by the sponsors of the project until 2005," when the ESDC realized that a blight determination might be legally necessary. *Id.*

2. The New York Court of Appeals Ignored Virtually Every Possible Indicator of Pretext in the Present Case.

The Court of Appeals' decision in the present case gives free rein to pretextual takings just as much as the opinions in the *Goldstein* cases. It ignores evidence of pretextual motive, evidence that Columbia would reap most of the condemnation's benefits, evidence of inadequate planning, and the fact that Columbia's identity as the main beneficiary of the taking was known from the beginning. Amazingly, the court's decision fails to cite *Kelo* at all, despite a lower court's extensive reliance on *Kelo's* pretext analysis to invalidate these takings. *See Kaur v. N. Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 18-20 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010).

a. Evidence of Pretextual Motive.

The *Kaur* takings arose from Columbia University's effort to acquire property for expansion in Manhattanville. *Kaur*, 15 N.Y.3d at 244-47. The official reason for the condemnation was the need to alleviate "blight." But the Court of Appeals failed to consider extensive evidence showing that the "blight"

determination was deliberately rigged for the purpose of transferring the condemned property to Columbia.

These takings had previously been invalidated by New York's Appellate Division, which found "no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein." *Kaur*, 892 N.Y.S.2d at 20. The ESDC, the condemning agency, only ordered a blight study after Columbia had already acquired most of the property in the area and "gained control over the very properties that would form the basis for a subsequent blight study." *Id.* at 21. When Columbia presented the agency with a plan to use eminent domain to acquire the remaining property and use it for Columbia's "sole benefit," a blight study was commissioned from AKRF, a firm simultaneously employed by Columbia on another project. *Id.* at 20-21.

AKRF was instructed by the ESDC to use a methodology "biased in Columbia's favor," which established blight through the presence of minor defects like "unpainted block walls or loose awning supports."[6] *Kaur*, 892 N.Y.S.2d at 17. Later, another firm was hired to conduct an independent blight study, but it was required to use the same flawed methodology. *Id.* at 17-18. As the Appellate Division concluded, "[v]irtually every neighborhood in the five

[6] For more details on the biases and flaws in the blight study, see Pet. at 9-11.

boroughs will yield similar instances of disrepair that can be captured in close-up technicolor." *Id.* at 17. Moreover, most of the "blight" AKRF found was located on property owned by Columbia, and was possibly allowed to develop in order to justify a blight finding. *See* Root, *College Cheats* (noting that Columbia already owned 76% of the land in the area at the time of the study and that "the university refused to perform basic and necessary repairs—thereby ... manufacturing the ugly conditions that later advanced the school's real-estate interests").

The Appellate division concluded that the area could not be considered blighted, and also ruled that the blight findings were an unconstitutional "pretextual" taking under *Kelo*. *Kaur,* 892 N.Y.S.2d at 18-20.

In reversing the Appellate Division, the Court of Appeals refused to consider most of the evidence that the study deliberately used biased methodology, noting only that AKRF's objectivity was not compromised merely "because Columbia had previously engaged AKRF" to produce its development plan for the area. *Kaur*, 15 N.Y.3d at 255. The court also noted that AKRF's findings were confirmed by a study conducted by another firm. *Id.* But it did not consider the relevance of the fact that the other firm was also required to use the same biased methodology as AKRF.

The Court of Appeals also noted that a third firm, Urbitran, had conducted a study finding "blight" in

the area prior to AKRF's, thereby attempting to negate the Appellate Division's finding that there was no evidence of blight prior to the acquisition of most of the area by Columbia. *Id.* at 257. The Court of Appeals, however, did not dispute the Division's finding that the ESDC had only commissioned the AKRF study because ESDC staff doubted the legal adequacy of the Urbitran findings.[7] *Kaur*, 892 N.Y.S.2d at 12-13, 21.

The Appellate Division found further evidence of improper motive in the ESDC's behavior with regard to Freedom of Information Law requests. *Kaur*, 892 N.Y.S.2d at 17-18. The ESDC improperly withheld documents from the owners and then insisted on closing the record of the proceedings before it handed over the documents. The ESDC thus deprived the owners of vital information needed to challenge the project at the only time such evidence could be used. The failure to release the documents at the critical time not only amounted to a due process violation—it indicated the extent to which the ESDC was willing to take any action in order to approve the project. *Kaur*, 892 N.Y.S.2d at 17-18 (plurality), 19-23 (Richter, J., concurring and discussing due-process violations at length). The Court of Appeals simply ignored this significant constitutional issue, and the evidence of pretextual motive it represents.

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[7] The Court of Appeals incorrectly stated that the Appellate Division had "ignored" the Urbitran study. *Kaur*, 15 N.Y.3d at 257.

b. Evidence That Columbia Will Be the Primary Beneficiary of the Takings.

The Court of Appeals also failed to seriously consider evidence that Columbia University would be the primary beneficiary of the takings. These takings were conducted pursuant to Columbia's preexisting expansion plans. *See Kaur*, 892 N.Y.S.2d at 21-22; Pet. at 23-24. As the Appellate Division pointed out, Columbia will be able to use the condemned property for its "sole benefit." *Kaur*, 892 N.Y.S.2d at 21.

The conclusion that the takings will primarily benefit Columbia is reinforced by the fact that there is little or no evidence that the condemned area was actually blighted. As the Appellate Division pointed out, "[t]he 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning." *Kaur*, 892 N.Y.S.2d at 19. Since blight alleviation was the stated purpose behind the taking, the absence of any significant blight strongly suggests that there will be minimal public benefit. By contrast, the benefits to Columbia are likely to be extensive, since it has long sought to acquire the properties in question. Pet. at 5.

c. Lack of Careful, Objective Planning.

In *Kelo,* the Supreme Court emphasized that the New London condemnations were the result of a "carefully considered development plan." *Kelo*, 545 U.S. at 478. In this case, by contrast, the plan was concocted by Columbia University—the very private interest that stood to benefit from the condemnations. *See* §§ I.E.2.a-b, *supra*. The blight alleviation plan was concocted after the condemning authority had *already* decided to condemn the property and transfer it to Columbia. Pet. at 21-23. As the Appellate Division explained, "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic." *Kaur*, 892 N.Y.S.2d at 19.

d. There is no Dispute that Columbia Was an Identifiable Private Beneficiary of these Takings.

In *Kelo*, this Court emphasized that there is a greater risk of a pretextual taking when the identity of the private beneficiary is known at the time of the decision to condemn. *See Kelo,* 545 U.S. at 478 n.6; *id.* at 491-92 (Kennedy, J., concurring). In the present case, there is no doubt that Columbia's identity as the beneficiary of the condemnations was known in advance. Indeed, Columbia lobbied for the condemnations and designed the development project of which they were a part. Pet. at 21-23.

In short, the New York Court of Appeals has made it virtually impossible to challenge a taking as pretextual. As Justice Catterson of the Appellate Division recently explained, "[T]here is no longer any judicial oversight of eminent domain proceedings [in New York.]" *Uptown Holdings, LLC v. City of New York*, 2010 WL 3958687, at *3 (N.Y. App. Div. Oct. 12, 2010) (Catterson, J., concurring).

To sum up, there is disagreement between lower courts over the definition of what counts as a pretextual taking. The judicial abdication favored by the New York Court of Appeals and the Second Circuit stands in sharp contrast to the many federal courts and state supreme courts that have taken *Kelo*'s strictures against pretextual condemnations seriously.[8] The latter, however, disagree among themselves about the proper criteria by which to judge pretextual takings.

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[8] These cases all explicitly rely on *Kelo's* pretext analysis. Even where some of them do so in part to interpret their own state constitutions, this Court could serve an important purpose in clarifying the relevant doctrine, which depends in large part on its interpretation of the federal Constitution. *See, e.g., Three Affiliated Tribes v. World Engineering, P.C.*, 467 U.S. 150, 152 (1984) ("[the] Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

II. THE COURT MUST ESTABLISH CLEAR STANDARDS FOR PRETEXTUAL TAKINGS IN ORDER TO PROTECT THE RIGHTS OF NUMEROUS PROPERTY OWNERS AGAINST CONDEMNATIONS DRIVEN BY FAVORITISM.

The issues raised by this case affect the rights of property owners across the country who are threatened by economic-development or "blight" takings. If courts do not protect property rights against pretextual condemnations, many people—particularly the poor, racial minorities, and those lacking political influence—risk losing their homes and businesses to condemnations undertaken for the benefit of well-connected private parties.

This danger is exacerbated in states like New York, which define "blight" broadly, making it possible to declare virtually any area blighted and then condemn it for transfer to a private interest. New York also employs uniquely dubious and abuse-prone eminent-domain procedures.

A. Blight and Economic-Development Takings Threaten Numerous Property Owners.

Since World War II, as many as several million Americans have been forcibly displaced by blight and economic development takings. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV.

183, 267-71 (2007) (citing relevant data). Property owned or rented by the poor, minorities, and politically weak individuals is especially likely to be targeted for condemnation for transfer to politically influential interest groups. *See id.* at 190-93, 267-71; Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007); Brief for the NAACP et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108).

Nonprofit and religious organizations are also unusually vulnerable to these condemnations. Because nonprofits generally do not pay taxes on their property and often produce little in the way of economic development, they make tempting targets for local governments hoping to increase tax revenue. *See* Brief for Becket Fund for Religious Liberty as Amicus Curiae in support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (explaining the special vulnerability of religious nonprofits and listing numerous examples where they have been targeted by economic-development takings). For example, numerous churches and other nonprofit institutions were condemned in the notorious 1981 *Poletown* case in Detroit, where an entire neighborhood was taken in order to clear the way for a new General Motors factory.[9] *See* Ilya Somin, *Overcoming Poletown:*

[9] This condemnation was upheld by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304

(Continued on following page)

County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017-18 (2004).

The approach adopted by the New York Court of Appeals exacerbates this problem by giving condemning authorities virtually unlimited power to use eminent domain to benefit politically influential interests.

B. The Risk of Pretextual Condemnations Is Greater in States That Have a Virtually Unlimited Definition of Blight.

The dangers of pretextual takings are heightened in states like New York that have adopted a nearly limitless definition of blight that makes it possible for almost any area to be declared "blighted" and condemned. Under such laws, almost any private interest group with political clout can lobby to have an area declared "blighted" and transferred to it. Abuses of this kind often occur in states with broad definitions of blight. *See generally* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42. Judicial scrutiny of potentially pretextual takings is necessary to ensure that broad definitions of blight do not become a license for takings that serve private interests at the expense of the public.

N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

Since *Kelo*, forty-three states have passed laws that constrain or forbid "economic development" condemnations. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009). Many of these laws are strong enough to significantly curtail eminent domain abuse. *Id.* at 2138-49. In many states, however, restrictions on economic development condemnations are undercut by the retention of nearly unlimited definitions of "blight," which leave virtually any property vulnerable to condemnation. *See id.* at 2120-30 (describing these statutes in detail). Even in the aftermath of the political response to *Kelo*, there is a serious danger of pretextual blight condemnations in many jurisdictions.

C. New York Law Leaves Its Citizens Especially Vulnerable to Eminent-Domain Abuse.

New York law vastly increases the danger of pretextual takings in two ways. First, it has adopted an incredibly broad definition of "blight." Second, its eminent-domain procedures make it almost impossible for a citizen to question—let alone refute—a condemnor's assertion that the use of eminent domain is legally proper.

1. New York's Definition of "Blight" Is Extraordinarily Broad.

The definition of "blight" endorsed by the Court of Appeals in the present case and *Goldstein v. New York Urban Development Corporation*, 921 N.E.2d 164 (2009), is one of the broadest in the country, and therefore especially vulnerable to abuse.

In *Goldstein*, the court concluded that the property in question could be condemned as "blighted" and blight alleviation is a "public use" recognized by the New York Constitution, thanks to a constitutional amendment allowing the condemnation of slum areas. 921 N.E.2d at 171-73.

The court, despite conceding that the area "d[id] not begin to approach in severity the dire circumstances of urban slum dwelling" that led to the enactment of New York's state constitutional amendment allowing blight condemnations, found that "economic underdevelopment and stagnation" sufficed to constitute "blight." *Goldstein*, 921 N.E.2d. at 171-72. Since there is nearly always "room for reasonable difference of opinion" as to whether any area is "underdeveloped," the *Goldstein* standard is essentially limitless. *See id.* at 172.

In the present case, the Court of Appeals applied the same definition of blight. *See Kaur*, 15 N.Y.3d at 255. Indeed, members of New York's lower courts have already recognized that, after *Goldstein* and *Kaur*, "there is no longer any judicial oversight of" blight condemnations in New York. *Uptown Holdings*,

2010 WL 3958687, at *3 (Catterson, J., concurring). The field is therefore left wide open for pretextual condemnations.

2. New York's Unique Eminent-Domain Procedures Leave the State's Property Owners Particularly Vulnerable to Pretextual Takings.

The problems in New York's eminent-domain law are exacerbated by the fact that New York's eminent-domain procedures do not allow property owners access to any kind of adversarial process to build a record for judicial review. In general, would-be condemnors in New York are required to hold a public hearing on any proposed project involving eminent domain. N.Y. EDPL § 202. While holding a public meeting before a legislative determination is not unusual, New York is unique in that the public hearing is the *exclusive* means by which a factual record can be created for judicial review. N.Y. EDPL § 208. A property owner who wishes to contest taking of her property (as distinct from contesting the amount of compensation owed) is required to file an affirmative challenge, which is heard in the first instance by a mid-level appellate court. N.Y. EDPL § 207. At that hearing, the evidence eligible for review is strictly limited to the record of the public hearing. N.Y. EDPL § 208; *see also Brody v. Village of Port Chester*, 345 F.3d 103, 113-16 (2d Cir. 2003) (Sotomayor, J.) (discussing exclusivity of proceedings under Section 207).

In other words, a property owner in New York who claims a taking is pretextual is limited to the factual record created at a public hearing. This requirement ensures that he or she has no right to discovery and no right to question the condemnor's witnesses (or, at least, no right to demand answers). In fact, New York is literally the only state in which a person's property can be condemned as "blighted" without anyone ever having to testify under oath about why it is "blighted" or having to answer any hostile questions about whether the property is, in fact, blighted.[10] This uniquely circumscribed procedure makes New Yorkers particularly vulnerable to pretextual takings—which makes it all the more troubling that both the Second Circuit and the New York Court of Appeals have adopted such a radically permissive interpretation of *Kelo*.

[10] New York is alone is refusing to provide any adversarial process to property owners challenging the validity of a taking. Perhaps the closest analogue to New York's system is California, which also requires that property owners challenge a blight determination in court immediately after the determination is made. Cal. Health & Safety Code § 33368 (2010). Even there, however, property owners retain the right to raise defenses (including the sorts of pretext claims at issue in this case) at the time of condemnation, and may avail themselves of ordinary trial-court procedures like discovery when they do. *See* Cal. Code Civ. Proc. §§ 1250.350-1250.370 (2010).

III. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS.

The present case is an excellent vehicle for this Court to define "pretextual" takings and resolve the widespread confusion in the lower courts on this important issue. As discussed above, the case features all four elements that this Court and lower courts have identified as possible indicators of a pretextual taking.

The Court can therefore use this case to consider the weight to be accorded to each of the four criteria. By doing so, it can provide needed guidance to state courts and lower federal courts, thereby upholding "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.).

The question of how best to weigh the different factors is one best addressed when and if this court decides to grant the petition for *certiorari*. Here, we mention just a few considerations relevant to each of the four factors.

Both the presence of a pretextual motive and that of a project where all or most of the benefits go to a private party are strong indications of a pretextual taking. If the government's objective in condemning property is to benefit a private party, it becomes a pure "A to B" taking of the sort that this Court has

always considered to be unconstitutional. *See Kelo*, 545 U.S. at 477 (noting that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*"). Similarly, if a private party monopolizes all or nearly all of the benefits of a taking, that is a strong indication that there is no public use behind it. A taking that "serve[s] no legitimate purpose of government" cannot "withstand the scrutiny of the public use requirement" and must be declared "void." *Midkiff*, 467 U.S. at 245.

The lack of an unbiased pre-condemnation planning process is at minimum an indication that favoritism is likely, triggering the need for heightened judicial scrutiny. *See Kelo*, 545 U.S. at 487 (noting that "a one-to-one transfer of property, executed outside the confines of an integrated development plan" may require additional judicial scrutiny); *id.* at 493 (Kennedy, J., concurring) (indicating that the fact that "[t]his taking occurred in the context of a comprehensive development plan" reduces the need for "a demanding level of scrutiny").

Finally, the presence of a private beneficiary whose identity was known in advance should also trigger a higher level of judicial scrutiny to guard against "the risk of undetected impermissible favoritism." *Id.* This is especially necessary in a case like the present one, where the private beneficiary itself initiated the project justifying the taking. *See* § I.E.2, *supra*.

By taking this case, the Court can resolve an important division of authority that has plagued state supreme courts and lower federal courts. It can also ensure the protection of vital constitutional property rights against pretextual condemnations.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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No. 10-402

IN THE

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded, after a careful review of the record, (1) that the proposed exercise of eminent domain would serve a "public use" by removing longstanding blight in a deteriorated neighborhood and promoting higher education through the construction of academic and research facilities at a non-profit university and (2) that Petitioners' allegations of "bad faith" and "pretext" were "unsubstantiated"?

2. Whether the Court of Appeals properly concluded that Petitioners were afforded due process where they (1) had "unfettered access" to all of the documents that formed the basis for the decision to use eminent domain, (2) appeared at the public hearing and submitted 10,000 pages of materials into the administrative record before the final decision to acquire their properties was made, and (3) failed to demonstrate the materiality of the additional documents obtained after the administrative record was closed?

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INTRODUCTION

Petitioners seek review of a unanimous decision of the New York Court of Appeals that applied well-established principles in upholding the decision of New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") to exercise its power of eminent domain. ESDC authorized the use of eminent domain to facilitate the Columbia Educational Mixed Use Land Use Improvement and Civic Project (the "Project"). The Project will replace dilapidated and substandard buildings in the Project Site with new educational and academic research facilities and publicly accessible open space to be owned and operated by Columbia University ("Columbia"), a non-profit educational institution.

The Court of Appeals held that the Project will serve two independent public purposes. First, the Project will eliminate longstanding blighted conditions in the area, which the Court of Appeals found were "extensively documented photographically and otherwise on a lot-by-lot basis." Second, the Project will promote education, academic research and the expansion of knowledge, which the Court described as "pivotal government interests." The Court further concluded that the Project will provide numerous other public benefits to the community, including two acres of publicly-accessible open space, upgrades in transit infrastructure, thousands of jobs, and a financial commitment to a local park.

Petitioners argue that ESDC's determination that the Project will eradicate blight and promote education was pretextual, and that ESDC acted in bad faith in approving the Project. But as the Court of Appeals concluded, the record refutes that contention. Petitioners' submission to the contrary is no more than a challenge to that factbound determination and thus does not warrant review by this Court.

The Court of Appeals also rejected Petitioners' claim that they were denied due process when ESDC closed its administrative record and approved the Project while a few of Petitioners' New York State Freedom of Information Law lawsuits were still pending. The Court of Appeals noted that Petitioners (1) participated fully in the public process, both during the two-day public hearing and during the subsequent comment period during which time they submitted more than 10,000 pages of documents into the record; (2) had "unfettered access to" the entirety of the administrative record, including the documents that formed the basis for ESDC's decision; and (3) had failed to establish the materiality of any of the documents at issue in their Freedom of Information Law requests. Petitioners challenge that determination as well, but that challenge is also unworthy of this Court's review, as it has no implications beyond this particular case. Indeed, Petitioners scarcely suggest otherwise, as they concur with the legal standard that the Court of Appeals applied to determine whether they received due process.

In sum, this case raises no issue of takings law of general importance warranting this Court's review.

STATEMENT

A. The Proposed Project

Despite Petitioners' assertions to the contrary, the Manhattanville area of West Harlem in New York City has been plagued for decades by depressed conditions. Numerous urban renewal initiatives have been proposed since the 1950s, but none has been successfully implemented. Only three new buildings have been erected in the area of the Project Site since 1961– a government-owned bus depot, a gas station and a now-vacant U-Haul Truck rental structure – and the area is afflicted by deteriorating structures and other substandard and insanitary conditions.[1]

The Project at issue in this case will transform 17 blighted acres in Manhattanville into a modern, gateless, open, urban campus of Columbia.[2] The Project calls for the creation of new academic facilities to replace blighted parcels in a bleak, long-stagnant, industrial area with outmoded manufacturing buildings. Those new facilities – classrooms, academic research facilities, faculty offices, libraries, university housing, and study and performance spaces – are essential to the

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[1] A-5403.

[2] The Project is described more fully in ESDC's General Project Plan. A-2520-93.

academic research, teaching, learning, and discourse at the core of higher education.

The Project includes buildings to be dedicated to advanced academic research. Among the first buildings to be constructed as part of the Project will be the Jerome L. Greene Science Center for Columbia's Mind, Brain and Behavior Initiative for the study of neurological diseases, such as Alzheimer's, Parkinson's, autism, dementia and schizophrenia. Restrictive declarations will prohibit Columbia, a non-profit educational institution, from using the Project Site to conduct scientific research as a commercial enterprise.

An essential component of the Project is a nearly two million gross square-foot, continuous, multi-level below-grade facility, which will extend from West 129th Street to West 133rd Street between Broadway and 12th Avenues (the "Below-Grade Facility"). The Below-Grade Facility will provide integrated space for all of the new buildings to be constructed on the main portion of the Project Site – 13 of the total 16 new buildings that will comprise the Project. By providing below-grade space for central energy facilities, science support, mechanical operations, and loading, freight and parking facilities that service most of the Project's new construction, the Below-Grade Facility will minimize street congestion and its attendant mobile source emissions and reduce the density of above-grade development, thereby making room for new public open spaces, wider sidewalks and improved sight lines.

The Below-Grade Facility makes necessary the acquisition of substantially all of the parcels within the Project Site, either by negotiation or (if necessary) by eminent domain.[3] Four of the six properties owned by Petitioners are situated diagonally across the main portion of the Project Site.[4] As a result, the Below-Grade Facility and its benefits – and indeed the Project itself – cannot be realized unless those properties are acquired.

The Project will benefit the City and State of New York and the area of West Harlem by (1) eliminating blighted conditions at the Project Site, (2) furthering higher education and academic research and enhancing the City and State as centers for these activities, (3) creating much-needed, park-like open space in the area, and (4) creating new employment opportunities. The Project is estimated to cost $6.28 billion, and will be funded by Columbia without taxpayer subsidies.[5]

In connection with the Project, Columbia will also provide other civic benefits, including (1) a community benefits fund of $76 million, (2) $20 million of support for affordable housing, (3) $20

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[3] The only private property owners subject to ESDC's exercise of eminent domain in this case are Petitioners, who own four self-storage facilities and two gas stations.

[4] A-87a (identifying Tuck-It-Away, Inc. as the owner of Block 1997, Lot 44 and Block 1998, Lot 29 and Tuck-It-Away Bridgeport, Inc. as the owner of Block 1996, Lot 56); A-198a (identifying P.G. Singh Enterprises, LLC as the owner of Block 1996, Lot 35).

[5] Pet. 4a.

million in contributions to the Harlem Community Development Corporation (an ESDC subsidiary) to support initiatives benefiting the greater Harlem community, and (4) support valued at $30 million in connection with a New York City public school to be operated in partnership with Columbia's Teachers College.[6]

B. ESDC And The Eminent Domain Process

In 1968, the New York State legislature created New York State Urban Development Corporation, a public benefit corporation which does business as ESDC. *See* Urban Development Corporation Act (the "UDC Act") (codified at N.Y. Unconsol. Laws §§ 6251-87). One of ESDC's primary roles is to foster revitalization of distressed areas by eliminating blight and facilitating industrial, residential and civic projects. Among ESDC's important revitalization tools is its power of eminent domain. *See* N.Y. Unconsol. Laws §§ 6254-55, 6263.

Under the UDC Act, ESDC is authorized to carry out specified types of projects, including Land Use Improvement Projects and Civic Projects. The UDC Act defines a Land Use Improvement Project as a "plan or undertaking for clearance, replanning, reconstruction and rehabilitation ... of a substandard and insanitary area, and for recreational or other facilities incidental or attendant thereto...." *Id.* §§ 6253(6)(c) and 6260(c). A Civic Project is defined as a "project ... designed and intended for the purpose of providing facilities

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[6] A-2567, A-2571.

for *educational*, cultural, recreational, community, municipal, public service or other civic purposes." *Id.* § 6253(6)(d) (emphasis added). Unlike a Land Use Improvement Project, a Civic Project is not predicated upon a determination by ESDC that the area is "substandard or insanitary."

To exercise its power of eminent domain, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), which establishes comprehensive procedures for extensive up-front public review and input followed by judicial review. Under the EDPL, a condemning authority must first notice and conduct a public hearing to solicit public comment on the proposed project. EDPL § 201; *see also* EDPL §§ 202-203. The condemning authority must then issue and publish its "determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." EDPL § 204(A), (B)(1).

Any "aggrieved" person may challenge the determination and findings by filing a petition directly in the Appellate Division of State Supreme Court. EDPL §§ 207(A), (B), 208. The Appellate Division "shall either confirm or reject the condemnor's determination and findings" after reviewing the record and considering the public use, benefit or purpose to be served by the project, the constitutionality of the proposed taking, the statutory authority of the condemnor to acquire the property, and the condemnor's compliance with the EDPL and New York State's Environmental Conservation Law. EDPL § 207(C). Upon the acquisition of property by eminent domain, the

property owner is entitled to receive just compensation, which is determined in an adversarial proceeding. *See* EDPL Art. 5.

The EDPL's procedures have been held to satisfy due process requirements. *See Brody v. Vill. of Port Chester*, 434 F.3d 121,134-36 (2d Cir. 2005); *Goldstein v. Pataki*, 516 F.3d 50, 55 (2d.Cir.), *cert. den.*, 128 S. Ct. 2964 (2008).

C. *The Public Process For The Project Conducted By The City Of New York And ESDC*

The public process for the Project was extensive and spanned over four years. It began when the New York City Planning Commission ("CPC") first considered rezoning 35 acres of West Harlem, including the 17-acre Project Site (the "Rezoning"). This triggered an extensive public review pursuant to the City's Uniform Land Use Review Procedure ("ULURP"). CPC considered the potential environmental impacts of the Rezoning in an Environmental Impact Statement ("EIS"), which evaluated nine alternatives to the Project.[7] A draft EIS was published for public review, comment and hearings before being revised as a Final EIS ("FEIS").

On November 26, 2007, CPC approved the Rezoning for the Project to facilitate the construction of "modern, state-of-the-art educational and research facilities" in the context of "a new urban campus environment" that will be "integrated with the urban grid, with all streets

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[7] A-158 (FEIS, Chapter 24, *Alternatives*).

remaining open to the public ... and a new open space network open to University-affiliated personnel and the general public alike."[8] CPC further found that Columbia "is a major educational institution and center of state-of-the-art research in the sciences and humanities, and makes a valuable contribution to the intellectual, scientific and cultural life of the City."[9]

Based on a careful review, CPC concluded that "the open space network, Central Below-Grade Service Area, and other beneficial features of the Columbia proposal" may require the use of eminent domain,[10] and that the exercise of eminent domain "would serve a public purpose insofar as it would allow for realization of the public benefits of the Columbia proposal."[11]

After the City Council approved the Rezoning on December 19, 2007, ESDC adopted a proposed General Project Plan ("GPP") for the Project as both a Land Use Improvement Project and a Civic Project on July 17, 2008. The GPP, together with the Rezoning, would allow the development of a Columbia campus that would include academic and research facilities, university-related housing, more than two acres of publicly accessible open space and street-level uses

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[8] A-2081.

[9] A-2079.

[10] A-2090.

[11] A-2093.

that will transform the Project Site into a vibrant, attractive urban streetscape.[12]

ESDC solicited public comment on the GPP and its proposed use of eminent domain in connection with the Project. ESDC held a duly-noticed public hearing on September 2 and 4, 2008. In connection with the hearing notice, ESDC made available copies of the GPP, the FEIS and the two neighborhood conditions reports separately prepared by ESDC's consultants, AKRF and Earth Tech. (ESDC hired Earth Tech to conduct an independent neighborhood conditions study after being criticized for engaging AKRF, which had performed work for Columbia on matters relating to the Project Site.) Each of those two consultants photographed and conducted detailed inspections and assessments of each of the lots in the Project Site, documenting physical and structural conditions, health and safety concerns, vacancy rates, site utilization, property ownership, building code violations, environmental hazards and crime data.[13] The public hearing was well attended and 98 attendees, including Petitioners and their counsel, spoke about the Project.[14]

During the public comment period, Petitioners submitted two legal memoranda and more than 10,000 pages of materials.[15] They

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[12] A-3063; A-2585, A-2587 and A-2591 (GPP, Exs. C, D & F).

[13] A-1142-43; A-996-97.

[14] A-990-1132, A-1133-1414, A-1415-1706, A-1135, A-1192-96, A-1417, A-1418, A-1420, A-1483-99, A-1569-79.

[15] A-1732-56, A-1757-70, A-1771.

focused much of their comments on critiquing the FEIS and neighborhood condition reports that served as the factual underpinning for ESDC's proposed finding, set forth in the draft GPP, that the Project Site is a substandard and insanitary area. Petitioners even submitted their own "No Blight" study utilizing the extensive documentation provided by ESDC and their own investigation of site conditions. ESDC subsequently prepared a 75-page document entitled "Response to Comments" that addressed the comments received from Petitioners and others and prepared a GPP that was modified in certain respects in response to public comment.[16]

Petitioners and their counsel made additional and extensive comments at the December 18, 2008 meeting at which ESDC's Directors affirmed the revised GPP.[17] The revised GPP, like the draft GPP, made the findings to approve the Project as a Land Use Improvement Project and as a Civic Project under the UDC Act.[18] At the same meeting, ESDC's Directors approved ESDC's 83-page New York State Environmental Quality Review ("SEQRA") Statement of Findings and made its Determination and Findings pursuant to EDPL § 204.[19]

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[16] A-2868-2942.

[17] A-3145-3255.

[18] A-2574-A-2579

[19] A-3231 and A-3231. In accordance with Rule 15.2 of this Court, ESDC objects to Petitioners' repeated statements that the there is no comprehensive or integrated plan for the Project. *See, e.g.*, Pet. 2, 3, 25.

D. The Freedom Of Information Law Litigation

Both before and during the EDPL process, Petitioners served numerous Freedom of Information Law ("FOIL") requests on ESDC and other agencies seeking Project-related documents.[20] In response, ESDC turned over about 8,000 pages of material. ESDC did not withhold any of the documents that formed part of the administrative record, including the GPP (as initially adopted for public comment by ESDC), the FEIS and the AKRF and Earth Tech neighborhood conditions studies. All of those documents were in the public domain during the EDPL public comment period.[21]

In connection with some of their FOIL requests, Petitioners filed N.Y. Civil Procedure Law and Rules Article 78 proceedings requesting orders directing ESDC to disclose documents withheld under FOIL exemptions. The Supreme Court for New York County ordered ESDC to make a further production, and the Appellate Division affirmed in part. *See Tuck-It-Away Assocs., L.P. v. ESDC*, 54 A.D.3d 154 (1st Dep't 2008). With respect to seven documents, ESDC successfully sought leave to appeal the disclosure order to the New York Court of Appeals. The Court of Appeals ultimately affirmed. The Court of Appeals did not hold that ESDC improperly categorized any of the documents

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[20] A-1734.

[21] A-996-97; A-1142-43, A-1426-27.

as exempt from disclosure under FOIL.[22] Rather, the Court upheld the disclosure order on the basis that ESDC had not sufficiently articulated a particularized reason for denying disclosure of these documents prior to the commencement of the FOIL litigation.

Here, as explained below, the Court of Appeals expressly held that Petitioners failed to demonstrate that any of the documents withheld under FOIL were material to this matter.[23]

E. Petitioners' Claims And The Decisions Below

Petitioners own four self-storage facilities and two gas stations within the Project Site. They challenged the Project on multiple grounds in the Appellate Division. Petitioners claimed that the proposed condemnations will not serve a public purpose, that ESDC's finding that the Project Site is blighted was made in bad faith and on the basis of an unconstitutionally vague statute, and that the Project serves only the private interests of Columbia. Petitioners also asserted that their due process rights were violated by ESDC's closing of the administrative record before some of their FOIL lawsuits were resolved.

On December 3, 2009, the Appellate Division granted the Petitions and annulled ESDC's Determination and Findings. A two-judge plurality

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[22] *See West Harlem Bus. Group v. ESDC*, 13 N.Y.3d 882, 884-85 (2009); Pet. 9a-10a.

[23] Pet. 30a-31a.

conducted a *de novo* review of ESDC's blight findings and concluded that the Project lacked a public purpose. These two judges also held that the UDC Act's authorization of eminent domain for Civic Projects serving "educational" purposes did not extend to projects involving private, non-profit educational institutions such as Columbia. A third judge, who concurred in the result, concluded that Petitioners' due process rights were violated when ESDC closed the administrative record before all appeals in the FOIL litigations had been heard and decided.

Two judges dissented, concluding that (1) Petitioners' objections to ESDC's Determination and Findings merely presented a "difference of opinion" as to the conclusions to be drawn from the evidence, in which event the courts should defer to the agency; (2) ESDC did not exceed its statutory authority under the UDC Act in designating the Project a "land use improvement project" and a "civic project"; (3) ESDC's finding that the Project will serve a public purpose was neither irrational nor baseless; and (4) there was no basis for Petitioners' contention that ESDC closed the record prematurely.

On June 24, 2010, the Court of Appeals unanimously reversed the Appellate Division's decision. The Court held that the Project would serve two separate public purposes – remediation of blight and advancement of education.[24]

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[24] One judge concurred in the result, agreeing that the Project should be sustained as a Land Use Improvement Project to remediate blight, and that Petitioners' due process rights were

The Court of Appeals first upheld ESDC's determination that the Project will rehabilitate a blighted area by replacing dilapidated buildings with modern buildings and creating much-needed publicly-accessible open space. Based on its review of the extensive administrative record, the Court concluded that "there is record support – 'extensively documented photographically and otherwise on a lot-by-lot basis' – for ESDC's determination that the Project Site was blighted."[25] The Court also found that ESDC utilized "objective data ... in its findings of blight."[26] More specifically, "ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole."[27]

The Court of Appeals rejected Petitioners' allegations that ESDC acted "in 'bad faith' and with pretext when it concluded that the Project Site was blighted."[28] The Court stressed that ESDC's findings were based on "objective data,"[29] citing three independent studies in the record which documented the blighted physical conditions in the

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not violated by the closure of the administrative record before completion of the FOIL litigation. Pet. 32a-34a.

[25] Pet. 19a (citation omitted).

[26] Pet. 19a.

[27] *Id.*

[28] Pet. 20a.

[29] Pet. 19a.

area, the first of which was prepared at a time when Columbia was only beginning to purchase property there.

The Court of Appeals further held that the statutory term "substandard or insanitary area" should not be deemed void for vagueness. The Court held that "it is not necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision (*Yonkers Cmty. Dev. Agency*, 37 N.Y.2d [478] at 484)."[30] The Court also pointed out that the U.S. Supreme Court, in *Berman v. Parker*, 348 U.S. 26, 33-34 (1954), "held that blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."[31]

The Court of Appeals also held that the Project independently qualifies as a Civic Project under the UDC Act because its purpose "is unquestionably to promote education and academic research while providing public benefits to the local community."[32] In so ruling, it rejected Petitioners' contention that the UDC Act limits a proposed educational project to public educational institutions. The Court also held that New York has long recognized "that schools, both public and

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[30] Pet. 21a (internal quotation omitted).

[31] Pet. 22a (*citing Berman v. Parker*, 348 U.S. 26, 33-34 (1954)).

[32] Pet. 26a.

private, 'serve the public's welfare and morals,'"[33] and it stressed that education is an "indisputably public purpose" and that "education and the expansion of knowledge are pivotal government interests."[34] Moreover, the Court noted that, because Columbia is a non-profit educational institution, "the concern that a private enterprise will be profiting through eminent domain is not present."[35] And it explained that the Project will "bestow numerous other significant civic benefits to the public," including the creation of "two acres of publicly accessible open space," upgrades in transit infrastructure, and the creation of 14,000 construction jobs and 6,000 permanent jobs.[36]

Finally, the Court of Appeals rejected Petitioners' claim that their due process rights were violated. The Court held that Petitioners had a meaningful opportunity to be heard because they had had "unfettered access" to the documents that formed the basis for ESDC's decision and had fully participated in the public process. The Court also ruled that Petitioners failed to establish that any of the documents at issue in the FOIL litigation (which are not in the record in this case, but which the Court of Appeals had examined) was material to ESDC's eminent domain determination.

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[33] Pet. 26a (*quoting Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593 (1986)).

[34] Pet. 26a.

[35] Pet. 26a.

[36] Pet. 3a-4a, 26a-27a.

REASONS FOR DENYING THE PETITION

POINT I

THE "PUBLIC USE" ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

A. The Court Of Appeals' Decision Raises No Important Issue Warranting Review

Petitioners argue that this case raises the question "whether *Kelo* controls whenever courts are confronted with evidence of impermissible governmental favoritism and pretext in an eminent domain proceeding."[37] In fact, this case does not raise that question. The Court of Appeals never suggested that the issue of pretext was irrelevant to this case, and it examined Petitioners' claims of bad faith and pretext and rejected them on the merits, holding that Petitioners' pretext claim was "unsubstantiated by the record." The Court concluded that Petitioners had failed to make out a plausible claim of pretext, given (1) the overwhelming evidence in the administrative record supporting ESDC's determination that the Project Site was blighted, (2) ESDC's undisputed determination that the Project advances educational purposes, and (3) Petitioners' failure to substantiate their allegations of bad faith and pretext.

Petitioners contend, however, that "the instant case presents such a clear example of the

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[37] Pet. 18.

sort of bad faith, pretext, and favoritism toward a pre-determined beneficiary that one could only conclude ... that 'a private purpose was afoot.'"[38] In so arguing, Petitioners merely challenge the Court of Appeals' conclusion in this particular case that the record supports ESDC's conclusion that the Project Site suffers from longstanding deteriorated conditions and that Petitioners had failed to substantiate their conclusory allegations of bad faith and pretext. That factbound determination raises no issue warranting review by this Court.[39]

Moreover, the Court of Appeals properly rejected Petitioners' claims of bad faith and pretext. In particular, the Court of Appeals rejected Petitioners' contention that ESDC's finding that the Project Site was blighted was tainted by ESDC's use of AKRF, a consultant that had previously worked for Columbia.[40] The Court of Appeals noted that, as a measure of caution and in response to criticism of its use of that consultant, ESDC engaged a second consulting firm, Earth Tech, which had no prior relationship to Columbia and which conducted an independent review and also arrived at the conclusion that the Project Site was blighted.[41] The Court further determined that,

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[38] Pet. 18. (quoting *Kelo v. City of New London*, 545 U.S. 469, 487 (2005) ("*Kelo*")).

[39] Sup. Ct. Rule 10; *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review").

[40] Pet. 20a.

[41] Pet. 20a.

"[c]ontrary to petitioners' assertions, Earth Tech did not merely review and rubber stamp AKRF's study, but conducted its own independent research and gathered separate data and photographs of the area before arriving at its own conclusions."[42] Earth Tech's analysis strongly supported ESDC's blight finding; as the Court explained, Earth Tech "determined that since 1961 there was a dearth of new construction in the area ... [and] enumerated the extensive building code violations in the area and the chronic problems that the buildings had with water infiltration."[43] Earth Tech also "found that many of the buildings in the Project site had deteriorated facades and that several of the buildings had been sealed by the New York City Fire Department because of unsafe conditions."[44] In sum, Earth Tech concluded that the neighborhood conditions created "'a blighted and discouraging impact on the surrounding community.'"[45]

The Court of Appeals also rejected, as unsupported by the record, Petitioners' contention that Columbia was responsible for the blight in the

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[42] Pet. 20a.

[43] Pet. 11a.

[44] The amicus brief filed by Senator Perkins incorrectly states on page 2 that ESDC "determined" that Petitioners' properties were "well-maintained." In fact, Petitioner Tuck-It-Away owned one building that had to be evacuated to avoid imminent collapse, and, its four parcels, taken together, had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years. Pet. 11a.

[45] Pet. 11a (quoting the Earth Tech report).

area by purchasing buildings and allowing them to fall into disrepair. The Court of Appeals noted that in 2003, when Columbia was just beginning to acquire property in the neighborhood, another study conducted by a different consultant, Urbitran, retained by a different agency "unequivocally concluded that there was 'ample evidence of deterioration of the building stock in the study area' and that 'substandard and unsanitary conditions were detected in the area.'"[46]

In sum, the Court of Appeals correctly concluded that the record amply supports ESDC's blight finding and contains no support for Petitioners' allegations of bad faith.

Petitioners assert that their allegations of pretext are supported by an ambiguous e-mail written by an ESDC staff attorney who had no role in the Project or its approval.[47] Although the e-mail was not part of the record below, it was before the Court of Appeals in connection with Petitioners' FOIL proceeding. The Court considered the e-mail, as evidenced by an exchange that took place during oral argument. When Petitioners' counsel read from the e-mail, one judge commented, "you're not really saying that this transforms the case? It's the same case with or without that document, isn't it?"[48]

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[46] Pet. 23a.

[47] Pet. 96a.

[48] http://www.nycourts.gov/ctapps/arguments/2010/Jun10/Jun10_OA.htm at 31:48-32:45 (video of Court of Appeals argument).

The Court of Appeals recognized that ambiguous, subjective musings of a staff attorney not working on a project are immaterial. Where, as here, the objective record demonstrates that the proposed condemnation will further numerous, substantial public purposes, an email authored by an agency employee not involved in the condemnation could not negate the objective public purposes served by the project. A contrary rule of law would encourage harmful fishing expeditions into the multi-faceted subjective motivations of staff and public officials. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), ... discerning the subjective motivation of [a legislative body] is ... almost always an impossible task.").

B. The Court Of Appeals' Decision Is Consistent With Kelo

Petitioners, joined by its amici, raise a broadside challenge to the Court of Appeals' employment of a deferential standard of review to determine whether the proposed condemnation in this case advances a public use. The Court of Appeals did not err in doing so. As this Court reaffirmed in *Kelo*, "public use jurisprudence has wisely ...afforded legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman*, 348 U.S. at 32, a court should not "substitute its judgment for a

legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

Petitioners criticize the Court of Appeals for not citing *Kelo* and for expressly deciding this case under the New York Constitution rather than the federal Constitution. The Court of Appeals may have assumed, however, that the "public use" requirement of Art. I, § 7(a) of the New York Constitution was at least as protective of property rights as the analogous provision of the Fifth Amendment of the U.S. Constitution, and thus may have found it unnecessary expressly to address the federal question. *See In re Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 550-51 (2010) (Smith, J., dissenting) (noting that Court of Appeals avoided holding that the private property protections of New York Constitution's public use provision are limited to those of the federal constitutional clause).

Petitioners argue that the Court of Appeals should have applied "the lengthy list of procedural safeguards" upon which Justice Kennedy purportedly "conditioned his tie-breaking concurrence" in *Kelo*.[49] Petitioners misread Justice Kennedy's opinion. Justice Kennedy "join[ed] the opinion for the Court and add[ed] ...further observations," commenting on the factual details in

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[49] Pet. 18.

New London's economic development plan.[50] He also reaffirmed the deferential standard of review set forth in this Court's prior jurisprudence.[51]

Moreover, nothing in *any* of the opinions in *Kelo* suggests – as Petitioners contend – that the government is required by the Constitution to send out a "request for proposals" when it is considering an exercise of eminent domain that would, in and of itself, advance a public purpose.[52] As even the dissent in *Kelo* agreed, where the proposed taking will eradicate longstanding blight, as is the case here, a public purpose would be achieved directly when the "harmful use" is eliminated.[53]

Here, the condemnation of Petitioners' properties will not only eliminate a "harmful use," it will also promote higher education.[54] The Court

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[50] 545 U.S. at 491-93.

[51] *Id.* at 490-91.

[52] Petitioners suggest that the Project escaped meaningful public scrutiny because ESDC did not initiate a competitive bidding process and because Columbia agreed to pay for the costs of the Plan. Pet. 23-24. There can be no serious contention that public scrutiny and accountability were lacking in this case. Many public entities in the City and State of New York had input into the proposed condemnation decision, as did the general public. The CPC and ESDC obtained information from the public using the alternative means of holding hearings and public comment periods under SEQRA, ULURP and the EDPL. ESDC approved the Project only after years of planning and after public notice, comment discussion and the City's Rezoning.

[53] *Kelo*, 545 U.S. at 500.

[54] Pet. 26a.

of Appeals recognized that higher education, academic research and expansion of knowledge are "pivotal government interests" which "serve the public's welfare and morals" and that "[t]he indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and research."[55] Thus, as an independent ground for its decision, the Court of Appeals concluded that the Project is a valid exercise of eminent domain because "the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community."[56] Petitioners do not explain how their claim of pretext — which challenges the propriety of ESDC's blight determination — could undermine that conclusion, given that no finding of blight is necessary for approval of a Civic Project to advance education.[57] Indeed, Petitioners do not deny that the Project facilities will be used for educational purposes by Columbia, a non-profit university.[58]

Moreover, it could hardly be impermissible – or considered to be pretextual – for the government

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[55] *Id.*

[56] *Id.*

[57] *See* p. 6-7, *supra,* p. 33-34, *infra.*

[58] Petitioners did not challenge the constitutionality of the UDC Act pertaining to Civic Projects. Pet. 27a n.9. Yet, as noted by the Court of Appeals, the Project's status as an educational project provides an alternate basis for ESDC's public use determination independent of ESDC's blight finding.

to exercise eminent domain for the purpose of advancing education merely because the government knows – and, indeed, publicizes – in advance which educational institution will construct educational facilities on the acquired property. To so hold would effectively invalidate many well-settled uses of eminent domain to advance a public purpose through the instrumentality of a private party, including the grants of rights-of-way to railroads and utility companies so that the public may receive vital services. Nothing in *Kelo* suggests that the Court's concern about the use of eminent domain for a purely "private purpose" (545.U.S. at 487) reaches so far as to require the government to be unaware of the identity of any private beneficiary when the government authorizes the exercise of eminent domain for a public benefit. *See Kelo*, 545 U.S. at 482 (reaffirming ruling in *Midkiff*, 467 U.S. at 244, that a taking does not violate public use requirement merely because private parties ultimately receive the property, as "'it is only the taking's purpose, and not its mechanics,' ... that matters in determining public use").

C. There Is No Conflict Among The Lower Courts That Warrants This Court's Review

Petitioners argue that "no consensus yet exists among the lower courts regarding whether *Kelo*'s pretext analysis should apply to all eminent domain takings or only to those asserting economic development as a public purpose."[59] Whether or

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[59] Pet. 26.

not there is such uncertainty in some lower courts, it is of no moment here, because the Court of Appeals never suggested that pretext was irrelevant in this case, where the condemnation is for the purposes of remediating blight and advancing education, not economic development as understood in *Kelo*. The Court of Appeals squarely considered Petitioners' contention that "ESDC acted in 'bad faith' and with pretext when it arrived at its determination"[60] and rejected that argument as unsupported by the record.[61] That factbound conclusion does not warrant this Court's review.

Because the Court of Appeals reached the pretext issue on the merits and held Petitioners' pretext allegations to be devoid of record support, the legal issue supposedly in disarray in the lower courts – whether the "mere pretext" doctrine applies outside the context of using eminent domain to foster economic development – would not affect the outcome of this lawsuit. If this Court were to hold that the "mere pretext" doctrine should be limited to economic-development takings, then the judgment of the Court of Appeals would be *affirmed* because the public purposes in this case are blight eradication and the construction of educational facilities. Yet if the Court were to hold that the "mere pretext" doctrine should apply in all eminent domain cases, then the judgment of the Court of Appeals would similarly be *affirmed* because the Court of Appeals has already

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[60] Pet. 20a.

[61] *See* pp. 15, 21, *supra*.

determined, based on its review of the voluminous record of proceedings before the CPC and ESDC, that there is no factual basis for Petitioners' "pretext" allegations in this case. Thus, the legal issue supposedly in disarray in the lower courts is not presented here and could not warrant granting the certiorari petition.

In any event, the Petition cites only a handful of cases to establish a supposed conflict in the scope of "pretext" review after *Kelo*. The fact that the Petition cites so few cases suggests that whatever conflict may exist is limited in nature and would benefit from further "percolation" in the lower courts. Since so few cases are cited as even having addressed the issue of pretext after *Kelo*, it is evident that the issue of pretext has not been thoroughly explored by the lower courts, and review by this Court would be premature. Moreover, as explained below, the very cases cited by Petitioners demonstrate that there is no substantial conflict among the lower courts.

Petitioners rely on *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), where the D.C. Court of Appeals reversed the trial court's striking of a public use defense to a condemnation. There, a draft bill authorizing the condemnation "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. The District of Columbia Council later passed a bill approving the condemnation, but the final bill included findings that were neither in the draft bill nor were the subject of a public hearing. Those findings asserted in conclusory fashion that the properties

were part of a complex that was "a blighting factor" in the nearby communities. *Id.* There was no record that supported this legislative "finding," and no opportunity for the public to contest the finding.

Mr. Franco challenged the taking of his property by asserting that the stated public purpose was pretextual. Concluding that Mr. Franco had properly pled a pretext claim, the Court of Appeals stated that while the "legislation recites that NCRC [the condemning agency] had 'advised the Council that the Skyland Shopping Center is blighted,' . . according to Mr. Franco, NCRC admitted that it had made no such finding." *Id.* at 171.

The *Franco* decision does not conflict with the decision below. The court in *Franco* rejected the trial court's conclusion that, "once the legislature has declared that there is a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext," and thus allowed the plaintiff to make his case on remand. 930 A.2d at 168. The Court of Appeals in this case suggested nothing to the contrary; indeed it reviewed the merits of Petitioners' allegations of pretext. Moreover, the *Franco* court, like the court below in this case, recognized that litigation of a pretext claim is properly limited to review of the objective record underlying a public use determination: "if the record discloses ... that the taking will serve 'an overriding public purpose' and that the proposed development 'will provide substantial benefits to the public,' the courts must defer to the judgment of the legislature." *Id.* at 174. *Franco* also noted –

consistent with the Court of Appeals' decision in this case – that the *Kelo* court did not suggest a taking will *per se* fail the public use requirement whenever "the identities of the benefiting private parties were known before the taking was authorized by the legislature." *Id.* at 175.

The Hawaii Supreme Court's decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Haw. 352, 198 P.3d 615 (2008), is very similar. In that case, the lower court had initially rejected the condemnation after concluding that the County by resolution had illegally delegated its power of eminent domain through an agreement with a private developer. 198 P.3d at 644 n.34. Based on that agreement, the Court concluded that the project would not serve a public purpose. *Id.* After the County approved an amended resolution, which deleted any reference to the development agreement, the lower court found that the same project would serve a public purpose. *Id.* at 646. A divided Supreme Court of Hawaii reversed, finding that the lower court based its finding not on a review of the objective data in the record, but merely on the stated public purpose in the County's resolution. *Id.* This was error, the court ruled, because the trial court was obligated to consider the plaintiff's claim of pretext notwithstanding the resolution's assertion of a public purpose. *Id.* at 647. No such error is present here, where the Court of Appeals considered (and rejected) Petitioners' pretext claim on the merits.

The additional cases cited by Petitioners also do not conflict with the decision below. In *Rhode*

Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006), the condemning authority already had a lease on and an option to purchase the property it sought to condemn. The record before the court indicated that the parties could not agree on a price for the purchase of the property and the condemnation was merely an effort to avoid further negotiations and to increase revenue for the government authority. The court stressed, however, that "it is not for this Court to question whether a taking .... will accomplish its intended goals because the [C]onstitution is satisfied if the Legislature '*rationally could have believed* that the [enactment] would promote its objective.'" *Id.* at 103 (quoting *Midkiff*). This deferential standard of review does not conflict with the Court of Appeals decision below.

In *Middletown Twp. v. Lands of Stone*, 595 Pa. 607, 939 A.2d 331 (2007), the Township sought to acquire property under a statute that authorized the use of eminent domain for recreational purposes; yet there was no evidence in the record that the Township planned any such recreational project, only that it had considered "various recreational options." Rather, the record showed that the Township decided to acquire the property to preserve open space and prevent development, purposes for which it had no authority to condemn property. Thus, the record objectively showed that the condemnation was not intended to accomplish its stated objective, which was a mere pretext. The opposite is true here; as the Court of Appeals explained, the record amply supports ESDC's conclusions that the condemnation was properly

authorized to remediate blight and to advance education.

POINT II

THE PROCEDURAL DUE PROCESS ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

The Court of Appeals correctly held that Petitioners' due process rights were not violated when ESDC closed the administrative record pursuant to the EDPL before the FOIL requests made by the Tuck-It-Away Petitioners were resolved. That narrow conclusion does not warrant this Court's review.

A. Petitioners Do Not Present Any Important Legal Issue Warranting This Court's Review

Petitioners do not argue that New York's EDPL is unconstitutional on its face or inherently denies property owners a fair opportunity to be heard on the question whether a proposed condemnation is for "public use." The Second Circuit has upheld, after *Kelo*, the EDPL procedures against a due process challenge, observing that the EDPL gives property owners a fair opportunity to be heard on the issue of public use before property is taken. *See Brody v. Village of Port Chester*, 434 F.3d at 135-36; *Goldstein v. Pataki*, 488 F. Supp.2d 254, 272 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 55 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008). Petitioners do not challenge those decisions; they do not argue, for example, that the

Due Process Clause requires discovery or full trial-type proceedings in a challenge to a "public use" determination.

Rather, Petitioners argue that, in this particular case, they were denied due process because ESDC did not hold open the administrative record until final completion of their FOIL litigation. But even then, Petitioners do not contend that the Court of Appeals applied the wrong test for due process or failed to assign the correct weight to their interest in the due process balance. Indeed, the Court of Appeals' decision applied the same legal standard – that a condemnee be provided with an opportunity to be heard in a meaningful manner at a meaningful time – that the Petition urges upon this Court.[62] *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). This legal standard is not in dispute by any party, nor is there any question that it was applied by the Court of Appeals. In short, Petitioners are really challenging the Court of Appeals' decision that they received due process in this particular case. That is not a basis for this Court's review.[63]

Furthermore, this case would not be an appropriate vehicle for consideration of any due process issue. Petitioners' challenge to ESDC's determination that the Project was an appropriate "Civic Project" for educational purposes rested

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[62] Pet. 33.

[63] *See* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "the misapplication of a properly stated rule of law").

entirely on a *legal* argument – namely, that under the UDC Act, eminent domain was authorized only for *public* educational institutions.[64] The Court of Appeals rejected that contention as a matter of law, concluding that eminent domain could be used to construct facilities for non-profit educational institutions such as Columbia.[65] Petitioners do not explain how the additional documents they sought under FOIL could have had any bearing on that issue of state law.

B. The Public Processes Provided By The Eminent Domain Procedure Law Comply With Due Process

As the Court of Appeals recognized, due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time. *Mathews*, 424 U.S. at 332. The opportunity must be appropriate to the nature of the case. *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Thus, due process is not a rigid rule unrelated to time, place and circumstances, but rather a flexible concept that calls for the procedural protection the particular situation demands. *Mathews*, 424 U.S. at 334.

The Court of Appeals also concluded, in applying the *Mathews* standard that, "[i]n this case, petitioners had an opportunity to comment on the proposed Project in a meaningful manner – both orally and through written submissions – and

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[64] Pet. 65a.

[65] Pet. 23a-27a.

at a meaningful time – well before ESDC issued its findings and determination to acquire petitioners' property by eminent domain."[66] The Petition does not identify any specific error in that decision. Petitioners do not dispute, for example, that ESDC held an extensive public hearing, that they were offered and took the opportunity to participate in that hearing, and that they submitted extensive comments for the record that ESDC then considered.

The Court of Appeals clearly reached the right result here. The Court explained that "petitioners' substantial opportunity to be heard is reflected in their extensive written submissions after the completion of the two-day public hearing." In addition, "prior to the ESDC determination, [Petitioners] had unfettered access to over 8,000 pages of documents including, most significantly, the GPP (as initially adopted by ESDC), the FEIS, and the AKRF and Earth Tech neighborhood conditions studies. All of these documents were available to the public during the comment period...."[67]

As a result of Petitioners' and others' vigorous participation in the public process, "ESDC prepared 75 pages of detailed responses to the comments received and duly considered their submissions before rendering its findings and determination."[68] Petitioners and their counsel

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[66] Pet. 28a-29a.

[67] Pet. 29a.

[68] *Id.*

once again objected to the Project at ESDC's December 18, 2008 meeting where the Directors voted to adopt SEQRA Findings, affirm the GPP, and issue the Determination and Findings to proceed with the Project.

Finally, review is unwarranted in light of the Court of Appeals' determination that the internal ESDC documents at issue in Petitioners' FOIL proceeding were not material and that Petitioners were not prejudiced by not obtaining them.[69] Petitioners provide no basis for this Court to review, much less overturn, that determination. Even if Petitioners were entitled to the documents under FOIL at the time of the hearing, a FOIL violation would not in and of itself establish a due process violation. Due process is violated only if Petitioners were deprived of an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. To establish that a FOIL violation rose to the level of a due process violation, petitioners "must show that the withholding of the [documents] caused [them] prejudice." *Adams v. United States*, 673 F. Supp. 1249, 1260 (S.D.N.Y. 1987). Since the Court of Appeals concluded that Petitioners failed to demonstrate the materiality of the documents at issue, it properly determined that Petitioners were

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[69] Pet. 30a-31a. Moreover, Petitioners failed to seek vacatur of the automatic stay of disclosure when ESDC appealed the Appellate Division's decision. *Id.* Had they done so, the courts could have considered at an earlier juncture whether Petitioners would suffer harm by closure of the administrative record without those documents.

not prejudiced and correctly rejected their assertion that they were denied due process.[70]

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
November 11, 2010

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[70] Pet. 30a-31a.

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Social Science, Legal, and Policy Research and Articles

1. Dick M. Carpenter II, and John K. Ross, Institution for Justice, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* (2007)

2. Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?* NORTHWESTERN UNIVERSITY SCHOOL OF LAW (2007)

3. John K. Ross and Dick Carpenter, *Robin Hood in Reverse: New York's Eminent Domain Policies Rob the Vulnerable to Reward the Powerful,* CITY JOURNAL (2010)

4. David T. Beito and Ilya Somin, *Battle Over Eminent Domain is Another Civil Rights Issue*, Cato Institute (2008)

5. Ilya Somin, *David Beito on Eminent Domain Abuse in Alabama* (2009)

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7. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and Private Uses of Eminent Domain,* YALE LAW & POLICY REVIEW (2003)

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9. Amanda W. Goodin, *Rejecting the Return to Blight in Post-*Kelo *State Legislation,* NEW YORK UNIVERSITY LAW REVIEW (2007)

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11. Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Redevelopment,* ECOLOGY L.Q. (2007)

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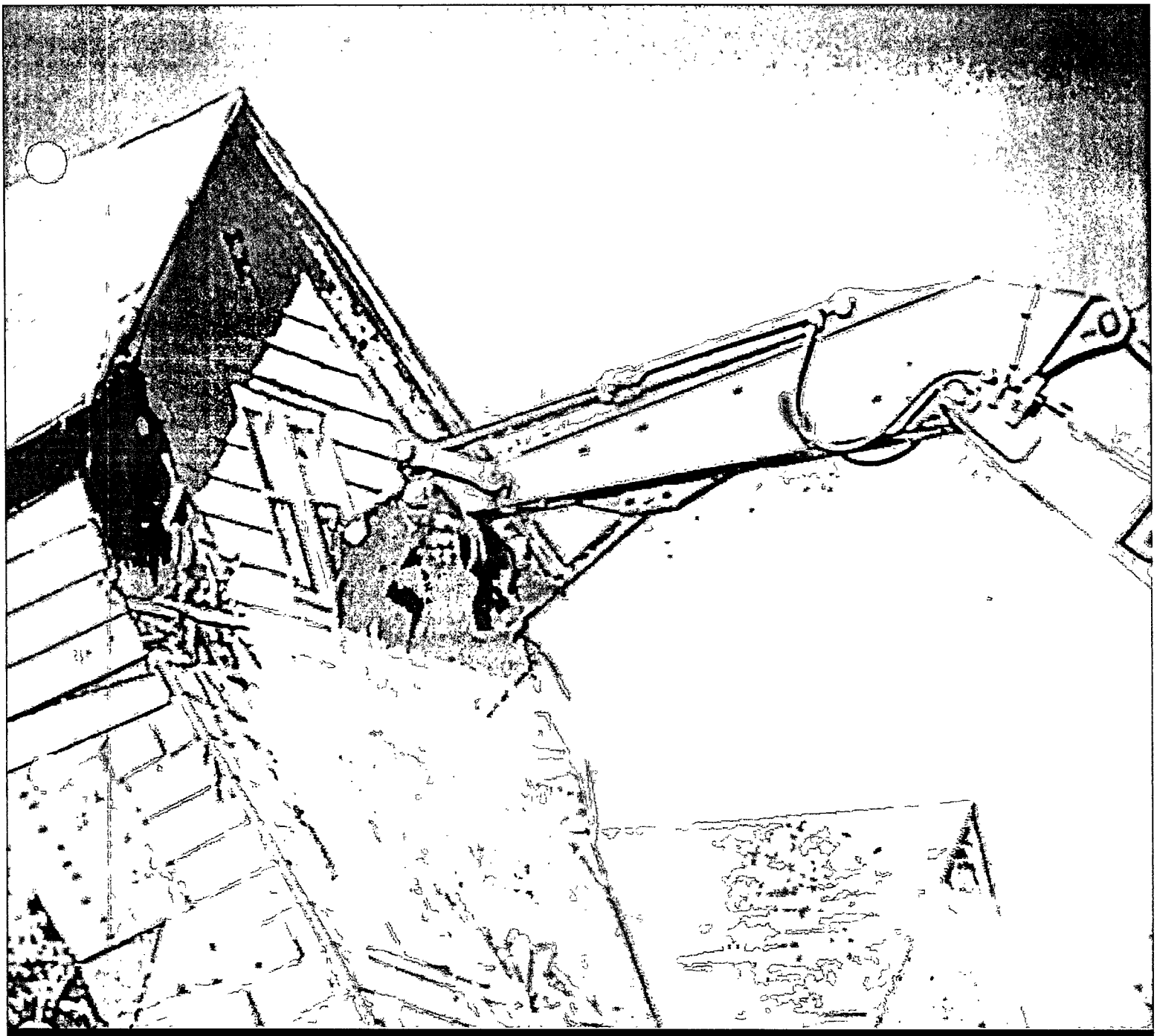

VICTIMIZING THE VULNERABLE

The Demographics of Eminent Domain Abuse

By Dick M. Carpenter II, Ph.D. & John K. Ross

Institute for Justice | June 2007

VICTIMIZING THE VULNERABLE

The Demographics of Eminent Domain Abuse

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Executive Summary

In *Kelo v. City of New London*—one of the most reviled U.S. Supreme Court decisions in history—the Court upheld the use of eminent domain by governments to take someone's private property and give it to another for private economic development. In a major expansion of eminent domain power, the now-infamous *Kelo* decision marked the first time the U.S. Supreme Court approved the use of eminent domain for purely private development under the Public Use Clause of the Fifth Amendment to the U.S. Constitution, which traditionally had been limited to taking property for unambiguous public uses, such as schools or courthouses.

In their dissents, Justices Sandra Day O'Connor and Clarence Thomas not only pilloried the five justices in the majority for this expansion of so-called "public use," but also predicted dire consequences as a result of the decision: Poor, minority and other historically disenfranchised and comparably powerless communities would be disproportionately hurt through eminent domain abuse. Although it is well documented that urban renewal projects of the 1950s and 1960s targeted the poor and minorities, some question whether such dynamics are true in contemporary redevelopment projects, as evidenced, for example, by the neighborhood at the center of the *Kelo* case—a working-class area different than those typically envisioned as in need of "renewal."

This research uses census data to test the predictions of Justices O'Connor and Thomas. It compares the demographic characteristics of 184 areas targeted by eminent domain for private development to their surrounding communities to see if such areas are, in fact, more likely to be populated by the poor, ethnic minorities and those with lower levels of educational attainment.

Results confirm the Justices' predictions. Specifically, in project areas in which eminent domain has been threatened or used for private development:

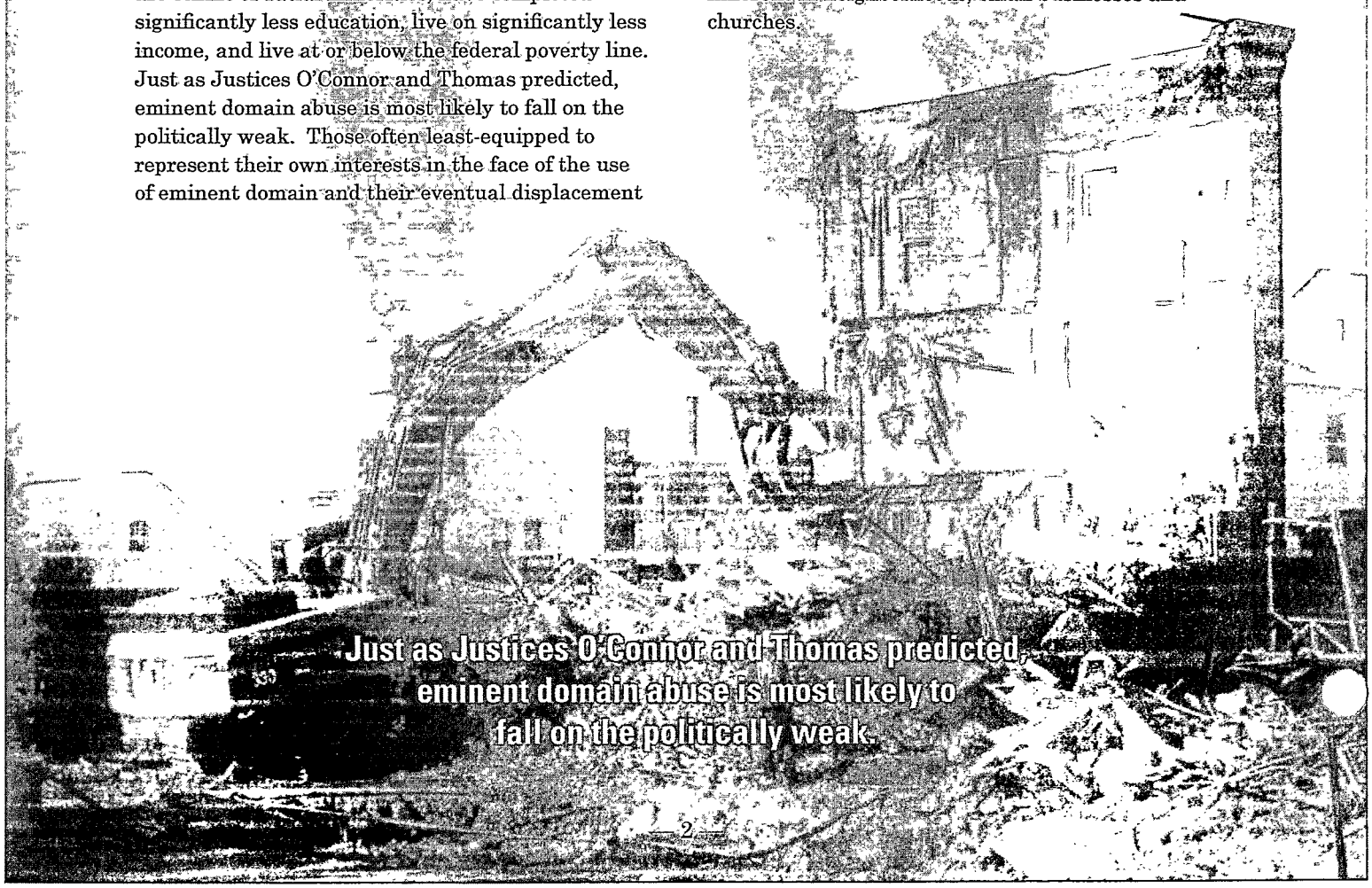
58% of the population includes minority residents, compared to only 45% in the surrounding communities

the median income is less than $19,000 per year, compared to more than $23,000 in surrounding communities

25% live at or below poverty, compared to only 16% in surrounding communities

a greater percentage of residents have less than a high school diploma and smaller percentages have various levels of college education compared to surrounding communities

Taken together, more residents in areas targeted by eminent domain for private development, as compared to those in surrounding communities, are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and live at or below the federal poverty line. Just as Justices O'Connor and Thomas predicted, eminent domain abuse is most likely to fall on the politically weak. Those often least-equipped to represent their own interests in the face of the use of eminent domain and their eventual displacement through this power, inequitably bear not only an economic burden but also a socio-cultural one through the loss of social networks and support systems inherent in neighborhoods, small businesses and churches.



Just as Justices O'Connor and Thomas predicted, eminent domain abuse is most likely to fall on the politically weak.

Expanding "Public Use"

In one of the most reviled decisions in recent history, the U.S. Supreme Court, on June 23, 2005, upheld in *Kelo v. City of New London* the government's use of eminent domain to take someone's private property and give it to another for private economic development.[1] The *Kelo* decision marked the first time the U.S. Supreme Court approved eminent domain for purely private development under the Public Use Clause of the Fifth Amendment to the U.S. Constitution. Traditionally, the power of eminent domain had been limited to taking property for schools, roads and other unambiguous public uses.

The expansion of the eminent domain power began in earnest with the Court's 1954 decision in *Berman v. Parker*, which upheld the constitutionality of urban renewal, a massive effort by federal, state and local governments to "revitalize" urban areas by removing slums and eliminating blight. Before *Berman*, with some limited exceptions, private property could only be taken through eminent domain for public *uses*. In *Berman*, however, the Court transformed the words "public use" to mean "public purpose," thereby broadening the definition.[2] The purported public purpose underlying the takings in *Berman* was the removal of blight, but slum clearance efforts of the 1950s and 1960s led to the demolition and destruction of many communities. Moreover, in the words of the time, urban renewal more often than not meant "Negro removal."[3]

Over time, some state courts expanded on *Berman* and further degraded protection for property owners by declaring that mere "public benefits" from possible increased tax revenue or hoped-for job creation justified the private-to-private transfer of property through eminent domain, regardless of a property's condition. Even well-maintained properties could be taken. The trend of broadening the definition of "public use" to "public purpose" to "public benefit" culminated with *Kelo*, in which the nation's highest court held that promoting economic development is a function of the government and provides a legitimate public purpose for private-to-private transfer of property. The Court, however, was closely divided, with a narrow 5-4 vote upholding eminent domain for private development. In a strongly worded dissent, Justice Sandra Day O'Connor wrote:

> *Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.*[4]

Justice O'Connor also predicted adverse consequences resulting from the majority's decision:

> *Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate*

Real-World Effects of Eminent Domain Abuse

Reports like these, that use averages representing areas from multiple cities and states, can sometimes under-represent the real-world effects of eminent domain abuse. But residents in project areas like that in El Paso, Texas, know all too well the shadow eminent domain casts.

In March 2006, the Paso Del Norte Group (PDNG) and the city of El Paso introduced a redevelopment plan that called for the use of eminent domain to redevelop more than 100 acres of downtown.[5] The population in this project area is almost 100 percent minority, 56 percent live at or below poverty and 80 percent have less than a high school diploma.

The working-class area will be replaced, if PDNG's vision is realized, with upscale lofts, apartments, shops and entertainment venues to lure new residents, shoppers and tourists. Not without precedent, residents fear the new neighborhood will not be as affordable as promised.[6]

In the face of mounting criticism over the project, Mayor John Cook announced in May 2006 that the city would start the plan over again and that eminent domain would only be used as a "last resort."[7] In October, City Council members approved the plan.[8]

It isn't the first time city officials pushed redevelopment on the area: "There have been 53 plans in the last 50 years," said Councilman Steve Ortega, a supporter of eminent domain for the project. "Now you have a business community that is ready to finance most of the plan, whereas [before] most of the plan was left to the public sector."[9] The public sector, however, will be in charge of conveying property to the "business community" from unwilling sellers.

In December 2006, City Council voted not to condemn any property until November 2008, a small reprieve to residents. But it also means more than 300 properties sit under the cloud of condemnation, which inevitably impacts day-to-day living, property values and any negotiations.[10]

influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[11]

Justice Clarence Thomas also dissented, noting: "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."[12] He went on to cite the disastrous effects of urban redevelopment in the middle 20th century on minority communities, concluding, "Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects."[13]

Urban Renewal's Legacy

For urban affairs scholars, the predictions of Justices O'Connor and Thomas represent a familiar refrain. For years, researchers have noted that the trend among urban redevelopment strategies is to attract wealthier middle classes back to the inner city, typically resulting in the replacement of one population with another.[14] Much of the research focuses on urban renewal, which generally refers to the set of redevelopment policies and projects used during the 1950s and 1960s to make room for downtown commercial development activities, more upscale residents, or both, by leveling "blighted" neighborhoods and displacing existing populations from central-city areas.[15] Demographically, these displaced populations

were disproportionately ethnic or minority communities[16] and/or low-income.[17]

For example, from 1949 to 1963, urban renewal displaced an estimated 177,000 families and another 66,000 individuals, most of them poor and most of them black.[18] Unfortunately, precise numbers are not available, and these data have been criticized for their conservatism, that is, underestimating the proportion of African-Americans affected. But of what is known of the race of 118,128 of the families relocated from 1949 to 1963, 78 percent were non-white.[19] Moreover, only 48,000 new housing units were constructed during the same period, and only 20,000 of those constituted low-cost housing.[20]

These residents did not acquiesce to displacement easily. Renewal efforts led to political battles in which poor and minority residents fought to save their neighborhoods.[21] But they typically held little power to resist the changes befalling their neighborhoods, as strong political coalitions formed to advance an agenda of replacement.[22] A number of historical studies have documented the role of powerful actors, such as urban mayors, federal officials and real estate representatives, in the development of post-war urban renewal and redevelopment, which left urban residents largely powerless in the process.[23]

Eminent Domain Abuse Today

Yet, just how relevant to today's redevelopment context are the comparisons to urban renewal made by Justices O'Connor and Thomas? Given the social and economic changes that have occurred in the United States since the post-war urban renewal era, does contemporary use of eminent domain inequitably threaten specific populations as it did in the 1950s and 1960s? Some might argue it does not; contemporary redevelopment projects using eminent domain are not exclusively set in traditional urban areas. For example, the

"Any Property May Now Be Taken"

Justices O'Connor and Thomas predicted that eminent domain abuse would fall hardest on the poor and minorities—as this report confirms—but they also understood that under *Kelo,* any property can be taken for private development. Indeed, neighborhoods affected by eminent domain are not *exclusively* those populated by residents who are poor, minority or less educated. In fact, 19 of the project areas from this sample are more accurately described as white, middle-class neighborhoods.[24]

Take, for example, Lake Zurich, Ill., a small community of about 18,000 residents. With a population of only 7 percent minority, 8 percent with less than a high school diploma and 0.3 percent at or below poverty, the project area in this community looks nothing like the typical project areas in this report.

Yet, in 2001, consultants S.B. Friedman recommended that city officials include 36 acres of downtown in a plan that allowed for the use of eminent domain.[25] In 2004, officials adopted the plan, drawn by Chicago architect Lucien LaGrange, which called for private developer McCaffery Interests to remake the old resort village's Swiss Alps-themed buildings into new restaurants, shops and condos.[26]

In February 2005, residents held a candlelight vigil to protest eminent domain.[27] "Is it public use?" asked Sarah Hudson. "I don't think so. Public use to me means a road or something like that; not condos at half-a-million dollars."[28] "It's not for sale," said Hudson of the house her grandfather stuccoed around 1911. Her building has since been bulldozed, as have dozens of lake houses and a 130-year-old farmhouse.[29]

Although village officials filed eminent domain proceedings in February 2005 against the owners of five houses and an apartment building, they held off acting until after the *Kelo* decision.[30] In April 2006, the last of the remaining property owners sold after dropping a counter-lawsuit contesting the village's eminent domain authority.[31] According to village administrator John Dixon, that meant the village had acquired 34 properties by "mutual agreement."[32]

neighborhood in question in the *Kelo* case differed in several important ways from areas typically envisioned as in need of "renewal."[33]

Therefore, we undertook this research to discern the demographic profiles of those living in areas targeted by the type of redevelopment and eminent domain at the center of the *Kelo* case and so widely used across the country.[34] In so doing, we sought to answer: Are the predictions of Justices O'Connor and Thomas valid? Does the use of eminent domain for private-to-private transfer disproportionately affect poor, minority or other less-politically powerful populations?

To answer these questions, we used data from the 2000 census to examine the characteristics of 184 areas targeted by eminent domain for private development (called project areas hereafter) to compare them to their surrounding communities. These project areas were zones within a municipality for which the use of eminent domain for private development was designated. More information about the methods and analyses are included in Appendix A.

"Perverse Results"

As the numbers in Table 1 indicate, the predictions of Justices O'Connor and Thomas held true: Losses from eminent domain abuse "fall disproportionately on the poor," and particularly on minorities.[35] Eminent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%).

Table 1 Averages for Project Areas and Surrounding Communities[a]

	Averages	
	Project Area	Community
Minority*	58%	45%
Median Income*	$18,935.71	$23,113.46
Poverty*	25%	16%
Children	25%	26%
Senior Citizens	13%	12%
Less than High School Diploma*	34%	24%
High School Diploma	28%	28%
Some College*	22%	25%
Bachelor's Degree*	9%	13%
Master's Degree*	3%	5%
Professional Degree*	1%	2%
Doctorate*	.6%	.9%
Renters*	58%	45%

a. Standard deviations are included in Appendix B

*Difference between project areas and surrounding communities is statistically significant ($p<.05$, which means we can be sure with 95% confidence that the differences found here in the sample data will be true in the greater population)

Residents of project areas are significantly less educated than those living in the surrounding communities. A greater percentage of those in project areas (34%) hold less than a high school diploma as compared to the surrounding cities (24%), and a consistently greater percentage of those in surrounding communities hold various levels of college degrees compared to the project areas.

Finally, a significantly greater percentage of residents in project areas rent their homes (58%) compared to residents in surrounding cities (45%). We found little difference in the percentages of children and senior citizens between the project areas and the communities.

Taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and significantly more of them live at or below the federal poverty line. As Justices O'Connor and Thomas predicted, "extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."

Of course, these data do not show or even imply that governments and developers deliberately discriminate by targeting particular areas with eminent domain *because* there are poorer, minority or less-educated residents. Yet, these results reveal such communities are disproportionately affected nonetheless, and these are typically communities less able to exert significant political influence in defense of their homes and neighborhoods. The results for such residents can be disastrous. As Justice Thomas discussed, and as researchers have acknowledged,[36] when poor residents are displaced as a result of eminent domain, they bear enormous economic and psychological burdens that even those with middle-incomes find difficult to shoulder.

The powerlessness they experience in the process also can negatively affect their well-being. Research into the effects of powerlessness reveal distinct emotional, psychological and physiological implications for those who perceive a lack of control over their personal circumstances.[37] Researchers find that displacement often elicits negative emotional and health reactions due to the loss of neighborhoods where residents held strong attachments to friends, neighbors, churches and local small businesses.[38] Displaced residents further find it difficult to replicate critical community networks and culture. Justice Thomas noted these losses when he wrote, "'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."[39]

Real Protections

Unfortunately, these predictions by Justices O'Connor and Thomas remain largely and remarkably unacknowledged to date. Justice Thomas called upon our past to inform present circumstances, and data in this study indicate the current effects of eminent domain for private development may mirror those of an unfortunate time when "urban renewal" meant "Negro removal." That is, the current trend of using eminent domain for private development, much like the failed urban renewal policies of decades ago, falls hardest on minorities and those of limited means—people often least equipped to defend themselves through the political process and thereby left most vulnerable to abuse by the Court's expansion of the eminent domain power.

Given the awesome nature of that power, and the inequitable effects demonstrated herein, political "quick fixes," bureaucratic tinkering, or promises of eminent domain as a "last resort" fall far short of protecting citizens who value their property as neighborhood and home from government leaders and developers who see property only for its exchange value. The only real solution is prohibiting the use of eminent domain for private development to protect the constitutional rights of all citizens, not least of which include those threatened by "Robin Hood in reverse."[40]

Appendix A: Methods

Sample

The sample was drawn from an Institute for Justice database of areas for which eminent domain for private development has been used or designated for residences since 2003, which closely ties these results to the predictions of Justices O'Connor and Thomas. The methods for collecting information for this database are the same that IJ followed in two previous reports documenting the extent of eminent domain abuse nationwide.[41] Projects were included in this report based on the availability of project maps, which ensured a more accurate alignment between project areas and block groups, as described below. Thus, the sample was created by collecting all projects from the database that included residences for which maps were available; project areas without maps were not included. The sample used here is 53 percent of the 348 projects in the database that are known to include residences; the database contains a total of 800 projects, including both businesses and residences.

Table A.1 lists the cities and states in this sample. As indicated, the project areas came from 112 cities in 26 states and the District of Columbia.

Table A.1 Cities and States in the Sample

State	City	State	City	State	City
CA	Concord	KY	Covington	NY	New York
	Fontana	MD	Baltimore		Patchogue
	Fremont	MO	Arnold		Peekskill
	Fresno		Liberty		Port Chester
	Los Angeles		Ozark		Syracuse
	Lemon Grove		Richmond Heights		Yonkers
	Livermore		Rock Hill	OH	Akron
	Long Beach		Rolla		Columbus
	Orange		St. Louis		Dayton
	Port Hueneme		Valley Park		Garfield Heights
	San Bernardino	NE	Lincoln		Lorain
	San Diego		Omaha		Portsmouth
	Santa Clarita	NJ	Asbury Park		Riverside
CO	Fort Collins		Camden		Youngstown
	Lakewood		Carteret	OK	Tulsa
CT	Middletown		Cinnaminson	OR	Keizer
	Norwalk		Cliffside Park		Roseburg
DC	Washington		Cherry Hill	PA	Canonsburg
FL	Cape Coral		Lindenwold		Greensburg
	Coral Springs		Lodi		Jenkintown
	Daytona Beach		Long Branch		Philadelphia
	Jupiter		Maplewood		Pittsburgh
	Lakeland		Millville		Pottstown
	Riviera Beach		Neptune		Washington
	Tampa		Neptune City	RI	Warwick
GA	West Point		Newark	TN	Knoxville
IA	Burlington		Paulsboro		Lenoir City
	Clinton		Trenton		Memphis
	Council Bluffs		Ventnor City	TX	El Paso
IL	Chicago		Vineland		Fort Worth
	Clarendon Hills		Westville		Houston
	Collinsville	NY	Albany	UT	Ogden
	Lake Zurich		Cheektowaga	VA	Newport News
	Machesney Park		Elmira		Richmond
	Oak Forest		Farmingdale		Staunton
	Riverside		Haverstraw	WA	Auburn
IN	South Bend		Niagara Falls		Renton
KS	Kansas City		Westbury		

The project areas vary in size from several blocks to those encompassing multiple neighborhoods. Likewise, the communities in which these project areas reside range in size from small cities (i.e., Lawnside, N.J., pop. 2,724) to large metropolitan areas (i.e., New York City, pop. 8,008,278). Table A.2 includes population statistics for the project areas and surrounding communities.

Table A.2 Population Statistics for Project Areas and Surrounding Cities

	Average	Standard Deviation	Minimum	Maximum
Project Areas	1,182	767	109	7987
Surrounding Communities	285,951	903,518	2,724	8,008,278

Data

Of the variables used in this report, percent minority represents all ethnic/minority groups other than white. Percent children includes children younger than 18, while senior citizens includes those 65 and older. The renter/owner percentages represent those living in occupied housing units. Education levels were aggregated into seven categories: less than a high school diploma, high school diploma, some college, bachelor's degree, master's degree, professional degree and doctorate. Poverty status was measured using the federal government's official poverty definition.

The data were collected from the SF-3 Census 2000 sample dataset, which includes detailed population and housing data collected from a 1-in-6 sample and weighted to represent the total population. Data for the project areas were constructed using the lowest level possible from the sample data—the block group, which is an area encompassing multiple census blocks. Project areas were identified in the census data with an address from within the project area. Using the address, the specific block group was identified for each project area. Appropriate block group data were then collected for each project area.

In some cases, project areas were smaller than block groups, potentially creating a situation where the project area demographics would not be accurately measured, similar to criticism posed by others about the use of census data for research of this kind.[42] To test for that possibility, we duplicated the analyses herein using block level data for overlapping variables from the 100 percent census data. Variables in this study that were common between 100 percent census and sample datasets include race, age and owner versus renter. Both descriptive and statistical results proved nearly identical, indicating smaller project areas are sufficiently represented by block groups.

Analyses

Differences between project areas and surrounding communities were measured using independent samples t-tests. Because of the substantial differences in group sizes (i.e., project area populations versus community populations), data were tested for unequal variance using Levene's test for equality of variances.[43] Results reveal large and statistically significant Levene values ($p<.05$) for all variables measured herein. Therefore, t-test results include those where equal variance was not assumed.

Appendix B

*Table B.1 Standard Deviations for Table 1**

	Standard Deviations	
	Project Area	Community
Minority	35%	26%
Median Income	$7,320.64	$5,348.81
Poverty	16%	7%
Children	10%	3%
Senior Citizens	9%	3%
Less than High School Diploma	17%	10%
High School Diploma	10%	6%
Some College	9%	5%
Bachelor's Degree	8%	6%
Master's Degree	5%	2%
Professional Degree	2%	1%
Doctorate	1%	1%
Renters	25%	12%

*Standard deviations indicate the spread or variability of the data. The larger the standard deviations, the more spread out the scores are from the mean or average. The smaller the standard deviations, the tighter the scores are to the mean. As indicated, the project area data show more spread than the community data.

