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## **THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE**

### **TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS**

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#### **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.”<sup>1</sup> The protection of property rights was one of the main purposes for which the Constitution was originally adopted.<sup>2</sup> 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.<sup>3</sup> 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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<sup>1</sup> BARACK OBAMA, *THE AUDACITY OF HOPE* 149 (2006).

<sup>2</sup> *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’”).

<sup>3</sup> 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](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*.<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> The Court upheld the condemnation of land in New London for transfer to a private party despite the fact that the

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<sup>4</sup> 545 U.S. 469 (2005).

<sup>5</sup> U.S. CONST. AMEND. V.

<sup>6</sup> *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.<sup>7</sup> In the 1954 case of *Berman v. Parker*, the Court upheld the condemnation of “blighted” property for transfer to private developers and concluded that the legislature has “well-nigh conclusive” power to define public use as it sees fit.<sup>8</sup> *Berman*’s highly permissive approach was reaffirmed in *Hawaii Housing Authority v. Midkiff* in 1984.<sup>9</sup>

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).<sup>10</sup> *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.<sup>11</sup> 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.<sup>12</sup> 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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<sup>7</sup> 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).

<sup>8</sup> *Berman*, 348 U.S. at 32.

<sup>9</sup> *Midkiff*, 467 U.S. at 240-41.

<sup>10</sup> 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);

<sup>11</sup> *Id.* at 62.

<sup>12</sup> 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.<sup>13</sup>

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.”<sup>14</sup> For the last several years, state and federal courts have struggled over the question of what qualifies as a “pretextual” taking.<sup>15</sup> 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.<sup>16</sup> Courts are not even allowed to consider whether the claimed benefits will actually materialize or not.<sup>17</sup> Even a relatively robust pretextual takings doctrine is therefore unlikely to give property owners more than marginal protection against abusive condemnations.<sup>18</sup>

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.<sup>19</sup> Nonetheless, most states permit a wide range of private-to-private condemnations.<sup>20</sup>

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<sup>13</sup> 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).

<sup>14</sup> *Kelo*, 545 U.S. at 477–78.

<sup>15</sup> 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).

<sup>16</sup> *Kelo*, 545 U.S. at 469-78.

<sup>17</sup> *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 the City’s considered judgments about the efficacy of its development plan).

<sup>18</sup> Somin, *Judicial Reaction* at 34-35.

<sup>19</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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 P.2d 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).

<sup>20</sup> See discussion in Part III, *infra*.

<sup>21</sup> 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).

<sup>22</sup> 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).

<sup>23</sup> Somin, *Grasping Hand* at 269-71.

<sup>24</sup> *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.”<sup>25</sup> Similarly, “slum clearance” was sometimes dubbed “Negro clearance.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> Hispanic groups, such as Puerto Ricans, were also commonly targeted.<sup>29</sup>

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.<sup>30</sup> Local governments sometimes sought to rid themselves of what they called “niggertowns.”<sup>31</sup> In most cases, those displaced by blight condemnations ended up worse off than they were before, and were not fully compensated for their losses.<sup>32</sup>

In 1954, the Supreme Court upheld the constitutionality of blight condemnations in *Berman v. Parker*.<sup>33</sup> 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.<sup>34</sup> Some 97.5% of them were African-American.<sup>35</sup> 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.<sup>36</sup> By the 1960s, the neighborhood in question was majority white.<sup>37</sup>

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.”<sup>38</sup> Unfortunately, the Supreme Court and most other legal elites failed to grasp the contradiction between aggressive judicial oversight

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<sup>25</sup> 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](http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04_tr_qry.html).

<sup>26</sup> Anderson, *FEDERAL BULLDOZER* at 65.

<sup>27</sup> Fullilove, *African-Americans and Eminent Domain*, at 2.

<sup>28</sup> Somin, *Grasping Hand*, at 269-71.

<sup>29</sup> Anderson, *FEDERAL BULLDOZER* at 64-65.

<sup>30</sup> 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.”).

<sup>31</sup> Quoted in FRIEDEN & SAGALYN, *DOWNTOWN* at 28.

<sup>32</sup> Somin, *Grasping Hand*, at 269-71.

<sup>33</sup> 348 U.S. 26 (1954).

<sup>34</sup> *Id.* at 36.

<sup>35</sup> *Id.*

<sup>36</sup> HOWARD GILLETTE, JR., *BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C.* 163-64 (1995).

<sup>37</sup> Pritchett, *“Public Menace” of Blight* at 47.

<sup>38</sup> *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.”<sup>39</sup> Over time, however, most states expanded the definition of “blight” to include virtually any area that might be considered underdeveloped in some way.<sup>40</sup>

State courts have ruled that even such areas as downtown Las Vegas and Times Square in New York can be declared “blighted” and condemned.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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<sup>39</sup> 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*.

<sup>40</sup> 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).

<sup>41</sup> 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).

<sup>42</sup> 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.*

<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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*.<sup>46</sup> The brief emphasized that economic development takings disproportionately target the minority poor, and cited a number of recent examples.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup>

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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<sup>44</sup> See Somin, *Grasping Hand* at 190-203, 267-69 (detailing these dangers).

<sup>45</sup> 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).

<sup>46</sup> 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.

<sup>47</sup> *Id.* at 7-12.

<sup>48</sup> *Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

<sup>49</sup> See Somin, *Let There Be Blight* (describing the details of this case and its background).

<sup>50</sup> Somin, *Grasping Hand* at 192-99.

<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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”<sup>54</sup> compensation required by the Supreme Court.<sup>55</sup> Undercompensation is particularly likely in the case of “low value” properties of the kind often occupied by poor minority group members.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> Social science confirms the common sense view that the poor, on average, have far less political influence than more affluent citizens.<sup>60</sup>

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.<sup>61</sup> 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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<sup>52</sup> *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).

<sup>53</sup> 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*).

<sup>54</sup> See, e.g., *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984).

<sup>55</sup> 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).

<sup>56</sup> See Chang, *An Empirical Study of Compensation*.

<sup>57</sup> Somin, *Grasping Hand* at 215-16.

<sup>58</sup> See *id.* at 190-203 (explaining why the politically weak are likely to be targeted for condemnation).

<sup>59</sup> 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>.

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

<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup> 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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<sup>62</sup> 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).

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

<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> As a result, forty-three states and the federal government enacted legislation intended to curb economic development takings in the years since *Kelo*.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> They include such large states as California, New York, New Jersey, and Texas.<sup>71</sup> 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.<sup>72</sup> Public ignorance enables state legislators to satisfy public demand for action on eminent

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<sup>65</sup> See Kelly, *The "Public Use" Requirement in Eminent Domain Law*.

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

<sup>67</sup> *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).

<sup>68</sup> Somin, *Limits of Backlash*, at 2120-35.

<sup>69</sup> *Id.* at 2120-28. See also the discussion of blight condemnations in § II.B., *infra*.

<sup>70</sup> *Id.* at 2117-20.

<sup>71</sup> *Id.*

<sup>72</sup> *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.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> 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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<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> See Steven J. Eagle, *Does Blight Really Justify Condemnation?* 39 URBAN LAWYER 833 (2007).

<sup>76</sup> 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)