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	U.S.	Conn.	Kelo Neighborhood	Project areas in this research
Minority	30%	22%	42%	58%
Less than High School Diploma	19%	16%	23%	34%
High School Diploma Only	28%	28%	48%	28%
Some College	40%	37%	42%	22%
BA	15%	18%	6%	9%
MA	5%	9%	6%	3%
Professional Degree	1%	2%	3%	1%
Doctorate	.9%	.9%	2%	1%
Median Household Income	$41,994	$53,935	$34,757	$18,935
Poverty	12%	7%	18%	25%
Renters	33%	33%	66%	58%

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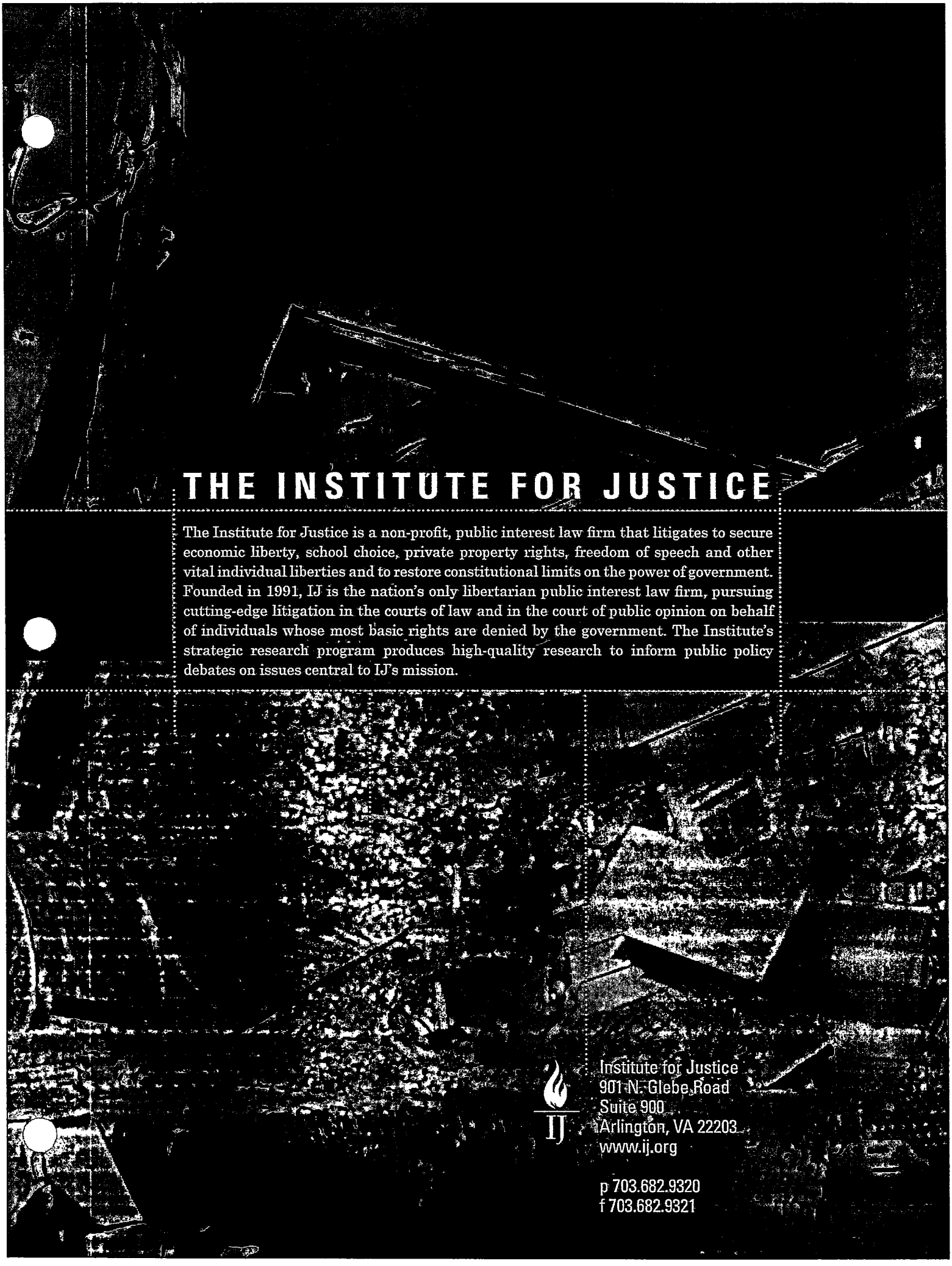

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IS POST-*KELO* EMINENT DOMAIN REFORM BAD FOR THE POOR?[†]

Ilya Somin[*]

INTRODUCTION

In a recent essay in the *Northwestern University Law Review*,[1] Professor David Dana argues that most post-*Kelo* reform efforts are seriously flawed because they tend to forbid the condemnation of the property of the wealthy and the middle class for "economic development," but allow the condemnation of land on which poor people live under the guise of alleviating "blight." This, he claims, results in reform laws that "privilege[] the stability of middle-class households relative to the stability of poor households" and "express[] the view that the interests and needs of poor households are relatively unimportant."[2]

I agree with Professor Dana that the problem of blight condemnations and its impact on the poor deserves much greater attention, and that post-*Kelo* reform initiatives should do more to address these concerns. However, I disagree with his argument that post-*Kelo* reform efforts have systematically treated land where the poor tend to live worse than that of middle and upper class homeowners. As of this time (April 2007), most of the states that have enacted post-*Kelo* reform laws have either banned both blight and economic development takings (five states, plus Utah, which enacted its reform law prior to *Kelo*), or defined "blight" so broadly that virtually any property can be declared "blighted" and taken (sixteen states). Several other states have enacted reforms that provide no real protection to any property owners because of other types of shortcomings. Only nine are

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[†] This Essay was previously published in the *Northwestern University Law Review Colloquy* on May 7, 2007, as Ilya Somin, *Is Post-*Kelo *Reform Bad for the Poor?*, 101 NW. U. L. REV. COLLOQUY 195 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/15/.

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[1] David Dana, *The Law and Expressive Meaning of Condemning the Poor after* Kelo, 101 NW. U. L. REV. 365 (2007), 101 NW. U. L. REV. COLLOQUY 5 (2006), http://www.law.northwestern.edu/lawreview/colloquy/2006/2/ (subsequent citations refer to 101 NW. U. L. REV. 365 (2007)).

[2] *Id.* at 365.

actually guilty of the sin condemned by Professor Dana: allowing only the condemnation of "blighted" areas narrowly defined.

To the extent that some states have indeed banned "economic development" condemnations in affluent neighborhoods while permitting blight condemnations to go on in poor ones, I agree that this is a lamentable state of affairs. However, it may still be a better result than simply subjecting all property to the risk of economic development takings. A law that protects the property rights of most but not all of the population is preferable to one that protects no one. Such a law might also benefit many poor people who live in non-blighted areas and are potentially vulnerable to economic development takings. Survey data suggests that the poor themselves overwhelmingly oppose economic development condemnations.

Furthermore, the exclusion of blighted property from bans on "economic development" condemnations in some states is not necessarily explained by indifference to or contempt for the interests of the poor. There are perfectly non-invidious (though in my view flawed) reasons for believing that condemnation is sometimes necessary to eliminate blight. There are few or no good reasons, however, to use condemnation to promote economic development through the transfer of property to private owners.

I. POST-*KELO* REFORM AND THE POOR

Since *Kelo v. City of New London*[3] was decided in June 2005, twenty-eight states have enacted eminent domain reforms through the regular legislative process and ten (including several that also enacted legislative reforms) by referendum. Altogether, thirty-five states have enacted reforms that purport to ban or restrict "economic development" takings. The state of Utah banned both economic development takings and blight condemnations in early 2005, before *Kelo* was decided.[4] Seventeen of the twenty-eight reforms enacted by state legislatures are largely ineffective, providing little or no real protection to property owners against economic development takings.[5] This is also true of several of the reforms enacted by referendum. With respect to these states, Professor Dana's claim that middle class households are getting better protection than the poor are is incorrect because, quite simply, neither group is getting any real protection at all.

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[3] 545 U.S. 469 (2005).

[4] *See* UTAH CODE ANN. § 17C-1-202 (amended May 1, 2006) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); *see also* Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV'T NEWS, June 1, 2005, *available at* http://www.heartland.org/article.cfm?artID=17162 (describing the politics behind the Utah law).

[5] I discuss this in much greater detail in a recent paper. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo (George Mason Law & Econ. Research Paper No. 07-14, 2007), *available at* http://ssrn.com/abstract=976298.

In at least sixteen states, post-*Kelo* reforms have been ineffective because they contain "blight" exceptions so broad that virtually any property can be defined as "blighted"—including property in middle class or even wealthy neighborhoods.[6] For example, nine state post-*Kelo* laws incorporate definitions of "blight" that include any area where there are obstacles to "sound growth" or conditions that constitute an "economic or social liability." These include reform laws in Alaska,[7] Colorado,[8] Missouri,[9] Ne-

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[6] For a more detailed analysis of these reform laws and the reasons why they are unlikely to have any meaningful effect, see *id.* at 15–21.

[7] *See* H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006) (enacted July 5, 2006) (exempting preexisting public uses declared in state law from a ban on economic development takings); ALASKA STAT. § 18.55.950 (2006) ("'[B]lighted area' means an area, other than a slum area, that by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or improvements, tax or special assessment delinquency exceeding the fair value of the land, improper subdivision or obsolete platting, or the existence of conditions that endanger life or property by fire and other causes, or any combination of these factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its condition and use."). Professor Dana interprets this statute as failing to address blight condemnations "at all." Dana, *supra* note 1, at 375. However, the text of the law does in fact exempt blight condemnations from its scope by exempting all preexisting public uses declared in state law, of which blight is one.

[8] *See* H.B. 1411, 65th Gen. Assem., Reg. Sess. (Colo. 2006) (enacted June 6, 2006) (allowing condemnation for "eradication of blight"); COLO. REV. STAT. § 31-25-103(2) (2006) (defining "blight" to include any condition that "substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare").

[9] *See* S.B. 1944, § 523.271.2, 93rd Gen. Assem., Reg. Sess. (Mo. 2006) (enacted July 13, 2006) (exempting blight condemnations from the ban on "economic development" takings); MO. REV. STAT. § 100.310(2) (2006) (defining "blight" as "an area which, by reason of the predominance of defective or inadequate street layout, insanitary 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").

braska,[10] North Carolina,[11] Ohio,[12] Texas,[13] Vermont,[14] and West Virginia.[15] Any obstacle to economic development can easily be defined as impairing "sound growth," making this definition of blight broad enough to justify virtually any condemnation that could be justified under an economic development rationale. Similarly, any impediment to "economic development" can be considered an "economic or social liability." Seven other states, including Illinois, Iowa, Kentucky, Maine, Tennessee, Wisconsin,[16] and the crucial state of California,[17] have differently worded but comparably broad blight exemptions. Several more states have enacted post-*Kelo* laws that fail to protect property owners for other reasons.[18]

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[10] *See* L.B. 924, 99th Leg., 2nd Sess. (Neb. 2006) (enacted Apr. 13, 2006) (exempting "blight" condemnations from ban on economic development takings); NEB. REV. STAT. § 18-2103 (2006) (defining blight to include any area in a condition that "substantially impairs or arrests the sound growth of the community, retards the provision of housing accommodations, or constitutes an economic or social liability" and has "deteriorating" structures).

[11] *See* H.B. 1965, § 2.1, 2005 Gen. Assem., Reg. Sess. (N.C. 2006) (enacted Aug. 10, 2006) (exempting blight condemnations from restrictions on economic development takings and stating that "'[b]lighted area' shall mean an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare").

[12] *See* S.B. 167, § 1, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (exempting "blight" condemnations from temporary moratorium on economic development takings); OH. REV. CODE ANN. § 303.26(E) (West 2006) (defining blight to include "deterioration" of structures or where the site "substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[13] *See* S.B. 7, 79th Leg., 2nd Sess. (Tex. 2005) (enacted Sept. 1, 2005) (exempting "blight" condemnations from the ban on economic development takings); TEX. LOC. GOV'T CODE ANN. § 374 (Vernon 2006) (defining a "blighted area" as one that "because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare . . . or results in an economic or social liability to the municipality").

[14] *See* S.B. 246, 2005–06 Leg., Reg. Sess. (Vt. 2006) (exempting blight condemnations from ban on economic development takings, and defining blight to include any planning or layout condition that "substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[15] *See* H.B. 4048, 77th Leg., Reg. Sess. (W. Va. 2006) (enacted Apr. 2006) (exempting blight condemnation from the ban and defining blight to include an area that, for any number of factors such as deterioration or inadequate street layout, "substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare").

[16] For a discussion of blight exemptions in these states, see Somin, *supra* note 5, at 18–22.

[17] *Id.* at 21–22.

[18] *Id.* at 26–28.

State courts have, for decades, interpreted similar definitions of blight to allow the condemnation of nearly any property a local government seeks to acquire. For example, recent state appellate court decisions have held that Times Square in New York City[19] and downtown Las Vegas[20] are "blighted," thereby justifying condemnations undertaken to acquire land for a new headquarters for the *New York Times* and parking lots for a consortium of local casinos respectively. If these areas can be considered blighted, so too could virtually any others. Sixteen states, however, have enacted post-*Kelo* reform laws that do provide substantial protection for property owners relative to that which existed previously—nine by legislation, four by referendum initiative, and three by both of these means.[21] Many of these jurisdictions, however, have banned blight condemnations as well as "economic development" takings, thereby contradicting Professor Dana's argument that Post-*Kelo* reform has ignored the needs of poor people who live in blighted areas.

The state of Florida has banned blight condemnations and economic development takings in its unusually strong post-*Kelo* reform law,[22] despite its extensive past use of blight condemnations. Referendum initiatives in Nevada and North Dakota similarly ban blight condemnation completely.[23] South Dakota's post-*Kelo* reform law continues to permit blight condemnations, but greatly reduces the political incentive to engage in them by forbidding the transfer of condemned property to private parties.[24] This rule prevents the use of blight condemnations to transfer property to politically influential interest groups, eliminating one of the main political incentives for undertaking them in the first place. Kansas's new law, meanwhile, limits its blight condemnations to cases where the property in question is "unsafe for occupation by humans under the building codes."[25] And as we have seen, the Utah reform law enacted a few months before *Kelo* also banned blight condemnations.

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[19] *See In re* W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

[20] *See* City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12–15 (Nev. 2003).

[21] *See* Somin, *supra* note 5, at 10–14.

[22] *See* H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006) (enacted May 11, 2006).

[23] *See* Nev. Ballot Question 2 (enacted Nov. 7, 2006 as NEV. CONST. art. 1, § 22 §§ 1) (forbidding the "direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party"); N.D. Measure 2 (enacted Nov. 7, 2006 as N.D. CONST. art. I, § 16) ("[P]ublic use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.").

[24] H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006) (signed into law Feb. 27, 2006). Professor Dana claims that South Dakota's law doesn't address blight condemnations "at all." Dana, *supra* note 1, at 375. However, private-to-private blight condemnations are surely covered by the law's general ban on private-to-private takings of any kind.

[25] S.B. 323, §§ 1–2, 2006 Leg., Reg. Sess. (Kan. 2006) (signed into law May 18, 2006).

In sum, of the seventeen states (counting Utah) that have recently enacted eminent domain reform laws with real teeth of any kind, six have either abolished blight condemnations or come close to doing so. Of the remaining eleven states, most do indeed protect middle and upper class neighborhoods by defining blight narrowly.[26] However, two of these states—Minnesota and Pennsylvania—also provide only very limited protection even to middle class neighborhoods because their bans on economic development takings exempt the major urban areas (Philadelphia, Pittsburgh, and the Twin Cities) where most of those states' condemnations take place.[27]

Overall, only nine of the thirty-six states that have enacted reform legislation in the wake of *Kelo* or, in the case of Utah, immediately before it, seem to even roughly fit the predictions of Professor Dana's thesis that post-*Kelo* reform protects the middle class and the wealthy without protecting the poor. The states in this category include Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Michigan, Oregon, and New Hampshire.[28] The remaining new laws either protect both groups more or less equally or provide no meaningful protection to anyone.

This pattern—combined with the broad "blight" exceptions in many of the post-*Kelo* laws—partially undermines Professor Dana's claims that post-*Kelo* reform protects the wealthy and the middle class at the expense of the poor. On the other hand, it is important to recognize—as I and other scholars have contended in earlier work—that both blight and economic development condemnations do, in practice, victimize the poor disproportionately.[29] This is a serious problem, and one that requires greater scholarly, judicial, and legislative attention. However, post-*Kelo* reform has not noticeably exacerbated the problem, and in those states that have abolished or substantially curbed blight condemnations, reform may well help to alleviate it.

II. ARE REFORM LAWS THAT STILL PERMIT BLIGHT CONDEMNATIONS BAD FOR THE POOR?

Given that nine states have indeed enacted post-*Kelo* reform laws that fit the pattern outlined by Professor Dana, it is still important to ask whether such laws do in fact harm the poor for the benefit of the relatively affluent, as he contends. Moreover, eleven state supreme courts have banned economic development takings under their state constitutions (including two since *Kelo*), and none of them have so far also banned blight condemna-

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[26] *See* Somin, *supra* note 5, at 28–33 (discussing these laws in detail).

[27] *Id.* at 27–30.

[28] *Id.* at 26–29.

[29] *See, e.g.*, Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183 (2007); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

tions.[30] While I agree with Professor Dana's view that the impact of eminent domain on the poor deserves greater consideration than it has so far ceived, I am not persuaded that post-*Kelo* reforms banning economic development takings while narrowing the definition of blight are worse than the pre-*Kelo* status quo. Such laws can provide valuable, even if still inadequate, protection to the poor. And even if these reforms fail to help the poor, they are unlikely to inflict additional harm on them.

It is important to recognize that even condemnations in "nonblighted" areas are likely to disproportionately victimize the relatively poor. For example, the notorious 1981 *Poletown* takings in Detroit displaced some 4000 mostly working class residents of a Detroit neighborhood so that General Motors could build a new factory to promote "economic development."[31] Reform statutes that ban economic development takings while simulta-

[30] The eleven states are Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington. *See* City of Little Rock v. Raines, 411 S.W.2d 486, 494–95 (Ark. 1967) (private economic development project not a public use); Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9–11 (Ill. 2002) (holding that a "contribu[tion] to positive economic growth in the region" is not a public use justifying condemnation), *cert. denied*, 537 U.S. 880 (2002); City of Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory.") (citation omitted); Opinion of the Justices, 131 A.2d 904, 906 (Me. 1957) (holding that private "industrial development" to enhance economy is not a public use); County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown* and holding that economic development takings are unconstitutional); City of Bozeman v. Vaniman, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); City of Norwood v. Horney, 853 N.E.2d 1115, 1141–42 (Ohio 2006) (following *Hathcock* in holding that "economic benefit" alone does not justify condemnation); Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 642 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma Constitution); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial "projected economic benefit" cannot justify condemnation); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down a taking justified only by economic development because such condemnations do not ensure "that the public has an enforceable right to a definite and fixed use of the property" (quoting 29 C.J.S. *Eminent Domain* § 31)); *In re* City of Seattle, 638 P.2d 549, 556–57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping as not for a public use); Hogue v. Port of Seattle, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property where government sought to "devote it to what it considers a higher and better economic use"). In some of these states, the wording of the state constitution restricts private-to-private condemnations much more explicitly than does the Federal Takings Clause. *See, e.g.*, *Muskogee*, 136 P.3d at 651–52 (discussing differences between the wording of the Oklahoma Constitution and that of the Fifth Amendment and using the distinction as justification for interpreting the state takings clause in a way contrary to the U.S. Supreme Court's interpretation of the Federal Takings Clause in *Kelo*). The *Norwood* case did, however, suggest that some blight condemnations would violate the state constitution. *See* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42 (discussing this aspect of *Norwood*).

[31] *See* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1011–16. The Poletown condemnations were upheld in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by Hathcock*, 684 N.W.2d at 765.

neously narrowing the definition of blight could well prevent future *Poletowns*. This is a valuable achievement, even if it still fails to protect poor people living in truly "blighted" areas.

Perhaps, however, such tangible benefits for the poor might be outweighed by the "expressive" harms emphasized by Professor Dana.[32] It is theoretically possible that the poor feel so stigmatized by the supposed "message" that their households are "fundamentally unequal in importance" to middle class homes that they might be willing to forego the tangible legal protection provided by post-*Kelo* reforms that ban economic development takings but do not completely abolish blight condemnations.[33]

We cannot know for sure whether the poor feel this way. However, survey evidence suggests that most do not. Professor Dana notes that "poor people subject to blight condemnation differ from the middle-class people subject to economic development condemnation in two important respects: they are more often renters than home owners, and they have less income and wealth."[34] Strikingly, however, neither of these important dividing lines is a strong predictor of public opinion on economic development takings. Rich and poor and renters and homeowners all oppose them by lopsided margins. Table 2 shows that all of these groups also support laws banning condemnations for private development.

While survey evidence may not be a good indication of the physical and economic effects of condemnation on the poor, they provide an important window on the "expressive" and dignitary harms emphasized by Professor Dana. If the poor themselves oppose *Kelo* and support laws banning economic development takings, that suggests that any such harms are either nonexistent or so minor as to be imperceptible to their supposed victims.

As Table 1 demonstrates, the November 2005 Saint Index survey of public opinion on *Kelo* shows that strong opposition to the decision cuts across class lines.[35] Seventy percent of respondents from households earning under $10,000 per year expressed opposition, and 80% from those earning $10,000 to $24,999. This is only slightly lower than the 89% opposition expressed by middle income households earning $35,000 to $49,999 (the highest rate for any income group), and actually higher than

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[32] Dana, *supra* note 1, at 380–81.

[33] *Id.* at 381.

[34] *Id.* at 380.

[35] Center for Economic and Civic Opinion at University of Massachusetts/Lowell, The Saint Index Poll, Oct.–Nov. 2005 [hereinafter Saint Index] (unpublished survey, on file with author). Question wording: "The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?" *Id.*

that expressed by the very wealthiest category (those earning over $150,000), of whom "only" 68% opposed *Kelo*.[36]

The Saint Index survey question asked respondents whether they supported the Supreme Court ruling holding that "local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public."[37] Significantly, it refers only to "economic development" condemnations and does not mention blight.

The same survey also shows that renters oppose *Kelo* almost as strongly as homeowners, thus casting doubt on Professor Dana's suggestion that post-*Kelo* reform inflicts dignitary harms on the former for the benefit of the latter.[38] The *Kelo* decision was opposed by 83% of homeowners and 70% of renters, including 54% of the latter who opposed the decision "strongly."[39] While the percentage of renters opposing economic development takings was smaller than that of homeowners, it was still a lopsided 70% to 28% margin.[40]

Table 1: Public Opinion on Kelo *by Household Income*[41]

HOUSEHOLD INCOME	*VIEWS ON* KELO	
	% Agree with Decision	% Disagree ("Strongly Disagree")
Under $10,000	25	70 (58)
$10,000–$24,999	20	80 (61)
$25,000–$34,999	18	80 (62)
$35,000–$49,999	11	89 (68)
$50,000–$74,999	15	85 (67)
$75,000–$150,000	25	73 (57)

[36] One might expect this group to be the least opposed to economic development takings because it is highly unusual for property belonging to the wealthy to be condemned for transfer to other private parties.

[37] Saint Index, *supra* note 35.

[38] Dana, *supra* note 1, at 380–81.

[39] Saint Index, *supra* note 35.

[40] *Id.*

[41] Saint Index, *supra* note 35. Question wording: "The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?" *Id.*

Over $150,000	32	68 (48)
Total	18	81 (63)

Table 2 provides direct evidence of popular support for state reform laws that ban condemnation of property for transfer to private developers—the sorts of takings at issue in *Kelo*.[42] Here too, survey respondents in all income categories supported post-*Kelo* reform by lopsided—and roughly equal—margins. Although the very poorest respondents supported reform laws by the smallest margin of any income group—62% to 28%—supporters still outnumbered opponents by more than two to one in that income class. And the highest rate of support from any income group was that recorded in the second-lowest category, households earning between $10,000 and $24,999 per year. This group of relatively poor respondents supported the enactment of laws banning condemnation of property for "private development" by an overwhelming 76% to 19% margin. The 2006 Saint Index survey does provide modest support for Professor Dana's claim that renters' interests differ from those of homeowners. Only 48% of renters supported reform laws in the survey, compared to 31% who were opposed.[43] By contrast, 78% of homeowners supported banning takings for "private development," with only 21% opposed.[44] Even among renters, however, supporters of banning takings for private development outnumbered opponents by roughly a three to two margin.

*Table 2: Public Opinion on Post-*Kelo *Reform by Household Income*[45]

HOUSEHOLD INCOME	*VIEW ON POST-*KELO *REFORM*	
	% SUPPORT ("STRONGLY SUPPORT")	% OPPOSE ("STRONGLY OPPOSE")
Under $10,000	62 (36)	28 (13)

[42] The wording of this survey is a bit unfortunate because it speaks of banning condemnations for "private development," whereas the standard rationale for *Kelo*-style condemnations is that they benefit the general public, not just "private" interests. However, such differences in wording seem to have only a minor impact on survey respondents' expressed attitudes to economic development takings. For more detailed discussion, see Somin, *supra* note 5, at 6–7 & n.34.

[43] Center for Economic and Civic Opinion at University of Massachusetts/Lowell, The Saint Index Poll, Sept.–Oct. 2006 (unpublished survey, on file with author).

[44] *Id.*

[45] *Id.* Question wording: "Some states are considering enacting laws that will stop state and local governments from taking private property for private development projects. Would you . . . [Strongly Support, Support, Oppose, Strongly Oppose, or don't know] such laws?" *Id.*

HOUSEHOLD INCOME	*VIEW ON POST-*KELO *REFORM*	
	% SUPPORT ("STRONGLY SUPPORT")	% OPPOSE ("STRONGLY OPPOSE")
$10,000–$24,999	76 (48)	19 (8)
$25,000–$34,999	65 (40)	29 (15)
$35,000–$49,999	75 (44)	21 (8)
$50,000–$74,999	69 (39)	23 (10)
$75,000–$150,000	73 (49)	23 (9)
Over $150,000[46]	N/A	N/A
Total	71 (43)	23 (10)

I am also skeptical of Professor Dana's assumption that most of the non-poor voters who support post-*Kelo* reforms banning economic development takings, but not blight takings, do so because they believe that "staying in your home only really matters if you are a middle-class person in a middle-class home."[47] It is possible that some voters hold this view. However, many others might believe that blight condemnations actually help the poor by "cleaning up" their neighborhoods. This was part of the historic rationale for blight condemnations, as Professor Dana admits.[48]

He emphasizes—and I emphatically agree—that real-world blight condemnations frequently harm the poor, often benefiting wealthy or middle class interests at their expense.[49] However, given widespread public ignorance about takings policy—ignorance so great that most people did not realize that *Kelo* made little change to existing legal doctrine and that economic development takings were widespread before that decision[50]—it is quite possible that most middle class and affluent voters were simply unaware of this record. In the same way, they seem to have been unaware of the fact that most states—especially prior to the post-*Kelo* reforms—defined blight so broadly that even middle class homes could easily be condemned on that

[46] Only two respondents were recorded in this category.

[47] Dana, *supra* note 1, at 380.

[48] *Id.* at 370; *see also* Pritchett, *supra* note 29, at 14–43 (describing the history of this rationale).

[49] Dana, *supra* note 1, at 381–82.

[50] *See* Somin, *supra* note 5, at 37–43 (discussing political ignorance about eminent domain policy and its role in the *Kelo* backlash in great detail).

basis.[51] Indeed, it may be that large numbers of voters who support various types of post-*Kelo* reform are completely unaware of the existence of blight condemnations, just as the majority of citizens are sometimes unaware of the existence of other important government policies.[52]

Had they been aware of the true effects of many blight condemnations, it is far from clear that most voters would have approved of them. A poll of 800 New Jersey residents taken in the fall of 2006 found that 86% disapproved of "[t]ak[ing] low value homes from people in order to build higher value homes," while only 7% supported such condemnations.[53] Many blight condemnations, of course, do exactly that.[54] Unless New Jersey opinion is highly unrepresentative of the rest of the country, it seems likely that ignorance, not contempt for the poor, accounts for the public's indifference to blight condemnations.

By the same token, it is possible that many of the low income survey respondents who support a ban on economic development takings also do so out of ignorance, perhaps not realizing that it will not protect them against blight condemnations. This is less likely, however, since large numbers of poor people have personal experience with blight takings, either because they themselves have been displaced by them or because they may know other people who have.[55] By contrast, very few middle class or wealthy voters are likely to have had comparable experiences.

Finally, it is worth noting that even a knowledgeable and sophisticated voter might have rational reasons for supporting a ban on economic development takings, while letting government retain the power to condemn at least some "blighted" areas, narrowly defined. As I have argued in great detail in a recent article, market mechanisms can, in most cases, accomplish the goals of economic development takings without the need for eminent domain.[56] By contrast, private sector elimination of blight may sometimes be stymied by collective action problems requiring government intervention to overcome.[57] My own view is that a ban on blight condemnations is prob-

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[51] *Id.* at 38–39.

[52] For example, a 2003 survey showed that 70% of respondents were unaware of the passage of President Bush's massive prescription drug bill, the largest new government program in almost forty years. *See* Ilya Somin, *Political Ignorance is No Bliss*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, at 6 tbl.1. This paper also gives many similar examples of widespread ignorance about major policy issues.

[53] Janice Nadler et al., *Government Takings of Private Property:* Kelo *and the Perfect Storm, in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 23 tbl.4 (Nathan Persily et al. eds., forthcoming 2007), *available at* http://ssrn.com/abstract=962170.

[54] *See* Somin, *supra* note 29, at 267–70.

[55] Since World War II, some 3.6 million mostly poor Americans have been displaced by "urban renewal" condemnations alone. *Id.* at 269.

[56] *Id.* at 204–10.

[57] *Id.* at 270.

ably desirable, even in spite of such concerns. Other specialists surely disagree, however.

In the absence of survey data directly addressing the issue, it is impossible to definitively determine whether Professor Dana's claim that voters are motivated by disdain for the interests of the poor is correct. I suspect that a significant number of voters may indeed see the issue as he conjectures. But most probably do not. At this point, however, I emphasize only that his is only one of several possible explanations for the laws he describes and that there are competing explanations supported by at least some substantial evidence.

Finally, even if Professor Dana is right about voters' motivations, the motives for enacting a law are less important than its effects. As explained above, a ban on economic development takings combined with a restrictive definition of blight can provide real benefits to the poor even if middle class voters do not intend such a result.

CONCLUSION

Twenty-seven of the thirty-six state reform laws enacted since 2005 do not reflect the combination of forbidding economic development condemnations while permitting "blight" condemnations only in poor areas that Professor Dana decries. Most either ban both blight and economic development takings or define "blight" so broadly that even middle class homes could be condemned.

To the extent that some reform laws do fit the Dana pattern, it is far from clear that they are worse than the pre-*Kelo* status quo. A ban on economic development takings provides at least some valuable protection for the poor, even if incomplete. At the same time, there is little evidence that it inflicts any "expressive harms" on them.

The available evidence suggests that most of the poor either do not perceive a ban on economic development takings as an expressive harm, or at least do not believe that this harm outweighs the benefits of a ban. It is also far from clear that those middle class and wealthy voters who continue to support "blight condemnations" do so because of an invidious belief that the poor are less worthy of protection. Outside observers should therefore be cautious about inferring the existence of expressive harms unless and until we have firm evidence that they are real and that their magnitude is significant enough to outweigh the benefits—including the benefits to the poor—of a ban on economic development takings. Like most other legislation, post-*Kelo* reform laws should be judged by their effects, not by the intentions of their supporters.

CITY JOURNAL

John K. Ross, Dick Carpenter

Robin Hood in Reverse

New York's eminent domain policies rob the vulnerable to reward the powerful.

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In November, New York's Court of Appeals, the state's highest court, upheld the use of eminent domain to take homes and small businesses to make way for wealthy developer Bruce Ratner's so-called "Atlantic Yards" development: 16 mammoth skyscrapers centered around a basketball arena. The court accepted the Empire State Development Corporation's contention that the area was "blighted"—based on a study that Ratner paid for himself and which wasn't even initiated until years after the project was announced.

The court didn't go so far as to embrace the reasoning of the U.S. Supreme Court's infamous 2005 ruling in *Kelo* v. *City of New London*, which allows governments to condemn property for economic-development reasons alone, regardless of whether the property is blighted. And just a few weeks later, a lower court rejected a similar attempt to condemn "blighted" properties in West Harlem on behalf of Columbia University, which was seeking to obtain a 17-acre site for expansion. But this limitation offers little comfort to property owners in New York State, which remains the nation's worst abuser of eminent domain. Thousands of properties remain at risk for condemnation under the absurdly lax blight standards given a green light by the state's highest court.

In her *Kelo* dissent, former Supreme Court Justice Sandra Day O'Connor predicted that "the fallout from this decision will not be random . . . the government now has license to transfer property from those with fewer resources to those with more." In a separate dissent, citing the legacy of urban renewal, Justice Clarence Thomas wrote that "losses [from eminent domain] will fall disproportionately on poor communities."

In 2007, we tested that hypothesis. Using census data, we constructed a demographic profile of residents from 112 cities in 26 states, including New York, living in project areas where eminent domain had been used or threatened. As we reported in the journal *Urban Studies*, when compared with residents of communities surrounding the project areas, those living under the cloud of condemnation were significantly more likely to be poor, minority, and less educated.

We recently conducted a similar analysis of 11 locations in the New York metropolitan area (New York City and Long Island) under threat of condemnation as "blighted" or "urban renewal" areas, and thus subject to eminent domain for private development under the court's ruling. The project areas are in Brooklyn (Atlantic Yards), West Harlem-Manhattanville (the area targeted by Columbia University), Jamaica (Queens), Baldwin and New Cassel (Nassau County, Long Island), and East Harlem—itself home to six urban renewal areas. We found that eminent-domain abuse in New York disproportionately affects ethnic and racial minorities and those less well-off and less educated. The 11 project areas we studied where eminent domain is authorized have a greater percentage of minority residents (92 percent) compared with the counties in which they're located (57 percent).

This disparity is far more pronounced in New York than in our national sample, where 58 percent of project-area residents are minorities, compared with 45 percent in surrounding communities.

Median incomes in New York project areas are considerably less ($21,323.32) than in surrounding areas ($29,880.25). Residents of project areas are more likely to be impoverished (28 percent) than in surrounding communities (17 percent). Forty percent of project-area residents do not have high school diplomas, compared to just 24 percent outside of the project areas. Project-area residents are also far more likely to rent their homes or apartments (87 percent) than residents of surrounding areas (62 percent), and the project areas themselves are more likely to be home to children (28 percent) than surrounding communities (23 percent).

Taken together, the data reveal that especially in New York City, eminent domain falls more heavily on the less affluent—exactly as O'Connor and Thomas predicted it would. Of course, these results do not suggest that local authorities intentionally target these communities for removal. Nonetheless, the data show that local governments wield condemnation against those least equipped to defend their homes and businesses. In effect, New York's Court of Appeals has endorsed Robin Hood in reverse, taking from the poor to give to the rich.

Following *Kelo*, 43 states passed reforms to rein in eminent domain abuse. New York did not. In 2009, legislators in Albany introduced dozens of bills, ranging from strong reforms such as forbidding condemnation for private projects to superficial remedies like requiring another round of hearings, an additional vote on projects, and the creation of a "comprehensive redevelopment plan" prior to condemnation. As in every legislative session since *Kelo*, bills languished in committee.

The Court of Appeals ruling should be a clarion call to state legislators that they cannot avoid the issue any longer. The court's deference to blight designations, and the punitive nature of eminent-domain abuse, suggest that mere procedural reforms will not suffice. To protect New York property owners, eminent domain for private development must be brought to an end.

Dick Carpenter is director of strategic research and John K. Ross is research associate at the Institute for Justice.

Battle over Eminent Domain is Another Civil Rights Issue

by David Beito and Ilya Somin

David T. Beito is chairman of the Alabama State Advisory Committee of the U.S. Commission on Civil Rights. Ilya Somin is an adjunct scholar at the Cato Institute.

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Few policies have done more to destroy community and opportunity for minorities than eminent domain. Some 3 to 4 million Americans, most of them ethnic minorities, have been forcibly displaced from their homes as a result of urban renewal takings since World War II.

The fact is that eminent-domain abuse is a crucial constitutional rights issue. On Tuesday, the Alabama Advisory Committee of the U.S. Commission on Civil Rights will hold a public forum at Birmingham's historic Sixteenth Street Baptist church to address ongoing property seizures in the state. The church was not only a center of early civil rights action, but also, tragically, where four schoolgirls lost their lives in a bombing in 1963.

Current eminent domain horror stories in the South and elsewhere are not hard to find. At this writing, for example, the city of Clarksville, Tenn., is giving itself authority to seize more than 1,000 homes, businesses and churches and then resell much of the land to developers. Many who reside there are black, live on fixed incomes, and own well-maintained Victorian homes.

Eminent domain has always had an outsized impact on the constitutional rights of minorities, but most of the public didn't notice until the U.S. Supreme Court's 2005 ruling in *Kelo v. City of New London*. In *Kelo*, the Court endorsed the power of a local government to forcibly transfer private property to commercial interests for the purpose of "economic development."

The Fifth Amendment requires that such seizures be for a "public use," but that requirement can be satisfied, the Court ruled, by virtually any claim of some sort of public benefit. Many charge that *Kelo* gives governments a blank check to redistribute land from the poor and middle class to the wealthy.

Few protested the *Kelo* ruling more ardently than the National Association for the Advancement of Colored People. In an amicus brief filed in the case, it argued that "[t]he burden of eminent domain has and will continue to fall disproportionately upon racial and ethnic minorities, the elderly, and economically disadvantaged." Unfettered eminent domain authority, the NAACP concluded, is a "license for government to coerce individuals on behalf of society's strongest interests."

Some earlier civil rights champions, by contrast, often ignored, or worse helped to undermine, the rights of property owners. Ironically, the same U.S. Supreme Court which handed down *Brown v. Board* in 1954 also issued *Berman v. Parker*, in which the Court allowed the District of Columbia to forcibly expel some 5,000 low-income African-Americans from their homes in order to facilitate "urban renewal." It was *Berman* that enabled the massive urban renewal condemnations of later decades, which many critics dubbed "Negro removal" because they too tended to target African-Americans.

Four years ago, the city of Alabaster, Ala., used "blight" as a pretext to take 400 acres of rural property, much of it owned by low-income black people, for a new Wal-Mart. Many of the residents had lived there for generations, and two other Wal-Mart stores were located less than fifteen miles away. Several of the landowners, particularly those who lacked political clout and legal aid, ended up selling out at a discount.

In the three years since *Kelo*, 42 states, including Alabama, have enacted new laws limiting eminent domain power, but many of the new laws contain loopholes that make them easy to circumvent. Some 19 states have forbidden takings for "economic development" but continue to permit the exact same kinds of condemnations under the guise of alleviating "blight" — a concept defined so broadly that virtually any property the government covets can be declared "blighted." If takings end up becoming a key constitutional rights issue for minorities in the 21st century, it will be fitting that the crusade against them begins in Alabama, where their victims have suffered most greatly. And there are few better places to kick off the debate than the Sixteenth Street Baptist Church, where the modern civil rights movement was born.

[Ilya Somin, April 27, 2009 at 5:40pm] Trackbacks
David Beito on Eminent Domain Abuse in Alabama:

Historian David Beito, chair of the Alabama State Advisory Committee of the U.S. Commission on Civil Rights, has a good op ed on eminent domain abuse in Alabama. Last year, Beito and I coauthored an op ed on the negative impact of takings on minorities and the poor.

The interesting thing about the cases discussed in Beito's current op ed is that Alabama actually enacted one of the nations' strongest post-Kelo eminent domain reform laws; after passing largely toothless reform legislation in 2005, the state legislature went back and enacted a much stronger reform in 2006. The 2006 law forbids condemnations for "economic development" and also limits "blight" condemnations, such that only genuinely dangerous or seriously dilapidated properties can be condemned under that rubric. I discuss the Alabama reform law in this article, along with those passed by other states (the majority of which are ineffective).

Some of the abusive condemnations Beito describes were initiated under "redevelopment" projects that were already in place at the time the 2006 post-Kelo law was enacted. The law is not retroactive, and so it allowed those projects to go forward and continue to condemn property under the old, very broad, definition of "blight." This case, however, appears to be more recent:

> What is happening in the cradle of the modern civil rights movement? Jimmy McCall would like to know. 'It was more my dream house,' he laments, 'and the city tore it down ... It reminds me of how they used to mistreat black people in the Old South.' In 1955, Rosa Parks took on the whole system of Jim Crow by refusing to give up her seat on a segregated Montgomery bus. Today, McCall is waging a lonely battle against the same city government for another civil right: the freedom to build a home on his own land.
>
> Though McCall's ambitions are modest, he is exceptionally determined. For years, he has scraped together a living by salvaging rare materials from historic homes and then selling them to private builders. Sometimes months went by before he had a client. Finally, he had put aside enough to purchase two acres in Montgomery and started to build. . .
>
> McCall only earns enough money to build in incremental stages, but eventually his dream home took shape. According to a news story by Benjamin Solomon, the structure had 'the high slanted ceilings, the exposed beams of dark, antique wood. It looks like a charming, spacious home in the making.'
>
> But from the outset, the city showed unremitting hostility. He has almost lost count of the roadblocks it threw up including a citation for keeping the necessary building materials on his own land during the construction process.
>
> More seriously, he was charged under the state blight law, which allows a municipality to designate a building as a 'public nuisance' and then demolish it. Critics have accurately called this 'eminent domain through the back door' and warn that opportunities for abuse are almost limitless. In contrast to the standard eminent domain process, for example, property owners do not have any right to compensation, even in theory.. . .

> Unlike countless others in similar straits, McCall fought back and hired an experienced local lawyer. In the middle of last year, he negotiated a court-enforced agreement, which gave him 18 months to complete the home. Only a month after the agreement took effect, the city demolished the structure. Local bureaucrats, obviously in a hurry to tear it down, did not even give him notice. The bulldozers came in the same day as the court order that authorized them.
>
> McCall appealed to the same judge who had allowed the demolition. Saying that she had been misled, the judge ordered the city to pay compensation. Montgomery has appealed and at this writing McCall has not received a cent. McCall thinks that the city intends to drag it out until his money runs out. 'I've got a lot of fight left in me, and all I want is justice,' he states.

The 2006 reform law allows local governments to condemn property that creates a "public nuisance." However, it is doubtful whether McCall's house would qualify as such. Under the Alabama Code, a "nuisance" is defined as "anything that works hurt, inconvenience or damage to another." It is possible to interpret this so broadly as to include the "inconvenience" McCall caused to the developers who apparently coveted his land. However, this would render almost any use of land a "nuisance" so long as someone else wants the property for a different purpose. In any event, Alabama law also states that "[a] public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals." It is difficult to believe that McCall's house somehow "damages all persons who come within the sphere of its operation." At most, it is a private nuisance to "one or a few individuals" who might wish to use the property for other purposes - and even that claim would be a stretch. But Alabama law does not permit the government to condemn property merely because there is a private nuisance there.

It's possible, of course, that there are some relevant other facts here that are as yet unknown to me. But the available evidence suggests that Montgomery's effort to take McCall's property violates state law. Unfortunately, the complex and difficult nature of the eminent domain process sometimes makes it hard for owners to resist even illegal takings.

Beito and McCall emphasize that, as in the past, takings disproportionately victimize lower-income African-Americans. Unlike in the 1950s and 60s, today such condemnations are rarely motivated by racism as such. Rather, low-income blacks are often targeted because of their political weakness. Local governments and politically connected developers know that they often lack the resources and influence to put up a fight. For this reason, as the NAACP explained in its amicus brief in *Kelo*, "[t]he burden of eminent domain has and will continue to fall disproportionately upon racial and ethnic minorities, the elderly, and economically disadvantaged."

josh bornstein (mail) (www): (link)
Thanks for the post. These are the sort of fact patterns that enrage just about everyone--regardless of political affiliations. I hope that, as time goes by, you'll be able to keep us updated.

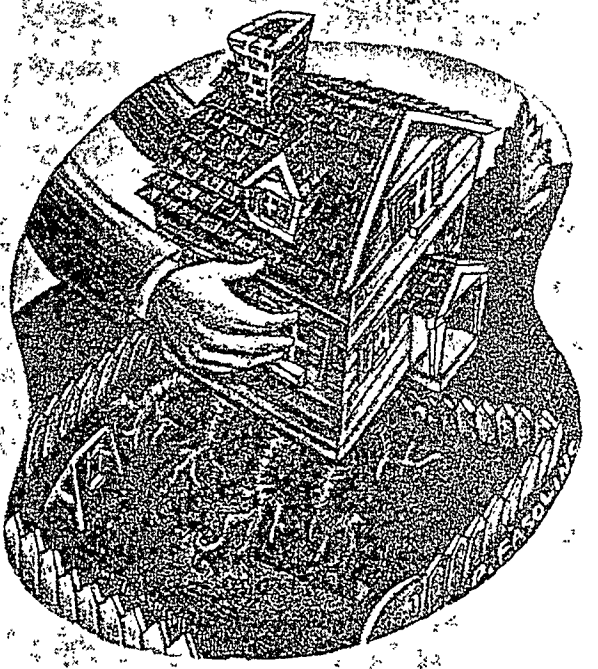
Just infuriating.
4.27.2009 6:00pm
Stephen Gordon (mail) (www): (link)
One of the issues is that there is no real law in Alabama regarding the harassment or intimidation of people by government or private agencies. Next year, we hope to put a law on the books outlawing these practices.

PERSPECTIVES
on Eminent Domain Abuse

Volume I

Eminent Domain & African Americans

What is the Price of the Commons?



by Mindy Thompson Fullilove, MD

Perspectives on Eminent Domain Abuse **is a series of independently authored reports published by the Institute for Justice**

Eminent Domain & African Americans

What is the Price of the Commons?

Mindy Thompson Fullilove, M.D.

Black people were uprooted from Africa and forced into slavery in the Americas. This disruption started a chain of destabilizing events that includes the slave trade within the Americas, the resettlement after emancipation, the institution of segregation, the Great Migration, redlining, the Second Great Migration, urban renewal under the Federal Housing Act of 1949 between that year and 1973, catastrophic disinvestment, federal demolition of public housing under the HOPE VI program, and gentrification.[1] Through all these upheavals, legalized "takings"—first of the person, to make him or her a slave, and more recently of houses, to get people's land—have threatened African Americans' lives, homes, and family. For the past 50 years, the government's use of eminent domain—its power to take land for "public use"—has been an important part of this story of repetitive forced displacement. And an important part of the story of eminent domain has been the story of the loss of neighborhood: the urban commons.

Taking land—in one way or another—is probably as old as human history, but using the law to legitimate the seizure of land is of more recent origin. It has important roots in the enclosure acts in England. These were special laws, passed in the House of Lords between 1600 and 1850, that allowed rich people to claim land that had been held in common by all the residents of an area or was owned by small landowners.[2]

In fact, many of the revolutionaries who founded the United States had lived through or knew about the excesses of English law that permitted the enclosures in England. They were aware that land was taken for purposes of economic development that profited the well-to-do. They were also aware that the loss of shared common lands—woods, fields, and marshes that provided grazing for livestock, firewood, and wild foods—had a devastating effect on the survival of the poor. Perhaps to protect against the excesses of English law, the framers wrote in the Fifth Amendment to the United States Constitution that "...private property [shall not] be taken for public use, without just compensation."

This amendment offered important protection for individual landowners. However, as experience

has shown—particularly in the last 50 years—some landowners received more protection than others and assets held in common received no protection at all. Both of these shortcomings play an important part in the story of African American dispossession in the 20th century. The specific example to be examined in this paper is the Federal Housing Act of 1949. Under that act, which was in force between 1949 and 1973, cities were authorized to use the power of eminent domain to clear "blighted neighborhoods" for "higher uses." In 24 years, 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African American.[3]

In 24 years, 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African American.

African Americans—then 12% of the people in the U.S.—were five times more likely to be displaced than they should have been given their numbers in the population. Given that African Americans were confined because of their race to ghetto neighborhoods, it is reasonable to assume that more than 1,600 projects—two-thirds of the total—were directed at African American neighborhoods.[4] Within these neighborhoods there existed social, political, cultural, and economic networks that functioned for both individual and common good. These networks were the "commons" of the residents, a system of complex relationships, shared activities, and common goals.

In order to get an understanding of what the loss of the commons meant, I decided to talk to people who had lived through the experience. My research group, the Community Research Group, with funding from a Robert Wood Johnson Health Policy Investigator Award, undertook a study of the long-term consequences of urban renewal in five American cities: Newark, New Jersey; Roanoke, Virginia; Pittsburgh, Pennsylvania; St. Louis, Missouri; and San Francisco, California.[5] We interviewed people who had been displaced, planners and politicians who organized urban renewal, and advocates and historians who had watched the process. We also visited the sites, spent time in local archives, collected photographs and maps, and read newspaper accounts. We read the extensive literature, largely created in the 1950s and 1960s, that examined urban renewal as it was going forward. We also spent time with two people—one in Newark and one in Philadelphia—who toured their cities with us, took us to their homes, and otherwise helped us become immersed in the story of urban renewal.[6]

One of those people was David Jenkins, who lost his home in Philadelphia's Elmwood neighborhood. David often used the phrase, "The government came and took our land," to describe his bitter experience with eminent domain during one of Philadelphia's largest urban renewal projects in the 1950s. His lingering anger resulted from a long list of losses he experienced: home; neighbors and neighborhood; family stability; support for his aspirations; security; and the joys of nature. This heavy burden created a deep grief that had eased but was not erased in the nearly 50 years since those events transpired.

David's house

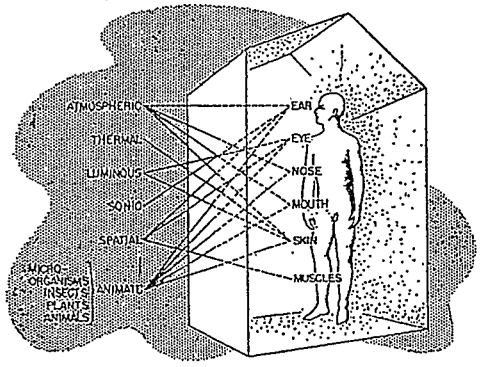
David's house was not grand or well-equipped, but his family—poor by many standards—owned the house and a nice piece of adjacent land. It is probable that the primitive septic system was used to justify the taking of the land in the eyes of the urban renewal authorities. In those days, less-than-perfect plumbing was a sure indicator of blight. Blight, in turn, was a "cancer" that needed to be cut out of the city in order for the city to survive.[7]

But the Jenkins family, like many other upwardly mobile families, was proud that they had gotten a toehold in the American city. Both of David's parents had migrated from the south, drawn to Philadelphia—and to the Elmwood neighborhood in particular—by abundant industrial jobs that offered unskilled workers a chance to make a decent living. Buying a home—

that crucial American dream—seemed a start in the right direction.

But a home is not just a symbol of social status. Rather, it is a splendid invention that gathers, protects, and situates the family. A home keeps the warmth in and the rain out, the predators at bay, and the loved ones close. James Marston Fitch, author of a beloved textbook on American architecture, noted that homes do many kinds of work for people, as he depicted in this drawing.[8] In many ways, we have family life because we have a home. Without a home it is difficult for the family to have dinner in the dining room or watch television together. Even a modest home like David's offers a family a center within which their collective life unfolds.

In 2006, looking back at a modest, working class house of the 1950s, people might wonder why a family would love such a structure. Current trends towards bigger and fancier houses make it seem that happiness depends on a large, comfortable home. While such a house can be fun for a family, large houses add what we might call "optional" features. What every family really needs is to have the "load"—as Fitch calls it—taken off, and the fundamentals satisfied.



Modern building acts as a selective filter which takes the load of the natural environments off man's body and thus frees his energies for social productivity.

Researchers from many disciplines have studied what homes mean to people. They have found that people come to love their homes and to feel connected to them. They miss their houses when they are away from them, and take great pleasure in returning to them. This connection, or attachment to home, is found among people all over the world. Even nomads are attached to the way they journey and to the tents or caravans that go with them. Some researchers have thought that the attachment to home comes from the very fact that a home "takes the load off."[9]

Of course, we must not forget the symbolic value of a home: people who can buy a house have made it in some small way in American society. Others look at them with respect for what they have accomplished. For David's parents—African Americans who had relatively little money—buying a home moved them into a new stratum in the small world of their Elmwood neighborhood.

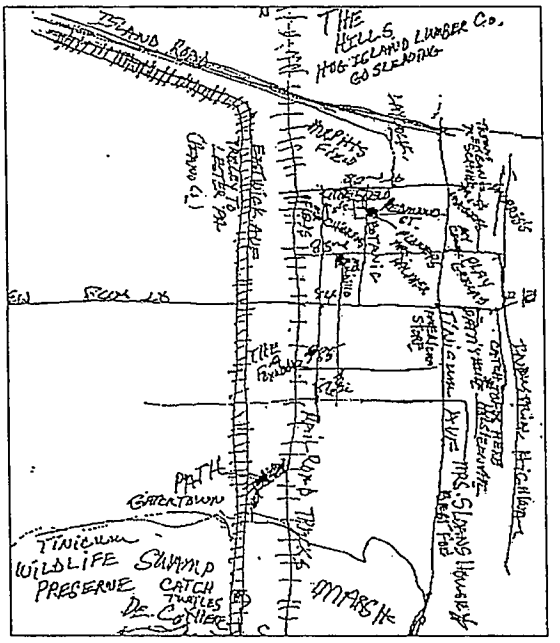
David's neighborhood

The magic of David's neighborhood is well illustrated by the handmade map he drew for me one day. Within the narrow domains of a boy's life—the area depicted is not one square mile—small notes highlight the richness of his neighborhood associations. He could catch turtles in the swamp, buy candy at Miss Maggie's store, sing gospel with Patti LaBelle in the Young Adult Choir at Beulah Baptist Church, or arrive in time for dinner at the home of any of the fine cooks who lived in the area. David's notes bring to life what it means to live in a neighborhood, partaking of the richness that it has to offer.

Parallel to the manner in which a home "takes the load off" the family, a neighborhood provides an even more extensive "external homeostatic system."[10] Just as a basic home is essential to survival, so too is a basic geographic niche, which in urban settings is provided

by the neighborhood within which people live or work. Within such a niche, human beings find the resources for survival, all of which are illustrated by understanding David's neighborhood.

Situated in a swamp at the edge of the city



David's map of his neighborhood.

and placed near noxious factories that were quietly poisoning the land, a mixed community of black and white working people had created a settlement. There they built churches, started stores, fought for schools and fire stations, dreamed of being connected to the city sewer lines, and organized themselves for all the activities of living.

This is no small feat for any group of people: it takes a lot of effort to create a functional community.[11] In David's neighborhood, one of the most important units of organization was the church. Within each house of worship, people were organized into many groups. At the same time, the churches were also connected to each other. The regular rhythms of going to prayer meetings and choir rehearsals ordered daily life so intimately that people knew when something had gone wrong, even without a word being spoken. Sister Mary's lateness or Brother John's lack of a tie were signals that could alert whole networks to the possibility of illness or marital discord. In such a tight-knit structure, people lost a bit of privacy, but they gained a superb support system that maximized their ability to navigate the trials and tribulations of daily life.[12]

What is the price of the commons?

Urban renewal's destruction of irreplaceable communities

There is a movie about the urban renewal project that took David's house.[13] In one scene, we see his older brother arguing with the authorities over the amount they have offered. "My mother has a lot of children," David's brother protested. His efforts to protect the family remind us to ask the question, "What is the cost of a priceless asset?"

For our interviewees, as for David's family, buying a home had been an important accomplishment, as had been developing a solid community. Both were assets that were paying rich dividends. The losses that accompanied urban renewal were manifold. On the following page, I present a table of the losses, with comments about each.

Displaced people that we interviewed as part of our five-city study emphasized that much of what they lost had to do not simply with the house, but with the larger "home" of their neighborhood. A neighborhood is more than just a collection of private properties, of course; it is a commons. African Americans dispossessed by urban renewal lost a commons: the ghetto neighborhoods that they had organized. Those neighborhoods—like David's—were able to provide social and economic support; they were a site for developing culture and political power; and they were launching pads for making it to first class American citizenship, something that has been denied to African

Americans since their first arrival on these shores in 1619.

Ejected from their homes, African Americans faced a very difficult struggle to find new places to live. Rigid policies of segregation made it impossible to live outside the demarcated ghetto areas, but the ghetto was shrinking in size, even as population was expanding.[14] It was often the case that housing prices were higher in the neighborhoods to which people were moving. Wherever they found themselves, the displaced families had to begin again, building a new community to replace the one they had lost. This challenge was extremely difficult. For example, a study of residents displaced from a Southwest neighborhood in D.C. found not only that former residents felt a deep sense of loss one year later, but also that 25% had not made a single friend after being forced from their old neighborhood.[15] Also, studies have shown that the tangible effects of forced dislocation include increased risk from stress-related diseases, such as depression and heart attack.[16]

Table of Losses:

Loss	An example*...
Unfair offer for old home	Mr. Caldwell Butler was a white lawyer who helped people displaced by urban renewal bring suit for just compensation. (p. 79).
Higher costs for new home	Mr. David Jenkins remembers that families were given $5,000 for homes that were taken in Elmwood, not enough to buy an equivalent home elsewhere in Philadelphia. (transcript)
Loss of sentimental value of home	Mr. Charles Meadows had his house "to where I really liked it" and never liked his new home as much. (p. 82)
Inability to move business	Many businesses were unable to move, as was the case in Pittsburgh's Lower Hill. (p. 172)
Segregation limiting mobility	Monsignor William Lindner noted that urban planning and vigilantism limited African American movement out of Newark. (p. 144)
Emotional turmoil: grief, anger, stress	*All* interviewees – even those who thought urban renewal was overall a good idea – agreed that losing one's home was a painful and stressful event.
Opportunity costs	Ms. Arleen-Ollie moved around for seven years during her childhood, while her parents tried to get back on their feet after displacement. (p. 78)
Loss of organizations	Councilman Sala Udin reported that there were thousands of organizations in the Lower Hill, many lost due to urban renewal. (transcript)
Loss of structure of neighborhood	Mr. Charles Meadows noted that, in the old neighborhood, "...we just had better relations." (p. 82)
Dispersal of family and neighbors	Councilman Sala Udin remembered being sad at moving because "old, old, *old* friendships that bound people together were being broken." (p. 174)
Loss of cultural capital	Ms. Tamanika Howze said she looked forward to rites of passage in the Hill District, such as going to the famous jazz clubs, many of which were lost in urban renewal. (p. 165)
Loss of political capital	Councilman Sala Udin noted, "...we are not only politically weak, we are not a political entity." (p. 175)
Permanent exile from the old place	Because the land was put to new uses, people could never go back to the areas that had been home. For David Jenkins, the sight of a car rental agency's parking lot where his home had been was almost as upsetting as losing his home the first time. (p. 132)
Loss of faith in government	Dr. Reginald Shareef, who studied urban renewal, reported; "...a deepening, deepening distrust and mistrust between the black community and the city government." (p. 99)

* All page numbers refer to my book, *Root Shock*; interview transcripts were all collected as part of our study of the long-term consequences of urban renewal.

It should be added to the long list of losses that businesses were displaced as well as homes. Businesses suffered severely, losing their strategic position and their client base. Compensation rarely covered the real losses the businesses incurred, and only a fraction were successful in relocating.[17] In some sectors—jazz venues, for example—the failure rates were so high that they threatened the whole industry. I have proposed that urban renewal is one of the reasons why jazz almost died in the United States in the 1960s, to be saved by music lovers in Europe and Japan. In any event, the massive loss of capital and of entrepreneurial know-how set African American economic development back by at least two decades.

Not only did African Americans lose their land, neighborhood, and capital, but also they were frequently excluded from the new "higher" uses to which the land was put. Lincoln Center in New York City and the Mellon Arena in Pittsburgh are two examples of "higher uses" that replaced African American homes without intending to welcome them to the new edifices.[18] Universities, which were built on formerly African American neighborhoods, accepted few students from the displaced communities.[19] Public housing that was built on the land was so inferior to the previous neighborhoods that it was demolished within decades of being built, and the residents were dispersed again.[20] Marc Weiss, in a review of the urban renewal program, noted that, as of June 30, 1967, urban renewal had destroyed 400,000 housing units and built only 10,760 low-rent units to replace them.[21] Furthermore, urban renewal both intensified segregation and divided rich African Americans from poor African Americans, a division that is widely acknowledged as a source of enormous hardship for rich and poor alike.[22]

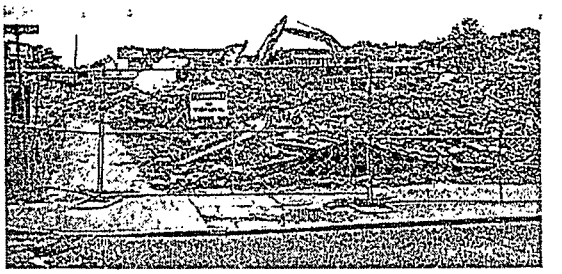
[A]s of June 30, 1967, urban renewal had destroyed 400,000 housing units and built only 10,760 low-rent units to replace them.

And now?

Urban renewal under the Housing Act of 1949 and its subsequent amendments was shut down in 1973 by President Richard Nixon. The program was ended because of widespread outrage that it was destroying American cities, increasing segregation, impoverishing working people, and destroying historic areas. Though that federal program was stopped, the tools of urban renewal had been honed through 20 years of projects. Politicians and developers found that they could repackage eminent domain and government subsidies in many new ways, facilitating the taking of land for "higher uses."

In 2006 in New York City, for example, major development projects were going on all over the city, many using or threatening to use eminent domain. African American neighborhoods were among those threatened. Columbia University, for example, had proposed an expansion of its campus into West Harlem, which has been an African American neighborhood since the days of the Harlem Renaissance in the 1920s.[23]

But such projects can be found throughout the United States. In 2005, Englewood, New Jersey, the town where I live, displaced businesses and homes in the African American section of town. The old buildings have been torn down to make room for a new complex that includes a shopping center and luxury homes. My 10-year-old granddaughter, who used to live on the block, often laments as we pass, "My house is gone. I can't believe it." I have photographed the demolition of the housing, and the scattering of the businesses. This 2005 photograph depicts the last moments of my granddaughter's old home.



All across the United States, the adroit use of eminent domain by developers and their politician partners threatens the homes of ordinary people. Houses that they worked hard to buy will be replaced by fancy new malls and condominiums. Those displaced may well be forced out of an area they have called home for many generations, unable to afford the housing that will be built on the spot, or even that in nearby neighborhoods. They will suffer as others have, struggling to rebuild their lives and their neighborhoods.

In fact, the losses are so massive and so threatening to human well-being that I have used the term "root shock" to describe them. This term is borrowed from gardeners, who observed that a plant torn from the ground will go into a state of shock, and may well die. The external homeostatic system of home and neighborhood "roots" people in the world. As the illustration below reveals, it is the house that has the roots, not the person. Our home and our neighbors connect us to the niches from which we draw sustenance.

A Home is a biological necessity. Losing a Home is a traumatic stress, costly for the individual and for the society. For the past 50 years, United States cities and redevelopment agencies have displaced people to build condominiums, highways, entertainment centers, and shopping malls. The displaced have only been compensated for a very small fraction of the losses they have endured. It is time for the pendulum to swing the other way, for drawing back from the widespread use of eminent domain and moving towards the all-out support of community and neighborhood life—the commons—as a source of well-being that every citizen needs and deserves.

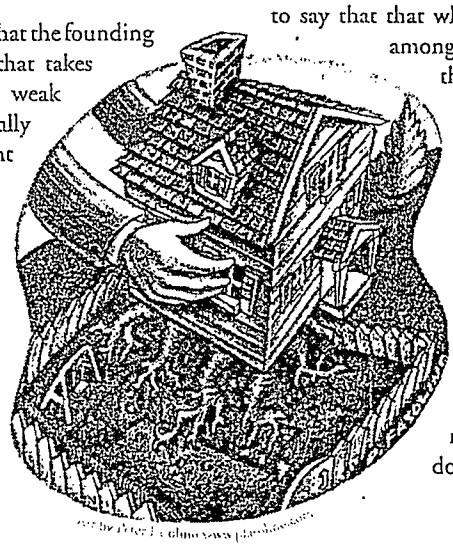
Surely, a commitment to justice would compel us to say that that which we all need, the weakest among us need the most. The poor, the minority, and the politically disenfranchised are deserving of our protection when they find themselves in the path of a misused tool of government.

What is the price of the commons? It has no price: it is as necessary as air or water, it is the stuff of life itself. As David Jenkins would say, "You can't take somebody's neighborhood. You just can't do that to people."

My reflections on this history

Eminent domain's destruction of communities must end

Eminent domain has become what the founding fathers sought to prevent: a tool that takes from the poor and the politically weak to give to the rich and the politically powerful. What the government takes from people is not a home, with a small "h", but Home in the largest sense of the word: a place in the world, a community, neighbors and services, a social and cultural milieu, an economic anchor that provides security during the ups and downs of life, a commons that sustains the group by offering shared goods and services.



Endnotes

1 These processes are not all equally well known to the American public, nor is their cumulative impact – what my colleague Rodrick Wallace has called "synergistic damage accumulation" – fully appreciated. The African slave trade, which dragged people from their homes in Africa and sold them into slavery in the Americas, took the liberty of 12 million who arrived alive. It is estimated that twice that number died on the journey within Africa and during the middle passage across the Atlantic. After the slave trade was banned in 1808, an internal slave market developed in the U.S., which regularly sold slaves from Virginia and other more Northern states to the lower South. Emancipation restored people's liberty, but at a great disadvantage of owning no land and having no education. There was massive population movement after the war as people sought to reunite with family, go to school, find land or work, and begin their new lives as freedmen. This hopeful epoch came to a violent end with the institution of Jim Crow laws, which made African Americans second-class citizens, stripped of their right to vote or to be protected in the courts. The two Great Migrations represented people's efforts to make new homes in the city, where they might have more economic and political opportunity. This effort, too, was thwarted by the reification of segregation in the cities. Redlining, instituted in 1937, aggravated segregation by steering investment away from African American ghetto neighborhoods. Urban renewal then found these to be "blighted" and ordered them cleared for "higher uses." Catastrophic disinvestment in the 1970s and 1980s represented the active removal of assets – from fire stations to banks and supermarkets – from minority and poor neighborhoods. Many of those displaced by urban renewal and catastrophic disinvestment moved into housing projects, and became vulnerable to a new "improvement" scheme in 1992, this one called HOPE VI. At the same time, poor and minority neighborhoods that had maintained some of their historic buildings and charm were targeted for gentrification, and the poor forced to move again. In sum, the efforts of African Americans to free themselves and become first-class citizens have not only been met with resistance, but also have been actively undone by government programs operated in close cooperation with business leaders. See, especially, Thomas W. Hanchett, *Sorting Out the New South City: Race, Class, and Urban Development in Charlotte, 1875 – 1975,* University of North Carolina Press, 1998, and Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940 – 1960,* University of Chicago Press, 1998, on the institution of segregation; Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It,* One World/Ballantine, 2004, on urban renewal; Deborah Wallace and Rodrick Wallace, *A Plague on Your Houses: How New York was Burned Down and National Public Health Crumbled,* Verso Press, 1998, on catastrophic disinvestment; and John A. Powell and Marguerite L. Spencer, "Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color," *Howard Law Journal,* Spring 2003, on gentrification.

2 The history of the enclosures has occupied many historians in Britain. Two useful articles are: Bill Frazer, "Common Recollections: Resisting Enclosure 'by Agreement' in Seventeenth-Century England," *International Journal of Historical Archaeology,* June 1999, at 75 – 99, and J.R. Wordie, "The Chronology of English Enclosure, 1500 – 1914," *Economic History Review,* Nov. 1983, at 483 – 505. A website, set up for ninth graders in Alberta, Canada, addressed the enclosure acts, and provides a useful, quick summary. It ends with "QUESTION: Did the wealthy land owners who passed the Enclosure Acts know that they would force peasant farmers off the land and into low paying, dangerous factory jobs in cities? ANSWER: Of course they did!" See Jason Hunter and John Wasch, "Enclosure Acts," *The Grade Nine Social Studies Website,* http://www.cssdlab.ca/tech/social/tut9/, accessed May 15, 2006.

3 Alexander Garvin reports these figures based on the final report of the urban renewal project issued by HUD in 1973. See Alexander Garvin, *The American City: What Works, What Doesn't,* The McGraw-Hill Companies, 1995, at 122. Numerous authors have cited the figure of one million people displaced, including Mary Bishop, "Street by Street, Block by Block: How Urban Renewal Uprooted Black Roanoke," *The Roanoke Times,* Jan. 29, 1995.

4 Herbert Gans, writing in "The Failure of Urban Renewal," noted, "Indeed, because two-thirds of the cleared slum units have been occupied by Negroes, the urban renewal program has often been characterized as Negro clearance, and in too many cities, this has been its intent." See Herbert J. Gans, "The Failure of Urban Renewal," *Urban Renewal: The Record and the Controversy,* ed. James Q. Wilson, The M.I.T. Press, 1966, at 539.

5 Our project, the Long-term Consequences of African American Upheaval, is the foundation of my book, "Root Shock: How Tearing Up City Neighborhoods Hurts America and What We Can Do About It." Fullilove, *supra.*

6 In order to document this personal experience of urban renewal, we asked Patricia Fullilove to be interviewed on camera for a movie called "Urban Renewal is People Removal," a 2005 LaBooth Video production. It won best short documentary at the Trenton Film Festival that year.

7 "Blight" is a term that has no fixed meaning. It implies that a building or a piece of land is in poor condition. It is used to infer that the building or land represents a "cancer" that has to be cut out in order for the "body" of the city to survive. "Blight" designations are applied to homes and territory that are to be designated for taking, as part of eminent domain proceedings. For excellent discussions of the origins and use of the term, see Wendell E. Pritchett, "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," *Yale Law & Policy Review*, Winter 2003, and Robert M. Fogelson, *Downtown: Its Rise and Fall*, Yale University Press, 2001. See especially the chapter, "Inventing Blight," at 317 – 380.

8 Fitch, writing in *American Building*, noted that we are faced with two contradictory necessities: the necessity of maintaining a constant equilibrium within the body while natural external environments may fluctuate from friendly to hostile. "Faced with these two and often contradictory necessities, man had to evolve external instruments for regulating the relationship between his body's relatively constant environmental requirements and the fluctuations of an inconstant Nature. Building and clothing are the principal instruments so evolved... the function of clothing is to protect the individual organism from the natural environment, while that of building is to protect an entire social operation or process." James Marston Fitch, *American Building: The Forces That Shape It*, Houghton Mifflin Company, 1948, at 149 – 150.

9 Marc Fried helped to establish the importance of attachment to home with the publication of his important paper, "Grieving for a lost home." See Marc Fried, "Grieving for a Lost Home: Psychological Costs of Relocation," *Urban Renewal: The Record and the Controversy*, ed. James Q. Wilson, The M.I.T. Press, 1966, at 359 – 379. Many scholars have since pursued this topic. Many dimensions of this important concept are explored in the book *Place Attachment*, edited by Setha Low and Irwin Altman. See Setha Low and Irwin Altman (eds.), *Place Attachment: Human Behavior and Environment: Advances in Theory and Research*, Plenum Press, vol. 12, 1992.

10 John Bowlby, a leader in the development of attachment theory, explored the essential role of the surrounding environment in his three-volume work on attachment. He proposed that there was attachment to place as well as to person, and described the natural environment as a second system of homeostasis. In elaborating on the development of an individual's particular manner of using the environment, he wrote, "Those trained in physiology may find it illuminating to view the behaviour under consideration as homeostatic. Whereas the systems studied by physiologists maintain certain physico-chemical measures, internal of the organism, within certain limits, the systems mediating attachment behaviour and fear behaviour maintain the individual within a defined part of the environment. In the one case the states held steady are interior to the organism, in the other the states held steady concern the relationship of the organism to the environment." John Bowlby, *Attachment and Loss, Vol. 2: Separation: Anxiety and Anger*, Basic Books, Inc., 1973, at 148 – 149.

11 Alexander Leighton, writing in *My Name Is Legion*, proposed a theory of community integration as the source of mental health. He defined an "integrated" community as one that would be able to raise healthy children, regulate the behaviors of its members, provide for a range of personalities, and care for the ill and the infirm. By contrast, the "disintegrated" community displayed family fragmentation, few and weak associations, few and weak leaders, few patterns of recreation, high frequency of hostility, high frequency of crime and delinquency, and weak and fragmented networks of communication. By comparing one disintegrated community to one integrated community, he was able to establish that rates of mental illness were higher in the disintegrated community. In fact, the poor people in the integrated community had better mental health than the well-to-do in the disintegrated community. Alexander H. Leighton, *My Name Is Legion: Foundations for a Theory of Man in Relation to Culture, Vol. 1*, Basic Books, 1959, especially at 306 – 315.

12 Kai Erikson, writing in *Everything in its Path*, reported the results of a study of the flood that destroyed Buffalo Creek, West Virginia, found that people seemed to know each other's business instantly. This meant that there were no secrets. Kai T. Erikson, *Everything in Its Path: Destruction of Community in the Buffalo Creek Flood*, Simon & Schuster, 1976. See especially, "Collective Trauma: Loss of Communality," at 186 – 245. Charles Meadows, one of the people interviewed in the Root Shock project, said of his Roanoke neighborhood, "You could stand out and talk, so we just had better relations. We knew about 'em; if anybody was sick, you knew about it; anybody died, we knew about it; anybody went to jail, we knew about it; if anybody got into trouble, or if there was a secret, we knew about it. There was no secret there, everybody knew everybody's business. But we still had better relations." Fullilove, *supra* at 82.

13 H.A. Franklin, *A Field of Weeds: The Story of Elmwood, Commonly Known as Eastwick*, EKO Productions Documentary Film, 1990.

14 The African American urban population was expanding between 1940 and 1970, as a consequence of the Second Great Migration. Even without the housing losses that accompanied urban renewal, ghetto areas would have been overwhelmed by the newcomers. As it was, two sources of housing shortage collided to create a very tense situation. Geographer John Adams, "The Geography of Riots," has proposed that cities with an extreme housing shortage were likely to have experienced

riots in the 1965-1970 period. John S. Adams, "The Geography of Riots and Civil Disorders in the 1960s," *Black America: Geographic Perspectives*, eds. Robert T. Ernst and Lawrence Hugg, Anchor Books, 1976, at 277 – 297.

15 This study is cited in Bernard J. Frieden and Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities*, The M.I.T. Press, 1989, at 34.

16 Fullilove, *supra*. For a detailed review of the literature on health effects of displacement, see Mark Boutros, "Is There Space for Place?: Forced Migration and the Psychology of Place," Dissertation, Teachers College, Columbia University, 2006.

17 Frieden and Sagalyn, in *Downtown, Inc.*, note, "A study of 350 firms displaced by renewal or highway projects in Providence, Rhode Island, between 1954 and 1959 offers a look at what relocation meant for businesses. About one-third of the firms went out of business. Most of those that survived were doubly disadvantaged: they paid higher rents while their sales declined. Among small businesses, six of ten reported a drop in income after they moved, while only one in ten reported an increase. One of five owners who lost their businesses became unemployed, and one of five took retirement. The rest found other work, but nine of ten who went out of business earned lower incomes afterward." Frieden and Sagalyn, *supra* at 35.

18 Lincoln Center replaced a working class, ethnically mixed neighborhood, which was the subject of "West Side Story." All of the cultural institutions that were gathered on the site were patronized by wealthy, white people. There was no concerted effort, for example through the pricing of tickets and the offering of events of interest, to enable working class people to attend the cultural activities held there. Mellon Arena, originally known as Civic Arena, was designed to house Pittsburgh's Light Opera Company, which performed Gilbert and Sullivan and other operettas. They performed to a largely white audience, a fact which is documented in historical photographs. See, for example, Harold Corsini's photograph, "Civic Light Opera Crowd," 1950, in the Carnegie Museum of Art exhibit catalog, *Pittsburgh Revealed: Photographs Since 1850*, at 41. Also see Harold Corsini, "Audience at Civic Light Opera," *Carnegie Museum of Art*, http://www.cmoa.org/searchcollections/Details.aspx?item=1023903, accessed November 20, 2006.

19 Professor Sandra Lane of Syracuse University has estimated that approximately 1% of the students in that large university come from the city of Syracuse, although the university expanded using land obtained during urban renewal. Personal communication.

20 The Pruitt-Igoe housing project in St. Louis was perhaps the first housing project to be so dysfunctional that it had to be demolished within two decades of being built. See Alexander von Hoffman, "Why They Built Pruitt-Igoe," *From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth-Century America*, eds. John F. Bauman, Roger Biles, and Kristin Szylvian, Pennsylvania State University Press, 2000, at 180 – 205. Housing projects in Newark, New Jersey, were abandoned nearly as quickly; see J.T. Cunningham, *Newark*, New Jersey Historical Society, 2002, and the New Jersey Historical Society's website at http://www.jerseyhistory.org. Many of the housing projects destroyed as part of the HOPE VI program were built during the urban renewal era on land cleared by urban renewal.

21 See Marc A. Weiss, "The Origins and Legacy of Urban Renewal," *Federal Housing Policies & Programs: Past and Present*, ed. J. Paul Mitchell, Rutgers University Press, 1985, at 253 – 254.

22 In many U.S. cities, people of different races and income levels lived together. Civic policies created neighborhoods that separated people by race and class. There was less separation among African Americans than among whites until urban renewal destroyed ghetto neighborhoods. Segregation was intensified, but the blacks were spatially separated by class, with the poor moving into housing projects and the better-off moving into small houses nearby. For a study of how Americans were spatially separated by race and class, see Hanchett, *supra*.

23 Columbia University announced its expansion plans in 2004, and has maintained information about the expansion on its website. The internet is an excellent source for the lively debate that swirls around Columbia's proposal. See also the excellent article by Daphne Eviatar in the *New York Times*, "The Manhattanville Project." Daphne Eviatar, "The Manhattanville Project," *The New York Times Magazine*, May 21, 2006, at 32 – 36.

About the Author

Mindy Thompson Fullilove, M.D., a professor of clinical psychiatry and public health at Columbia University, has done pioneering research on the effects of AIDS on African American communities. She is the author of *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It,* and *The House of Joshua: Meditations on Family and Place.* She lives in Englewood, New Jersey.

About the Institute for Justice

The Institute for Justice is a non-profit, public interest law firm that litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government. Founded in 1991, IJ is the nation's only libertarian public interest law firm, pursuing cutting-edge litigation in the courts of law and in the court of public opinion on behalf of individuals whose most basic rights are denied by the government.

About the Castle Coalition

The Castle Coalition, a project of the Institute for Justice, is a nationwide network of citizen activists determined to stop the abuse of eminent domain. The Coalition helps property owners defeat private-to-private transfers of land through the use of eminent domain by providing activists around the country with grassroots tools, strategies and resources. Through its membership network and training workshops, the Castle Coalition provides support to communities endangered by eminent domain for private profit.

The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain

Wendell E. Pritchett†

In 1952, the District of Columbia Redevelopment Land Agency (DCRLA) announced a sweeping plan to clear and redevelop the southwest quadrant of the nation's capitol. Max Morris and Goldie Schneider were two business owners affected by the proposal. Schneider operated a successful hardware store that had been in the family for decades; Morris owned a department store. The agency, which had designated the area as "blighted," planned to acquire their buildings, demolish them, and transfer the cleared land to the Bush Construction Company. Schneider and Morris, however, refused to sell.[1] To prevent the government from taking their properties by eminent domain, they filed suit, alleging that taking their buildings would violate the Public Use Clause of the Fifth Amendment to the United States Constitution, which states "nor shall private property be taken *for public use*, without just compensation."[2] Their claims would wind their way to the United States Supreme Court, which concluded in the 1954 case of *Berman v. Parker* that the condemnations were constitutional.[3]

The DCRLA's victory, which set the stage for a nation-wide expansion of the urban renewal program, was the result of a careful, sustained effort by advocates of urban renewal to shape the jurisprudence of eminent domain. From the early 1920s through the 1940s, renewal advocates developed their argument that cities were in crisis and that only major changes in property law could prevent urban decline. They used these claims to secure the right to

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1. *See* George Beveridge, *Suit Challenges Slum Program for Southwest*, EVENING STAR, Dec. 27, 1952, at A12; George Beveridge, *Fund to Press Project B Fight in Court Sought*, EVENING STAR, Nov. 17, 1953, at B1.

2. U.S. CONST. amend. V (emphasis added).

3. Berman v. Parker, 348 U.S. 26 (1954). Morris's and Schneider's cases were originally filed separately, but they were merged by the three-judge panel that considered the constitutional claims. Morris's case was appealed to the Supreme Court while Schneider's case was returned to the trial judge and became moot after the Court's opinion in *Berman*. *See Consolidation of Two Suits Against Project B Ordered*, EVENING STAR, Feb. 10, 1954, at A23.

condemn property and turn it over to others who would use it more appropriately, thereby changing the meaning of the Public Use Clause.

The conflict between Morris, Schneider, and the D.C. government, as well as the battles over urban renewal in general, illuminate a critical tension in American law and politics: the struggle to balance the rights of individual property owners against societal interests in the development, or protection, of scarce resources. It is a long-held axiom that government cannot take the property of one person and give it to another. That principle, however, has frequently been honored in the breach. For two centuries, local, state, and federal governments have used eminent domain in pursuit of public policy goals, often at the expense of the individual property owner but also to the benefit of purely private interests.

While conflicts over "regulatory takings" have been a vital topic for scholarly discussion for the past three decades, eminent domain receives far less consideration.[4] The *Berman* decision is responsible for the relative lack of attention to this issue. Before *Berman*, the judicial system played a significant role in reviewing government condemnations. While courts were generally deferential to public and private uses of eminent domain, judges frequently declared that a particular taking was not in the public interest.[5] *Berman* severely restricted judicial review in cases of eminent domain.[6] Legal scholars from perspectives as diverse as Richard Epstein, Bruce Ackerman, and Margaret Radin today view the Public Use Clause as moribund and argue that government powers of eminent domain are practically limitless.[7] But the law of eminent domain was, before the mid-1900s, subject to great debate—a debate that is being resurrected today.

The urban renewal program played a critical role in the demise of the Public Use Clause. An effort to revitalize the city through the private

4. The literature of regulatory takings is too voluminous to cite. For representative sources, see WILLIAM FISCHEL, TAKINGS, FEDERALISM AND REGULATORY NORMS: LAW, ECONOMICS AND POLITICS (1995); Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967); Andrea Peterson, *The Takings Clause: In Search of Underlying Principles, Part I: A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Andrea Peterson, *The Takings Clause: In Search of Underlying Principles, Part II: Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Carol Rose, Mahon *Reconstructed: Why the Takings Issue is Still A Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); and William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

5. *See* discussion *infra* pp. 9-13.

6. While *Berman* applied only to federal takings, it has been extremely influential upon state courts. *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 426 (1983).

7. *See* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162 (1985); MARGARET JANE RADIN, REINTERPRETING PROPERTY 136-37 (1993).

redevelopment of publicly condemned land, urban renewal was promoted by elites as the answer to city decline. Renewal advocates envisioned the creation of a futuristic metropolis, organized according to modern principles of planning. Building this new city required the clearance and redevelopment of large areas of the city. In European cities, such efforts were undertaken by government, but American renewal advocates opposed such centralized power. Instead, they argued that cities could be rebuilt privately, and they proposed the creation of "urban redevelopment corporations." Renewal advocates were a diverse group—they were real estate interests, progressive reformers, urban planners, politicians, and other concerned citizens—and they had divergent goals for the city. But they all agreed that urban revitalization required a broad application of the government's eminent domain powers.

This initiative necessitated a re-imagining of the public use doctrine because a program that took the dwellings and businesses of private owners and transferred them to other private owners to build houses and commercial operations was, at best, legally problematic. While the law of eminent domain in the early twentieth century was far from consistent, many legal professionals believed that taking property and turning it over to others in the manner conceived by renewal advocates conflicted with the Public Use Clause. The relevant precedents stated that eminent domain could be used only where it provided specific benefits to the general public, and critics and supporters alike questioned whether urban renewal met this standard. Before urban revitalization could begin, the law would have to change.

To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.[8] To make the case for renewal programs, advocates contrasted the existing, deteriorated state of urban areas with the modern, efficient city that would replace them. Urban revitalization required the condemnation of blighted properties and the transfer of this real estate to developers who would use it more productively.

By elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a re-conceptualization of property rights. One influential understanding of property defines it as a bundle of rights, the most important being the rights to occupy, exclude, use, and transfer.[9] In the urban renewal

8. On property as rhetoric, see Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, *in* CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstad eds., 1988); and Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998).

9. ACKERMAN, *supra* note 7, at 26-28.

regime, blighted properties were considered less worthy of the full bundle of rights recognized by American law. Property owners in blighted areas were due government-determined fair value for their holdings, while tenants were grudgingly given relocation assistance, but they were not entitled to undisturbed possession. When landowners attempted to fight the condemnation of their properties, state supreme courts from Washington to Maine gave their blessing to the use of eminent domain for urban renewal. In 1954, in *Berman*, the United States Supreme Court also approved the use of eminent domain for such purposes, opening the door to an era of urban reconstruction that continues today (although the nature and scope of urban renewal efforts has since evolved).

The role of the urban renewal program in reshaping the urban landscape is well-documented. Several studies have shown how urban elites promoted redevelopment to reorganize urban areas and to protect and enhance their real estate investments. These scholars have studied the rise of "growth coalitions"[10]—groups of business and political leaders that promoted renewal—and they have examined the political debates over post-war housing policy.[11] Other works have documented the impact of urban renewal in intensifying racial segregation and limiting the mobility of African-Americans.[12] Little work has been done, however, to explain how renewal advocates secured public and judicial support for the expansive use of eminent domain in the program.[13]

In the past two decades, several legal scholars have studied the changing interpretations of the Public Use Clause and the central role of the *Berman* case in this doctrine. Most students have questioned the broad interpretation of the Public Use Clause laid out by Justice William O. Douglas in *Berman* and have argued for a narrower reading. Scholars claim that the courts have given too

10. *See, e.g.*, SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965); JOHN MOLLENKOPF, THE CONTESTED CITY (1983).

11. *See, e.g.*, RICHARD O. DAVIES, HOUSING REFORM DURING THE TRUMAN ADMINISTRATION (1966); MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965 (1975); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA (1996); JON TEAFORD, ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA (1990); URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (James Q. Wilson ed., 1966).

12. *See, e.g.*, RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA (1996); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 (1983); ZANE MILLER & BRUCE TUCKER, CHANGING PLANS FOR AMERICA'S INNER CITIES: CINCINNATI'S OVER-THE-RHINE AND TWENTIETH-CENTURY URBANISM (1998); JOEL SCHWARTZ, THE NEW YORK APPROACH: ROBERT MOSES, URBAN LIBERALS AND REDEVELOPMENT OF THE INNER CITY (1993); THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996); JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN POSTWAR DETROIT (1997).

13. Robert Beauregard has examined the role of rhetoric in the understanding of urban problems. *See* ROBERT A. BEAUREGARD, VOICES OF DECLINE: THE POSTWAR FATE OF AMERICAN CITIES (1993). Robert Fogelson examines the rise of blight rhetoric in his new book, DOWNTOWN: ITS RISE AND FALL, 1880-1950 (2001).

much discretion to legislatures and administrative bodies to use eminent domain and that these powers have been used by interested parties to distort private market negotiations over coveted properties.[14] These studies explore the application of the *Berman* doctrine and its role in the law of eminent domain today, but legal scholars have not analyzed the context in which state courts and the United States Supreme Court broadened their interpretation of the Public Use Clause.

By examining the emergence of the urban renewal program, this Article highlights the role of legal consciousness in shaping urban policy.[15] The elites who promoted urban renewal (with some exceptions) shared an ideology that held private property rights sacrosanct, and they were profoundly skeptical about governmental intervention in the economy. But, at the same time, renewal advocates realized that government power was necessary to secure their goal of urban revitalization. While a small number of urban planners were less reticent about increased government influence over private property, most renewal advocates believed that condemnation would focus on a discrete group of properties that they would systematically select. They did not want to dismantle the protections provided by the Public Use Clause so much as carve out an exception that, they argued, clearly served the public interest. In reality, the initially modest effort to secure legal authority for urban renewal paved the way for wide-ranging powers of condemnation.

The stated goal of the urban renewal program was to provide a means for public/private partnerships in urban development. But renewal programs were controlled by a small number of real estate interests and politicians who used the power of eminent domain to reorganize urban land. Today, the redevelopment agencies they created, like many other "public authorities," remain insulated from political accountability, and they have been criticized as a result.[16] The legal and political history of these urban redevelopment authorities, moreover, contributes to the history of the American administrative state.[17] Most theories of the administrative state posit a publicly-managed

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14. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 289-90 (2000); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 60-61 (1998); Joseph J. Lazzaroti, *Public Use or Public Abuse*, 68 U. MO. KAN. CITY L. REV. 49 (1999); Mansnerus, *supra* note 6; Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 18 (1981). For less critical views of judicial interpretations of the Public Use Clause, see Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 213 (1978); and Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

15. On the study of "legal consciousness" in history, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987); and Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 56 (1995).

16. *See infra* notes 223-225 and accompanying text.

17. On the rise of the American administrative state, see STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982);

bureaucracy, created as the result of public pressure, that regulates a discrete subset of the economy. Redevelopment agencies, however, complicate these theories because they were created to serve private ends and were controlled by the interests that created them.[18]

The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation. *Berman* was decided just six months after *Brown v. Board of Education*,[19] but while *Brown* receives more attention, *Berman* was equally influential in shaping American race relations. The urban renewal program played a crucial role in redistributing urban populations and creating additional obstacles to efforts to achieve integration.

The legal history of the urban renewal program also provides an example of the changing nature of property rights in the United States. Several influential scholars, particularly Joseph Sax, Carol Rose, and Laura Underkuffler, have argued that property rights should be viewed as "evolutionary" doctrines. These scholars, while they differ in their explanations of the process, agree that property does not have a static definition but rather reflects relationships between people, and between government and individuals, that have changed over time. Understanding the evolution of property rights requires an examination of the ways that people conceive of their relationship to property in particular historical contexts.[20]

THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Margaret Weir et al. eds., 1988); Michael K. Brown, *State Capacity and Political Choice: Interpreting the Failure of the Third New Deal*, in 9 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 187 (1995); Ira Katznelson & Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, in 5 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 301 (Karen Orren & Stephen Skowronek eds., 1991); and Andrew A. Workman, *Creating the National War Labor Board: Franklin Roosevelt and the Politics of State Building in the Early 1940s*, 12 J. POL'Y HIST. 233 (2000).

18. On the complicated nature of public authorities, see A. Scott Henderson, *Charles Abrams and the Problem of the "Business Welfare State,"* 9 J. POL'Y HIST. 211 (1997); Gail Radford, *William Gibbs McAdoo, the Emergency Fleet Corporation, and the Origins of the Public Authority Model of Government Action*, 11 J. POL'Y HIST. 59 (1999); and Keith D. Revell, *Cooperation, Capture and Autonomy: The Interstate Commerce Commission and the Port Authority in the 1920s*, 12 J. POL'Y HIST. 177 (2000).

19. 347 U.S. 483 (1954).

20. *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence: An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Laura S. Underkuffler, *On Property: An Essay*, 100

This Article will examine how the interaction of renewal advocates and the courts changed legal conceptions of property in the middle of the twentieth century. Part I outlines the movement for urban renewal in the early twentieth century and surveys the law of takings from the early 1800s to the 1930s. Part II discusses the role of rhetoric in the efforts of renewal advocates to rally public support for urban redevelopment during the 1920s and 1930s. Part III describes the intimate relationship, both political and jurisprudential, between the New Deal public housing program and the expansion of urban renewal. Part IV examines the continued role of blight rhetoric in the lobbying effort to create urban renewal programs during the 1940s. Part V analyzes several early renewal projects and describes the efforts of renewal proponents to create a national urban renewal program. Part VI traces the acceptance of the discourse of blight by state courts and examines the *Berman* case. The Conclusion surveys the post-*Berman* expansion of public and private eminent domain powers and briefly discusses current debates over the public use doctrine.

I. PROGRESSIVE ERA HOUSING REFORM AND THE LAW OF EMINENT DOMAIN

Fears of the "contagion" of the slums captured the attention of reformers throughout the 1800s. Toward the end of the century, the slum became the main focus of Progressive reformers. After Jacob Riis exposed the problem in his best-selling book, *How the Other Half Lives*,[21] hundreds of college educated men and women followed him into the warrens of the poor in American cities. While reformers like Jane Addams looked to use the talents of the poor to rebuild their neighborhoods themselves, others like Lawrence Veiller sought to secure the powers of local government to erase the slums. Veiller pushed New York and other cities to adopt housing regulations that he thought would force landlords to meet minimum maintenance standards and builders to construct modern dwellings.[22] These laws sometimes resulted in better housing, but their impact in improving the slum was minimal.[23]

While there were many nineteenth century attempts to regulate working-class housing, the first serious efforts at "slum clearance" began in New York City at the end of the century. After years of agitation by housing reformers, the state passed the Tenement House Act of 1895, which allowed the city Board of

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YALE L.J. 127 (1990). I am not arguing that these scholars share the same position on the meaning of property and property rights, rather that, in defining property as "evolutionary," these scholars have "historicized" the question. In order to analyze the changing nature of property and property rights, we need to understand the historical context in which these issues were debated.

21. JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1904).

22. *See* THE TENEMENT HOUSE PROBLEM (Robert W. DeForest & Lawrence Veiller eds., 1903); Lawrence Veiller, *Housing Reform Through Legislation*, 51 ANNALS AM. ACAD. POL. & SOC. SCI. 68 (1914).

23. *See* ROY LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917 (1962).

Health to condemn and demolish buildings declared unfit for human habitation. Progressives hoped that this legislation would eliminate the decrepit tenements that exacerbated the health and social problems in slum areas, but New York's landlords vigorously fought the passage and enforcement of the Act. As a result, its implementation was inconsistent at best.[24]

Housing reformers faced several major impediments to clearing the slums. The administration of a housing regulatory system required the development of detailed building standards for judging dilapidated housing as well as the employment of qualified persons to enforce these standards. Neither were available in the infancy of urban America's regulatory system. The biggest obstacle to redevelopment was the inability of housing administrators to secure title to run-down, but frequently profitable, slum tenements. In the early 1900s, condemnation was a complicated, time consuming process, and conservative judges, as well as entrenched political corruption, frequently prevented housing officials from acquiring the buildings they sought. In addition, the Supreme Court's requirement that condemnors pay fair market value for property taken (not a price determined by the city) inhibited large-scale takings of slum property.

Housing reformers had conflicting views on the best means to eliminate the slum. Most realized that the tenement economy survived because housing was desperately needed by the urban poor. Destruction of tenements required the construction of replacement housing, but because they were strongly opposed to government interference with the private market, most reformers refused to support public housing programs. Veiller, one of the most vocal critics of tenements, consistently asserted that "government housing play[s] no part in the solutions of housing problems. The motto of the American people," he argued, "is to keep the government out of private business and to keep private business out of government."[25] Veiller and other housing reformers supported and organized private associations to purchase slum properties and redevelop them, but they lacked the funds needed to make a major impact.[26] They hoped to secure the power of eminent domain for private redevelopment of the slum, but most legal scholars in the early 1900s believed that this violated the Public Use Clause.[27]

24. *See* MAX PAGE, THE CREATIVE DESTRUCTION OF MANHATTAN 90-92 (1999).

25. *Id.* at 91.

26. *See* A. SCOTT HENDERSON, HOUSING AND THE DEMOCRATIC IDEAL: THE LIFE AND THOUGHT OF CHARLES ABRAMS 49 (2000); RADFORD, *supra* note 11.

27. One effort that achieved limited success in eliminating slums was the use of what reformers called "excess condemnation." Properties adjacent to those necessary for the construction of government projects were taken and sold to defray the costs of the project. During the construction of the Manhattan and Williamsburg Bridges in the early 1900s, for example, the use of excess condemnation enabled the city to clear 700 tenements (uprooting 50,000 people) on the Lower East Side. Excess condemnation was attacked as an unreasonable extension of the public use doctrine, and some courts limited its application. But most state supreme courts approved the process. These battles were among the earliest

The "Public Menace" of Blight

From the American Revolution through the first half of the twentieth century, the law of eminent domain was full of inconsistencies. Rationalization of the diverse state and federal court rulings about what constituted a valid public use was extremely difficult. The founding fathers, moreover, left little guidance on the meaning of the term. Although the sovereign's right of eminent domain was part of natural law principles adopted by the Constitutional Convention from English law, little evidence exists to explain why the framers included the limitation that condemned land be taken solely for public use. In the first half of the 1800s, every state except North Carolina included a public use clause in its constitution, but they too provided little guidance on the meaning of the phrase. As a result, courts interpreted these clauses on an ad hoc basis. During the nineteenth century, state courts vacillated between support for an expansive use of eminent domain and a fear that condemnation would be abused to the detriment of individual property rights. The United States Supreme Court, moreover, infrequently expounded upon the meaning of the Public Use Clause, and when the Court did consider cases involving condemnation, its principles—private property rights were sacrosanct—conflicted with its approval of a wide variety of condemnations.[28]

In the early Republic, eminent domain was used to support the expansion of the nascent economy, and many state courts adopted a broad interpretation of public use to support the taking of property for mills, dams, or roads, holding that these enterprises provided a "public benefit."[29] Even though condemnations of property for dams or highways frequently provided significant advantages to individual parties, courts concluded that because the facilities resulting from the condemnation could be exploited by a large number of people, they did not violate the restriction that condemned property be for public use. As the Industrial Revolution gathered steam, the use of the power of eminent domain for railroads, utilities, and other types of improvements increased. To support economic development, legislatures across the country granted private corporations the right to condemn property needed for expansion. As with prior condemnations, such takings were approved on the theory that the fruits of the takings would be available to the general public. According to legal historian Harry Scheiber, "'the comfort, convenience and

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efforts of urban reformers to expand the limits of the public use doctrine. *See* SCHWARTZ, *supra* note 12, at 14; Note, *The Public Use Limitation in Eminent Domain, An Advance Requiem*, 58 YALE L.J. 599, 606-07 (1949).

28. *See* Meidinger, *supra* note 14, at 18; *see also* STANLEY K. SCHULTZ, CONSTRUCTING URBAN CULTURE: AMERICAN CITIES AND CITY PLANNING, 1800-1920, at 41 (1989); Berger, *supra* note 14, at 213; Jones, *supra* note 14, at 289-290; Kochan, *supra* note 14, at 60-61.

29. Nineteenth century judges approached questions of eminent domain, economic regulation, and taxation in a similar fashion, seeking to ascertain the nature of the "public interest" in each activity. The interconnectedness of these three areas of law was crucial to the rise of the doctrine of substantive due process. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 6 (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 54-55 (1993).

prosperity of the people' became a principal justification in the American courts generally for accepting legislative determinations that certain older vested rights in property must be forced to give way to the technological and entrepreneurial agents of progress."[30] Through the Civil War, state courts approved a wide variety of takings.[31]

Towards the end of the 1800s, an increasing number of judges attempted to restrict the use of eminent domain by private parties. Worried about the rise of "class legislation" that favored certain interests over the public good, leading jurists like Michigan Supreme Court Chief Justice Thomas Cooley argued that condemnation should be used only in cases of clear public benefit. In his seminal treatise, *Constitutional Limitations*, Cooley stated that a public use should be found only "where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare."[32] In response to the growing power of corporations to secure public aid for growth, Cooley argued that "the distinction between different classes or occupations, and the favoring of one at the expense of the rest . . . is not legitimate legislation."[33] This restrictive view of the proper application of the government's eminent domain powers placed many laws supporting economic development in question. In the 1877 case *Reyerson v. Brown*, for example, Cooley declared Michigan's Milldam Act of 1873, which allowed private companies to condemn land for the construction of water-powered mills, unconstitutional and stated that private corporations could be given the right of eminent domain only in cases of "extreme necessity."[34]

Concerned that government support for private business would be followed by government regulation of free enterprise, many nineteenth century judges invalidated attempts at public/private cooperation. In their zeal to protect business from government intervention, courts in the late 1800s frequently deprived corporations of public benefits, including financial subsidy and rights

30. Harry Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329, 370, 386 (Donald Fleming & Bernard Bailyn eds., 1971).

31. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 259-61 (1977); SCHULTZ, *supra* note 28, at 89; Berger, *supra* note 14, at 208-09; Jones, *supra* note 14, at 291; Kochan, *supra* note 14, at 291-92; Meidinger, *supra* note 14, at 24; Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

32. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 533 (2d ed. 1871).

33. People v. Salem, 20 Mich. 487 (1870), *cited in* GILLMAN, *supra* note 29, at 56. On Cooley's views regarding "class legislation," see Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court, 1865-1886*, 10 AM. J. LEGAL HIST. 97 (1966).

34. Ryerson v. Brown, 35 Mich. 334, 339 (1877); *see also* Scheiber, *supra* note 30, at 386. The Illinois Supreme Court concurred in this position, declaring that state's Mills and Millers Act of 1872 illegal. *See* Gaylord v. Sanitary Dist., 68 N.E. 522 (Ill. 1903). Harry Scheiber argues that in the West the courts continued to be amenable to a broad interpretation of the Public Use Clause. Scheiber, *supra* note 31, at 244-47.

of condemnation.[35] In 1888, the New York Court of Appeals voided the Niagara Falls and Whirlpool Railway Company's state-granted right of eminent domain. Citing Judge Cooley, the court declared that, while the railroad might provide a means for the public to "fully gratify their curiosity" in seeing the falls, this was not a sufficiently compelling purpose to justify the use of condemnation.[36] The court further argued that while it was cognizant that the legislature had declared such a use to benefit the public, the final determination of what constituted a public use remained the court's prerogative.[37] In the late 1800s and early 1900s, other state supreme courts took similarly restrictive positions on the appropriate uses of eminent domain.[38]

Most nineteenth century battles over the appropriation of land were fought in the state courts, which were generally ambivalent towards expansive interpretations of the Public Use Clause. The United States Supreme Court, when it considered such matters, however, was generally amenable to the use of eminent domain to support economic development. The Court's broad interpretation of the Public Use Clause was at odds with its oft-stated opposition to government intervention in the economy.[39] The 1896 case of *Missouri Pacific Railway v. Nebraska*[40] is one of the few where the Court viewed eminent domain with suspicion. In that case, the Court considered a state act that required the Missouri Pacific Railroad to allow farmers to construct a cooperative grain elevator on its property, declaring that to order the railroad to set aside its own land for such purposes violated the Due Process Clause of the Fourteenth Amendment. Because the grain elevators would provide benefits to the farmers who used them rather than the general public, the Court reasoned, the program was unconstitutional. "[S]o far as it required the railroad corporation to surrender a part of its land to the petitioners," the law was, "in essence and effect, a taking of private property . . . for the private use of [another]," the Court stated.[41]

The Court's statement that the property of one person cannot be taken for the benefit of another was used so frequently in the early 1900s that it became

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35. *See* Scheiber, *supra* note 30, at 392.

36. *In re* the Application of the Niagara Falls & Whirlpool Ry. Co., 15 N.E. 429, 432 (N.Y. 1888).

37. *Id.*

38. *See, e.g.*, Minn. Canal & Power v. Koochiching, 107 N.W. 414 (Minn. 1906); R.R. Co. v. Iron Works, 8 S.E. 453, 467 (W. Va. 1888).

39. For a review of the late nineteenth century views of the Supreme Court, see GILLMAN, *supra* note 29, at 6-15; Michael Les Benedict, *Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); David Gold, *Redfields, Railroads and the Roots of "Laissez-Faire Constitutionalism,"* 27 AM. J. LEGAL HIST. 254 (1983); Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

40. 164 U.S. 403 (1896).

41. *Id.* at 417. Later that year, the Court specifically declared that the public use provisions of the Fifth Amendment applied to the states. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896); *see also* Meidinger, *supra* note 14, at 30.

axiomatic, but the principle was frequently honored in the breach. In spite of the strong language the Court used in declaring the Nebraska Act unconstitutional, it was thereafter reluctant to overrule state or federal condemnations. During the early twentieth century, the Justices were amenable to a wide variety of takings, and *Missouri Pacific* is the only case in which the Court invalidated a state-approved condemnation. Unlike other areas of economic regulation in which the Court continued to view legislative acts with suspicion, in a wide variety of cases, it ceded the authority to determine what constituted a public use to the state courts.[42] In 1923, the Court declared that it would regard state court determinations regarding the Public Use Clause "with great respect" and concluded that its review of public use cases was exceedingly limited.[43] Rejecting the view that condemned property had to be available to the general public, the Court also stated that it was "not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in order to constitute a public use."[44] While the Justices never varied from, and stated frequently, their view that property could not be condemned and transferred to another party, their expansive readings of the Fifth Amendment gave encouragement to advocates of urban renewal.[45]

At the same time the Court was approving a wide variety of takings, it handed renewal advocates another tool to control urban development. In the 1926 case of *Village of Euclid v. Ambler Realty Company*, Justice Sutherland ruled that zoning codes were an acceptable government measure to shape urban areas and did not violate the Due Process Clause of the Fourteenth Amendment.[46] Sutherland concluded that zoning was an acceptable method to control public nuisances and within the police powers of local government to protect the health and safety of residents. Many of the leading urban reformers, in particular Alfred Bettman, who wrote a persuasive amicus curiae brief on behalf of the Village of Euclid, would later argue that the Court's opinion

42. For cases considering the public use doctrine, see, for example, *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923) (state could condemn land to build tunnel for railroad); *Block v. Hirsh*, 256 U.S. 135 (1921) (war emergency provided public purpose for statute protecting tenants from eviction); *Hendersonville Light and Power Co. v. Blue Ridge International*, 243 U.S. 563 (1917) (company could condemn land to build power plant for street railway); *Mt. Vernon-Woodbery Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (allowing power company to condemn land for electric project). *See also* Berger, *supra* note 14, at 213; Mansnerus, *supra* note 6, at 414.

43. Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923).

44. *Id.*

45. In the small number of cases that involved takings by the federal government, the Court also gave federal agencies similar broad discretion. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896) (Congress could authorize condemnation of Gettysburg Battlefield); Luxton v. N. River Bridge Co., 153 U.S. 525 (1894) (Congress could authorize condemnation of land for construction of bridge); Shoemaker v. United States, 147 U.S. 282 (1893) (D.C. administrator could condemn land for public park).

46. Vill. of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

supported the use of eminent domain for urban renewal.[47]

While the United States Supreme Court accepted the necessity of government coercion in support of economic development in the early twentieth century, in many state courts, particularly those in the Northeast and Midwest (the areas with the largest, oldest cities), the doctrine of public use remained limited. The appellate courts of New York and Ohio continued to hold to a narrow interpretation of the clause and viewed with skepticism state legislative delegations of eminent domain powers to private parties.[48] In 1912, the Supreme Judicial Court of Massachusetts, in an advisory opinion, specifically declared that housing was not a "public use" for which public funds could be spent.[49] The insistence of these courts that it was the judiciary's role to determine what constituted a public use, and their refusal to develop standards by which to define the doctrine, made a large-scale urban renewal scheme a very risky undertaking.

But the conflicting legal precedents were not the only reason that renewal advocates struggled with the law of eminent domain. Equally important, the scheme conflicted with renewal advocates' deeply rooted conceptions of property rights. The principle that one person's property could not be taken and given to another was ingrained in their understanding of American jurisprudence. The Public Use Clause restrained government from abusing private property owners, and it was a constitutional protection against socialism. Renewal advocates navigated a narrow path between the Scylla of continued urban decline, and the Charybdis of increased government influence over private property. They needed a method to secure government assistance while retaining private control over urban redevelopment and to achieve urban redevelopment without drastically altering legal protections for private property in general. The discourse of blight provided a means to achieve their goals.

II. THE DISCOVERY OF BLIGHT

During the 1920s, American cities witnessed a construction boom that surpassed all previous periods of growth. Skyscrapers rose higher than ever, bridges spanned rivers across the country, and public buildings sprouted throughout urban areas. In addition, several million units of housing were built

47. On the importance of *Euclid* in urban law, see Richard Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 611-13 (2001); and Melvyn Durchslag, Village of Euclid v. Ambler Realty Co., *Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645 (2001).

48. *See, e.g.*, Little Falls Fibre Co. v. Henry Ford & Son, Inc., 229 N.Y.S. 445, 449 (App. Div. 1928) (prohibiting construction of dam on Mohawk River); Pontiac Improvement Co. v. Bd. of Comm'rs., 135 N.E. 635 (Ohio 1922) (prohibiting condemnation of land where public use was unclear); *see also* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980, at 28 (2001).

49. *In re* Opinion of the Justices, 98 N.E. 611 (Mass. 1912).

during the decade, allowing second generation immigrants to escape the slums. But while these were healthy changes, many urban elites realized that cities would face trouble in the near future. The expansion of the suburbs drew the rich and middle-class out of the city. At the same time, the combination of slowed immigration and economic mobility resulted in increased vacancy rates in working-class districts. The number of residents in the urban core declined, to the joy of housing reformers, but the slums remained, impervious to change.[50]

Throughout the 1920s, renewal advocates hoped that run-down neighborhoods, at least those close to the business and entertainment districts, would provide profit-making opportunities that would result in the private acquisition and clearance of deteriorated structures. However, instead of rebuilding older neighborhoods, developers focused on the outlying areas and the suburbs. The construction of mass transit and improvements in roads made these new units easily accessible, and developers generally avoided the problems that came with inner-city development. In New York City, for example, despite dramatic growth during the decade, some 67,000 substandard buildings remained in the city as of 1930.[51]

The late 1920s brought a convergence of forces that supported the urban renewal movement, and several groups that were formerly antagonists in the battle for city revitalization began to cooperate. Real estate interests, housing reformers, and big-city politicians all hoped to reap benefits through urban renewal, and they formed a tenuous coalition to promote redevelopment. Their goals were widely divergent. Housing reformers wanted government support to eliminate decrepit housing and replace it with modern, affordable dwellings. Politicians hoped to increase their cities' tax bases and provide jobs (as well as opportunities for graft) to their constituents. Real estate interests sought to gain access to large parcels of downtown property for profitable redevelopment.[52]

The planning profession provided a common language that joined real estate interests, housing reformers, and local government. Planners argued that cities were anarchic and inefficient, and they sought to rationalize the city through the development of strict standards for city growth. Successful city development, they claimed, required a professional analysis of the needs and resources of urban areas. During the construction boom of the 1920s, planners played a major role in the development of suburban communities and, through professional societies like the American Institute of Planners and the American

50. *See* SCHWARTZ, *supra* note 12, at 26.

51. *See* PAGE, *supra* note 24, at 72-73.

52. On the varied goals and interests of urban renewal advocates, see FOGELSON, *supra* note 13, at 346-47; PETER HALL, CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY 228-29 (1996); TEAFORD, *supra* note 11, at 26-29; and John F. Bauman, *Visions of a Post-War City: A Perspective on Urban Planning in Philadelphia and the Nation, 1942-1945*, 6 URBANISM PAST & PRESENT, Winter/Spring, 1980-81, at 1.

Society of Planning Officials, became intimately involved in the reorganization of urban life.[53]

Herbert Hoover's vocal support for zoning and comprehensive planning was crucial to the growth of the planning profession and to the rise of the urban renewal movement. As Secretary of Commerce, Hoover created a Special Division of Building and Housing, which promoted planning through the development of the Standard City Planning Enabling Act, a model law adopted by many states during the 1920s. The Commerce Department also published and distributed the *City Planning Primer*, which promoted the benefits of zoning and other types of urban planning.[54] In 1931, Hoover convened the Conference on Home Building and Homeownership, an intensive study of the state of American housing. The thirty-one committees of the conference examined every aspect of the problems facing cities and suburbs. Among these groups was the Committee on Blighted Areas and Slums, which promoted its plan for urban redevelopment as "a combination of governmental aid in the clearing of sites and of private enterprise in rebuilding upon them. . . ."[55] This plan would require the passage of "enabling legislation that will permit and facilitate the large-scale condemnation of slum areas," the committee reported.[56]

Urban planners like Alfred Bettman, Harland Bartholomew, and John Ihlder, and real estate interests including Metropolitan Life Insurance President Frederick Ecker and Leonard Reaume, former president of the National Association of Real Estate Boards, were active participants in this conference, and they shaped discussions over the future of American housing. They formed a powerful, nation-wide coalition to fight for slum clearance. The influence of planners also continued to rise as the New Deal established agencies like the National Resources Planning Board (run by urban planner Frederic Delano, President Roosevelt's cousin), which funded the preparation of local and regional plans.

This coalition worked to foster a political climate amenable to the radical reconstruction of urban areas. Led by the planners in the group, they gradually developed a new terminology of city decline, a discourse of blight and renewal.

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53. On the rise of the planning profession, see M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 206 (1983); HALL, *supra* note 52, at 136-75; MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890, at 397-400 (1971); and Robert Beauregard, *Between Modernity and Postmodernity: The Ambiguous Position of U.S. Planning*, 7 ENV'T & PLAN. D: SOC'Y & SPACE 381, 388 (1989).

54. On Hoover's role, see Janet Hutchinson, *Shaping Housing and Enhancing Consumption: Hoover's Interwar Housing Policy, in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH CENTURY AMERICA 81 (John F. Bauman et al. eds., 2000). *See also* Chused, *supra* note 47, at 598-99; Radford, *supra* note 11, at 86.

55. PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, 3 SLUMS, LARGE-SCALE HOUSING AND DECENTRALIZATION 25 (John M. Gries & James Ford eds., 1932).

56. *Id.* at xii.

This discourse contrasted the existing, deteriorated state of urban areas with a possible modern, revitalized future. Vital to this effort was the elevation of two terms to public attention: "slums" and "blight." Advocates worked to convince urban residents that these problems would continue to plague cities without government intervention. In book after book, including Mabel Walker's *Slums and Blight* and Edith Elmer Wood's *Slums and Blighted Areas*, as well as in professional journals like *American Planning and Civic Annual*, *Architectural Record*, and *National Municipal Review*, planners developed an increasingly complex lexicon of terms to describe these phenomena and explained why they plagued cities. A slum, according to planners, was an area with run-down buildings, dirty streets, and a high crime rate that was almost exclusively inhabited by poor people. While the popular view of the slums focused on the inhabitants, planners concentrated on the conditions that created such areas. According to the experts, a slum was a district that had an excess of buildings that "either because of dilapidation, obsolescence, overcrowding, poor arrangement or design, lack of ventilation, light or sanitary facilities, or a combination of these factors, are detrimental to the safety, health, morals and comfort of the inhabitants thereof."[57] A slum was a "social liability to the community" because it spawned crime and other problems.[58]

Other urban areas did not meet the definition of a slum, but they were "blighted." The term was first used by the Chicago school of sociology. Founded in the Progressive era, the Chicago school was led by Robert Park, Ernest Burgess, and R.D. McKenzie, and produced an impressive amount of scholarship that focused in particular on the problems of the poor in cities. These scholars introduced the "ecological approach" to the field of sociology, and this method of study was crucial to early twentieth century understandings of urban change. Blight, originally used to describe plant diseases, was a part of this broader approach to understanding society.[59] Cities were like living organisms, the Chicago school argued, and, therefore, urban change occurred in natural patterns. Blight arose around the central business district, in areas that were formerly residential. As cities expanded, these areas became mixed use districts, with industry and commerce.[60] The formerly attractive housing was

57. MABEL WALKER, URBAN BLIGHT AND SLUMS 3 (1936).

58. *Id.* at 3 (1935). On the role of discourse in shaping policies towards cities, see CHRISTOPHER MELE, SELLING THE LOWER EAST SIDE: CULTURE, REAL ESTATE AND RESISTANCE IN NEW YORK CITY (2000).

59. *See* LEONARD REISSMAN, THE URBAN PROCESS: CITIES IN INDUSTRIAL SOCIETIES 93-121 (1964); Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY 47 (Robert E. Park et al. eds., 1925); Roderick D. McKenzie, *The Ecological Approach to the Study of the Human Community*, *in* THE CITY 63 (Ernest Burgess et al. eds., 1925).

60. Scholars like Homer Hoyt argued that these areas became blighted because property owners expected the central business district to expand: Owners let their properties decline because they thought that they would be demolished after they were bought for redevelopment. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 364 (1936).

divided into smaller units for the poor, and "parasitic and transitory services" such as flophouses proliferated.[61]

In periods of migration, these areas were "invaded" by ethnic and racial minorities in search of affordable housing. This use of medical terminology by the Chicago school made its analysis appear objective and scientific, but it also reflected the general prejudices of society regarding racial minorities, particularly blacks. In his discussion of Chicago, Burgess noted the "disturbances of metabolism caused by an excessive increase [in population] such as those which followed the great influx of southern Negroes" into the city after World War I.[62] These waves of people caused a "speeding up of the junking process in the area of deterioration."[63] Another study, which acknowledged that many areas occupied by blacks had other unattractive features, concluded that "certain racial and national groups . . . cause a greater physical deterioration of property than groups higher in the social and economic scale."[64] Blight, therefore, may have been a naturally occurring process, but racial minorities were central to the Chicago school's understanding of urban change.

For urban planners and other renewal advocates, the theory of urban ecology became a means of reorganizing property rights within the city. Not surprisingly, planners argued that blight was caused by lack of planning. "Unguided urban growth" and an "indiscriminate mixture of homes, factories, warehouses, junk yards, and stores that has resulted in depressed property values" were responsible for urban blight.[65] Buildings in these areas were "obsolete" because "an excessive amount of land is devoted to streets and alleys."[66] The streets in these districts, which were built for horses, had "now become motor speedways."[67] Population densities in these areas were higher than acceptable under "principles of modern planning."[68] All of these problems were the result of "unplanned urban expansion" without appropriate zoning.[69] To renewal advocates, blight was bad not only because of the damage it caused to residents, but also because it drained urban resources. The increasing costs of police and social services in these areas, combined with the loss of tax revenues as people left the city, placed a significant burden on government.[70]

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61. McKenzie, *supra* note 59, at 76.
62. Burgess, *supra* note 59, at 54.
63. *Id.*
64. HOYT, *supra* note 60, at 314.
65. MEL SCOTT, METROPOLITAN LOS ANGELES: ONE COMMUNITY 108 (1950).
66. ARTHUR HILLMAN & ROBERT CASEY, TOMORROW'S CHICAGO 70 (1950).
67. *Id.*
68. *Id.*
69. *Id.*
70. *See* EDITH ELMER WOOD, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES 19-21 (1935). For discussions of the general chacteristics of slums and blighted areas, see BEAUREGARD, *supra* note 13, at 136-37; MILES COLEAN, RENEWING OUR CITIES 38-39 (1953); JAMES FORD, SLUMS AND

Renewal advocates never developed a systematic process by which to determine when an area was blighted. While they devoted a great deal of study to blighted areas, renewal advocates preferred to define the phenomenon with vague generalities. Hoover's slum committee, for example, declared that "a blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped."[71] Hoover's committee, however, did concede that in some cases "a slum has become economically profitable because of the high rents that can be obtained for improper use, and is not long blighted according to the definition." Nevertheless, the area was still a problem, the committee argued. In fact, "because of this economic strength, it is a greater danger to the community," they declared.[72]

In popular discussions of the issue, renewal advocates often merged their descriptions of slums and blighted areas. This served useful political and judicial purposes because slums were known problems. Frequently, planners argued that a blighted area was one "on its way to becoming a slum."[73] The fear of the slums provided planners an argument for their attempts to take control of blight. As the term originally described plant diseases, the evocation of blight created a vision of a plague spreading across the city, moving from one neighborhood to the next. The future of the city rested upon the effort to stop its spread. For this reason, renewal advocates asserted, these areas had to be cleared and rebuilt. "We must cut out the whole cancer and not leave any diseased tissue," stated New York City Comptroller Joseph McGoldrick.[74]

Because the term was so poorly defined, blight became a useful rhetorical device—a means by which real estate interests could reorganize property ownership by separating "productive" and "unproductive" land uses. The development of the discourse of blight provided real estate investors with a means to rationalize urban land ownership. In the early 1900s, the majority of rental properties in large American cities were owned by individuals (many of them immigrants). Landlords typically owned just a few properties and frequently did not have the resources to maintain or improve them. These small landholdings were inefficient, developers argued, and they prevented the

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HOUSING 11 (1936); NATIONAL ASSOCIATION OF HOUSING OFFICIALS, HOUSING OFFICIALS YEARBOOK 1936, at 241 (Coleman Woodbury ed., 1936); and WALKER, *supra* note 57, at 4-6.

71. PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, *supra* note 55, at 41.

72. *Id.* at 2.

73. WALKER, *supra* note 57, at 4; *see also* GELFAND, *supra* note 11, at 109.

74. Joseph D. McGoldrick, *The Superblock Instead of Slums*, N.Y. TIMES MAG., Nov. 19, 1944, at 54-55, *cited in* Howard Gillette, *The Evolution of Neighborhood Planning: From the Progressive Era to the 1949 Housing Act*, 9 J. URB. HIST. 421, 437 (1983). On the use of language to shape policies towards urban areas, see ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 67 (1995); and MELE, *supra* note 58, at 20-22.

production of modern, large-scale housing and commercial projects.[75] Real estate development was an emerging field in the 1920s, when mortgage bankers and institutional investors expanded their role in housing production dramatically in the suburbs and outlying areas of the city.[76] Many institutional investors saw potential in the urban core, but because they faced insurmountable obstacles to securing title to property in congested urban areas, redevelopment of slum areas stagnated. Eminent domain, therefore, was sought as a necessary means for the efficient accumulation of urban property.

Realtors, developers, and mortgage bankers were served by the National Association of Real Estate Boards (NAREB) in their efforts to secure access to urban land. Formed in 1908 to professionalize the selling of real estate, the NAREB subsequently expanded into many other areas of property development, and by the 1930s, it was one of the most powerful interest groups in the nation. The real estate executives who led the group were instrumental in the creation of new methods of real estate finance and insurance, and as the originators of planned suburban communities, they were vital to the growth of the field of planning. Led by Herbert Nelson during the 1930s and '40s, the group promoted a variety of programs to privately redevelop urban neighborhoods. The NAREB was aided in this effort by its research wing, the Urban Land Institute (ULI), described by its director, Hugh Potter, as "the city planning department of the Realtors of this country."[77] Together, the NAREB and ULI used the language of planning to persuade the public to support the use of eminent domain for private redevelopment.

As real estate interests became increasingly active in the promotion of urban redevelopment, Nelson and other renewal advocates shifted the analysis of blighted areas towards economic concerns. The problem with blighted areas was not only that they might become slums with their concomitant social problems. More importantly, blighted areas were obstacles to the economic growth of the city. "A blighted area is one which has deteriorated from an economic standpoint and therefore become less profitable to the city, the general public and the owners of its real estate. Depreciation has set in and the area is rapidly becoming a liability rather than an asset," argued planner Mabel Walker.[78] Blight prevented the creation of a modern city, and blighted areas were extremely difficult and expensive to cure. The problem, renewal

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75. *See* JARED N. DAY, URBAN CASTLES: TENEMENT HOUSING AND LANDLORD ACTIVISM IN NEW YORK CITY, 1890-1943, at 178 (1999).

76. On the rise of the real estate industry, see MARC WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987).

77. Hugh Potter, *The Need for Federal Action in Rebuilding Cities*, *in* 14 AMERICAN PLANNING & CIVIC ANNUAL 175, 175 (Harlean James ed., 1943); *see also* WEISS, *supra* note 76, at 50-51 (discussing conflicts within NAREB between real estate brokers and community builders); Gillette, *supra* note 74, at 434 (discussing role of NAREB and ULI in promoting urban redevelopment efforts).

78. WALKER, *supra* note 57, at 6-7.

advocates asserted, was that property owners often were unaware of the decline of property values in their neighborhood, and there was a resulting "discrepancy between the value placed upon the property by the owner and its value for any uses to which it can be put."[79] Owners, they argued, held on to their properties "in the hope that by some miracle they may eventually get back at least their original investment."[80] These "artificially high values," set by naive (or speculative) property owners, made acquisition and clearance very difficult.[81]

Ethnic prejudice underlay much of the analysis of blighted areas, particularly in New York City, where the majority of owners of apartment buildings and small-scale commercial operations were immigrants. For immigrant Jews and Italians, most of whom lacked formal education, tenement ownership was a popular means of upward mobility, as was the operation of garment factories and other businesses with low capital requirements. The tenements they owned were often the oldest and most decrepit, and immigrant landlords' neglect of these buildings was, according to one scholar, "a central management principal" designed to lower costs and maximize profits.[82] Undercapitalized immigrant businesses also presented problems to urban elites in their efforts to manage the city. While tenements were crucial to the housing of the immigrant masses and small businesses were vital to their economic survival, urban elites blamed apartment and industrial facilities for the creation of blight.[83]

Small-scale, immigrant property owners, renewal advocates argued, were not interested in the broader good of the city. They were speculators, persons whose only goal was to make a fast buck regardless of the damage they did to surrounding property values. "In certain spots," argued ULI President Hugh Potter, "the high prices at which slum areas are held reveal the influence of greed; the properties have been milked for years without repair."[84] Because these immigrant landlords were inefficient and their interests speculative, their

79. *Id.* at 7; *see also* GUY GREER, YOUR CITY TOMORROW 103 (1947).

80. WALKER, *supra* note 57, at 6-7.

81. *See* COLEAN, *supra* note 70, at 79; Alfred Bettman, *Federal and State Urban Redevelopment Bills*, *in* 14 AMERICAN PLANNING AND CIVIC ANNUAL 166, 171 (Harlean James ed., 1943) [hereinafter Bettman, *Federal and State Urban Redevelopment Bills*]; Alfred Bettman, *Urban Redevelopment Legislation*, *in* 15 AMERICAN PLANNING AND CIVIC ANNUAL 51 (Harlean James ed., 1944) [hereinafter Bettman, *Urban Redevelopment Legislation*].

82. DAY, *supra* note 75, at 33, 56.

83. On tenement landlords, see Donna Gabaccia, *Little Italy's Decline: Immigrant Renters and Investors in a Changing City*, *in* LANDSCAPE OF MODERNITY: NEW YORK CITY, 1900-1940, at 235, 245 (David Ward & Olivier Zunz eds., 1992). On the role of small business in immigrant mobility, see SUSAN GLENN, DAUGHTERS OF THE SHTETL: LIFE AND LABOR IN THE IMMIGRANT GENERATION (1990). On efforts to restrict industrial development in Manhattan, see Keith D. Revell, *Regulating the Landscape: Real Estate Values, City Planning, and the 1916 Zoning Ordinance*, *in* LANDSCAPE OF MODERNITY: ESSAYS ON NEW YORK CITY, 1900-1940, at 28 (David Ward & Olivier Zunz eds., 1992).

84. Potter, *supra* note 77, at 175.

property rights were not worthy of the same level of respect. Eminent domain would pay them "fair value" and return the property to those who would use it productively. In 1933, Herbert Nelson called for a "model state law helpfully outlining a legal device for empowering proper units to rule out adverse uses and effectively replan blighted areas."[85] Despite the obtuse wording of his proposal, Nelson clearly envisioned expanded use of eminent domain for redevelopment.

The purpose behind the designation of certain areas as blighted was clear. Renewal advocates believed that the blighted land could be put to a "higher use" under the right circumstances. One planner cited mid-town Manhattan as an example of an area where "the height of the land, the frontage on the river, and the growing transportation accessibility would make it a desirable location, if it were not for the slum characteristics it has acquired."[86] Many blighted areas supported viable businesses and provided affordable housing to working-class persons. The problem with a blighted area, however, was that it was not profitable enough—it did not produce enough tax revenues for the city, and it did not create profit opportunities for those who most coveted the land. As sociologist Scott Greer explained in his 1965 assessment of the urban renewal program, the definition of blight was "simply that 'this land is too good for these people.'"[87]

The changing terminology used to describe cities set the stage for the implementation of urban renewal. Through the creation and explication of the problem of blight, renewal advocates shifted the terms of the debate. The rights of private property remained sacrosanct, but subject to new limitations. Not all property owners were due the same respect. Those who held onto blighted properties were acting against the public interest because their speculation and inefficient management imperiled city residents and taxed the finances of city government. Furthermore, the refusal of these owners to sell their properties at "reasonable prices" prevented the rationalization of urban real estate and the creation of modern cities. "It is a public use," D.C. reformer John Ihlder declared in 1936, "to reclaim a slum or blighted area that is proving a disastrous economic and social liability to its community."[88] To prevent further damage to urban areas, eminent domain was necessary to wrest this land away from these owners and to ensure that it was used more appropriately.

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85. Herbert Nelson, *Urban Housing and Land Use*, 1 LAW & CONTEMP. PROBS. 158, 165 (1934).

86. WALKER, *supra* note 57, at 12; *see also* COLEAN, *supra* note 70, at 79.

87. GREER, *supra* note 10, at 31; *see also* GELFAND, *supra* note 11, at 108; TEAFORD, *supra* note 11, at 6. Hoover's committee on slums and blighted areas from the outset envisioned "the use of former slum sites for the housing of higher income groups." PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, *supra* note 55, at 9.

88. John Ihlder & Maurice Brooks, *Use of the Power of Eminent Domain in Slum Reclamation*, 12 J. LAND & PUB. UTIL. ECON. 355, 360 (1936).

III. PUBLIC HOUSING AND URBAN RENEWAL

The Great Depression provided the context for the beginnings of the reconceptualization of the Public Use Clause, as the development of public housing helped to legitimate urban renewal efforts. In 1934, at a time when urban issues were considered particularly pressing, the first volume of *Law and Contemporary Problems* devoted a special section to the question of urban revitalization. Assessing the need to clear slum areas, Coleman Woodbury, then Secretary of the Illinois State Housing Board, asserted that "those who see housing as a major economic activity of the next generation will breathe more easily if and when a few high state courts and the United States Supreme Court clearly recognize housing as a public use." Until then, he concluded, "housing development will go ahead very slowly. . . ."[89]

The Great Depression devastated tenement landlords. Vacancies increased, taxes rose, and new housing regulations increased maintenance costs. Most tenements were bought on credit, and because many had changed hands in the heated real estate market of the 1920s, mortgage payments on many properties exceeded their income. As a result, tenement owners were not able to make their loan payments. Many tenement owners lost their properties at foreclosure, and institutional investors, along with city governments, became de facto slum lords in many cities.[90]

This crisis, however, created new opportunities for renewal advocates. Many tenements were demolished because they were declared unsafe according to recently established minimum standards of occupancy. In addition, the consolidation of tax-delinquent buildings in the hands of corporations and government made the clearance of large areas for redevelopment possible. Property owners became increasingly amenable to condemnation as a means to exit a failing market. Where they once opposed any government regulation, landlords now wanted to be "bailed out" of their troubled investments. In addition, the creation of the Homeowner's Loan Corporation, the Federal Housing Administration, and other federal programs to support the real estate industry further supported the rationalization of the real estate market. Large corporations increasingly supplanted individual investors as owners of apartment buildings. As a result, opportunities for large-scale redevelopment of urban areas expanded.[91]

The acquisition of property by institutional investors also intensified the push for government intervention in the real estate market. During the 1930s, renewal advocates devised a variety of schemes to clear blighted areas. The

89. Coleman Woodbury, *Land Assembly for Housing Developments*, 1 LAW & CONTEMP. PROBS. 213, 215 (1934).

90. *See* DAY, *supra* note 75, at 174-78.

91. *See* Gabaccia, *supra* note 83, at 246.

Urban Land Institute (ULI), for example, proposed the creation of private redevelopment agencies to spur redevelopment through slum condemnation conducted by private corporations. Under the ULI plan, when these bodies garnered the support of 75% of the owners in a designated area, the city could condemn the land and pass it on to the agency.[92] Many government officials, however, opposed such a wholesale transfer of government power to private corporations and raised constitutional complaints over the appropriate uses of eminent domain. In response, the real estate lobby altered its proposal to envision a limited role for government in the redevelopment process and proposed the creation of publicly managed "urban land commissions" to select sites and condemn properties. The public agency, according to the plan, would then have responsibility to dispose of the land to public or private entities.[93] This proposal also languished, however, as renewal advocates continued to face legal and political opposition. A significant urban renewal program would not be implemented until the 1940s.[94]

Violently opposed by real estate interests, public housing became, ironically, the wedge for the expansion of slum clearance. Through the efforts of director Harold Ickes, the Public Works Administration (PWA) implemented the nation's first significant public housing program, and between 1934 and 1937, the PWA constructed more than 21,000 units of publicly-owned housing for the working-class.[95] To secure support for the program, Ickes agreed that slum sites would be given priority for public housing developments.[96] This would enable real estate investors (particularly mortgage companies) to relieve themselves of underperforming properties. Many housing reformers had pushed for working-class housing in the suburbs and outlying areas of cities, believing that these healthier surroundings would improve the social conditions of the urban poor. Development in less densely populated areas would also be cheaper and would allow the construction of more units. But Ickes believed that public housing could provide shelter to the working-class and revitalize slums at the same time. From that point on, public housing and urban renewal would be intimately related.[97]

Despite Ickes's efforts to limit the real estate lobby's opposition, the public

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92. GELFAND, *supra* note 11, at 113-15.

93. *See* BOYER, *supra* note 53, at 252-53; GREER, *supra* note 79, at 107-08; LOUIS JUSTEMENT, NEW CITIES FOR OLD: CITY BUILDING IN TERMS OF SPACE, TIME, AND MONEY 29-30 (1946); URBAN LAND INSTITUTE, A PROPOSAL FOR REBUILDING BLIGHTED CITY AREAS (1943); *Urban Development Principles Restated*, 6 URB. LAND, Mar. 1947, at 3.

94. Land clearance in cities, however, did increase dramatically during the New Deal, as local governments, funded by the Public Works Administration and the Works Progress Administration, implemented public projects like bridges, tunnels, and other government facilities. These projects dislocated thousands of city residents. *See* SCHWARTZ, *supra* note 12, at 46-47.

95. *See* RADFORD, *supra* note 11, at 100-01.

96. *See id.* at 101-02.

97. *See* SCHWARTZ, *supra* note 12, at 25-26; Carol Aronivici, *Housing the Poor: Mirage or Reality*, 1 LAW & CONTEMP. PROBS. 148 (1934).

housing program quickly came under legal attack. In the early battles over the New Deal, as conservative courts struggled to rein in the Roosevelt Administration, the government's eminent domain powers were once again contested. In 1935, a federal district judge in western Kentucky ruled that public housing did not meet the requirements of the Public Use Clause and denied the PWA the right to condemn land for housing projects.[98] Relying on late nineteenth century precedents, the judge construed the Public Use Clause narrowly and concluded that the agency could only condemn property for facilities that provided equal access to all citizens.[99] Public housing, with a limited number of units and a detailed screening process for tenants, did not meet this requirement.

> If the property of the citizen can be condemned and taken . . . simply because the legislative department . . . may determine that the use to which this property is to be put is for the general welfare, the property of every citizen in this country would be subject to the whims and theories of any temporary majority.[100]

The court further commented that a broad interpretation of the Clause would inevitably make the courts the arbiters of public use, denying the right of legislatures to make policy. "The action of the courts in such cases would inevitably reflect the individual views of the judges." Better, he concluded, to have "a fixed and definite guide."[101]

The Sixth Circuit affirmed the holding, concluding that "the taking of one citizen's property for the purpose of improving it and selling or leasing it to another . . . is not, in our opinion, within the scope of the powers of the federal government."[102] While public housing officials wanted to contest the issue in the Supreme Court, President Roosevelt's advisors decided not to pursue the case further. Government officials worried that the case would provide an opportunity for the conservative Supreme Court to gut much of the economic recovery effort. As a result, the federal program was limited to projects that the PWA could build without the use of eminent domain.[103]

The year following the ruling, Congress passed the Wagner Housing Act, which created the United States Housing Authority and replaced federal construction with a system of subsidy for local housing authorities.[104] The Act caused a dramatic expansion in public housing across the nation, as almost

98. United States v. Certain Lands in Louisville, 9 F. Supp. 137 (1935), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *appeal dismissed*, 297 U.S. 726 (1936).

99. *Id.* at 140.

100. *Certain Lands in Louisville*, 9 F. Supp. at 138; *see also* HENDERSON, *supra* note 26, at 71-72; Ira S. Robbins, *The Use of Eminent Domain for Housing Purposes*, *in* HOUSING OFFICIALS YEARBOOK 1936, at 116 (Coleman Woodbury ed., 1936).

101. *Certain Lands in Louisville*, 9 F. Supp. at 139.

102. *Certain Lands in Louisville*, 78 F.2d at 688.

103. *See* HENDERSON, *supra* note 26, at 71; RADFORD, *supra* note 11, at 103.

104. United States Housing Act of 1937, ch. 896, § 11, 50 Stat. 893 (1937) (current version at 42 U.S.C. § 1437 (1994)).

every state approved legislation authorizing the creation of local housing authorities to secure federal funding. The bill also supported the goals of renewal advocates by specifically linking public housing construction to slum clearance and requiring each housing authority to demolish or repair as many "substandard" units as it built.[105]

Public housing was also attacked in state courts, but unlike the Sixth Circuit, most state judges gave wide discretion to local agencies to use eminent domain for public housing. As it did in many areas of twentieth century legal reform, New York led the way in reinterpreting the Public Use Clause.[106] The state had authorized a public housing program before the passage of the Wagner Act, and the newly created New York City Housing Authority (NYCHA) fought the legal battles over eminent domain concurrently with the WPA. In a holding that contrasted distinctly with the Sixth Circuit, New York's Court of Appeals approved the condemnation of properties by the NYCHA. The court relied heavily on the argument that slum clearance was an integral part of public housing production and declared that "slum areas are the breeding places of disease which take toll not only on its denizens, but, by spread, from the inhabitants of the entire city and state."[107] The elimination of these areas through the construction of public housing, the court ruled, constituted a valid public purpose.

Other courts followed New York's direction in approving the use of condemnation for public housing, and slum clearance played an important role in many of these cases. The Supreme Court of Massachusetts stated that if the construction of housing for low-income persons were the "sole object of the statute we might have more difficulty."[108] But the court distinguished the state's public housing act from prior attempts to subsidize housing that it had rejected. An earlier proposed statute, the court argued, "contained no provision for the eradication of the sources of disease and danger. It was not a slum clearance law."[109] Because slums were a "public nuisance," the court concluded that their destruction was a valid use of eminent domain.[110]

In authorizing the condemnation of land for public housing, state courts shifted public use jurisprudence. In most prior cases, courts had examined the

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105. *Id.*; *see also* RADFORD, *supra* note 11, at 103.

106. On New York's central role in changing interpretations of the Public Use Clause and other legal doctrines, see NELSON, *supra* note 48.

107. N.Y. City Housing Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936); *see also* HENDERSON, *supra* note 26, at 72-75; NELSON, *supra* note 48, at 258-59.

108. Allydon Realty Corp. v. Holyoke Housing Auth., 23 N.E.2d 665, 668 (Mass. 1939).

109. *Id.* at 669.

110. *Id.*; *see also* Dornan v. Phila. Housing Auth., 200 A. 834, 841 (Penn. 1934) ("[T]he elimination of unsafe and dilapidated tenements is a legitimate object for the exercise of the police power."). Public housing cases are cited in Stephen A. Reisenfeld & Warren Eastlund, *Public Aid to Housing and Land Redevelopment*, 34 MINN. L. REV. 610, 634-35 (1950). *See also* Meidinger, *supra* note 14, at 33-34.

intended future use of the condemned property and determined whether that use was in the public interest. In *Muller* and its progeny, courts looked instead to the state of the property *before* condemnation. Since the destruction of tenements and other substandard buildings would eliminate noxious conditions in the area, courts reasoned, eminent domain provided a public benefit. By altering their methods for determining what constituted a public use, courts lessened the importance of the ultimate disposition of the property in their considerations. This shift would be crucial in considerations of the legality of urban renewal.[111]

The approval of local public housing by state courts provided strong precedents for urban renewal advocates who wanted to exercise the powers of eminent domain for the benefit of private developers. Public housing, however, was not identical to the programs promoted by renewal advocates. Unlike renewal efforts driven by private real estate interests, public housing projects would be owned by local government and leased to tenants. While public housing opinions were favorable to the cause, urban renewal required a further expansion of the public use doctrine. World War II-era concerns about the future of American society provided a platform for promoting such change.

IV. PLANNING A MODERN CITY

During the Great Depression, planners secured a prominent position in discussions over the economic and social development of the country. The Tennessee Valley Authority was only the largest of many significant development projects in which planners played an important role. During World War II, national planning took on still greater urgency, and federal agencies presented numerous post-war plans for the creation of new systems of transportation, sanitation, and the development of natural resources. Through the National Resources Planning Board (NRPB) as well as state, regional, and local planning commissions, planners lobbied for comprehensive programs to reorganize cities, suburbs, and rural areas. "The war has given a new intensity to thinking about the future of cities," argued NRPB Chair Charles Ascher. "Let us not quail before the magnitude of the task."[112]

The movement for comprehensive planning received a boost from

111. Though the Court of Appeals did not cite it, the *Muller* decision is similar in its reasoning to the Supreme Court's decision in *Miller v. Schoene*, 276 U.S. 272 (1928). There, the Court approved a Virginia law that directed owners of red cedar trees to cut them down in order to protect the state's apple orchards from the "cedar rust" disease.

112. Charles Ascher, *Better Cities After the War*, 57 THE AM. CITY, June 1942, at 55. For more on post-war planning and redevelopment efforts, see NAT'L RESOURCES PLAN. BD., NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1943 (1943); NAT'L RESOURCES PLAN. BD., POST-WAR PLANNING (1942); W.E. REYNOLDS, POST-WAR URBAN REDEVELOPMENT (1946); SCOTT, *supra* note 53, at 397-400; *City Planning Merges into National Planning*, 48 THE AM. CITY, Nov. 1939, at 65; and Frederic A. Delano, *Must Urban Redevelopment Wait on Bombing?*, 56 THE AM. CITY, May 1941, at 35.

economists worried that the end of the war would push the economy back into depression. During the conflict, Harvard economist Alvin Hansen and Federal Reserve advisor Guy Greer published several influential reports in which they argued that the nation needed a full-scale plan for post-war conversion to maintain employment levels and prevent economic crisis. Hansen and Greer focused in particular on slum clearance and urban redevelopment as methods to keep workers busy after the war. They recommended that each city and region develop a "Master Plan" for its area.[113] Seconding the proposal, Ascher argued that after the war ended the country could "seize what may be a unique opportunity to remold our cities, to provide a creative, healthful and satisfying living and working environment for a people afforded economic security by full employment."[114] The creation of a modern city, Hansen argued, required "far-reaching changes in state laws" to give cities "adequate legal power . . . to control the use of their land areas." These changes were to be "brought about mainly by the pressure of public opinion."[115]

During the 1940s, renewal advocates took their case to the public. In pamphlets, radio addresses, "futuramas," and other media, they argued that cities could be revitalized through public/private partnerships. These programs, with the use of eminent domain, would provide public benefits by eliminating the decrepit urban core and replacing it with a gleaming modern city. Cities across the country organized commissions to prepare blueprints for the post-World War II era. Some, including Cincinnati, Portland, Dallas, and Detroit, drafted comprehensive plans for their cities. These documents established zoning districts, created stronger building standards, recommended changes in city infrastructure, and sought to create an orderly system for future growth.[116] While some cities approved master plans, others like New York drafted more practical initiatives of public works aimed at renewing slum areas while providing construction jobs. Business leaders, politicians, and planning professionals cooperated in this process, and their efforts were promoted by private coalitions of civic leaders such as the Allegheny Conference in Pittsburgh, the Municipal Housing and Planning Council of Chicago, and the Citizen's Council on City Planning in Philadelphia (CCCP). These groups were controlled by the economic elite of each city, and their goal was to protect their urban investments by securing public support for government-assisted

113. *See* ALVIN H. HANSEN & GUY GREER, URBAN REDEVELOPMENT AND HOUSING (1945).

114. Ascher, *supra* note 112, at 55.

115. Alvin H. Hansen, *The City of the Future*, 32 NAT'L MUN. REV. 68, 70 (1943).

116. For examples of master plans, see ROBERT E. ALEXANDER & DRAYTON S. BRYANT, REBUILDING A CITY: A STUDY OF REDEVELOPMENT PROBLEMS IN LOS ANGELES (1951); EDWARD M. BASSETT, THE MASTER PLAN (1938); CINCINNATI CITY PLANNING COMMISSION, THE CINCINNATI METROPOLITAN MASTER PLAN (1948); DETROIT CITY PLAN COMMISSION, THE DETROIT MASTER PLAN (1951); GEORGE B. GALLOWAY, POSTWAR PLANNING IN THE UNITED STATES (1942); and T.J. KENT, JR., THE URBAN GENERAL PLAN (1964).

redevelopment.[117]

But businessmen were not the only advocates of renewal. Liberal groups were active participants in this project. The CCCP, founded in 1943 to "facilitate citizen participation in city planning and to further the science of city planning in Philadelphia," included in its membership the Association of Philadelphia Settlements, the Central Labor Union, the Inter-racial Committee of Germantown, and the local branch of the NAACP. Civic associations across the country promoted a revitalization program in which local agencies condemned properties, cleared them, and turned them over to private entities for redevelopment. These proposals required significant subsidies to be viable, and city leaders lobbied local, state, and federal governments to fund their programs.[118]

To garner public aid, urban elites took several steps. In New York City, Mayor LaGuardia took to the radio and the stump to promote his postwar public works program. "There will always be a New York City," LaGuardia stated, and, therefore, planning for the postwar period was "of the utmost importance."[119] In several cities, including Chicago and Detroit, renewal advocates sponsored forums and advertising campaigns aimed at eliciting resident backing. One of the most dynamic tactics to rouse public interest was sponsored by the CCCP. In 1947, the group created the "Better Philadelphia Exhibit," a multi-media presentation of its vision for a modern city. Thousands of people paid a dollar each to visit the exhibit at Gimbel's department store. There they saw designs for modern housing, read plans for updated infrastructure, and listened to testimony from public officials in support of Philadelphia's rebirth. The most popular part of the exhibit was a scale model of downtown Philadelphia, a vision of the city in the year 2000 that featured modern buildings, transportation, and residences.[120]

In many cities, advocates published pamphlets to educate the public on the need for urban renewal and comprehensive planning. Two such documents were *Metropolitan Los Angeles*, written by Mel Scott, and *Tomorrow's Chicago*, by Arthur Hillman and Robert Casey.[121] Both pamphlets were supported by local elites—*Metropolitan Los Angeles* was funded by the John Randolph and Dora Haynes Foundation and *Tomorrow's Chicago* by the Metropolitan Housing and Planning Council and the Field Foundation—and

117. *See* TEAFORD, *supra* note 11, at 50.

118. *See id.* at 51-52.

119. N.Y. CITY PLAN. COMM'N, PROPOSED POSTWAR WORKS PROGRAM FOR THE CITY OF NEW YORK ii (1942); *see also* N.Y. OFF. OF THE CITY CONSTR. COORDINATOR, PUBLIC WORKS PROGRAM: PROGRESS REPORT AS OF JANUARY 1, 1949 (1949); NEW YORK ADVANCING (Rebecca B. Rankin ed., 1945).

120. *See* TEAFORD, *supra* note 11, at 52; JOHN BAUMAN, PUBLIC HOUSING, RACE, AND RENEWAL: URBAN PLANNING IN PHILADELPHIA, 1920-1974 (1987).

121. HILLMAN & CASEY, *supra* note 66; SCOTT, *supra* note 65; *see also* MEL SCOTT, CITIES ARE FOR PEOPLE: THE LOS ANGELES REGION PLANS FOR LIVING (1942); Beauregard, *supra* note 53, at 384.

they sought to foster broad support for urban revitalization. Incremental programs of rehabilitation and social services, these pamphlets argued, could not alleviate the structural defects of American cities. The only solution, they concluded, was the clearance of blighted areas and the creation of planned developments that would revitalize the city.

With clearance accomplished, *Metropolitan Los Angeles* envisioned the creation of a region of low-density, single-family houses in well-planned communities. Each would have a combination of professional, commercial, recreational facilities and industry providing employment to area residents. The freeway would support the creation of these small communities by "divid[ing] the area into cells" that would become the "well-organized communities . . . of the future."[122] In Chicago, planners envisioned a central city that, once cleared, would be opened up into "superblocks" one-fourth square mile in area. Each community within the newly organized city would have a school and park in the center, and clusters of high and low-rise apartment buildings would surround the central square. Single-family houses would be grouped around smaller play areas, and shopping and parking would be close by. Neighborhoods would be "linked together by a flowing system of broad boulevards and green spaces." Industrial areas, buffered by "green belts," would be easily accessible.[123] With a master plan "as we build and rebuild, we would leave the right places vacant, and what we build would be where it belongs," argued *Tomorrow's Chicago*.[124] The modern city would be efficient and would enable residents to live more productively.

Renewal advocates argued that government intervention was necessary to make their vision of urban revitalization a reality. Condemnation had to be used to secure properties from people who stood in the way of the modern city. Eminent domain powers and government subsidy were needed because "most blighted properties are valued at far more than their real worth—and at more than private enterprise could afford to pay a development agency for them."[125] Government could also lower acquisition costs through eminent domain and thereby provide incentives for redevelopment. Responding to criticism that such a program would rescue the bad investments of property owners, advocates argued that redevelopment would be "a process of strengthening municipal fiscal structure and of giving us more orderly and livable communities. Incidentally, and as an inescapable by-product of all this, it would 'bail out' distressed property." But this would be "a minute part of its total effect."[126]

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122. SCOTT, *supra* note 65, at 95.
123. HILLMAN & CASEY, *supra* note 66, at 140-41.
124. *Id.* at 146.
125. SCOTT, *supra* note 65, at 110.
126. Potter, *supra* note 77, at 178-79.

With government assistance, these slum and blighted areas could be transformed into new modern communities with amenities that would attract middle-income persons. Renewal advocates envisioned the clearance of areas large enough to construct neighborhood developments "sufficiently large to resemble small towns:"[127] These newly created areas of the city would have lower population densities, more community spaces, and traffic patterns organized to support business while protecting residential areas. "In a way, it is a plan to bring suburban advantages to the center of the city," argued *Tomorrow's Chicago*.[128] Urban renewal would counter the lure of the suburbs and place cities in a more competitive position to attract residents.[129]

But none of this would be possible without legal reform. Advocates used these pamphlets and other publicly-disseminated documents to justify the increasing power of the state in the private market. "[S]ome citizens," the author of *Metropolitan Los Angeles* granted, "hold the opinion that planning for a whole metropolitan area is undemocratic—that it smacks of totalitarianism or some other form of control from the top down, in contrast to our ideal of action from the grass roots upward."[130] But planning in the United States, advocates argued, was a democratic process, based on the sanctity of individual rights. "When there is comprehensive planning and control of land use, private-property rights are generally made more secure. Landowners have some protection against sudden and chaotic change in their own areas and those adjoining," concluded *Tomorrow's Chicago*.[131] Public/private cooperation would provide the means to ensure that property values were maintained.

Planning professionals also argued that the completion of a comprehensive master plan provided a public benefit that countered concerns about the abuse of eminent domain powers. "Nothing is unconstitutional until the courts make it so," claimed Alfred Bettman, a leading advocate of master plans and urban redevelopment. Bettman argued that, while some people believed that the urban renewal scheme violated the Public Use Clause, there was no reason to believe that the courts would not approve a "carefully drawn measure, rational in its conceptions, genuine in its details, administered with intelligence and integrity, and which meets a real social and economic evil which, by its very nature, cannot be reached without public action of this nature. . . ."[132] The creation of modern neighborhoods would provide an appropriate application of the Public Use Clause, he asserted.

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127. HILLMAN & CASEY, *supra* note 66, at 72.

128. *Id.* at 73.

129. *Id.*

130. SCOTT, *supra* note 65, at 165.

131. HILLMAN & CASEY, *supra* note 66, at 163.

132. Bettman, *Urban Redevelopment Legislation*, *supra* note 81, at 60; *see also Report of the Committee on Urban Redevelopment*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE ON PLANNING 250 (American Society of Planning Officials, 1941).

While most renewal advocates argued that urban renewal was legally permissible under then-current interpretations of the doctrine, other advocates flatly stated that the primacy of property rights must be superseded and that the narrow interpretation of the Public Use Clause was unsuited to modern urban problems. "[I]t has become clear beyond question," argued Guy Greer, "that the rights of individual property ownership can no longer be considered absolute: they must be modified to avoid destruction of the rights of the community at large."[133] Condemnation would provide owners with the fair value of their property and improve urban neighborhoods for all residents. By making the elimination of blight vital to the survival of the city, advocates avoided questions about who benefited from the condemnation process and who bore the costs. Although many city residents objected to the taking of their properties, the discourse of blight, emanating from seemingly objective professionals, obscured the debate over urban revitalization programs.

The development of the discourse of blight reflected an evolution in the proper uses of eminent domain. Eminent domain in the nineteenth century was used primarily to secure undeveloped land. By the late 1800s, condemnation of improved land was an important part of city building, used for bridges, utilities, transportation, and other types of infrastructure. The use of eminent domain was not new to post-war America, but the urban renewal scheme was nevertheless novel, both in form and scope. It authorized the transfer of land from one group of private owners to another group that would use it for practically the same purposes, and it envisioned the transfer of large amounts of real estate in an effort to reshape the urban landscape. Urban renewal was a major undertaking that required not only vast amounts of funding but also an alteration of the relationship between property owners and the state. By advocating a reinterpretation of the Public Use Clause and cementing the discourse of blight, widely disseminated pamphlets like *Metropolitan Los Angeles* and *Tomorrow's Chicago* were crucial to the adoption of the program. Through their rhetoric, these documents explained the public purpose behind these private transfers and helped mute concerns about the expansive powers that the program created.[134]

V. PUBLIC RENEWAL AND PRIVATE BENEFIT

By the 1940s, renewal advocates had created a detailed program for urban revitalization. The basic tenets of urban renewal held that in order to protect property values and promote the efficient growth of urban areas, cities needed a comprehensive plan for redevelopment. The plan would designate the areas to

133. GREER, *supra* note 79, at 116.

134. For a discussion of these efforts to secure public support, see CHARLES W. ELIOT, CITIZEN SUPPORT FOR LOS ANGELES DEVELOPMENT (1945).

be reclaimed and what types of projects would be built in each district. The actual development would be conducted privately, but the government would be an important partner. To keep acquisition costs down, eminent domain powers, along with government subsidies, were necessary.[135] Throughout the decade, renewal advocates lobbied the public to support their program. As experimental renewal programs began and the discourse of blight turned from theory to reality, the limitations of the terminology became clear. Developers selected properties not because they were run down, but because they were profitably attractive. Moreover, politicians and institutional leaders used redevelopment programs to serve other goals like the restriction of mobility for blacks.

During the 1940s, a majority of states passed redevelopment acts. New York state was the first to pass urban renewal legislation in 1941, followed by Illinois, and by 1948 twenty-five states had similar laws.[136] These laws authorized the creation of locally-chartered organizations with the authority to condemn and clear blighted areas that would then be privately redeveloped. The programs varied in their particulars—some acts authorized the creation of private organizations to condemn properties, while others vested that responsibility in a newly created public agency or in the area's public housing administration. Some redevelopment acts authorized the use of tax incentives to promote revitalization, and one (Illinois) provided grants to subsidize developments. Most demanded the submission of comprehensive plans for the designated areas, and many required that the plans be approved by the local planning commission. Despite these particular differences among redevelopment plans, however, they did share one important requirement: all required that, after land was set aside for public infrastructure, the cleared property be transferred to private developers.

Eminent domain powers were the most significant facet of these redevelopment acts. The District of Columbia Redevelopment Act of 1945 was typical. Passed by Congress after lobbying from several groups, including the American Society of Planning Officials and the Urban Land Institute, it declared that, "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare."[137] The legislation further concluded that redevelopment could not be attained by "the ordinary operations of private

135. *See* Bettman, *Federal and State Urban Redevelopment Legislation*, *supra* note 81, at 168.

136. *See* JUSTEMENT, *supra* note 93, at 29-30; SCOTT, *supra* note 53, at 424-25; *see also* Bettman, *Federal and State Urban Redevelopment Bills*, *supra* note 81, at 166 (discussing legislation pending in 1943); Thomas Desmond, *Blighted Areas Get a New Chance*, 30 NAT'L MUN. REV. 629, 629-32 (1941) (discussing New York's Desmond-Mitchell Urban Redevelopment Corporation Law).

137. District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790 (1946) (current version at D.C. CODE ANN. § 6-301.01.(2001)).

enterprise" and made the legislative determination that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment" was a "public use."[138] Other state acts also emphasized the importance of eminent domain and included specific provisions to convince the courts that their programs were constitutional. When New York amended its act in 1942 to allow insurance companies to invest in housing projects, it declared that the condemnation of blighted areas for the development of housing was a "superior public use," giving urban renewal projects priority even when local governments considered using sites to build schools, parks, or other public works.[139]

Despite much legislative activity, only two major renewal projects commenced in the early 1940s—Pittsburgh's redevelopment of the Golden Triangle, which eliminated an industrial district in the oldest section of the city and replaced it with office buildings, and Metropolitan Life Insurance's Stuyvesant Town, which cleared the east side of Manhattan between 14th and 23rd streets for residential construction. The Stuyvesant project required the uprooting of 11,000 working-class families so that they could be replaced by 8,756 middle-class families. Stuyvesant Town was a harbinger of problems to come as urban renewal expanded its scope. Lewis Mumford called the project "prefabricated blight" and condemned its high density and lack of public amenities (including its lack of schools).[140] Others complained that the project, with rents too high for the working-class residents dislocated by the clearance of the area, added to New York's wartime housing shortage. African-Americans bridled at the comments of Metropolitan Life Insurance Chairman Frederick Ecker, who defended the company's decision to deny admission to blacks by declaring that "blacks and whites just don't mix."[141] But most of New York's political, business, and civic leadership supported the project wholeheartedly, and most housing reformers, though they expressed concern over the dislocation of the poor, also welcomed the development. Desperate to clear blighted areas, these elites argued that tough choices had to be made.[142]

The majority of people uprooted for Stuyvesant Town were white, but soon urban renewal would set its sights on the black ghetto. While race was always central to definitions of blight, after the great migrations of World War II, race played an increasingly important role in city planning. By the mid-1940s, the expanding minority black and Latino ghettos were the main concern of business leaders and urban politicians. In 1950, for example, the Los Angeles

138. *Id.*

139. *See* HENDERSON, *supra* note 26, at 126.

140. Lewis Mumford, *Prefabricated Blight*, THE NEW YORKER, Oct. 30, 1948, at 49, 54.

141. Charles Abrams, *The Walls of Stuyvesant Town*, THE NATION, Mar. 24, 1945, at 328.

142. On Pittsburgh's first project, see JEANNE LOWE, CITIES IN A RACE WITH TIME 126-44 (1965); and TEAFORD, *supra* note 11, at 108. The Stuyvesant Town controversy is discussed in detail in HENDERSON, *supra* note 26, at 122-45; and SCHWARTZ, *supra* note 12, at 84-107.

City Planning Commission designated eleven areas as blighted. All but one of them had a population that was majority Mexican-American or African-American.[143] Chicago, according to city planners, had the largest blighted central areas of any city in the United States, over twenty square miles. The area selected almost completely overlay Chicago's "black belt" on the Southside and included many rapidly changing areas on the Westside.[144]

Because of its increasing concern over the expansion of the black ghetto, Chicago became a leader in the slum clearance movement. While white neighborhoods to the south of the ghetto responded violently to the arrival of black neighbors, Chicago's elites were more subtle in their reactions to neighborhood change. After World War II, business leaders from downtown department stores and financial institutions joined with major nonprofit organizations, including the University of Chicago and the Illinois Institute of Technology (IIT), to respond to the encroachment of the ghetto. These elites were concerned that their investments were imperiled by the growth of black Chicago, and they sought to renew the areas surrounding downtown to make them attractive to middle-income people. "We have two choices, either to run away from the blight or to stand and fight," argued Henry Heald, IIT's president.[145] Rallying behind the slogan "Stand and Fight" and led by Heald, realtor Fred Kramer, and businessman Holman Pettibone, business and institutional leaders embarked on the revitalization of the inner city.[146]

In 1947, pushed by this coalition, Chicago Mayor Martin Kennelly reached an agreement with New York Life Insurance Company to build the "Lake Meadows" development on the near Southside. While much of the proposed clearance area was deteriorated, New York Life created a controversy when it demanded that several well-maintained blocks be cleared because they would afford the project better views of the lake. Even redevelopment advocates acknowledged that the plan ignored "actual slum areas completely" and planned "the demolition of a well-kept Negro area where the bulk of property is resident owned, its taxes paid, and its maintenance above par."[147] Residents argued that the area was not a slum and that they were "being wrongfully ousted from the land where they have invested thousands of dollars in upkeep and improvements."[148] Protesters further asserted that the project was "'Negro clearance' rather than slum clearance" and said, "If it is a slum clearance

143. ALEXANDER & BRYANT, *supra* note 116, at 38.

144. *See* HILLMAN & CASEY, *supra* note 66, at 70; CHI. PLAN COMM'N, HOUSING GOALS FOR CHICAGO 62 (1946). For a fuller discussion of the use of urban renewal in reshaping the racial landscape of American cities, see HIRSCH, *supra* note 12; and SUGRUE, *supra* note 12.

145. METRO. HOUSING & PLAN. COUNCIL, RECLAIMING CHICAGO'S BLIGHTED AREAS (1946).

146. *See* HIRSCH, *supra* note 12, at 102-05.

147. *Id.* at 125.

148. *Citizens Hold Huge Rally to Block Land Grab*, PITTSBURGH COURIER, June 25, 1949.

program, then let's make it that and start where the slums are."[149] Although their complaints delayed the project, these efforts ultimately did not stop the clearance of the area.

The Lake Meadows development was a success in providing middle-class housing to Chicagoans (unlike most renewal projects the new tenants were also black), and the clearance of the area also enabled local institutions like IIT to expand their facilities. At the same time, the project replaced only a small percentage of the units that were demolished and exacerbated the severe housing shortage in the city. Excluded from many areas, poor blacks increasingly relied on the units of the Chicago Housing Authority for shelter. As a result, the hopes of housing officials to maintain integration in Chicago's public projects were dashed. In addition, the dislocation caused by the Lake Meadows project increased pressure on other neighborhoods, heightened tensions between blacks and whites, and accelerated neighborhood decline in other areas of the Southside.[150]

Lake Meadows, Stuyvesant Town, and Pittsburgh's Golden Triangle received national attention as models for urban redevelopment, but they were the only achievements that renewal advocates could claim during the 1940s. Despite the acceptance of the need for redevelopment and the passage of state laws to support such efforts, major obstacles to renewal remained. The condemnation process was cumbersome and many property owners fought their ejection. Because urban renewal laws were untested in most states, struggles over condemnation went all the way to state supreme courts. In addition, renewal area residents, who were typically poor and politically weak, still elicited support in their efforts to save their neighborhoods. Furthermore, the tax credits authorized by most state acts were not enough to excite the interest of private developers. Even though renewal advocates believed slum properties could be put to a "higher use," planning principles (which required lower density development) would result in lower returns in renewal areas.[151]

Therefore, advocates argued, redevelopment required government financing. "Private enterprise will not be able to redevelop property on the basis of the present cost of acquisition unless the excessive valuations are written off by means of either tax exemptions or direct subsidies," argued developer Louis Justement, whose views were seconded by the National Association of Housing Officials and the NAREB.[152] But cities and states lacked the resources for a significant renewal program, and as renewal efforts

149. *Housing Project Hangs Fire: Charges 'Clearance' of Negroes is Aim*, CHI. DEFENDER, May 7, 1949, at 4.

150. *See* HIRSCH, *supra* note 12, at 122-23.

151. *See* GELFAND, *supra* note 11, at 116-17; GREER, *supra* note 79, at 111; JUSTEMENT, *supra* note 93, at 54-59; MOLLENKOPF, *supra* note 10, at 79-80.

152. JUSTEMENT, *supra* note 93, at 54.

stalled, advocates increased their focus on the federal government. National subsidies, they argued, were necessary to revitalize cities. "It is no more than equitable that the credit of the federal government be applied to the reclamation of eroded urban land," argued ULI President Hugh Potter.[153] "The cities need not feel like paupers going hat-in-hand to a source of bounty in seeking the use of such credit for they contain in large measure the sources from which it is drawn."[154] Throughout the 1940s, the NAREB and other lobby groups used such arguments in advocating for the passage of federal legislation to support urban redevelopment.[155]

Several senators agreed. In 1945, Senators Robert Taft, Allen Ellender, and Robert Wagner introduced a comprehensive housing act. Their proposal combined funding for additional public housing with subsidies to lower the costs of acquisition in slum clearance sites. Under Title I of the bill, the federal government would pay two-thirds of the cost of purchasing and clearing renewal areas. While many groups supported the bill, it languished for four years because of NAREB opposition. Real estate interests certainly wanted government aid for renewal efforts, but they were so adamantly opposed to the public housing included in the legislation that they would not support the bill. After his election in 1949, President Truman made urban housing a centerpiece of his "Fair Deal," and the bill finally passed. The Housing Act of 1949 promoted the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of "a decent home and a suitable living environment for every American family" through public and private construction.[156]

The bill was a high point of post-war liberalism, representing the largest commitment in American history to aid the unfortunate through publicly-subsidized housing. But it was vague about how this goal was to be met. The 810,000 units of public housing authorized in the legislation fell far short of the demand, and Congress failed to fund even that low target. By linking urban renewal to the program, the Housing Act of 1949 ultimately displaced many thousands more families than it housed, and the bill had only weak protections for the people dislocated by renewal efforts. These flaws would become evident as the program was implemented, but at the time, the Act was hailed by housing reformers and city planners as a means to restore cities to their central

153. Potter, *supra* note 77, at 177.

154. *Id.*

155. *See* Bettman, *Federal and State Urban Redevelpment Bills*, *supra* note 81, at 166-71; Arthur Binns, *Report of the Committee on Housing and Blighted Areas of the National Association of Real Estate Boards*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE ON PLANNING, 1941, at 153-55 (American Society of Planning Officials, 1941); Nat'l Ass'n of Housing Officials, *Subsidy and Taxation for Urban Redevelopment*, 59 THE AM. CITY, June 1944, at 76.

156. *See* GELFAND, *supra* note 11, at 115; GREER, *supra* note 79, at 112-15.

place in American life.[157]

VI. THE CONSTITUTIONALIZATION OF URBAN RENEWAL

Mid-century saw urban renewal projects planned or underway in cities across the nation. New York remained the leader in urban renewal, with several major developments in progress. In the post-war years, the combination of public housing, highway, and urban renewal projects undertaken by the city's redevelopment czar Robert Moses changed the face of whole neighborhoods. Though the uprooting of residents in clearance areas had been a concern before, the extent of New York's program made relocation a major problem. The City Planning Commission estimated that, between 1946 and 1953, more than 250,000 people were uprooted in the city. Hundreds of apartment buildings, stores, factories, and warehouses were condemned in pursuit of New York's modernization.[158]

Despite the dislocation of thousands across the country, urban renewal was accepted as a necessity by 1950. Commenting on redevelopment plans in the southwest section of Washington, D.C., the *Post* portrayed the issue as one of "Progress or Decay" and stated bluntly that "Washington Must Choose."[159] Only redevelopment, the paper argued, could stop the "headlong flight to the suburbs."[160] The *New York Times*, assessing the nation's largest urban renewal program, stated that change was inevitable and celebrated the efforts of the "municipal surgeons" who performed "a series of operations" to revive the city.[161] Despite the serious impact it had on many residents, urban renewal was widely viewed as the only answer to the decline of the city.

Faced with a clear crisis in cities, only a few policy-makers expressed concerns about the possible abuse of eminent domain powers. New York housing reformer Charles Abrams was one. "In my opinion, under present redevelopment laws, Macy's could condemn Gimbels—if Robert Moses gave the word," Abrams argued.[162] But even Abrams believed that condemnation was necessary—his complaint was that the power was wielded undemocratically. Civil rights activists also struggled to balance competing concerns in the debate over urban renewal. In his 1948 book *The Negro Ghetto*,

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157. *See* GELFAND, *supra* note 11, at 154-55; HALPERN, *supra* note 74, at 65; MOLLENKOPF, *supra* note 10, at 79-80; SCOTT, *supra* note 53, at 460-67; TEAFORD, *supra* note 11, at 107.

158. *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 965-68 (1974).

159. HOWARD GILLETTE JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 156 (1995) (discussing a series of *Washington Post* articles promoting redevelopment).

160. *Id.* at 156.

161. SCHWARTZ, *supra* note 12, at 252.

162. HENDERSON, *supra* note 26, at 20. In New York, the only group that consistently supported uprooted homeowners and tenants was the leftist American Labor Party. Their influence declined dramatically during the anti-Communist hysteria of the 1950s. *See* SCHWARTZ, *supra* note 12, at 195.

Robert Weaver (later to become the first HUD Secretary) argued that urban renewal presented a "threat or an opportunity" to African-Americans.[163] He worried that the program would be used to entrench racial segregation and prevent blacks from moving into new areas. While Weaver's fears were borne out in the early 1950s, he continued to support the principle of urban renewal, and he argued that areas developed according to "sound planning principles" provided the best hope for the integration of middle-class blacks into society. Weaver's complaints were not with the use of eminent domain, but with the focus of redevelopment officials on the clearance of minority areas and their refusal to support integration in newly developed areas.[164]

Faced with increasing momentum in the urban redevelopment movement, property owners and clearance area residents did not meekly accept the renewal program. Instead, in every city that attempted condemnation, the courts were forced to adjudicate disputes over the implementation of the program. Recent precedents facing litigants clearly favored an expansive definition of a public use.[165] But many of the cases had been about public housing, which benefited only a small number of people but, nevertheless, was a government-owned undertaking. This changed in the late 1940s and early 1950s, when at least seventeen state courts considered the constitutionality of redevelopment statutes.[166] All but three of these courts upheld the right of local authorities to condemn land and turn it over to private parties for renewal. The success of renewal initiatives in state courts depended on a coordinated effort of real estate interests and housing reformers. The NAREB, the National Association of Housing Officials, the National Conference of Mayors, and other pro-redevelopment groups provided assistance to state and local authorities, helped to draft briefs, and submitted their own amicus curiae briefs to the courts. Courts relied heavily on these briefs in writing their opinions, and many of them directly appropriated the language of blight.[167]

Most states had declared slum clearance a public use in public housing cases a decade earlier, so much of the litigation over urban renewal acts centered on two questions: Was the condemnation of blighted properties legal in areas that were not yet slums, and was the transfer of condemned property to

163. ROBERT WEAVER, THE NEGRO GHETTO 322 (1948).

164. Robert Weaver, *Habitation With Segregation*, OPPORTUNITY, June-July 1952.

165. *See* discussion *supra* pp. 25-26.

166. For state cases involving urban renewal, see REISENFELD & EASTLUND, *supra* note 110; and Note, *Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422, 1425 (1965).

167. See, for example, the cases cited in *Berman v. Parker*; Brief for the District of Columbia Land Redevelopment Agency and National Capital Planning Commission, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53); and Supplemental Brief for the District of Columbia Land Redevelopment Agency and National Capital Planning Commission, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53). Additional cases are also discussed in Daniel Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953); and Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504 (1959).

private parties allowed under the Public Use Clause? Renewal advocates argued that clearance of slums and blighted areas was imperative and that a comprehensive program was necessary to prevent further urban decline.[168] The courts agreed. Following the lead of renewal advocates, judicial opinions frequently merged slums and blight into one phenomenon, ignoring the argument that urban renewal was more about private redevelopment than about slum clearance. To many courts, urban problems were so severe that it was inappropriate for judges to restrict the use of condemnation to solve them. The Pennsylvania Supreme Court stated that if urban renewal was rejected, cities would "continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young, and, while contributing little to the tax income of the municipality, consume an excessive proportion of its revenues because of the extra services required for police, fire, and other forms of protection."[169] The future of the city, the court concluded, rested on the ability of government to eliminate slums and blight. Slum clearance, the court reasoned, "certainly falls within *any* conception of 'public use' for nothing can be more beneficial to the community as a whole than the clearance of [areas] characterized by the evils described in the Urban Redevelopment Law."[170]

Considering the argument that the transfer of property to private parties violated the Public Use Clause, courts recapitulated the argument of renewal advocates that removal of blight was the object of redevelopment acts and that the subsequent disposition of the property did not vitiate the public benefits provided by clearance. That private property cannot be taken for private use "is too well settled to require citation of authority," the Massachusetts Supreme Court stated. "But the plaintiff's argument, we think puts the cart before the horse."[171] The purpose of the act was to clear slums, and any ancillary impacts were not significant. The Pennsylvania Supreme Court agreed. Redevelopment acts were "directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized," the court reasoned.[172] Even though private developers were central to the program, the court concluded that it was "not the object of the state to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of

168. For a representative argument by a redevelopment authority, see Appellee's Brief, Belovsky v. Redevelopment Auth., 54 A.2d 277 (Pa. 1947), *in* SUPREME COURT PAPER BOOKS (Supreme Court of Pennsylvania, 1948).

169. Belovsky v. Redevelopment Auth., 54 A.2d 277, 282 (Pa. 1947).

170. *Id.*

171. Papadinis v. City of Somerville, 121 N.E.2d 714, 717 (Mass. 1954) ("[W]e are of the opinion that the main purpose of the plan is slum clearance and that the disposition of the land by sale thereafter is incidental to that purpose. Once the public purpose contemplated by the statute has been achieved the authority is not obliged to retain the cleared land as unproductive property.").

172. *Belovsky*, 54 A.2d at 282.

the real or fundamental purpose."[173] The Illinois Supreme Court similarly held that

> when rehabilitation has been accomplished by the acquisition of the land and the removal of the structures, and after holding and using it for some appropriate public purpose, if there is any surplus land left, which is not needed for any of these purposes, it may be sold, leased or exchanged as provided therein.[174]

By conflating the two steps—slum clearance and redevelopment—courts made the dramatic expansion of eminent domain powers appear unexceptional.

Not all state courts agreed that urban renewal was an appropriate governmental function. The Supreme Court of Florida declared that the condemnation of private homes for private commercial redevelopment was unconstitutional and concluded that "if the municipalities can be vested with any such power or authority, they can take over the entire field of enterprise without limit so long as they can find a blighted area containing sufficient real estate."[175] The Georgia Supreme Court shared this view and rejected the attempt of the Housing Authority of Atlanta to condemn industrial and residential property in order to create a modern industrial park. Acknowledging that other state courts had held differently, the court stated that it could not "subscribe to the doctrine that the power of eminent domain may be resorted to . . . every time there may be some public benefit resulting. To hold so would be to cut the very foundation from under the sacred right to own property."[176] South Carolina's Supreme Court also invalidated that state's urban renewal act,[177] but these were the only objections. By 1954, a large body of state law had approved the urban renewal scheme.

Notwithstanding the Sixth Circuit's opposition to public housing and urban renewal programs, federal precedents also favored renewal advocates. The Supreme Court had long given wide latitude to the use of eminent domain, and during the 1930s, the judicial underpinnings of the public use doctrine began to collapse. Although the 1934 case of *Nebbia v. New York*[178] was not about the Public Use Clause, it did set the tone for dramatic changes in Supreme Court jurisprudence with respect to judicial review of economic regulation, thus laying the foundation for the *Berman* decision. In considering New York State's attempt to regulate the price of milk, Justice Roberts declared that the Court's role in assessing legislative regulation of the economy was very

173. *Id.* at 283.

174. People *ex rel.* Tuohy v. City of Chicago, 68 N.E.2d 761, 766 (Ill. 1946); *see also* David Jeffrey Co. v. City of Milwaukee, 66 N.W.2d 362, 375 (Wis. 1954) ("The fact that the property may not long remain in the ownership of the city does not in itself indicate that the use will not be a public use and that the city may not be invested with the power of eminent domain in acquiring it.").

175. Adams v. Housing Auth., 60 So. 2d 663, 668-69 (Fla. 1952).

176. Housing Auth. v. Johnson, 74 S.E.2d 891, 894 (Ga. 1953). This opinion was reversed by amendment to the Georgia State Constitution in 1954. *See* Mansnerus, *supra* note 6, at 456; Note, *supra* note 166, at 1425.

177. Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956).

178. 291 U.S. 502 (1934).

limited. Prior to *Nebbia*, the Court required that businesses be "affected with the public interest" to be subject to regulation. Roberts, however, declared that the states were "free to adopt whatever economic policy may reasonably be deemed to promote the public welfare."[179] *Nebbia* had no direct impact on Public Use Clause jurisprudence, but, by questioning the necessity for a judicial investigation into the nature of government regulation, the case undermined the meaning of the Public Use Clause. If all legislative enactments were presumed to serve the public interest, then the Fifth Amendment limitations on the power of eminent domain were empty.

In cases involving eminent domain, the Supreme Court continued to grant wide deference to the legislature. In 1946, the Court allowed the Tennessee Valley Authority to condemn property for an electric power project. The land owners argued that the property was not necessary for the completion of the power dam, but the Court stated that "it is the function of Congress to decide what type of taking is for a public use and the agency authorized to do the taking may do so to the full extent of its statutory authority."[180] In the aftermath of that decision, the Court's deference to the legislature caused at least one legal commentator to write a "requiem" for the public use doctrine, but this scholar may have missed its passing by a decade.[181]

It was in this context of expanding state approval for urban renewal and broadened federal authority for eminent domain in other contexts that the federal courts considered the issue of urban renewal. In 1952, the District of Columbia Redevelopment Land Agency (DCRLA) proposed a massive clearance project that would lead to the reconstruction of almost the entire southwest quadrant of the city. During its twenty-year duration, this project dislocated over 20,000 impoverished black residents and replaced their homes with office buildings, stores, and predominantly middle-income housing. As part of this initiative, the DCRLA condemned a department store owned by Max Morris. All the parties agreed that his property was not "blighted," but the agency argued that the parcel was necessary to "replan" the area.[182]

When Morris filed for an injunction against the taking, Judge E. Barrett Prettyman, in a long and complex opinion for the three-judge panel that heard the case, held that the District of Columbia's redevelopment law was constitutional. The condemnation of property to eliminate or prevent slums, which were "injurious to the public health, safety, morals and welfare," was a valid purpose under the Constitution, the court ruled, and the agency could take

179. *Id.* at 537. For an assessment of the importance of this case, see CUSHMAN, *supra* note 29, at 80-81.

180. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551-52 (1946).

181. Note, *The Public Use Doctrine: An Advance Requiem*, 58 YALE L.J. 599 (1949).

182. *See* Schneider v. D.C. Redev. Land Agency, 117 F. Supp. 705 (D.C. 1953); Brief for the District of Columbia Redevelopment Land Agency and National Capital Planning Commission at 13-14, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53); LOWE, *supra* note 142, at 205.

land in such circumstances even if it was to be transferred to private parties.[183] But the court sought to place limitations on the DCRLA's right to condemn: "These extensions of the concept of eminent domain . . . are potentially dangerous to basic principles of our system of government. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights."[184] Prettyman concluded that the government cannot seize property merely because it is in a slum. The condemnation was authorized only "to the extent that the taking is reasonably necessary to the accomplishment of the asserted public purpose."[185] Interpreting the Redevelopment Act in this manner, the court upheld the law.

The taking of "blighted" land, however, presented greater difficulties for the court. Judge Prettyman took issue with the DCRLA's definition of blight and declared that the condemnation of land for aesthetic purposes was not valid. Prettyman's opinion critiqued the basic philosophy of modern planning. Some people, he argued, "prefer single-family dwellings, like small flower gardens, believe that a plot of ground is the place to rear children, prefer fresh to conditioned air, sun to fluorescent light."[186] However, "in many circles," the opinion continued, "such views are considered 'backward and stagnant.'"[187] He questioned: "Is a modern apartment a better breeder of men than is the detached or rowhouse? Is the local corner grocer a less desirable community asset than the absentee stockholder in the national chain . . .?"[188] It was not the government's prerogative, Prettyman declared, to determine who was correct in such matters. "The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic."[189]

The DCRLA's view of its authority, the court concluded, was overly broad. The agency argued that it had the right to select any area for clearance as long as a slum existed within its boundaries. Since the statute did not define blight or explain what would constitute an appropriate land usage and allowed the DCRLA to determine such factors on a case-by-case basis, Prettyman concluded that the authority granted by the act would amount to an "unreviewable power to seize and sell whole sections of the city."[190] In so concluding, the opinion critiqued the expansion of government power into private life envisioned by the Redevelopment Act. The purpose of the DCRLA's plan in Southwest Washington, the court argued, was "to create a

183. *Schneider*, 117 F. Supp. at 718-19.
184. *Id.* at 716.
185. *Id.* at 718-19.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 721.

pleasant neighborhood," and if such a scheme were "undertaken by private persons the project would be most laudable."[191] However, "as yet the courts have not come to call such pleasant accomplishments a public purpose."[192] To do so would run "squarely into the right of the individual to own property and to use it as he pleases."[193] The rights of private property are subject only to necessary government intervention. "One man's land cannot be seized by the government and sold to another man merely in order that the purchaser may build upon it a better house. . . ."[194]

Because the court held the law constitutional but placed numerous restrictions on the DCRLA's condemnation powers, both parties appealed, asking the Supreme Court to define the limits of the Public Use Clause. The DCRLA desired the broadest possible interpretation of the clause, while the appellants argued that unlimited authority would imperil the basic rights of property owners. In its briefs to the Supreme Court, the DCRLA asserted that the condemnation of Morris's property was necessary to prevent the further decline of Southwest Washington. That purpose, the agency argued, was well within the police power of Congress, which authorized the agency to "promote the public health, safety, morals and welfare of the District of Columbia by eliminating and preventing slums and to use eminent domain for that purpose."[195] The agency further asserted that prior attempts at urban renewal had failed to revitalize cities and a comprehensive program was necessary. "Because it was not satisfied with earlier efforts to solve the problem of . . . blighted areas . . . Congress discarded the piecemeal or individual structure approach and sought to attain its goal by replanning and redevelopment [of] the whole of substandard areas."[196] Relying on several state cases, the agency further argued that the clearance was the "public purpose" and the subsequent sale was "purely incident to the basic program."[197] In the alternative, the DCRLA argued that the public purpose continued even after the property was no longer publicly owned because the property would be subject to strict regulations after its sale.[198]

Morris's attorneys argued that the taking violated the Fifth Amendment. They claimed that the program was not one of slum clearance but simply a real estate promotion that transferred property from one private entity to another.[199]

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191. *Id.* at 724.
192. *Id.*
193. *Id.*
194. *Id.*
195. Brief for the District of Columbia Redevelopment Land Agency and National Capital Planning Commission at 19, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).
196. *Id.* at 32.
197. *Id.* at 29.
198. *Id.* at 30 (citing Velishka v. City of Nashua, 106 A.2d 574 (N.H. 1954)).
199. Brief for Appellant Berman at 10, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).

The agency, their brief insisted, believed that "diverse ownership and leasehold interests are not conducive to a sound business center and that single ownership of the commercial area would enhance the character."[200] While they conceded this argument might be true, they maintained that "such pleasant accomplishments cannot be called a public use or purpose which would validate seizure."[201] The appellants also argued that the law was void because the renewal legislation had no "standard for the factual determination of a blighted area."[202] In fact, despite three pages of terms relevant to the legislation, the District's Urban Renewal Act had no definition of blight. In response, the redevelopment advocates argued that the standards were delineated by the terms themselves. "Adequate and specific standards," argued the DCRLA, "are set out in the following language: 'technological and sociological changes,' 'obsolete lay-out,' 'substandard and blighted areas,' . . . 'comprehensive planning and replanning,' 'lack of sanitary facilities, ventilation or light,' 'delapidation, overcrowding, faulty interior arrangements.'"[203]

Although the parties debated in detail the technical definition of blight and the legal rationale for urban renewal efforts, none of the briefs in the *Berman* case even mentioned the fact that the project would uproot thousands of poor blacks and would reshape Washington's racial landscape. The fact that both parties ignored this aspect of the case is particularly poignant because *Berman* was argued just four months after the Supreme Court's monumental declaration on American race relations in *Brown v. Board of Education*.[204] *Brown* began an era in which the Court rewrote much of the constitutional jurisprudence regarding individual rights. *Berman* was a minor case in the context of these major changes to American law, and it therefore receives little attention in analyses of the Warren Court.[205] But the two cases were intimately related. The urban renewal program that the Court approved allowed cities to redistribute their populations, increasing residential segregation and thereby making the integration of schools far more difficult.

Justice William O. Douglas did make note of the racial makeup of the population in the renewal district, but he did not attach any significance to that fact. After noting that the renewal area was seriously deteriorated (64.3% of the dwellings were beyond repair, 57.8% had outside toilets, 60.3% had no baths,

200. *Id.*

201. *Id.*

202. *Id.* at 13.

203. Brief for Renah F. Camalier and Louis W. Prentiss, Commissioners of the District of Columbia Redevelopment Land Agency at 9, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).

204. 347 U.S. 483 (1954). *Brown* was decided in May of 1954 while *Berman* was argued in September.

205. Lucas Powe, for example, does not cite the case in his political history of the Warren Court. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

and 83.8% lacked central heating) as well as 97.5% "Negroes," the Court unanimously approved the condemnation and granted redevelopment authorities broad discretion for urban renewal.[206] The authority bestowed by the police power of Congress as administrator of the District, Douglas asserted, "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[207]

Public safety and health are well within the police power, Douglas stated, and the urban renewal program sought to improve them. Directly appropriating the language of planners, he argued that

> miserable and disreputable housing conditions do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . . They may also be an ugly sore, a blight on the community which robs it of charm. . . . The misery of housing may despoil a community as an open sewer may ruin a river.[208]

Douglas upbraided the lower court for substituting its policy preferences for those of the legislature and declared that Congress has the authority to "determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[209] If democratically elected officials decide that such improvements are worthy, Douglas stated, there is "nothing in the Fifth Amendment that stands in the way."[210]

Slums and blighted areas were a threat to the health of cities, and both were within the purview of urban renewal. "The experts," Douglas stated,

> concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole . . . . to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks . . . the lack of light and air, the presence of outmoded street patterns. . . .[211]

Douglas agreed that the commission had the authority to include a large area in the renewal district so as to avoid the "piecemeal approach." The "public purpose" having been decided, the means of executing the project were "for the Congress and Congress alone to determine."[212] Therefore, the Court concluded, it was within Congress' authority to decide that the "public end may be as well

206. *Berman*, 348 U.S. at 30, 36.
207. *Id.* at 32.
208. *Id.* at 32-33.
209. *Id.* at 33.
210. *Id.*
211. *Id.* at 34.
212. *Id.* at 33.

or better served through an agency of private enterprise. . . ."[213]

Douglas also rejected the argument that the standards for determining the redevelopment area were inadequate for it was, he argued, "the need of the area as a whole which Congress" addressed and the goal of eliminating "not only slums", but "also the blighted areas that tend to produce slums" was an acceptable delegation of authority.[214] In conclusion, the Court declared, the rights of property owners were "satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[215]

That Douglas would take such a strong position in support of the urban renewal program is unremarkable. Douglas and the rest of the Court viewed urban renewal as a government initiative to improve the economic and social conditions of cities. By the time *Berman* was argued, the Court had a more than twenty-year record of restraint in considering such measures.[216] *Berman* was consistent with the New Deal Court's philosophy that legislatures were best suited to determine the appropriate uses of government power in the area of economic regulation. The DCRLA and other redevelopment agencies, run by planning experts, would apply professional standards to determine which areas required redevelopment and would implement the program in an equitable fashion for the benefit of the city.

The irony is that, at the same time it was deciding *Berman*, the Court was deciding *Brown*, which reflects a distrust of government (particularly local government) to protect the interests of minority groups and to treat all citizens equally. Douglas's opinion in *Berman* reflects a faith in the political system's ability to operate in a non-discriminatory manner.[217] Urban renewal, however, was an economic development program with profound racial implications that were ignored by all the parties to the litigation. The reality of urban renewal was that redevelopment was used to reshape the racial and economic geography of cities. Such was the case in Southwest Washington where, of the 5,900 units of housing that were constructed on the site, only 310 could be classified as

213. *Id.* at 33-34.

214. *Id.* at 35.

215. *Id.* at 36.

216. In *United States v. Carolene Products*, 304 U.S. 144 (1937), the Court stated that it would grant legislatures wide latitude in reviewing economic regulation. Justice Stone stated that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. at 152. Douglas's approach to the urban renewal program is consistent with *Carolene Products*. On the Court's jurisprudence regarding economic regulation, see CUSHMAN, *supra* note 29; GILLMAN, *supra* note 29, at 200-05; and Martin Shapiro, *The Supreme Court's "Return" to Economic Regulation*, *in* 1 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 91 (Karen Orren & Stephen Skowronek eds., 1986).

217. This is not to argue that the Court has not considered the discriminatory impact of regulatory programs. The Court has maintained its authority to review administrative determinations for fairness. *See* Shapiro, *supra* note 216, at 138-39. The Court's increasing attention to administrative law in the past half century is evidence of this effort. *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS ch. 7 (3d ed. 1999).

affordable to the former residents of the area.[218] By the 1960s, the formerly black neighborhood was majority white.[219]

The rhetoric of blight enabled urban elites to craft and implement these broad powers of condemnation. In the decade following *Berman*, urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods, and helped entrench racial segregation in the inner city. Racial motivations were often submerged under the labels of "slum clearance" or "neighborhood revitalization," but a primary goal of postwar urban renewal was to channel minority settlement into certain areas and to uproot minority communities in other areas. In cities across the country, urban renewal came to be known as "Negro removal."[220]

CONCLUSION

The Supreme Court's decision in *Berman* affected a dramatic expansion in the government's powers of eminent domain and provided judicial legitimation for urban renewal efforts. Throughout the 1950s and into the 1960s, American cities undertook massive redevelopment projects that cleared large areas surrounding the central business district. These projects resulted in the dislocation of more than one million people.[221] The majority of these families were minorities. Across the nation, inner city neighborhoods were designated as blighted, properties condemned, and land turned over to private parties.

Berman, however, was a pyrrhic victory for renewal advocates because the urban renewal program came under attack only a few years after the ruling. By the early 1960s, critics were questioning the basic philosophy of urban renewal. They argued that, despite the investment of billions of dollars, cities had not been revitalized, and they complained that the dislocation caused by the program had resulted in the creation of more slums. The movement against urban renewal was led by Jane Jacobs, whose best-selling critique of urban redevelopment, *The Death and Life of Great American Cities*, argued that the diversity of cities was central to their survival. Jacobs assailed principles of modern planning and argued that most redevelopment projects did "not rest

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218. *See* GILLETTE, *supra* note 159, at 163-64.

219. *See id.* at 164. For a discussion of the *Berman* opinion as part of Douglas's jurisprudence, see VERN COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS 376-77 (1974). On Douglas's views on civil rights, see Drew S. Days III, *Justice William O. Douglas and Civil Rights*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 109-19 (Stephen L. Wasby ed., 1990).

220. *See* HALPERN, *supra* note 74, at 68-69; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 56 (1993).

221. No report has documented the exact number of people dislocated from urban renewal, but a 1969 report by the National Commission on Urban Problems estimated that the highway program uprooted 32,400 families a year during the early 1960s. Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, *in* FROM TENEMENTS TO THE TAYLOR HOMES 227 (John Bauman et al. eds., 2000).

soundly on reasoned investment of public tax subsidies, as urban renewal theory proclaims, but on vast involuntary subsidies wrought out of helpless site victims."[222]

By the mid-1960s, critics from across the political spectrum declared the urban renewal program a prime example of government overreaching. Liberals argued that it exacerbated racial discrimination,[223] while conservatives stated that it wasted government resources and interfered with the private market.[224] The rise of the historic preservation movement also put a harsh light on large-scale demolition projects that destroyed important landmarks like New York's Pennsylvania Station. As a result of these critiques, the federal urban renewal program was greatly curtailed, and urban planners became increasingly circumspect about their ability to create a wholly modern city.[225] The dream of erasing the antiquated city and building a completely modern replacement is no longer the planning profession's primary focus.[226]

Condemnation, however, remains a powerful tool of government policy. In recent decades, state and local governments have undertaken a wide variety of initiatives that transferred condemned property to private entities in the name of housing, commercial, or industrial development, and the urban redevelopment corporations created in the 1940s continue to wield great power over city land use. In light of past failures, private interests and government bodies are more circumspect in promoting the benefits of eminent domain. Instead of promising to rebuild cities, they focus on more practical aspects such as job creation. The reason for using the power of condemnation—the desire to secure coveted property without private market negotiations—however, remains the same.[227]

The most famous eminent domain case of the last two decades involved the construction of a General Motors plant in Detroit. The project, in the city's racially-diverse, working-class neighborhood of Poletown (which all parties agreed was not blighted), required the acquisition and clearance of a site that had over 1,000 buildings housing more than 4,200 people. In contesting the use of eminent domain, neighborhood residents faced not only General Motors but the city's African-American mayor and all of the area's major labor

222. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1993).

223. *See* GREER, *supra* note 10; URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, *supra* note 11.

224. *See* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962 (1964).

225. Criticisms of urban renewal led to many reforms of the condemnation process to protect the interests of property owners and tenants. On changes in the urban renewal program and the planning profession, see THOMAS, *supra* note 12, at 179-84. The urban renewal program was terminated by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1994).

226. *See* THOMAS, *supra* note 12, at 180-81.

227. William Nelson, in his analysis of condemnation in New York City, argues that it has been a particularly effective means to subsidize private development projects that receives little public attention. *See* NELSON, *supra* note 48, at 260-61. On debates over urban development, see BERNARD J. FRIEDEN & LYNNE B. SAGALYN DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES (1989).

organizations and non-profit institutions. Both government and labor leaders desperately wanted the project, which they hoped would stem the flood of job loss in the city. To keep General Motors from building elsewhere, the city spent over $200 million to acquire and prepare the property, which it sold to the company for $8 million.[228]

The residents' fight against condemnation went all the way to the Supreme Court of Michigan, which approved the redevelopment plan.[229] Relying on *Berman*, the court declared that it would not restrict the ability of state and local government to respond to the economic problems facing the city. If the legislature concluded that government support for this kind of economic growth was important, the public use requirement was met.[230] "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental," the court ruled.[231] Other courts have granted similar deference to governmental programs that involve the transfer of land to private developers.[232]

The concept of blight remains integral to redevelopment efforts. While many courts have expanded the Public Use Clause to encompass any initiative that brings economic growth, most states still require that a redevelopment agency determine that an area is blighted before condemnation can occur.[233] Legislatures have created long lists of criteria that redevelopment agencies are required to use to determine whether an area is blighted. These criteria, however, remain vague and subject to broad interpretation by redevelopment authorities, to which courts have granted great deference.[234]

The United States Supreme Court has also further enunciated its principle of broad deference to legislative determinations of public use. In 1984, the

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228. The Poletown project is examined in THOMAS, *supra* note 12, at 161-66; Kochan, *supra* note 14, at 69-72; and Mansnerus, *supra* note 6, at 418-21.

229. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

230. *Id.* at 459.

231. *Id.* Note the similarity of the *Poletown* court's reasoning with the state cases discussed in footnotes 171-174 and accompanying text.

232. *See, e.g.*, Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963) (approving the condemnation of private businesses to build the World Trade Center); Karesh v. City Council, 247 S.E.2d 342 (S.C. 1978) (allowing condemnation for convention center and garage); Hogue v. Port of Seattle, 341 P.2d 171 (Wash. 1959) (approving condemnation of agricultural lands for private port facility); *see also* Mansnerus, *supra* note 6, at 418 n.43, 421 n.65 (citing additional cases). Thomas Merrill argues that state courts have been more skeptical about condemnation programs than federal courts. Merrill, *supra* note 14, at 96-97. In a survey of over 200 cases decided between 1954 and 1986, Merrill found that state courts rejected a condemnation on the basis that it was not a public use in fifteen percent of the cases. *See, e.g.*, Baycol Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975) (rejecting attempt to condemn property for shopping mall).

233. For an examination of current definitions of blight, see Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389 (2000).

234. Mansnerus, *supra* note 6, at 426. Many courts have declared that they will approve blight designations "absent fraud or abuse." Others impose a standard of "clear error." Luce, *supra* note 233, at 409-13.

Court approved a program by the state of Hawaii to condemn the property of large landholders and sell it to other residents.[235] Justice Sandra Day O'Connor ruled that the public use requirement was "coterminous with the scope of the sovereign's police powers" and further stated that the Court would accept any use of eminent domain that was "rationally related to conceivable public purposes."[236] The Supreme Court's restraint in this area has led many commentators to complain that the Court has abdicated its responsibility to protect property owners from government abuse.[237] Legal scholar Richard Epstein has argued that the Court has entirely read the phrase "public use" out of the Fifth Amendment.[238]

In response to the courts' continued deference to legislative determinations of public use, scholars and legal advocates have given increased attention to the Public Use Clause in the past decade. 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 Clause.[239]

Legal advocates have also taken an increasing interest in the use of eminent domain. The Institute for Justice, based in Washington, D.C., has established an Eminent Domain Law Project that assists clients fighting the condemnation of their properties. The organization has taken on cases in several states, including New York, New Jersey, New Mexico, Mississippi, and Connecticut, representing clients such as a woman fighting the condemnation of her Atlantic City home for a casino owned by Donald Trump and a group of African-American farmers battling the efforts of the state of Mississippi to condemn their property for the construction of an automobile plant.[240] In the Atlantic City case, the condemnees succeeded in convincing the trial judge that the transfer of their property to Trump Casino violated the Public Use Clause.[241]

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235. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

236. *Id.* at 240, 241.

237. Kochan, *supra* note 14, at 115; Mansnerus, *supra* note 6, at 424.

238. EPSTEIN, *supra* note 7, at 161-63.

239. *See, e.g.*, Jones, *supra* note 14, at 306 (suggesting that courts use "strict scrutiny" in assessing the use of eminent domain); Kochan, *supra* note 14, at 110-11 (proposing the creation of "political filters" to increase the cost to private parties of using condemnation to acquire property); Mansnerus, *supra* note 6, at 444 (arguing for a requirement of "true rational basis," by which courts would review uses of eminent domain). *But see* Merrill, *supra* note 14, which concludes that state courts have done a fairly good job of balancing interests in eminent domain cases.

240. Inst. for Just., Litigation Backgrounder, *Saving the Skin of Property Owners in Connecticut* (2001); David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20; Laura Mansnerus, *There Stays the Hotel and the Neighborhood*, N.Y. TIMES, Dec. 31, 2000, § 1, at 21.

241. Casino Redev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998); David M. Herszenhorn, *Widowed Homeowner Foils Trump in Atlantic City*, N.Y. TIMES, July 21, 1998, at B1.

The judge's decision, however, rested on defects in the condemnation process and did not attempt to reinterpret the Public Use Clause. Therefore, while the anti-eminent domain effort has increased the cost of condemnation to specific developers and delayed the process in several cases, the initiative has yet to significantly alter interpretations of the Public Use Clause. These efforts have, however, raised public attention to the issue of condemnation, and increased political opposition to eminent domain has helped defeat recent urban redevelopment initiatives in Baltimore and Pittsburgh.[242]

American cities have witnessed dramatic political and demographic changes since the 1950s. African-American mayors lead many urban areas, and blacks and other minorities play a major role in the political structure of most large cities. The housing shortages that most cities experienced in the post-World War II era are no longer a concern. Instead, policy-makers face a glut of abandoned, vacant buildings. Urban policies that supported segregation in the 1940s and 1950s are a fait accompli in the modern era, and many cities have reached what sociologists call "hyper-segregation."[243] In this context, urban redevelopment policies have a very different impact on city residents. Community members are generally more concerned with the lack of government involvement than with fears of eminent domain.

Policymakers continue to argue that land clearance is crucial to the rebirth of the city, and the rhetoric of blight continues to shape urban policy. The city of Philadelphia, for example, is currently considering a major "Neighborhood Transformation Initiative," which aims to clear large areas of the city's most dilapidated housing in the hope that the cleared land will attract private development. While the city's African-American mayor never uses the term, Philadelphia's newspapers make constant reference to the "blight problem," and several articles have discussed the need to stop the disease of blight before it afflicts other neighborhoods.[244] In Detroit, the clearance of the city's more than 10,000 abandoned structures has brought about greater use of the city's eminent domain powers. Community activists have argued that government condemnation is crucial to the solution of this problem. "Blight is like a cancer," argued one activist in the summer of 2002. "Our theory has been we can eliminate it before it spreads."[245]

In the abstract, the goals of these initiatives are widely accepted and praised. The taking of fire-ravaged buildings that serve only to shelter drug

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242. David Nitkin & Joe Nawrozki, *Condemnation Bill Defeated: Baltimore County Plan to Renew East Side Loses by 2 to 1*, BALT. SUN, Nov. 8, 2000, at 1A; James Zambroski, *Revitalization Plan Back to Square One*, PITTSBURGH TRIB.-REV., Nov. 23, 2000.

243. On the increasing segregation of American cities, see MASSEY & DENTON, *supra* note 220.

244. *See, e.g.*, Jennifer Lin, *Keeping Blight at Bay*, PHILA. INQUIRER, Nov. 25, 2001, at A24; Monica Yant Kinney, *Growing a Leafy Antidote to Decay*, PHILA. INQUIRER, Nov. 29, 2001, at B1.

245. Jodi Wilgoren, *Detroit Urban Renewal Without the Renewal*, N.Y. TIMES, July 7, 2002, § 1, at 10.

dealers does not elicit much sympathy. But most city neighborhoods do not present such an easy case as Detroit. In many poor areas, residents struggle to build community in the midst of abandonment. Blight, while sometimes obvious, remains in the eye of the beholder. Only when specific properties are identified for redevelopment will the public benefits of renewal meet the resistance of property owners and renters. While land in urban areas may be less valuable today than it was fifty years ago, the competition over the property within American cities will continue to implicate and shape the public use doctrine.

CASTLE COALITION
CITIZENS FIGHTING EMINENT DOMAIN ABUSE

50 State Report Card

Select State

50state report card

Tracking Eminent Domain Reform Legislation since *Kelo*

Synopsis

In the two years since the U.S. Supreme Court's now-infamous decision in *Kelo v. City of New London,* 43 states have passed new laws aimed at curbing the abuse of eminent domain for private use.

Given that significant reform on most issues takes years to accomplish, the horrible state of most eminent domain laws, and that the defenders of eminent domain abuse—cities, developers and planners—have flexed their considerable political muscle to preserve the status quo, this is a remarkable and historic response to the most reviled Supreme Court decision of our time.

Of course, more work remains to be done, in both state legislatures and Congress, to protect homes, businesses, churches, and farms. Indeed, because some states have not passed reforms, and because many reforms are incomplete, it is important to take a step back and evaluate the work that has been done and is left to do. Some states have passed model reforms that can serve as an example for others. Some states enacted nominal reform—possibly because of haste, oversight, or compromise—and need to know what is left to fix. And finally, there are those states that have failed to act altogether, leaving home, farm, and business owners threatened by *Kelo*-type takings and beyond.

Eminent domain authority carries with it tremendous responsibility. Early in our nation's history, the U.S. Supreme Court even described it as "the despotic power." Quite simply, it is the power to remove residents from their long-time homes and to destroy small family businesses. Thus, as the Founding Fathers understood, it is a power that must be used sparingly and only for the right reasons. This understanding is reflected in the Fifth Amendment to the U.S. Constitution that states, "[N]or shall private property be taken for public use, without just compensation." Most states' constitutions have identical or similar language—language that is supposed to prevent the use of eminent domain for private benefit by restricting its exercise to only true public uses, like roads, fire stations, and schools.

For most of our nation's history, courts stayed true to the plain language and intent of the federal and state "public use" clauses, and prevented the taking of property for private benefit. However, those takings began to proliferate as public use was interpreted more broadly. The most significant expansion of the term came with the incorporation of "blight" removal as a public use. At first, blight was used as a justification to remove properties that were real threats to public health and safety (what were historically considered public nuisances, the abatement of which was always allowed pursuant to the government's police powers). Over the past several decades, however, the definition of blight has become so expansive that tax-hungry governments now have the ability to take away perfectly fine middle- and working-class neighborhoods and give them to land-hungry private developers who promise increased tax revenue and jobs.

Open-ended blight designations provide a way for local governments to circumvent the public use requirement. The *Kelo* decision then obliterated the federal public use requirement by equating "public use" with "private use." Under *Kelo*, local governments can condemn homes andbusinesses and transfer them to new owners as long as government officials think that the new owners will produce more money with the land. As Justice O'Connor stated in her dissenting opinion, the result is that "[t]he specter of condemnation hangs over all property. 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."

The Supreme Court did get one thing right in *Kelo*: states are free to enact legislation that restricts the power of eminent domain. True eminent domain reform should start with states narrowing their laws' definitions of public use. State legislatures need to establish that a public use means that the government or the public at large owns, occupies, and has

a definite right to use property acquired by eminent domain. The use of eminent domain to transfer private property from one party to another for "economic development" should specifically be excluded as a public use.

Ideally, state legislatures should enshrine the above definition of public use not only in their state laws, but also in their state constitutions. Eminent domain affects one of our most fundamental rights—the right to own property. Thus, protections against its abuse should be anchored in state constitutions so that they will be secure from subsequent attempts by cities, developers, and others that benefit from eminent domain abuse to weaken them.

Of course, as noted above, blight is a device that allows local governments to abuse the power of eminent domain. Thus, any reform that fails to address the issue of blight is inadequate and leaves home and business owners at significant risk of being victims of abuse. State legislatures should either eliminate the use of eminent domain for blight or redefine the term narrowly so that it refers only to individual properties that directly threaten public health and safety. Unless open-ended definitions of blight are changed, blight designations can be applied to any neighborhood—no matter how nice—that politically connected developers desire.

Also, since taking away someone's home or livelihood is such a severe act, when the government uses eminent domain, the burden should be on it to prove a legitimate public use. Instead of giving deference to legislative determinations of public use, courts should make governments show that they are using eminent domain properly.

While other provisions—such as providing sufficient notice of takings—are helpful in reform legislation, the components of reform discussed above are the most important because they directly put the brakes on private-to-private transfers of property for private gain.

In this report card, we have evaluated the quality and strength of reforms that have passed in the states, both so that legislators can know what is left to do and so that citizens can find out if they are really protected from eminent domain abuse. In grading reforms in this report card, we have taken into account the criteria for good reform noted above, keeping in mind the basic question, "How hard is it now for the government to take a person's home or business and give it to someone else for private gain?" The states in which it is now impossible or extremely difficult get high marks; those in which it is easy get low marks. States that failed to pass any eminent domain reform received failing grades.

50 State Report: Grades of States that Passed

Florida	A
North Dakota	A
South Dakota	A
Michigan	A-
New Mexico	A-
Alabama	B+
Arizona	B+
Delaware	B+
Georgia	B+
Nevada	B+
New Hampshire	B+
Oregon	B+
South Carolina	B+
Virginia	B+
Indiana	B
Kansas	B
Louisiana	B
Utah	B
Wyoming	B
Iowa	B-
Minnesota	B-
Pennsylvania	B-
Wisconsin	C+
Colorado	C
North Carolina	C-
Texas	C-
Washington	C-
West Virginia	C-

50 State Report: Grades of States that Failed

States receiving an "F" for failing to pass any degree of eminent domain reform.

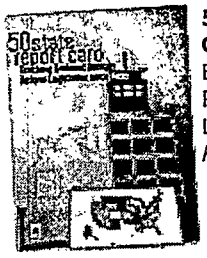
Idaho	D+
Illinois	D+
Kentucky	D+
Maine	D+
Nebraska	D+
Alaska	D
Connecticut	D
Maryland	D
Missouri	D
Montana	D
Ohio	D
California	D-
Rhode Island	D-
Tennessee	D-
Vermont	D-
Arkansas	F
Hawaii	F
Massachusetts	F
Mississippi	F
New Jersey	F
New York	F
Oklahoma	F

Alabama

Select State

- Original bill prohibited eminent domain for private development but left open the blight loophole.
- The following year that loophole was closed.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade

B+

Read: Alabama Chapter
Read: Entire Report

Coming Abuses

coming soon

Bills

Senate Bill 68
Sponsored by: State Senator Jack Biddle
Status: Signed into law on August 3, 2005.

House Bill 654
Sponsored by: State Representative Thad McClammy
Status: Signed into law on April 25, 2006.

Overview

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*, Alabama was the very first state to react legislatively to give its citizens stronger protections against the use of eminent domain for private profit. Senate Bill 68 (2005) specified that eminent domain could not be used for "private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity." The language was a good start to reforming the state's eminent domain laws.

But while in one clause the law gave home and small business owners, farmers, and ranchers the substantial protection they deserve, a different clause within the same law gave rise to another threat to citizens' property rights. SB 68 prohibited cities and counties from using eminent domain for private development or for enhancing tax revenue, but it left an exception for the seizure of so-called blighted properties. This would have allowed property to be condemned under blight law if it might become blighted in the future, or if the property is deemed "obsolescent"—usually a code word for "We'd like to have something else here." And if the property was condemned for blight, cities could still turn it over to private interests.

House Bill 654 was passed in 2006 to pick up where SB 68 left off, significantly closing the blight loophole by narrowing the criteria by which property could be designated as blighted. Under HB 654, blight designations must be made on a property-by-property basis, which prevents vague and abusive blight designations that cover an entire neighborhood. The criteria to determine blight now ensure that only truly unsafe or neglected properties can be acquired and then given to a private developer.

Alabama has proved to be a national leader in eminent domain reform. It is important to note, however, that statutory reforms are at risk of amendment in future legislative sessions. Alabama has excellent constitutional language prohibiting eminent domain for private use. However, the state's property owners would be best protected if its constitution also included a traditional, narrow definition of public use.

Alaska

Select State

- Prohibition against using eminent domain for economic development is based on intent, not action.
- Blight loophole remains.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform · Legislation since *Kelo*

D

Read: Alaska Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 318
Sponsored by: State Representative Eric Croft
Status: Signed into law on July 5, 2006.

Overview

Alaska's state constitution contains almost the same language as the U.S. Constitution's Fifth Amendment: "Private property shall not be taken or damaged for public use without just compensation." For years, that statement protected property owners. The general public understood what public use meant and no one worried that his home, business, farm, or church might one day be suddenly taken from him so that a private developer could build a mall.

That all changed with the *Kelo* decision, as the constitutional provision that everyone trusted to protect their most fundamental of rights was suddenly ambiguous. After all, once the federal Takings Clause was interpreted to allow eminent domain abuses, Alaskans realized that their state's Takings Clause could be treated the same way. Under Kelo, since "public use" now also means "private use," Alaskans need more protection at the state level.

In 2006, HB 318 sailed through both legislative houses with unanimous support. The new law prohibits the use of eminent domain "to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes." Unfortunately, this language does not provide property owners solid protection. In order to prevent authorities from taking private property from one person and turning it over to another private entity, states need to ban all private-to-private transfers (with a few narrowly tailored exceptions for common carriers and the like). By focusing on the intent behind the transfer, rather than the transfer itself, Alaska's Legislature provided a ready-made excuse for authorities to say that a private transfer was not their purpose when they originally acquired the property.

Additionally, snowcats could still drive through the loophole of the state's blight statute. Alaska's vague definitions of "slum areas" and "blighted areas" are virtually identical to those that have been horribly exploited in many other states. As currently written, the factors to determine blight could apply to virtually any home. And since the designations are made by "area," only a few properties need to be blighted before officials can destroy an entire neighborhood.

Arizona

Select State

- Slum clearance law now requires each property to be evaluated individually and found to be a threat to the public by clear and convincing evidence.
- Property rights protections now found in statute need to be included in the state constitution.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B+

Read: Arizona Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate Bills 53, 1206, and 1650
Sponsored by: State Senator Christine Kehoe

Senate Bill 1809
Sponsored by: State Senator Michael Machado
Status: All signed into law on September 29, 2006.
Senate Bill 1210
Sponsored by: State Senator Tom Torlakson

Prop. 99
Sponsored by: citizen initiative
Status: Approved by voters on June 3, 2008

Overview

The Arizona Legislature responded to Kelo by passing House Bill 2675 (2006), an extremely strong piece of blight reform legislation. The bill would have required a condemning authority to prove by "clear and convincing evidence" that a property is maintained in a slum condition, and blight designations could be made only on a property-by-property basis. It also prohibited the use of eminent domain for economic development. Unfortunately, however, the governor vetoed the bill.

But the people of Arizona would not let their governor have the last word when it came to protecting their liberties. Proposition 207 was filed in response to the veto and the statutory reform was reborn through citizen initiative. The language, very similar to HB 2675, appeared on the ballot last fall and passed by a substantial margin.

The Private Property Rights Protection Act (§ 12-1136) accomplished many necessary eminent domain reforms. Most importantly, the initiative significantly limited the scope of activities that could qualify as a public use. Rather than creating an exhaustive list of approved uses, Arizona's new definition of public use simply requires that the general public retain "possession, occupation, and enjoyment of the land." With this approach the statute encompasses the traditional uses of eminent domain, with allowances for acquisition of property to handle utilities, unsafe structures, or abandoned properties, but not for benefits from economic development. The next step is to include these protections in the state constitution.

Proposition 207 did not amend Arizona's Slum Clearance and Redevelopment chapter, so extremely broad definitions of "blighted area" and "slum area" were not changed. But after the recent reforms, all eminent domain actions now require a judicial determination that the use is, in fact, "public." In the case of slum clearance and redevelopment, the government must present clear and convincing evidence that each and every targeted parcel poses a direct threat to the public, such that eminent domain is necessary to eliminate the threat. With these new protections, as well as heightened compensation requirements, the citizens of Arizona have fought back against eminent domain abuse and can worry less about developers and city officials kicking them out of their homes.

Arkansas

Select State

- Failed to pass legislative reform.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

F

Read: Arkansas Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Overview

The General Assembly was not in session in 2006. However, the state created a commission to study the use of eminent domain and ways of reining in abuse.

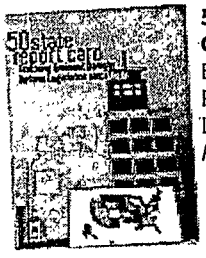
Unfortunately, when the legislature returned to session in 2007, it failed to pass any eminent domain reforms.

Colorado

Select State

- Moderate improvements to the state's public use requirement, however the state still needs a sufficiently narrow definition of public use.
- Clear and convincing evidence" is now required for blight designations, however the definition of blight is still considerably vague.

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

C

Read: Colorado Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 1411
Sponsored by: State Representative Al White
Status: Signed into law on June 6, 2006.

Overview

Even before the Supreme Court handed down its decision in Kelo, Colorado municipalities had an unfortunate history of abusing eminent domain for the benefit of wealthy private developers. In 2006, the Colorado General Assembly improved the state's eminent domain laws by passing House Bill 1411, which amended the public use definition to "not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue" and stated that "Private property may otherwise be taken solely for the purpose of furthering a public use."

While it was definitely a step in the right direction, HB 1411 left some room for improvement. The new law allows municipalities to continue using eminent domain to seize so-called blighted properties, and the state's definition of blight is sufficiently vague to allow for considerable abuse. The good news is that in HB 1411, the legislature did take measures to tighten the blight loophole by requiring government officials to prove by clear and convincing evidence that "the taking of the property is necessary for the eradication of blight."

The General Assembly missed a golden opportunity, in that same session, when it considered but did not pass an amendment to the state constitution that would have prohibited the condemnation of private property for economic development. While the statutory protections it did eventually adopt will, for the time being, provide some increased protections from the government condemning people's homes, businesses, farms, and places of worship—unless condemnors convince a court that the property is in fact blighted—those protections may eventually be stripped away if the public fails to guard carefully against those who can find personal gain through the abuse of eminent domain. Hopefully the legislature will revisit the possibility of a constitutional amendment and Coloradans will have the chance to provide themselves with the most enduring type of protections for their fundamental right to keep what they properly own.

Connecticut

Select State

- Attempts at substantial reform have failed, while passed reform measures leave plenty of loopholes for continued abuse
- The state's abusive redevelopment statutes continue to leave nearly all property owners at risk

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade

D

Read: Connecticut Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate Bill 167
Sponsored by: State Senate Judiciary Committee
Status: Signed into law on June 25, 2007.

Overview

Even though Connecticut is the state that gave us the Kelo case, the General Assembly was the 42nd state to pass eminent domain reform—and the legislation was not worth the wait.

In 2006 the legislature managed to pass a bill that merely creates a property rights ombudsman, and then failed to fill the position for a year. At the end of the 2007 session, the General Assembly passed Senate Bill 167 with nearly unanimous support. The bill was easy to agree on because it does almost nothing to curb eminent domain abuse in Connecticut. The bill purports to stop condemnations "primarily" for increased tax revenue and requires municipalities to pass approval by a "super-majority."

Unfortunately, SB 167 offers no substantive property rights protections because when cities are determined to see a project approved, they can easily assert an alternative "primary purpose" for a condemnation and are usually of one mind when it comes to voting. Without stronger eminent domain reform, Connecticut continues to have some of the most broad and easily abused eminent domain laws in the nation.

Delaware

Select State

- Public use defined to restrict eminent domain to traditional uses.
- So-called blighted property can only be taken when it is a direct threat to the health and safety of the community.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Delaware Chapter
Read: Entire Report

50 State Report Card Grade

Current Abuses

Coming Soon

Bills

Senate Bill 7
Sponsored by: State Senator Robert Venables.
Status: Signed into law on April 9, 2009.

Overview

Just after the Kelo decision, Delaware created a state commission to study the use of eminent domain and ways of reining in abuse, but the bill passed by the General Assembly and signed by the governor could hardly be considered substantive reform. Senate Bill 217 (2005) does no more than require that cities have a plan when condemning property and that the condemnations are for a "recognized public use as described at least six months in advance of the institution of condemnation proceedings." The bill also changed the party that determines compensation for successful condemnation challenges from the condemning agency to the courts.

Although a condemning authority must declare its intended use for a property in advance of the condemnation, and is then limited to that specific use for the property, Delaware provides a sizeable catalog of public use options to pick from. The term is not clearly defined in state statutes and courts have elected open-ended interpretations. In the wake of Kelo, Delaware's laws could easily accommodate the use of eminent domain for private economic development.

Due to just that kind of threat to a number of businesses in Wilmington, the legislature revisited reform in 2008. Senate Bill 245 (2008) originally passed the Senate 19-1 and the House unanimously, but in June 2008, the governor vetoed the legislation. The legislature was subsequently unable to override the governor's veto. Undeterred, the legislature returned in 2009 and overwhelmingly passed S.B. 7 (2009), which contained nearly identical language as S.B. 245. This time, the bill was signed by the new governor—who had campaigned on just this issue. S.B. 7 restricts eminent domain to its traditional uses—roads, schools, parks and police stations—while still allowing for the construction of utilities and leaving local governments the ability to acquire properties that pose a direct threat to public health and safety.

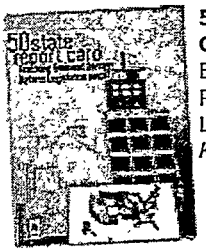
Delaware citizens are finally safe from the abuse of eminent domain for private profit.

Florida

Select State

- The state set an example by restoring eminent domain authority to its original and limited purpose by removing the blight exception and closing the book on its long history of property rights abuse.
- A ten-year waiting period for private transfers further secures property rights in the state.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Florida Chapter
Read: Entire Report

50 State Report Card Grade

A

Current Abuses

Coming Soon

Bills

House Bill 1567
Sponsored by: State Representative Marco Rubio
Status: Signed into law on May 11, 2006.

House Joint Resolution 1569
Sponsored by: State Representative Marco Rubio
Status: Passed by the legislature on

May 4, 2006.
Approved by voters on November 7, 2006.

Overview

In 2006, the Florida Legislature proved that it understood the public outcry caused by the Supreme Court's abandonment of property rights. Florida created a legislative commission to study the use of eminent domain and ways of reining in abuse, then passed House Bill 1567 with an overwhelming majority. The new law signed by the governor requires localities to wait 10 years before transferring land taken by eminent domain from one owner to another—effectively eliminating condemnations for private commercial development. HB 1567 also forbids the use of eminent domain to eliminate so-called blight, instead requiring municipalities to use their police powers to address individual properties that actually pose a danger to public health or safety.

Not content with mere statutory protections, the Florida Legislature also put a constitutional amendment on the November ballot so that the state's citizens could make sure that these reforms could not easily be stripped away. The new amendment, which was approved in a landslide, requires a three-fifths majority in both legislative houses to grant exceptions to the state's prohibition against using eminent domain for private use.

Thanks to these sweeping reforms, Florida has gone from being among the worst eminent domain abuse offenders to offering some of the best protection in the nation for homes, businesses, and houses of worship that formerly could have been condemned for private development. HB 1567 and Florida's new constitutional amendment should be models for other state legislatures. They prohibit takings for private benefit while still allowing the government to condemn property for traditional public uses such as roads, bridges, and government buildings.

Georgia

Select State

- Sufficiently narrows the definition of blight to apply to only unsafe property, parcel-by-parcel.
- Redevelopment projectss must now be voted on by an elected body.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Georgia Chapter
Read: Entire Report

50 State Report Card Grade

B+

Current Abuses

Coming Soon

Bills

House Resolution 1306
Sponsored by: State Representative Jeff May
Status: Passed by the legislature on April 4, 2006.
Approved by voters on November 7, 2006.

House Bill 1313

Sponsored by: State Representative Rich Golick
Status: Signed into law on April 4, 2006.

Overview

Georgia is another state in which 2006 will be remembered as a banner year for the protection of private property rights. The Georgia General Assembly not only heeded citizens' calls for reform by passing important statutory reforms about the way that eminent domain may be used, but it also gave voters the opportunity to adopt a constitutional amendment requiring a vote by elected officials to precede the use of eminent domain for redevelopment.

House Bill 1313 (2006) counters the Kelo decision by providing that economic development is not a public use that justifies the use of eminent domain. Just as importantly, the bill significantly tightens the definition of blight in Georgia's eminent domain laws. Now property can only be designated blighted if it meets two of six objective factors and "is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property." The bill also requires government officials to evaluate blight on a parcel-by-parcel basis in order for the properties to be subject to condemnation for private development. No longer can entire areas be threatened with the wrecking ball based on the dilapidation of a few properties; now home and business owners can protect themselves by keeping their buildings well-maintained. The new law emphasizes, "Property shall not be deemed blighted because of esthetic conditions," and the government is given the burden of showing that a piece of property meets the criteria for blight. These changes go a tremendous way to protecting the freedoms of Georgia's citizens.

House Resolution 1306 (2006) became a constitutional amendment that was approved by nearly 85 percent of the voters. Unfortunately, the constitutional amendment was only a minor procedural requirement that before eminent domain can be used for redevelopment, it must be voted on by elected officials. (In most cases of eminent domain abuse, elected officials vote; the point of constitutional protections is to prevent citizens' rights from being voted away.) While any constitutional amendments strengthening property rights are good, Georgians would be better off if some of the strong reforms of HB 1313 made it into the state constitution.

Hawaii

Select State

- Failed to pass legislative reform.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Hawaii Chapter
Read: Entire Report

50 State Report Card Grade

F

Current Abuses

Coming Soon

Bills

Overview

Hawaii produced a key court case in the history of eminent domain authority expansion and abuse. In Hawaii Housing Authority v. Midkiff, the U.S. Supreme Court upheld an expansive definition of the "public use" provision, essentially reading the public use provision to mean "public purpose," as defined by the State Legislature.

Many bills were filed that attempted to address Kelo-style takings. Unfortunately, Hawaii missed the chance to be a national leader in restricting eminent domain abuse and the Legislature still needs to pass reform.

Idaho

Select State

- The state constitution has an extremely weak definition of public use and the courts have made it even worse.
- Any reform in the legislation was voided by its exemption for "public and private uses ... provided in the constitution."

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Idaho Chapter
Read: Entire Report

50 State Report Card Grade

D+

Current Abuses

Coming Soon

Bills

House Bill 555
Sponsored by: House Committee on State Affairs
Status: Signed into law on March 21, 2006.

Overview

Unlike many states, Idaho has relatively weak constitutional language regarding the property rights guaranteed its citizens. While the Idaho Constitution does require that condemned property be taken for a public use, it also says "any ... use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use." To the detriment of property owners in the state, the Idaho Supreme Court has further weakened property rights by adopting an interpretation of public use that is not tied to—and therefore not restrained by—any traditional understanding.

In 2006, the Idaho Legislature passed House Bill 555, which ostensibly adds to the state's existing law by providing limitations on eminent domain for private parties, urban renewal, or economic development purposes. Unfortunately, the Legislature left several loopholes, including one that allows condemnations for "those public and private uses for which eminent domain is expressly provided in the constitution of the State of Idaho." Thanks to the aforementioned broad language of the Idaho Constitution and its interpretation by the state supreme court, the door to eminent domain abuse remains wide open.

In the November 2006 election, the state had a citizen initiative, Proposition 2, on the ballot that contained the same meager reforms contained in HB 555, but with the added (and very controversial) element that would have limited

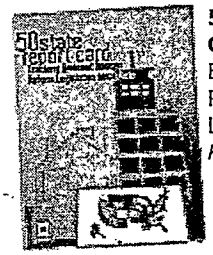
regulatory takings. In the absence of meaningful protection against eminent domain abuse and with the added confusion of the regulatory takings measure, the amendment failed to pass.

Illinois

Select State

- The state failed to close its blight loophole by continuing to allow blight designations by area using extremely vague factors.
- Agricultural land was protected from private development, but other properties remain at risk.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Illinois Chapter
Read: Entire Report

50 State Report Card Grade

D+

Current Abuses

Coming Soon

Bills

Senate Bill 3086
Sponsored by: State Senator Susan Garrett
Status: Signed into law on July 28, 2006.

Overview

Illinois presents another example of eminent domain reform that sounds more impressive than it really is. The Illinois General Assembly passed Senate Bill 3086 (2006), which purportedly limits the taking of private property for private development. This might be technically true, as the new law generally does prohibit government officials from condemning property for private development. But the legislature built in exceptions that significantly undermine the good that the bill otherwise might have done. The new law still allows the use of eminent domain to acquire property in a so-called blighted area. While at least five factors must be present for an area to qualify as blighted, the vague and illogical list of factors for a blighted area represent some of the worst examples in law, including "obsolescence," "excessive vacancies," "excessive land coverage," "deleterious layout," and "lack of community planning." The bill also still allows condemnations for private development, as long as economic development is a "secondary purpose" to the primary purpose of urban renewal "to eliminate an existing affirmative harm on society from slums to protect public health and safety."

Since the state's statutes still allow entire areas to be designated blighted on account of a few properties, the threat of eminent domain abuse still looms large in Illinois. SB 3086 did improve the situation by prohibiting the seizure of "production agriculture" for private development and by requiring the government to prove that an area is blighted before a condemnation can proceed. But unless citizens convince the General Assembly to create a tighter definition of blight and to assess properties on a parcel-by-parcel basis, Illinois will not avoid eminent domain abuse similar to that evidenced in Kelo.

Indiana

Select State

- The legislation strengthened the definition of public use and the criteria for condemnations.
- Unfortunately, an exception for certified technology parks means economic development is still prioritized over property rights.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Indiana Chapter
Read: Entire Report

50 State Report Card Grade

B

Current Abuses

Coming Soon

Bills

House Bill 1010
Sponsored by: State Representative David Wolkins
Status: Signed into law on March 24, 2006.

Overview

In an effort to make sure that Indiana's citizens would not have to fear the same kind of eminent domain abuse perpetrated in New London, Connecticut, the Indiana General Assembly acted quickly to create a state commission to study the use of eminent domain and ways of eliminating abuse. When all was said and done, the Legislature adopted House Bill 1010 (2006), which provides meaningful protection against abuse. Thanks to these concerted efforts, Indiana's reforms now provide lawmakers nationwide an example of the kind of common sense reform that can and should happen throughout the country.

House Bill 1010, which sailed through both legislative houses with overwhelming support, redefines public use and provides objective criteria for the acquisition of property in most situations. These steps are vitally important, because most abuses of eminent domain are enabled by standards for public use and blight that leave local governments ample room to craft their own definitions, which many courts have been hesitant to overrule. By clearly stating when eminent domain may and may not be used, the Indiana General Assembly has given the state's property owners a significant measure of security against the unholy alliance of tax-hungry municipalities and land-hungry developers.

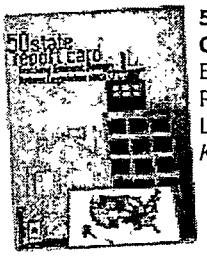
While this bill goes a long way toward preventing eminent domain abuse, there is still some room for improvement. Importantly, the legislature allowed an exception for certified technology parks, meaning that there are still ways for the state legally to take private property for another private party's benefit. This is a loophole that should be closed. And, as always, it is important to remember that statutory protections are not as permanent as constitutional ones. If Indiana is serious about forever guarding the fundamental rights of its citizens, the General Assembly should introduce a constitutional amendment to restrict any future legislature from changing the protections in this bill.

Iowa

Select State

- Blight designations are now property-by-property and an area can only be condemned if 75 percent of the individual properties are blighted.
- Blight must be proved by clear and convincing evidence.

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B-

Read: Iowa Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

House File 2351
Sponsored by: State Senator Bob Brunkhorst
Status: Governor's veto overridden on July 14, 2006.

Overview

Even in the wake of the most reviled Supreme Court decision in decades, reform is not always an easy task. Iowa deserves special credit for the perseverance it showed in trying to impose restrictions on eminent domain abuse. Convinced that it had an obligation to show greater respect for Iowans' constitutional rights, the Iowa General Assembly passed House File 2351 (2006) by a vote of 89-5 in the House and 43-6 in the Senate. The bill made it more difficult for government officials to label properties "blighted," and thereby to pursue eminent domain projects that would benefit private developers. Incredibly, Iowa's governor vetoed the bill, claiming that it provided too much protection for individuals' rights. Rather than agreeing to the governor's watered-down version of the bill, the General Assembly met in a special session and overrode the veto with a 90-8 vote in the House and a 41-8 vote in the Senate, thus securing important reforms to protect the state's citizens from eminent domain abuse. It was the first vote in Iowa to override a governor's veto since John F. Kennedy was in the White House.

While not perfect, HF 2351 represents an important improvement in Iowa's protection of property rights. The new law changes how blight designations are used and requires a property-by-property assessment. Only when 75 percent of the properties in an Urban Renewal Project are blighted can the remaining non-blighted property be condemned. The new law also requires the government to prove blight by clear and convincing evidence, a significant shift away from the unthinking deference that has so long marked courts' consideration of blight designations by municipalities.

The Iowa General Assembly has shown its willingness to pursue these important reforms, even when opposed by the governor. Future legislative sessions must see these efforts continue so that Iowans may enjoy even more meaningful safeguards for their property rights.

Kansas

Select State

- Condemned property cannot be transferred to a private entity except in very limited circumstances.

- Unfortunately, the prohibition against takings for economic development can be ignored as long as the Legislature expressly authorizes a project.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B

Read: Kansas Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Senate Bill 323
Sponsored by: State Senator Derek Schmidt
Status: Signed into law on May 18, 2006.

Overview

Kansas is another example of a state that made great strides in 2006 to prevent further abuses of eminent domain for private benefit. Kansas' governor signed into law Senate Bill 323, which prohibits property from being acquired and transferred from one private owner to another except in certain very narrow circumstances, such as for utilities or in instances where the property has defective title or is objectively unsafe. According to the terms of the statute, blight designations may only be used for unsafe property and must be made on parcel-by-parcel basis.

The reforms were desperately needed in Kansas, where eminent domain had repeatedly been used for private benefit. These shady deals were also justified by the state's courts, creating a persistent climate of abuse in the state. Now, under the new law, local governments face severe restrictions on their ability to take homes and businesses for the benefit of a private developer.

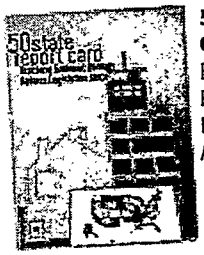
One area that will need to be addressed in future legislative sessions is a loophole that allows the use of eminent domain for economic development as long as the Legislature itself expressly authorizes the taking. The Kansas Legislature should have this exception removed before it is tempted to put it to use. Once it has done so, the state can stand as a proud example to the rest of the country.

Kentucky

Select State

- The state failed to pass any meaningful reform, leaving entire neighborhoods at risk of blight designation and condemnation.
- The state needs a clear definition of "public use" and extreme restraint, if not revocation, of condemnation authority based on "blight."

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

D+

Read: Kentucky Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 508
Sponsored by: State Representative Rob Wilkey
Status: Signed into law on March 28, 2006.

Overview

In 2006, Kentucky's Legislature did pass a bill that modified the state's eminent domain laws, but those changes did not fix even the most basic problems with its laws. Even after adopting House Bill 508, Kentucky still allows non-blighted property to be condemned even if the state does not intend to own or occupy the property, and its statutory language could even allow condemned property to be handed over to other private parties. In addition, Kentucky's eminent domain laws leave in place the common blight loophole that, due to an extremely broad definition of what can be considered blighted or "slum" areas, could permit the taking of entire neighborhoods of well-maintained homes.

Without further reforms, Kentuckians will continue to live under the threat that their homes, businesses, farms, and houses of worship could be taken for someone else's private gain. The Legislature should more carefully hone the definition of public use to only include traditional public uses, close the blight loophole by adopting narrow and objective standards based on threats to the health and safety of the community, require blight to be assessed on a parcel-by-parcel basis, and adopt a constitutional amendment that defines public use and prohibits the use of eminent domain to transfer property from one private person to another.

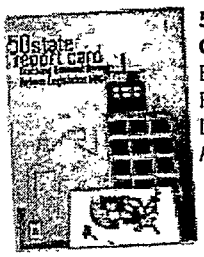
Louisiana

Select State

- Each piece of property must be a threat to public health and safety to be condemned for blight.
- Condemnations for industrial parks and port facilities are forbidden on residential property.

50 State Report Card

50 State Report Card Grade



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B

Read: Louisiana Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 707 (Constitutional Amendment No. 6)
Sponsored by: State Representative Rick Farrar
Status: Passed by the legislature on June 19, 2006.
Approved by voters on September 30, 2006.

Senate Bill 1 (Constitutional Amendment No. 5)
Sponsored by: State Senator Joe McPherson
Status: Passed by the legislature on May 31, 2006.
Approved by voters on September 30, 2006.

Overview

In the midst of a heart-breaking year, Louisiana's citizens were more aware than ever of the fundamental importance of having homes, businesses, and houses of worship that cannot be taken away at the whim of a government official. Even as rumors swirled around the state that large sections of New Orleans and the surrounding areas might be taken away from their rightful owners because of the devastation caused by Hurricanes Katrina and Rita, the people of the state voted to make sure that the government had clear limits on how it could use eminent domain in the wake of the storms.

Senate Bill No. 1, ratified by Louisiana's voters on September 30, 2006, amended the state constitution to specifically prohibit the taking of private property for a private use. Under the amendment's terms—and with a few notable exceptions—localities are prohibited from condemning private property merely to generate taxes or jobs. Instead, the state's blight laws must now ensure that eminent domain can only be used for the removal of a threat to public health and safety caused by a particular property. All economic development and urban renewal laws currently on the Louisiana books must conform to the limitations imposed by SB 1. The new amendment does not address the power of municipalities to use eminent domain for the benefit of industrial parks since that is specifically permitted in another provision of the Louisiana Constitution. It does, however, provide that a person's home cannot be taken for an industrial park or even for a public port facility.

House Bill 707 provides a "right of first refusal," requiring the government to offer any condemned property it no longer needs back to the original owner before selling it to any other private party.

The protections adopted in Louisiana's amendments are absolutely vital to ensure that citizens who are still trying to rebuild the homes, businesses, and communities shattered by the hurricanes will not have to face the additional trauma of losing those uniquely important places that they can call their own. As long as it is not a threat to the public health and safety, property is protected by the Louisiana Constitution from the greedy ambitions of those developers whose vision of New Orleans doesn't include its long-time residents.

Maine

Select State

- Primary purpose and intent language mean the reforms to the public use definition offer no real additional protection for property owners.
- Additionally, "blight" continues to be a recognized public use and the state urban renewal laws' broad language continues to leave the door wide open for abuse.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Maine Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Legislative Document 1870
Sponsored by: State Representative Deborah Pelletier-Simpson
Status: Signed into law on April 13, 2006.

Overview

The state of Maine edged toward providing stronger protections for its citizens' property rights by passing Legislative Document 1870, which says that it is not a public use to condemn property "for the purposes of private retail, office, commercial, industrial or residential development." The bill also specifies that eminent domain may not be used "primarily for the enhancement of tax revenue" or to "transfer to a person, nongovernmental entity, public-private partnership, corporation or other business entity."

The use of qualifiers such as "primarily" means that the statute will be easy to circumvent, since local governments can assert some other primary purpose for private-to-private takings. Even worse, Maine's new law also includes gaping exceptions for the acquisition of so-called "blighted" properties pursuant to the state's ubiquitously broad urban renewal laws. Despite the state's new, limited definition of public use, the urban renewal laws, as currently written, allow perfectly fine properties to be designated as "blighted," condemned, and handed over to private developers. It is particularly important that these problems be addressed in a traditional vacation destination like Maine, as recent trends have seen commercial developers cutting deals with local governments to wipe out poorer, older neighborhoods and replace them with projects that cater to the wealthy. Thus, the Legislature needs to change the definition of blight to ensure that properties are evaluated on a parcel-by-parcel basis and subject to condemnation only if they are a real threat to the health and safety of the community. Until the Legislature acts to close these loopholes, the state's eminent domain laws will continue to allow local governments to condemn homes, businesses, and places of worship for private profit.

Maryland

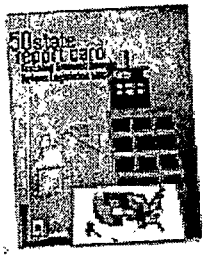
Select State

- Condemnation authorization expires after four years.
- Increased compensation provisions.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade



Read: Maryland Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate Bill 3
Sponsored by: State Senator James DeGrange
Status: Signed into law on May 8, 2007.

Overview

Maryland legislators filed more than 40 bills addressing eminent domain during the 2006 session. Legislation banning the use of eminent domain for economic development reached the floors of both chambers. However, when property rights advocates attempted to amend the bills to create legislation that offered real reform, the measures stalled and the General Assembly adjourned without passing any eminent domain reform.

In 2007, very few bills addressed eminent domain reform, and even fewer received a committee hearing. The only bill that passed was Senate Bill 3, which requires condemners to proceed within four years of authorization or the authorization expires. Additionally, the bill raises caps on various compensation arrangements.

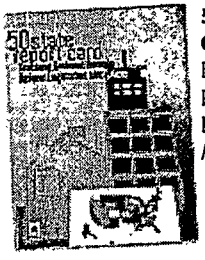
An expiration on condemnation authorizations may reduce speculative and unnecessary condemnations, as well as help property owners avoid years of uncertainty surrounding a proposed project. However, Maryland needs much tougher reform, including stronger property rights protections in the state constitution.

Massachusetts

Select State

- Failed to pass legislative reform.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade

F

Read: Massachusetts Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Overview

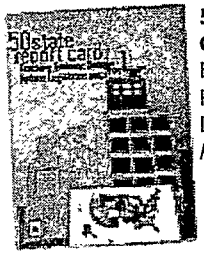
The Massachusetts General Court has seen a number of bills filed addressing eminent domain abuse and responding to the Kelo decision. Unfortunately, legislators filed relatively ineffectual legislation. Eminent domain abuse continues throughout the state, and although home rule allows local municipalities to pass their own eminent domain protections, the legislature must pass eminent domain reform to ensure uniform protection for home and business owners.

Michigan

Select State

- A new, strong constitutional amendment fortifies good, recent caselaw and means property rights are safer than they have been in decades.
- Blight must now be proved on an individual property basis.

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

A-

Read: Michigan Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Senate Joint Resolution E
Sponsored by: State Senator Tony Stamas
Status: Passed by the legislature on December 13, 2005.
Approved by voters on November 7, 2006.

House Bills 5818, 5819, and 5060
Sponsored by: State Representatives Steve Tobocman, Leon Drolet, John Garfield, and Glenn Steil
Status: All signed into law on September 20, 2006.

House Bills 5820 and 5821
Sponsored by: State Representatives LaMar Lemmons III and Bill McConico

Status: Both signed into law on October 3, 2006.

Senate Bill 693
Sponsored by: State Senator Cameron Brown
Status: Signed into law on September 20, 2006.

House Bills 6638 and 6639
Sponsored by: State Representatives Lamar Lemmons III, Steve Tobocman, and Leon Drolet
Status: Both signed into law on January 8, 2007.

Overview

Michigan is an example of a state that was not content to rest on its laurels. Just three years ago the Michigan Supreme Court set the standard for the rest of the country by emphatically rejecting the idea (which, ironically, the same court had championed in its earlier Poletown decision) that private commercial development is a constitutionally permissible justification for taking one private person's property and transferring it to another private party. In the wake of Kelo, however, the Michigan Legislature determined to act decisively to ensure that Michiganders would not have to worry about their rights.

The result of the Legislature's efforts was Senate Joint Resolution E, an amendment to the state constitution that prohibits "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues." Moreover, the amendment changed so-called blight law within the state, requiring blight to be determined on a parcel-by-parcel basis and requiring the government to prove by "clear and convincing evidence" that a property's condition satisfies the definition of blight established by law. These were significant, important changes to the existing laws in Michigan.

The resolution passed the House by a vote of 106-0 and the Senate by 31-6. After being signed by the governor, the constitutional amendment was placed on the ballot for the November 2006 election, where more than 80 percent of Michigan voters approved the amendment.

In addition to the constitutional amendment, Michigan's Legislature also adopted a number of bills that address condemnation procedure and compensation. House Bills 5817, 5818, and 5819 raised the cap on state-provided moving expenses for individuals (but not businesses), allowed low-income individuals to recover attorney's fees following an unsuccessful condemnation challenge, and outlined the process of surrendering property. House Bills 5820 and 5821 outlined procedures for determining and delivering compensation.

Finally, House Bill 5060 and companion Senate Bill 693 mirrored the language of the proposed constitutional amendment by altering the definition of public use to exclude economic development.

Minnesota

Select State

- Property cannot be condemned for private commercial development and a majority of individual properties must be blighted before an area can be condemned.
- Unfortunately, the exemptions for TIF districts mean it will be several years before these protections are realized in those districts.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B-

Read: Minnesota Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate File 2750 (House File 2846)
Sponsored by: State Senator Thomas Bakk
Status: Signed into law on May 19, 2006.

Overview

In response to the U.S. Supreme Court's decision in *Kelo v. City of New London*, an amazing and diverse coalition of civil rights groups, religious leaders, trade associations, concerned citizens, and officials from Minnesota's major political parties worked together to reform the state's eminent domain laws. The coalition included representatives from the Institute for Justice, NAACP, Urban League, Hispanic Chamber of Commerce, Hmong Chamber of Commerce, Farmers Union, Farm Bureau, Teamsters, Minnesota Family Council, Minnesota Automobile Dealers Association, National Federation of Independent Business, other trade associations, ministers from local black churches, former Independent Party gubernatorial candidate Tim Penny, and individuals who had been threatened with takings of their property.

Bipartisan legislative reform was introduced in the first week of the legislative session and on May 19, 2006, the governor signed into law Senate File 2750, legislation that protects homes, farms, and small businesses from eminent domain abuse. The law explicitly prohibits municipalities from using eminent domain to transfer property from one owner to another for private commercial development. It also requires that blighted properties be an actual danger to public health and safety to be condemned for private development. Non-blighted properties can be condemned only if they are in an area where the majority of properties are blighted and there is no feasible alternative to taking them to remediate the blighted properties.

Unfortunately, SF 2750 exempts more than 2,000 Tax Increment Financing districts, many of which are in the Twin Cities, for up to five years. It also includes exemptions for projects in Richfield and Minneapolis. While the end result is very strong reform that provides Minnesotans with significant protections, if the bill had passed without exemptions the State Legislature could have boasted enacting one of the strongest reforms in the country.

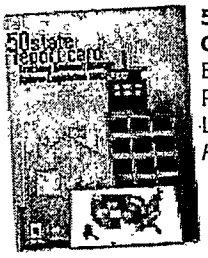
Mississippi

Select State

- Failed to pass legislative reform.

50 State Report Card

50 State Report Card Grade



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

F

Read: Mississippi Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Overview

The 2006 legislative session saw two strong bills in the constitutional amendment of House Resolution 10 and the statutory reform of House Bill 100. Unfortunately, the bills were gutted through the committee process and during debate, resulting in bills not worth passing.

The legislature made even less progress in the 2007 session.

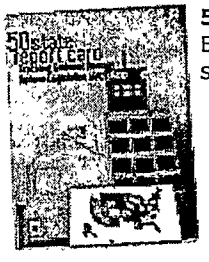
In 2009 a strong bill passed both houses with overwelming bipartisan support. H.B. 803, the first piece of meaningful reform to pass the Mississipi Legislature since Kelo, passed the house 119-3 and the Senate unanimously. The House was able to override Governor Haley Barbour's veto, but the Senate balked.

Missouri

Select State

- Prohibiting takings "solely" for economic development and failing to reform grossly abused blight statutes means property rights remain at risk.
- The state's abusive redevelopment statutes continue to leave nearly all property owners at risk

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Missouri Chapter
Read: Entire Report

50 State Report Card Grade

D

Current Abuses

Coming Soon

Bills

House Bill 1944
Sponsored by: State Representative Steve Hobbs
Status: Signed into law on July 13, 2006.

Overview

Particularly after the Supreme Court's decision in *Kelo*, Missouri is a state sorely in need of eminent domain reform. For years redevelopment agencies throughout the state have used bogus blight designations to acquire private property for private development. The General Assembly had the opportunity to dramatically improve its eminent domain laws, but let its citizens down by failing to adopt real, substantial reforms.

The state government did adopt House Bill 1944 (2006), which changes the law in several ways. The new law does specify that property cannot be condemned "solely" for economic development and it ends the prior practice of letting private developers initiate condemnations on their own behalf, but it continues to allow government agencies to take private property for the use of other private parties for any other justification, no matter how small or irrelevant. Conveniently for tax-hungry local governments and land-hungry developers, the law continues to let cities condemn whole neighborhoods as "blighted" based on vague, subjective factors such as "inadequate street layout," "unsafe conditions," and "obsolete platting." While it is a marginal improvement that such blight designations must now occur on a property-by-property basis—at least until a preponderance of the properties are blighted—the operational definition is so broad that any community could be at risk, no matter how well maintained. The new law says that blighted areas must be condemned within five years of their designations or else a new designation will be required, and farm land is specifically exempted from being declared blighted. HB 1944 also establishes an Office of Ombudsman in the Office of Public Counsel within the Department of Economic Development, which will ostensibly serve to assist property owners that are under threat of eminent domain.

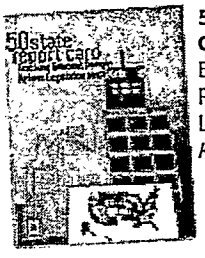
When all of these minor changes are taken into account, however, the end result is not much different from the starting point. Almost every home, business, and house of worship in Missouri may still be taken by any municipality or government agency with a little patience, ingenuity, and a wealthy developer to provide the financial incentive. Citizens will only have meaningful protection against eminent domain abuse when blight can only be used to describe property that is an actual danger to public health or safety, and that means the state needs to amend the state constitution to remove Art. VI, Sec. 21, which currently allows condemnation of blighted areas.

Montana

Select State

- Broad public use language was addressed but not sufficiently narrowed.
- Ambiguous definitions of blight mean that loophole remains open.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Montana Chapter
Read: Entire Report

50 State Report Card Grade

D

Current Abuses

Coming Soon

Bills

Senate Bill 41
Sponsored by: State Senator Jim Elliot
Status: Signed into law on May 8, 2007.

Senate Bill 363
Sponsored by: State Senator Christine Kaufman
Status: Signed into law on May 16, 2007.

Overview

The Montana Legislature was not in session in 2006, but citizens hoped to place a property rights initiative on the November 2006 ballot. However, Initiative 152 was challenged in court over issues regarding signature gathering and subsequently was struck from the ballot.

In 2007, the Legislature passed Senate Bills 41 and 363. These companion bills open up the two precise sections of code needing reform—the definitions of public use and blight. Unfortunately, the reform that passed barely increases property rights protections.

The Montana Code, like the statutes of almost every state prior to Kelo, provides a back door for municipalities to acquire private property through bogus blight designations. Unfortunately, SB 41 only rearranges a few words in the laundry list of vague criteria necessary to declare an area blighted. The bill was originally intended to prohibit the government from serving as a "pass through" (doing the dirty work of condemning property for private developers) with a strong provision prohibiting the transfer of condemned property to a private entity for ten years. Instead, the bill was amended to remove the time limit and add "intent" language, making it an easy provision to work around.

SB 363 addresses public use but fails to remove old, problematic definitions such as "and all other public uses authorized by the legislature of the state." The bill also attempts to limit the blight loophole by reducing the criteria that qualify an area as blighted, but "deterioration" and "age obsolescence" remain on the list.
Other language in the bill purports to stop the use of eminent domain when its "purpose" is increased tax revenue. Like the "intent" language of SB 41, this provision will be easy to get around since local governments can always claim a different reason for acquiring property, and courts will not question that assertion.

These bills represent a first step toward eminent domain reform, but the state has more work to do to ensure that every Montanan is protected against the abuse of eminent domain.

Nebraska

Select State

- Primary purpose language means condemnations for economic development will not be meaningfully restricted.
- Agricultural property cannot be designated "blighted."

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Nebraska Chapter
Read: Entire Report

50 State Report Card Grade

D+

Current Abuses

Coming Soon

Bills

Legislative Bill 924
Sponsored by: State Senator Deb

Fischer
Status: Signed into law on April 13, 2006.

Overview

In 2006, the Nebraska Unicameral Legislature took only a baby step toward providing its citizens with much-needed protection for their property rights. Legislative Bill 924 prohibits the use of eminent domain "if the taking is primarily for an economic development purpose." However, there is nothing stopping the condemnor from declaring one primary purpose for the taking and then changing the purpose after condemnation. The prohibitions do not apply, however, to "public projects or private projects that make all or a major portion of the property available for use by the general public ... ." The bill clarifies that agricultural property cannot be designated as "blighted" by local governments and therefore cannot be subject to condemnation.

The effect of some aspects of this bill, such as the ability to use eminent domain for "private projects that make all or a major portion of the property available for use by the general public," is uncertain. While the Unicam may have merely intended for this provision to allow condemnations for private museums or recreational centers—neither of which are traditional public uses—it also could be (and almost undoubtedly will be) argued that this exception will allow shopping malls or similar commercial ventures that allow a high degree of public access. If a court finds that this was the legislative intent, the language restricting condemnations for economic development becomes worthless. The Unicam would have been better served to limit the use of eminent domain strictly to traditional public uses.

Another deficiency of Nebraska's new law is that it retains a huge exception for the condemnation of properties designated as "blighted" under the state's urban renewal laws, which may then be transferred to private developers. As is the case with many other states, Nebraska's definition of "blight" is incredibly broad, allowing local governments the opportunity to affix the label to almost any neighborhood that a private developer might desire, regardless of the condition of the targeted buildings. Unless the Unicam acts to clarify that blight designations should only be meted out on a parcel-by-parcel basis where the properties are identified as posing a threat to the health or safety of the community, these loopholes will continue to allow local governments to condemn homes, businesses, and places of worship for private profit. In the future, Nebraska's lawmakers should extend the same protection they gave to farmers to every property owner across the state. All Nebraskans—regardless of where they live or what they do—deserve protection from the abuse of eminent domain.

Nevada

Select State

- A pending constitutional amendment would be one of the strongest reforms yet, prohibiting "public use" for any transfer of property to a private party and placing the burden to prove public use on the government.
- Statutory reform in 2007 provided some of those protections immediately.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Nevada Chapter
Read: Entire Report

50 State Report Card Grade

B+

Current Abuses

Bills

Coming Soon

Ballot Question 2
Sponsored by: citizen initiative
Status: Approved by voters on November 7, 2006, must be approved again in November 2008.

Assembly Bill 102
Sponsored by: State Assemblyman William Horne
Status: Signed into law on May 23, 2007.

Assembly Joint Resolution 3
Sponsored by: State Assemblyman Joseph Hardy
Status: Approved by the 2007 Legislature, must be approved again by the 2009 Legislature and voters in 2010.

Overview

Although the Nevada Legislature was not in session in 2006, the state's citizens would not be deterred from presenting a strong constitutional amendment protecting private property rights. When the citizen initiative qualified for the ballot, it contained both a prohibition on private-to-private transfers and controversial regulatory takings language. Challenged in court, the "regulatory takings" element was taken off and the measure appeared on the ballot as a pure "public use" issue: "Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use." The amendment passed by a wide margin, but Nevada requires constitutional amendments to be approved in two successive general elections, so the measure must now appear again on the 2008 ballot.

When the Legislature convened for the 2007 session, it acted quickly to pass statutory reform that turns many of the protections from the citizen initiative into law immediately. Assembly Bill 102 contains the public use definition from the citizen initiative, but with exceptions for blight and relocation of those displaced by highway projects. Unfortunately, AB 102 also differs from the initiative's five-year buy-back provision, by pushing that time limit to fifteen years and defining "use" so broadly that the very act of planning the project or condemning the property qualifies, effectively abolishing the buy-back provision. Despite these few weaknesses, AB 102 provides significant, immediate protection against eminent domain abuse. And if the initiative is approved again in 2008, Nevada will have even stronger language in a constitutional amendment.

Assembly Joint Resolution 3 proposes the language of AB 102 in a constitutional amendment. The bill passed this year and must be approved again in the 2009 Legislature. If approved a second time, the amendment would appear on the 2010 ballot. If the initiative passes in 2008, voters would decide in 2010 whether to replace the constitutional property rights protections of the initiative with language like that of AB 102. Either way, Nevadans can be proud that when the U.S. Supreme Court brought their federal constitutional rights into question, they acted with haste and resolve to ensure that people in their state would remain free to enjoy what rightfully belongs to them.

New Hampshire

Select State

- Blight is now property-by-property and must be a "menace" to health and safety.
- A constitutional amendment prohibits taking property for private use.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B+

Read: New Hampshire Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate Bill 287
Sponsored by: State Senator Bob Odell
Status: Signed into law on June 23, 2006.

CACR 30
Sponsored by: State Representative Robert Giuda
Status: Passed by the legislature on April 20, 2006.
Approved by voters on November 7, 2006.

Overview

On Friday, June 23, 2006, exactly one year after the Kelo decision, New Hampshire Governor John Lynch signed into law Senate Bill 287, legislation that provides citizens with meaningful protection against eminent domain for private profit. The eminent domain reform bill, which sailed through both legislative houses, explicitly states, "Public use shall not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities."

Unfortunately, the bill continues to allow the use of eminent domain for the elimination of blight, and even though SB 287 requires that an individual property, as opposed to an area, be a "menace to health and safety," the blight exemption still prevents New Hampshire's reform from receiving the highest grade.

Knowing that statutes are easier to repeal than constitutional provisions, the New Hampshire General Court also made sure that the state's citizens had the opportunity to vote on a constitutional amendment that would guarantee the greatest possible protection for their property rights. CACR 30 was that proposed constitutional amendment, which said: "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." In the November 2006 elections, more than 85 percent of New Hampshire voters cast their ballots in favor of this new provision.

This is one of the strongest reform efforts mounted in response to *Kelo*. New Hampshire legislators understand what defenders of eminent domain abuse still do not—that *Kelo* created a big problem for the states to fix, that economic development will undoubtedly continue without eminent domain, and that every home, business, farm, and place of worship needed protection against condemnation for private gain.

New Jersey

Select State

- Failed to pass legislative reform.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

F

Read: New Jersey Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Overview

New Jersey desperately needs reform, as the State's Public Advocate admitted in his recent report. In particular, the criteria used to declare an area "in need of redevelopment," a designation that triggers the power of eminent domain, are so broad that most every New Jersey property is subject to acquisition.

There have been bills that purport to reform the Local Redevelopment Housing Law (LRHL) definition of "blight," but they fall short of the reforms necessary for true eminent domain protection in New Jersey. The new definitions contained the same vague and subjective criteria used by municipalities to take property for private development, such as "dilapidated," "obsolescent," and "lack of proper utilization." The definition for "detrimental to safety, health, or welfare of the community" appeared to have more objective criteria for residences, but businesses are left even more unprotected, since "lack of proper utilization" that leads to "stagnant or not fully productive" use of the land makes properties "blighted."

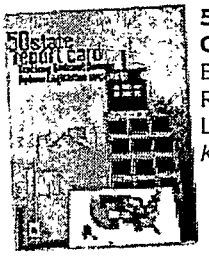
New Jersey is one of the nation's worst eminent domain abusers and is one of the states with the most work to do in the legislature.

New Mexico

Select State

- Reform legislation was vetoed in the 2006 session, but passed in 2007.
- Eminent domain may no longer be used for blight.

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

A-

Read: New Mexico Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 393
Sponsored by: State Representative Peter Wirth
Status: Signed into law on April 3, 2007.

Senate Bill 401
Sponsored by: State Senator Steven Neville
Status: Signed into law on April 3, 2007.

Overview

In 2006 the Legislature passed good reform language in House Bill 746. Unfortunately, the governor vetoed the bill, and instead formed the Task Force on the Responsibile Use of Eminent Domain. A majority of the Task Force members voted to recommend repealing the power of eminent domain for economic development, and lawmakers introduced several bills adopting the Task Force's recommendations.

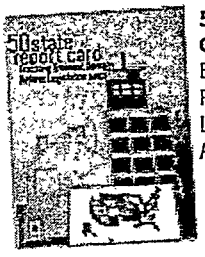
This year, House Bill 393 removed the power of eminent domain from the state's Metropolitan Redevelopment Code—ensuring protection for New Mexico's home and small business owners from the type of eminent domain abuse seen in Kelo. By no longer allowing condemnations for blight, New Mexico passed some of the nation's strongest reform. An exception was made for so-called "antiquated platting" issues in Rio Rancho, but that amendment was narrowly written and does not affect the heart of the reform.

New York

Select State

- Failed to pass legislative reform.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: New York Chapter
Read: Entire Report

50 State Report Card Grade

F

Current Abuses

Coming Soon

Bills

Overview

As a state that is among the leaders in eminent domain abuse, it is not surprising that New York trailed far behind the other states in its response to Kelo. The only bill that seemed to have any traction did little more than create another study committee, yet the New York State Legislature failed to even pass that.

The state did pass legislation specifically targeting a large electric-line project, as well as a private golf club on Long Island. However, there is no momentum toward comprehensive reform, so the Legislature continues to allow the government to take homes and small businesses for private gain.

North Carolina

Select State

- The state revoked eminent domain authority for economic development.
- Unfortunately, although "blight" is designated on a property-by-property basis, it is still broadly defined and subject to abuse.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: North Carolina Chapter
Read: Entire Report

50 State Report Card Grade

C-

Current Abuses

Coming Soon

Bills

House Bill 1965
Sponsored by: State Representative Bruce Goforth
Status: Signed into law on August 10, 2006.

Overview

North Carolina made important strides toward ensuring strong protections for property rights, but still has room for improvement. The General Assembly commissioned a Select Committee on Eminent Domain Powers to assess the use of eminent domain in the state. Rather than proposing a constitutional amendment to create a fairly permanent prohibition on the use of eminent domain for private economic development, the committee recommended only tweaking the state's condemnation laws.

House Bill 1965, which was proposed by the committee and eventually passed by the General Assembly, repeals all laws allowing local condemnations for economic development, meaning that a municipality must go through the General Assembly if it wants to get eminent domain authority for economic development. The bill did not narrow North Carolina's broad definition of "blight," although it does require blight designations to be assessed on a parcel-by-parcel basis.

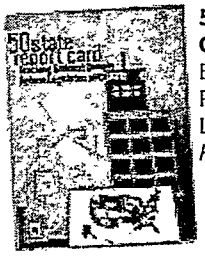
The reforms thus adopted do provide modest protections for North Carolina's homes, businesses, farms, and houses of worship, but they are still far from secure. In future sessions, the General Assembly needs to ensure that its blight laws only allow the condemnation of parcels that pose a threat to public health and safety. Furthermore, the state's citizens should demand the opportunity to adopt a strong constitutional amendment that will enshrine a clear, narrow definition of "public use." Without these changes, North Carolinians will not be completely free of the threat of eminent domain for private benefit.

North Dakota

Select State

- The strong constitutional amendment prohibits private ownership or use, ensuring property rights in the state.
- Statutory reforms modify the Century Code to comply with new constitutional protections.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: North Dakota Chapter
Read: Entire Report

50 State Report Card Grade

A

Current Abuses

Coming Soon

Bills

Ballot Measure 2
Sponsored by: citizen initiative
Status: Approved by voters on November 7, 2006.

Senate Bill 2214
Sponsored by: State Senators Stanley Lyson, Joel Heitkamp, and Aaron Krauter
Status: Signed into law on April 5, 2007.

Overview

North Dakota didn't even have a legislative session in 2006, yet it still managed to pass one of the nation's strongest constitutional amendments because of the hard work of concerned citizens. A citizen initiative placed an amendment on the ballot that declared, "a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business."

When this amendment was presented to voters during the November 2006 elections, it found overwhelming support. While North Dakota has not had nearly the problems with eminent domain abuse that have been characteristic in other states, residents can be proud that they have ensured the strongest possible protection for essential property rights. This state's successful reforms are a shining example to all American citizens of what is possible when people resolve to stand up for their freedoms.

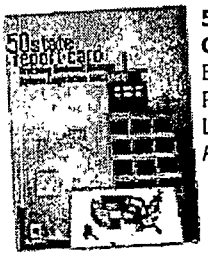
In 2007, Senate Bill 2214 was signed into law, amending the Century Code to reflect the changes made by Measure 2.

Ohio

Select State

- The state passed a temporary moratorium on economic development takings and created a task force, but the result was weak eminent domain reform.
- The legislature needs to pass a statewide definition limiting blight to codify the state supreme court's *Norwood v. Horney* decision.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Ohio Chapter
Read: Entire Report

50 State Report Card Grade

D

Current Abuses

Coming Soon

Bills

Senate Bill 167
Sponsored by: State Senator Timothy Grendell
Status: Signed into law on November 16, 2005.

Senate Bill 7
Sponsored by: State Senator Timothy Grendell
Status: Signed into law on July 10, 2007.

Overview

Thanks to extraordinarily permissive laws, eminent domain abuse in Ohio has been widespread in recent years. Since the U.S. Supreme Court delivered the Kelo decision, Ohio has seen some major changes to its eminent domain laws—but the state legislature can claim precious little responsibility for these changes.

On July 26, 2006, the Ohio Supreme Court unanimously ruled in *Norwood v. Horney* that the Ohio Constitution does not permit eminent domain to be used solely for economic development, that Ohio courts must apply "heightened scrutiny" when reviewing governmental uses of eminent domain, and that cities could not constitutionally condemn non-blighted properties based on the idea that they might eventually become blighted. The Ohio Supreme Court's holdings represent a dramatic improvement in the legal protections for home and business owners in the state.

The Ohio General Assembly commissioned a Legislative Task Force to study the use of eminent domain in the state, and imposed a statewide moratorium on taking properties in non-blighted areas when the primary purpose is economic development a (which expired on December 31, 2006).

In response to the Task Force findings, the 2007 General Assembly passed Senate Bill 7. Although the new law provides better notice for property owners when their land is under threat, and procedural and compensation changes, SB 7 will not stop eminent domain abuse. Ohio's eminent domain law continues to allow a combination of subjective factors (such as age and obsolescence, dilapidation and deterioration, excessive density, faulty lot or street layout) to be used by condemning authorities to take property for private gain. Additionally, only seventy percent of homes must qualify under this ambiguous and expansive definition for an entire neighborhood to be condemned.

Now that the Ohio Supreme Court has emphatically articulated constitutional limits to the use of eminent domain in Ohio and instructed courts to carefully scrutinize local governments' efforts to condemn the homes and businesses of their citizens, the Ohio General Assembly's job is simplified considerably. In order to ensure that Ohioans no longer have to fear becoming the target of eminent domain abuse, and in the event the removal of blight remains a permissible reason

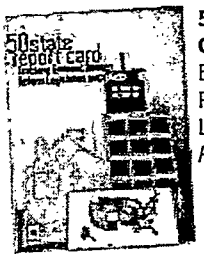
to use eminent domain, the legislature needs a statewide definition of blight so that the term is given clear and limited meaning, as well as a constitutional amendment to give it effect in home-rule cities. Furthermore, blight designations need to be on a parcel-by-parcel basis, rather than threatening entire neighborhoods based on the condition of a few ill-kept houses.

Oklahoma

Select State

- Failed to pass legislative reform.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Oklahoma Chapter
Read: Entire Report

50 State Report Card Grade

F

Current Abuses

Coming Soon

Bills

Overview

In response to *Kelo*, the Oklahoma Legislature formed several study committees preceding the 2006 session.

Then, in May 2006, the Oklahoma Supreme Court rejected the U.S. Supreme Court's *Kelo* decision that permitted eminent domain for private development, ruling instead in Board of County Commissioners of Muskogee County v. Lowery that economic development is not a constitutional reason to use eminent domain under the Oklahoma Constitution. The Court originally heard the case in 2004, before the *Kelo* decision. In Lowery, Muskogee County sought to take an easement for water pipelines for a private electric generation plant. The stated purpose of the condemnation was "economic development." Noting that the U.S. Supreme Court had explicitly reminded states that they did not have to follow the Kelo decision in interpreting their own constitutions, the Oklahoma Supreme Court concluded that "our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution."

However, the Court said that its decision does not apply to condemnations for "blight." Unfortunately, the definition of "blight" under Oklahoma law is so broad that virtually any neighborhood would qualify. That means cities could switch to condemnations under the Neighborhood Redevelopment and Oklahoma Housing Authorities Acts.

Last year the legislature proposed an excellent constitutional amendment, House Joint Resolution 1057 (2006), that would have stopped this from happening. The bill made it all the way to conference committee only to die in the last days of session due to the confusion over the protections Lowery actually offers. The legislature failed to pass needed reform again this session. In fact, the only momentum was for another study committee. Until reform is passed, Oklahomans will still be vulnerable to eminent domain abuse.

Oregon

Select State

- Blight designations are by individual property, which must be a danger to the community's health and safety.
- Unfortunately, the prohibition on private transfers contains "intent" language.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Oregon Chapter
Read: Entire Report

50 State Report Card Grade

B+

Current Abuses

Coming Soon

Bills

Ballot Measure 39
Sponsored by: citizen initiative
Status: Approved by voters on November 7, 2006.

Overview

Oregon is another example of a state in which citizens were so dedicated to making eminent domain reform a reality that they took the matter into their own hands. The Oregon State Legislature did not have a session scheduled for 2006, so a group of passionate citizens organized to get a statute on the ballot that would limit the government's authority to use eminent domain for private benefit.

Measure 39, the statute proposed in the initiative, forbids government parties to condemn private property used as a residence, business establishment, farm, or forest operation "if at the time of the condemnation the public body intends to convey fee title to all or a portion of the real property, or a lesser interest than fee title, to another private party." Given the opportunity to vote on it, Oregonians approved the new law by nearly two-to-one. The new statute is particularly important because its language prohibits private-to-private transfers (although the use of "intends" makes that prohibition incomplete since it is always hard for a citizen to prove government intent). The initiative states that a blight designation can be applied only to individual properties that constitute a danger to the health and safety of the community.

Even though Oregon now has valuable statutory limits on the use of eminent domain, they can still be reversed by future acts of the State Legislature. In order to ensure that these reforms are made as strong as possible, this state needs to adopt a constitutional amendment that will safeguard property rights by enshrining a narrow definition of "public use" in its organic law.

Pennsylvania

Select State

- The definition of blight now includes specific criteria and blight designations have an expiration date.
- Unfortunately, the largest cities and worst abusers of eminent domain may continue to condemn under previous blight designations for another seven years.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Pennsylvania Chapter
Read: Entire Report

50 State Report Card Grade

B-

Current Abuses

Coming Soon

Bills

House Bill 2054
Sponsored by: State Representative Glen Grell
Status: Signed into law on May 4, 2006.

Senate Bill 881
Sponsored by: State Senator Jeffrey Piccola
Status: Signed into law on May 4, 2006.

Overview

In 2006, Pennsylvania responded to the U.S. Supreme Court decision in *Kelo v. City of New London* and the widespread abuse of eminent domain throughout the state by taking a giant step toward providing its citizens with the property rights protection that they deserve. Senate Bill 881, the "Property Rights Protection Act," which was supported by a broad group of organizations, including the Pennsylvania State Conference of NAACP Branches, the League of United Latin American Citizens, the Mexican American Legal Defense and Education Fund, the Farm Bureau and National Federation of Independent Business, was adopted with near-unanimous support in the General Assembly. It prohibits the use of eminent domain "to take private property in order to use it for private enterprise," while also significantly tightening the definition of "blight" in the state's eminent domain laws and placing time limits on blight designations. The bill also provides that agricultural property cannot be "blighted" unless the Agricultural and Condemnation Approval Board determines the designation is necessary to protect the health and safety of the community.

These changes were absolutely imperative for a state that—in an example of the bizarre extremes to which states had allowed their "blight" definitions to go—had previously allowed the condemnation of property for no better reason than that it was determined by a local government to be "economically or socially undesirable." Also, the old law never allowed blight designations to expire, meaning that a property in a designated area could still be taken for private use years down the road, regardless of any improvements or other changes in circumstances.

The bill's primary drawback—and it is a significant one—is that it includes a glaring exception that allows certain municipalities and counties (Philadelphia, Norristown, Pittsburgh, and Delaware County, among others) to condemn property in areas that have already been designated as "blighted" under the state's urban renewal laws. (Those places cannot impose new blight designations under the old definition of "blight.") This exception, which exempts the areas of the state most prone to eminent domain abuse, will expire after seven years, but it is still an unfortunate addition to an otherwise good bill.

Rhode Island

Select State

- Failed to pass legislative reform.

50 State Report Card **50 State Report Card Grade**

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

D-

Read: Rhode Island Chapter
Read: Entire Report

Current Abuses **Bills**

Coming Soon

Overview

Senate Bill 2155 (2006) would have limited takings for economic development. After a lengthy struggle in the Senate, it finally moved to the House, where it died with the end of session on June 23, 2006.

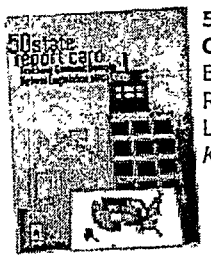
SB 2728A (2008), which was signed by Gov. Don Carcieri on July 2, 2008, does little more than provide local governments a roadmap for using eminent domain for private economic development. The provision requiring that property owners receive at least 150% of fair market value in compensation is all that prevents the state's attempt at reform from receiving an F.
Rhode Island continues to need substantive reforms, including a strong definition of public use and a narrow definition of blight.

South Carolina

Select State

- Constitutional amendment declares that "blighted" property must be "a danger to public health and safety," effectively eliminating bogus "blight."

50 State Report Card **50 State Report Card Grade**



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

B+

Read: South Carolina Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Senate Bill 1031
Sponsored by: State Senator Chip Campsen
Status: Passed by the Legislature on June 14, 2006.
Approved by voters on November 7, 2006.

Senate Bill 155
Sponsored by: State Senator Chip Campsen
Status: Ratified by the Legislature on April 26, 2007.

Overview

When the 2006 election gave South Carolina's citizens an opportunity to stand up and express their support for private property rights, they came through with flying colors. More than 85 percent of voters in South Carolina approved a constitutional amendment that provides home and business owners across the state with meaningful protection against eminent domain abuse. The amendment specifically prohibits municipalities from condemning private property for "the purpose or benefit of economic development, unless the condemnation is for public use." It further requires that an individual property be a danger to public health and safety for it to be designated as blighted, closing a loophole that enabled local governments to use eminent domain for private use under the state's previously broad blight definition. The amendment also removes provisions of the state constitution that had specifically allowed several counties to use eminent domain for private uses.

Before South Carolinians had their say, state law allowed government officials to take property for private use under the guise of blight removal, so what happened in the Kelo case could have happened in South Carolina. The constitutional amendment fixed that problem and gave the state's citizens some of the strongest protection in the country from eminent domain abuse, ensuring that so-called blight laws could not be used as a backdoor way of using eminent domain to take homes, businesses, farms, and places of worship for private profit.

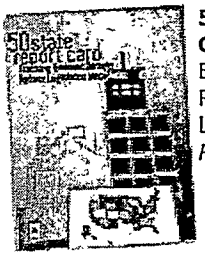
A constitutional amendment is unambiguously the most effective way to stop the abuse of eminent domain for private gain, and the passage and approval of this provision should effectively safeguard South Carolinians' fundamental right to keep what they rightfully own.

South Dakota

Select State

- Complete prohibition of private-to-private transfers.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade

A

Read: South Dakota Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

House Bill 1080
Sponsored by: State Representative Larry Rhoden
Status: Signed into law on February 17, 2006.

Overview

While many state legislatures seemed uncertain about how to go about protecting their citizens' property rights in the wake of *Kelo*, in early 2006 South Dakota became the first state to strike right at the heart of the problem with a well-crafted eminent domain reform bill.

House Bill 1080 prohibits government agencies from seizing private property by eminent domain "for transfer to any private person, nongovernmental entity, or other public-private business entity." The act—which passed the House by a vote of 67-1 and the Senate unanimously—also stipulates that after seven years, if condemned land is not used for the purpose for which it was acquired, the original owner has right of first refusal to buy the property at current fair market price. By taking this approach, South Dakota lawmakers demonstrated their recognition that it is simply wrong for the government to take property from one person and give it to another private party.

Thanks to the state's broad restriction on the use of eminent domain for private development—which was done without leaving any loopholes or exceptions—every home, business, and ranch in South Dakota should finally be safe from eminent domain abuse.

Tennessee

Select State

- Failed to appropriately address the definition of "public use" or "blight."
- Changes to notice requirements put property owners at a greater disadvantage.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Tennessee Chapter
Read: Entire Report

50 State Report Card Grade

D-

Current Abuses

Coming Soon

Bills

House Bill 3450/Senate Bill 3296
Sponsored by: State Representative Joe Fowlkes
Status: Signed into law on June 5, 2006.

House Bill 3700
Sponsored by: State Representative Joe Armstrong
Status: Signed into law on June 27, 2006.

Overview

Just like several other states, Tennessee created a state commission to study the use of eminent domain and ways of reining in abuse. State legislators filed dozens of bills intended to make sure that Tennesseans would not have to worry about their own homes, businesses, farms, or houses of worship being condemned for someone else's private benefit. But of all the possible eminent domain reform bills to choose from, the General Assembly ended up selecting two that did very little to improve the protection of property rights in their state.

House Bill 3450/Senate Bill 3296 made a slight improvement to the state's definition of "blight," yet the definition still remains too broad. The bills also provided some additional notice to property owners during the condemnation process. The bills did remove the power of eminent domain from certain parties and modified the state's definition of "public use" to exclude economic development, but they still permit governmental entities to transfer property no longer being used for a public use to another public or private party and they expressly allow the government to condemn properties for the purposes of building "industrial parks." House Bill 3700 actually seems to be a bit of a regression, changing a previous requirement that condemning authorities publish notices (including a map of the targeted area) once a week for three consecutive weeks to a requirement that the condemning authority post the map of the targeted area for review in at least two locations. House Bill 3700 also removes a prior requirement that condemning authorities obtain approval from the governing body of the affected county unless the condemnations were pursuant to a redevelopment plan that utilized tax increment financing applicable to the county property tax levy.

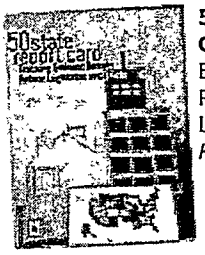
These changes to Tennessee's law should be deeply disappointing to the state's citizens, especially since the General Assembly could have selected from any number of bills that would have offered real, substantial protections for citizens' property rights. Due to the legislature's failure to fix the state's definition of blight, the issues will need to be revisited if Tennesseans are to be assured of the property rights protections they deserve.

Texas

Select State

- Constitutional amendment requires "blight" be determined on a property-by-property basis
- Authorizes the legislature, by a 2/3 vote, to give any private entity the power of eminent domain

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Texas Chapter
Read: Entire Report

50 State Report Card Grade

B-

Current Abuses

Coming Soon

Bills

Senate Bill 7
Sponsored by: State Senator Kyle Janek

Status: Signed into law on September 1, 2005.

House Bill 1495
Sponsored by: State Representative Bill Callegari
Status: Signed into law on June 15, 2007.

Proposition 11
Sponsored by: Representative Frank Corte
Status: Approved by voters on Nov. 3, 2009.

Overview

In 2009, Texans overwhelmingly approved Proposition 11. The constitutional amendment was an overall improvement, with one major exception.

It made significant improvements in prohibiting condemnations based on bogus claims of blight. Government must declare blight on a property-by-property basis, and can no longer make area-wide blight designations. This will likely stop large-scale redevelopment based on so-called blight removal.

It also improved the definition of public use in Texas, by requiring that takings only occur for the "ownership, use and enjoyment of the property" by the public, while allowing for incidental private uses. Unfortunately, this provision is qualified by "primary purpose" language—if economic development or an increase in tax revenue is the "primary purpose" of a taking, it is prohibited. Government agencies often try to circumvent such language by claiming an alternative primary purpose.

But it made one far less desirable change in authorizing the legislature, by a 2/3 vote, to give any private entity the power of eminent domain. This is the most dangerous provision in the constitutional amendment and could allow eminent domain abuse in the future, so Texans will need to diligently watch the happenings of the Texas legislature (which only meets every other year).

The other changes should have an immediate effect of reducing eminent domain abuse in the state.

In the immediate aftermath of *Kelo*, the Texas Legislature passed Senate Bill 7 (2005), which has both positive and negative aspects.

On the positive side, the new law says the government or a private entity may not take property if doing so confers a private benefit, is pretextual, or is for economic development (unless economic development is secondary to the main objective of eliminating real "blight"). Additionally, courts are not to give any deference to a condemning authority's decision that a condemnation will be for a public use. These are important reforms that should go a long way to preventing future abuses in Texas.

On the down side, however, the bill created specific exceptions to those prohibitions so that they do not apply to utilities, port authorities, and other specific agencies and projects, including the new Cowboys stadium. And, as seen in other states, there is a specific exemption for blight removal.

The Texas Legislature was not in session in 2006, but in 2007, it passed a bill that redefined public use. Under House Bill 2006, condemnation only qualifies as a public use when it "allows a state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property." The bill would have closed the blight loophole and effectively closed the chapter on eminent domain abuse in Texas—but the governor vetoed it.

House Bill 1495 did become law, requiring the state attorney general to summarize current eminent domain law into a "Landowner's Bill of Rights." This document will be available to the general public, and must be provided to any property owner facing condemnation. The new law educates the public on the law of notice, procedure, and compensation rights of a condemned party, but does not protect property owners from continuing eminent domain abuse.

Utah

Select State

- The state led the nation in eminent domain reform with pre-Kelo legislation that completely removed eminent domain authority for blight.
- Unfortunately, the state became the first to roll back reform by re-instating a more limited blight authority and allowing a condemnation by a neighborhood majority vote.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Utah Chapter
Read: Entire Report

50 State Report Card Grade

B

Current Abuses

Coming Soon

Bills

Senate Bill 117
Sponsored by: State Senator Howard Stephenson
Status: Signed into law on March 21, 2006.

House Bill 365
Sponsored by: State Representative Stephen Urquhart
Status: Signed into law on March 20, 2007.

Overview

Utah demonstrated remarkable zeal in protecting its citizens' liberties by enacting eminent domain reform both before and after the *Kelo* ruling. Senate Bill 1841 (2005) removed the power of eminent domain from redevelopment agencies and has served as a model of excellent reform. Senate Bill 117 (2006) added approval and notice requirements for public use takings. The new law specified that the appropriate legislative body must vote to approve any taking of property by eminent domain, adding a layer of accountability for public officials who might otherwise be able to avoid taking responsibility if the takings power is utilized without appropriate restraint.

Unfortunately, in 2007 the Legislature passed and the governor signed House Bill 365, legislation that rolled back the state's prior eminent domain reform. The bill allows local governments to take private property for blight and allows property owners who own a large majority of property (in size or value) to vote to force out neighbors who want to keep their homes or small businesses. That means property owners who merely want to be left alone to enjoy what is rightfully theirs are exposed to abuse.

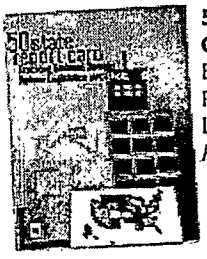
This new law marks an unfortunate turn in the battle against the abuse of eminent domain. While eminent domain authority remains significantly restrained, it demonstrates that the beneficiaries of eminent domain abuse—local governments and developers—will not easily relinquish this powerful tool. Developers, unlike the public in general, hire well-paid lobbyists who patrol state capitals to expand their power to threaten ordinary homeowners and small businesses. The result is that Utah property owners, who once had one of the strongest protections against eminent domain abuse in the country, now risk losing their property to greedy local governments, developers, and neighbors.

Vermont

Select State

- "Primarily" language means all economic development prohibitions are useless.
- "Blight" loophole remains.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Vermont Chapter
Read: Entire Report

50 State Report Card Grade

D-

Current Abuses

Coming Soon

Bills

Senate Bill 246
Sponsored by: State Senator Wendy Wilton
Status: Signed into law on April 14, 2006.

Overview

Like many other states, Vermont made a limited effort to address the concerns of citizens who were outraged over the *Kelo* decision, but it unfortunately fell well short of enacting real reform.

Senate Bill 246, passed by the Legislature and signed into law in April 2006, prohibits the use of eminent domain where "the taking is primarily for purposes of economic development" or confers a private benefit on a particular private party. While the Legislature at least acknowledged the need for eminent domain reform, the language adopted in this bill will be of little to no help to home and business owners forced to try to rebut a municipality's claim that its primary purpose is something other than private development.

Even more importantly, the Vermont Legislature left in place the same kind of "blight" loophole that enables eminent domain abuse in other states, allowing condemning authorities to designate entire neighborhoods as blighted on the basis that a few individual properties meet vague and subjective criteria that have little to do with the health or safety of the surrounding community.

The Vermont Legislature needs to follow up Senate Bill 246 with substantial reforms that will close the "blight" loophole, clearly limit the approved public uses of eminent domain, and prohibit the transfer of private property to other private parties.

Virginia

Select State

- Private property may be condemned for only traditional "public use."

- Sufficiently narrows the definition of "blight" to apply only to unsafe property, parcel-by-parcel.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Virginia Chapter
Read: Entire Report

50 State Report Card Grade

B+

Current Abuses

Coming Soon

Bills

House Bill 2954
Sponsored by: State Delegate Rob Bell
Status: Signed into law on April 4, 2007.

Senate Bill 781
Sponsored by: State Senator Ken Cuccinelli
Status: Signed into law on April 4, 2007.

Senate Bill 1296
Sponsored by: State Senator Thomas Norment
Status: Signed into law on April 4, 2007.

Overview

The only eminent domain bill that passed the 2006 General Assembly, House Bill 699, made minor changes to the Housing Authorities Law, which continued to define "blight" so broadly that almost any property could be designated "blighted," thus permitting eminent domain for private development. A bill that did provide property owners with important protections, sponsored by Del. Johnny Joannou, did not make it out of conference committee.

However, several new bills were introduced in 2007, and the General Assembly returned this year committed to protecting the commonwealth's home and small business owners. House Bill 2954, sponsored by Del. Rob Bell, requires that private property be seized for only traditional "public uses," like roads, schools and post offices. Importantly, it also tightens the Housing Authorities Law's definition of "blight." Local governments can still acquire properties that pose a real threat to public health or safety, but perfectly fine homes and businesses can no longer be seized using vague and subjective criteria like "deteriorated" and "dilapidated," nor can they be seized because they happen to sit within "blighted" areas.

HB 2954 received overwhelming support in both chambers, and Senate Bills 781 and 1296 were amended to mirror its language so that all three could be combined. The governor offered mostly nominal amendments to the legislation, leaving intact the bill's strong protections, though one amendment does exempt the Norfolk Redevelopment and Housing Authority from the provisions of the bill until July 1, 2010, as the city builds a new public recreational facility. The General Assembly accepted the governor's amendments and the new law will be effective on July 1.

Virginia's Constitution is unique because it allows the General Assembly to define "public use," so the reforms of 2007 may not be permanent. Thus, for complete reform, a constitutional amendment is required.

Washington

Select State

- Unfair notice provisions were changed to protect property owners.
- Significant reform is still needed.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: Washington Chapter
Read: Entire Report

50 State Report Card Grade

C-

Current Abuses

Coming Soon

Bills

House Bill 1458
Sponsored by: State Representative Kevin Van De Wege
Status: Signed into law on April 17, 2007.

Overview

The Washington Legislature intended to make eminent domain reform a priority of its 2006 session. The governor proposed legislation early in the session and the issue was the subject of significant hearings and debate. Unfortunately, the legislative process ended up polarizing interested parties and, as a result, the legislature did not pass a single eminent domain reform bill.

In 2007, House Bill 1458 was filed in response to Washington Supreme Court decisions holding that state and local governments could provide notice, on an obscure government website, of the public meeting where a final decision to condemn property would be made. Public meetings are vitally important because it is the sole opportunity a property owner has to provide evidence that his or her property is not necessary for the government's purported public use.

At the request of the governor and attorney general, HB 1458 was introduced with 54 co-sponsors and passed both houses of the Washington State Legislature by unanimous votes. The new law requires that a condemning authority in Washington notify affected property owners, by certified mail, at least 15 days prior to the public meeting at which a final decision on condemnation will be made.

Washington still has significant eminent domain reform to accomplish, but HB 1458 is a good first step and provides an immediate change to formerly unjust notice standards. Reform of other eminent domain laws is expected to remain on the agenda for next year's legislature and Attorney General McKenna announced that he would create a task force to thoroughly review Washington's eminent domain laws and recommend any necessary changes to the 2008 legislature.

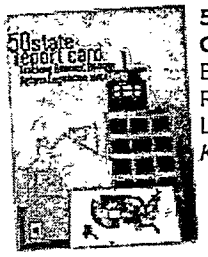
West Virginia

Select State

- "Blight" is now determined on a property-by-property basis.

- Unfortunately, the definition of "blight" remains extremely broad and vague.

50 State Report Card



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

Read: West Virginia Chapter
Read: Entire Report

50 State Report Card Grade

C-

Current Abuses

Coming Soon

Bills

House Bill 4048
Sponsored by: State Delegate Kevin Craig
Status: Signed into law on April 5, 2006.

Overview

Prior to the Supreme Court's decision in *Kelo v. City of New London*, West Virginia's eminent domain laws were among the worst in the country, as court decisions had given West Virginia localities sweeping power to condemn even non-blighted properties in redevelopment areas. The fact that the Legislature has been able to at least begin to place limits on how eminent domain may be used qualifies the state for a passing grade. But celebration of this initial step cannot obscure the fact that this state has a lot of ground to cover before it offers its citizens real protections against eminent domain abuse.

House Bill 4048, passed both houses of the Legislature on the last day of the session, makes it slightly more difficult for the government to seize non-blighted private property by eminent domain in so-called blighted areas. Cities must prove each individual structure is blighted, rather than allowing entire neighborhoods to be labeled as blighted. Despite this improvement, however, West Virginia's definition of blight remains so broad that perfectly normal homes and businesses could be condemned if a developer persuaded a local government to act on its behalf. An earlier version of the bill would have prohibited all use of eminent domain for private development, but this sweeping restriction was set aside in order to ensure the bill's passage.

Eminent domain abuse in West Virginia is widespread. Historically, homes, small businesses, and churches have been especially at risk in West Virginia because blight designations never expire, so redevelopment agencies can condemn properties in a redevelopment area decades after the city originally declared them blighted. While the new law provides some well-deserved safeguards, it is important that lawmakers in West Virginia say no to the few remaining defenders of eminent domain abuse and completely address the overwhelming public outcry with meaningful reform legislation. The state's citizens will not have meaningful protection against eminent domain abuse until "blight" can be used to describe only individual properties that are a danger to the public health or safety.

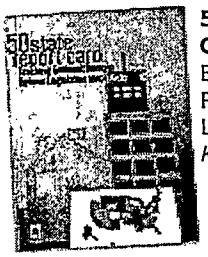
Wisconsin

Select State

- New eminent domain law prevents bogus "blight" designations for residential properties only.

50 State Report Card

50 State Report Card Grade



50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

C+

Read: Wisconsin Chapter
Read: Entire Report

Current Abuses

Coming Soon

Bills

Assembly Bill 657
Sponsored by: State Representative Mary Williams
Status: Signed into law on March 30, 2006.

Overview

The state of Wisconsin made some significant improvements to its eminent domain laws by enacting Assembly Bill 657 in 2006. Wisconsin's new legislation prohibits the government from designating large areas as "blighted" based on the condition of a small number of properties within that area. The bill provides some increased protection for residential properties by adding new factors to the legal definition of blight. Specifically, the law requires that residential property be "abandoned" or converted from single to multiple units and be in a high-crime area in order for it to be designated "blighted." In addition, the bill contains a vital protection—the requirement that each specific residential property be blighted before it can be acquired and transferred to a private entity. These changes to the law make it significantly more difficult for governments to target residential property for private profit, though other types of property, like small businesses and farms, remain vulnerable. As the law currently stands for owners of these non-residential properties, blight designations may still be based on subjective and vague terms like "obsolescence" and "faulty lot layout."

This law is a significant step forward, but the Wisconsin State Legislature should make a point of addressing the remaining problems in future sessions. A top priority should be replacing the subjective terms in the state's blight definition with objective factors that can be conclusively demonstrated, so that property owners can take specific action to maintain their properties in such a way that they cannot be threatened with condemnation. Furthermore, the Legislature needs to extend the same protections it has afforded residential property owners to all of the state's citizens.

Wyoming

Select State

- Redefines "public purpose" to mean the "possession, occupation and enjoyment of the land by a public entity."
- No transfer of property to private entities, unless condemned for "public health and safety," determined parcel-by-parcel.

50 State Report Card

50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*

50 State Report Card Grade

B

Read: Wyoming Chapter
Read: Entire Report

Current Abuses	Bills
Coming Soon	**House Bill 124** Sponsored by: State Joint Agriculture, Public Lands, and Water Resources Interim Committee Status: Signed into law on February 28, 2007.

Overview

The State Legislature was not in regular session in 2006. The Joint Agriculture Committee pledged to work toward two bills in 2007 that provide more protections for private property owners: one would focus on "urban" issues and one on rural issues.

House Bill 124 was one of the promised committee bills, but the reforms were incredibly meager. As drafted, the bill only increased notice and required the government to make an attempt at "good faith negotiations" before condemning private property, and early amendments seemed to weaken the bill further. However, property owners from across the state showed up at the Capitol to demand protection and their voices were heard, and Wyoming now has significantly stronger reform.

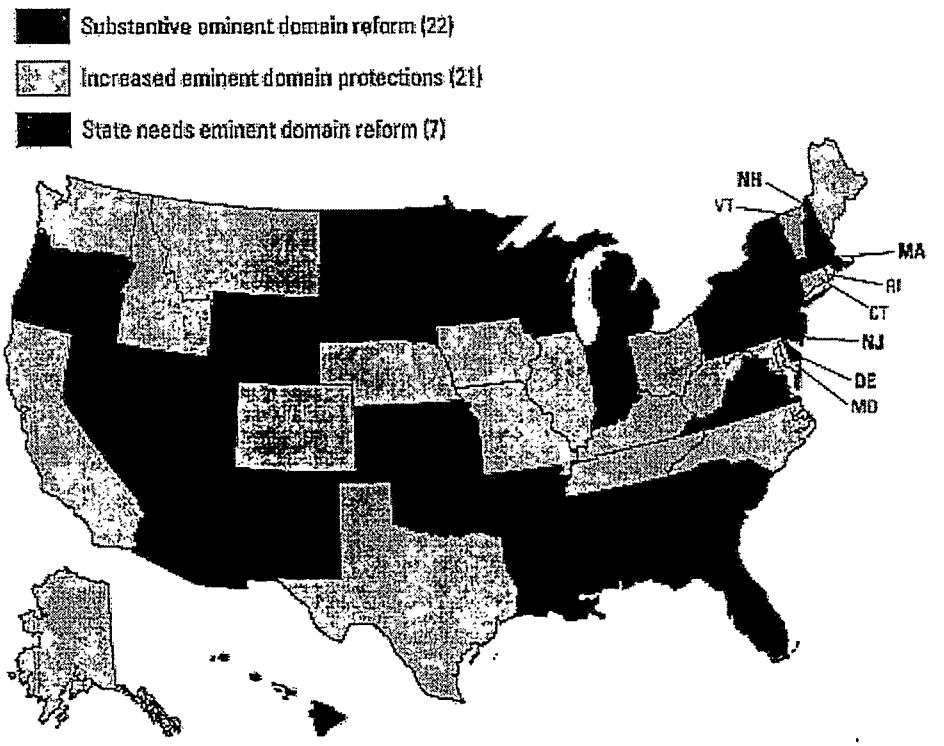
State, counties, and municipal corporations now may condemn only for public purpose, defined as "the possession, occupation and enjoyment of the land by a public entity." Private transfer is prohibited except for "condemnation for the purpose of protecting the public health and safety," and that condemnation is on a property-by-property basis. Municipalities are no longer allowed to delegate away condemnation authority, and if condemned property has not experienced "substantial use" ten years after the taking, the former owner may apply to the court to repurchase the property for the amount of the original compensation.

While this new law is a dramatic improvement, Wyoming property rights remain at risk under the state's water, mining, and common carrier exceptions unique to the state, if not the West. Additionally, a constitutional amendment is needed to ensure property rights protection for generations to come.

U.S. States Map Links and Pull Down Links

Select State

Eminent Domain Legislation Status Since *Kelo*



Source: Castle Coalition www.CastleCoalition.org Updated: July 16, 2009

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NOTES

REJECTING THE RETURN TO BLIGHT IN POST-*KELO* STATE LEGISLATION

AMANDA W. GOODIN*

This Note examines state legislative responses to Kelo v. City of New London, *the recent U.S. Supreme Court case that held that the exercise of eminent domain for private development does not violate the public use requirement of the Takings Clause. In response to* Kelo, *many states are legislatively prohibiting the use of eminent domain for development generally, but continuing to allow its use for development in blighted areas. This Note discusses the problems with such legislation and concludes that states should avoid crafting rules that allow the use of eminent domain for development solely in blighted areas. Such rules would improperly burden poor and minority communities and imbalance the political process by which rules on eminent domain for development are established.*

* Copyright © 2007 by Amanda W. Goodin. B.A., 2000, Yale University; J.D. Candidate, 2007, New York University School of Law. I would like to thank Vicki Been, Barry Friedman, Ron Drenger, Teddy Rave, Robin Moore, Niki Fang, and members of the Furman Program and the *New York University Law Review* for many helpful comments on earlier versions of this Note.

INTRODUCTION

The U.S. Supreme Court's decision in *Kelo v. City of New London*[1] focused national attention on the use of eminent domain for urban development projects. In a highly controversial opinion,[2] the Court held that the "public use" limitation in the Takings Clause of the Fifth Amendment[3] is not violated when land is taken from one private owner and given to another as part of an economic development plan.[4] The opinion was widely unpopular—much of the public seems to have taken to heart Justice O'Connor's ominous dissent, which warned that "[t]he specter of condemnation hangs over all property. 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."[5] Public disapproval of *Kelo* has provoked a wave of state statutory reform proposals.[6] Some of this proposed state legislation prohibits the use of eminent domain for economic development but continues to allow the use of eminent domain to redevelop "blighted" areas,[7] effectively overriding *Kelo* but leaving the Court's earlier holding in *Berman v. Parker*[8] intact.

The attention *Kelo* has generated offers an excellent opportunity for states to reconsider whether and how they wish to restrict the use of eminent domain for urban development projects.[9] States may structure their rules on eminent domain for development in a variety of ways, and these options will be highly dependent on the preferences and circumstances of each individual state. Legislation that

1 545 U.S. 469 (2005).

2 *See infra* note 81 (discussing opposition to and support for *Kelo*).

3 U.S. CONST. amend. V. *See infra* Part I (discussing takings doctrine).

4 *Kelo*, 545 U.S. at 489–90.

5 *Id.* at 503 (O'Connor, J., dissenting).

6 *See infra* Part III.A (discussing state legislative reactions to *Kelo*).

7 *See id.*

8 348 U.S. 26 (1954). In *Berman*, the Supreme Court held that the use of eminent domain to redevelop a "blighted" area as part of an urban renewal project was a constitutionally legitimate public purpose under the Takings Clause. *Id.* at 35. *Kelo* allows the use of eminent domain for any economically profitable redevelopment project. 545 U.S. at 484–85. See Part I, *infra*, for a more detailed discussion of *Kelo* and *Berman*.

9 Similarly, Congress could choose to limit the takings power of the federal government through federal legislation. This Note, however, is concerned only with takings at the state level.

allows the use of eminent domain for development only in blighted areas, however, is invariably a poor choice. Rather than rushing to override *Kelo*, states need to carefully consider whether and how eminent domain should be available for development projects and should adopt eminent domain rules that apply evenhandedly to all property owners.

This Note argues that restricting eminent domain to blighted areas is unwise for several reasons. First, it is likely to result in takings from solely low-income areas. This result poses fundamental fairness and environmental justice concerns if the use of eminent domain for development imposes net costs on property owners in low-income areas, while society as a whole enjoys the benefits. Second, the political process by which these eminent domain laws—including laws establishing levels of compensation—are established will be imbalanced, since only a discrete group of property owners will have a personal incentive to see that these laws are generous to the individual property owner.

Part I of this Note provides an overview of eminent domain doctrine, including the *Kelo* and *Berman* decisions. Part II discusses the use of eminent domain for development. Part III explains why legislation that only allows eminent domain for development in blighted areas is unwise. Part IV discusses possible ways to address the problems posed by this legislation and concludes that states should not return to the concept of blight in eminent domain law.

I
GOVERNMENT TAKINGS: EMINENT DOMAIN DOCTRINE

The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation."[10] Courts read the Takings Clause as confirming the government's power to take private property[11] and imposing two important limitations on this power: Property may only be taken for a "public use," and the private owner must receive "just compensation."[12] The extent of these two limitations, as well as what government actions

[10] U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment applies to takings by the federal government and has been incorporated against the states under the Due Process Clause of the Fourteenth Amendment. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897) (holding that Takings Clause is incorporated under Fourteenth Amendment); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987) (same).

[11] *See, e.g.*, United States v. Carmack, 329 U.S. 230, 241–42 (1946) (describing Takings Clause as "tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power").

[12] *E.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–37 (2005); *Carmack*, 329 U.S. at 242.

constitute a taking of property,[13] are the subject of much litigation and commentary.[14]

A. Public Use

Kelo and *Berman* both address the question of what constitutes a "public use" of property such that the government may take it without the owner's consent. The public use requirement is satisfied when the taken property is intended for future use by the public—for example, when land is condemned for a railroad with common-carrier duties.[15] Courts have also held that the public use requirement is satisfied where the taken property is transferred to another private party, so long as the taking serves a "public purpose."[16] So what constitutes a public purpose? The Court has repeatedly made clear that this is a question for the legislature rather than the courts, a deferential approach embraced by the *Kelo* Court.[17] In both *Berman*, decided in 1954, half a century before *Kelo*, and in *Hawaii Housing Authority v. Midkiff*,[18] decided in 1984, the Court made clear that it would rarely

[13] When the government takes title to a piece of real property through the exercise of eminent domain, it is clear that a taking has occurred. Sometimes, however, a regulation that "goes too far" may also be considered a taking. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The question of when a regulation amounts to a taking is not at issue in this Note.

[14] The takings literature is vast; a few notable works are RICHARD A. EPSTEIN, TAKINGS (1985) (arguing that takings doctrine shows tension between private and public law and conflict between original constitutional design and expansion of state power); WILLIAM A. FISCHEL, REGULATORY TAKINGS (1995) (discussing appropriate role of reviewing courts in regulatory takings); and Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (discussing fairness of "just compensation" and arguing that legislatures and administrative agencies have important role in compensation process).

[15] Kelo v. City of New London, 545 U.S. 469, 477 (2005).

[16] *See id.* at 479 ("[T]his 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" (quoting Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984)). Reading "public use" as encompassing a "public purpose" has been long accepted in takings doctrine. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984) (equating "public use" with "public character" and looking to legislative history for evidence of public purpose); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) (finding creation of private power company to be clear public purpose).

[17] *Kelo*, 545 U.S. at 480, 482–83 (noting historical deference to state legislatures and courts in determining local public needs); *see also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204–25 (1978) (chronicling evolution of state and federal courts' interpretations of Public Use Clause, including long-standing deferential approach to legislature).

[18] 467 U.S. 229 (1984).

overturn the legislature's determination of what constitutes a public purpose.[19]

In *Berman*, the owner of a department store in the District of Columbia challenged a statute allowing the District of Columbia Redevelopment Land Agency to condemn "blighted" areas for redevelopment.[20] The store owner argued that taking private property "merely to develop a better balanced, more attractive community" did not fall within the scope of the Public Use Clause.[21] The Court disagreed:

> 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[22]

The store owner also challenged the redevelopment statute as applied to him, arguing that even if the Agency could condemn blighted land, his store was not blighted and so could not be "swept into" the Agency's broad redevelopment plan.[23] Again, the Court disagreed, finding that it was within the power of the legislature to authorize redevelopment on an area-wide, rather than a building-by-building, basis.[24]

The Court reiterated this deferential approach several decades later in *Midkiff*,[25] stating that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[26]

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[19] *See id.* at 244 (holding that courts "must defer" to legislature's determination that "taking will serve a public use"); Berman v. Parker, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.").

[20] 348 U.S. at 28–31.

[21] *Id.* at 31.

[22] *Id.* at 32–33.

[23] *Id.* at 34.

[24] *Id.* at 35.

[25] At issue in *Midkiff* was a Hawaii statute that allowed the Hawaii Housing Authority to condemn portions of large landowners' estates in order to sell the lots to existing lessees; the Court held that Hawaii's plan to redistribute land ownership in order to break up the existing land oligopoly did not violate the public use requirement. Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 231–34 (1984).

[26] *Id.* at 241.

Kelo follows this pattern of deference to legislative determinations of public purpose. In *Kelo*, the City of New London approved a major development project in the hopes of revitalizing the city and reversing "[d]ecades of economic decline."[27] The planned development included a waterfront hotel, an urban village and commercial area, a museum, and a substantial research and office facility for Pfizer Inc., a pharmaceutical company, that city planners hoped would create jobs and business.[28] While the city was able to acquire most of the property it needed for the project on the private market, several homeowners refused to sell.[29] When the city agency initiated condemnation proceedings, the homeowners brought suit, claiming that the development project was not a valid public purpose and thus violated the Fifth Amendment.[30]

The Court upheld the legislature's determination that the taking served a valid public purpose, in keeping with its long line of "public use jurisprudence [that] has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[31] The Court found that "[p]romoting economic development is a traditional and long accepted function of government," and that "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized."[32] The Court rejected the private homeowners' further contention that the New London redevelopment project served a purely private purpose because much of the taken property would be transferred to a private development corporation that stood to benefit from the project.[33] The Court reasoned that "the government's pursuit of a public purpose will often benefit individual private parties"[34]—that is, the city's goal of economic development was no less legitimate simply because a private party also stood to gain from the redevelopment project. After *Kelo*, it seems that the Public Use Clause imposes few limits on the use of eminent domain so long as the legislature deems that a given use serves a public purpose.[35]

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[27] Kelo v. City of New London, 545 U.S. 469, 473 (2005).

[28] *Id.* at 474.

[29] *Id.* at 475.

[30] *Id.*

[31] *Id.* at 483.

[32] *Id.* at 484.

[33] *Id.* at 485–86.

[34] *Id.*

[35] Justice Stevens, writing for the majority in *Kelo*, emphasized the "comprehensive character of the [city's economic development] plan [and] the thorough deliberation that

B. Just Compensation

The second limitation imposed by the Takings Clause is that private property owners must receive "just compensation" when their property is taken. Courts have generally described the compensation requirement as driven by fairness: The compensation requirement is meant to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[36] Many commentators, on the other hand, have framed the compensation requirement in efficiency terms: By forcing the government to pay for the property it takes, the government will internalize the cost and will only take when the benefits outweigh the costs.[37]

The Takings Clause clearly requires compensation for takings but leaves unanswered the question of what amount of compensation is required. Courts have generally found that the fair market value of the taken property is the appropriate measure of compensation.[38] Both courts and commentators have frequently noted that fair market value is often incomplete compensation because it leaves some costs to be borne by the property owner, such as consequential damages and the additional subjective value the owner may attach to her property.[39] The Court has characterized the costs imposed by incomplete

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preceded its adoption . . . ." *Id.* at 484. It is possible that some comprehensive redevelopment plan is a prerequisite to constitutional condemnations for economic development.

[36] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[37] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (6th ed. 2003) (explaining how compensation requirement affects government incentives to take property); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 349 (2000) (describing efficiency rationale for Takings Clause).

[38] *E.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (awarding fair market value of condemned property even though payment fell substantially below replacement value); United States v. Miller, 317 U.S. 369, 374 (1943) (describing fair market value as "what a willing buyer would pay in cash to a willing seller"). Other measures may be appropriate, however, if market value is too difficult to ascertain or would result in "manifest injustice" to the owner or the public. *564.54 Acres of Land*, 441 U.S. at 512 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

[39] *See 564.54 Acres of Land*, 441 U.S. at 511 ("Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property."); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property."); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) (describing constitutionally required compensation as incomplete).

compensation as "part of the burden of common citizenship"[40]—complete compensation is not required because all property owners bear the risk of having these costs imposed on them.[41]

In sum, the public use limitation does not significantly restrict the purposes for which government may take private property, and the compensation requirement is satisfied even if some residual costs are borne by the property owner. These constitutional requirements, however, are a floor, not a ceiling; states may further restrict the purposes for which property may be taken and/or require greater compensation for takings.[42]

II
EMINENT DOMAIN FOR DEVELOPMENT AND THE PROBLEM OF LAND ASSEMBLY

States have broad latitude within the constitutional requirements discussed above to fashion rules on eminent domain for development.[43] The main ways that a state could restrict the use of eminent domain for development are to narrow the definition of public use,

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[40] Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

[41] *See id.* (residual costs imposed by incomplete compensation are acceptable "[i]n view . . . of the liability of all property to condemnation for the common good"). Some commentators have also suggested that incomplete compensation is itself desirable for various reasons. *See, e.g.*, Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 32–33 (2003) (discussing how incomplete compensation mitigates moral hazard problem—i.e., full compensation creates socially undesirable incentives for owners to overinvest in developing their property); Merrill, *supra* note 39, at 131–33 (describing private incentive problems created by full compensation for regulatory takings); *infra* note 69 and accompanying text (discussing reasons why incomplete compensation could be desirable).

[42] Kelo v. City of New London, 545 U.S. 469, 489 (2005).

[43] The constitutional requirements discussed in Part I, *supra*, apply to all takings. The development projects at issue in this Note are just one of many types of projects for which governments may choose to exercise their eminent domain power. As already discussed, governments may condemn property so long as it is intended for "public use." *See supra* Part I.A. This includes property that will literally be used and owned by the public—for example, condemnations to accommodate expansions to a publicly-owned commuter rail system. There are also many other instances in which governments will condemn land on behalf of private parties, claiming that the project furthers a public purpose. For example, governments can condemn land on behalf of a private telecommunications company so that it may install a receiver and transmitter station. Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684, 687 (Utah 1979) (finding that services provided by privately-owned receiver and transmitter station constitute "public use" and allowing exercise of eminent domain to facilitate station's construction).

While the arguments for and against the use of eminent domain may vary depending on the type of project, there is often a great deal of overlap. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (suggesting theory of eminent domain in which merits of takings are judged not by type of project involved but, instead, by evaluating whether eminent domain is most efficient means for furthering project). This Note focuses only on arguments relevant to the use of eminent domain for development projects.

increase the measure of compensation, or provide more extensive procedures.[44] Deciding whether these restrictions on eminent domain are desirable, however, is a complicated question. There are good reasons for states to restrict their eminent domain power, as many of them are now doing. There are also good reasons to use eminent domain for development projects.

At bottom, deciding when to allow governments to exercise the power of eminent domain for development, and how much to compensate when they do, involves balancing the interests of the community against the interests of the individual. Development projects may offer a number of important benefits to the community.[45] If the use of eminent domain makes these projects more feasible,[46] then it is in the interests of the community to allow its use for development.

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[44] Restricting the definition of "public use" so that development projects are not included clearly disallows the use of eminent domain for such purposes. By requiring the government to pay more for the property it takes, increasing compensation directly raises the (financial) cost of eminent domain and may therefore limit its use. Enhancing procedural requirements may also increase the cost of eminent domain by requiring additional investment of time and administrative resources. These and other restrictions on the use of eminent domain for development are discussed in greater detail in Part II.B, *infra*.

[45] Benefits of development projects include job creation and economic growth—reasons offered by supporters of the development project at issue in *Kelo*. 545 U.S. at 472–74. For a city with high unemployment and a dwindling population, the prospect of new jobs and economic growth may be quite compelling. *See id.* ("[New London'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 economic benefits can cause the land abutting the assembly project to appreciate in value. *See* Michael A. Heller & Roderick M. Hills, Jr., LADs and the Art of Land Assembly 11 (Oct. 2005) (unpublished manuscript, on file with New York University Law Review) (describing apparent injustice when owners of land abutting project see their land values increase, while condemnees do not share in such gains). In addition to economic growth, development projects may benefit the community by making the city more attractive and by creating recreation and leisure opportunities. *Kelo*, 545 U.S. at 474–75.

Finally, promoting these development projects in already-populated urban areas, rather than distant undeveloped suburbs, may benefit the community by preventing many of the problems associated with suburban sprawl. These problems include increased traffic and decreased availability in agricultural land, ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 28–29 (1999); increases in the per-capita cost of roads, public facilities, and services, *id.* at 24–27; and other environmental harms such as the destruction of wildlife habitat, wetlands, and other environmentally sensitive areas, *id.* at 28–29. For a further discussion of these and other problems with sprawl, see generally FREILICH, *supra*, at 21–29, and Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies are Losing*, 34 CONN. L. REV. 539, 563–75 (2002). For a discussion of the tools used to control sprawl and their economic and legal implications, see generally Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

[46] Eminent domain may make development projects more feasible because it allows the government to bypass the bargaining problems that may arise in attempts to assemble land for development projects. This problem of "holdouts" is discussed in notes 49–58, *infra*, and accompanying text.

On the other hand, prohibiting the use of eminent domain for development may be in the best interests of the individual property owner whose land is taken. If use of eminent domain is allowed, she is harmed because she is forced to sell her property at a lower price than she would choose: If the owner had been willing to sell her property for the amount of compensation that she would receive through a condemnation proceeding, then presumably the government would have been able to acquire her property through the private market.[47] Additionally, the owner may be harmed because she loses some of her individual autonomy, as she must relinquish her control over whether her property is sold and how it is used.[48]

What is the appropriate balance between the interests of the community in seeing that beneficial projects are realized and the interests of individual landowners in controlling whether and at what price to sell their property? As certain assumptions (for example, that individuals are not behaving strategically, or that the government behaves like a rational economic actor) are relaxed, this balancing becomes very complicated.

In the following two sections, this Note first discusses the reasons why it may or may not be desirable to give governments broad latitude to exercise eminent domain for development projects, then addresses some of the possible reforms to eminent domain law that are shaped by these and other concerns.

A. Holdouts and Holdins

Eminent domain facilitates development projects by overcoming the bargaining problems that may arise in attempts to assemble land.[49] As a result, it is often employed to acquire multiple, contiguous, privately-owned parcels of land.[50] One reason that eminent domain is so frequently used for these assembly projects—including urban

[47] This assumes that the individual property owner is not acting strategically and demanding a higher price for her property because she knows that her particular parcel is needed to assemble a tract of land. *See infra* notes 49–58 and accompanying text.

[48] *See infra* note 62 and accompanying text (discussing how property takings affect individual autonomy).

[49] *See* POSNER, *supra* note 37, at 55 (discussing holdout problem).

[50] According to two studies, in the last half century over sixty percent of eminent domain cases contested in state or federal appellate courts involved the use of eminent domain to assemble large tracts of land from a number of individual landowners. *See* Merrill, *supra* note 43, at 98 (surveying cases from 1954 through 1985); Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 REAL PROP. PROB. & TR. J. 251, 262 (2004) (surveying cases from 1986 through 2003). These studies used a definition of "assembly" that includes urban renewal projects as well as other assembly projects such as public highways or dams. Merrill, *supra* note 43, at 98; Wilk, *supra*, at 262. Thus, the results of these studies cannot be used to accurately deter-

renewal and development projects—is to avoid the possibility of "holdouts," or strategic behavior on the part of the individual landowner.[51] If a landowner realizes that a buyer must acquire her particular parcel of land to assemble a contiguous tract for a development project, she might strategically refuse to sell in an attempt to extract a higher price from the buyer—in other words, she might hold out. Without the power of eminent domain, the buyer must either accept the landowner's demands for a higher price or choose not to acquire the property.[52] If the buyer may exercise the power of eminent domain, however, then she may force the transfer of the property at market price.[53] Eminent domain thus allows the government to bypass the holdout problems that may thwart private attempts to assemble land.

The holdout problem is not insurmountable without the use of eminent domain—assembling land on the private market is certainly possible.[54] While assembling land on the private market is possible, however, it can often be very expensive: For example, in one project from the 1970s, assembling one block in Manhattan cost forty million dollars, which, at the time, was the most ever paid for one block in the city.[55] While assembly costs are not invariably astronomical, they may be high enough to prevent some beneficial projects from going forward.[56] If assembling land in already-developed areas is too costly,

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mine what portion of assembly takings are for development projects such as those at issue in *Berman* and *Kelo*.

[51] *See* POSNER, *supra* note 37, at 55, 61 (explaining how high transactions costs and bilateral monopolies can cripple negotiations with holdouts); Merrill, *supra* note 43, at 75–76 (same).

[52] Holding out is possible only when the seller is protected by what Guido Calabresi and A. Douglas Melamed define as a "property rule," where the seller has the right to refuse to sell, because the buyer must have the consent of the seller to acquire the property. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

[53] In these cases, the seller is only protected by what Calabresi and Melamed define as a "liability rule," where the seller can be forced to transfer the property in exchange for a sum arrived at based on objective criteria. *Id.*; *see also supra* notes 38–41 and accompanying text (noting that measure of compensation for property taken by eminent domain is fair market value).

[54] At least one commentator has argued that there is no evidence to support the contention that employing eminent domain is more efficient than assembling land on the private market. Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 475 (1976).

[55] Peter Hellman, *How They Assembled the Most Expensive Block in New York's History*, NEW YORK, Feb. 25, 1974, at 30, 37, *reprinted in* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 846, 853 (3d ed. 2005).

[56] Assuming that governments are rational economic actors, then as the price of a beneficial project increases, it may no longer be worth the cost and will not be undertaken. *See* Michelman, *supra* note 14, at 1218 (arguing that government will not proceed with

developers may choose to build further outward in the suburbs, contributing to urban sprawl.[57] If these development projects benefit the community[58] and if the use of eminent domain overcomes individual strategic behavior that threatens to thwart them, then the argument for allowing the use of eminent domain for development projects is relatively strong and straightforward.

There are, however, also good reasons to restrict the government's exercise of eminent domain for development. First, a reluctant seller may not be a holdout but rather a "holdin."[59] That is, she may refuse to sell not because she is behaving strategically, but because she subjectively values her property at a higher price than the market value. This gap between the owner's subjective value and the market value may cause a reluctant seller to refuse to sell because the price is too low. If a reluctant seller is a holdin rather than a holdout, then eminent domain may harm her by not compensating her for the full value she places on her property;[60] it may also distort the perceived efficiency of a project because the cost of acquiring a holdin's property through eminent domain reflects only part of the value that the property owner loses when her property is taken.[61]

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projects where costs outweigh benefits). *But see infra* notes 68–70 and accompanying text (arguing that governments do not behave like rational economic actors).

57 *See* Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (noting that eminent domain may be "a critical weapon in fighting sprawl"). For a discussion of problems caused by urban sprawl, see *supra* note 45.

58 *See supra* note 45 (describing benefits of development projects).

59 *See* Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 83, 128–29 (2004) (distinguishing "holdins" from "holdouts"). The subjective value an owner derives from her property may be highly idiosyncratic, or it may be of a type that governments want to encourage—for example, the subjective value a property owner derives from being part of a community. *See id.* at 142 (differentiating idiosyncratic valuation from value of community and suggesting that government compensate for loss of community in takings cases).

60 As discussed in notes 38–41, *supra*, and the accompanying text, courts have generally found that the Takings Clause only requires compensation equal to the fair market value of property. In addition to the subjective value that the owner may lose if compensation is limited to market value, she also loses the opportunity to bargain for some of the surplus created by the assembly project—an opportunity she would have on the private market. Heller & Hills, *supra* note 45, at 10–11.

61 *See* Parchomovsky & Siegelman, *supra* note 59, at 84, 136–37 (noting that government's failure to compensate for subjective value of community may lead to approval of inefficient projects). Requiring the government to compensate for subjective value would solve this problem; however, distinguishing holdouts from holdins is difficult because if the owners will be compensated for their subjective value then they have an incentive to inflate their claimed subjective value. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1030 (1995) (describing how bargainers have incentive to overstate their private valuations). It may be possible to create incentives for owners to reveal their "true" subjective valuations, for example by requiring that owners self-value their property for purposes of compensation *and* for purposes of property tax. *See infra* note 75 and accompanying text. However,

A second cost of eminent domain is the loss of autonomy individuals may feel due to their lack of control over their property.[62] Normative beliefs may play a role here: Individuals and/or a community may simply feel that the government should not be able to take their property for certain reasons (such as economic development), regardless of whether subjective value is compensated.[63]

In sum, allowing government to exercise its power of eminent domain for development may be desirable for projects that actually benefit the community; without eminent domain, bargaining problems caused by strategic holdouts may prevent the projects from going forward, leaving the community worse off than it would have been had the project been realized. Restricting the government's use of eminent domain, however, may protect both individuals who value their property highly and community values of autonomy and dignity in property ownership. Deciding how much weight to give each of these competing considerations in determining when eminent domain should be used is no easy task, as evidenced by the multitude of solutions proposed by commentators.[64]

B. Restricting the Use of Eminent Domain for Development

As discussed above, there are reasons to give government broad latitude to exercise its eminent domain power for development and reasons to restrict it. If a state decides that some restrictions on the use of eminent domain are desirable, then there are many types of restrictions from which to choose. Some restrictions would limit when or what types of property the government should be allowed to take; others focus on structuring compensation so that the government will take at an efficient level. Each of these proposed restrictions is animated by a different set of concerns, and each strikes a different balance between allowing the use of eminent domain for projects that

governments and/or communities may not have an equal interest in compensating for all types of subjective value. Perhaps taxpayers should not have to compensate an owner for the large subjective value she places on an old building that has been in the family for years—one that she no longer occupies and is now run down and below code. Simply requiring the government to compensate property owners for the "full" value of their property, then, may not be the best solution.

[62] *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 966–67 ("[T]here is arguably a deeper value associated with autonomy that is different in kind [from other uncompensated losses] . . . .").

[63] *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006) (arguing that increased compensation may not make up for "dignitary harms" caused by takings).

[64] *See infra* Part II.B.

benefit the community and restricting it in order to protect individuals.

One way to curtail the government's use of eminent domain is to require increased compensation for takings, on the theory that increasing the price government must pay for land will cause the government to take land less frequently.[65] In particular, states could require increased compensation for particular types of takings that they find objectionable, so as to discourage (without flatly prohibiting) these types of takings. For example, states could require increased compensation for takings related to development projects or for other exercises of eminent domain where the "public purpose" of the taking is deemed to be less worthwhile. This might deter those projects thought to have less beneficial effects.[66] Alternatively, as an attempt to distribute the burden imposed by eminent domain more fairly across neighborhoods, states concerned with distributive justice could require increased compensation for the exercise of eminent domain in low-income areas.[67]

Increased compensation, however, may not serve as a check on eminent domain because governments do not necessarily behave like rational economic actors: While rational economic actors respond to financial incentives, government actors respond primarily to political incentives.[68] Forcing the government to provide compensation for the property it takes, then, does not necessarily force the government to internalize the costs of the project.[69] If governments respond primarily to political incentives rather than financial incentives, then

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[65] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 605 n.386 (2005) (illustrating this point by highlighting that South Carolina government was initially willing to force individual property owner to preserve beachfront property, but was unwilling to preserve property when forced to bear cost itself).

[66] *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866–68 (suggesting that compensation be varied depending on extent of public benefit).

[67] For an exchange on the topic of progressive compensation, see Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999), proposing a progressive compensation rule; Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157 (2000), responding to Dagan and rejecting Dagan's progressive compensation rule; and Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000), defending his progressive compensation proposal against Lunney's criticisms.

[68] Levinson, *supra* note 37, at 354–57.

[69] One consequence of this disconnect between financial and political costs is that political costs may be minimized by compensating property owners (at the expense of disorganized, diffuse taxpayers) to mitigate the political costs of those development projects that primarily benefit an organized interest group. Therefore, requiring governments to compensate for takings may not create incentives for governments to take only for efficient or beneficial projects; instead, projects that do not actually benefit the community may be implemented at the community's expense. *See id.* at 375–77 (explaining, using interest

increased compensation may not actually curtail the use of eminent domain. Increased compensation may also create undesirable incentives for landowners by encouraging them to overinvest in developing their property.[70]

In response to these and other concerns, it has been argued that legislative restrictions should be imposed on the definition of "public use," limiting the government's power of eminent domain to certain types of projects.[71] While increasing the amount of compensation arguably deters, but does not prohibit, certain types of takings, a legislative determination that a certain type of project does not serve a public use completely forecloses the use of eminent domain.

Adjusting levels of compensation or restricting what types of projects constitute a public use are not the only tools available to states establishing eminent domain rules: They could develop creative mechanisms for the use of eminent domain generally, or specifically for development projects. For example, instead of restricting the types of *projects* for which eminent domain is available, states could disallow the taking of certain types of *property*—such as property that is particularly important to an individual's sense of personhood.[72] Or, in situations that pose environmental justice[73] concerns, communities could be given veto power over proposed exercises of eminent domain

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group analysis, why it may be in governments' political interests to engage in economically inefficient takings even if compensation is paid).

This implies that it may actually be desirable to undercompensate property owners. The property owners whose land will be taken may be the only concentrated group that will have a strong incentive to oppose the project. If the property owners do not wish to sell, they may provide political pressure against the project, pressure that the diffuse and unorganized taxpayers will not. Undercompensating property owners, then, may be an essential part of the political equation: If holdins are fully compensated, they may no longer have as strong an incentive to oppose the project (though they might still object on autonomy grounds), in which case there will be no organized, interested group to balance out the political pressure for the project from the project's beneficiaries. Opposition from property owners balances the political equation, making it more likely that only projects that actually do benefit a larger portion of the community will go forward. *See id.* (suggesting that undercompensation may deter inefficient taking).

[70] Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 528–31 (1986).

[71] *E.g.*, Garnett, *supra* note 63, at 137, 149 (advocating "substantive restrictions on eminent domain").

[72] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1005 (1982).

[73] The environmental justice movement is concerned with the disproportionate environmental burden borne by minority and low-income areas—for example, the disproportionate siting of hazardous waste disposal sites that may cause cancer and other adverse health effects in minority and low-income neighborhoods poses environmental justice concerns. *See generally* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998); Vicki Been, *What's Fairness Got To*

for development.[74] If states want to compensate for subjective value without giving owners incentives to inflate their valuations, states could let owners self-determine the value of their property for the purposes of compensation in the event of a taking *and* for the purposes of property tax, or could require that the owner be willing to sell to any willing buyer at the price that the owner self-determines.[75] If states want to allow landowners to bargain for some of the increase in property values generated by the assembly project, then states could require that developers bargain with the group of landowners whose property they hope to purchase. This allows various groups of landowners to negotiate with developers for the best possible price for their assembled land and gives a majority of the community the power to sell their assembled land to the developers—exercising the power of eminent domain over reluctant members if necessary.[76]

The above proposals do not exhaust the ways in which states could choose to reform their eminent domain laws. Concluding which restrictions, compensation requirements, or other rules on the use of eminent domain produce the fairest overall scheme or best incentives is well beyond the scope of this Note. It seems clear, however, that there is no single right answer to the question of which rules regarding the use of eminent domain are best. This being the case, it seems particularly appropriate to allow local governments to develop individualized rules concerning the use of eminent domain, reflecting each state's preferences regarding these competing considerations. If particular rules turn out to have unintended consequences, or if public opinion shifts from supporting greater protection for property owners to greater support for development projects, these rules can be changed through state political processes.

III
PROBLEMS WITH A BLIGHT RESTRICTION

The first two Parts of this Note have discussed the constitutional requirements imposed by the Takings Clause[77] and the use of eminent

Do With It? Environmental Justice and the Siting Of Locally Undesirable Land Uses, 78 CORNELL L. REV. 1001 (1993).

[74] *See* Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1875–78 (2004) (proposing "Residents' Choice Rule" to give disadvantaged communities greater control over local land use).

[75] *See* Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401 (2005) (proposing self-assessed valuation mechanism for regulatory takings).

[76] Heller & Hills, *supra* note 45 (proposing such bargaining system to replace traditional eminent domain where assembly of fragmented land is at issue).

[77] *See supra* Part I.

domain for development.[78] This Part criticizes one particular type of state reform to eminent domain law: state laws that restrict the use of eminent domain for development to blighted areas.[79] The first section of this Part discusses the state legislative responses to *Kelo* and categorizes the blight restrictions that states are considering or have passed. The second section argues that these restrictions disadvantage low-income and minority communities by distorting the political process by which rules on eminent domain for development are established.

A. State Legislative Responses to Kelo

Doctrinally, the Court's decision in *Kelo* was unsurprising;[80] nonetheless, the decision provoked fierce public opposition.[81] It is hard to say exactly why *Kelo* provoked such a strong public reaction where previous takings cases did not;[82] whatever the reasons behind the strong public opposition to *Kelo*, it has served as a catalyst for eminent domain reform at the state level.

After the Supreme Court announced its opinion in *Kelo*, many states raced to reform their eminent domain laws. Texas, Delaware, and Alabama passed reforms within weeks of the *Kelo* opinion, and Ohio immediately declared a moratorium on the use of eminent domain for development until the end of 2006.[83] At one point there were no less than six proposed laws, five constitutional amendments, and several citizen initiatives on eminent domain reform before the California legislature.[84] A year later, the momentum to reform eminent domain continued: Dozens of states have passed reforms to their

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[78] *See supra* Part II.

[79] *See, e.g.*, *infra* note 87; *see also* Bd. of County Comm'rs v. Lowery, 136 P.3d 639, 646–47 nn.11 & 13 (Okla. 2006) (interpreting Public Use Clause narrowly to prohibit use of eminent domain for economic development except for blighted areas).

[80] *See supra* Part I.A (discussing *Kelo v. City of New London*, 545 U.S. 469 (2005), and precedent).

[81] *See, e.g.*, Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (reporting that *Kelo* provoked "firestorm of public resentment"); *United States: Hands Off Our Homes; Property Rights and Eminent Domain*, THE ECONOMIST, Aug. 20, 2005, at 34 (discussing "fierce backlash" to *Kelo*). While many of the reactions to *Kelo* have been negative, there has been some support for the decision as well. *See* Diane Cardwell, *Bloomberg Says Power to Seize Private Land is Vital to Cities*, N.Y. TIMES, May 3, 2006, at B1 (describing New York City Mayor Bloomberg's support for eminent domain use for development).

[82] *See* Heller & Hills, *supra* note 45, at 1 ("Rarely do people express outrage when a court says: we respect you and you may as you see fit. Yet this is precisely the political and editorial reaction to [*Kelo*].").

[83] John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

[84] *Id.*

eminent domain laws, and others are close, with bills awaiting final legislative or gubernatorial approval.[85]

Most states that have proposed or passed legislative reforms have focused primarily on tightening their definition of "public use" to exclude development projects or projects aimed at increasing tax revenue.[86] Much of this legislation, however, explicitly does not apply to

[85] *See* Castle Coalition, Legislative Action Since *Kelo*, http://www.castlecoalition.org/pdf/publications/state-summary-publication.pdf (last visited Nov. 16, 2006) (summarizing passed and pending state eminent domain legislation); Castle Coalition, State Legislative Actions, http://www.castlecoalition.org/legislation/index.html (follow "On Printable List" hyperlink under "Passed Legislation") (last visited Nov. 16, 2006) (same).

Some of these state reforms seem to be knee-jerk reactions to *Kelo* rather than carefully reasoned decisions about the use of eminent domain. The Rhode Island House and Senate, for example, have both adopted bills urging the United States Congress to amend the U.S. Constitution to prevent *Kelo*-like takings. H. Res. 6636, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); S. Res. 1237, 2005 Gen. Assem., Jan. Sess. (R.I. 2005). While these bills effectively express the Rhode Island legislators' disapproval of *Kelo*, proposing an amendment to the U.S. Constitution is probably the least feasible path Rhode Island could choose to restrict the use of eminent domain for economic development.

On the other end of the spectrum, Kentucky's legislation prevents the use of eminent domain for anything except actual, physical use and ownership by the public. Act of Mar. 28, 2006, ch. 73, 2006 Ky. Acts 162, 162 (codified at KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2006)). Kentucky's law rejects the "public purpose" reading of the Public Use Clause that has been established in Supreme Court jurisprudence for over a century; *see* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896) (holding that public use requirement is satisfied if taking serves a public purpose), and radically curtails the state's power of eminent domain.

A few of the strictest state restrictions on eminent domain already have exceptions carved out of them for specific projects. Texas, for example, has prohibited the use of eminent domain for development projects, except for condemnations needed to build a new stadium for the Dallas Cowboys. *See* TEX. GOV'T CODE ANN. § 2206.001 (Vernon Supp. 2006) (prohibiting use of eminent domain for economic development but listing exceptions including "a sports and community venue project approved by voters at an election held on or before December 1, 2005"); *Texas Voters Approve Stadium Referendum*, USA TODAY, Nov. 3, 2004, at C1 (noting voter approval of construction of new stadium for Dallas Cowboys). Fully prohibiting the use of eminent domain for redevelopment but carving out one or two specific exceptions is, at best, a short-term solution. If there are currently projects that states feel require the use of eminent domain (even in the face of the intense post-*Kelo* public opposition to its use), there probably will be more in the future; better to sort out now, in general terms, when and how eminent domain may be used, than to only make allowances for projects on the immediate horizon.

[86] *See, e.g.*, Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) (disallowing condemnation for development, except for blighted areas); Act of June 6, 2006, ch. 349, 2006 Colo. Sess. Laws 1749, 1749 (codified as amended at COLO. REV. STAT. § 38-1-101 (2006)) (disallowing condemnation for economic enhancement or increasing tax revenue); Landowner's Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (disallowing condemnation by transfer to private entity for economic development); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (Supp. 2006)) (disallowing condemnation for economic enhancement or primarily for increasing tax revenue); Act of

blighted areas[87]—in other words, eminent domain is only allowed for development in blighted areas.

The state legislation that limits the use of eminent domain for development can be grouped into three categories: (1) legislation that essentially prohibits the use of eminent domain for development; (2) legislation that does not meaningfully limit the use of eminent domain for development; and (3) legislation that effectively limits the use of eminent domain for development to specific areas.

1. *Legislation that Prohibits the Use of Eminent Domain for Development*

Some of the state legislation proposed or passed in the wake of *Kelo* flatly prohibits the use of eminent domain for development, regardless of whether the property is blighted or not. For example, a recent Florida statute enumerates the purposes for which private property may be taken; development is not among them. For good measure, the statute then provides that "taking private property for the purpose of eliminating slum or blight conditions is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public-purpose requirement of [the Florida Constitution]."[88]

Some of the legislation that ostensibly allows the use of eminent domain for the development of blighted areas, however, is so restrictive that it essentially prohibits the use of eminent domain for development in these areas as well. For example, a recent Georgia act defines blight narrowly as property that meets at least two conditions from a list of possibilities and contributes to health or safety problems.[89] The same act also enumerates what uses count as a public

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Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same).

[87] *See, e.g.*, Act effective Aug. 3, 2005, No. 313, 2005 Ala. Laws 643, 645–46 (codified as amended at ALA. CODE § 18-1B-2 (LexisNexis Supp. 2006)) ("[T]he . . . provisions of this subsection [restricting takings] shall not apply to the exercise of the powers of eminent domain . . . based upon a finding of blight in an area . . . ."); Landowner's Bill of Rights and Private Property Protection Act, No. 444, 2006 Ga. Laws 39, 41 (codified as amended at GA. CODE ANN. § 22-1-1 (Supp. 2006)) (prohibiting condemnation for economic development but allowing use of eminent domain in blighted areas); Act effective Aug. 23, 2006, ch. 579, 2005 Me. Laws 1561, 1561 (codified at ME. REV. STAT. ANN. tit. 1, § 816 (West Supp. 2006)) (excepting blighted areas from eminent domain reforms); Act of Apr. 13, 2006, LB 924, sec. 2, 2006 Neb. Laws 341, 341 (codified as amended at NEB. REV. STAT. § 76-710.04 (Supp. 2006)) (same). *But see* Act of May 11, 2006, ch. 2006-11, sec. 2, § 73.014, 2006 Fla. Laws 1, 4 (prohibiting use of eminent domain to remedy blight) (codified as amended FLA. STAT. § 73.014 (2006)).

[88] FLA. STAT. § 73.014 (2006).

[89] Landowner's Bill of Rights and Private Property Protection Act, GA. CODE ANN. § 22-1-1 (Supp. 2006) (including following in list of conditions: uninhabitability, inade-

use for which the power of eminent domain may be exercised and disallows the use of eminent domain for any other purpose.[90] Indiana's statute is even more restrictive: A parcel must meet *all* of a long list of blighting factors to be taken for development.[91]

Under these statutes, each parcel must fall within the definition of blight and be individually condemned. Because only distinct, extremely neglected parcels of land may be designated as blighted, such statutes effectively disallow the use of eminent domain to assemble land for development. It seems improbable that a completely uninterrupted stretch of such parcels would exist. Moreover, it is relatively unlikely that eminent domain will be the preferred tool for dealing with individual properties that cause significant negative externalities, since the condemnation process is lengthier and more costly than other ways of dealing with the problem.[92]

2. *Legislation that Does Not Meaningfully Limit the Use of Eminent Domain for Development—Broad Definitions of Blight*

In contrast, some of the recently enacted state legislation that ostensibly limits the use of eminent domain for development to blighted areas contains definitions of blight that are broad enough to reach virtually any parcel of property. Under West Virginia's statute, for example, an *area* may be considered blighted if it meets any one of a number of conditions including "improper subdivision or obsolete platting," "faulty lot layout in relation to size, adequacy, accessibility or usefulness," or "deterioration of site improvement" that "substantially impairs or arrests the sound growth of the community." An individual *parcel* may be declared blighted if one of a list of factors is present, including "obsolescence, inadequate provisions for ventilation, light, air or sanitation, high density of population and overcrowding, [or] deterioration of site or other improvements."[93] South Carolina's legislature passed a joint resolution proposing an amendment to the state constitution that defined blight as "lack of ventilation, light, and sanitary facilities, dilapidation, [or] deleterious land use," and explicitly provided that blighted property may be con-

quate ventilation, imminent harm to life or other property caused by natural disasters, Superfund identification, or sub-code status).

[90] *Id.*

[91] IND. CODE § 32-24-4.5-7 (Supp. 2006).

[92] David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 8–9 (Nw. Law & Econ., Research Paper No. 917891, 2006), *available at* http://ssrn.com/abstract=917891.

[93] W. VA. CODE ANN. § 16-8-3 (LexisNexis 2006).

demned and put to "private use."[94] Under such an amendment, if a developer is able to negotiate with a number of land owners to purchase their property through the private market, it seems likely that the developer would be able to acquire the parcels of any remaining holdouts under these broad definitions of blight.

State definitions of blight that predate *Kelo* are particularly likely to be so broad as to be essentially meaningless. Every state defines "blight" by statute, requiring a finding of at least one among a list of factors that constitute blight.[95] These older definitions are often veritable laundry lists of factors that collect concepts from different ideas and uses of blight over the course of its early development,[96] the mid-century urban renewal movement,[97] and modern incarnations.[98] Blighting factors include everything from structural deterioration[99] to overcrowding;[100] from inadequate parking[101] to high crime rates;[102] from property tax delinquency[103] to uneconomic use of land.[104] In many states, the presence of a single blighting factor is legally suffi-

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94 J. Res. 1031, Gen. Assem., 116th Sess. (S.C. 2005).

95 Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394 (2000).

96 The concept of "blight" as an urban disease grew out of the early urban planning movement. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 7 (2003) (describing fears of slum "contagion"). As the field of urban planning developed and grew, the profession developed a new discourse to describe the inner city conditions they hoped to plan out of existence. "Blight" was a term first used by the Chicago School of Sociology to describe areas that were not yet slums but were destined to decline. *See id.* at 16–17 (discussing origins of "blight" in urban development context). While planners were increasingly successful in developing the concept of blight as a serious urban problem, exactly what conditions constituted blight were never clearly defined. Some early definitions of blight were almost comical in their ambiguity. One Philadelphia planner, for example, helpfully explained that a blighted area "is a district which is not what it should be." Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 306 (2004).

97 *See infra* notes 119–23 and accompanying text (discussing urban renewal movement's concept of blight).

98 As the urban renewal movement came down from its peak, development projects changed but did not disappear; the focus shifted to more isolated projects with specific goals, including economic growth and job creation. Pritchett, *supra* note 96, at 48–49. This, too, was often justified under the rhetoric of blight, and new economic factors such as inefficient use of land and insufficient tax revenues were suddenly also decried as signs of blight. Gordon, *supra* note 96, at 314.

99 N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 2006).

100 CAL. HEALTH & SAFETY CODE § 33031(b)(5) (West 2006).

101 § 33030(c).

102 § 33031(b)(7).

103 MD. CODE ANN., art. 41, § 14-805(a)(1)(iv) (LexisNexis 2003).

104 N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 2006).

cient to support a finding of blight.[105] The determination that land is blighted is generally made by redevelopment agencies,[106] and this determination is given substantial deference by the courts.[107] These definitions are so broad that most if not all of the economic development projects allowed by *Kelo* would already have been permissible based on a finding of blight.

3. *Legislation that Effectively Restricts the Use of Eminent Domain for Development—Narrow Definitions of Blight*

Blight has always been, and often still is, a loosely defined concept that is ill-suited to serve as a meaningful check on the government's power of eminent domain. However, this objection is certainly surmountable: States may choose to define blight more precisely by statute, thereby imposing more substantial limits on the government's power of eminent domain. Indeed, some states are doing just that, passing legislation in the wake of *Kelo* that both restricts the use of eminent domain for development to blighted areas and significantly revises their definitions of blight.[108] Unlike some of the broad definitions of blight discussed above, these definitions of blight are narrow enough that only some individual parcels could reasonably be described as blighted. If definitions of blight are narrow enough to reach only some parcels, then it seems relatively unlikely that enough qualifying parcels will exist contiguously for land to be assembled for development.

Some of this legislation, however, specifically allows the taking of unblighted parcels in an area where some portion of the parcels are blighted, which makes land assembly possible. Pennsylvania's recent statute, for example, requires a single parcel to meet at least one of a number of conditions (e.g., a public nuisance, a fire hazard, neglect and unimprovment) to be declared blighted.[109] However, if a majority of parcels in a given area are blighted under the statute, then the entire area may be declared blighted and taken.[110] Iowa requires that

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105 Luce, *supra* note 95, at 403–04. Courts and agencies, however, will usually list as many blighting factors as are applicable, even though only one would be sufficient. *Id.*

106 Luce, *supra* note 95, at 407.

107 *See* Luce, *supra* note 95, at 409 (stating that most common standards of review for finding of blight are "arbitrary and capricious" and "bad faith").

108 *E.g.*, Act of July 14, 2006, H.F. 2351, sec. 2, § 6A.21–.22, 2006 Iowa Acts 1031, 1031–32 (codified at IOWA CODE § 6A.21–.22 (2007)); Act of May 19, 2006, ch. 214, sec. 2, § 117.025, 2006 Minn. Laws 195, 195–96 (codified at Minn. Stat. § 117.025 (2006)); Property Rights Protection Act, No. 2006-35, sec. 1, § 205, 2006 Pa. Laws 148, 151–53 (to be codified at 26 PA. CONS. STAT. § 205).

109 § 205(b), 2006 Pa. Laws at 151–53.

110 § 205(c), 2006 Pa. Laws at 153.

seventy-five percent of the parcels in an area be blighted to take the entire area,[111] and Minnesota requires that at least fifty percent of the buildings in the area be "structurally substandard" to declare the area blighted.[112] Unlike the statutes discussed above that essentially prohibit the use of eminent domain for development,[113] these bills, by permitting an area to be taken if *some*, rather than *all*, of the parcels fall under a narrow definition of blight, allow for the use of eminent domain for land assembly and development.

B. Distorting the Political Process

As discussed above, laws restricting the use of eminent domain to blighted areas fall into three categories: (1) legislation that essentially prohibits the use of eminent domain for development; (2) legislation that does not meaningfully limit the use of eminent domain for development; and (3) legislation that effectively limits the use of eminent domain for development to specific areas.[114]

The first of these categories—laws that effectively prohibit the use of eminent domain for development—does not pose many of the problems that the latter two present. There are good reasons to disallow the use of eminent domain for development, and a state could easily conclude that individual property rights should take priority over the community's interest in development.[115]

The remaining two categories of rules restricting the use of eminent domain for development to blighted areas, however, do raise serious problems because they will disadvantage low-income and minority neighborhoods. Both may result in the disproportionate taking of land from low-income and minority neighborhoods, and may distort the political process by which these eminent domain laws will be changed.

1. Disproportionate Takings

Some commentators have argued that "[j]ustifying eminent domain on a finding of blight invariably targets low-income communi-

111 IOWA CODE § 6A.22 (2007).

112 MINN. STAT. § 117.025 (2006).

113 *See supra* Part III.A.1.

114 *See supra* Part III.A.

115 *See supra* Part II.A (discussing arguments for and against use of eminent domain for development). It arguably might be simpler to explicitly disallow the use of eminent domain for development instead of restricting its use to the point that it is effectively disallowed, but this marginal additional simplicity does not confer substantial benefits.

ties . . . ."[116] This seems to be a particularly accurate prediction regarding restrictive definitions of blight, because the factors that constitute blight are more likely to be found in low-income areas—for example, the less-valuable buildings in low-income neighborhoods are far more likely to be "dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by statute or an applicable municipal code"[117] than buildings in upper- and middle-income neighborhoods.

The history of blight condemnations during the urban renewal movement confirms that the poor will be displaced under a blight rule. Blight developed as a loose concept early in the twentieth century;[118] it became the animating concept behind, and the legal justification for, the nationwide urban renewal movement in the ensuing decades.[119] In the 1950s and 1960s, cities across the country engaged in massive urban renewal projects that relied heavily on the use of eminent domain.[120] Major sections of many cities were demolished and rebuilt.[121] Throughout its course and across the country, the urban renewal movement resulted in the displacement of "177,000 families and another 66,000 single individuals, most of them poor and most of

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116 Pristin, *supra* note 57 (internal quotations omitted) (quoting John D. Echeverria, Executive Dir., Georgetown Envtl. Law and Policy Inst.); *see also* Dana, *supra* note 92, at 9 (making similar argument).

117 Property Rights Protection Act, No. 2006-35, sec. 1, § 205(b)(3), 2006 Pa. Laws 148, 152 (to be codified at 26 PA. CONS. STAT. § 205(b)(3)).

118 *See* Pritchett, *supra* note 96, at 16 n.59 (citing earliest references of use of term "blight").

119 The use of eminent domain for these expansive urban renewal projects was challenged in many state courts as not serving a constitutionally legitimate public purpose, and was almost invariably upheld. *See, e.g.*, State v. Land Clearance for Redev. Auth., 270 S.W.2d 44, 52 (Mo. 1954) (en banc) (holding that redevelopment project constitutes valid public purpose); Kaskel v. Impellitteri, 115 N.E.2d 659, 662 (N.Y. 1953) (upholding condemnation for redevelopment of blighted area); Schenck v. City of Pittsburgh, 70 A.2d 612, 615–16 (Pa. 1950) (upholding condemnation for redevelopment of commercial area to ease traffic congestion and reduce density of buildings). The issue of whether urban renewal projects served a public purpose under the Takings Clause made its way to the Supreme Court in 1954 in *Berman*, by which point the urban renewal movement was in full swing nationwide. The Supreme Court, using the language of blight developed by the urban renewal movement in the preceding decades, declined to use the Public Use Clause to constrain the national movement. Berman v. Parker, 348 U.S. 26, 35–36 (1954).

120 The urban renewal movement began in 1949 with the passage of new federal legislation that made substantial federal funding available for large-scale urban renewal projects, Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1441–60 (2000)), and formally ended in 1974. Gordon, *supra* note 96, at 313. For more on the urban renewal movement, see generally MARTIN ANDERSON, THE FEDERAL BULLDOZER (1967).

121 New York provides one of the most dramatic examples of the reshaping of a city through urban renewal projects: Robert Moses's aggressive development agenda reshaped much of New York City as we know it today, leveling many neighborhoods in the process. *See generally* ROBERT A. CARO, THE POWER BROKER (1975).

them black."[122] Urban renewal projects did not just temporarily displace low-income residents: Some projects had the effect of forcing low-income residents out of the city entirely if substitute low-rent housing could not be found.[123]

Just because blight designations may have discriminated against or disparately impacted low-income and/or minority neighborhoods in the past does not necessarily mean that they will have the same impact under post-*Kelo* legislation. However, the tarnished history of redevelopment to cure blight should give policymakers pause when electing to limit the use of eminent domain for development to blighted areas.

Even under definitions of blight that are so broad that they could be applied to practically any property,[124] there are reasons to believe that property will still be taken disproportionately from low-income communities for development projects. Several incentives are aligned to induce the government to develop in low-income areas. The cost of each location is one factor that would cause a developer to prefer one location over another. Whether "costs" are counted as financial or political (or both), redeveloping low-income areas will be less costly. If governments respond to financial costs in deciding what property to take,[125] then they will likely take from low-income areas because the land is likely to be less expensive. If governments respond to political

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122 BERNARD J. FRIEDEN & MARSHALL KAPLAN, THE POLITICS OF NEGLECT 24 (1975). Only 20,000 new units of low-rent housing were built during this period. *Id.*

123 The blighted area that was condemned and redeveloped in *Berman*, for example, contained only 310 units of housing after redevelopment that were as affordable as the 5900 units that had been condemned. Pritchett, *supra* note 96, at 46–47; *see supra* note 122 and accompanying text (noting that there were only 20,000 new units of low-rent housing for more than 177,000 displaced).

The potential for redevelopment in blighted areas to displace some residents remains: In most states, a redevelopment project that involves the condemnation of blighted land generally does not involve an obligation on the developer's part to redevelop the blighted area for similar uses. So, for example, if low-income housing is condemned, states usually do not require that more low-income housing be built as part of the redevelopment project. *But see* IOWA CODE § 403.22 (2002) (disallowing tax revenue division unless low and moderate income family housing is built in areas designated as "economic development" areas). In the absence of a same-use redevelopment requirement, or, perhaps, an affirmative obligation to provide some amount of low-income housing, a city's expansive use of eminent domain to eradicate blight might function a lot like exclusionary zoning—zoning schemes that price low-income residents out of entire areas by zoning all lots for housing beyond their price range. *See* S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 724 (N.J. 1975) (establishing "fair share" requirement to combat practice of exclusionary zoning in New Jersey); S. Burlington County NAACP v. Twp. of Mt. Laurel, 456 A.2d 390, 460, 464 (N.J. 1983) (affirming "fair share" requirement).

124 *See supra* Part III.A.2 (discussing broad definitions of blight).

125 *See supra* notes 65–67 and accompanying text (noting that under standard economic account of Takings Clause, government responds to financial costs).

costs in deciding what property to take,[126] then they will likely take from low-income areas as well because low-income areas are less likely to be politically powerful.[127]

Although the political and financial incentives that lead to the disproportionate taking of property from low-income and minority neighborhoods will be present even if a state's eminent domain laws do not restrict the use of eminent domain for development in any way, statutorily restricting the use of eminent domain for development to blighted areas, particularly under narrower definitions of blight, may make it even more likely that land will be taken from low-income neighborhoods. To that extent this state legislation is unwise because it exacerbates a preexisting problem.

2. *Political Process Problems*

Restricting the use of eminent domain for development to blighted areas also distorts the political process by which these rules are established. As discussed above, the use of eminent domain for development involves balancing the interests of the community

126 *See supra* notes 68–69 and accompanying text (summarizing argument that governments respond to political costs).

127 Low-income neighborhoods are likely to be less politically powerful because they are significantly less likely to vote. *See* ACORN, DEMOS & PROJECT VOTE, A PROMISE UNFULFILLED 3 (2005) (finding that eighty-five percent of citizens in households with incomes of $75,000 or more are registered to vote, but only fifty-nine percent are registered in households with incomes less than $15,000); MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES, INCOME AND RACIAL DISPARITIES IN THE UNDERCOUNT IN THE 2000 PRESIDENTIAL ELECTION 9 (2001), *available at* http://oversight.house.gov/Documents/20040629065057-51969.pdf (finding that poor and minority voters were more than three times as likely to have their ballots discarded as compared to wealthy voters' ballots). Low-income neighborhoods are also far less likely to make substantial campaign contributions, which may limit their political influence. *See* Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 70–71 (1991) (discussing barriers that poor and minority communities face in mobilizing against local toxic threats); National Voting Rights Institute, About Us: "Wealth Primary," http://www.nvri.org/about/wealth.shtml (last visited Jan. 31, 2007) (noting that less than one percent of population provides over eighty percent of all money in federal elections; eighty-one percent of major congressional campaign contributors have annual incomes of $100,000 or more). *But see* Stephen Ansolabehere et al., *Are Campaign Contributions Investment in the Political Marketplace or Individual Consumption? Or "Why Is There So Little Money in Politics?,"* (MIT Sloan, Working Paper No. 4272-02, 2002), *available at* http://web.mit.edu/jdefig/www/papers/invest_or_consumpt.pdf (arguing that campaign contributions are not "policy-buying," but instead are form of consumption and participation). Some commentators, however, have argued that some communities may actually have a disproportionately large amount of political influence. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723–26 (1985) (arguing that "discreteness and insularity" can increase groups' bargaining power by fomenting group solidarity, providing social sanctions, and lowering organizational costs).

against the interests of the individual.[128] If blight is understood to allow the use of eminent domain only in low-income areas, then only a discrete group of low-income property owners have a personal interest in ensuring that new rules for the use and compensation of eminent domain are more generous to the individual property owner. If, on the other hand, eminent domain rules are understood to allow for development in any area, then all property owners will *believe* that compensation and condemnation procedure rules will affect them too. This creates a much larger constituency with an interest in making those rules generous to the individual, even if in practice most projects will still take land in low-income areas.

The previous section argued that the use of eminent domain for development may result in the disproportionate taking of land from low-income communities. Whether or not this imposes a burden on these communities depends on whether the use of eminent domain disadvantages the individual whose property is taken. It could be that eminent domain actually grants windfalls to property owners because compensation is generous in practice,[129] in which case taking land disproportionately from low-income or minority neighborhoods might be less troubling (at least from an environmental justice perspective).[130] If, however, the use of eminent domain for development results in undercompensation or imposes other disadvantages on the property owner whose land is taken,[131] then we should be concerned with the unfairness of imposing these costs primarily on low-income and minority neighborhoods.

Local governments have a great deal of flexibility to fashion rules regulating their use of eminent domain within the minimum requirements of the Constitution.[132] If these rules primarily affect low-income and minority neighborhoods, then they may be more disadvantageous to the individual whose property is taken than a rule

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[128] *See supra* Part II.

[129] It is not necessarily the case that a property owner whose land is taken through eminent domain is left worse off; there are reports in American history of savvy entrepreneurs who would buy up land knowing that it would be condemned by the government, and would reap a handsome profit from the compensation for the taking. Christopher Serkin, *Big Differences for Small Governments*, 81 N.Y.U. L. REV. 1624, 1640 n.61 (2006); *see* Garnett, *supra* note 63, at 101–05 (arguing that academics overstate undercompensation problem by focusing on constitutional minimums, rather than actual compensation practices).

[130] The environmental justice movement is generally concerned with the disparate burdens that low-income or minority communities bear, not the benefits they receive. *See supra* note 73 (defining environmental justice).

[131] *See supra* notes 59–63 and accompanying text (discussing harms eminent domain may impose on individual property owners).

[132] *See supra* Part I.A.

that affects all property. This is true for several reasons. First, if a given eminent domain rule applies only to a minority of property owners (regardless of whether that minority is low-income residents or some other group), the rule may disadvantage the minority to the benefit of the majority.[133] This may be of particular concern at the local level.[134] If blight rules single out low-income residents, then majoritarian politics might adopt compensation and procedural rules for the use of eminent domain for development that disadvantage the minority of individuals to whom they apply.[135]

Second, this majoritarianism problem may be exacerbated if low-income or minority residents are less able to secure gains through the political process because of bias or discrimination.[136] While it is unlikely that bias and discrimination against low-income or minority neighborhoods will infect every land use rule-making process, commentators have found that biases infect at least some.[137] In addition to problems of bias or discrimination, low-income communities might be unable to protect themselves from unfair eminent domain rules through the political process because they have limited time and

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133 *See* William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1582–83 (1988) (discussing problem of majoritarianism in takings in context of owners of developed and undeveloped land).

134 *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 867 (1995) ("[E]mpirical studies indicate that local government decisionmaking is characterized by majoritarian politics."). *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (attributing local governments' majoritarianism to their responsiveness to homeowners).

135 While public choice scholars might argue that we should expect discrete minorities to be effective at opposing legislation that disadvantages them, there are several reasons why that dynamic does not work here. First, discrete minorities are disproportionately politically powerful only if the majority is relatively disinterested and unorganized. With all of the attention and opposition that *Kelo* has generated, *see supra* notes 81–86 and accompanying text, the majority is anything but disinterested regarding eminent domain reform. Second, the source of a discrete group's power is their superior bargaining position. However, low-income neighborhoods are less likely to be politically powerful and, therefore, would be more likely to have that advantage neutralized, *see supra* note 127.

136 Some commentators have argued that the Takings Clause should protect against just this type of discrimination. *See* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 137 (1992) ("[T]he takings clause can be defended as a barrier against a serious form of discrimination [i.e., lack of compensation] against politically disfavored groups."); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 310–11 (1990) (arguing that takings law does and should protect minorities that are particularly vulnerable in political process).

137 *See* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997) (discussing results of study finding that some locally undesirable land uses were disproportionately sited in Hispanic neighborhoods but were not disproportionately sited in poor or African-American neighborhoods).

money, lack of access to technical expertise,[138] and a relative lack of political influence.[139]

To the extent that the rules surrounding the use of eminent domain are likely to be unfair in the first instance because of these political process problems, these rules are also less likely to be changed through the political process for the same reasons. This sets blight rules apart from other state responses to *Kelo*: Other responses can be changed through the political process should they prove to be inadequate in practice.

These political process problems exist to the extent that state laws that limit the use of eminent domain for development to blighted areas are perceived to apply only to low-income areas. In the case of statutes that define blight narrowly, this perception is likely accurate.[140] In the case of statutes that define blight broadly, this perception is inaccurate; yet, it is still frequently held.[141] If this is the case, then statutes that define blight broadly pose the same political process problems as statutes that define blight narrowly.[142]

A rule of compensation that leaves substantial costs to be borne by the property owner is not necessarily undesirable;[143] it is, however, troubling if such a rule applies only to a discrete group of property

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138 *See* Austin & Schill, *supra* note 127, at 71 (describing these problems as obstacles to mobilization against toxic threats).

139 *See supra* note 127 and accompanying text (discussing reasons why low-income neighborhoods may have less political power).

140 *See supra* Part III.A.3.

141 While *Kelo* barely, if at all, changed the rule on when the exercise of eminent domain is permissible, it nonetheless sparked strong public opposition. The most plausible explanation for this opposition is that statutes that limited the use of eminent domain to blighted areas, broadly defined, were inaccurately perceived as legally limiting the use of eminent domain more than they actually did.

142 Statutes that define blight broadly also offer an additional political process distortion. If the purpose of post-*Kelo* state legislation is the legal restriction of allowable uses of eminent domain, then legislation that limits the use of eminent domain for development to blighted areas fails on its own terms when blight is broadly defined. Such legislation is largely symbolic: It reflects a legislative desire to restrict the use of eminent domain for development, but provides no standards that are restrictive in practice. On its face, however, this legislation is perceived to restrict the use of eminent domain for development, and so this empty legislation may take the heat off of state legislators to enact reforms that are actually meaningful in practice. *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 223 (1990) (discussing problems created by overbroad or meaningless legislation that gives legislators political benefit of having acted while avoiding actual difficult choices).

143 *See supra* note 69 (noting that undercompensation might appropriately generate opposition from property owners against projects in order to counterbalance pressure from interest groups in support of project).

owners.[144] Rules that limit the use of eminent domain for development to blighted areas leave minority groups, and no one else, with a personal interest in ensuring that new rules for the use and compensation of eminent domain are generous to individual property owners.[145] In contrast, rules that apply evenhandedly to all property owners will lead to a more balanced political debate on the competing interests of the community and the individual that are at stake in decisions on the use of eminent domain for development.[146]

IV
REJECTING BLIGHT

What should be done about this state legislation? Legal challenges promise little success. State legislation that allows the use of eminent domain for development only in blighted areas is constitutional.[147] Two commentators have argued that courts should strictly

144 *Cf.* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003) (arguing that antidiscrimination principle is basis for right of just compensation and that Takings Clause is best understood as comparative right).

145 It is not necessarily the case that compensation and procedural rules on the use of eminent domain for development will be developed separately; they may simply be the same as the rules for the use of eminent domain generally. Since the use of eminent domain generally (as opposed to its use specifically for development, which is the topic of this Note) is not restricted to blighted areas, *see* Merrill, *supra* note 43, at 97–101 (surveying eminent domain cases contested in state and federal appellate courts and finding that eminent domain has been employed for multiple purposes), the general applicability of these rules may protect against the problems discussed in this section to some degree.

146 *See supra* Part II (describing competing interests of community and individual in use of eminent domain for development).

147 *See supra* Part I.A. While the concerns with these blight rules map some of the concerns in *Carolene Products* footnote four, United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938), it does not fit into that framework under current case law: The poor are not a protected group, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973), and while race is a suspect classification, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), the fact that a given rule disparately impacts a racial minority does not, alone, pose a constitutional problem, Washington v. Davis, 426 U.S. 229, 242 (1976). Even though these blight rules are constitutional under the Court's current jurisprudence, they should give us pause because they pose familiar and troubling concerns about the limitations of the political process. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (proposing "political process" theory of government action whereby actions by majority against minority should receive careful judicial scrutiny).

review the use of eminent domain in scenarios such as these,[148] but such strict scrutiny is unlikely under current case law.[149]

One possible solution would be for citizen groups to carefully monitor how this state legislation plays out in practice and to draw as much attention as possible to future inequities, should they develop. A well-founded environmental justice claim, announced loudly and often, could generate the political capital necessary to prevent the imposition of disparate burdens on disadvantaged groups.[150] Another possibility is for community activists to work towards a more forward-looking land use planning model of environmental justice, one that works to build strong communities rather than reacting to inequities once they occur.[151] For example, protective zoning laws that prevent the intrusion of incompatible land uses[152] would eliminate one "blighting" factor.[153]

In the end, however, the best solution is for states to avoid using "blight" entirely as they reform their eminent domain laws. Other options abound,[154] and blight poses problems no matter how it is defined.[155] Even if redeveloping blighted areas were an effective way

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148 Ralph Nader and Alan Hirsch argue for strict scrutiny:

> [C]ourts should subject eminent domain takings to strict scrutiny where three conditions are present: 1) the land is transferred to another private party rather than held by the public; 2) the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and 3) the party whose land is taken is relatively powerless politically.

Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 224 (2004).

149 *See supra* Part I.A (describing judicial deference to legislative determinations of public purpose in takings doctrine).

150 This tactic has sometimes been successful in opposing the siting of locally undesirable land uses in poor or minority neighborhoods. For example, strong and well-publicized community opposition to the siting of Shintech's polyvinyl chloride plant in Convent, Louisiana—a town populated by low-income minority residents, in an area already exposed to significant pollutants—was sufficient to force the company to abandon its attempt to locate the plant in Convent. For a good discussion of the Shintech siting story, see Gemma Aymonne Heddle, Sociopolitical Challenges to the Siting of Facilities with Perceived Environmental Risks 28–44 (June 2003) (unpublished M.S. thesis, Massachusetts Institute of Technology), *available at* http://lfee.mit.edu/metadot/index.pl?id=2675&isa=Item&field_name=item_attachment_file&op=download_file.

151 Arnold, *supra* note 73 (arguing that environmental justice advocates should move from reactive strategies to proactive planning and participation).

152 Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993) (arguing for protective zoning rights for low-income and minority neighborhoods).

153 *See* Luce, *supra* note 95, at 435 (noting that incompatible land use (e.g., mixed industrial and residential) is statutory blighting factor in some states).

154 *See supra* Part II.B (describing wide variety of possible modifications to rules on eminent domain for development).

155 *See supra* Part III (discussing problems with blight legislation).

to improve inner-city slum conditions,[156] the chance that these neighborhoods will simply be leveled rather than bettered,[157] combined with the political process shortcomings,[158] leads to the conclusion that, on balance, rules limiting the use of eminent domain for development to blighted areas are best avoided.

CONCLUSION

This Note has argued that state legislation limiting government's eminent domain power for development to blighted areas is troubling for several reasons. First, state laws limiting the use of eminent domain for development to blighted areas may not restrict the government's eminent domain power at all, since many blight definitions are expansive. Limiting the government's eminent domain power is not necessarily desirable, but imposing a limit that in practice is no limit at all is a cumbersome and disingenuous way of giving governments broad authorization to exercise their eminent domain power.

Second, state laws that do meaningfully restrict the government's power of eminent domain for development projects by restricting its use to blighted areas *and* redefining blight to reach fewer properties may be even more troubling. Such rules may restrict the use of eminent domain for development to a discrete and relatively noninfluential group of property owners and result in rules that are less generous to the individual than they would be were they applicable to all property owners. Not only might the rules surrounding the use of eminent domain be less generous when they are first developed, they also may be less likely to be changed through the political process.

Kelo has prompted many states to experiment with their eminent domain laws, and in many ways this experimentation is a good thing. Hopefully, over time, states will arrive at rules that are well-tailored to their local preferences and circumstances. Returning to the stretched and troubled rhetoric of blight, however, is one choice that states should avoid.

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156 The history of the urban renewal movement should indicate that this is a dubious proposition. *See supra* notes 118–23 and accompanying text (discussing history of urban renewal movement).

157 *See supra* notes 122–23 and accompanying text (noting that urban renewal resulted in displacement of many residents without construction of equivalent amounts of low-income housing).

158 *See supra* Part III.B.2 (discussing political process problems with blight rules).

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Condemnation of Low Income Residential Communities Under the Takings Clause

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Many and varied voices today are calling for narrowing the scope of "public use" in the Takings Clause. In doing so, they primarily seek to limit, in varying degrees, the constitutional authority of government to use eminent domain for urban redevelopment. For critics, found both on the right and on the left, easy recourse to condemnation unduly diminishes the regard due private property or permits monied interests to leverage government power for their own ends. The critics have been successful in recent years, as several state courts have narrowed their interpretations of public use in their state constitutions. A striking example is Michigan, where the state supreme court recently overruled unanimously its "notorious" *Poletown* decision and held under the state constitution that a local government could not condemn land in order to turn it over to a private developer, even if the initiative would advance the public interest by creating many jobs and expanding the tax base.[1] Now the U.S. Supreme Court has held that eminent domain may be used for economic redevelopment under the federal Constitution, at least in some circumstances, but popular backlash threatens a crude legislative response.[2]

Although the critics have raised some valid concerns, the limitation of public use advocated and, to some extent, accomplished seems wrong-headed. In this paper, I choose as my focus condemnation for urban redevelopment of residences of low income people, whether modest homeowners or renters. There are several reasons for this choice. Advocates for limiting eminent do-

* Professor Of Law, Georgetown University Law Center. This paper was substantially completed several months before the U.S. Supreme Court's decision in *Kelo v. City of New London.*

1. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).
2. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

main often invoke the harms suffered by low income urban residents when their homes are bulldozed.[3] Poor residents, often ethnic or racial minorities, historically have disproportionately suffered from condemnations and seem vulnerable in the local political process. While I agree that such residents deserve additional legal protection, I think that the critics have grasped the wrong end of the problem in advocating strengthened substantive judicial oversight of the purposes of redevelopment projects. Low income residents would be better protected by improving the procedures required before eminent domain may be used, and by changing the interpretation of "just compensation," than they would be by limiting the meaning of public use. Understanding the resulting losses and contrasting them with those of other landowners whose property might be condemned also seems important for assessing the fairness or justice of using eminent domain for economic redevelopment. Eventually, such a focus also may help to clarify what types of losses through eminent domain should raise constitutional concerns.

Local governments need broad powers of eminent domain to survive, and to support their poor residents in the competitive economy of the 21st century. Indeed, it seems likely that adopting most interpretations of public use advanced by property rights proponents would aid land investors and harm poor residents. Such measures would not protect any defensible understanding of property rights.

In Part 1 of this paper, I describe the evolution of interpretation of the "public use" clause that authorizes the use of eminent domain for urban redevelopment. In Part 2, I chart the effort to narrow the scope of public use in order to eliminate or police redevelopment by condemnation. In this part, I present and analyze the arguments for such reinterpretation and the new rules suggested for how public use should be understood. I also sketch the changing economic and political situation of cities that lead them to take this activist approach to positive economic planning. I conclude that courts cannot justify limiting condemnation through policing the purposes for which condemnation is sought. In Part 3, I argue for expanded procedural protections before

3. The NAACP, along with the AARP and others, filed a brief *amicus curiae* in the U.S. Supreme Court in *Kelo*, arguing that permitting eminent domain for economic redevelopment "will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged." Brief of Amici Curiae NAACP, et al., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

condemnation can deprive people of their homes. I also argue for the justice of changing our interpretation of "just compensation" to pay homeowners for the psychic and community losses they suffer through displacement.

I.

PUBLIC USE FOR ECONOMIC REDEVELOPMENT

Current controversy has revived ancient debate about whether the term "public use" in the Takings Clause limits government from using condemnation for economic redevelopment. During the 19th century, courts debated whether the term required government (or the public in some other incarnation) to actually use or occupy the expropriated property.[4] Courts that required actual use and possession by government were plainly concerned, as a matter of political or legal theory, that it was unconscionable for government to take property from one private individual and give it to another.[5] This is the same intuition that drives courts today. Later, I wish to examine how weighty a consideration it should be, at least when the prior owner is compensated. But most courts in the past were not at all consistent, as courts generally found that the necessity for assembling land for canals and railroads and other projects owned by private actors persuasively justified the use of eminent domain.[6]

Courts were not driven to this narrow view by either the language or history of the Takings Clause. As many courts recognized in the 19th century, the term "use" in common speech could just as well mean purpose or benefit.[7] Moreover, the founding generation seems not to have been troubled by concerns or debate about the types of projects or goals for which eminent domain could be used. Early state courts that had fashioned limitations upon what a public use could be struggled to accommodate condemnations where a private person would own the expropriated land, such as the Mill Acts (permitting lower private mills to build works that flood upstream land of another) or railroad and canal construction, because they saw such mea-

4. *See generally*, DAVID DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS (Foundation Press 2002).

5. The classic quote is by Justice Chase: "[A] law that takes from A and gives to B" *Calder v. Bull*, 3 U.S. 386, 388 (1798). *Calder* was not an eminent domain case and did not involve compensation.

6. *See, e.g., Hairston v. Danville & Western Ry.*, 208 U.S. 598 (1908).

7. *E.g.*, 1 N. Webster, American Dictionary of the English Language (1st ed. 1828)(meanings of "use" include "advantage" and "production of benefit").

sures as vital to a growing economy. Such courts answered the objection to forcing transfer of property to a private person by emphasizing either that the public might use the property (as in traveling with a private common carrier) or that the public would benefit from the private transfer; mills, railroads and canals were accessible to the public and created economic growth that benefited all.

But it appears more likely that the term "public use" was never intended to act as any restraint upon the power of eminent domain at all. In a careful analysis of the original understanding of the term, Matthew Harrington concluded that the term was descriptive rather than prescriptive.[8] After looking at English and colonial condemnation practices, early state constitutions, and the drafting history of the Fifth Amendment, he found that "the drafters did not intend to impose a substantive limit on congressional expropriations [but] intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures)."[9] If this view is right, as it seems to be,[10] the power of eminent domain should be limited by the standards of the Due Process Clause to the same extent as any legislative authority. This would give coherence and weight to the Supreme Court's modern but otherwise unstable equation of the scope of the power of eminent domain and of police power.[11]

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8. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245 (2002). Harrington's quibble with the term "Takings" Clause stems from his insistence that it should be called the "Compensation" clause because it was intended to require compensation, not to limit a power the Framers viewed as inherent in legislatures. *Id.* at 1286-87. This view has sometimes been expressed in the regulatory takings debates as well.

9. *Id.* at 1248.

10. Dean Treanor has noted that the first state constitutions did not require compensation but only that the property owner or the legislature consent to the expropriation. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 789 (1995). Harrington argues persuasively that the framers of these early constitutions probably believed that legislative control of the eminent domain power would protect citizens from its arbitrary employment. 53 HASTINGS L. J. at 1276.

11. Thus, *Berman v. Parker*, 348 U.S. 26 (1954) equates "public use" with the scope of the police power, justifies it on the deference courts owe to legislative judgments, but Harrington's analysis gives historical and textual reasons for the equation. Scholarship claiming a literal, restraining meaning for "public use", seems to aggressively interpret vague references against highly-colored claims of background commitment to largely unviable property rights. *See* Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 4 MICH. ST. L. REV. 878, 898-901 (2004).

The law has developed, however, on the assumption that "public use" provides a firm but vague standard for substantive review of eminent domain decisions. Thus, state court decisions looked in different directions on different facts, with many odd and inconsistent distinctions.[12]

Remarkable, however, has been the consistency of the United States Supreme Court, which never has found an exercise of eminent domain to violate the public use requirement.[13] Early on, the Court eschewed any reliance on a "literal" reading of "public use."[14] Moreover, in many of these older cases the Court upheld exercises of eminent domain which had as their palpable purposes economic development and in which the condemned property would end up in private hands with little or no public access.[15] The Court justified its deference to state and local determinations of public use based upon the great variety of needs and conditions across the country.[16]

States continued to construe their own versions of "public use" in a variety of ways. An important 20th century milestone was the acceptance of the idea that eminent domain could be employed for slum clearance, even if the property would be given to private developers for more valuable development, because the removal of "blighted" properties was itself a "public use."[17] This

12. *See* DANA & MERRILL, *supra,* note 4, at 193-98.

13. In *Missouri Pacific Ry. Co. v. Nebraska,* 164 U.S. 403, 416 (1896), the Court set aside as violation of the Due Process Clause an order of a state agency requiring a railroad to allow private parties to build a grain elevator on the station grounds, but emphasized that the order was not nor was claimed to be an exercise of the power of eminent domain. *See also Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 241 (1984).

14. *See, e.g., Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531 (1906)("inadequacy of use by the public as a universal test")(per Holmes, J.).

15. *Strickley,* 200 U.S. at 532; *Clark v. Nash* 198 U.S. 361 (1905); *Fallbrook Irrigation Dist v. Bradley,* 164 U.S. 112 (1896); *see also Head v. Amoskeag Mfg. Co.,* 113 U.S. 9 (1885)(limiting holding to conflict of rights among riparian users, but noting statutory purpose to secure "the advantages inuring to the public from the improvement of water power and the promotion of manufactures").

16. *Rindge Co. v. Los Angeles County,* 262 U.S. 700, 705-06 (1923); *Clark v. Nash, supra,* 198 U.S. at 367-68.

17. *New York City Housing Authority v. Muller,* 270 N.Y. 333, 1 N.E. 2d 153 (1936). The courts viewed slum clearance as an aspect of public health, a perspective that had much influence on the mistakes of urban renewal. The *Muller* court wrote about slums:

> The public evils, social and economic of such conditions, are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expendi-

approach was entirely consistent with progressive thought of the time, in its faith in scientific planning and modern design. But at the same time, it withdrew legal protection for the property interests of poor residents to an exceptional degree, since the houses of better off people would not be blighted, almost by definition.

Berman v. Parker,[18] decided 50 years ago next month, marks a decisive break. Giving a green light to ambitious urban renewal plans in Southwest Washington DC, the unanimous Court equated public use with the police power, essentially denying constitutional limits on the ends to be served by eminent domain, and embraced deference to legislative judgments about choice of means or details already well established in the Court's interpretation of the Due Process Clause. The urban renewal that followed represents the largest concerted effort to stem the tide of urban economic decline in our history, and left an ambiguous legacy that colors appraisals today of the deferential approach to interpretation of public use.[19] Many persons, disproportionately black and poor, lost their homes, and the public housing, highways, and commercial development that replaced them often have been seen as representing a sterile and socially naïve approach to urbanism. It is useful to note that urban renewal on this grand scale ended because of legislative decisions ending federal subsidies, protecting residents, and requiring prior consideration of historic and environmental resources.[20]

Midkiff[21] adds little to the applicable principles, beyond the adherence of three current justices. The Hawaiian legislation in the case, which empowered certain categories of leaseholders to buy the fee interest in their residences through an indirect eminent domain scheme, was adopted to some extent to provide tax protection to the selling owners, and imposed only abstract losses on the prior owners who were in no sense singled out. The deci-

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ture of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums..

Id. at 254.

18. 348 U.S. 26 (1954).

19. *See* Nicole Stelle Garnet, *The Public Use Question As A Takings Problem*, 71 GEO. WASH. L. REV. 934, 946-48 (2003).

20. Statutes that curbed the excesses of urban renewal and related highway construction include the National Historic Preservation Act, 16 U.S.C. 470, *et seq.*, Section 4(f) of the Department of Transportation Act, 49 U.S.C. 3303{c}, and the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*

21. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

sion affirms the broad scope of public purposes that could be served and the nearly complete deference that courts should pay legislative determinations that condemnation further some conceivable public interest.[22] Perhaps, it is significant that the advantage to the public at large here was entirely economic, i.e. to improve the competitive functioning of the private land market, while *Berman* also contained some aesthetic and humanitarian purpose.[23]

So one could reasonably assume by the mid-1980's that substantive public use review in federal courts was as etiolated a provision as substantive due process review in economic cases or commerce clause limits on federal legislation. "Today, nearly all courts have settled on a broader understanding that requires only that a taking yield some public benefit or understanding. This

22. *Midkiff's* formulation on these points is stark. A takings need only be "rationally related to a conceivable public purpose." 467 U.S. at 241. Likely success in its goals should not be required: "empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Id.* at 243.

23. The language of two additional Supreme Court decisions seems to drive stakes into the heart of any restrictive reading of public use. In *Ruckelshous v. Monsanto Co.*, 467 U.S. 986 (1984), the Court rejected an argument that a federal statute forcing the manufacturer of a pesticide to publicly disclose a trade secret did not serve a public use, even though "the most direct beneficiaries" of the requirement were the manufacturer's competitors who could avoid "costly duplication of research and streamline the registration process, making new end use products available to consumers more quickly." *Id.*, at 1014-15. The Court affirmed that the requirement need have only a "conceivable public character" and that determination of the "optimum amount of public disclosure to the public is for Congress, not the courts to decide . . . ." *Id.*

Equally dismissive was *Nat R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992), involving a public use challenge to the Interstate Commerce Commission's order to one private railroad to convey to another ownership of a stretch of track, based on findings that transfer would enhance Amtrak service over the tracks because the transferee would maintain the condition of the track better than the transferor. The Court noted the similarities to *Midkiff* and *Berman*, in that "condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged." *Id.* at 422. The Court proceeded to apply the settled law, "[T]here can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objective." *Id.* at 422-23.

Both cases arguably involved some more concrete use of the condemned property by the public than do economic redevelopments. *Ruckelshous* approved public disclosure of information that, at least in theory, could be used by any member of the public, and *National Railroad Passenger* facilitated use by a publicly controlled common carrier. But neither opinion hinted at any consideration of such a formalistic approach to public use, and emphasized only the advancing of the public interest.

reading equates public use with "public interest."[24] The leading scholarly analysis of public use, then and now, by Professor Thomas Merrill, found that federal decisions since *Berman* had uniformly found a public use, although the state courts were somewhat less consistently deferential.[25] Merrill thought this development acceptable both because of the inability of courts to ground limits on the legislative power on principle and because the risks of misuse of eminent domain were rather low, given the preference of government to buy property consensually and avoid the added costs of litigation and political contention. Nonetheless, he worried about the risk of private actors hijacking the eminent domain process when the owner accorded the property a higher "subjective" value than the market, as may occur with residences or established businesses.

II.

REVIVAL OF CONSTITUTIONAL DEBATE ABOUT PUBLIC USE

In this section, I want to consider and critique the renewed efforts to restrict the constitutional meaning of public use. The cases and arguments are interesting, but the case for stricter reading is seriously flawed in logic, doctrine, and empirical assessment. This section attempts to state the arguments for narrowing public use, other than unfairness to the poor, and show their weaknesses. The following section then concentrates on the effects of condemnation for urban redevelopment on the poor residents who are displaced.

One preliminary point should be made, which is obvious but rarely remarked upon in these debates. State and local government entities are bound by state statutory definitions of "public use," typically incorporated into authorization for the use of eminent domain. Courts that hold that certain projects do not amount to a constitutional public use are not merely correcting some errant local government or special purpose public entity, but narrowing the scope of authority of the state legislature to define when eminent domain is appropriate. The Michigan Su-

24. DANA & MERRILL, *supra*, note 4, at 196.

25. Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61 (1986). Merrill's case survey has been updated, with entirely consistent results, in Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends*, 1986-2003, 39 REAL PROP. PROB. AND TRUST J. 251 (2004).

preme Court in *Hathcock*,[26] for example, not only set aside the actions of Wayne County, but expressly found that the Michigan legislature had misread the state constitution in authorizing the county to use eminent domain to achieve any "public purposes within the scope of its powers for the use or benefit of the public . . . ."[27] Not only should state legislatures be afforded deference in interpreting the meaning of public use, but concerns about specific abuses of power by local entities can be addressed politically by amending statutory authorizations. Wholesale withdrawal of constitutional authority is not the only remedy.

The battleground for public use can be understood to be the circumstances where owners attach a large value to their properties in excess of what they can receive under just compensation. These concerns are crystallized in the notorious *Poletown*[28] case, where the divided Michigan Supreme Court upheld a taking by the City of Detroit of an entire neighborhood, 465 acres, consisting of homes for 4,200 residents, as well as several schools and churches, to provide General Motors (GM) with a site meeting its specifications for construction of a new factory. Plainly anguished, and applying a higher standard of review than *Berman*,[29] the Court held that providing a site for a privately-owned factory, given the economic crisis into which Detroit had plunged, constituted a "public use" under the state constitution. The dissenters, and many critics, charged that the taking had been for the private gain of General Motors, with only incidental employment benefits for the people of Detroit. Justice Ryan, in his dissent, although acknowledging the unprecedented economic crisis facing Detroit, denied the relevance of *Berman* and argued that the Michigan constitution permitted condemnation of land for a new private owner only when it would be used as an "instrumentality of commerce" or in a "slum clearance."[30]

Poletown casts a long shadow. Memorialized in film and books,[31] the anguish of the people whose modest but functioning

26. *County of Wayne*, 684 N.W.2d at 765. The court first held that the proposed condemnation for economic redevelopment was within its statutory authority before it held that this exceeded the authority granted by the Constitution.

27. Michigan Comp. Laws §213.23 (2005).

28. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (1981).

29. The Court required that the City show that there was "substantial proof that the public is primarily to be benefited." *Id.* at 459.

30. *Id.* at 477.

31. Jeanie Wylie, Poletown: Community Betrayed (1989); Poletown Lives! (Documentary film produced and directed by George L. Corsetti, 1983). A brief but more balanced account of the controversy is provided by the Jenny Nolan, "Autoplant vs.

neighborhood was destroyed to create a site for a plant for the world's largest corporation seizes the moral imagination. The auto plant, moreoever, never fulfilled Detroit's expectations for employment. The Court's decision has been a regular element of the first year Property class since it was decided in 1981. Students invariably express outrage that the government could inflict such harm on innocent people. That sense of outrage stands also behind the litigation effort that has now succeeded in overturning the judicial imprimatur. But most people have misdiagnosed the problem.

First, arguing against use of eminent domain for redevelopment by simply invoking *Poletown* states a *non-sequitor*. The case would have seemed quite different if the land for the GM plant had been vacant and held for speculation. In such an instance, there would be no suffering from displacement nor uncompensated loss to residents from the destruction of their community. Investors would have been compensated fully for the market value of the property. At the same time, cities need the eminent domain power to assemble large sites if they are to compete with greenfield sites for economic development. Such authority not only allows them to serve their residents, but also provides some brake on urban sprawl.

Second, the case would have seemed equally tragic if Poletown had been taken for a publicly-owned facility with less economic value than a large privately-owned factory, such as a convention center or football stadium. There are numerous cases where communities the size of Poletown have been bulldozed for urban highways.[32] These highways are not more clearly in the public interest than a factory. But in none of these cases would the property owners have had a colorable claim that the project did not amount to a public use. The goals for such transportation projects nearly always include economic development.

Finally, the justices of the Michigan Supreme Court agreed that the Poletowners would not have had a public use claim if their neighborhood plausibly could have been characterized as blighted.[33] Yet they would have lost all the community associa-

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Neighborhood: The Poletown battle," The Detroit News, available at http://info.detnews.com/history/story/index.cfm?id=18&category=business (last visited February 16, 2005). I am indebted to Professor John Mogk for this reference.

32. For a classic account, concerning the condemnation of 1500 apartments for one mile of the Cross Bronx Expressway; *see* ROBERT A. CARO, POWERBROKER: ROBERT MOSES AND THE FALL OF NEW YORK, 850-94 (Vintage ed. 1975).

33. *Poletown Neighborhood Council*, 410 Mich. at 663-664.

tions and way of life, and GM could have been given the land. It might be said that a finding of blight provides a substantive criteria for condemnation, which lessens the chances that the taking is being done at the behest of a private party, but that simply relegates rent seekers to preying upon the poorest and least politically connected segment of society. As we have seen, blight is a socially constructed understanding of urban decay which rests on a doubtful analogy to a gangrenous limb and more closely describes a degree of disinvestment that can be addressed directly and without amputation.[34] Most American cities today contain vibrant historic districts that not long ago were considered blighted.

Arguments for imposing new substantive standards on legislative bodies to satisfy the public use requirement reflect a deep and perplexing inconsistency. What should trouble us about *Poletown* is not primarily the benefit to GM, which could have located its plant in the rural South, but the deliberate destruction of a living neighborhood, with all that entails. The benefit to GM may deepen the condemnees' sense that the government power displacing them is beyond their control, which certainly can enhance the pain. But if government officials are making a good faith, reasonable judgment that Detroit needs this plant for employment, and there is not another site, then the purpose for the decision seems no more objectionable than a taking to site a highway or prison. The reality is that attracting a large, new automobile factory creates entirely plausible and substantial economic benefits for a community.

The harms suffered by the property owners seem largely unrelated to the faults that the courts find with the condemnations. Whether a redevelopment proposal likely will achieve the results that a city plans for does not address the loss suffered by a homeowner who must relocate to another community. The homeowner would suffer just as much if the land was taken for a road or a prison, instances in which no court is willing to second guess the judgment of the condemnor as to whether the project is justified or where it should be located. Moreover, it seems perverse for the constitutional rule to encourage the government to retain ownership of and manage the housing or stadium project when

34. *See* Wendell E. Pritchett, *The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. AND POLICY REV. 1 (2003).

most believe that the private sector can better manage low income housing and sports venues, let alone automobile factories.

The view, that there is something seriously wrong about the consensus essentially eliminating substantive restrictions on compensated takings, starts with Professor Richard Epstein.[35] The litigation effort to restrict eminent domain by a stricter interpretation of public use has been spearheaded by public interest libertarian law firms that also have long been active in regulatory takings cases. The Institute for Justice created the Castle Coalition to press this issue and has publicized its work.[36] Plainly they respond to and invoke the losses suffered by small homeowners who must leave their homes and communities of many years, a loss that just compensation might never heal nor even attempt to heal, as discussed below. Small business owners also often cannot recover all their losses through constitutionally adequate compensation. The focus of their concern seems be that private interests will hijack the government's power of eminent domain through influence or corruption to obtain property either that they could not otherwise obtain or at lower prices than would be agreed to in a consensual transaction. For them the necessity of legislative authorization for the taking is inadequate; judges need a constitutional rule to filter good from bad exercise of eminent domain.[37] Their position is that economic redevelopment is not a public use *per se*, or, in the alternative, that courts should enquire closely whether the public benefits sought are reasonably certain to be accomplished.

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35. It is important to recall that Epstein's ethical objection to eminent domain stems from his broader objection to any form of wealth redistribution. RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND EMINENT DOMAIN, 162-66 (1985). A contending principle might be that measures that improve the public welfare ought not to be prohibited because they also redistribute wealth, if the basic rights of prior owner are respected.

36. *See* www.ij.org/private_property/index.html (Last visited February 16, 2005).

37. Some justifications for narrowly construing public use seem merely incantational. The South Carolina Supreme Court takes the view that even if a planned project has undeniable, significant economic benefits for a local government, eminent domain cannot be used because "the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases." *Georgia Dep't of Trans. v. Jasper County, South Carolina,* 586 S.E.2d 853, 856 (S.C. 2003), *quoting Karesh v. City Council of City of Charleston*, 247 S.E. 2d 342, 345 (S.C. 1978). Of course, an owner has no right to as he pleases with his property, even in South Carolina, but is subject to a broad array of common law and public law restrictions in the public interest. In any event, such a right has little connection with the meaning of public use. Property rights proponents have not made a convincing positive normative case against expropriation *per se*.

But concern about eminent domain is not an exclusive possession of the right. Ralph Nader and Allen Hirsch have also argued for heightened scrutiny of public use whenever taken land is transferred to a private party.[38] Nader fought for the Poletowners against General Motors and Detroit at the time of the condemnation. His argument here does give particular weight to the losses suffered by displaced residents, but the constitutional solution offered by his co-author and him is to apply strict scrutiny to the public use justification for such takings.[39] But, as I have argued, the losses suffered are essentially unrelated to the purpose pursued or the ultimate owner of the property taken.

On the other hand, it seems undeniably true that in many instances, the community will be better off, even after compensation is paid, if particular parcels are owned by A rather than B, particularly if A has the expertise and resources to combine them with other parcels to create a well-located site of an appropriate size for productive activity not otherwise feasible in that community. B's concerns about receiving less compensation than he thinks fair goes only to the question of whether the compensation is constitutionally just. Further, to the extent that courts are being asked to weigh in some intrusive manner whether the public benefits that a project will bring are large enough or of the right kind, they are being lured back to a Lochnerean inquiry into the wisdom of legislative measures. Indeed, such an approach bears a strong structural and ideological relation to an enhanced means-ends analysis in regulatory takings cases.[40] Moreover, no principled constitutional line can be drawn across such varying perceptions. This seems borne out by several recent cases.

The cases where courts have expanded the requirements for "public use" do sometimes present troubling facts, but offer inadequate constitutional solutions.[41] *99 Cents Only Stores v. Lan-*

38. Ralph Nader and Allen Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207 (2004). They also filed a brief *amicus curiae* in *Hathcock*, urging the court to overturn *Poletown*.

39. *Id.* at 224-25.

40. The Supreme Court rejected such inquiries in *Lingle v. Chevron, USA, Inc.*, 125 S.Ct. 2074 (2005).

41. Other significant recent cases include *Daniels v. Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002)(lack of public use in attempted voiding of a restrictive covenant to permit commercial use; less deference paid to determinations of public use by agencies without legislative power); *Southwestern Illinois Development Auth. v. Nat. City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002)(no public use in attempted taking for a

caster Redevelopment Agency,[42] is an important case because here a federal court purporting to follow *Midkiff* found that a taking served a purely private interest because the public interest advanced was pretextual. In that case, it appears that a county redevelopment agency sought to condemn land so it could void a lease with the plaintiff, in order to allow Costco to expand its store onto that adjacent site. The "power center" in which these stores stood was the prize accomplishment of the county's redevelopment efforts and the only shopping center in town with a "regional draw." The court characterized this as the "naked transfer of property from one private party to another."[43] The county argued that it needed Costco to remain in the center as an anchor to preserve its economic value to the county. The court rejected this contention, because of a lack of evidence in the record suggesting that this was the real reason or was plausible.[44] This, of course, entirely departs from *Midkiff's* admonition to courts to accept a "conceivable" public purpose and not to consider whether the taking would in fact achieve its purpose.

But what actually was constitutionally infirm in what the county attempted to do? The preservation of the success of the power center obviously was an important goal for the county and losing its anchor store would have been perilous. Of course, the county may have been wrong, Costco could have been bluffing, but it is hard to see how a court would be a better judge of that than the city, which had no non-economic reason to prefer one retailer to another and intended to put a lot of public money behind its judgment, by selling the land to Costco for $1. Given the serious public money being expended, one would also expect voters to evaluate critically the wisdom of such spending.

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parking lot for a raceway); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003)(no public use under state constitution in taking for mixed use development); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. 1998)(taking of residences for future vague enhancement of Trump casino not a public use). *See generally* Corey J. Wilk, The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003, 39 Real Prop. Prob. and Trust J. 251 (2004).

42. *99 Cents Only v. Lancaster*, 237 F.Supp. 2d 1123 (C.D: Cal. 2001).

43. *Id.* at 1129. It seems fair to surmise that Costco's insistence on expanding onto the site of the plaintiff may have reflected a desire to get rid of the plaintiff, which would compete with Costco on many products, out of the center. Such desires are unexceptionable in themselves and non-competition clauses are commonly enshrined in shopping center leases. Moreover, 99 Cents probably fought the case because of the advantage of being contiguous to Costco.

44. The discussion in the case is confusing because Lancaster sought to fit its account within the terms of preventing "future blight" in order arguably to place its action within the state enabling statute.

What about injury to the plaintiff? As a constitutional matter, it is hard to see why we should care. The city offered to buy out the plaintiff's lease for its market value plus additional amounts to cover moving expenses and lost goodwill, presumably something quite close to the damages that a landlord would suffer for (efficiently) breaching the lease. While 99 Cents Store was being "singled out" by the city in some sense, the criteria was straightforwardly economic. Surely, its corporate "feelings" do not pluck any constitutional strings![45] However much the efforts of Lancaster to maintain the value of the center may resemble making sausages, nothing in the constitution should be seen to prevent it.[46]

Hathcock v. Wayne County,[47] demands attention as the decision reversing *Poletown.* The case involved an attempt by Wayne County to assemble land for a business and technology park, immediately south of the newly renovated airport, intended to stimulate the depressed economy of the greater Detroit area. After buying nearly 1,000 acres consensually, the county sought to take by eminent domain the remaining 300 acres of the project area held in scattered lots by several owners. The takings were authorized by a state statute requiring that they be "necessary" for the "use or benefit of the public." The Michigan Supreme Court held the proposed takings unconstitutional, ruling that, in the absence of blight, government *per se* cannot take property and transfer it to a private owner regardless of the amount or certainty of the economic benefit to the public.[48]

45. Business corporations simply lack the capacity to entwine their property with their "personhood." *Margaret J. Radin, Property and Personhood*, 34 STAN. L. REV. 957 (1982).

46. Professor Garnet suggests that *99 Cents Only Stores* shows "the salutary role that a heightened means-ends [analysis]" could play. Nicole Stelle Garnet, *supra,* note 19 at 967. But the court breezily dismissed the city's plausible claim that catering to Costco was necessary to protect the center, a bet on which it was prepared to expend both money and political capital. The court's hasty rejection of the city's claims undermines Professor Garnet's belief that greater judicial involvement will enhance the public interest.

The Supreme Court in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), fingered *99 Cents Only Store*, as a case of "one to one transfer of property, executed outside of the confines of an integrated development plan" that ought to be viewed "with a skeptical eye." *Id.* at 2667, n. 17. That seems fair, but should not entail a reflexive conclusion that such condemnations cannot substantially further the public welfare.

47. *County of Wayne*, 684 N.W.2d 765.

48. I do not know how the court would apply this rule to leases of taken facilities by the government to private users, which can range from 99-years ground leases, as in *Kelo,* to short term leases of small retail spaces.

The *Hathcock* opinion is depressingly formalistic and opaque, finding only (doubtfully) that the Michigan courts did not interpret "public use" to include "benefit" at the time the current state constitution was adopted in 1963.[49] Thus, there is little analysis of what values such a ruling serves and its costs. The property owners in the case were not neighbors in a thriving residential neighborhood, as in *Poletown.* Several owned merely vacant land held for speculation and thus were fully compensable by damages. At the same time, the decision burdens local governments trying to generate economic activity in a state that last year ranked 48th in the creation of new jobs. There is no claim in the opinion that the project Wayne County was pursuing was other than a sensible, carefully considered, democratically approved attempt to create some economic synergy in the right place.

The court did purport to consider three practical arguments other than economics to justify the takings. First, it rejected the idea that assemblage of the entire area under one owner was necessary for the project, based upon its observation that "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce."[50] This seems not to have been a problem of factual record, as such, but a sweeping conclusion that since controlling an entire area is not necessary for all economic development, it is never necessary - a conclusion infirm in logic. It is difficult to understand why the law should privilege the inexpert views of a court on the necessity of unified control in any particular case over the contrary view of the state (through its authorizing statute) or the county that is prepared to pay for the land. The reality, of course, is that sometimes unified control over a site is necessary and sometimes it is not.

Second, the court was troubled by a lack of continuing public oversight to ensure that the land taken would continue to serve public needs after being conveyed to private businesses. But the county wants to lure economic activity and cannot accomplish that goal if it sets too rigid rules for making profits or threatens

49. The court seems not to have considered whether those who adopted the 1963 constitution might have read "public use" in light of *Berman,* the mass of state cases following it, or the interpretation implicit in the Michigan legislation authorizing takings for public benefit.

50. *Id.* at 783.

penalties for failure.[51] In any event, the County did act pursuant to a plan that a developer would need to follow. Oversight is always a question of degree.

Lastly, the court noted that its ruling does not invalidate the clearing of blighted slums as a public purpose. Ironically, this ruling insures that very poor people can continue to be displaced from their communities for redevelopment by private developers. The court's justification for this is only that they had approved such takings for urban renewal before the 1963 constitution was adopted. The opinion as a whole is wooden and obtuse about both constitutional law and urban realities.

Finally, *Kelo v. City of New London*,[52] has taken on great significance since a divided Supreme Court affirmed a decision adhering to established law deferring to legislative determinations of "public use." A divided Connecticut Supreme Court *en banc* upheld New London's taking of several homes and two businesses as part of a redevelopment of a waterside site to enhance its economic potential for the benefit of the entire city. The court employed a *Berman* type analysis, concluding that federal and Connecticut interpretations of "public use" were identical. The court plainly was impressed by the care in the planning that went into the decision to develop this sort of mixed use and marina project adjacent to a new Pfizer "global research center." The court canvassed the recent decisions taking a harder line against eminent domain for economic redevelopment, but concluded that each dealt with "outlier" facts and did not change the traditional manner of review.

Justice Zarella's dissenting opinion may be the most careful opinion yet justifying greater judicial activism in eminent domain.[53] After agreeing that a court should defer to a legislature's statement that its announced purpose would constitute a public use, he stated that a court should go on to examine what the "actual use" of the property would be and require the city to establish by clear and convincing evidence that proposed public

51. This is a difficult matter that deserves more extended consideration: what should government constitutionally be required to do to increase the chances that taken land will be used for purposes that advance the public welfare. State authorizing statutes sometimes specify such matters.

52. *Kelo*, 125 S.Ct. 2655.

53. He would have been better off omitting a largely mythic history of property rights and eminent domain. It is a gross simplification to claim that "protection of private property is the principal aim of our society." *Id.* at 577. Also he places the adoption of the first takings clauses *after* concern about overuse for canals, etc.

benefits would in fact be realized.[54] The dissent felt that the greater uncertainty of securing public benefit from economic redevelopment than from traditional public projects justified the courts in applying a "heightened standard of judicial review . . . to ensure that the constitutional rights of private property are protected adequately . . . ."[55]

Although Justice Zarella should be commended for actually trying to articulate the real issues here, his analysis is faulty. He found two distinctions between takings for economic development and "traditional takings." First, he argued that "traditional takings almost always are followed by an immediate or reasonably foreseeable public benefit."[56] He seems confused here, as his examples show. The destruction of slum housing might indeed be soon followed by "relocation of project area residents and demolition of substandard structures," but a net public benefit may never come from what can also be viewed as a tragedy. Can we say that there is a public benefit if the displacees dwell in worse housing and the land lies unused? A dam can be an environmental disaster and a military base a jumping off point for tragedy. In short, the dissent confuses immediately putting condemned property to a public use, which is largely a matter of definition, with immediately securing a public benefit, which is always less certain.

Second, Justice Zarella argues that the public benefit that comes from a "conventional taking typically flows from the actions of the taking party" rather than a private transferee. This is demonstrably wrong in the cases of condemnation for railroad lines, canals, and mills, which are privately built and run. But it may also be wrong in cases of facilities that continue to be owned by the government. Nearly all will be occupied and used by government officials different from those who authorized the expropriation. Some require that they be used by private persons to create public benefit, such as roads or port facilities. Even takings that create purely public facilities managed by the government may never create any public benefit. The general point is that securing future benefits from any activity of government requires complex and uncertain predictions about the future behavior of many public and private persons. Requiring certainty prevents action.

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54. *Id.* at 583.
55. *Id.* at 587.
56. *Id.* at 578.

The dissent also claims that takings for redevelopment raise a peculiar problem of government acting to aid powerful private interests. Many commentators have identified such "rent seeking" as the root problem with redevelopment takings.[57] No doubt this problem is real; Professor Merrill carefully explains the advantages to a private interest in getting the government to use eminent domain on its behalf rather than securing the property through a consensual deal.[58] What seems missing from these concerns is comparison with some acceptable baseline of realistic governmental action. Is the threat of undue private influence greater in eminent domain than in land use regulation or economic subsidy? After all, in this case, New London was going to lease the land to be taken to a developer for $1 per year, not an uncommon arrangement to promote the economic objectives of the project, yet a far greater benefit to that developer than using eminent domain to acquire it in the first place.[59] Similarly, New London was going to rezone the area, greatly enhancing its value to the developer. As we know, a city can rezone land bringing serious loss to the present owner who generally is not entitled to any compensation. If fact, nearly all legislation has substantial distributional consequences, and private interests maintain armies of lobbyists to try to capture benefits and fend off costs. There seems no reason to suppose that eminent domain presents risks of a different type or magnitude than any legislation, nearly all of which appropriately get low levels of judicial scrutiny. Moreover, nearly every government project using eminent domain, even entirely traditional public uses, like building a military base, can have significant distributional consequences that private interests will contend over.

What does raise special concern in *Kelo* is that relatively low income people will be displaced from their homes. This fact is featured prominently in news accounts of the case and in the petition for certiorari.[60] Yet it plays no role in Justice Zarella's dis-

57. *Id.* at 579.

58. *See* Merrill, *supra*, note 25.

59. Similarly, in *99 Cents Only Stores*, Lancaster was going to pay $3.4 million for the land and another $150,000 plus to break the plaintiff's lease, and then sell the land to Costco for $1. *99 Cents Only v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1126 (C.D. Cal. 2001).

60. Petition for Writ of Certiorari to the Supreme Court of Conn., at 2, *Kelo v. City of New London*, 843 A.2d 500, (No. 04-108) ("Petitioners have poured their labor and love into their homes. They are places where people have lived for years, have raised their families, and have grown old.").

sent, or in any of the opinions tightening the vice on public use. Moreover, Zarella and the *Hatchcock* opinion go out of their way to reaffirm the blight cases. Thus, the campaign against eminent domain has the curious disjuncture that the remedies offered provide at best tangential benefits to the most conspicuous and sympathetic victims of the measures. Rather, the decisions and the arguments seem to serve highly abstract judgments about the symbolic value of secure property rights that cannot survive critical scrutiny.

The U.S. Supreme Court's opinions in *Kelo* raise too many interesting issues to be dealt with in an afterthought. Although the Court squarely rejected petitioner's argument that economic development cannot be a public use, the Court did not expansively equate public use with the police power but essentially scrutinized the record for indicia that the project reasonably could be thought to have a substantial public benefit.[61] Justice O'Connor's dissent embraces the petitioner's argument, and thus labors to distinguish *Berman* and *Midkiff* as involving only the elimination of harmful land uses, and caricatures the Court's opinion as holding that government can take from A and give to B so long as the use is "upgraded".[62] While she may rightfully be concerned about the propriety of some redevelopment projects, she does not thoughtfully examine whether they may better be checked by judicial limitations on the ostensible purposes for eminent domain than by process-based protections. The visceral, indeed, paranoid public reaction to *Kelo*, fomented to an extent by O'Connor's intemperate rhetoric, has substituted for a season the shouting of simplistic slogans and frenetic lobbying for scholarly weighing of ends and means.

III.

REDEVELOPMENT TAKINGS AND THE URBAN POOR

In preceding sections, I have tried to frame more precisely concerns about the harms caused by eminent domain. My contention has been that there should be no serious constitutional objection to using eminent domain for economic redevelopment, even if the taken property ends up in the control of private developers. The arguments of property rights advocates and supportive judges seriously miss the mark. But one must confront

61. *Kelo*, 125 S.Ct. at 2666-67.
62. *Id.* at 2671, 2673-74.

directly the special harm of displacement from one's home, which sever residents from places and communities bound up with their identities and social possibilities. As developed below, these harms may be visited more drastically on the poor, and current constitutional law gives them less protection.

While the Takings Clause requires just compensation for the property taking, it steadfastly has ignored the more complex losses imposed by residential displacement. As explained more fully below, condemnees generally receive only the fair market value of the property taken, but no damages for consequences of displacement, including moving expenses, the likely higher cost of replacement housing, and personal losses. Poor residents often own little property of value, but suffer disproportionately from a forced move. This imbalance poses two problems for the poor. First, it encourages government to choose too readily the places where low income people live as the location for new projects that can be accomplished through eminent domain, because taking those places is less costly. Second, low income residents must bear a higher percentage of their losses. In this section, I offer interpretations of the Takings Clause that may ameliorate these concerns.

But concern about unfairness of constitutional compensation to poor residents does not lead directly to the conclusion that the poor should oppose the use of eminent domain for urban economic redevelopment. Urban governments most likely to pursue redevelopment are also the most consistent champions of poor residents, who continue disproportionately to live in cities. Increases in employment and tax base sought through such redevelopment often rebound to the benefit of the poor, since they are most dependent on the capacity of urban government to provide services and benefits and will benefit disproportionately from locating new economic activity in cities. Thus changes in the approach to eminent domain must hold in tension sometimes conflicting concerns lest they make poor residents worse off than before. It may help to clarify this point before turning to remedies for the distortions in just compensation law.

A. *The Stake of the Poor in Urban Redevelopment*

Poor people and racial minorities long have borne a disproportionate share of the burden of expropriation for urban redevelopment. The urban renewal programs that formed the core of national urban policy from 1945 to the 1970's often was charac-

terized aptly as "Negro removal," as they often purposefully replaced low income black communities with higher income, largely white residential developments.[63] In *Kelo*, the NAACP, joined by the AARP and the Southern Christian Leadership Council, argued that using eminent domain for economic redevelopment "will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged."[64] The nub of the argument was that since low value property was being put to higher value uses, poor people would be dispossessed more often.[65] This view seems simplistic.

It makes sense that a city trying to enhance the economic value of its fabric would eliminate the dwellings to which its poorest residents have been relegated. These are lowest market value developments, and, characterized as "blight," their removal in itself long has been considered an acceptable goal for a taking, regardless of what replaced them.[66] And it also seems predictable that, everything else being equal, expropriation would fall upon those with the least power in the local political process. During the heyday of urban renewal in the 1950's and 60's, poor minorities lacked political power, even in cities where their numbers might have justified it, and this exposed them to removal.[67] But permitting eminent domain to remove blight but not more broadly to permit economic redevelopment, as was assumed at that time, ensures that property taken for redevelopment will dis-

63. Between 1949 and 1963, 63% of all families displaced by urban renewal were non-white and 56% of the non-white families were poor enough to be eligible for public housing (although usually none was available). BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES, 28 (MIT Press 1989). In Baltimore, for example, urban renewal and highway project demolition displaced 10,000 families, 90% of whom were black. *Supra,* note 60 at 29.

64. Brief of Amici Curiae NAACP, et al. at 3, *Kelo* v. *City of New London,* 843 A.2d 500, (No. 04-108). The brief discloses no embarrassment from the fact that the property owners in the case do not fall within these categories.

65. *Id.* at 3-4. Bizarrely, the brief does not quarrel with *Berman* or the many blight cases in which nearly all those displaced were black and poor. *See id.* at 16-18.

66. *New York City Housing Authority*, *supra*, note 17. Designations of blight or slum conditions by redevelopment agencies have been treated as conclusive by courts. *Kaskel v. Impellitteri*, 115 N.E. 2d 659 (1953). In the period before serious relaxing of "public use," developers would look for the "blight that's right," an area with development potential that could be characterized with a straight face as blight, often gerrymandering the boundaries of a project to include some substandard residential buildings. FRIEDEN & SAGALYN, *supra,* note 63, at 23. Findings that a project would clear away blight or slums also helped unlock the coffers of federal urban renewal funds. 42 U.S.C 1441.

67. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 51 (2003).

place the poorest residents. Today, it seems probable that any exercise of eminent domain that disproportionately harmed members of a racial minority would violate the federal Fair Housing Act.[68]

Nonetheless, since low income people continue to reside disproportionately in cities, their future prospects are linked with those of the nation's cities. They should want their cities to exercise eminent domain if it can accomplish overall economic stimulation. The social and economic prospects for urban low income residents necessarily depend on the ability of cities to maintain their economies both for employment opportunities and for the revenue capacity of the city to provide education, housing, and other services needed to advance.[69] During the 20th century, the economic prospects for cities deteriorated dramatically. Early in the century, dependence in manufacturing on fixed place rail and harbor transportation concentrated industry and immigration in city centers. The rise of trucking on modern highways, along with improvements in electrical transmission destroyed the competitive advantage enjoyed by cities in manufacturing, even as southern blacks streamed into northern cities in search of disappearing jobs.[70] Federal aid and urban renewal were early efforts to address this fundamental economic problem.[71] But federal aid to cities has declined precipitously, placing most of the burden of providing services on state and local governments.[72]

Cities have in fact become successful promoters of real estate development within their borders, and in the process have clawed their ways back from the precipices of insolvency that threatened many older cities not many years ago. They have done this through shrewd redevelopment and public subsidies

68. 42 U.S.C. 3601 et seq. Section 3604(a) makes it "unlawful . . . [t]o make unavailable or deny . . .a dwelling to any person because of race, color, religion,. . .or national origin." Most courts hold that *violations* of the FHA can be made out by showing that the challenged acts have a discriminatory effect on protected persons. *See, e.g., Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), Cert. Denied, 434 U.S. 1025 (1978). The NAACP would far better use its resources in developing this theory than in embracing libertarian property arguments.

69. J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L. J. 405 (2003).

70. *See generally*, Douglas W. Rae, City: Urbanism and Its End (Yale University Press 2003); Fred Siegal, The Future Once Happened Here: New York, D.C., L.A. and the Fate of America's Big Cities (Free Press 1997).

71. *See* Jon C. Teaford, The Rough Road to Renaissance; Urban Revitalization in America, 1940-1985 (Johns Hopkins University Press 1990).

72. *See, e.g.,* Ian Urbina, *Bush Budget Would Cut Millions From City's Social Services*, N.Y.Times, Feb. 9, 2005, at B3.

that have attracted substantial private investment. Redevelopments of waterfronts, no longer suitable for containerized shipping, into residential and recreational centers, for example, have brought tourists, new residents and businesses downtown. Of course, not all such efforts have been successful, but enough have been to provide a new model of urban redevelopment.

Some of these efforts have displaced existing residents. But it is naïve to suggest that urban communities are stable in the absence of redevelopment. Far more people, of course, have left older cities due to industrial disinvestment and the large array of public and private inducements to move to suburbs than have been displaced by redevelopment.[73] American cities in the 1960's and 1970's witnessed flight from central sites and urban decay that have no precedent outside of war.[74] Urban economic projects attempt to provide greater economic stability to declining places by bringing employment and new residents to where people already are.[75] Even the Poletown project, however misguided, was an attempt to provide stability to Detroit at the sacrifice of a neighborhood; to give more people a reason to stay. It is understandable but far too limited to consider the plight of those forced to leave by condemnation without consideration of those forced to leave by disappearing jobs, community, and hope.

The cities also have created structures that give greater voice and more tangible benefits to low income residents. Substantial grass roots protests emerged in reaction to urban renewal and highway construction, eventually halting large top-down redevelopment. Cities found that they could undertake large projects only with the informed consent of affected citizens and eventually allowed neighborhood voices a place at the bargaining table.

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73. The population of Cleveland, for example, declined from 915,000 in 1950 to 478,000 in 2000, a striking decrease but not untypical for northern industrial cities. New London, Connecticut, had lost 10% of its population and thousands of jobs in the 1990's, compared to the 115 parcels of land taken in the project challenged in *Kelo*, 125 S.Ct. 2655.

74. The most notorious example is New York City's South Bronx, where crime and drugs led to a wave of arson the effects of which have been compared to those from the bombing of German cities in World War II. TEAFORD, *supra*, note 71, 206-07. *See generally* JILL JONNES, SOUTH BRONX RISING: THE RISE, FALL, AND RESURRECTION OF AN AMERICAN CITY (Fordham University Press 2002).

75. For a large scale defense of adopting policies to support community economic stability, *see* THAD WILLIAMSON, DAVID IMBROSCIO, AND GAR ALPEROVITZ, MAKING A PLACE FOR COMMUNITY: LOCAL DEMOCRACY IN THE GLOBAL ERA (Routledge 2002).

One respected study concluded: "Public-private deal making was critical for the rebuilding of downtown."[76]

Cities have greater need for exercising eminent domain than suburbs or rural areas because they are least likely to have large tracts of vacant or undeveloped land available for new ventures. They need more often to assemble large sites from smaller, previously developed parcels. Urban land assembly costs will be higher. Government can overcome these handicaps by using eminent domain to assemble substantially-sized tracts at strategic locations. Familiar examples that most would consider successful are the Inner Harbor in Baltimore and Times Square in New York. Making eminent domain for economic redevelopment unconstitutional would strike at the heart of a process that has contributed to urban regeneration since the 1970's.

Poor city dwellers would benefit most from more jobs within or near the city. We continue to suffer from a striking imbalance between job creation on suburban fringes and persistent unemployment and poverty within urban cores and older, inner ring suburbs, particularly among African-Americans.[77] Moreover, attracting higher income residents to urban areas would break down some of the isolation which exacerbates the social deprivation of the underclass. For example, the educational accomplishments of poor inner city children may improve when they mix with children from more affluent homes that hold higher expectations for schools. Higher tax revenues permit greater expenditures on education and other supportive social services. To the extent that the plight of poor citizens has been aggravated by the flight of the middle class and employment to the suburbs, its return to the city can aid them.[78]

Sometimes, poor urban residents are the direct beneficiaries of redevelopment expropriations. For example, the Dudley Street Neighborhood Initiative formed a community development corporation in Boston that condemned thirty acres of privately owned land for a much admired, community controlled, mixed use development of affordable housing and local businesses.[79]

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76. FRIEDEN & SAGALYN, *supra,* note 63, at 316.

77. *See, e.g.,* Michael A. Stoll, "Job Sprawl and the Spatial Mismatch Between Jobs and Blacks," February 2005, *available at* http://www.brookings.org/index/reports.htm.

78. I develop this theme in the context of gentrification in Byrne, *Two Cheers for Gentrification*, *supra,* note 69.

79. Elizabeth A. Taylor, *The Dudley Street Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061 (1995).

The project could not have achieved its goals without land assembly through eminent domain.[80] In truth, benefits to low income people from redevelopment usually is more indirect, from an improved economy, but political organization can help poor residents get direct, but collateral benefits, such as set asides of affordable housing units.[81] Below, I address procedural reforms that could give condemnees greater voice in redevelopment projects.

It is unclear the extent to which property rights advocates view use of eminent domain, to develop low income housing by community development corporations, to raise less concern about public use than development of market rate housing or commercial space by profit seeking firms. It certainly could be argued that the benefit to the public from subsidized housing is direct while the benefit from market rate housing comes indirectly from economic stimulus. But subsidized housing likely will be built and managed by community development corporations or their even more private agents, so the government would need to look to private actors to achieve public ends. Experience has shown that private parties, including non-profits and community development corporations, do a better job of creating and producing subsidized housing than do public housing authorities. It would be perverse for constitutional rulings to drive innovative housing and development programs back to comparatively inefficient government ownership.

Anecdotes and conjecture are an inadequate basis upon which to assess the benefits and failures of redevelopment. There is an urgent need for empirical studies to understand better the role played by eminent domain in overcoming holdouts in the reinvigoration of depressed communities, accomplishing smart growth, and redeveloping brownfields. Unfortunately, judicial decisions and public debate seem to be proceeding largely on the basis of lively anecdotes rendered by partisans.

Before leaving the topic of harms and benefits to the poor from redevelopment, I need to touch upon another conceptual

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80. *Id.* at 1080.

81. An example of this is the Arthur Capper/Carrollsburg project in Washington, DC. This is a Hope VI project replacing older public housing (rather than an exercise of eminent domain), but residents were able to obtain a firm commitment to replacing each public housing unit in the new development one for one, even as the city develops another 525 subsidized units and 300 market rate units. *See* District of Columbia Housing Authority, Arthur Capper/Carrollsburg, *available at* http://www.dchousing.org/hope6/arthur_capper_hope6.html (last visited Aug. 22, 2005.).

issue. Urban living is even more intensely contextual than rural or suburban living. People live in denser housing that is disconnected from natural geographical elements. The value of private space depends even more on location; the character of any location depends on numerous municipal services and cooperation on so many different levels that clear distinctions between public and private spheres seem forced. People spend more time in public space and the enhancement of its amenity value is more acute. Thus the balance between public and private rights in cities has tilted more toward the public throughout history. Cities have been more prone to regulate housing standards and land use, and employ eminent domain, than rural areas. Accordingly, property owners have less reasonable expectations of being free from civic action. As we consider below, however, this also magnifies the loss they suffer when displaced from their communities.

B. *Procedural Rights for Residents*

Even if poor residents as a group ought to support urban redevelopment programs, they also still are most likely to be displaced by them, as discussed above. In other words, poor residents want successful programs but are concerned about where they occur. Post urban renewal redevelopment projects generally attempt to avoid large displacements and involve residents and grass roots representatives more fully in the negotiation process.[82] In an ideal world, one might mandate that poor residents ought not to be more likely than all residents to be displaced and would be guaranteed a fair share of the benefits from any redevelopment program. But the economic reality is that poor residents are likely to be concentrated in low value enclaves that repel private investment. Moreover, private capital can be induced to take on the risks of investment in such locations only on the prospect of substantial returns.

If a central problem for poor residents is a lack of political power, it may be possible to construe the Takings Clause to mandate procedures that can amplify their political voices. Important statutes have required decision makers to weigh more carefully the various costs of demolition. The National Environ-

82. A recent study found a consensus among local officials that large scale urban development projects "should proceed only if their negative side effects were negligible, or at least fully mitigated." ALAN ALTSHULER AND DAVID LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 43 (Brookings Institution Press 2003).

mental Policy Act requires consideration of the environmental impacts of a project and of alternatives before a federal project is begun.[83] The National Historic Preservation Act requires an agency to consider adverse effects on historic resources, including neighborhoods eligible for inclusion in the National Register of Historic Places, before undertaking a project,[84] and Section 4(f) of the Transportation Act requires highway officials to take numerous steps to avoid or minimize harming various lands, such as wildlife refuges, public parks, and historic resources.[85]

Such statutes will affirmatively protect some neighborhoods against thoughtless destruction, by directing attention to environmental or historical resources.[86] Even more, they provide models for collecting information and considering more carefully the costs of eliminating functioning communities. For example, EPA already expressly considers disproportionate effects on poor and minority communities in assessing the environmental effects of projects that it undertakes that are subject to NEPA.[87] Such statutory procedures also provide opportunities for voice by the existing residents to explain the value of current communities. The legal and political mobilization of residents facilitated by such statutory procedures effectively changed the power balance in transportation planning and construction, ending the urban highway construction craze of the 1950's and 60's.[88] Residents of

83. 42 U.S.C. 4321 et seq. Numerous states have adopted similar provisions for actions by state and local governments. For example the California Environmental Quality Act, Cal. Pub. Res. Code sec 21000 *et seq,* requires early consideration of environmental consequences of using a site planned for condemnation for some public use. Failure to conduct prior environmental analysis can lead to dismissal of an eminent domain action. *Burbank-Glendale-Pasadena Airport Auth v. Hensler*, 233 Cal.App.3d 577 (1991).

84. 16 U.S.C. 461 et seq.

85. 49 U.S.C. 303.

86. Interestingly, an Environmental Impact Statement was prepared and challenged as insufficient in federal court concerning the Poletown project. *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981). The court rejected the plaintiffs' contention that the EIS failed to consider reasonable alternate sites for the GM plant, because it held that the proposed alternates were not feasible. *Id.* at 1379. However, the inquiry never engaged with the costs of displacement, except to note that some alternates were rejected because they would displace more people. What should be required in the future is a public inquiry into whether the benefits of the project exceed the costs of displacement, so the political process will explicitly address it.

87. *See Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (Apr. 1998), *available at* www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf (last visited Aug. 22, 2005).

88. ALTSHULER & LUBEROFF, *supra,* note 82, at 88.

Washington, for example, used procedural rights under the Transportation Act to stall and eventually defeat construction of highways through black neighborhoods in the 1970's.[89]

Drawing by analogy from these statutes, government could be forced to consider the costs of taking residents' homes, the relative value of alternate locations for a proposed project, and means of limiting the harm at the preferred site. As in NEPA and the NHPA, the emphasis should be on requiring study and disseminating information. This will have the advantage of invigorating political debate. The condemning authority might be required to find that the taking was "necessary" despite its awareness of the costs to the residents and its attempts to mitigate harm. While a court could assess the adequacy of the inquiry, the decision made should not be subject to review in substance, because the final decision whether to take property should be legislative. Such a process may also direct the attention of decision-makers to the value of functioning communities, even if poor; the blindness to these social assets was one of the greatest failings of urban renewal, as pointed out by Jane Jacobs.[90]

The provision of federal money to cover the costs of acquisition and demolition may make even more critical the need for procedures that expose the costs of displacement. Local leaders are more likely to disregard the socioeconomic costs of displacement when the federal government provides the bulk of funding. Professor William Fischel analyzes in a forthcoming paper how availability of federal dollars may distort the local political process in favor of eminent domain, since federal programs typically grant funds only for specific types of projects. Fischel is concerned that local officials might never consider alternate use of funds for redevelopment that would not have such large social costs. On a more specific level, another author has pointedly criticized the federal Community Development Block Grant pro-

89. *See D.C. Federation of Civic Assoc'n v. Volpe*, 459 F.2d 1231 (D.C. Cir 1971), cert. denied 405 U.S. 1030 (1972); Zachary M. Schrag, The Freeway Fight in Washington, D.C.: The Three Sisters Bridge in Three Administrations, 30 J. URB. HIST. 648 (2004).

90. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, 441 (Random House 1961).

gram for not requiring a community or the HUD to detail the expected socioeconomic costs of displacement.[91]

Process adequate to avoid systematic unfairness should be constitutionally required as a procedural element of "public use," before any condemnation of existing residences. Even if *Berman* correctly abandoned any substantive restraint on eminent domain, it stumbled on a facile trust in an idealized political process. Although the opinion trumpets the need to leave redevelopment decisions to the legislative process, the disenfranchised residents of Washington, DC, had no voice at all in Congress's approval of urban renewal, let alone the subsequent administrative decisions about where and how it should be conducted.[92] Although DC is an extreme case, urban renewal was characterized by top down, technocratic decisions about the scope and location of expropriation that employed federal money to break free from customary local political constraints.[93]

While interpretations of public use have most often been substantive, there is persuasive support for interpreting those words to create procedural protections. Matthew Harrison's historical analysis, discussed above, finds that the framers accepted eminent domain when the product of "legislative consent" rather than of executive imposition. They also rejected British notions of "virtual representation" in a distant Parliament where they elected no members. This original concern with eminent domain as the fruit of consent through actual representation supports interpretations ensuring vulnerable people a reasonable chance to be heard in the decision where to expropriate. This interpretation is consistent with that of Dean Treanor in his magisterial analysis of the original meaning of the Takings Clause, where he found that the framers mandated compensation in the case of physical appropriations because of concern that legislatures would undervalue the losses owners might suffer.[94] He goes on

91. Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901, 906.

92. Residents of Washington have no voting representative in either house of Congress, which directly governed until elected local government was established in 1974. The attempts of black residents to prevent the redevelopment of Southwest Washington, which was 76% black, are recounted in HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY; RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C., 151-69 (Johns Hopkins University Press 1995).

93. *See, e.g.*, Douglas W. Rae, *supra*, note 70, at 320-25.

94. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995).

to suggest that an appropriate modern "translation" of this original meaning would focus judicial scrutiny on "governmental actions that affect discrete and insular minorities in environmental justice cases."[95]

Moreover, scholarship about public use has emphasized concern with rent seeking and other failures of the political process, typically diagnosed through the lens of public choice theory. Professor Garnet in her carefully reasoned recent article argues generally for some heightened scrutiny for the fit between the use of eminent domain and the purposes government claims to be seeking, but directs her programmatic suggestions toward procedural protections that will enhance the ability of courts to perform this analysis.[96] While I disagree with her substantive analysis for the reasons given above, her arguments for greater procedural protection demonstrate the procedural core of the public use requirement. The Court in *Dolan v. City of Tigard*, for example, created both substantive and procedural barriers to regulators exacting property interests as mitigation before permits would be issued; the city was forced to hold an individualized inquiry, in which it bore the burden of proof, to establish "rough proportionality" between the harms addressed by the permit process and what the owner must convey.[97]

Professor Garnet raises concern about "quick take" statutes, which permit the government to use streamlined procedures for eminent domain when circumstances require urgent public action. She effectively notes that such statutes diminish the ability of residents to mobilize and argue against the taking of their homes before crucial decisions are made, and in *Poletown* the city did use quick take to ensure that its plan was "a *fait accompli* before meaningful opposition could be registered or informed opposition organized."[98] Indeed, it is difficult to understand why such provisions should ever be available to displace residents from their homes, at least without a showing of the gravest exigency, given the permanent scar of destruction of home and community. It is true that the Supreme Court long has held that "where adequate provision is made for the certain payment of

95. *Id.* at 876.

96. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 at 969-74.

97. *Dolan v. Tigard*, 512 U.S. 374, 391 and n. 8 (1994).

98. Garnett, *supra,* note 96 at 971, *quoting Poletown Neighborhood Council*, 304 N.W.2d at 470 (Ryan, J., dissenting).

the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just."[99] Nonetheless, if one accepts that payment of money cannot make residents whole for the loss of their homes and communities, the argument for substantial advanced notice and a hearing on the need to take a particular location seems compelling. After all, the relevant due process inquiry is whether a post deprivation hearing adequately protects cognizable interests.[100]

C. *Reassessing Compensation for Residents*

Rather than insist on a substantive interpretation of the public use requirement, it may be more efficacious to address the criteria for "just compensation." If public use is interpreted not to place substantive requirements in front of legislatures, then owners no longer are protected in any sense by a "property" rule within the meaning of Guido Calabresi's famous taxonomy.[101] If a court finds that the public use criterion has been met, or eviscerates the requirement entirely, then the residents' assets are protected only by a liability rule, offering damages for invasion of the owners' rights. Setting the measure of damages at different levels will change the level of protection afforded the owner and make the decision whether to take the property more or less efficient. It may also affect our judgment of whether the taking is just.

The traditional measure of "just compensation," however, does not provide complete damages to residents. It is familiar that the standard of "just compensation" is met by the payment of "market value." That is, in most cases, the government need only pay for the taken property what a willing seller would have taken from a willing buyer in the absence of eminent domain. The problem is that the government's resort to eminent domain

99. *Bragg v. Weaver*, 251 U.S. 57, 62 (1919); *see also Cherokee Nation v. S. Kan. Railway Co.*, 135 U.S. 641, 658-59 (1890).

100. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

101. Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). That is, if a Court decides that a proposed taking is not for a "public use," the government cannot force the owner to surrender ownership, but can gain a transfer only on a consensual basis. The distinction between property and liability rules is applied to several related problems in Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978).

indicates that the seller is not willing. Most condemnees receive less than their actual loss, since they are not willing to sell at the prevailing market price (like most property owners at any given time). In some cases this may be attributable to negotiation strategy or a simple belief by the owner that he can manipulate the valuation litigation to get a higher price. But it also can be attributed to what Professor Merrill has called a "subjective premium," a personal value that the owner places upon his property well above its market value.[102] In most cases, courts refuse to order any payment of such subjective losses. The consequence of this is that while in some cases there may be very little subjective loss, as in the case of unimproved land held for investment, in others there may be enormous subjective loss, as when a poor resident is driven from a community that is bulldozed.

There are many reasons why market value may not be just compensation for residents. A home is both a haven from the assaults of society and a locus where the webs of family and community grasp us. One need not be a Hegelian to appreciate that personal identity can be significantly bound up in a home, especially one of long standing, which may be associated in memory with departed loved ones or stirring personal events.[103] But in some cases, like *Poletown,* far more than an individual home is destroyed, namely an entire community and way of life centered on networked residences and community centers such as churches and shops. Thus, the loss to the individual is compounded, and may increase geometrically (rather than arithmetically) by the size and vitality of the community destroyed. The individual loses relationships and the social meaning that comes from a familiar place and community, which may amount to "root shock."[104] There may even be ways in which these local community efforts and networks might be considered to be property.[105]

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102. Merrill, *supra*, note 25, at 83-84.

103. *See* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 991-96 (1982).

104. MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World Ballantine Books 2004). In this recent book, an African-American psychiatrist attempts to describe and gauge the harm caused an individual from being uprooted from a community. The effect of the destruction of black neighborhoods on former residents is at the core of her concern.

105. *See* Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1 (2004).

Also, the poorer a displaced resident, the less likely it is that she will receive full compensation for her loss. First, to the extent a poor person owns a fee simple, it is likely to be of relatively low market value, increasing the need to cope with a higher replacement cost. (Some slum property owners will welcome eminent domain as release from a hazardous investment.) Second, most poor people will not own a fee but have, at best, a leasehold. The government pays the value of the fee interests that it takes, and the parties divide the compensation according to their shares or lease provisions.[106] But the amount realized by a low income residential tenant will be low in any event, and likely will be zero. There are several reasons for this: the value of the leasehold must be offset by rent to be paid.[107] If a tenant holds on a month to month lease, no compensation will be due, even if local law permits eviction only for cause.[108] Also, if the lease contains a standard "condemnation clause," which terminates the lease upon the taking, no compensation need be paid.[109] Thus, the tenant suffers the inconvenience and collateral harms of displacement, while the landlord, who may be a nonresident investor, receives the full measure of his property's worth in the market. Third, for poor people, the value of social relations within the community may be a proportionately more valuable asset in their social portfolio than their financial investment in their residence; thus, the percentage of their loss that will be uncompensated under current law will be higher than for many more affluent residents. With fewer resources to manage their transition to some new affordable location, poor displacees may spiral downward in despair.[110]

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106. Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 U.C.L.A. L. REV. 1083 (1987).

107. *United States v. Petty Motor*, 327 U.S. 372, 381 (1945); *Great Atlantic and Pacific Tea Co. v. State*, 238 N.E. 2d 705, 710 (1968).

108. *In the Matter of Dormitory Auth. of the State of New York*, 699 N.Y.S. 2d 645, 646 (Sup. Ct. 1999).

109. *See, e.g., Pennsylvania Ave. Redevelopment Corp. v. One Parcel of Land*, 670 F.2d 289, 292 (D.C. Cir. 1981).

110. The special nature of the harm suffered by low income displacees is shown in the detailed study of those displaced from SW Washington. Although, contrary to expectations, nearly all found displacees lived in decent housing, many suffered from social disorientation; they had lost a sense of community built up from having lived in stable social conditions for a long time. Researchers found that the sense of community had not been reestablished and that 1/4 of the interviewees had not made single friend since moving. Their sense of alienation was pervasive and there was such a "shocking" amount of anomie that a majority thought children should not be

The Constitution does not say "market value," is says "just compensation." The goal is to put the owner "in as good a position pecuniarily as if his property had not been taken."[111] The Supreme Court defines "just compensation" as compensation that is fair both to the owner and to the public that has to pay, but nearly always limits condemnees to the market value of the property confiscated. It is black letter law that compensation is measured by the loss to the owner rather than the gain to the public. Yet the Court itself acknowledges that using the market value standard "does not necessarily compensate for all the values an owner may derive from his property."[112]

I need to consider further why these kinds of losses are not compensated, although they might be in a tort case. Of course, the condemnor by definition is not a wrongdoer, and the payment to the condemnee will come from the public fisc. At the same time, however, setting compensation nearer the actual costs to the residents will (theoretically) prevent excessive taking of their property. The focus has been limited to the value of the property lost rather than consequential damages. Plainly, this prefers those whose locational assets are capitalized in real estate to those whose assets consist of local knowledge, connections, and mutual affections.

The explanation for this preference in the cases frequently is explained in terms of ease of measurement.[113] The Court will not compensate the subjective values that an owner may have for his, for example, ancestral home. The market value of a house is relatively straightforward, but determining the value of lost emotional attachments is inherently unreliable and costly to investigate. Perhaps the poor suffer more from not considering their intangible losses, since this may cause their losses to be entirely neglected.

Some writers have suggested paying a premium above market value, say 150%, as a way to approximate their total loss through expropriation more closely. This is often defended as a way to take account of the compulsory nature of the taking without engaging in unreliable inquiries into subjective value. A multiplier

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brought into this world. DANIEL THURSZ, WHERE ARE THEY NOW? 100-01 (Health and Welfare Council of the National Capital Area 1966). Similar depression afflicted displacees from the West End of Boston after it was cleared in 1958-59. FRIEDEN & SAGALYN, *supra* note 63, at 34.

111. *Olson v. United States,* 292 U.S. 246, 255 (1934).

112. *United States v. 564.54 Acres of Land,* 441 U.S. 506, 511 (1979).

113. DANA & MERRILL, *supra,* note 4 *at* 175-77.

is no answer for the poor, however, since they will have little or nothing to multiply. Moreover, courts have not been receptive to incorporating such premiums in constitutional formulas.

In *Kimball Laundry*, Justice Frankfurter justified the failure generally to compensate for subjective losses on three grounds:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity that makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship. Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.[114]

The grounds here are objectivity, citizenship, and lack of public benefit. They are unconvincing either alone or together. First, while the price given by the market may provide a fair value in that it will be impersonal, the argument above has maintained that it leaves out values just as or more important to owners (as Frankfurter concedes) and unduly punishes the poor. This is most apparent in the case of poor, long term apartment residents.[115]

Second, he argues that loss of subjective value should be understood as a burden of citizenship like lost property value under the police power. The point is all rhetoric and no substance. Subjective values are far less likely to be diminished by zoning and environmental regulations than by eminent domain; regulations generally do not deprive owners of possession nor prohibit

114. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

115. This can be seen clearly when the resident is displaced from a rent controlled unit from which statutorily he cannot be evicted at the end of his term. *See In the Matter of Dormitory Auth. of the State of New York*, 699 N.Y.S. 2d 645 (Sup. Ct. 1999).

established land uses that are not nuisances.[116] Displacement of residents by police power regulations is rare and usually necessary for the safety of the residents.[117] It falls more readily on underdeveloped land, limiting future choices for development and thus affecting market value far more than subjective value.[118] More broadly, Justice Frankfurter offers no argument for why bearing subjective losses falls within the duties of citizenship while bearing market losses does not.

Third, the lack of public benefit in extinguishing subjective values argues for, rather than against, compensating them. To the extent that the requirement for compensation should be thought of as encouraging more efficient decisions to take property, because decision makers must take the costs into account in weighing the benefits of an expected redevelopment, ignoring subjective losses threatens to prompt takings that inflict more net harm than good. This likelihood is increased to the extent that subjective loss usually will not have offsetting public benefits. Finally, it is a fundamental principle that compensation is measured by what the property owner has lost rather than by what the government has gained.

Thus, some additional payments to poor residents, independent of the market value of the property taken, seem demanded both by fairness and by efficiency. My suggestion is that all residents displaced by eminent domain be entitled constitutionally to moving expenses and home loss payments, which the condemning authority can measure using some statutory formula based on the number of persons in a household. The court could in its constitutional interpretation require that "just compensation" compel that such losses be addressed and assess whether statutory formulas are adequate on their face, but need not assess whether they correctly compensate for subjective losses in specific cases.

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116. The protection of non-conforming uses from zoning changes reflects the law's reluctance to prohibit established uses. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS, 222-24 (Aspen Law and Business 2d ed. 2000).

117. A great furor erupted when the District of Columbia forced the evacuation by generally poor residents of an apartment building in scandalous physical condition. *See* Carol D. Leonnig, Tenants' suit Accuses D.C. of Prejudice in Evictions; Gentrification Causes Ouster Hispanics Say, Wash. Post, April 14, 2004.

118. *See, e.g., Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978)(loss of air rights for new construction not a taking when owner retains substantial economic use that represents its chief expectation); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)(losses from new zoning regulation on undeveloped land borne by owner).

Persons displaced by federal or federally assisted projects since 1970 are entitled by statute to payments for moving and other expenses.[119] Many states also provide statutory compensation to residents in excess of fair market value. California, for example, pays for actual moving expenses and additional payments to make up the difference between the market value of the property taken and the cost of a comparable replacement dwelling or rental.[120] The ability to administer such a program at the federal level would seem to undercut concerns about administrative capacity or fairness.

Paying the costs of resident relocation may not address the pain suffered from the compulsory displacement from home and community. In England, where all rights to compensation are provided by statute, displaced residents are entitled to "home loss payments" determined by formula.[121] The courts have made it clear that the purpose of home loss payments is "to make some compensation to a man [sic] for the loss of his home as opposed to the loss of any interest he might have had in the particular dwelling which he formerly occupied."[122] If a tenant is displaced who has no legal interest in remaining in his dwelling, the tenant has no claim to home loss payments, but may have a claim for "disturbance payments," which will pay moving expenses.[123]

While this does not get at all of the elements of loss suffered, it may be a reasonable and easily applicable surrogate that will

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119. Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4622 (2004), provides:

> Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the head of the displacing agency shall provide for the payment to the displaced person of—
>
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;
>
> (3) actual reasonable expenses in searching for a replacement business or farm; and
>
> (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $10,000.

120. CAL. GOV. CODE §§7262-64 (2005).

121. JESSE DUKEMINIER & JAMES KRIER, PROPERTY, 1115 (Aspen Publishers 5th ed. 2002). *See generally* JEREMEY ROWAN-ROBINSON & CLIVE BRAND, COMPULSORY PURCHASE AND COMPENSATION 235-41 (Gaunt Inc. 1995).

122. R. V. Corby District Council ex p. McLean, 1 W.L.R. 735, 736 (1975), *quoted in* Rowan-Robinson and Brown, *Id.* at 235-6.

123. *Id.* at 241-46.

cause decision makers to weigh the losses that they are inflicting on displacees and afford them more just compensation when they do so.

CONCLUSION

Recent complaints about the use of eminent domain to redevelop urban areas properly raise concerns about displaced residents. Proposals and decisions restricting the purposes for which condemnation may be used, however, both are wrong in principle and attack a problem distinct from the losses that raise the concern in the first place, while denying powers to government necessary to overcome economic and social disadvantages. Poor residents will be better protected by requiring more formal, public consideration of whether taking residences is necessary and by using a measure for just compensation that captures more fully the losses they actually suffer.

Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment

Marc B. Mihaly[*]

This Article analyzes the Supreme Court's most recent foray into redevelopment—the controversial case of Kelo v. City of New London. *Over vehement dissents by the Court's conservatives, an unenthusiastic Justice Stevens validated New London's condemnation of single-family homes for a mixed-use commercial development. The case ignited a firestorm of opposition. Property rights advocates, moving beyond the dissenters' arguments, introduced legislation in most states and in Congress which would terminate the use of condemnation to assist economic redevelopment for any purpose. This Article critiques both the majority opinion and dissents in light of the modern practice of public-private economic redevelopment. It argues that the majority opinion fails to elucidate the economic and social activity involved, and that the facts in* Kelo *are unrepresentative of modern redevelopment—a productive and necessary cure for land use market failure in center cities. This public-private collaboration catalyzes the revitalization of downtowns, facilitates infill development, and produces much of the nation's affordable housing. Where such redevelopment requires the use of eminent domain, its exercise is essential against economically motivated owners who refuse to participate in the redevelopment and hold out for untenable prices. The exercise of eminent domain rarely involves*

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condemnation of residential uses, and when so directed, now requires relocation and produces compensation that usually exceeds fair market value. This Article proposes that modern public-private economic redevelopment commingles public and private uses, public and private ownership, and public and private gain in ways that renders inapposite and un-administrable both the majority's view of land use and the dissenters' proposed litmus tests for acceptable use of eminent domain. Finally, this Article contends that Justice O'Connor's dissent clashes inexplicably with principles of deference she herself articulated in the Court's last pronouncement on redevelopment, that the dissenters' policy complaints are decades out-of-date, and that the landscape of uses and municipal financing the Justices would reinstate lies in the irretrievable past.

INTRODUCTION

Kelo v. City of New London[1] has engendered a breadth and intensity of public reaction unique among the Supreme Court's land use decisions. Justice Stevens, writing for a five-member majority, held valid the condemnation of a group of single-family homes to carry out a redevelopment plan for the deteriorated waterfront of New London, Connecticut.[2] Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas, filed a passionate dissent.[3]

As expected, property rights groups and Libertarian organizations excoriated the majority opinion and celebrated the dissents. More interesting is the reaction of the rest of the population. Americans of most political persuasions, and education and income levels found the outcome counterintuitive at best, or more often, simply repulsive. Federal and state legislators took note of the universality of this response. Members of Congress, state legislators, and city councilpersons have introduced measures containing palliatives or correctives to the perceived abuse.[4]

What accounts for the breadth and the depth of the popular response? No doubt much is a reaction to the specter presented by the facts of the case as set forth in the various *Kelo* opinions—the condemnation of a group of well-kept single-family homes in a small, functioning residential community to facilitate the creation of a corporate industrial and office campus. The breadth of response also owes much to the success of those, including some amici for the *Kelo* plaintiffs, who have labored to enhance the status of private property and reduce the role of government in American society. They have altered the terms and

1. 545 U.S. 469 (2005).

2. *Id.* at 490. Justices Kennedy, Souter, Ginsberg and Breyer joined the opinion of the Court. Justice Kennedy filed a concurring opinion. *Id.* at 490 (Kennedy, J., concurring).

3. *Id.* at 494 (O'Connor, J., dissenting). Justice Thomas also filed a separate dissent, *id.* at 505 (Thomas, J., dissenting).

4. *See, e.g.*, Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. § 2(a)–(b) (2005) (causing a state or local government to stop receiving federal funding if it uses its power of eminent domain for economic development purposes); *id.* § 7(a)(4). For an updated summary of the response by states to the *Kelo* decision, see Castle Coalition, Institute for Justice, State Legislative Actions, http://www.castlecoalition.org/legislation.html (last visited Jan. 7, 2007), and National Conference of State Legislatures, State Legislative Response to Kelo, Annual Meeting 2006, http://www.ncsl.org/programs/natres/annualmtgupdate06.htm (last visited Jan. 15, 2007).

language of political discourse in ways that render it difficult to make the case for affirmative government efforts in the social arena. It is not surprising then that the potential abuse of redevelopment, one of the most powerful roles assigned to government, makes an easy target, while the virtues of redevelopment remain obscure.

However, without diminishing the success of various policy advocates in framing the debate, more is required to explain both the *Kelo* decision and the popular response. Simple ignorance of the transformed and transforming nature of city-center land use development lies at the heart of the pervasive popular reaction to the *Kelo* decision. Americans enjoy the fruits of economic redevelopment. They live, shop and recreate in revitalized urban cores, they rent or own housing for all income levels created by these efforts, and they enjoy stadiums and arenas that stand where dilapidated warehouses and parking lots once lay vacant. They do not, however, understand how the transformation occurred.

The public also remains unaware of the results of a contentious, but successful movement to reform redevelopment in ways that address the abuses of the mid-twentieth century cited in the *Kelo* dissents. In recent decades, agencies have increasingly avoided the use of condemnation, especially in the single-family residential context. Reforms in federal and state law ensure that condemnees receive payment well in excess of fair market value, and the majority of condemnees upgrade their housing as a result.[5] Few know that in many states, economic redevelopment requires that housing lost to demolition be replaced at a greater than one-to-one ratio.[6]

Educated Americans who otherwise generally understand zoning and development remain unaware of a quiet revolution in city-center redevelopment. Modern forms of urban land use erase traditional boundaries between public use and private use. New forms of contractual relationships between governmental entities and the private sector break apart the hoary "bundle of sticks," and redistribute the attributes of title in ways that supplant traditional real property concepts of public versus private ownership. This sea change arises in the context of an endeavor to remake government, to bring to the public sector qualities found in the private sector, and to infuse in government land use planning an understanding of economics and the operation of markets.[7]

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5. *See generally infra* Sections I.A–B.

6. *See infra* note 32 and accompanying text; *see also infra* note 131 (describing new affordable housing units resulting from redevelopment in San Francisco).

7. *See generally* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992); AL GORE, NATIONAL PERFORMANCE REVIEW, BENCHMARKING STUDY REPORT, SERVING THE AMERICAN PUBLIC: BEST PRACTICES IN PERFORMANCE MEASUREMENT 1 (1997). The

This Article examines the *Kelo* opinions in light of the realities of modern public-private redevelopment, and concludes that neither the majority nor the dissents comprehend their subject. Justice O'Connor's dissent invokes concepts, categories, and rules rendered inapposite and un-administrable by the practice of modern public-private development partnerships. Her and Justice Thomas' dissents reflect unexamined personal and political biases that are generally forty years out of date. The America they would reinstate lies in the irretrievable past. Whether these dissenting Justices and those who joined them lack the comprehension to counter visceral reactions to the facts of the case, or whether a property rights orthodoxy drives their reasoning, their dissents in *Kelo* repeat a pattern present in other land use opinions by conservative Justices that misconstrue or omit an examination of the policy foundations, nature, methods, and pragmatic record of the governmental program at stake in the case. The *Kelo* dissenting opinions join an unfortunate line of Supreme Court land use cases whose reasoning reflects the passions or prejudices of the authors more than the realities upon which they rule.

The majority opinion in *Kelo* fails to elucidate the defects of the dissents. Beyond a dry and incomplete summary of the official findings in the case, the opinion penned by Justice Stevens says nothing about the underlying issues of urban decay or the contribution of public-private economic redevelopment to modern American cities. The majority's primary analytic reliance on judicial precedent and judicial deference invites the popular reaction that in fact occurred. This Article contends that these defects in Justice Stevens' opinion arise from the same lack of comprehension afflicting the dissents and the general public, compounded by an unexamined personal position on the role of the free market in city-center land use.

Perhaps in response to the unusual breadth of public antipathy to the decision, Justice Stevens spoke out after the decision, indicating he disagreed with the condemnation as a matter of policy, but felt compelled by precedent to reach the conclusion he did. He stated that "the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[8] Supreme Court Justices breathe the same air we all do, so it is inevitable that ideology should influence the judicial process to some extent. Here, however, the personal ideological position goes to the very heart of the redevelopment effort upon which the Justice rules. Public-private economic

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National Performance Review aimed to make government more efficient by uniting the public and private sectors. *Id.*

8. Linda Greenhouse, *Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. Interestingly, Stevens' speech was before a bar association.

redevelopment evolved precisely because decades of experience grappling with issues of urban decay led to a consensus among economists, attorneys, planners, and developers that the unassisted operation of the free market would *not* reverse stubborn economic decline in certain defined situations and geographic areas. As a fair reading of the facts would show, the "free play of market forces" had long failed the New London neighborhood in question in *Kelo*.

This misunderstanding of market forces and market failure comprises one facet of an overall misunderstanding of modern redevelopment. The Justices in the *Kelo* majority do not understand the redevelopment process or the realities underlying the New London redevelopment at issue in the case. An opinion validating New London's actions should have articulated how the regime advocated by the dissents would do violence to the planning and contractual process that has recreated the modern American center city—a new land use regime that is the product of hard-won sophistication among city officials, regulators, and public and private redevelopment advocates.

I. BAD FACTS MAKE BAD LAW: *KELO* IS NOT MODERN PUBLIC-PRIVATE REDEVELOPMENT

The surface of the New London story as presented in the opinions presents a situation so intrinsically compelling that the case against redevelopment appears made without the legal analysis that followed. The city of New London brought the public planning, funding, and eminent domain powers of redevelopment power to bear in order to facilitate Pfizer's plans to locate a corporate campus along a river in town. The city also sought associated uses such as a river-walk, a park, and some related commercial and residential use. Plaintiffs' homes stood in the way. The city condemned their well-kept single-family residences, not for a park, a street, or other public facility, but pursuant to a plan that called for retail uses and parking on the specific site of their homes. Plaintiffs thus lost their houses, their roots and their community for no other reason than "economic development," which presumably means Pfizer's benefit and increased tax base for the city.[9]

The offensive elements of this story are apparent: the use of government power to take private, single-family homes in a functioning neighborhood; the apparent injustice of condemnation in the face of important intangible values for which no fair market formula could compensate; and the appearance of collusion between powerful private interests and government to advance private, rather than public good.

However, this portrayal suffers from the simple omission of key elements of the New London situation that shed a different light on the

9. Kelo v. City of New London, 545 U.S. 469, 475-77 (2005).

condemnation.[10] The subject area had an astounding vacancy rate and suffered tenacious economic decline and blight by any definition. The redevelopment plan was a well-developed approach to economic revival in the face of decades of decline, and the use of a corporate pioneer such as Pfizer is an essential and typical element of the strategy to bring a moribund area back to life. The new project actually contained more housing than it condemned. Without the exercise of eminent domain, the plaintiffs would have frustrated a program of economic revitalization that benefited the New London community.

Both the majority and the dissents visualize the very concept of public-private economic redevelopment through the lens of this incomplete rendition of the *Kelo* facts. This Part contends that these facts convey an unrepresentative picture of modern American public-private economic redevelopment. Condemnation, infrequent in the modern context, is rarely directed against residential uses and is even more rarely against functional single-family homes. Recent scholarship shows that condemnees receive payment in excess of market value in large part because of relocation payments made to ensure they acquire subsequent housing of comparable size, value and location.[11] Many states require a lengthy planning process and public participation prior to the condemnation of the sort employed by New London.

The *Kelo* facts, especially as portrayed by the dissents, represent redevelopment's past more than its present. In the last four decades, complex political and social forces, some created by the reaction to past abuses of the power of eminent domain, have successfully altered the face of redevelopment[12] through changes in federal and state redevelopment laws.[13] Redevelopment is now a primary device for the economic redevelopment of our center cities and produces much of the new housing in center cities, especially low-income housing.[14]

The *Kelo* opinions omit these realities and focus on the alleged abuses in the case. While appellate courts must focus on the facts in front of them, they also must struggle to put "bad facts" into context and employ reasoning that avoids extending the plaintiff's situation in ways that would do violence to the underlying tools developed by civil society. This the *Kelo* Court fails to do. Instead, the Justices ignore key facts that would justify the condemnation, and imply (in the majority opinion) or state outright (in the dissents) that the *Kelo* facts as portrayed *are* redevelopment. Even the majority's use of the term "economic development" implies a process operating simply to create new forms of

10. *See infra* Part IV.B.
11. *See infra* Part I.A–B.
12. *See infra* Part I.D.
13. *See infra* notes 40–46, 86–88 and accompanying text.
14. *See infra* notes 86–88 and accompanying text.

private economic wealth, a conclusion the dissents openly voice.[15] By contrast, the term "*re*development" reflects the intent of modern government to correct the failure of the market alone to bring an area back to life after a substantial period of economic decline.[16] This Article develops a more representative picture of modern redevelopment, and in so doing employs the more accurate terms "economic redevelopment," "public-private redevelopment," or "public-private economic redevelopment," phrases which reflect the new kinds of partnerships between government and the private sector.

An effort to contrast the *Kelo* facts with the representative realities of modern redevelopment must begin with the disclaimer that it is difficult to know what constitutes "representative" reality in the land development endeavor. Land development engages multiple actors at the most local level, creating projects so different from one another as to defy comparison, and presenting financial and political project histories difficult for non-actors to comprehend or analyze comparatively. In this context-dominated environment, developers and communities frequently must "reinvent the wheel" for their own projects, and little comparative scholarship exists. Educational associations such as the Urban Land Institute (ULI) and professional organizations such as the American Planning Association have made heroic efforts to organize, categorize and disseminate experience in the development field.[17] Nonetheless, conferences focusing on development and redevelopment rarely discuss the announced topic per se; instead, they usually consist of a series of individual project presentations loosely grouped around the subject, with the comparative conclusions treated briefly if at all. Most public-private redevelopment participants base their work on local experience, without significant benefit from scholarly literature.

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15. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 502 (O'Connor, J., dissenting) ("How much the government does or does not desire to benefit a favored private party has no bearing on whether an *economic development* taking will or will not generate secondary benefit for the public.") (emphasis added). Similarly, Justice Stevens' majority opinion alludes to "economic development" with respect to private party financial gain. *Id.* at 484 (majority opinion) ("Promoting *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 that we have recognized.") (emphasis added).

16. *See, e.g.*, MIKE E. MILES, GAYLE BERENS & MARC A. WEISS, URBAN LAND INST., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 38, 153–56 (3d ed. 2000) (describing the purposes of urban redevelopment, and distinguishing the public redevelopment intention of the modern public sector from private sector efforts). California law broadly defines redevelopment as predicated upon protecting the interests of the "general welfare." CAL. HEALTH & SAFETY CODE § 33020 (West 2006). Other states define redevelopment as "urban renewal." *See, e.g.*, ARK. CODE ANN. § 14-169-705(b)(2)(A)(i) (West 2006); ALASKA STAT. § 18.55.700(b)(1) (2006).

17. *See* Urban Land Institute, http://www.uli.org (last visited Jan. 15, 2007), and American Planning Association, http://www.planning.org (last visited Jan. 15, 2007).

The variety and situational nature of land use development frustrate the courts as well, resulting in the inability to form generally applicable rules.[18] Judicial deference,[19] as well as judicial references to the American federalist experiment featuring the states as "laboratories,"[20] may implicitly recognize this varied and intensely local nature of land use.

The same impediments affect analyses of redevelopment, particularly regarding the use of eminent domain for redevelopment. Conferees and scholars would like to form conclusions about public-private redevelopment, and cities would like to find answers from sister governments, but the barriers to generation of like-like comparisons frustrate their efforts. In fact, the task is doubly difficult since the nature of the redevelopment and its use of eminent domain varies not only by city, but also over time. Fifty years of experience in fifty states generates grist for any argument without demonstrating obvious patterns or general solutions, and in this polarized environment, every position purports citation to experience.[21]

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18. Shunning any "set formula," the Supreme Court's 1978 landmark decision in *Penn Central Transportation Company v. New York City* proffered a regulatory takings test heavily predicated upon the "particular circumstances" of each case. 438 U.S. 104, 123–24 (1978) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) and citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1964)) (quotations omitted). In the realm of noncategorical takings jurisprudence, the Court has consistently reaffirmed *Penn Central's* ad hoc, balancing approach. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (citing positively *Penn Central's* fact-dependent, balancing standard); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (affirming that the *Penn Central* test was still controlling); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (distinguishing *Penn Central's* "case-specific inquiry" requirement from both physical invasion challenges and situations involving the categorical denial of "all economically beneficial or productive use of land").

19. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 *passim* (1984) (majority opinion by Justice O'Connor).

20. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

21. Much scholarly literature debates the appropriateness of eminent domain for redevelopment. In some cases, authors have characterized individual projects. *See, e.g.*, ROBERT DREHER & JOHN D. ECHEVERRIA, GEO. ENVTL. L. & POL'Y INST., KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR REDEVELOPMENT 2–3, 22–26, 42–43 (2006) (arguing that public-private redevelopment is a viable tool for improving communities and calling for thoughtful reforms that will carefully ensure that government can continue using eminent domain as a tool for urban revitalization); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (arguing that because eminent domain is more expensive than acquiring property in the market, it is self-regulating); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 365–66 (2006) (arguing that local government has taken "public use" to the extreme and is misusing its eminent domain power to the demise of poor and minority communities); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 496–98 (2006) (arguing that the Court decided *Kelo* correctly as a matter of law but that

Nonetheless, it is possible and important to extract from this welter of redevelopment experience some generalizations as to its present nature. As discussed in the following four sections, the *Kelo* facts, especially as portrayed in the *Kelo* opinions, lie far from the center of the experience of redevelopment and its use of eminent domain in recent years and in most locales. The Justices, especially the dissenters, have locked themselves in an uncritical embrace of a generally dated, one-sided view of the complex redevelopment reality.

A. Modern Redevelopment Rarely Includes Condemnation of Residential Uses

Much of the popular reaction to *Kelo* rests on the specter of Susette Kelo being forced out of her home, a fact pattern recited in both the majority and dissenting opinions. The majority told us that petitioner Wilhelmina Dery lived in her home all of her life, and that Susette Kelo made extensive improvements to her house and prizes its water view.[22] Justice O'Connor added that Dery's home has been in her family for over one hundred years, and that Dery's son lives next door in a house bestowed upon him as a wedding gift.[23]

In most American cities this condemnation scenario would occur rarely, if ever. In recent decades condemnation of any use has become infrequent.[24] Many factors contribute to a disinclination to use the power

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economic development takings should be banned because they are inefficient and unjust); Nancy Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3 (2003) (arguing for a less deferential standard of review in eminent domain cases); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence* 4–5 (ExpressO Preprint Series, Paper No. 1106, 2006), *available at* http://law.bepress.com/expresso/eps/1106 (arguing that eminent domain is unnecessary because government can acquire the land through the market and that it is socially undesirable because land owners are not compensated for the full value of their loss); Lee Anne Fennell, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock*: Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958, 962 (2004) (arguing that "just compensation" does not compensate land owners completely because it does not account for subjective value); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 488 (1976) (concluding, based on a study from 1962–1970, that high-value properties receive more than fair market value while lower valued properties receive less); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 101, 142–43 (2006) (arguing that land owners often receive more than fair market value because government only uses eminent domain when it has to, usually settling with landowners at above-market rates, and because government pays for relocation costs). *See* Timothy J. Dowling, *How to Think About* Kelo *After the Shouting Stops*, 38 URB. LAW. 191 (2006); Gideon Kanner, Kelo v. New London: *Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006).

22. Kelo v. City of New London, 545 U.S. 469, 475 (2005).

23. *Id.* at 494 (O'Connor, J., dissenting).

24. *See* J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POL'Y DEBATE 1, 16–17 (2001) (revealing a survey which indicated

of eminent domain. Redevelopment and economic development agencies are reluctant to use condemnation because the total costs of acquisition, including legal fees, runs higher than fair market value, generally by about a third.[25] The possibility that a condemnation could result in the property owner bringing a lawsuit encourages the government to settle before trial at above-market prices.[26] Reductions in federal funding for redevelopment since the 1980s, including a reduction in funding for eminent domain, further discourage the use of condemnation.[27]

Acquisition of land in current residential use is even more infrequent. Modern economic redevelopment tends to focus on converting depressed industrial or commercial areas to mixed-used facilities. Eminent domain thus acquires undeveloped land, land in "holding uses," such as underutilized parking lots and dilapidated, often-empty warehouses, or land held for industrial use that no longer conforms to the current zoning. Agencies avoid acquisition of occupied residential land, whether by negotiation or condemnation, because of the expense of relocation, and, in many situations, because of the risk of political controversy.[28] For example, while redevelopment played a major role in San Francisco land use and development since the inception of the concept, the city's Redevelopment Agency infrequently condemns property, and more than three decades have passed since the last residential condemnation in the city.[29]

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that only four out of thirty-six cities would be willing to relocate at least fifty households and thirty businesses in a blighted area for a large-scale redevelopment project).

25. *See* Merrill, *supra* note 21, at 80–81 (explaining that market exchange due to the additional "due process" costs, such as filing a judicial complaint, serving process, appraising the property, and allowing the property owner a hearing, makes eminent domain more expensive). One commentator challenges the current weight of scholarship that asserts that condemnees do not receive fair market value for their property, finding that condemnees often actually receive greater than fair market value. Garnett, *supra* note 21, at 101. She finds three reasons for this: (1) government avoids taking high-subjective-value properties that are often associated with costly and politically damaging battles in the courts and public opinion; (2) in addition to fair market value, the federal Uniform Relocation Assistance Act usually requires the condemnor to pay relocation assistance costs; and (3) government is incentivized to acquire most property pre-condemnation through settlement at above fair market value prices to avoid the political upheaval that can result from initiating condemnation proceedings. *See id.* at 118, 121, 142–43.

26. *See* Merrill, *supra* note 21, at 77 n.65 (citing Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 436–40 (1967)) (noting that about 85 percent of condemnations settle before trial).

27. C. THEODORE KOEBEL, CTR. FOR HOUS. RES., VA. POLYTECHNIC INST. & STATE UNIV., URBAN REDEVELOPMENT, DISPLACEMENT AND THE FUTURE OF THE AMERICAN CITY 21–22 (1996) (concluding that when the federal government has funded projects, it has moved away from redeveloping residential areas to redeveloping commercial areas because of the high political and social costs of residential displacement).

28. Farris, *supra* note 24, at 10 (observing that city officials and developers avoid land-assembly problems by looking for large, underdeveloped sites such as abandoned lots, dump sites, and parking lots).

29. Telephone Interview with David Madway, former Chief Counsel, S.F. Redevelopment Agency (Aug. 9, 2005).

When residential condemnation does occur, it most commonly involves a different situation than the one represented by the acquisition of the single-family dwellings of the *Kelo* plaintiffs. Residential condemnation usually seeks to acquire and demolish residential tenements, typically multi-unit structures, often owned by absentee landlords who have declined to maintain the structures.[30] This represents a major issue especially in older cities, where inner-city housing is at risk of deterioration to the point of abandonment and total loss. Typical remedies such as building code enforcement are cumbersome, and the resulting fines neither substitute for, nor stimulate the affirmative investment necessary to repair the building. Creative city administrations have used redevelopment instead of, or in addition to, code enforcement. They acquire the subject land and buildings through condemnation, relocate the tenants, and replace the dilapidated structure with new affordable housing on the site.[31] Many states or cities have legislated that the replacement projects in such situations provide more new low-income units than those demolished, resulting in a net gain of affordable housing units in the area.[32]

To say that residential condemnation is rare is not to say it does not occur. Occasionally a high-profile redevelopment effort does require the destruction of single-family homes and negotiation for acquisition fails. Such projects tend to become focus of controversy and litigation, which renders them more visible than their frequency or size might merit. In the small coastal community of Long Branch, New Jersey, for example, redevelopment of a downtown and waterfront that has been economically depressed for decades will involve in the demolition of single-family residences. This redevelopment, however, will create far more housing of the same tenure and type that is destroyed, as is frequently the case with such plans.[33]

In sum, *Kelo* is an outlier because condemnation was employed at all, and even more so because New London directed eminent domain against a viable single-family use.

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30. Farris, *supra* note 24, at 10 (noting that the underdeveloped sites used most often for redevelopment are usually surrounded by blight or environmental hazards).

31. *E.g.*, Jerry E. Abramson, A COMPREHENSIVE HOUSING STRATEGY FOR LOUISVILLE METRO 17 (2006).

32. *See infra* note 131 and accompanying text.

33. The current Phase II of the Long Branch, New Jersey effort requires the demolition of thirty-six single-family residences, of which twenty-four are now subject to condemnation. The redevelopment effort has to date involved the rehabilitation and sale of approximately 400 units to low-income purchasers. Telephone Interview by Jonothan Cohen with Howard Woolley, Town of Long Branch Bus. Adm'r, in Town of Long Branch, N.J. (Dec. 1, 2006) (Mr. Cohen is a student of the author and a paper describing the interview is on file with the author).

B. Most Condemnees Receive Compensation Sufficient to Cover Intangible Values

The dissents represent that the *Kelo* plaintiffs do not want money; they want their homes and community. These assertions present us with a vivid representation of what a considerable literature calls uncompensated "subjective loss" or "intangible values."[34] Critics list among the drawbacks of condemnation its failure to compensate for a host of losses other than "fair market value."[35] In the literal sense, the critics are correct; most state condemnation statutes and uniform appraiser instructions give a condemnee what she would obtain from a third party in an arms-length commercial transaction.[36] Courts have consistently required that compensation must equal, but cannot exceed fair market value, even if government should want to provide more.[37]

The missing intangible values examined in the scholarship include added value to the condemnee due to sentimental attachment to the property that cannot be valued using the traditional fair market value calculation of what a willing buyer would pay a willing seller in a market transaction.[38] Intangible values also include the inconvenience of moving, special needs of the owner not recognized in the market, attorneys' fees for fighting the condemnation, relocation costs, and for a commercial enterprise, lost goodwill and strategic losses associated with the relocation of a business.[39] Critics have considered these as defects of the system of eminent domain. They assert that Susette Kelo typifies the reality that fair market value fails to compensate adequately those displaced by condemnation.

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34. Merrill, *supra* note 21, at 83. It also includes relocation costs and the value of any special modifications the owner may have added to the property that is of unique value to that property owner but that do not increase the property's value. *Id.*

35. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (6th ed. 2003) (noting with approval that "just compensation is not full compensation in the economic sense" because it does not include subjective values); Fennell, *supra* note 21, at 962–67 (arguing that fair market value does not include the value of the owner's subjective value of her property, lost opportunity to reap a surplus from the sale of her property in the market, and autonomy to decide whether to sell); David L. Callies & Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, *in* EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 137, 154 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (concluding that the fair market value standard is inadequate when government takes for redevelopment purposes because it does not allow the condemnee to recover a premium for the economic benefit or detriment of the redevelopment, nor does it include social value, relocation, attorneys' fees, and replacement value).

36. *See* 4 NICHOLS ON EMINENT DOMAIN § 12.02 (3d ed. 2006) (declaring it "well settled" that when land is taken through eminent domain, the measure of compensation is fair market value).

37. *See id.* § 12.02 n.1 (setting forth federal and state court decisions).

38. *Id.*

39. *See* sources cited *supra* note 35. Most scholars concede the difficulty of creating or administering a system to value sentimental attachment and special needs.

The *Kelo* majority opinion lends tacit support to this view. Justice Stevens never mentions the federal and state legislation that has addressed many of the concerns about compensation, directly with respect to intangible costs, and indirectly for sentimental attachment. Congress first acted to safeguard the rights of condemnees in 1971 with the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs.[40] The Uniform Act responded to the public outcry after the government used eminent domain in the 1940s to 1960s to remove urban blight. Congress intended to ensure that all persons displaced by government renewal programs be treated fairly and equally and to minimize the hardship of displacement.[41] The Uniform Act requires the government to pay for actual moving expenses and up to $22,500 (in addition to the acquisition cost) to help the displaced homeowner secure comparable replacement housing.[42] The Uniform Act covers all redevelopment projects undertaken with federal funds.[43] Condemnation compensation now includes attorneys' fees[44] and lost goodwill for businesses.[45] Severance damages can address many business and commercial strategic losses.[46] Furthermore, if the city receives federal assistance for redevelopment in the form of Community Development Block Grants, it must comply with federal requirements for replacement housing.[47]

State relocation assistance law usually covers projects not subject to the Uniform Act.[48] Many states and cities go beyond the federal baseline requirements.[49] Today, most cities prevent the removal of housing units unless the inhabitants can be relocated into units of similar quality and

40. 42 U.S.C. §§ 4601–4655 (2006) [hereinafter Uniform Act]; *id.* §§ 4622–4623.

41. *See id.* § 4621(b) (congressional policy section).

42. *Id.* §§ 4622–4623(a)(1).

43. *Id.* § 4630.

44. *Id.* § 4654(a) (entitling owners to attorneys' fees, as well as appraisal and engineering fees, if they prevail in a condemnation suit); *id.* § 4623(a)(1)(C) (requiring, as part of the owner's recovery of replacement housing costs, the condemning authority to pay the owner's reasonable expenses incurred for a title search, recording fees, and other closing costs due to the purchase of a new dwelling). Most states allow condemnees to recover attorneys' fees if they prevail in a condemnation suit. *See* 8A NICHOLS ON EMINENT DOMAIN, *supra* note 36, § 15.02 (compiling state-by-state summaries on whether attorneys' fees are recoverable).

45. 8A NICHOLS ON EMINENT DOMAIN, *supra* note 36, § 29.01[1] (noting the "trend" among states to award compensation for loss of goodwill and other business damages); *see also id.* § 29.01[2][a] (explaining that a few jurisdictions have adopted Uniform Eminent Domain Code § 1016, which allows a business to recover goodwill if the owner can prove that the loss was caused by the taking and that the loss "cannot reasonably be prevented by a relocation of the business" or by taking other measures to preserve the goodwill).

46. *See generally id.* § G16.02 (outlining the approach of various states on the payment of severance damages).

47. 24 C.F.R. § 570.606 (2006).

48. Garnett, *supra* note 21, at 123.

49. *Id.* at 121.

job accessibility.[50] Most significantly, many states use excess relocation costs indirectly to compensate for other intangible costs and sentimental attachment. Recent studies have concluded that relocation compensation is higher than actual relocation cost,[51] and that in many cases governments utilize the relocation assistance as a *de facto* surrogate for addressing intangible costs. Condemnees often upgrade their housing as a result of the redevelopment effort, frequently within the same area.[52]

Finally, it should be noted that where the occupants of residential structures subject to eminent domain are tenants (and as discussed above,[53] this is usually the case), the relocation requirement provides a benefit not generally available to tenants facing the operation of the unassisted market.[54] In private sales and eminent domain condemnations, the fair market value flows to the owner, not the tenant. But eminent domain condemnations do provide tenants with relocation assistance, whereas private sales do not. Poor tenants may be on month-to-month leases and evicted on thirty days notice.[55] Regardless of the term of their lease, in many states sale of the residential building terminates the leases of all the renters, in contrast to negotiated commercial leases, which are usually protected in the event of a sale.[56] Thus, where a private developer negotiates a sale with the owner of a multi-family residential building, the residents lose their housing without recourse or relocation rights. Those same residents fare much better if the building is condemned by a

50. *See* Uniform Relocation Assistance Act, 42 U.S.C. § 4630 (2006) (requiring "comparable replacement dwellings"); *id.* § 4601(10) (defining "comparable replacement dwelling" as a dwelling that is "decent, safe, and sanitary," adequate in size, affordable, functionally equivalent, and in a location with reasonable environmental conditions that is "not less desirable" than the displaced person's prior dwelling with respect to various factors).

51. *See* Garnett, *supra* note 21, at 124–25 (citing a 1995 U.S. Department of Transportation study and concluding that because residential condemnees receive a generous amount of relocation assistance, they get the replacement value for their property rather than just the fair market value).

52. *Id.* at 122–23 (explaining that because the Uniform Relocation Assistance Act requires that the replacement dwelling be "decent, safe, and, sanitary" and of adequate size, displaced residents who previously lived in conditions that failed to meet the housing code may receive a larger home than they previously had).

53. *See supra* text accompanying note 30.

54. J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 UCLA J. ENVTL. L. & POL'Y 131, 164 (2005) ("[M]ost poor people will not own a fee but have, at best, a leasehold. The government pays the value of the fee interests that it takes, and the parties divide the compensation according to their shares or lease provisions. But the amount realized by a low income residential tenant will be low in any event, and likely will be zero.") (footnotes omitted).

55. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 540 (1982); *see also* Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 811–12 (1994).

56. *See* KOEBEL, *supra* note 27, at 13 ("[T]enants are often displaced when properties are upgraded or converted to other uses.").

redevelopment agency providing relocation assistance and equal or improved affordable replacement housing.[57]

Thus, had events in New London proceeded without the subject litigation, Ms. Kelo, Mrs. Dery, and the other plaintiffs would likely have received compensation in excess of the fair market value of their homes. Such payments would have permitted them to "upgrade." A number of the *Kelo* plaintiffs owned residences in the neighborhood other than the ones they inhabited, and presumably those houses were rented to others.[58] In that case, their tenants would certainly have benefited from relocation assistance unavailable had these owners just sold the units to new owner-occupants. It is also quite possible that these plaintiffs could have relocated in some of the eighty units of replacement housing in the New London redevelopment effort.[59] Such a move might have served as a poor substitute for the loss of an existing community, or it might have constituted an improvement. The majority opinion does not tell us anything about those newly developed housing opportunities, nor does it address federal or state law on relocation, or the use of relocation funds to compensate owners for sentimental attachment.

C. Affected Residents and Businesses Participate in Modern Redevelopment

The *Kelo* dissents portray the plaintiffs as victims of redevelopment, not active participants. This image of uninvolved and surprised homeowners inaccurately represents the general experience of modern redevelopment. The same reforms that have opened city governments to the public have also made redevelopment a more participatory process at the state level. In most states, redevelopment begins with the iteration of a redevelopment plan.[60] The plan evolves in public, often through volunteer committees and planning workshops that draft modifications and alternatives. State open meeting laws usually make these processes

57. *See* MILES ET AL., *supra* note 16, at 155; *see also* KOEBEL, *supra* note 27, at 13 (explaining that because residential tenants are highly mobile, they are relatively unaffected by displacement other than that they must change the timing of their move); Garnett, *supra* note 21, at 125 (finding that residential tenants benefit the most from relocation assistance, as the majority of tenants "significantly upgrade" their housing because of the assistance).

58. *See* Kelo v. City of New London, 545 U.S. 469, 475 (2005) ("In all, the nine petitioners own 15 properties in Fort Trumbull . . . .").

59. In the Long Branch, New Jersey redevelopment project discussed *supra* note 33, for example, residents of single-family units which were to be replaced were offered thirty to forty percent premiums over fair market value, discounted prices on units in the redeveloped area, and $5,000 per year to cover property taxes and maintenance fees for ten years. Interview with Howard Woolley, *supra* note 33.

60. *See, e.g.*, ALA. CODE § 24-2-4 (2006); ALASKA STAT. § 18.55.530 (2006); CAL. HEALTH & SAFETY CODE § 33131 (West 2006); DEL. CODE ANN. tit. 31, § 4520 (2006); IND. CODE ANN. § 36-7-14-15 (West 2007); MASS. GEN. LAWS ANN. ch. 121B, § 18 (West 2006).

accessible and transparent to the public.[61] Many states formalize this process through the requirement that agencies appoint or cause the election of formal area committees representing residential and commercial renters or owners of the affected area. Councils adopt these plans in open, noticed hearings. This public participation is usually real, not token; the public process often takes years and alters fundamentally the shape of ultimate product.[62] Some state statutes limit residential condemnation unless adopted redevelopment plans expressly authorize its use. In California, for example, no residential condemnation may proceed unless the applicable redevelopment plan so specifies. Unless an elected project area committee of local residents and businesses approves the plan containing the express residential condemnation power, the local government must muster a two-thirds vote of its governing body to adopt the plan.[63]

Justice Stevens' *Kelo* opinion says nothing of this, leaving the reader with an impression of the plaintiffs as casualties, rather than members of a body politic with participatory rights. The majority does not tell us that Ms. Kelo could have participated in forming and adopting the redevelopment plan, or even whether she did.[64] In fact, the City of New London held extensive public hearings, at which some of the *Kelo* plaintiffs participated.[65] The opinion does not tell us that in many states the condemnation could not have proceeded without the likely consent of a committee representing Ms. Kelo and her neighbors.[66] For the dissents, the omission of this information is consistent with overriding concern for the property owners' rights; as discussed below,[67] the dissenters' formulation of individual rights proceeds without the reference to the intention or nature of the subject governmental program, so a right to

61. *See, e.g.*, ALASKA STAT. § 18.55.530(h) (requiring a public hearing prior to a government body adopting a redevelopment plan); CAL. HEALTH & SAFETY CODE § 33333.2 (requiring a public hearing if a redevelopment plan is amended); Del. Code Ann. tit. 31, § 4524 ; Ind. Code Ann. § 36-7-14-17.5(a) ; MASS. GEN. LAWS ANN. ch. 121B, § 48.

62. These observations are based on the author's practice in the field and conversations over time with other practitioners. For similar conclusions, see Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 223-25 (1999) (discussing historical animosity toward including public participation in redevelopment projects for fear of delay and possible developer abandonment; however, modern approaches consider such participation invaluable for successful implementation of a brownfield project).

63. CAL. CIV. PROC. CODE §§ 1245.235, 1245.240 (West 2005); *see also* DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

64. The relevant statute governing citizen participation in the *Kelo* case provides for standard due process protections. *See* CONN. GEN. STAT. § 8-127 (2006). The statute does not expressly require landowner participation in redevelopment, as the redevelopment statutes of other states do. *See, e.g., supra* text accompanying note 63 (outlining California's framework).

65. E-mail from Tom Londregan, Dir. of Law, City of New London, to Mark Beaudoin (July 26, 2006, 11:44 EST) (on file with the author).

66. *E.g.*, CA. CIV. PROC. CODE §§ 1245.235, 1245.240.

67. *See infra* Part IV.C.

participate in the program's formulation is of no value. For the majority the omission of information about public participation, however, is difficult to fathom.

D. The Characterization of Redevelopment in the Kelo Dissents Reflects the History of Redevelopment, Not Its Present

How is this portrait of modern economic redevelopment, with its largely infrequent, nuanced, and well-compensated use of eminent domain, consistent with the dark picture of redevelopment painted by the dissents[68] and their amici?[69] The answer lies in the evolution of redevelopment during the last half of the twentieth century. Critics, including the *Kelo* dissenters, confuse redevelopment's past with its present.

Redevelopment's past presents us with a contradictory and complex record. Perhaps nothing better embodies the dialectic of modern social experience than the last century and a half of the deliberate, idea-driven and government-directed remake of cities, a history marked by the simultaneity of good and evil, of civic accomplishment and social destruction, and by the combination of great ambition and great corruption.[70]

This endeavor commenced well before the twentieth century, and has produced much of what we love in cities—their great boulevards, parks and public spaces, monuments, museums, stadiums, and arenas. In this regard, the city of Paris, France is iconic. In the nineteenth century, George Eugene Haussmann, the prefect of the Paris region, transformed the city from a medieval agglomeration of tiny sub-communities into modern Paris with its celebrated boulevards and public spaces.[71] American planners and landscape architects arrayed streets and parks in patterns that imitated this style throughout the United States, most

68. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) (stating that all private property is now vulnerable to government takings and citing several cases where local government has taken property for economic development); *id.* at 522 (Thomas, J., dissenting) (suggesting that the racial discrimination that occurred during the urban renewal period of the 1950s and 1960s will happen again because of the Court's decision).

69. *See, e.g.*, Brief of Better Government Ass'n et al. as Amici Curiae Supporting Petitioners at 4, *Kelo*, 545 U.S. 469 (No. 04-108) (calling the use of eminent domain for economic development "widespread" and "abus[ive]"); Brief of Jane Jacobs as Amici Curiae in Support of Petitioners at 2, 19–20, *Kelo*, 545 U.S. 469 (No. 04-108) (arguing that eminent domain for economic development benefits politically connected private interests to the demise of less powerful groups such as minorities and the poor).

70. For an excellent introduction to the modern experience of intentional city-making in light of the dialectic of modern experience, see MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR 150–51, 164–71, 290–312 (1982).

71. *Id.* at 150–52. *See generally* A.E.J. MORRIS, HISTORY OF URBAN FORM 144, 158 (2d ed. 1979) (providing an in-depth history of the restructuring of Paris).

notably in Washington, D.C.[72] In this country during the last century, city builders such as Robert Moses and other Haussman disciples undertook heroic infrastructure projects[73] and massive neighborhood redevelopment to clear slums, remove urban features they believed constituted blight, and create the city that they, urban planners, real estate visionaries, and housing reformers, hoped would eliminate urban poverty and transform urban life. These efforts provided millions of new housing opportunities for the poor and middle classes, and produced the transportation infrastructure that allows metropolitan areas to exist as economic and cultural unities.[74]

Yet, and it is a giant "yet," this remaking of cities destroyed as it created. To remake Paris, Haussmann displaced tens of thousands of people and destroyed entire neighborhoods. In this country, Moses and other redevelopers displaced hundreds of thousands of urban residents and thousands of local businesses. They divided communities with new highways and other infrastructure. Many damaged fundamentally the cities they wished to conceive.[75] Adding to the critique of redevelopment, graft and manipulation by economic elites permeated the effort. Redevelopment became a tool that isolated the poor as often as it meliorated their condition.[76] It also had a racial dimension: politicians used urban redevelopment and the associated tool of condemnation as a

72. *See, e.g., id.* at 279 (describing, in part, Parisian urban design influence over Washington, D.C., planner Major Pierre Charles L'Enfant (1754–1825)).

73. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974) (detailing the political as well as personal life of Robert Moses). It should be noted, especially in light of the *Kelo* dissenters' acceptance of condemnation for public uses such as roads, that many of the largest displacements and many of the racially motivated condemnation efforts supported highway building projects, certainly a form of economic redevelopment, but not the Court's vision of economic development.

74. *See id.*; John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive,* 68 ALB. L. REV. 865, 882 n.98 (2005) ("[Robert Moses] subsequently became the key figure in the rebuilding of New York City and its suburbs through the creation of a modern highway and bridge system."); *Paul Goldberger,* Emminent Dominion: Rethinking the Legacy of Robert Moses, THE NEW YORKER (February 5, 2007); Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape,* 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 126 (1997) (discussing Moses' construction of roadways connecting various parts of metropolitan New York City, including relatively easy access to local recreational designations, like Long Island's beaches); *see also* G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios,* 8 ALB. L. ENVTL. OUTLOOK 37, 46–47 (2002).

75. *See, e.g.,* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICAN REBUILDS CITIES 29 (1997) (stating that urban renewal displaced in excess of 400,000 families and 39,000 businesses).

76. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1, 6 (2003) (asserting that renewal programs were controlled by elite groups of real estate interests and politicians who aimed to change the urban landscape through eminent domain).

device to move entire African-American communities to more isolated areas or settle property disputes adversely to African-American owners.[77]

In San Francisco, for example, the Yerba Buena neighborhood, two blocks south of the central business district, provided housing and community to transient workers, racial minorities and recent immigrants. For its residents, Yerba Buena possessed the same sort of history, context, and meaning that all communities provide their inhabitants.[78] City government, assisted by, or as some argued, on behalf of local real estate developers, extended the downtown and displaced over 4,000 residential units, and in the process destroyed the community. These scenarios were repeated in Boston, New York, Chicago and most other major American cities.[79]

Some of these projects created monuments to civic greed and corruption, while others created positive features out of abusive policies. The unassisted market would probably have replaced the Yerba Buena community with downtown office uses. Tenement owners would have sold to the highest bidder leaving residents to relocate on their own. Instead, redevelopment created, in the midst of what is now downtown, a full-block central park surrounded by a mix of hotel, office, and retail-entertainment facilities, a children's museum and playground, a modern art museum, and 2,500 housing units with more than 1,400 dedicated to low- or moderate-income residents.[80] Alone, the unassisted market would not have produced these beneficial community uses nor provided partial relocation assistance.

While these social contradictions will continue to some extent to plague city reconstruction, redevelopment has evolved: twenty-first-century redevelopment differs fundamentally from that of 1960. The abuses of redevelopment and extensive use of condemnation[81] produced a

77. *See* FRIEDEN & SAGALYN, *supra* note 75, at 28 (stating that 63 percent of the families displaced by urban renewal from 1949 to 1963 whose race was known were nonwhite); 12 THOMPSON ON REAL PROPERTY § 98.02(e) (Thomas ed. 2004) (noting that urban renewal had been called "negro removal"). For an early, critical analysis of urban renewal, see MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964).

78. CHESTER HARTMAN, YERBA BUENA: LAND GRAB AND COMMUNITY RESISTANCE IN SAN FRANCISCO 93–98, *passim* (1974).

79. See id., passim; HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS *passim* (1st ed. 1962); HERBERT J. GANS, THE URBAN VILLAGERS *passim* (updated and expanded ed. 1982).

80. S.F. Redevelopment Agency, Yerba Buena Center, http://www.sfgov.org/site/sfra_page.asp?id=5610 (last visited Jan. 27, 2007).

81. *See* Robert Moses, *What Happened to Haussmann*, ARCHITECTURAL FORUM, July 1942, at 57–66 (writing critically of the displacement and destruction of communities caused by George Eugene Haussmann's nineteenth-century transformation of Paris); *see also* BERMAN, *supra* note 70, at 150–51 ("The new construction wrecked hundreds of buildings, displaced uncounted thousands of people, destroyed whole neighborhoods that had lived for centuries."); CARO, *supra* note 73, at 764 (discussing Moses' increasing titles and power in mid-twentieth-century New York).

countermovement of equal scope and complexity. As is the case with both public and private social efforts in a democracy, the endeavor became more pragmatic as stakeholders organized and developed sophisticated responses. In San Francisco, for example, the Yerba Buena experience produced two decades of reaction, resulting in reform of the redevelopment agency and the redevelopment process, and reformulation of the underlying project.[82] This is typical—redevelopment has changed fundamentally in the last half century, something neither the dissenting *Kelo* Justices nor their supporting amici recognize.

Residents and small-business owners displaced by condemnation initiated a reform movement that grew to include academics, organizers, and attorneys in the New Left who documented the socioeconomic and racial impacts of redevelopment and used litigation as a tool for land use advocacy.[83] Concepts of city evolved as well, as intellectuals in the planning community advocated for preservation or imitation of many of the physical characteristics that redevelopment as practiced at the time tried to replace. Jane Jacobs, perhaps the most eloquent and certainly the most influential of these writers, began the process with her excoriation of the City Beautiful and Modernist movements that had inspired both private sector developers as well as Moses and other practitioners of redevelopment at the time. In her prescient 1961 classic, *The Death and Life of Great American Cities*, she detailed the social, economic, and aesthetic virtues of the traditional dense urban fabric and street grid, and attacked "slum clearance" redevelopment.[84] In the ensuing three decades, a complex relationship between neighborhood preservationists and the environmental movement brought many large urban redevelopment and infrastructure projects to a standstill. Projects stalled during protracted litigation. City councils and redevelopment boards faced new community coalitions, sometimes changed position, and sometimes changed composition.[85]

Commencing in the late 1960s, and gathering strength in the 1970s, these efforts altered the face of redevelopment. Neighborhood-based

82. *See* HARTMAN, *supra* note 79, *passim* (telling the story of the reformulation of the Yerba Buena Center project).

83. *See, e.g., id.*; JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965).

84. JACOBS, GREAT AMERICAN CITIES, *supra* note 83. Ironically, she seems entrained in the very redevelopment she attacked, unable to appreciate the reform that she herself helped initiate, and shortly before her death authorized the filing of an amicus brief in her name on behalf of the *Kelo* plaintiffs. *See* Brief of Jane Jacobs, *supra* note 69.

85. Hartman, *supra* note 78, *passim*; Greer, *supra* note 83. *See generally* RUTHERFORD H. PLATT, *Land Use and Society: Geography, Law, and Public Policy* 177–206 (rev. ed. 2004) (discussing how post–World War II critics of urban sprawl, fragmenting inner cities, along with the civil and environmental rights movements, began changing how communities approached redevelopment and infrastructure projects).

community development groups, which emerged in the 1960s, shifted the focus of urban renewal from blight elimination to improving education, health, and employment and creating housing.[86] State legislatures amended redevelopment and economic development statutes to institutionalize representation of local businesses and residents in the formation of redevelopment plans. For example, in 1975 Texas amended its 1957 Urban Renewal Law to focus on improving the living and economic conditions of low-income residents through community development plans.[87] Community group members gained memberships on redevelopment agency commissions.[88] Politics and negotiation replaced condemnation as the preferred implementation device.

Sensitized by this altered political and intellectual landscape, cities became reluctant to undertake large efforts dependant on the exercise of eminent domain to relocate a significant population. Projects became smaller and more carefully crafted to accommodate diverse community interests.[89] Public agencies limited condemnation to selective use against unanticipated holdouts. Some states passed statutes to make residential condemnation difficult without the consent of the affected community. Many city councils took condemnation *de facto* off the table.[90]

It is important to understand that these trends, while predominant, are far from uniform. The trend toward more consensually developed projects does not eliminate the potential for abuse. Recent political trends and tax limitations may have weakened the independence of local government at the same time as the power and sophistication of urban economic elites elevated their capacity to bend government to their interests.[91] Race continues to play a role in targeted redevelopment.

In selected locations economic redevelopment projects still involve substantial condemnation of functioning residential areas. Some contend that recent projects proposed in New York City represent a Robert Moses revival. They argue that the Manhattan West Side, Bronx Terminal Market, and Brooklyn sports facility redevelopment projects

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86. *See* KOEBEL, *supra* note 27, at 19–20.

87. *See* Texas Community Development Act of 1975, 1975 TEX. GEN. LAWS 2058 (codified as amended TEX. LOC. GOV'T CODE ANN. §§ 373.004, 373.006 (Vernon 2005)).

88. See *supra* text accompanying note 63 for a description of California's scheme.

89. *See* KOEBEL, *supra* note 27, at 21 (emphasizing that the political and social costs of urban renewal discouraged government from undertaking large-scale redevelopment efforts of residential areas but that smaller, locally initiated projects continued).

90. *See generally* STEVEN J. EAGLE, REGULATORY TAKINGS § 13-9(b) (2d ed. 2001) (discussing state legislative acts from the late 1990s promulgated to protect private property interests); *see also* National Conference of State Legislatures, Eminent Domain, http://www.ncsl.org/programs/ natres/emindomain.htm (last visited Jan. 27, 2007).

91. *See, e.g.*, Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. MICH. ST. U.-DETROIT C. L. 901, 905 (2001) (disapproving of takings for economic development because of the increased ability of corporations to influence local government).

reflect early days of urban renewal because of the prominent use of eminent domain, significant displacement of residents and business, and limited citizen participation.[92] However, just as many observers contend citizen participation has been effective.[93] Recent pleas from Manhattan community groups for the city to intervene in the sale of much of Stuyvesant Town and Peter Cooper Village, two lower-middle-class working communities, by one private owner to another, demonstrate the complexity of the picture. Community groups argued that since eminent domain originally created the community, the city should reassert its role as economic redeveloper to insure that the community remains affordable.[94]

Finally, some have lamented the resulting contraction of redevelopment ambition, contending that a lack of investment in large infrastructure projects that inevitably involve condemnation will make cities unlivable. Some observers of city economic development characterize this transformation as the end of the era of major public "megaprojects."[95] Others welcome these trends as a sign of respect for neighborhood life and the environment. Nonetheless, redevelopment has in general become less ambitious, more consensual, and much less likely to employ condemnation.[96] Overall, redevelopment continues at a smaller scale, and condemnation remains a valuable, if somewhat rarely utilized, tool.

Much of the recent round of redevelopment critique stems from failure to acknowledge this history. Most of the critical literature cited by property rights advocates dates from the early history of redevelopment, and modern critics cite sources from the same period and omit discussion of the reforms.[97] The *Kelo* opinions suffer from the same defect. It does

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92. *See* Susan Fainstein, *The Return of Urban Renewal: Dan Doctoroff's Grand Plans for New York City*, 22 HARV. DESIGN MAG. 1 *passim* (2005).

93. *See, e.g.*, Robert D. Yaro, *Plans for Manhattan's Far West Side*, 22 HARV. DESIGN MAG. 15, 15–17 (2005) (finding the Far West Side plans have been subjected to much debate, though two of the major proposals in the plans have largely evaded local legislative review).

94. *See* Charles V. Bagli, *$5.4 Billion Bid Wins Complexes in New York Deal*, N.Y. TIMES, Oct. 18, 2006, at A1.

95. For an introduction to megaprojects and their performance record, see BENT FLYVBJERG ET AL., MEGAPROJECTS AND RISK: AN ANATOMY OF AMBITION 1–7 (2003).

96. Surveys to the contrary are unreliable because of the researcher's bias. All large projects involve controversy; surveys undertaken for partisan purposes amass alleged trends by taking one consistent view of each project. One such survey is cited uncritically by Justice O'Connor in her *Kelo* dissent. Kelo v. City of New London, 545 U.S. 469, 503 (O'Connor, J., dissenting) (citing DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003)). For a critical analysis of this report, see ROBERT DREHER & JOHN D. ECHEVERRIA, *supra* note 21, at 38.

97. *See, e.g.*, HARTMAN, *supra* note 78; GANS, THE URBAN VILLAGERS (1st ed.), *supra* note 79, at 281–335; GANS, THE URBAN VILLAGERS (updated and expanded ed.), *supra* note 79, at 323–46 (discussing the redevelopment of Boston's inner city neighborhood, the West End);

not appear that the Justices know much about this history. The difference among them lies in their reaction to this lack of knowledge. The majority refuses to take sides, seeking refuge in precedent.[98] As discussed above, omission of historical context is unfortunate because public opinion required more than a tepid defense of redevelopment to justify the Court's decision. The majority opinion could have traced the history and evolution of redevelopment, but it did not. Nothing in the opinion alerts the reader to the decline in condemnation, nor to all the ways in which condemnation of the Kelo and Dery houses is an anomaly in this country. Appellate opinions, especially in controversial Supreme Court cases, should consist of more than legal holding and decision; they must give context, breadth and depth to their reasoning. To the extent that the text of any Supreme Court decision matters, such a full explanation could have meliorated the popular and political reaction to the case.

The dissents reflect a more anachronistic tendency, voicing complaints based on redevelopment's past without acknowledging its present. Justice Thomas, for example, refers to redevelopment as "negro removal,"[99] without no mention that the phrase became prevalent in a period of reaction to redevelopment as practiced in the 1960s when condemnation displaced African-American neighborhoods without corresponding relocation or housing benefits. He thus fails to confront the reforms of the last forty-five years. He does not discuss the federal and state legislation requiring relocation to housing of similar quality and size. He makes no mention of the studies that show that condemnees often upgrade their housing. Of special importance, Justice Thomas fails to note that today, redevelopment is responsible for the production of a significant portion of all the low- and very low-income housing in our cities.[100] Neither of the dissents explains that federal rules require one-for-one replacement of units when a redevelopment project removes a

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Kanner, *supra* note 21, at 365–75, nn.166, 169 & 173 (suggesting that the Court's decision in *Kelo* will result in widespread abuse of the eminent domain power and basing this conclusion on the historical misuse of condemnation during 1950s and 1960s). Kanner provides little current data suggesting that local government is misusing condemnation for redevelopment to the detriment of any disadvantaged group. Much like the Justices in *Kelo*, Kanner does not recognize that the use of eminent domain as a tool for redevelopment has changed significantly since the 1950s. *See id.* at 374 n.189.

98. *See Kelo*, 545 U.S. at 490 (noting the important and legitimate public debate on the issue, but claiming that "[b]ecause over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek."); *see also* Greenhouse, *supra* note 8 (quoting Justice Stevens' speech on *Kelo*).

99. *Kelo*, 545 U.S. 469 at 522. (Thomas, J., dissenting).

100. This observation is based on the author's three decades of experience in the field. *See also, e.g.*, DEBORAH L. MYERSON, URBAN LAND INSTITUTE, 3 ULI COMMUNITY CATALYST REPORT, BEST PRACTICES IN THE PRODUCTION OF AFFORDABLE HOUSING 7–8 (2005) (providing examples of mixed-income housing projects in Baltimore and Pittsburgh provided by redevelopment).

federally assisted housing unit, unless there is already a sufficient supply of affordable housing in the area.[101]

Justice O'Connor implies that the plaintiffs were victims of corporate power, but does not tell us that in the last four decades the states have enacted reform legislation to provide safeguards that enhance the predictability and fairness of governmental behavior during redevelopment and to provide for citizen participation. Some examples of these state reforms illuminate their breadth. California's process has already been documented, but most other states have safeguards to protect an affected landowner's rights if her property is acquired through eminent domain for redevelopment.[102] In Texas, a municipality can prepare a redevelopment plan only if it makes a finding of blight, designates an area as appropriate for urban renewal because redevelopment is necessary to further some public purpose, and a majority of voters approve the plan.[103] Moreover, if land is taken through eminent domain, the original owner has first priority to repurchase property in the redevelopment area.[104] Michigan also requires citizen involvement. Redevelopment plans must include a provision on creating and involving a community advisory group composed of representative residents of the redevelopment area who will be "consulted throughout all stages of the planning of the redevelopment so that the desires of residents shall be incorporated into the plans for the area to the extent feasible."[105] Michigan requires that before land can be acquired for redevelopment, a master plan must be adopted designating an area as blighted; and the city must designate district areas for which citizens' district councils of between twelve and twenty-five residents of the affected community will be formed and consulted by the local legislative body.[106]

It might be contended that these omissions of contextual information merely reflect a tendency by Justice O'Connor and her fellow dissenters to limit their discussion to the perceived abuses of eminent domain facing them in the case. Much of the law concerning the early amendments to the Constitution naturally addresses abuses that may be the exception, not the rule. But most of the enunciated doctrines stop the abuse without destroying the underlying social endeavor. The warnings the Court required in *Miranda v. Arizona*[107] may complicate law enforcement. Yet no one would suggest that *Miranda* outlaws law enforcement.

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101. 24 C.F.R. §§ 42.301, 42.375 (2006).
102. *See supra* text accompanying note 63; *see also* BEATTY ET AL., *supra* note 63, at 89, 136.
103. TEX. LOC. GOV'T CODE § 374.011(a) (Vernon 2006).
104. *Id.* § 374.017(b)–(c).
105. MICH. COMP. LAWS § 125.904(1)(f) (2006); *see also id.* § 125.74(1), (3)(a), (4)–(6), (9)
106. *Id.* § 125.74(1), (3)(a), (4)–(6), (9).
107. 384 U.S. 436 (1966).

The *Kelo* dissenters however, would, outlaw the strategic use of condemnation for economic redevelopment in all cases, not just in those situations where abuse might be present. As discussed in the next section, the threat or the exercise of eminent domain is essential to economic redevelopment. If the dissenters prevailed, much of the economic redevelopment in the country, with its benefits to center cities and the poor, would cease. The dissents have taken an extreme position in the long, complex debate among thousands of actors, over the fate of American cities, a role their factual, contextual, and historical omissions demonstrate they are not equipped to undertake.

II. THE IMPORTANCE OF EMINENT DOMAIN DESPITE ITS RARE USE: THE HOLDOUT

In a statement made largely for rhetorical effect, Justice O'Connor says, "[p]etitioners are not holdouts; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle."[108] This facile remark glosses over much of the essence of redevelopment.

The authors of modern, government-assisted economic redevelopment sought a specific solution to land use market failure. A century of trial-and-error approaches to the stubborn persistence of economic decline and social impoverishment in large areas in central cities has led both the public and private sectors to conclude that a major obstacle to economic revitalization of urban cores is "over-subdivision," where old land use patterns leave an artifact of multiple small lots under different ownerships. The unassisted market, even over time, cannot assemble these lots into shape and size that would accommodate contemporary land uses.[109] If the private sector attempted to redevelop such a fragmented array of lots, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price. Given the tight margins of development projects, such a "holdout" would often render the redevelopment financially infeasible,[110] and the effort would collapse. Thus the holdout presented a major obstacle to private city-center revitalization.

Redevelopment, as conceived in the 1940s and 1950s, was an attempt to solve the land-assembly problem. The earliest legislative proposals for

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108. Kelo v. City of New London, 545 U.S. 469, 495-96 (2005) (O'Connor, J., dissenting).

109. *See* Farris, *supra* note 24, at 13 (emphasizing that a major obstacle to infill development is assembling property because of the great number of transactions necessary for one large lot and the likelihood of holdouts).

110. *See* Merrill, *supra* note 21, at 74–75. Merrill explains,

> Without an exercise of eminent domain, . . . [e]ach owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.

federal urban renewal aimed to help local governments revitalize their communities by creating redevelopment agencies with the power to acquire land (through eminent domain and outright purchase), and assemble acquired holdings into economically functional parcels for redevelopment consistent with the applicable redevelopment plan.[111]

The power of eminent domain prevents holdouts from derailing valuable revitalization efforts. Although condemnation is rare and expensive, the latent authority to condemn encourages the transactions necessary to effectuate the plan for redevelopment. Without condemnation, a single holdout knows it can frustrate an entire project. The expense of condemnation gives some bargaining power to the holdout,[112] but the legal availability of condemnation ensures that the sale will occur at something approaching market value. If the exercise of eminent domain appears coercive, it is because it *is* coercive, and that is the heart of the concept.

Some observers and *Kelo* amici contend that options other than eminent domain can address the holdout problem. For example, the private sector uses secret buying agents to acquire substandard parcels for assembly into larger holdings for development. These sorts of activities are, however, inimical to government, and if employed in the public context, would reactivate the appearance, if not the substance, of the corruption and collusion that contaminated redevelopment's past.[113] Also, many of these private techniques work more effectively in the suburban context of homogenous development than in the complex urban context where multiple ownerships of small lots creates the need for redevelopment.

Two recent examples, more representative of redevelopment today, illustrate exercises of eminent domain that prevented holdouts from thwarting important redevelopment efforts. These present a very different picture than the facts presented by any of the *Kelo* opinions, but they are representative of city-center public-private redevelopment. These two public-private collaborations involved a mix of public and private uses, each pivotal to revitalization of the city's moribund and deteriorated downtown waterfront. In the end, each would have failed without the exercise or the threat of exercise of eminent domain.

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111. Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation*, *in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 72–79 (James Q. Wilson ed., 1966).

112. *See* Merrill, *supra* note 21, at 80 (noting that because of the high transaction costs of condemnation, government prefers, and usually succeeds in, assembling land through negotiations in the market).

113. *But see* Kelly, *supra* note 21, at 3 (citing STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124–25 (2004) (arguing that the traditional justification for eminent domain—the holdout—is a fiction)). Kelly asserts that takings for the benefit of private parties are unnecessary because private parties can work through secret buying agents to hide their deep pockets and avoid the holdout problem. *Id.*

A. The Ferry Building

The Ferry Building in San Francisco sits at the intersection of Market Street, the city's major arterial, and the Embarcadero, a boulevard running along San Francisco Bay.[114] The Ferry Building's imposing Beaux Arts structure with a colonnade, two-story internal gallery, roof supported by iron buttresses, and topped by a landmark clock tower, served for nearly a century as the hub of the city's passenger ferry service.[115] Commuters landed on its edge, purchased tickets, and shopped.[116] Maritime-related offices occupied much of the building.[117] By the 1990s the building was in disrepair, a condition repeated on pier after pier along the waterfront as transportation and shipping needs changed.[118] Divided from the immediately adjacent downtown office-core by an elevated freeway, the waterfront languished for more than two decades,[119] presenting a classic case of real estate free market failure. Despite the ideal waterfront views and excellent transportation facilities, piers lay vacant or underused, offered for lease at lower and lower prices.[120]

In the 1990s, the city of San Francisco, through its Port Authority and Redevelopment Agency, embarked on an ambitious redevelopment plan to revitalize this waterfront.[121] The city invested federal, state, and city funds to rebuild the dilapidated waterfront Embarcadero roadway, creating a palm tree-lined pedestrian, rail, bus, and automobile multi-modal boulevard.[122] The city built parks and negotiated for a new cruise terminal. A new baseball park, privately financed and built but supported by city tax-increment financing, anchored the redevelopment at the

114. S.F. BAY CONSERVATION & DEV. COMM'N, SAN FRANCISCO WATERFRONT: SPECIAL AREA PLAN 17 (2000) [hereinafter SPECIAL AREA PLAN].

115. John King, *Project Diary: Surviving Controversy, SMWM's Quiet Mix of Old and New Has Returned San Francisco's Ferry Building to the Center of Urban Life*, ARCHITECTURAL RECORD, Nov. 2004, at 1; *see* PORT OF SAN FRANCISCO, SAN FRANCISCO FERRY BUILDING, REQUEST FOR DEVELOPER QUALIFICATIONS AND PROPOSALS 5, 7 (1998) [hereinafter RFP].

116. King, *supra* note 115, at 1 (noting that there were about 100 million passengers per year using the terminal in the early 1900s).

117. *Id.*; Telephone Interview with Diane Oshima, Asst. Deputy Dir. of Planning & Dev. for the Port of San Francisco (Feb. 14, 2007).

118. *See* King, *supra* note 115 (explaining that by the 1940s, ferry service was almost completely replaced by the Bay and Golden Gate Bridges).

119. *Id.* at 2.

120. *See id.* (describing the waterfront as "derelict").

121. *Id.*; interview with Diane Oshima, *supra* note 117.

122. Interview with Diane Oshima, *supra* note 117; RFP, *supra* note 115, at 6, 9. For a look at the design goals for each area of the project, including the Ferry Building itself, Rincon Park, and the piers, see S.F. PORT COMM'N, THE PORT OF SAN FRANCISCO, WATERFRONT DESIGN & ACCESS: AN ELEMENT OF THE WATERFRONT LAND USE PLAN 14–17 (1997, republished June 2004) [hereinafter WATERFRONT DESIGN & ACCESS PLAN].

southern end.[123] At the geographic and design center of this effort lay restoration plans for the historic Ferry Building itself.[124]

This public effort comprises what the *Kelo* Court calls "economic development." Years of committee work and public hearings produced a design:[125] the renovated Ferry Building would house ferry passenger facilities and an urban marketplace occupied by small Bay Area food businesses and restaurants.[126] The remodeled space on the upper floors would provide office or other commercial space[127] with unobstructed waterfront views, a high-end product the city hoped would rent at a sufficient premium to cover the cost of the historic renovation, the public spaces, and make up potential deficits from the small-scale, locally based retail operation.[128]

The city and its port carried out the proposed redevelopment. Today, the renovated San Francisco waterfront is one of the most heavily used public spaces in the Bay Area. Market-rate and low-income housing is under construction.[129] Tens of thousands of workers and tourists walk or ride transit along the Embarcadero to ball games on summer days and evenings.[130] The Redevelopment Agency has constructed new market-rate and low-income housing, and restaurants occupy space in the renovated Port space. Private development followed the public-private redevelopment; private developers have built thousands of new residential apartments and condominiums along the Embarcadero and near the ball park.[131] The Ferry Building itself, restored and rebuilt, has

123. WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 97 (laying out the design criteria for the Rincon Park and promenade); RFP, *supra* note 115, at 6 (noting that the ground lease for the new ballpark was "negotiated and executed" with the Port). See *infra* text accompanying note 245 for a brief description of tax-increment financing.

124. WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 95 (naming the Ferry Building as part of the National Registry of Historic Places).

125. *See* RFP, *supra* note 115, at 3–4 (explaining the measures taken by the Port Authority prior to seeking a developer for the project, including predevelopment and feasibility analyses, environmental and historic approvals, and extensive work with the public which led to their approval of the project in a ballot proposition).

126. King, *supra* note 115, at 2–3; WATERFRONT DESIGN & ACCESS PLAN, *supra* note 122, at 82–83.

127. *See* RFP, *supra* note 115, at 10; Interview with Diane Oshima, *supra* note 117.

128. *See* King, *supra* note 115, at 3 (noting that all of the office and retail space is fully leased).

129. S.F. REDEVELOPMENT AGENCY, MAJOR PROJECT SUMMARY 10, *available at* http://sfgov.org/site/uploadedfiles/sfra/Projects/MajorProjectSummary.pdf (last visited Jan. 15, 2007) [hereinafter MAJOR PROJECT SUMMARY] (explaining that in the Rincon Point area, located just south of the Ferry Building, 2,576 residential units are being built with 24 percent of those building being set aside for very low-, low-, and moderate-income units).

130. *See* King, *supra* note 115, at 3 (stating that locals and tourists are drawn to the area because of the Ferry Building's "new shine").

131. For an area-by-area summary of the number of units of affordable housing produced along the Embarcadero because of the San Francisco Redevelopment Agency's efforts, see MAJOR PROJECT SUMMARY, *supra* note 129.

won national planning awards and local acclaim,[132] and is today in heavy use as ferry commuters mingle with downtown residents in the urban market. The project finances appear to work, though, at this time of this writing, they have a smaller margin and less certainty than the city and the project developer would prefer.[133]

Yet the Ferry Building project would never have happened without the power of eminent domain. For many years, an old San Francisco institution, the World Trade Club, shared the dilapidated third floor with the Port staff under a long-term lease from the Port.[134] As the plans for the renovation matured, it became clear that the World Trade Club had to relocate to allow office space to be located in the upper floor. Such premium office space would generate most of the revenue as the hoped-for economic engine of the revitalization project. The Port offered the World Trade Club generous terms and relocation assistance. The Club refused, not for financial reasons, but rather because it simply did not want to move, the same "principle" asserted by Ms. Kelo.[135]

No amount of patient negotiation or relocation efforts would change the stance of the Club's board of directors. And beyond a certain point, financial inducements, even if they had been effective in convincing the Club to move, became too costly for the project's fiscal margin. Finally, the Port moved to condemn the lease.[136] This government action spurred the Club to compromise in a settlement: the Port moved the Club into comparable quarters nearby, and the Ferry Building project moved forward. Site assembly in this situation meant acquisition of the leasehold. None of this would have be possible if the regime advocated by the *Kelo* dissents had prevailed at the time. The site assembly, the historic renovation, and the consolidation of the Embarcadero renovation project would all have failed without the power of eminent domain.

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132. Press Release, Port of San Francisco, Port of San Francisco Honored with Prestigious Awards for Public Beautification Projects (Nov. 4, 2003), *available at* http://www.sfgov.org/site/uploadedfiles/port/news_events/press_releases/2003/news110403.pdf (describing the many awards the City of San Francisco has won for its revitalization of the Ferry Building, including the National Trust for Historic Preservation award).

133. Memorandum from Harvey M. Rose, Budget Analyst, Bd. of Supervisors, City & County of San Francisco, to Chris Daly and the Bd. of Supervisors, City & County of San Francisco 5 (Apr. 26, 2004), *available at* http://www.sfgov.org/site/uploadedfiles/budanalyst/Reports/sfport/ExecutiveSummary.pdf.

134. *See* RFP, *supra* note 115, at 12.

135. *See* Kelo v. City of New London, 545 U.S. 469, 496 (2005).

136. See Minutes of the Board of Supervisors, City and County of San Francisco, Nov. 13, 2000, *available at* http://www.ci.sf.ca.us/site/bdsupvrs_page.asp?id=11828 (authorizing, by resolution, the acquisition of the World Trade Club by eminent domain).

B. The Gap Headquarters

Nearby on the same Embarcadero lies another version of economic development, more private, yet just as dependant on the use of eminent domain for redevelopment. The example illustrates how redevelopment enlists both land use planning and strategic economic planning in the revitalization effort. The Gap clothing company, headquartered in San Francisco since the company's inception, found its corporate headquarters physically insufficient and unsuitable for its changing corporate campus needs. A long and fruitless search for a downtown location of sufficient size led the company to determine to leave San Francisco. Faced with the loss of 1,400 jobs downtown, the Redevelopment Agency found a large site for the Gap headquarters on the Embarcadero near the Ferry Building.[137]

The site attracted the Redevelopment Agency because the Gap headquarters would locate more daytime workers within the same waterfront area as the Ferry Building. These workers would populate the planned open spaces during the day, while the new inhabitants of residential buildings in the area would use the parks in the late afternoons and weekends.[138] The Gap workers would also join the area residents in contributing the critical market mass necessary to the success of restaurants and other small retail shops along the waterfront. These retail facilities, rendered economically viable by local clientele, would in turn make the area more attractive to visitors, including tourists arriving on the planned downtown cruise terminal. These are the kind of synergies economic redevelopers think about. The Gap also agreed to help defray some costs of the Embarcadero renovation, and as mitigation for open space impacts, to construct and dedicate to the city one of the park areas on the water's edge as called for in the Port's Waterfront Plan.[139] The Redevelopment Agency successfully negotiated the purchase of most of the land necessary for the project.[140]

Near the conclusion of the land assembly effort, however, the owner of a corner parcel, a strategic 13,600 square feet of the 90,000 square-foot site, suddenly became enamored of his parking lot and refused to accept even a generous above-market price.[141] This was a financial holdout. The project stopped until the Redevelopment Agency condemned the site.[142]

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137. CLIFFORD W. GRAVES, S.F. REDEVELOPMENT AGENCY, REQUEST FOR AUTHORIZATION TO ENTER INTO CERTAIN AGREEMENTS WITH THE GAP 1–2 (Jan. 3, 1995).

138. This was an important consideration as unpopulated parks in urban areas often turn into havens for the homeless—discouraging rather than activating neighboring streets.

139. See GRAVES, *supra* note 137, at 2 (listing the exactions, which include the development of Rincon Park).

140. *Id.*

141. *Id.* at 4.

142. *Id.*

The issue here is not public power in the service of a corporate client; no one contends the Gap could not have found headquarters space elsewhere in another jurisdiction. Rather, public benefits accrued via economic revitalization of a depressed area through investments that stitched together infrastructure investments and strategic private and public uses. Absent the power of condemnation, the project, with all its public benefits, would have failed.

These public-private redevelopment examples from San Francisco tell a different story from the facts in *Kelo.* Yet these successful efforts typify modern public-private economic redevelopment. Agencies assemble vacant or underutilized land, sometimes through the use of eminent domain, to create new public facilities, often in tandem with new affordable housing, producing uses and amenities that reinvent the urban downtown. Millions of Americans live, work, and recreate in these areas. It is these projects, efforts such as the Ferry Building and the Gap headquarters, that the legal approach of the *Kelo* dissents would render impossible to carry out. Not difficult—impossible.

III. THE DISSENT'S DISTINCTIONS BETWEEN PUBLIC AND PRIVATE USE CANNOT FUNCTION IN THE MODERN URBAN REDEVELOPMENT CONTEXT

Broad assumptions concerning the nature of real estate development underlie the *Kelo* dissents, some express and some implied. Most are inaccurate. Fortunately the dissents did not prevail. But in light of the tepid majority and changes in the composition of the Court, they could someday prevail. Moreover, the same misconceptions influence the current debates in Congress and the states over the issue. Some states have already enacted limitations on the use of eminent domain for economic development, and in others legislation or ballot measures have been proposed which would enact to one degree or another the dissenters' position.[143] Some state courts have elected to follow the approach of the *Kelo* dissenters in interpreting takings provisions in their state constitutions.[144] Thus, despite the outcome in *Kelo*, it is important to examine the dissenters' assumptions and lay out the corresponding reality.

The legal case turns on the meaning of "public use" for which eminent domain is constitutionally permissible.[145] Justice O'Connor's

143. *See* sources cited *supra* note 4. For a cogent analysis of one such ballot measure, see Cal. Ctr. for Envtl. Law & Policy, Boalt Hall, Univ. of Cal., *Proposition 90: An Analysis* (Oct. 2006).

144. *See, e.g.*, Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 652 (Okla. 2006); City of Norwood v. Horney, 853 N.E.2d 1115, 1140 (Ohio 2006).

145. *See* Kelo v. City of New London, 545 U.S. 469, 472 (2005) ("The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the *Takings Clause of the Fifth Amendment.*") (citing U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation . . . .")).

dissent parses public use to create three categories. Two, she tells us, are "relatively straightforward and uncontroversial."[146]

First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium.[147]

She characterizes these two categories as "public ownership" and "use by the public,"[148] and this Article will as well. According to O'Connor, condemnation for these uses would be acceptable; condemnation for economic redevelopment would not.[149] Although this distinction possesses the benefit of facial clarity, the characterization of public use so oversimplifies reality that the test becomes dysfunctional in many modern land use settings.

A. "Use-by-the-public": The Problematic Distinction between Public and Private Land Use

Justice O'Connor's public use-private use distinction could not function with respect to many urban redevelopment projects that mix public and private uses in the same project or even the same building. Before discussing the problems with her approach, we must clarify what "use-by-the-public"[150] means to the dissent. Justice O'Connor uses it to mean "available for the public's use."[151] Justice Thomas likewise talks of the public's "legal right to use the property."[152] Justice O'Connor's phrase "often common carriers"[153] would seem limiting, as are two of the three examples (the railroad and public utility). Her stadium example, however, appears to confirm that for her the concept means what it usually means in the land use context; it includes both classic public land uses and private uses operated for a profit and open to the subset of the general public willing and able to pay the price of entry.[154] Such uses include theaters, movie houses, shopping centers, smaller stores, restaurants, hotels, and also perhaps spas and resorts open to the public on day-use basis. Each of these uses serves anyone who pays for the use.

146. *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).
147. *Id.* at 498 (citations omitted).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 521 (Thomas, J., dissenting).
153. *Id.* at 498 (O'Connor, J., dissenting).
154. 2A-7 NICHOLS ON EMINENT DOMAIN, *supra* note 36, at § 7.02[2]–[4] (explaining that the definition of "public use" is unsettled, but recognizing criteria for a proper exercise of eminent domain, such as title not being held by a private party for profit unless the public receives some benefit).

While it is unclear whether the dissent fully considered such uses, this Article assumes the dissenters would accept this common planning meaning of the term "use-by-the-public."[155]

Justice O'Connor would characterize as constitutionally acceptable a condemnation undertaken in order to acquire land for "use by the public." If the land were for use other than by the public, the exercise of eminent domain would presumably violate her rule. Thus her test requires that one know at the time of the condemnation the eventual use of the subject land.

Whatever the doctrinal or social defects of her proposed rule, such foreknowledge might be possible in the traditional zoning universe where land uses are clearly separate from one another, where land serves one use at a time, and thus one is likely to know in advance the redeveloped land use that will eventually occupy land to be condemned. Many Americans, including, one suspects, the authors of the *Kelo* dissents, live in such a relatively simple land use world—one created by "Euclidean zoning," a concept named for the 1926 Supreme Court case which upheld the basic zoning power.[156] Euclidean zoning divides land areas into zones, each of which permits a primary use,[157] such as residential, commercial, or light industrial. In Euclidean zones one could presumably know with some degree of certainty the eventual use of land acquired through condemnation because all land in the area is subject to the same use

155. Many post-*Kelo* proposed legislative responses go beyond the dissents and clearly limit public uses to publicly owned uses. For example, California's voter-rejected Proposition 90, which would have required that the subject property be "owned by the government; an agency other than the condemnor could use it for a public public use, or the property could be leased to another entity for a public use." Cal. Att'y Gen., Proposition 90, Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment. § 19(a)(2), *available at* http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf. With such a definition of public use, the problems discussed in this section would not pertain, although, as discussed in Parts III.B and V, conflict over what really constitutes government occupancy would continue.

156. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). This invention could be just as well named for Euclid himself, the Greek mathematician, credited with the invention of geometry. EUCLID, THE THIRTEEN BOOKS OF EUCLID'S ELEMENTS (Sir Thomas L. Heath trans.), *in* 11 ROBERT MAYNARD HUTCHINS, GREAT BOOKS OF THE WESTERN WORLD ix, ix–x (1952) (biographical note).

157. *See* PETER W. SALSICH JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 377 (2d ed. 2003). The zoning concept also served to reinforce and perpetuate this separation of use in a time when new land use forms began to threaten separated uses. Growing industrial uses crowded against residential areas. In growing nineteenth-century cities, elites found it ever more difficult to escape the crowding and pollution associated with the growing metropolis. Zoning presented itself as a way to preserve the status quo, to keep other uses away from single-family neighborhoods, and to separate classes and races. A narrow majority of the *Euclid* Court had prepared to hold that the residential zoning challenged by commercial uses was per se unconstitutional as a taking of private property. As was probably the case in *Kelo*, the author suspects that the personal experiences of the Justices informed their positions, as a dislike of apartments animates the opinion. *See Euclid*, 272 U.S. at 394.

limitations, some permitted as-of-right and the rest listed as uses subject to conditional approval.[158] It is a closed universe.[159]

Euclidean zoning guided the expansion of our cities through much of the twentieth century.[160] While the automobile and cheap gasoline are the technological and economic parents of suburbia, Euclidean zoning is suburbia's legal progenitor. Much early redevelopment followed these Euclidean patterns, separating uses, replacing dense mixed-use development patterns in urban neighborhoods with uses segregated by zone. Where this crisp geographic separation of uses prevails, Justice O'Connor's proposal to allow condemnation for land "use by the public" could conceivably function; we would arguably know at the time of exercise of eminent domain whether the condemnation would provide a permissible use such as a park, a movie theater, or a skating rink.

The unraveling of the dissent's logic begins with the concept of "mixed use." In the late 1960s, architects, urban planners, and developers began to rethink the development patterns[161] created by traditional Euclidean zoning.[162] These practitioners rejected the use-segregated, monolithic developments of the decades before, and hoped to replicate the development patterns of older cities.[163] They focused on the desirability of mixing uses to create social and economic synergies.[164] The reaction evolved slowly, and included the "new town" concept, and by

158. SALSICH & TRYNIECKI, *supra* note 157, at 377. Specifically, the underlying zoning document maps the zone, and, significantly, provides that within the zone, the primary use is "permitted." Permitted uses are allowed anywhere in the zone as-of-right, without discretionary approval by a planning commission or zoning administrator. The permitted use must still comply with applicable building codes. A few other uses may be allowed as "conditional uses," subject to the complete discretion of a commission or zoning officer. Conditional uses are intended to be allowed only in some specific locations, under some conditions, as specified in a zoning ordinance special-use permit section. *Id.* at 225. For example, a single-family dwelling zone (typically "R-1"), *id.* at 159, designates houses as permitted uses, that are permitted as-of-right. Conditional uses, desired perhaps but only in certain locations, could include schools, small neighborhood-serving stores, and perhaps group homes.

159. Of course, even in such a traditional zone, the true fate of land might be subject to some uncertainty, because the land could be rezoned, or the zoning ordinance or redevelopment plans amended between condemnation and development.

160. *See* SALSICH & TRYNIECKI, *supra* note 157, at 177 (explaining that while local governments were dissatisfied with the rigidity of Euclidean zoning in the post–World War II era, they preserved zoning for the most part and added flexibility through regulation).

161. *See* JACOBS, GREAT AMERICAN CITIES, *supra* note 83 and accompanying text.

162. *See supra* notes 156–160 and accompanying text.

163. *See* Todd W. Bressi, *Planning the American Dream*, *in* PETER KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY xxv, xxv (1994) (calling the New Urbanist movement "a rediscovery of [the] planning and architectural traditions" of early urban development in communities such as Boston's Back Bay and Seattle's Capitol Hill).

164. *Id.* at xxx–xxxv (outlining the design features of a New Urbanist city, such as neighborhoods that accommodate a variety of activities from living to shopping to working).

the 1990s, the "New Urbanist" movement.[165] These advocates for change believed housing types should be intermixed, and housing should be commingled with supportive retail and commercial uses,[166] as well as appropriate types of heavy commercial or light industrial uses, to bring jobs close to housing.[167] This mixed-use framework makes it difficult to apply Justice O'Connor's test because a current parcel will likely be redeveloped in more than one type of use.

New versions of mixed use render the application of Justice O'Connor's approach ever more difficult, if not impossible. Planners and attorneys developed new regulatory approaches to implement these mixed-use concepts. The Planned Unit Development[168] overlay and the Specific Plan[169] supplanted traditional single-use zones, especially in urban centers.[170] These concepts freed private developers to mix uses more intensely than ever and also to invent new land uses that defied the traditional Euclidean categories. Since the early 1990s this trend has accelerated such that most urban center development is mixed-use or new-use.[171] In a quiet land use revolution, many Americans now live, recreate, and work in these new mixed-use or new-use environments. Readers may recognize these examples in their own communities:

- A structure with a public indoor plaza, a food court, and an arcade with shops.
- A single structure that includes a public plaza combined with the lobby to a hotel tower and the lobby of a residential multi-family tower. Restaurants inside the building are open to the public and provide food service to the hotel and take-out service to the

165. KATZ, THE NEW URBANISM, *supra* note 163, at ix (recalling that New Urbanism began in 1991 when mainstream periodicals, such as *The Atlantic*, *Travel & Leisure*, and *People*, began featuring stories on the movement).

166. Bressi, *supra* note 163, at xxx. *See generally* CONGRESS FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM 79–109 (Michael Leccese & Kathleen McCormick eds., 2000) (setting forth the vision of the Congress of New Urbanism for how urban centers and sprawling suburbs should be restored).

167. Bressi, *supra* note 163, at xxxi (illustrating Peter Calthorpe's template for city design, which mixes commercial, office, and residential uses to make jobs, goods, entertainment, and services easily accessible).

168. *See* Salsich & Tryniecki, supra note 157, at 178–79.

169. *See, e.g.*, DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CALIFORNIA LAND USE AND PLANNING LAW 37 (25th ed. 2005) (citing CAL. GOV'T CODE §§ 65450, 65455, 65867.5).

170. *See* SALSICH & TRYNIECKI, *supra* note 157, at 178 (describing Planned Unit Development as "encouraging flexibility" because it allows a developer to mix uses within one small tract and deviate from the density requirements usually imposed under the zoning scheme); CURTIN & TALBERT, *supra* note 169, at 37 (providing that in California, the specific plan is a tool used to implement the general plan for a particular geographic area).

171. Jesse C. Smith, *Vitalizing Urban Property*, URB. LAND, July 2005, at 50, 50 (noting that most city development is mixed use and citing as the newest trends, the union of entertainment and recreation, public transit with housing and retail, and waterfront projects).

residential tower. Gym, massage, and day care are shared by the hotel and residential users, and are open to the public.

- An older, derelict shopping center redeveloped into a mixed-use development (a process called "refill"[172]) that includes public spaces at ground level, on parking podiums, on the mezzanine, and on rooftops, some landscaped. New buildings contain shops, community meeting rooms, a movie theater, and an all-purpose theater available for rent for civic uses, all on ground level. Shops are on the mezzanine, and housing above. All uses share the parking.
- A renovation of an old warehouse into a project with ground-floor restaurants, retail on the first and second levels, low- and very-low-income units on the third floor, and a fourth floor of "loft" live/work residences and penthouse apartments.
- A new shopping center with a central spine, partially indoor and partially outdoor, that is developed as a central park, anchored at one end by a department store and at the other by structure that contains ground floor retail and restaurants, and an entry foyer for a second-floor public library[173] and city hall. Structured parking serves all the uses.
- A structure containing, in one undivided space, a series of small open shops, a restaurant, and a police station.
- A single structure containing offices, shops, and a public school.

Such mixed-use developments are no longer the exception; they are sprouting everywhere—in the center city, suburbia, in "edge cities," in large cities and smaller cities. The public enjoys these models and they consequently become prominent economic success stories.[174] And for that same reason, redevelopment and public-private development aimed at revitalization of distressed areas looks to these models as well.

A perusal of this list both asks and answers the obvious question raised with respect to the distinctions drawn by Justice O'Connor's approach: How, in this new land use world, can one find the bright line dividing the prohibited use of eminent domain exercised for development of private uses from the permitted use of eminent domain for redevelopment of public uses? The answer is that one cannot. This new approach to mixed-use rejects bright-line distinctions between land uses,

172. Refill, also known as infill, aims to redevelop existing buildings and communities rather than build new ones. *See* Robert Puentes, *First Suburbs in the Northeast and Midwest: Assets, Challenges, and Opportunities*, 29 FORDHAM URB. L.J. 1469, 1480–81 (2001–02) (advocating for local government policy that encourages the rehabilitation of communities through refill).

173. Libraries are increasingly combined with private uses. *See, e.g.*, Janny Scott, *Stranger than Fiction? Having People Live on Top of Branch* Libraries, N.Y. TIMES, Nov. 13, 2006, at B1.

174. *See* Smith, *supra* note 171, at 51 (giving San Francisco's Ferry Plaza Farmers Market as an example of a successful public-private redevelopment project).

opting instead for areas simultaneously used for living, working, shopping, and recreating. Mixed uses blur the distinction between public and private use because the very same land can be used for a public arcade, a city hall, and private residences. One cannot say that a given parcel to be condemned is fated for just one use. Justice O'Connor's definition of public use is unworkable in this context.

The problems with Justice O'Connor's test are compounded by the large footprints required by modern public-private redevelopment uses. Eminent domain is a tool for land assembly employed largely because economically viable uses do not fit within antiquated ownership patterns.[175] Agencies acquire on a parcel-by-parcel basis, and then assemble the parcels into larger parcels. Failed negotiation leads to condemnation.[176] The boundaries of the condemned individual parcels are an historical artifact that bears little or no relationship to the "footprints" of the ultimate uses. Redevelopment aims to create a new use pattern that the prior parcelization would not support. Development footprints straddle portions of more than one condemned parcel as properties are agglomerated to facilitate new uses. Even if uses in the ultimate development were separated in the horizontal plane and vertically uniform, one could not necessarily assign one parcel proposed for condemnation to one ultimate land use fate that could be then labeled public or private.

But modern land uses are generally not separated horizontally, nor are they vertically uniform in their use. Public uses are intermingled with private uses in the same development, in the same building, and even the same space within a building.[177] It becomes impossible to characterize a condemnation to acquire the space that includes shops, housing, a library and the city hall, or the space that includes a community theater, a sports club, a hotel and apartments. If one were to take the strictest view of Justice O'Connor's test and simply prohibit condemnation for parcels some portion of which could eventually include the prohibited land use, the test is then too narrow, and would effectively outlaw an entire genre of urban development. At best, the dissents' bright-line definition of public use is no longer a line at all, but a muddle inapplicable to most new, mixed-use urban development situations.

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175. John Fee, *Reforming Eminent Domain*, *in* EMINENT DOMAIN USE AND ABUSE, *supra* note 35, at 125, 131 (arguing that eminent domain is sometimes essential to assembling the large parcels of land necessary to accommodate important public projects such as large retail, manufacturing, housing, and universities).

176. *See id.* (identifying the holdout as a main obstacle to land assembly).

177. *See* Bressi, *supra* note 163, at xxx–xxxv (detailing the attributes of New Urbanist mixed-use development).

B. "Public Ownership": The Problematic Distinction between a Government Project and a Private Project

The O'Connor dissent would also allow condemnation in aid of all projects where the private property is transferred to "public ownership." Again, the dissent gives us a short list of examples: "a road, a hospital, or a military base."[178] These are uses the government has traditionally owned. Yet, however much Justice O'Connor would like to insure the separation of public and private ownership, however much she uses such distinctions as the lodestone of her argument, facts on the ground confound the distinction. Modern development mixes government and private ownership in arrangements that defeat any bright-line test. Governments now own land that supports private uses; private parties own land devoted to public use; and governments and private parties share elements of the fee interest in the same land.[179]

The simplest and most common example is the long-term ground lease. Many clearly private uses are built on land owned by the public and leased to the developer and subsequent user.[180] For example, developers build many low-income apartments on land owned entirely by a governmental entity that leases the land to a developer; the developer then leases back the low-income units to a city housing authority. In other situations, a city may enter a long-term ground lease with a private company that contracts to develop an office building on the site. The term of the lease is substantially less than the useful life of the building, which will revert to the city when the ground lease expires. The private company builds the building to city specifications so that at the end of the lease, the city can locate city offices in the building. In each case the use is private (for now), but the government owns the underlying fee interest in the land. There exists no policy or doctrinal basis on which to distinguish, for purposes of the test articulated by the *Kelo* dissents, whether this conglomeration is a "private" use or a "public" use.

The increasing sophistication of the public-private relationship renders the public-private ownership distinction even more uncertain. During the last several decades, those engaged in the design of the institutions and instruments to carry out redevelopment and other public-private development partnerships have given much thought to the respective capabilities of the public and private sectors. The private sector now understands government can bring to a development project

178. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

179. *See* Fee, *supra* note 175, at 131 (noting that private ownership can often provide public services more efficiently than government-owned services).

180. BEATTY ET AL., *supra* note 63, at 153. Ground leases are effective tools in redevelopment because they reduce or eliminate developers' up front land costs and enable redevelopment agencies to maintain control over a project after completion. *Id.*

city-wide and area-wide planning capability (and responsibility), institutional ability to involve the public in a credible planning effort,[181] access to tax-free financing,[182] land assembly capability,[183] the ability to hold land with low or no carrying cost, the ability to reduce regulatory risk through development agreements or other public-private contracts,[184] and certain tort immunities.[185]

Likewise, government has come to appreciate that developers have capabilities that government does not share. These attributes include certain project or building-specific planning expertise, development, construction, leasing and sometimes maintenance expertise;[186] relatively high tolerance for and understanding of market risk and interest rate risk;[187] access to private equity markets and lines of credit;[188] institutional flexibility and responsiveness with respect to contractual relationships with other private entities;[189] and the ability to segregate project funds free from the claim of other public needs.[190]

Public-private negotiations strive to determine the most efficient actors for each development function at each stage in the life of a project. Projects move through concept planning, development planning, zoning, subdivision, engineering, land acquisition, grading and utility installation,

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181. *See generally* Nick Beermann, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 SEATTLE U. L. REV. 175, 206–08 (1999) (discussing generally the capacity of public-private partnerships to be legitimated through appropriate safeguards ensuring the public involvement).

182. Theodore C. Taub & Katherine A. Castor, *Public/Private Joint Ventures in Development and Redevelopment*, ALI-ABA Course of Study Materials, Land Use Institute: Planning, Regulations, Litigation, Eminent Domain, and Compensation 1 (Aug. 1999).

183. KOEBEL, *supra* note 27, at 8, 22 (explaining that government can help with land assembly, development subsidies, and regulatory incentives).

184. *Id.* at 8.

185. Redevelopment corporations are often immune from tort liability because they act to carry out governmental functions. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* §§ 47–48 (2006).

186. *See* MARY BETH CORRIGAN ET AL., URB. LAND INST., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC/PRIVATE PARTNERSHIPS 10 (2005) [hereinafter ULI'S TEN PRINCIPLES].

187. *See* MIKE E. MILES ET AL., URBAN LAND INST., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 36 (3d ed. 2000) (identifying private developers as "primary risk bearers," because they put up their own equity and sometimes also guarantee investors or lenders). Because local government is spending public money when it helps fund redevelopment projects, it remains accountable for the success or failure of the project. For this reason, local government has become increasingly focused on the costs and benefits of financing revitalization projects. *See id.* at 282 (delineating costs and financing options public officials typical consider).

188. Taub, *supra* note 181, at 1–2; *see also* MILES ET AL., *supra* note 187, at 71–75 (discussing basic equity and debt markets) and 94–97 (addressing innovative finace options available to private developers such as opportunity funds, REITS, and commercial mortgage-backed securities).

189. *See* ULI'S TEN PRINCIPLES, *supra* note 186, at 7 (identifying, as an important step in the redevelopment process, the developer's research of the resources needed to complete the project, such as assessment of risk, potential deal structures, and potential investors).

190. This is an advantage that the public sector often has difficulty achieving when government funding is low and state or local monies are demanded elsewhere.

construction ("vertical development"), sale and leasing, and maintenance.[191] For each stage for each project, public and private negotiators wrestle with defining the best allocation of the components of responsibility, defining, for each project component and stage, which entity directs it, which pays for it, and which performs it.

The result is embodied in a contractual relationship between the public and private entities, and transcends concepts that could be memorialized in a government plan or zoning ordinance.[192] At that point it is much too simple to talk about "ownership" because the proverbial bundle of sticks associated with land ownership has been deliberately broken apart and replaced with a pattern of contractual responsibilities that allocates to the respective public and private parties the specific elements of assembly, clearance, construction, maintenance, and control they are best equipped to perform for the subject development.

For example, a typical mixed-use development might be planned and conceived by a city, built by a developer, and transferred to a homeowners association which must allow public use pursuant to permit conditions and adopted covenants, conditions, and restrictions. A large redevelopment project might involve city ownership of part of the property and private ownership of the rest. The city might have acquired the land long ago, holding it free of debt with low carrying costs. If so, the city might agree, for valuable consideration reflected elsewhere in the deal, to acquire the private property and hold it until the market is ready to absorb the planned uses.

A second, more complex example presents a situation repeated in various forms in larger public-private urban land use arrangements. After a public selection process, a city enters into a contract with a large developer that will serve as master developer of an area. The city owns the land and creates the master plan and zoning plan. The developer pays for the subdivision planning and engineering. The developer and city jointly hold public forums and jointly staff a public advisory board selected by the city, the expenses of which are paid by the developer as predevelopment cost. The developer advances the funds for and builds the major or "backbone" infrastructure. The city floats bonds and buys the infrastructure from the developer. The city holds the land until ready for sale to the developer. The developer takes and owns the land on which it builds a hospital, a stadium, and a public school. The developer sells the hospital, keeps the stadium, and the school is leased back to the city. The city retains the land under multi-family, mixed-income rental

191. For visuals of the predevelopment and development processes, see two flow charts provided in ULI'S TEN PRINCIPLES, *supra* note 186, at 4 & 5.

192. *See id.* at 4. For more on development agreements and how cities are using them to increase the public's return on their investment in redevelopment, see MILES ET AL., *supra* note 187, at 283 fig.14-6.

housing, which the developer builds and turns over to the city ownership of the low-income units. The developer maintains and manages the housing pursuant to a contract with the housing agency.

These complex relationships are the rule, not the exception. Condemned parcels underlie these projects in random ways, fated for a variety of uses in the final development. Which condemnation is to acquire a project for "public ownership"? The O'Connor opinion complains that the majority approach would "wash out any distinction between private and public use of property."[193] Evolution of the land use model has already erased the distinction.

Finally, the test proposed by the dissents would incentivize evasion through simple manipulation of the nature of the public-private arrangement. Consider the *Kelo* facts. The dissents emphasized that the parcel containing petitioners' homes was designated in the redevelopment plan not for a classic public use such as the park itself, but for "park support"—commercial, parking and retail uses not owned by the government or necessarily open to the public.[194] In the face of the bright-line test as proposed by the dissents, the public entity could readily have placed those parcels inside the park rather than in "park support," leaving it to an implementation phase to sort out what land was actually designated for open space and what for park support. In fact, many urban parks now integrate these support uses into the park itself. The park support uses could be operated under a lease or concession on parkland retained by the city (as happens frequently in the National Park System).[195]

IV. GRAPPLING WITH THE DISSENT'S PROPOSED TEST OF "AFFIRMATIVE HARM ON SOCIETY"

Justice O'Connor then addresses what she calls a third category of condemnation. She begins with a strange admission.

> But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.[196]

193. Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

194. *Id.* at 495.

195. *See, e.g.*, George Cameron Coggins & Robert L. Glicksman, *The National Park System: Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 729 (1997) (discussing the National Park Service's contracting with private concessionaires for "food, lodging, transportation, recreation, and other services" for national park visitors).

196. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

Her reference addresses the Supreme Court's two prior pronouncements on redevelopment, neither of which involved "public ownership" or "use-by-the-public." *Berman v. Parker*[197] upheld the use of eminent domain as part of redevelopment in the District of Columbia, and *Hawaii Housing Authority v. Midkiff*[198] validated the use of condemnation to undo the Hawaiian feudal oligarchy through land redistribution. Justice Douglas' holding and reasoning in *Berman* espoused a positive view of the redevelopment. Infused with the affirmative approach to government dominant in the decades after the New Deal, Justice Douglas supported condemnation of the plaintiff's department store in a blighted area of Washington, D.C., even though the store itself, as is the case with the Kelo and Dery homes, was in good repair and a commercial success. The *Berman* opinion explicitly approves the condemnation of the store for subsequent sale to a private developer. *Midkiff*, written by Justice O'Connor herself, cites *Berman* as its primary authority, restates positively the goals of Hawaii's legislature, and defers to its legislative fact-finding.

This third category to which Justice O'Connor refers in *Kelo*, of course, is economic redevelopment, the concept *Berman* firmly endorsed as a tool to revitalize America's urban landscape. But Justice O'Connor then extracts a rule that limits both *Berman* and her own prior opinion in *Midkiff* to what she now construes as their facts: "In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."[199]

Justice O'Connor would thus limit the use of condemnation in aid of redevelopment to situations where the existing use inflicts an "affirmative harm on society."[200] She fails, however, to articulate a legal basis on which to distinguish *Midkiff* and *Berman*. Further, the situation in New London more than meets her proposed test of "affirmative harm on society."

A. In Kelo, *Justice O'Connor Effectively Overturned Her* Midkiff *Decision*

It is a testimony to the complexities of the human mind that Justice O'Connor should join Justices Rehnquist and Scalia in *Kelo*, and even more strange that she pens the dissent herself. After all, she herself is the

197. 348 U.S. 26, 35–36 (1954).
198. 467 U.S. 229, 245 (1984).
199. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).
200. *Id.*

author of *Midkiff*,[201] and a reading of that case leaves one startled at her dissent in *Kelo*.

Thirty years after *Berman*, Justice O'Connor used the *Berman* reasoning and holding to uphold the Hawaii condemnations at issue in *Midkiff*. Considering *Berman* the authoritative source for the law, she explained then that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers,"[202] In *Kelo*, O'Connor backtracks on her *Midkiff* decision. She avoids overturning her own prior holding by characterizing her former equation of the police power and public use as dicta, calling it "errant language" and "unnecessary for the specific holding."[203] Yet the two decisions directly and irreconcilably oppose each other.

The *Midkiff* decision she describes in 2005 is not the same *Midkiff* she wrote in 1984. A reader of her *Kelo* dissent would not recognize the actual text of *Midkiff*. In *Kelo*, her "harm on society" test discussed above includes a requirement that "each taking *directly* achieve[] a public benefit,"[204] a test reinforced by her judicial gloss on the facts which gives virtually no deference to legislative intent. In *Midkiff* she takes the opposite approach:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.[205]

Justice O'Connor states in the very first words of her *Kelo* dissent that the "bedrock" of Fifth Amendment jurisprudence assures that government cannot condemn the property of A to give it to B.[206] She then advocates that the judiciary must adopt a line so bright that it destroys all economic development takings in order to protect against abusive exercise of this power. Yet, on this issue, one cannot distinguish between her opinion in *Midkiff* and the *majority* opinion in *Kelo*. Justice O'Connor states in *Midkiff*:

> To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private

201. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
202. *Id.* at 240.
203. *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting).
204. *Id.* at 500.
205. *Midkiff*, 467 U.S. at 242–43 (citations omitted).
206. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

> person without a justifying public purpose, even though compensation be paid." . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. See Berman v. Parker . . . .
>
> . . . .
>
> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." "[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair."[207]

Thus, despite the Justice O'Connor's effort in *Kelo* to narrow rather than overrule *Midkiff,* she affords irreconcilably different levels of deference to legislative decisions in the two decisions. Her *Kelo* dissent, if adopted, would *sub silencio* amount to a reversal of *Midkiff.*

Justice O'Connor reverses another key element of *Berman* and *Midkiff* that is even more central to the entire redevelopment effort—the approval of area-wide determinations of blight. She takes the position that a finding of blight for an area is not sufficient; the use on each parcel proposed for condemnation must itself inflict an "affirmative harm on society" and its taking must be necessary to remedy the harm.

O'Connor's discussion at first appears to go the other way on this issue. Discussing *Berman,* she states that Mr. Berman's department store was not itself blighted, noting that the court elected not to second-guess the redevelopment agency's decision "to treat the neighborhood as a whole rather than lot-by-lot."[208] She avoids any direct pronouncement on the subject, a fact by itself significant since, in her care not to directly overrule *Berman* and *Midkiff,* she is otherwise careful to delineate the extent to which she takes on these opinions. For example, her dissent specifically addresses language in those cases that asserts the power to take for public use is "coterminous" with the police power, labeling those words as "errant language" and dicta that should be ignored.[209] Yet nowhere does she address with similar directness the area-wide blight determination she admits is directly approved in *Berman.* By negative

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207. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241, 243–44 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937), Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923), and Block v. Hirsh, 256 U.S. 135, 155 (1921)) (citations omitted).

208. *Kelo,* 545 U.S. at 499 (O'Connor, J., dissenting).

209. *Id.* at 501.

inference, it might seem that she does not want to limit *Berman* in that respect.

But that is not O'Connor's intent, and it shows from her language. After limiting *Berman* and *Midkiff* to situations involving takings to eliminate affirmative harm to society, she states: "Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."[210] Her italicized "directly" must have some significance. Does it mean to create some general requirement of closeness between action and result, perhaps the application of a new requirement for some nexus between the condemnation and the elimination of harm? Justice O'Connor clarifies her intent in the next sentences.

> New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[211]

But that is exactly what happened in *Berman* and what can happen whenever an agency makes an area-wide finding of economic decline, distress, or blight as a prelude to instituting area planning. It appears that Justice O'Connor would overrule *Berman* and require a parcel-by-parcel determination of "harm" or blight; a result clear from the text, if bizarre in light of the fact that she herself wrote *Midkiff*.

This requirement of individualized blight determination would hinder contemporary redevelopment more than any aspect of the opinion. Many states require a finding of blight prior to establishment of a redevelopment area.[212] None requires that the finding be individualized to each parcel because market failure and economic blight are area concepts. The market does not fail parcel by parcel. A viable use may exist inside of a blighted area, but still present an obstacle to the

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210. *Id.* at 500.

211. *Id.* at 500–01.

212. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 33030–33037 (West 2006); CONN. GEN. STAT. §§ 8-125(b), 8-127 (West 2006); Maritime Ventures, LLC v. City of Norwalk, 894 A.2d 946, 959 (Conn. 2006) (outlining Connecticut's redevelopment planning program and noting that it requires a redevelopment agency to make a finding of blight when adopting a redevelopment plan); FLA. STAT. ANN. § 163.355 (West 2006) (requiring, before the exercise of its community redevelopment powers which includes eminent domain, the adoption of a resolution finding that an area is blighted or that there is a shortage of low- or moderate-income housing); Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 731 (Fla. Dist. Ct. App. 2002) (stating that the plaintiffs' rights under the Florida Constitution would be violated if a finding of blight was not made to justify the taking of their land).

parcelization and development necessary to transform an area and insure its successful redevelopment.

B. The Situation in New London Meets the Test of "Affirmative Harm"

Even if O'Connor's "affirmative harm" requirement were valid, the facts in New London would satisfy the test. She sketches out her definition of "affirmative harm on society" in her discussion of *Berman* and *Midkiff*. O'Connor characterizes those opinions as permitting condemnation only to eliminate an "extraordinary" pre-condemnation use—"extraordinary"[213] being something on the order of the horrible slums ("extreme poverty") referenced in *Berman* and the aristocracy referenced in *Midkiff* ("resulting from extreme wealth").[214] After articulating the test, she falls silent on the facts at hand. Given her proposed decision adverse to New London, presumably she believes the situation there would not pass the test of affirmative harm.

But the *Kelo* facts do pass the test, such as it is. The facts in *Kelo* are similar to the facts in *Berman*, and in other severe cases of market failure that have given rise to appropriate uses of eminent domain for redevelopment. It is worth retelling the *Kelo* story, not as it was recited by the Court (either the majority or dissents), but from the perspective of modern redevelopment. The facts in *Kelo* constitute the elements that typically lead to exercise of the redevelopment power in states where a finding of "blight" is required. A potentially attractive waterfront location suffers long-standing stagnation; no market exists for uses in the area, banks will not lend, and developers will not redevelop. The human cost in the area is high: existing businesses have fallen into patterns of substandard performance due to lack of customers and inability to finance purchase of machinery, make building repairs, or undergo improvements. Houses are abandoned and apartment buildings stand half empty.

This is the situation that prevailed in New London. The city did not make a formal determination that Fort Trumbull was blighted because Connecticut's redevelopment law did not require such a finding before an eminent domain condemnation, but the situation more than met the usual blight standard.[215] The record—but not the opinions—states that the New

213. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

214. *Id.*

215. New London exercised its eminent domain powers pursuant to a Connecticut development statute that does not contain a blight standard. *See* Brief of the State of Connecticut as Amicus Curiae in Support of the Respondents at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108) (citing CONN. GEN. STAT. ANN. § 8-186 (West 2002)). However, Connecticut law empowers municipalities to define "blight" pursuant to local ordinance. CONN. GEN. STAT. ANN. § 7-148(7)(xv) (West 2007). Blight "factors" commonly used

London redevelopment area suffered from an astonishing 82 percent vacancy rate for nonresidential structures.[216] Sixty-six percent of these structures were in fair or poor condition.[217] In these types of situations residents are unemployed or must travel long distances outside the area to find work, and the area is not safe. In sum, the unassisted market failed to function in New London.

Redevelopment attacks the problem of economic stagnation by developing an area-wide plan, and then catalyzing revitalization through public improvements that set the scene for pioneering private development. These early public improvement projects ensure strategic investment of scarce public funds. Early infrastructure often focuses on parks and new attractive streets that serve as on-the-ground evidence to lenders and developers of the potential for change in the area.[218] The private investment stategy requires locating a developer sufficiently motivated—often for extrinsic reasons—to risk funds in an area that has not previously supported successful enterprise. The agency often builds upon pioneer project proponents who have already demonstrated an interest in the area or own an interest in projects underway in the area, seeking private development that will provide quality jobs, attract secondary beneficial uses, and promote the renewed visibility of the subject area.[219]

New London followed this typical and rational pattern: it focused first on developing a plan, and then on funding a park as catalytic infrastructure. The city then selected a research facility, Pfizer, already interested in the area as a pioneer private project to provide jobs and visible growth.

The *Kelo* opinions tell a different story, one that underemphasizes the important transitions, nuances, and context of modern redevelopment. The majority opinion limits itself to a recital (characteristically somewhat brief and bland) of the facts leading to

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by Connecticut communities include vacancy, threat to public health, fire hazard, criminal or illegal activities, or depreciation of neighborhood property values. Kevin E. McCarthy, Office of Legislative Research, Municipal Blight Ordinances (Oct. 23, 2003), *available at* http://www.cga.ct.gov/2003/olrdata/pd/rpt/2003-R-0771.htm (summarizing blight ordinances for the communities of Farmington, Middletown, and Stamford).

216. Brief of the Respondents at 3, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

217. *Id.*

218. *See* PATRICIA L. KIRK, URB. LAND INST., REBUILDING THE NATION'S URBAN FOUNDATION, Jan./Feb. 2006, *available at* http://www.uli.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=64779 (explaining that because federal funding in redevelopment has dropped significantly, states and local government must ensure that early infrastructure is leveraged to encourage private investment in the area).

219. *See* MILES ET AL., *supra* note 187, at 132 (explaining that beginning around the turn of the twentieth century, local government viewed development as a way to revitalize downtowns).

redevelopment, and describes a city designated by a state agency as "distressed" after decades of economic decline.[220] Justice Stevens neither mentions nor explains the significance of the high vacancy rate. The dissenting Justices fail to acknowledge these conditions at all. The truncated factual recitation in Justice O'Connor's opinion begins with the petitioners and skips directly to the Pfizer development.[221] She does not mention the economic decay, unemployment, or population loss. Her only citation to the underlying purpose of redevelopment is in a brief clause on the mission of the New London Development Corporation.[222] She selects as her only mention of the redevelopment plan a quote that describes the redevelopment as designed to "complement the facility that Pfizer was planning to build,"[223] a statement that probably turns the order of events on its head. Justice Thomas recites a brief and politically charged version. He characterizes the entire New London effort as merely "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."[224]

These omissions and mischaracterizations reveal the panorama of the dissenters' ideological prejudices and misunderstanding of redevelopment. In light of these opinions, it is especially unfortunate that the majority failed to make the case for redevelopment.

C. A Private Rights Orthodoxy Drives the Dissenters' Determined Ignorance of Governmental Purpose

A careful study of the *Kelo* dissents yields no information for the uninformed reader of the goals and processes of redevelopment, the procedural protections developed over the last three decades, or even of the supporting facts in the case. In a world-view fixed on the property rights of individuals, the intention of the regulating government program holds no interest or, for that matter, relevance. The two dissents look at the redevelopment world from the bottom up, from the eyes of the landowner. These Justices believe that their only obligation, as guardians of the constitutional rights of the property owner, is to ask and answer what this all this means for the condemnee. Once a need becomes a "right," such as the dissents' creation of Susette Kelo's right to be free from the exercise of eminent domain in this case, then there is no point to

220. Kelo v. City of New London, 545 U.S. 469, 473 (2005).
221. *Id.* at 495 (O'Connor, J., dissenting).
222. *Id.*
223. *Id.* As discussed *supra* text accompanying note 219, working with a pioneer developer early in project formation is desirable.
224. *Id.* at 506 (Thomas, J., dissenting).

discussing whether her need should be accommodated, and no need to balance her needs against others' needs, individual or collective.

We have seen this approach before from some of these dissenting Justices. An early version emerges in Justice Rehnquist's dissent from the majority opinion in *Penn Central Transportation Co. v. City of New York*.[225] *Penn Central* involved a challenge to the application of New York City's historic preservation law.[226] The majority, in an opinion written by Justice Brennan, upheld the scheme and its application.[227] Brennan commenced with a complete review of historic preservation laws in the fifty states and 500 municipalities. He then described the derivation and details of the New York City legislation, turning to the individual plaintiff's interests much later in the opinion. Finally he evaluated the plaintiff's individual interests against the larger interests of the community as expressed in the legislation and its history.[228]

In contrast to the majority, Justice Rehnquist's *Penn Central* dissent took the bottom-up approach that O'Connor took in *Kelo*. He began his opinion charging that the city had "singled out" the plaintiff's building, creating a substantial cost with "little or no offsetting benefit."[229] He contended that the ordinance unfairly targeted the plaintiff, and he emphasized the plaintiff's application costs.[230] His dissent omits discussion of historic preservation goals or approaches, or the New York City ordinance. This classic bottom-up view of the world reemerged three decades later in the *Kelo* dissents, one of which Justice Rehnquist joined.

This decision to ignore the applicable governmental program is not an artifact of the internal logic of drafting a dissent. Justice Scalia takes the same approach in *Nollan v. California Coastal Commission*[231] where he is joined in the majority by Justices Rehnquist, White, Powell, and O'Connor. This majority upholds a homeowner's challenge to a condition to a permit (an "exaction") for substantial enlargement of his house on the beach. As in Justice Rehnquist's *Penn Central* dissent, the *Nollan* opinion starts with the plaintiff, continues with a recitation of his travails with the Coastal Commission, and then moves directly into its analysis of the legal flaws in the Commission's case. The opinion omits discussion of the pattern of overdevelopment of the California coast or the privatization of the coast that prevents the public from accessing visible beaches. Nor does the opinion discuss the popular concern which led to the passing of the California Coastal Initiative in 1972, or even the

225. 438 U.S. 104 (1978).
226. *Id.* at 108–09.
227. *Id.* at 107, 138.
228. *Id.* at 136–38.
229. *Id.* at 138 (Rehnquist, J., dissenting).
230. *Id.* at 138–39.
231. 483 U.S. 825 (1987).

operative statute, the Coastal Act,[232] passed by the state legislature because of the citizen initiative.

Most significantly, the *Nollan* opinion omits treatment of the nature of public access and the state policies acknowledging the importance of access both *to* the beach ("vertical access") and *along* the beach ("lateral access"). The opinion ignores California's considered and publicly debated public access policy, which culminated in legislation stating that both vertical and lateral access were major goals of the state and conditioning development on implementation of the two types of access.[233]

As is the case with the *Kelo* dissents, the logic of the opinion in *Nollan* rests on an inaccurate construct of the facts. Justice Scalia posits that the purpose of the exaction was simply "psychological" access whereby those driving along the coast could see the ocean, a strange form of *vertical* access.[234] He then contrasts this avowed purpose with the actual exaction of *lateral* access along the Nollan's beachfront, and finds missing the now famous concept of "nexus."[235] Had the Coastal Commission exacted a condition relating to the alleged regulatory goal of this visual *vertical* access, such as a public viewing spot on the Nollan property so people off the beach could look at it, then the exaction would have passed his nexus test. But the exaction of access along the beach had nothing to do with this avowed purpose to view the beach from afar, and thus fails his test.[236]

This approach absurdly fragments the unified concept of "public access." Public access exactions create an opportunity for the public to enjoy the coast. Vertical and lateral access together comprise the *program* of public access. Getting to the beach is of little use if one cannot walk along the beach, and the ability to walk along the beach is of little value if one cannot get to and from it. California coastal law and commentary clarifies that a successful public access program contains both vertical and lateral access in an appropriate configuration.[237] Each

232. For a detailed discussion on the citizen movement, see William J. Duddleson, *How the Citizens of California Secured Their Coastal Management Program*, *in* PROTECTING THE GOLDEN SHORE: LESSONS FROM THE CALIFORNIA COASTAL COMMISSIONS 3, 48 (Robert G. Healy ed. 1978); *see also* California Coastal Act, CAL. PUB. RES. CODE §§ 30000–30900 (West 2006).

233. California Coastal Act, CAL. PUB. RES. CODE § 30001.5(c); *see also* CAL. CONST. art. 10, § 4 (amending state constitution to forbid property owners from preventing public access to the shorelines).

234. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 (1987).

235. *Id.* at 835–37.

236. *Id.* at 836. See Fenster, "Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions." 58 Hastings Law Journal 729 (2007) (containing an excellent analsis of *Nollan and its treatment in practice and by the judiciary.)*

237. *See* CAL. PUB. RES. CODE § 30212(a) (West 2006) (requiring public access from the nearest road to the ocean (vertical access) and along the shoreline (lateral access)).

coastal property owner dedicates the access that makes sense given the property's location. The Nollan's location near two developed access points rendered vertical access unnecessary, but required lateral access.

The benefits of a successful dedication program inure at least as much to the affected property owners as to the general public. Coastal landowners enjoy the beach not just by looking at it or walking the short stretch of their private ownership, then turning around and walking back inside their home; they walk along the beach across the property owned by others and may in fact do a loop, walking along the beach, then via vertical public access to a public road atop a bluff, then down the road, back to the beach, and across more private dedications to their property. This pattern of reciprocal burdens and benefits occurs in every modern subdivision, coastal or not, in the form of sidewalks, made possible by dedication by each parcel owner (or by the precursor owner or developer). The stroll across beachfront dedications constitutes the coastal analogue of the proverbial walk around the block.

For Justice Scalia, however, the beach access program, its history, its implementation, and its procedure must give way before his construct of the rights of the landowner. He eschews recitation of the public's needs and corresponding governmental solutions as logically unnecessary to the opinion. They are also inconvenient to the argument. Successful iteration of Justice Scalia's legal construct requires a gloss on the facts to support the concept, a characterization obtainable only through the omission of a true description of the regulatory or land use environment, and a misstatement of the underlying governmental purpose.

Similarly, in *Kelo*, the dissents had to blind themselves to the economic ills, the reality of the program designed to address the ills, and the safeguards developed to protect landowners in the last four decades.[238] In *Nollan*, this intellectual casuistry garnered a majority. In *Kelo*, it almost succeeded, and the view may yet prevail in state courts or legislation.

V. THE PROBLEMATIC DISTINCTION BETWEEN PUBLIC AND PRIVATE GAIN

The *Kelo* Court's misperceptions of the nature of modern redevelopment goes beyond the dissents' confusion over use, ownership, and blight. The majority opinion, the concurrence, and the dissents share

238. This determination to ignore underlying social policy is in stark contrast to Justice O'Connor's approach in *Midkiff*. The structure of *Midkiff* resembles Brennan's majority opinion in *Penn Central*, more than the typical landowner rights opinion such as Justice Rehnquist's dissent in *Penn Central* and Justice Scalia's opinion in *Nollan*, discussed above. Though a bit less intense than Brennan's opinion, *Midkiff* begins with a three-page recitation of the entrenched nature of the Hawaiian oligarchy, and the determined evolution of the land redistribution scheme the Hawaiian public sector developed to address the issue. Only then does she turn to the plaintiffs and *Berman*. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232–34 (1984).

an outdated, nostalgic perception of the financial relationship between the public and private sector in public-private redevelopment.

Each opinion articulates the view that government does not possess the legal authority to acquire property from one citizen merely to transfer it to another.[239] This reflects a fear that government will act as an agent of private rather than public power. The majority admits that use of eminent domain to transfer property from one citizen to another for the sole reason that the second "will put the property to a more productive use and thus pay more taxes" would "raise a suspicion that a private purpose was afoot."[240] Justice Kennedy's concurrence considers the possibility of city council "capture" by private parties.[241]

The dissents focus almost entirely on the possibility of takings for impermissible private purposes, and put a political gloss on their discussions. Justice O'Connor explains that the majority rule will benefit "citizens with disproportionate influence and power in the political process, including large corporations and development firms."[242] Justice Thomas quotes Justice O'Connor's language with approval and adds race as an issue: "Urban renewal projects have long been associated with the displacement of blacks . . . ."[243]

The frailties of American politics that animate these concerns have not changed, and probably never will; corruption has not ceased, racial prejudice remains a central factor, and in many cities economic elites dominate politics. Rather, the *Kelo* Justices fail to grasp that the structure of public-private economic redevelopment renders almost quaint the very concept of distinct, clearly separable "public" gain and "private" gain. It is worth examining the outlines of this relationship between a public entity and a potential developer.

The *Kelo* dissents imply that redevelopment applies governmental power to subsidize public budgets and enrich private parties.[244] Most large redevelopment projects, however, pose significant fiscal challenges for both the public and private entities involved. Redevelopment proposes to revitalize a depressed area by creating jobs and new infrastructure to serve the public; the effort involves the major development risk that the costly changes will not provide anticipated revenue necessary to support the public expenditures involved. Replacement of antiquated

239. *See* Kelo v. City of New London, 545 U.S. 469, 472-90 (2005); *id.* at 490–93 (Kennedy, J., concurring) (explaining that there may be cases where the transfers are "suspicious" and will require courts to apply a demanding level of scrutiny to determine if the transfer is for "an impermissible private purpose"); *id.* at 493 (O'Connor, J., dissenting).

240. *Id.* at 487 (majority opinion).

241. *See id.* at 491 (Kennedy, J., concurring).

242. *Id.* at 505 (O'Connor, J., dissenting).

243. *Id.* at 522 (Thomas, J., dissenting).

244. *E.g.*, *id.* at 503 (O'Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

infrastructure, often high demolition costs, and a strong community desire for a healthy public benefit package overwhelm likely revenues from possible market uses.

Cities and their agencies (referred together here as "city" or "cities") struggle with how to bridge the gap between available local funding and the cost of desired uses. Successful projects usually leverage federal contributions for regional or other major infrastructure, a variety of grants, and creative public financing. Tax-increment financing, for example, provides a common bootstrapping device. Cities issue bonds early in a project's life on the basis of pledge of the anticipated "increment" between current property tax revenues (often negligible in distressed areas) and the increased tax revenues generated when new uses hopefully increase the value of the land and improvements.[245] Even after the application of these techniques, the projects often face funding shortfalls.[246]

The *Kelo* Justices reason that the interests of government and the private sector must remain separate to prevent abuse.[247] Cities recognize, however, that while they can facilitate or oversee much of the redevelopment, they are not equipped to take on many aspects of the effort. Cities can provide a conduit for grants and issue public debt, and they can hold land for long periods without actual cash outlays for the debt service that developers would incur. However, public development goals such as low-income housing, public infrastructure or neighborhood revitalization need early injections of capital. Cities typically lack access to capital early in the project, cannot front high "predevelopment" expenses (that is the costs of planners, economists, engineers, and attorneys necessary to work through the details of the project proposal). Cities cannot accept development and market risk, and they are ill-suited to perform the vertical development of uses on the site.

Given these incapacities and the reciprocal advantages of a relationship with a private developer, the city may advertise for a "master developer." The master developer will initially assist the city with planning, perform due diligence reviews concerning site issues such as contamination, and assist in estimating the cost of old infrastructure demolition and new project-related infrastructure and improvements.[248] Eventually, the master developer will also find and manage relationships with developers of sub-areas within the project, and potentially with

245. DAVID PAUL ROSEN, PUBLIC CAPITAL 49 (1988).

246. *See* Farris, *supra* note 24, at 22.

247. Kelo v. City of New London, 545 U.S. 469, 478 n.6 (2005).

248. For an example of the requirements a redevelopment authority includes in a request for proposal, see RFP, *supra* note 115, at 11–12.

builders.[249] The city's advertisement typically asks for experience and financial capability.[250]

Most developer-selection processes reveal that, while the resulting relationship is important to both parties, it is not collusive. Public advisory committees often advise the city council on the selection process and the selection itself. Competing development teams make presentations to the council in open session. On the basis of these, the council selects one developer with whom to negotiate the documents that would guide a permanent relationship.[251] This exclusive negotiation period may be short or last several years, depending on the size of the project. The negotiators ordinarily meet in private and make interim reports to council in executive (closed) session.

These relationships force developers to take risks that bring immediate financial benefits to the city and its citizens. During the exclusive negotiation period, the developer usually fronts all of its predevelopment costs and may advance all or a portion of the city's as well.[252] For a large project area, these costs run into the millions of dollars. This is high-risk money for the developer because the city, while obligated to negotiate for the full period in good faith, has no obligation to consummate the relationship;[253] if the negotiations fail, the developer has lost the fruit of its work. If the city and developer teams reach agreement on key issues, the relationship matures to a set of contractual documents that the council then considers in open session. If, after public hearing and testimony, the council approves the contracts, the obligations mature and the project commences.[254]

In *Kelo*, Justice Thomas characterizes the city-developer relationship as simply "suspiciously agreeable."[255] Yet, in almost any significant redevelopment effort the negotiation of these contractual documents involves contentious issues and tests the patience of all concerned. These negotiations produce a relationship sufficiently complex to defy summary presentation. Each negotiation evolves in distinct ways, but large project efforts contain similar elements. The parties first attempt to reach a mutual understanding of the project economics.[256] They often field

249. *See, e.g., id.* at 17.

250. *See, e.g., id.* at 16.

251. *Id.* at 16–17.

252. *See id.* at 15 (making the developer responsible for all predevelopment costs).

253. *See id.* at 11 (allowing the Port Commission to reject a project if the economic and social benefits of a project are outweighed by its disadvantages up until a master lease is approved).

254. *See id.* (requiring approval by the Port Commission and the city's Board of Supervisors).

255. Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).

256. ULI'S TEN PRINCIPLES, *supra* note 186, at 4, 7 (naming "[e]stablish[ing] [f]easbility" as one of the first steps to a redevelopment effort).

independent teams to develop engineering estimates of project costs such as infrastructure and to perform market studies to determine the likely revenues from the sale of land, and sale or rental of buildings. This effort, when reasonably complete, allows the construction of a hopefully mutually-agreed upon economic model of the development, a spreadsheet commonly called a "pro forma."[257]

As they build the pro forma, the city and the developer negotiate a reasonable rate of profit for the developer based on the returns typically realized in the development world for projects with similar risk profiles. That profit is usually measured as the present value of the net cash flow from the development, or the developer's internal rate of return (IRR).[258] The parties argue about the level of each sort of risk—regulatory risk (which the city asserts it will mitigate through the contract under negotiation), construction risk (the risk of cost overruns which can be quite high), market risk (the risk that the rental and sales markets will change), and interest rate risk (the risk that interest rates will change).

These discussions produce an allocation of risk simply ignored in the *Kelo* opinions. The city may, for example, decide to take some of the regulatory risk by agreeing to pay back some predevelopment funds advanced by the developer for city costs if the project approvals are not forthcoming. The city may agree to appropriate ways to take some portion of the market risk by assembling the property and holding it at no cost to the developer until the market has reached sufficient maturity. As an additional way to assume some of the market risk, the city may agree to issue tax-increment financing as soon as the bond market permits, and repay the developer some or all of the predevelopment costs.

Contrary to the fears of the *Kelo* Justices, these typical city efforts are not gifts of public funds to the developer. Some smaller cities lack expertise and may suffer financially in negotiations that are inadequately staffed, but if the city is minimally competent, it calculates and then "monetizes" the value of these concessions in the form of other benefits to the public. The city typically requires that the developer assume specific financial risks to insure that the project moves forward and to incentivize the developer to keep its money in the project. The city might, for example, require that the developer take the land for the backbone infrastructure early, engineer and build it according to a schedule in order to "prime the pump" with the construction of desired public parks, boulevards, recreational spaces or other public facilities regardless of whether the market is present for development at that time. Similarly, the

257. MILES ET AL., *supra* note 187, at 554 (Appendix D) (defining pro forma as "[a] financial statement that projects gross income, operating expenses, and net operating income for a future period based on a set of specific assumptions").

258. *Id.* at page 88–89; GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 677–81 (5th ed. 2005) (explaining and contrasting net present value with internal rate of return).

contract might require the developer to develop these public facilities at its own cost, and dedicate them to the city.[259] These negotiations often produce a profit-sharing arrangement.[260] In many situations the developer has a right to the excess project revenues over project costs up to a certain return on its investment, and after that, the parties divide profits according to an agreed-upon formula.

The draft contract allocates financial and performance rights and obligations. The relationship that emerges from these arduous negotiations resembles a complex partnership. For example, the city might contribute tax-increment financing, tax relief, substantial in-kind predevelopment costs, and the land either for free or at below market value ("written down"). The developer might make a large initial cash infusion prior to the sale of bonds for most of the predevelopment costs, contribute the remaining cash required after public financing for most of the predevelopment, demolition, and construction of the infrastructure and improvements. The developer takes the market risk, and must manage the sale or lease of the revenue-producing elements.

How do the fears of the *Kelo* Justices compare with these realities? The majority, without explaining the factual underlay discussed above, simply quotes *Berman* for the proposition that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."[261] In the majority opinion, the form or mechanism for economic redevelopment is not the issue; rather, abuse is a factual matter for a reviewing court, which determines the question of adequate public purpose by examining the record directly, and with deference.

Justice Kennedy puts a bit more meat in his analysis of judicial review, and in some cases, his approach to searching out instances of actual abuse corresponds well with the reality of public-private development. He would, for example, look to the existence of a comprehensive redevelopment plan and evidence that the economic benefits of the project are real as evidence that a redevelopment scheme serves public rather than private purposes.[262] Some of Kennedy's criteria work less well. He fixes on the timing of identification of the private beneficiaries. He assumes that if the decision makers are "blind" as to the identity of the ultimate developer at the time of condemnation, the

259. *See supra* note 137 and accompanying text (explaining that the Gap was required to dedicate a park in order to lease the land for its new headquarters in San Francisco).

260. For a real-life example of typical financing terms, see MILES ET AL., *supra* note 187, at 283 fig. 14-6.

261. Kelo v. City of New London, 545 U.S. 469, 486 (2005) (quoting Berman v. Parker, 348 U.S. 26, 34 (1954)).

262. *See id.* at 493 (Kennedy, J., concurring).

underlying motive is more likely to serve public needs rather than private power.[263]

However, it may be of financial and strategic advantage to the public to have a master developer involved in the economic and physical planning of the site well before site acquisition is complete. The same could be true for early knowledge of the ultimate commercial users of the site. While it is true that at the time of condemnation sometimes the ultimate purchasers or lessees of land uses on the site may be unknown, they often are known, and if so, it is for good reason. As a pro forma is developed for the site, it may become apparent, for example, that the project would fail because too many expenses occur too early and the revenue comes too late in the period of project development. A project can sink under the weight of early costs such as developer-contributed predevelopment funds that compound at a high rate of interest reflecting the high risk at that point in the project. One solution is an early revenue generator such as a successful large-scale retail project or a pre-leased corporate headquarters. In that event, very early in the project, even during the exclusive negotiation period before a contractual relationship is cemented, the putative master developer, or the master developer and the city together, may work to identify such a potential owner who can generate revenue early in the development.

A fear that government will become an instrument of private power and condemn in the pursuit of increased tax revenues permeates the dissents' opinions.[264] The true picture is more complex; as to tax-driven motivation, public entities rarely make money on these projects. They must devote all the increased tax revenues from the project to tax-increment financing to move the pro forma onto positive ground. As to abuse of condemnation for private gain, the process is in fact susceptible to corruption, a concern, however, that arises not so much from this public-private partnership as it does from the intrinsic role financial support of political candidates plays in the current electoral process. All governmental decisions run the risks of contamination by interested parties. Public-private partnerships clearly pose new and special challenges because they involve such intricate interdependencies. However, note the safeguards: public selection determines the developers, public contracts memorialize the relationships, and cities generally provide periodic public reports on the financial and other aspects of redevelopment projects.

These partnerships do undermine the concepts underlying the idea that government must never condemn the land of A to give it to B. This is no longer a regulatory world in which government exercises a reactive,

263. *See id.*

264. *Id.* at 501–04 (O'Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

police-power role and the developer plays the protagonist. City redevelopment instead inhabits a contractual world, where agreements break apart traditional roles and rearrange their elements with much refinement to reflect the needs and attributes of each party. The government typically is the project protagonist, affirmatively pushing the redevelopment to achieve public benefits. This public-benefit package often achieves major public goals such as the production of low-income housing, creation of new jobs for a low-income community, construction of new parks and recreational facilities, and needed infrastructure. The developer is more of an agent of the public, performing specified tasks for a return that allows it to function and attract the necessary private capital to make the project succeed. In some cases, a contract formalizes this agency relationship such that the developer simply performs its obligations for a negotiated fee.

Whatever the form, public gain and private gain intertwine. The solutions to abuse should not outlaw the public-private relationship so fruitful to public goals, but rather focus on an open process, involvement of the subject community in decisions concerning the use of eminent domain, and clear-minded judicial review.

CONCLUSION

The Courts that produced *Berman* and *Midkiff* would have strongly supported the legislative decisions of the New London Development Corporation. O'Connor herself wrote in *Midkiff* that "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[265]

How then does one explain the change in the Court, the tepid majority, and the change in Justice O'Connor? The explanation lies in the unfortunate mix of ignorance and belief. Justice Stevens finds refuge in precedence, but cannot articulate a defense of essential elements of economic redevelopment because he does not understand them. His personal ideology probably leaves him uncomfortable with the redevelopment's longstanding and successful core concept of public intervention to cure land use market failure.

Justice O'Connor could, with no special land use expertise, grasp the unusual concentration of power in *Midkiff*. The feudal remnant that owned so much of Hawaii's land represented a concept hostile to both capitalism and individual liberty. It is easy for an American conservative, even a property rights advocate, to find in her ideological orthodoxy a

265. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

home for Hawaii's effort to extirpate the oligarchy so the modern land use market could function.

Public-private economic redevelopment is not similarly accessible. The Court lives in the past when the public and private roles were crisply separate, where government built roads and parks with general-fund money derived from property taxes, and the private market built the houses, factories and shops. The national and international movement towards new forms of business that partner with the state for mutual gain finds no place in the Justices' understanding of land use and eminent domain. The majority does not comprehend the new concepts and the dissents are utterly uncomfortable with the heart of the public-private relationship.

It is impossible to know the extent to which the defects in the majority and dissenting opinions contributed to the public reaction to the decision. In any case, the *Kelo* decision precipitated a sudden swell of antipathy for economic redevelopment. Since the decision, a majority of states have either considered or adopted measures limiting the use of condemnation in this context.[266] What does the future of public-private redevelopment look like after *Kelo?* Hopefully the body politic will recover perspective on this issue, and consider further reforms that retain this valuable tool. The beneficiaries of redevelopment—the poor, minorities, and other urban constituencies, including some developers, are slowly organizing after an early silence during the initial storm of reaction.[267] Perhaps in the end, this crisis will force public-private redevelopment to make its case to legislatures and the general public, bringing understanding of its benefits to a wider circle than before, and finally putting to rest the shadow of its checkered past.

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266. *See* Castle Coalition, *supra* note 4, and Nat'l Conf. of State Legislatures, *supra* note 4.

267. *See, e.g.*, U.S. Conference of Mayors, Resolution, *Eminent Domain*, adopted Jan. 26, 2006; DREHER & ECHEVERRIA, *supra* note 21, at 1.

> Critics of the *Kelo* decision from across the political spectrum have called upon Congress and/or state legislatures to establish new limits on the government's authority to take private property for economic development purposes. In response, many local officials, urban planners, and some downtown developers have spoken out in defense of the use of eminent domain in the context of urban redevelopment projects.

Id.

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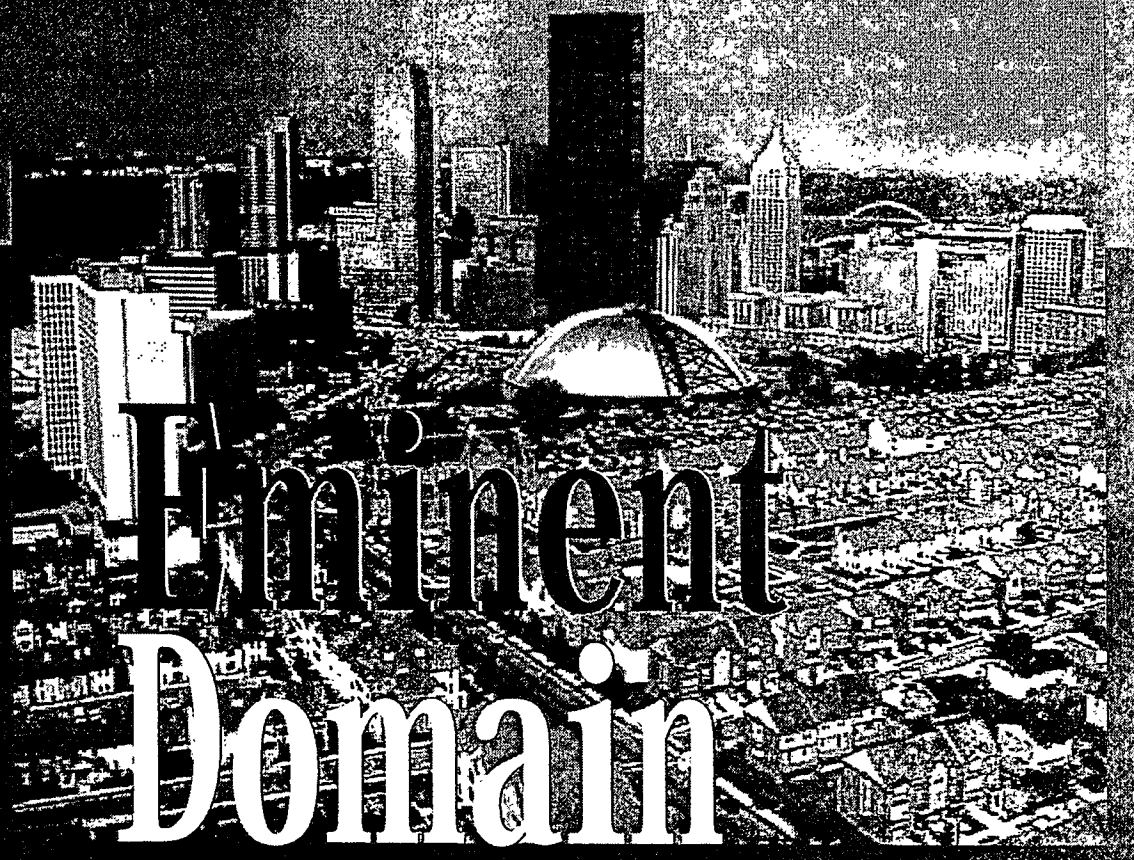

Eminent Domain

AN IMPORTANT TOOL FOR COMMUNITY REVITALIZATION

Urban Land Institute

Eminent Domain:

An Important Tool for Community Revitalization

Prepared by Douglas R. Porter

Urban Land Institute

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Contents

Executive Summary

Eminent domain is a critical tool for revitalizing cities and improving the quality of life in urban and suburban neighborhoods. The use of eminent domain has been essential to the successful redevelopment of projects across the country. From 42nd Street in New York City and Pennsylvania Avenue in Washington, D.C., to Kansas City, Kansas, and Greenville, South Carolina, public efforts to bring new life to declining areas would not be possible without the power of eminent domain.

This statement represents the conclusions of a ULI policy forum on eminent domain convened at ULI offices in Washington, D.C., during July 2006 at which leading public and private sector experts and practitioners discussed the significant role eminent domain plays in promoting urban revitalization.

In summary, forum participants affirm the following five principles and observations regarding eminent domain and recommend that the following rationales and practices be employed to defend its use in redevelopment to achieve economic development goals.

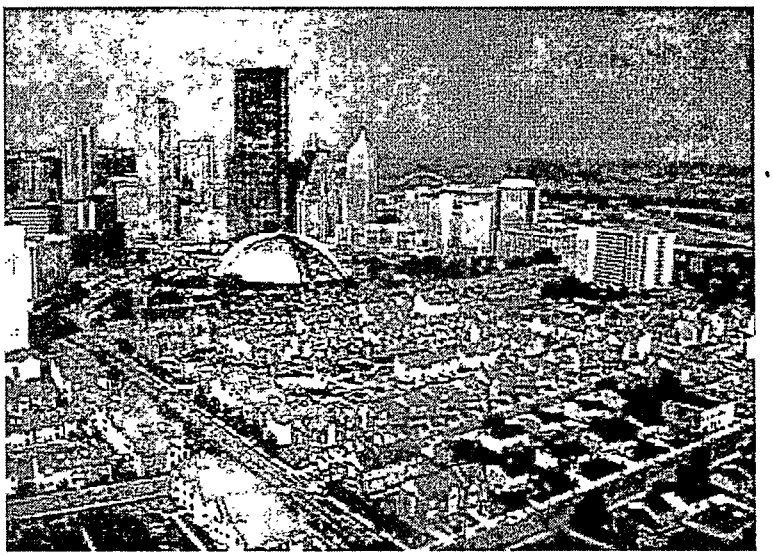
Principle 1

Private property rights are a cornerstone of American law. The Fifth Amendment to the U.S. Constitution protects ownership of private property by limiting the governmental exercise of the power of eminent domain to acquisition of property required for a public use and by mandating payment of "just compensation" to property owners. Courts have ruled that achieving public benefits through economic development, in accordance with a comprehensive plan, is an acceptable use of the power of eminent domain.

■ The rationale for redevelopment, including public purposes to be served and benefits to be achieved, should be spelled out in a comprehensive redevelopment plan that provides the policy foundation for use of eminent domain.

■ If the ultimate use will achieve defined public benefits, redevelopment to stimulate economic development may legitimately involve the transfer of property from one private owner to another.

■ Government efforts to spur economic development through redevelopment generally favor public acquisition of private property through negotiated sale rather than through the use of eminent domain.



Crawford Square, Pittsburgh, Pennsylvania

Pittsburgh's Hill District is starting to regain the vibrancy and diversity it exhibited in the 1940s and 1950s, when Lena Horne, Duke Ellington, Billy Eckstine, and Sarah Vaughan performed at local jazz clubs and the Pittsburgh Crawfords of the Negro Leagues attracted fans to Ammon Field. After decades of neglect, the district's fortunes began to turn when McCormack Baron Salazar and its public and private partners starting working with residents to envision a future for the neighborhood. More than 400 new apartments and single-family homes—half available to new and existing low-income residents and half at market rates—were constructed. An attractive design and street layout draws on Pittsburgh neighborhood architectural traditions. None of this could have happened without the city's use of its power of eminent domain to assemble the site for redevelopment.

Principle 2

Public and private efforts to rectify abuses of the power of eminent domain should address specific problems rather than broadly prohibit its use for the legitimate public purpose of economic development.

■ While some urban redevelopment projects involving use of eminent domain have razed historic buildings, uprooted families, and failed to realize overly ambitious development goals, any personal hardships stemming from redevelopment usually are unrelated to whether ownership of acquired property has ended up in private rather than public hands.

■ The distinction between final ownership by public or private entities is becoming less significant because redevelopment for economic purposes frequently involves a combination of public and private goals and benefits, especially through the increasingly successful use of public/private partnerships.

Principle 3

The public purposes to be served and specific public benefits expected from proposed redevelopment should be documented in a redevelopment plan determined through resident participation and approved by the government.

■ The public purposes and benefits of proposed redevelopment projects should be identified through a process that incorporates resident participation.

■ Before redevelopment is initiated, a redevelopment plan should be prepared and adopted documenting the public purposes and benefits to be served and describing the character of the proposed development.

Renaissance Place at Grand, St. Louis, Missouri

The St. Louis Housing Authority selected McCormack Baron Salazar as its development partner to work with the residents and community stakeholders to revitalize the Blumeyer public housing complex. A $35 million HOPE VI grant was used to assist in the construction of more than 500 new mixed-income family and seniors' rental housing units in the renamed Renaissance Place at Grand community. St. Louis also allocated more than $5 million to assist in the redevelopment process, which included extensive new public improvements—streets, sidewalks, and underground utilities—in addition to new housing and expanded community services.

Principle 4

Public officials and redevelopment agencies should seek out, listen to, and respect the points of view of property owners, residents, and business owners in redevelopment areas.

- Advance notice should be given regarding proposed redevelopment goals and their implications for affected properties and property owners.
- Property owners, residents, and business owners in redevelopment areas should be given opportunities to participate in planning for the redevelopment.

Principle 5

Eminent domain is a powerful tool that should be employed only after other methods of property acquisition are found unworkable.

- Careful consideration should be given to alternatives to property acquisition and demolition of structures.
- Negotiations to purchase private properties should be undertaken in good faith and incorporate offers of just compensation that recognize both tangible and intangible redevelopment costs to property owners, residents, and business owners.

Summary

Forum participants call on public, nonprofit, and private organizations advocating improvement of housing and economic conditions in America to support the use of eminent domain in accordance with this statement of recommended principles and practices, and to assist in informing elected officials and community leaders about the importance of the power of eminent domain as a tool for revitalizing communities.

Introduction

Since colonial times, cities and towns in the United States have acquired property to make land available for public facilities, residential development, and economic growth. For these purposes, hundreds of local governments have found it helpful to use the power of eminent domain to acquire private properties within designated redevelopment areas.

The Fifth Amendment to the U.S. Constitution allows governments to take property for public purposes with appropriate compensation to property owners. Governments may employ the power of eminent domain—sometimes termed condemnation—to acquire land for construction of highways, schools, military bases, and other public facilities; for revitalization of blighted and contaminated areas; and for assembly of sites for industries, railroads, and other developments that will contribute to economic activities.

Many icons of America's urban revitalization have been made possible by government use of eminent domain powers in redevelopment projects—for instance, New York City's Lincoln Center and the revitalized Times Square, Baltimore's Inner Harbor, and San Francisco's Yerba Buena and Mission Bay areas. Redevelopment efforts in other city and suburban neighborhoods, commercial centers, and industrial districts have proved successful at renewing poorly developed and worn-out areas. Although governments generally assemble redevelopment sites by negotiating sales with property owners, it is often necessary to exercise the power of eminent domain to clear titles of abandoned properties and to acquire holdouts at reasonable prices.

On occasion, questions and concerns have arisen about the appropriate use of eminent domain for redevelopment. These include the following:

- the appropriateness of the public purposes to be served by acquisition of private properties;
- the amount of compensation to property owners compared with tangible and intangible costs to these owners;
- the adequacy of public information about the project and the acquisition process; and
- the belief by some property owners that private property should not be subject to condemnation by public jurisdictions.

These issues, which have stirred controversy in a number of communities, deserve discussion and clarification in every locale that is considering the use of eminent domain for redevelopment.

Kelo v. City of New London

A nationwide debate over the public purposes of eminent domain in redevelopment projects has been prompted by the 2005 U.S. Supreme Court decision in *Kelo v. City of New London.* The case concerned the use of eminent domain by the economically challenged city of New London, Connecticut, in order to acquire several privately owned properties within a site it had designated for a major economic development project. The redevelopment was to include a resort hotel and conference center, a new state park, 80 to 100 new residences, and various research, office, and retail uses. The property was being developed by a private corporation selected by the city and under the city's direction. Homeowner Susette Kelo was among 15 landowners of 115 affected who objected to the taking. In its decision, the court affirmed an earlier decision by the Connecticut Supreme Court that New London's "taking" of properties with payment of just compensation was consistent with the eminent domain clause of the U.S. Constitution.

Critics of the court's findings have called for congressional and state legislative actions to limit *Kelo*-like activities, contending that eminent domain was being wrongly used to advance powerful private interests. And in a separate case, the Ohio Supreme Court ruled on July 26, 2006, that Norwood, Ohio, could not justify the taking of six properties to round out a site for economic development by making a vague claim that the area was deteriorating. The court implied that more persuasive evidence was needed to demonstrate the need for use of eminent domain.

Lessons from Urban Renewal

Redevelopment efforts in many communities still suffer from the backlash sparked by urban renewal projects in the decades after authorization of the Housing Act of 1949, which provided federal funding for local redevelopment projects. Support eroded as urban renewal programs indulged in erratic planning, mass displacement of inner-city minority residents, and poorly managed programs for compensating property owners and relocating residents. Also, many ambitious plans for redevelopment were based on unrealistic real estate market projections.

These memories die hard. But redevelopment agencies today have learned from these experiences to plan carefully for revitalization of blighted and functionally obsolete areas. And generally they carry out eminent domain proceedings only when other property acquisition methods prove ineffective.

The forum participants oppose limitations on the use of the power of eminent domain for legitimate public purposes and are worried that the current debate may result in the severe restriction or even the discarding of a valuable tool for promoting urban revitalization. Cities and towns that have struggled to maintain economic viability have welcomed the mounting interest in urban lifestyles that is opening up opportunities for stimulating development in urban and suburban downtowns, in-town neighborhoods and historic areas, and shopping districts. New restrictions on the use of eminent domain would put obstacles in the way of sorely needed revitalization.

The Constitutional Basis for Eminent Domain

In the Fifth Amendment to the U.S. Constitution, the "takings clause" recognizes the right of governments to use the power of eminent domain, but limits its application: "[N]or shall private property be taken for public use, without just compensation." In other words, governments can "take" private property only for public use and only upon payment of "just compensation."

The most problematic term in that provision is *public use*. The U.S. Supreme Court has defined the public use requirement as restraining government from taking a private property solely to benefit another private party. But the court also has approved use of the power of condemnation to achieve a variety of broadly defined public purposes. The argument turns on whether public use is defined as government ownership of property for use by the public, such as a civic building or a highway, or is defined as a *public purpose* regardless of the final public or private ownership of the

Reason Institute Finds Libertarian Judge Supports *Kelo* Decision

Judge Alex Kozinski of the U.S. Circuit Court of Appeals for the Ninth Circuit, widely recognized as a libertarian, was asked in the August 28, 2006, issue of the Reason Institute's *Reason* magazine for his opinion of the *Kelo v. City of New London* decision. His response:

"I just can't imagine how it could have come out any other way. They [property owners] were paid for it. What's the difference between taking property for public roads or anything else? Do only public automobiles travel on public roads? If the government thinks the city will benefit by having a road there . . . so that people can drive their private cars on it, then it has to make that decision. Who owns the road really doesn't matter. You are objecting to *Kelo* because property was taken for privately owned businesses. But the businesses provide services to lots of people."

property, such as a museum owned by a nonprofit corporation or a privately built toll road used by the public.

The U.S. Supreme Court generally has supported the second view: eminent domain can be employed as a means of achieving a public purpose, or, as the court ruled in 1837 in *Charles River Bridge v. Warren Bridge*, to promote "the public interest and convenience." In two important cases in the 20th century, *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984), the Supreme Court defined public use in broad terms—in *Berman*, approving condemnation of private property for redevelopment by private developers, and in *Hawaii Housing Authority*, allowing the state to break up the concentration of land ownership among a few owners by transferring it to lessees.

The court's decision in the *Kelo* case followed precedent in upholding by a 5-4 majority the city's exercise of eminent domain. The majority opinion, written by Associate Justice John Paul Stevens, upheld the broader interpretation of public purpose, acknowledging that governmental pursuit of public purpose "will often benefit individual private parties." The opinion emphasized the positive factor of the city's adoption of a carefully considered, comprehensive community plan as the basis for actions to employ eminent domain for economic development, in addition to the developer's contractual requirement to carry out the redevelopment program.

The strongly worded dissenting opinions by other justices revealed a sharply divided court and encouraged a widening debate over the use of eminent domain, especially for purposes of economic development. Former Associate Justice Sandra Day O'Connor, writing the principal dissenting opinion, argued that acquisition of private property through eminent domain to transfer it to other private parties should be limited to redressing "affirmative harm" to society, such as removing blighted conditions.

The Conditions of Blight

The courts and the current debate over eminent domain continue to reaffirm the appropriateness of its use to remove blight and to redevelop blighted areas. While state statutes may offer varying definitions of blight, the Housing Act of 1949, as amended, describes the activities that might be undertaken in federally funded urban renewal projects. The approved activities include the acquisition of properties meeting the following basic descriptions, among others:

- a slum area or a blighted, deteriorated, or deteriorating area;
- predominantly open areas that—because of obsolete platting, ownership diversity, deterioration of structures or site improvements—substantially impair or arrest community growth;
- open land necessary for sound community growth to be developed for predominantly residential uses; and
- vacant, unused, underused, or inappropriately used land or land occupied by functionally obsolete nonresidential buildings.

The U.S. Department of Housing and Urban Development, which administered the federal urban renewal program, defined slum and blighted areas as those meeting the following criteria, among others: having buildings with serious defects warranting clearance and having environmental deficiencies including, for example, overcrowding of structures, incompatible types of uses, detrimental land uses or conditions, and inadequate public utilities or community facilities.

Use of eminent domain to eliminate blight has been consistently supported as a legitimate public purpose by past supreme courts, and even by eight of the nine justices in their commentary on the *Kelo* case. However, federal and state statutes define the term "blighted conditions" in a variety of ways, such as dilapidated buildings, lack of basic plumbing or other fixtures, abandoned properties, or obsolete uses. (See sidebar, page 7.)

Helping stir reaction to the decision by the media, federal and state lawmakers, and the public were the minority opinions and Associate Justice Anthony Kennedy's reminder that states could choose to further limit use of eminent domain. Almost every state has introduced eminent domain reform bills, and the U.S. Congress has passed a resolution expressing disapproval of the majority opinion and is considering several other legislative actions. (See feature box, page 16.)

In June 2006, President Bush issued an executive order outlining limitations on federal taking of private property (most of which appear to reflect long-standing policies). In response to the order, the U.S. Department of Housing and Urban Development on July 17, 2006, published a notice in the *Federal Register* promising to closely examine funding requests for mixed-use housing projects that might employ eminent domain—suggesting that the spiraling effects of the current outcry may influence even smart growth projects.

Why We Should Care

Public action to acquire properties for redevelopment, including use of the power of eminent domain when necessary, can generate benefits by improving housing and neighborhood conditions for residents and by strengthening the local economy. The following are examples of successful projects involving the use of eminent domain; more detailed descriptions are provided in the Case Studies portion of this report.

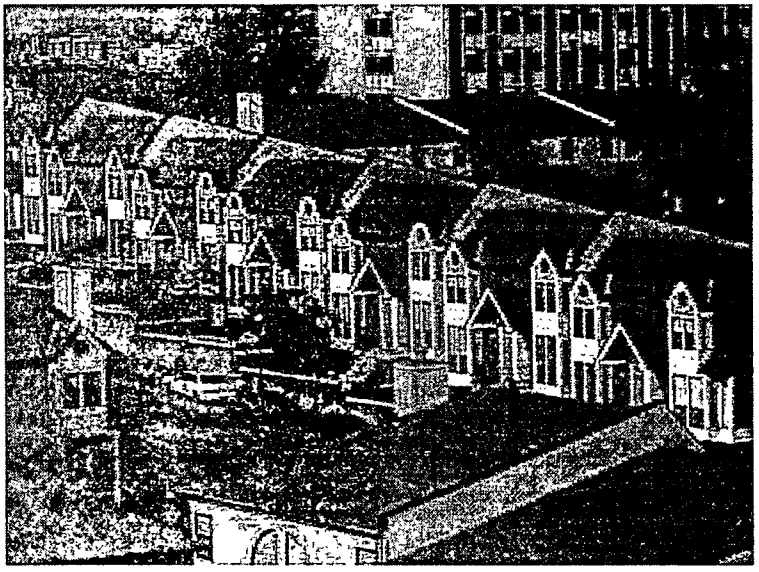
Residential Redevelopment

Redevelopment can improve opportunities for residents to obtain affordable and market-rate housing through development and rehabilitation of residential areas or the addition of housing components in mixed-use projects. The expansion of residential development in central locations improves access to the downtown job market and to the variety of entertainment and cultural facilities generally available in and near center-city areas. Not only does new housing enhance the stability and livability of older neighborhoods, but also development within already urbanized areas reduces the need for edge-city growth.

The Freetown neighborhood in Greenville, South Carolina, which was developed in the 1880s as a haven for freed slaves, has undergone a complete makeover that replaced decaying housing and junk-strewn lots with 80 affordable new homes, ten rehabilitated residences, a new community center, and upgraded neighborhood infrastructure. The Greenville County Redevelopment Authority accomplished all this by acquiring blighted properties in order to assemble buildable sites for new homes.

The authority used eminent domain only to acquire two holdout properties and to clear title to abandoned and tax-delinquent properties. In 2006, it completed carefully phased redevelopment activities with the successful return of more than one-third of the displaced households to the Freetown community.

In a somewhat different case involving residential redevelopment, the Dudley Street neighborhood, housing a multicultural population of 24,000 people in Boston's Roxbury district, had seen property abandonment, arson, trash dumping, and widespread poverty. The Dudley Street Neighborhood Initiative, a grass-roots community organization, countered the city's plans for large-scale redevelopment with a different vision that focused on reinvigorating the 64-acre heart of the 1.5-square-mile neighborhood. Its strategy was to consolidate vacant, intermingled public and private properties that would provide a sufficient foundation for development that could change the neighborhood's economic environment.



Quality Hill, Kansas City, Missouri

The redevelopment of Quality Hill brought about the rehabilitation of a declining historic neighborhood in downtown Kansas City, Missouri. Through both rehabilitation and new construction, the project created nearly 500 affordable and market-rate apartments and condominiums, and thousands of square feet of commercial space in a multiple-phased development. The developer, McCormack Baron Salazar, brought historic tax credits, foundation support, bank loans, and city funds to the deal. The city's power of eminent domain made possible the assembly of the land.

The Neighborhood Initiative requested and received city authorization to use eminent domain to overcome the complex process of acquiring tax-delinquent and abandoned properties. In this way, the organization was able to assemble enough land to allow construction of more than 400 single-family homes, a new town common, a community center and gym, a child care center, and a community greenhouse. A total of 740 existing houses were refurbished in the community as well. Boston's willingness to entrust the power of eminent domain to the Neighborhood Initiative proved to be a key to successful redevelopment.

In both examples, eminent domain was employed as a backup to acquisition through negotiated agreements with property owners. Also, condemnation was used primarily to overcome problems with determining ownership or the value of tax-delinquent and/or abandoned properties.

Redevelopment to Spur Economic Growth

Redevelopment programs that create sites for new or expanded industries and businesses are launched with the expectation that the increased economic activity will make more jobs available to residents, attract new types of businesses, and in general increase the level of business activity in the community. A well-planned redevelopment effort can overcome obstacles and create opportunities for attracting job- and revenue-generating activities to formerly unmarketable locations.

One successful project, Village West in Kansas City, Kansas, was initiated by the city and county as a joint redevelopment effort. The highly accessible 400-acre site contained 146 homes and farms plus four businesses. Some of the properties were acquired through eminent domain when owners

refused the offered buyout value. Once the property was assembled and made available for development, it attracted entertainment and retail businesses that since 2001 have created 3,500 jobs and drawn 9 million visitors a year. The site is still being developed, with major additions opening in 2007 and more being planned.

On a somewhat smaller scale, the town of Arlington Heights, Illinois, carried out a series of transit-oriented redevelopment projects from 1995 to 2003 that have revitalized its moribund downtown. Redevelopment sites were assembled from town-owned commuter parking lots, and through private acquisitions by a developer and town condemnation of two small holdout parcels. Developers selected by the town undertook development that included the mixed-use, public/private Arlington Town Square and, in subsequent development, 300 condominium units, additional retail and office space, a performing arts complex, and a central park, plus parking structures serving residents, shoppers, and commuters. The town also provided gap financing for several projects, grants and loans for facade improvements and interior renovations of some 35 buildings, and relocation assistance for displaced businesses and residents.

Murphy Park, St. Louis, Missouri

With creative financing, McCormack Baron Salazar in the mid-1980s joined forces with the St. Louis Housing Authority, the U.S. Department of Housing and Urban Development (HUD), and public housing residents to create a new model for inner-city housing by mixing public housing, affordable housing, and market-rate units in one privately owned and managed development. This effort proved so successful that HUD created the HOPE VI program based on the principles of mixed-income residents and mixing public and private financing sources. The city's power of eminent domain was used in the assembly of the additional land necessary to lower the number of units per acre (the existing public housing buildings were high rises) and to provide land for the new non-public housing units—two concepts critical to the success of Murphy Park.

Redevelopment for economic development also aims to generate increased tax revenues for improvement of public services and facilities. Village West in Kansas City produces $5 million per year in property taxes, compared with $15,000 before redevelopment, an amount that has enabled the city and county to lower tax rates, increase funds dedicated to revitalizing older areas, and allow early payment of bonds. In Arlington Heights, special districts were established to raise $27 million in public funding that is generating $133 million in private investment.

Replacing blighted and functionally obsolete areas with new developments adds luster and life to cities and suburbs, heightening their image in the regional urban spectrum and enhancing residents' identity with their neighborhood or community. In all four of these examples, the power of eminent domain played a small but significant role in assembling sites for redevelopment.

Guiding Principles and Practices for Use of Eminent Domain

The power of eminent domain is a valuable tool for local governments seeking to replace blighted and outmoded land uses with development that can expand a community's economy, employment, and tax base. The proposed constraints on use of eminent domain could block critically needed improvements in cities and suburbs.

It is vital, however, that the power of eminent domain be employed in a fair and equitable manner. Redevelopment programs that acquire private properties must be responsive to the legitimate desire of property owners, neighborhood residents, and businesses for fair treatment, proper notice and other procedures ensuring equitable treatment, and just compensation.

To achieve that objective, forum participants developed a set of guiding principles and best practices that can improve fair and equitable use of eminent domain by public agencies to promote revitalization and redevelopment. These principles suggest approaches that can help government agencies and developers prevent problems that often arise in the use of eminent domain.

Principle 1

Private property rights are a cornerstone of American law. The Fifth Amendment to the U.S. Constitution protects ownership of private property by limiting the governmental exercise of the power of eminent domain to acquisition of property required for a public use and by mandating payment of "just compensation" to property owners. Courts have ruled that achieving public benefits through economic development, in accordance with a comprehensive plan, is an acceptable use of the power of eminent domain.

This principle acknowledges the importance of private property ownership in American life and law and underscores the significance of constitu-

tional safeguards against the unreasonable governmental taking of private property. The nation's founding fathers were property owners; some held thousands of acres of land. They respected the concept of private ownership and sought to protect the rights of property owners against improper seizure of properties by governments at all levels. And they were moved to require appropriate compensation to owners for the value of properties acquired by the government. At the same time, they recognized the necessity of public property acquisition to serve public purposes—for public building sites and roadways, for example.

Thus, the Constitution's takings clause requires that exercise of the power of eminent domain serve a public purpose and create public benefits. These purposes and benefits are best spelled out in a comprehensive redevelopment plan that establishes the policy foundation for use of eminent domain in a proposed redevelopment area.

Definition of public purposes and benefits is even more important when the private property to be acquired through eminent domain will be transferred to another private property owner for redevelopment.

However, because of their experiences over centuries, governments prefer to make sparing use of the power of eminent domain. Generally, they favor negotiation of a reasonable purchase price with a willing seller over engaging in possibly controversial and time-consuming legal proceedings. In most areas designated for redevelopment, public agencies tend to pursue condemnation for only a small proportion of properties—in many instances, only to clear title of vacated or tax-delinquent properties or to acquire properties after attempts to negotiate acquisition have proven fruitless. In the latter circumstance, government possession of the power of eminent domain for acquisition of holdout properties can spell the difference between success and failure in achieving redevelopment goals.

Despite the long history of use of eminent domain, and perhaps because of the wide range of its application over time, disputes arise. In particular, the questions of public purpose—especially in government pursuit of economic development—and adequacy of compensation for the tangible and intangible costs of taking private property continue to create controversy.

Putting the Principle into Practice

Government agencies and developers must respect private property rights and should employ the power of eminent domain only in accordance with the practices outlined under the remaining principles.

Principle 2

Public and private efforts to rectify abuses of the power of eminent domain should address specific problems rather than broadly prohibit its use for the legitimate public purpose of economic development.

Calls for drastic limits on the use of eminent domain threaten to stifle community efforts to promote urban and suburban revitalization. There is no doubt that abuses of the power have occurred—in the provision of timely information about the intent and process of proposed property acquisition, in the determination of just compensation, and in the definition of proper public purposes to be served by the acquisition. These problems are preventable, however, without eliminating eminent domain as a useful tool for promoting redevelopment.

Use of eminent domain to foster economic development appears to prompt the greatest oppo-

sition when it involves public acquisition of one owner's private property so it can be sold to and reused by another private owner.

In itself, the public purpose of promoting economic development is unassailable—governments have provided many incentives, including offers of development sites, for this purpose for many years.

Use of the power of eminent domain to assemble such sites, however, has raised questions, especially if the proposed beneficiary of the acquired property is known before its acquisition, as was the case in the controversial condemnation of an entire neighborhood in Detroit to allow development of a General Motors factory. Resolution of the issue, then, depends on the extent to which the project's value to the community at large—manifested through use of the power of eminent domain—outweighs the negative impact the acquisition has on private property owners.

The definition of public purposes to be served by eminent domain frequently involves a combination or overlapping of public and private purposes, as demonstrated in the increasingly successful use of public/private partnerships in urban and suburban redevelopment. The private sector now develops and owns toll roads, public arcades and plazas, government office buildings, stadiums, and streets that previously were considered to be the exclusive province of the public sector. And the public sector sometimes invests in hotels, conference centers, apartment buildings, and industrial parks once thought of as the exclusive province of the private sector.

Is sale of redevelopment land to a private owner to help fund construction of a public convention center a public or a private purpose? What about public open spaces or community centers included by developers in otherwise private projects? Or commercial space built by developers but supported in part by public parking garages? These developments appear to generate public benefits, but also clearly benefit private participants. Rarely do redevelopment projects serve solely public or private purposes.

Putting the Principle into Practice

To ensure that eminent domain is employed fairly in redevelopment, developers and government agencies should take care to involve residents and property owners in the decision-making process, thereby generating broad agreement on the public good. They also should prepare a realistic redevelopment plan and make displacement as painless as possible for owners and residents.

Principle 3

The public purposes to be served and specific public benefits expected from proposed redevelopment should be documented in a redevelopment plan determined through resident participation and approved by the government.

For redevelopment sites acquired wholly or in part through eminent domain, it is prudent to define the public purposes to be served and the public benefits expected from private use of the properties. For example, among potential public purposes and benefits of privately sponsored economic development efforts, including those that may be assisted by the use of eminent domain, are the following:

- increased property and/or sales tax revenues for the local jurisdiction;
- expanded employment opportunities for local residents;

- greater proximity of residents to local services and jobs;
- increased business activity for existing shopping and service outlets;
- elimination of run-down and unsightly conditions;
- improvement of infrastructure systems;
- spillover enhancement of surrounding areas;
- creation of place-making qualities that improve community identity;
- creation of opportunities for related development of civic and cultural buildings and spaces; and
- attraction of visitors to nearby public and cultural facilities.

The redevelopment plan can spell out in detail aspects of such purposes and the benefits that pertain to the proposed redevelopment area.

Putting the Principle into Practice

To carry out Principle 3, developers and government agencies should take the following steps:

Identify public purposes and benefits. In consultation with property owners, residents, and business owners in the proposed redevelopment area, developers and government agencies should identify specific public purposes to be served and the public benefits to be achieved through redevelopment.

Prepare a plan. Before initiating redevelopment, a local government or redevelopment agency should prepare and adopt a plan that, at a minimum, defines the public purposes and benefits to be served by redevelopment and describes the general character of proposed development, proposed uses, preservation and/or restoration of existing uses, and potential phasing of future development.

These practices reflect recommended local planning practices in general. More particularly, they reflect the emphasis the *Kelo* decision placed on New London's adopted plan for the redevelopment area as a means of establishing the rationale for undertaking the project. Many states require preparation and adoption of such plans before initiation of redevelopment.

Principle 4

Public officials and redevelopment agencies should seek out, listen to, and respect the point of view of property owners, residents, and business owners in redevelopment areas.

The prospect that redevelopment will result in the loss of property ownership, as well as required relocation and substantial changes in the area, can breed anxiety and concern among the residents most directly affected—property owners, homeowners and renters, and business owners and employees. Local public officials should ensure that these concerns and questions can be aired and addressed throughout the redevelopment process, particularly when use of eminent domain is considered.

Putting the Principle into Practice

To carry out Principle 4, the following steps should be taken:

Seek public participation. Property owners, residents, and other interests in proposed redevelopment areas should be given advance notice of and opportunities to participate in planning before public decisions are made on formal designation of the area to be redeveloped, adoption of plans, and decisions to proceed with property acquisition potentially involving use of eminent domain.

Phase acquisition and relocation. The planning process should consider the opportunities for phasing of property acquisition and relocation of residents and businesses to alleviate unnecessary hardships for property owners, residents, and business owners.

Retain existing residents. Relocation activities should take advantage of all opportunities provided by the redevelopment process to rehouse existing residents and businesses within the new development and to make property available there for sale to previous owners of acquired properties.

Local officials should go the extra mile in addressing the impact of property acquisition—including that acquired through the use of eminent domain—on current residents, businesses, and property owners. In the Freetown redevelopment process in Greenville, South Carolina, for example, the Greenville County Redevelopment Authority worked with neighborhood residents to identify homes that could be refurbished rather than demolished, to determine the need for relocation assistance, and to temporarily relocate about one-third of the resident households, then return them to new and rehabilitated homes in Freetown.

Eminent Domain Ballot Initiatives

In the November 2006 elections, nine states passed measures by a significant margin to ban or restrict use of the power of eminent domain for private projects. Only in California and Idaho did voters reject such restrictions. Plans to place similar measures on ballots in other states in 2008 are already underway.

EMINENT DOMAIN BALLOT INITIATIVES, 2006

STATE	BALLOT INITIATIVE	SUMMARY	RESULT
Arizona	Proposition 207	Prohibits use of eminent domain for private projects; requires compensation for regulatory takings.	Passed
California	Proposition 90	Prohibits use of eminent domain for private projects; requires compensation for regulatory takings.	Failed
Florida	Amendment 8	Restricts use of eminent domain for private projects.	Passed
Georgia	Amendment 1	Restricts use of eminent domain for private projects.	Passed
Idaho	Proposition 2	Restricts use of eminent domain for private projects; requires compensation for regulatory takings.	Failed
Michigan	Proposal 4	Restricts use of eminent domain for private projects.	Passed
Nevada	Question 2	Restricts use of eminent domain for private projects.	Passed
New Hampshire	Amendment 1	Restricts use of eminent domain for private projects.	Passed
North Dakota	Amendment 2	Restricts use of eminent domain for private projects.	Passed
Oregon	Measure 39	Restricts use of eminent domain for private projects.	Passed
South Carolina	Amendment 5	Restricts use of eminent domain for private projects.	Passed

Source: American Institute of Architects

Principle 5

Eminent domain is a powerful tool that should be employed only after other methods of property acquisition are found unworkable.

Redevelopment agencies generally employ eminent domain only as a last resort. Agencies have found through experience that offering generous payments for property, within reasonable, state-established legal limits, can help them and developers avoid or soften objections to its acquisition. They have also learned that property owners who understand the potential benefits of planned redevelopment are more likely to cooperate with property acquisition programs. Many examples exist of redevelopment efforts that manage to obtain ownership of most properties slated for acquisition without use of eminent domain.

Putting the Principle into Practice

To carry out Principle 5, the following steps should be taken:

Consider alternatives to acquisition. Government agencies should give careful consideration during the redevelopment planning process to identifying potential alternatives to property acquisition and demolition of structures, subject to satisfying plan objectives. Among the possible alternatives are structural rehabilitation, adaptive use, lot division to retain structures, property trades, and change of use.

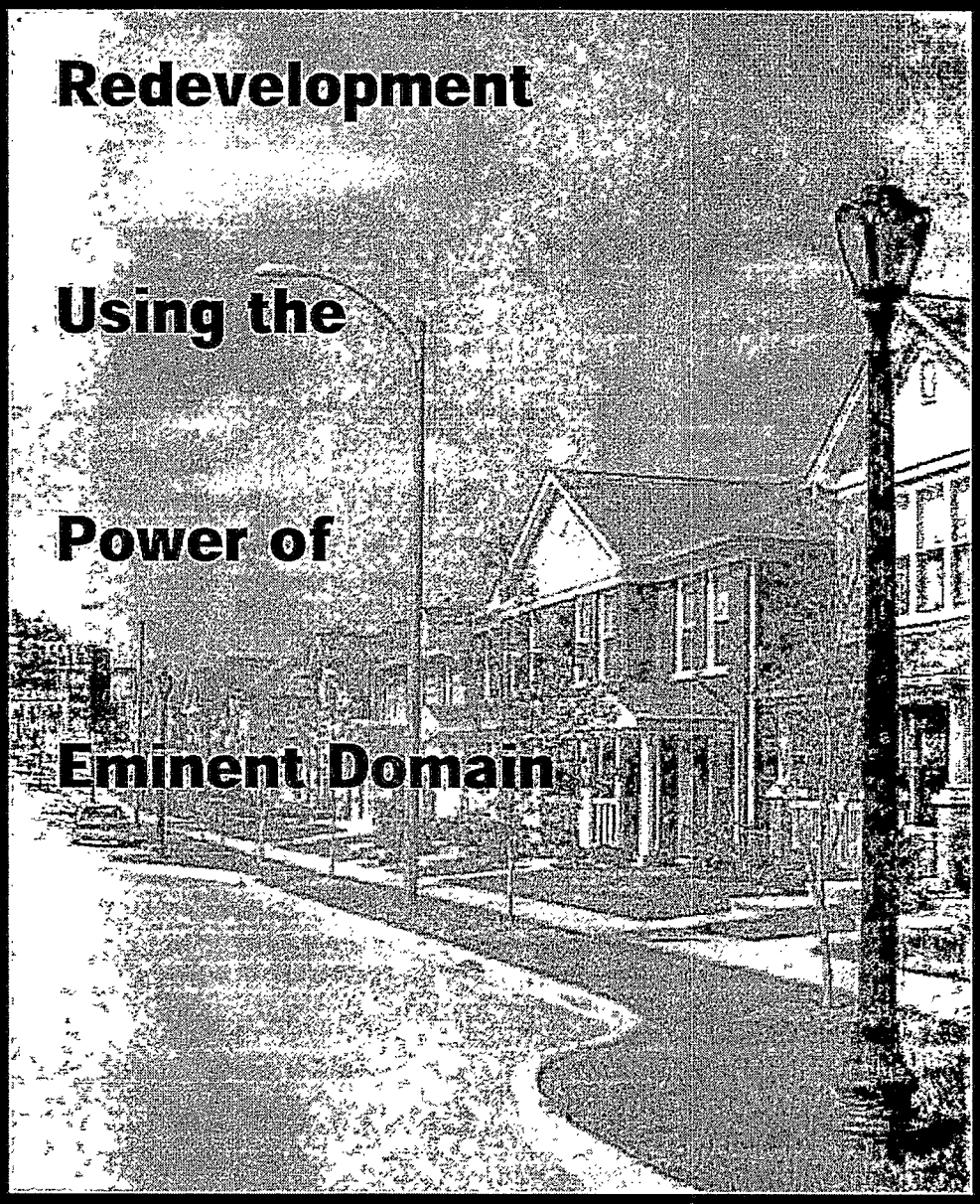
Recognize tangible and intangible costs of displacement. Government agencies should undertake good-faith negotiations to purchase private properties with offers of just compensation that include recognition of both tangible and intangible costs to property owners, residents, and business owners. Especially in view of potential proceedings involving the exercise of eminent domain, redevelopment agencies should interpret the constitutional requirement for just compensation to emphasize the justice of including not only the assessed or market value of the property, but also other potential costs to residents and businesses such as reasonable reslocation expenses, income losses during relocation, and the loss of neighborhood and family ties with the area.

Both of these practices can benefit from efforts by the redevelopment agency to establish strong relationships during the initial planning process with area property owners, residents, and business owners.

Summary

The forum participants call on public, nonprofit, and private organizations advocating improvement of housing and economic conditions in America to support the use of eminent domain in accordance with this statement of principles and recommended practices, and to assist in informing elected officials and community leaders about the importance of the power of eminent domain as a tool for revitalizing communities.

Case Studies:



Freetown

Greenville, South Carolina

The Freetown neighborhood in Greenville was developed in the 1880s as a haven for freed slaves. The neighborhood declined over the years: housing became little more than shacks, cracked sidewalks and worn pavement were the norm, and drug dealing and crime rates rose. Residents appealed to the Greenville County Redevelopment Authority for help.

Today, Freetown is a different place after undergoing a complete makeover that replaced decaying housing and junk-strewn lots with 80 affordable new homes and ten rehabilitated residences; neighborhood street, water, and sewer infrastructure also was upgraded. One of the most dramatic improvements is a new $600,000 community center—equipped with a full-sized gymnasium, meeting rooms, and a kitchen—that replaced a small U.S. Army barracks building previously used as the neighborhood center.

The redevelopment authority accomplished all this beginning in 1998 by acquiring blighted properties in order to assemble buildable sites for new homes. Acquisitions included a 54-unit apartment complex that had been a haven for criminals; it was torn down and replaced by more than a dozen new single-family homes. Most new houses in Freetown have about 1,100 square feet of space and are valued at less than $75,000.

The authority used the power of eminent domain to acquire only two holdout properties and to clear title to abandoned and tax-delinquent properties. Relocation grants ranging from $10,000 to $20,000 helped residents make downpayments on new homes. Having completed a carefully phased redevelopment program in 2006, the authority successfully returned more than one-third of the displaced households to the Freetown community, which now numbers about 200 families.

Sources: Telephone interviews on August 9, 2006, with Martin Livingston, director of the Greenville County Redevelopment Authority, and Gwen Kennedy, former redevelopment authority director; Greenville County Redevelopment Authority, *Community Report, 2004*; and John Boyanoski, "Three's the Charm," *Planning*, April 2005, 22–25.

Dudley Street Neighborhood

Boston, Massachusetts

The Dudley Street neighborhood, made up of a multicultural population of 24,000 and located in Boston's Roxbury district, had seen property abandonment and arson, trash dumping, and widespread poverty. The neighborhood consisted of older one-, two-, and three-family homes, a few larger boarded-up multifamily buildings, and about 1,000 vacant lots; a variety of commercial and community services were available to residents. The Dudley Street Neighborhood Initiative, a grass-roots community organization formed in 1984, countered the city's plans for large-scale redevelopment of the 1.5-square-mile area with a different vision. Focusing on reinvigorating the 64-acre heart of the neighborhood, the group's strategy was to consolidate vacant, intermingled public and private properties to provide a foundation for development sufficient to change the neighborhood's economic environment.

In response to its request to the city, the Neighborhood Initiative received authorization to use eminent domain to overcome the complex process of acquiring tax-delinquent and abandoned properties. It created a community land trust, and from 1991 to 1994 the organization assembled 132 parcels with enough land to allow construction of more than 400 homes in single-family, duplex, and triplex structures. In addition, the organization refurbished 740 houses and constructed a new town common, a community center and gym, a child care center, and a community greenhouse. The willingness of Boston to entrust the power of eminent domain to the Neighborhood Initiative was a key factor in the organization's ability to redevelop the area.

Sources: Robert G. Dreher and John D. Echeverria, "*Kelo*'s Unanswered Questions," unpublished paper from the Georgetown Environmental Law & Policy Institute, 2006; and Enterprise Program, "Program Profile: Dudley Street Neighborhood Initiative," 2000, www.practitionerresources.org.

Village West

Kansas City, Kansas

Creation of Village West in Kansas City, a successful entertainment, shopping, and tourism district, was initiated by the city and county as a joint redevelopment effort. The 400-acre site at the junction of interstates 70 and 435 contained 146 homes and farms, plus four businesses. All but two properties were acquired through negotiated price agreements: one 15-acre parcel held by an absentee owner and another, smaller parcel whose owner refused the offered sales price were acquired through the exercise of eminent domain. The potential use of eminent domain appeared to prompt property owners to enter into serious negotiations toward a reasonable sales price.

Once the properties were assembled and made available for development in 2001, they quickly attracted entertainment and retail businesses, in part due to the popularity of the nearby Kansas Speedway and the prime location of the city and county within a large midwestern region. A key element is the Nebraska Furniture Mart, owned by Berkshire Hathaway Corporation, which built a huge store on a 16-acre site and is adding to it a 360,000-square-foot expansion on eight additional acres. Other major projects include a Dave & Buster's entertainment venue, more than 400 hotel rooms, the first phase of a 750,000-square-foot lifestyle center, and the Community America Ballpark (home of the T-Bones minor league baseball team), plus dozens of other retail and entertainment outlets.

Village West, which in 2006 had 38 businesses that employ nearly 3,500 people, draws nearly 9 million visitors a year. Property values in the redevelopment area now top $189 million, generating more than $6 million in real property tax revenues in 2005 for the city and county. The Village West tourist district, a highly successful economic development project, continues to make major additions, and more are planned.

Sources: Telephone interviews with Rob Richardson, Wyandotte County/Kansas City, Kansas, planning director, and project coordinator Denise Hays, August 14, 2006; city/county annual reports, 2004 and 2005; and the Village West home page, www.villagewest.us.

Downtown
Arlington Heights, Illinois

Arlington Heights, located about 24 miles northwest of central Chicago, has revived its moribund downtown through a series of public/private redevelopment projects that have relied on land acquisition by public and private organizations, aided by public use of eminent domain powers when necessary to complete assembly of developable sites.

Arlington Heights is a classic suburban community of 77,000 residents living in upscale neighborhoods, but a proliferation of shopping centers dominated the retail market to the detriment of its downtown. By the mid-1980s, with vacant storefronts, run-down buildings, and parking lots all too common in the community's center, the town council began fighting back.

Officials drew up a central business district master plan in 1987 that focused on encouraging mixed-use, high-density development through strategic public actions. It then invested in construction of parking garages, new parks, and improved streetscapes. Two private residential projects were built in the 1980s. The town then launched a series of public/private projects that featured the opening of a major in-town, neotraditional shopping center in 1999, and development of three condominium buildings and a performing arts center in the next two years. Downtown Arlington Heights has been re-created as a walkable, attractive, busy town center.

The town took decisive actions to create these projects. It established financing districts to make available bond proceeds for gap financing of new developments, grants and loans for facade improvements and interior renovations, and business relocation assistance. Over a lengthy period it acquired key downtown properties to serve as a land bank for future projects, meanwhile operating many of them as commuter parking lots.

In the late 1990s, the town sought developer interest for engaging in public/private projects. Town officials worked cooperatively with several developers to shape feasible developments, including acquisition of properties through eminent domain when necessary to produce developable sites. The town also invested in substantial streetscape and park improvements to provide an attractive public framework for private construction.

Sources: In-person and telephone interviews with Arlington Heights planning director William Enright, 2001 through 2005.

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