PRIVATE PROPERTY FOR THE POLITICALLY POWERFUL

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INTRODUCTION—A SHORT HISTORY OF THE EROSION OF RESPECT FOR PRIVATE PROPERTY

Traditional Anglo-American law always considered property rights nearly sacrosanct, with the giants of the legal field equating private property with liberty and an area that was best not molested by government.[1] A central purpose of government was seen to be a protector of private rights and liberties, including and especially, rights in property.[2] And, so great was the regard for private property, that not even actions for "the common good" could violate it.[3] Of course, the practical necessity of condemnation was recognized by early theorists such as Blackstone, who cautioned government to use that

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1. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *2 ("There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 222 (Peter Laslett, ed., student ed., Cambridge Univ. Press 1988) (1689) ("Whenever the legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are thereupon absolved from any further obedience."). This understanding was not confined to Great Britain. In the prior century, Hugo Grotius wrote, "Thus property, as now in use, was at first a creature of the human will. But, after it was established, one man was prohibited by the law of nature from seizing the property of another against his will." HUGO GROTIUS & ARCHIBALD COLIN CAMPBELL, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS 21 (1901) (translation of HUGO GROTIUS, LAW OF WAR AND PEACE, ch. 1, § X (1625)).

2. *See, e.g.*, THE FEDERALIST NO. 10 at 49 (James Madison) (J.R. Pole ed., 2005) ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government."); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed., 2007). Of course, there are contrary views. *See, e.g.*, David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 L. & SOC. INQUIRY 1, 47–48 (1996) ("property less and less the 'guardian' of other rights, and more transparently a form of individual and class domination").

3. 1 WILLIAM BLACKSTONE, COMMENTARIES *135 ("So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.").

power sparingly—noting that it is not the sort of power that an individual man, or even a "set of men," can exercise.[4]

But there is also a critical reality to the nature of government that is common to all forms of government not run by angels: those in power take advantage of those who are not. And in the context of eminent domain, the advantage taken is often private property. To avoid abuse of any power wielded by the government—either by the executive or the legislature—the judiciary is supposed to mediate. The judiciary is given the authority to act as a neutral arbiter between government and individuals. This judicial power to interpose between individuals and their government is key to liberty. It was an essential epiphany to those involved in the struggles for power between the monarchy, the parliament, and the judiciary of seventeenth century England that not even the king could command his subjects or pass judgment upon them without the law adopted by Parliament and the interpretation of that law by independent judges.[5] With the elimination of the monarchy's own prerogative courts such as the Star Chamber, an *independent* court system—with the ability to say "no" to the Crown—became an essential element of the British Constitution, and ultimately many state constitutions and the Constitution of the United States.[6] Thus, the courts have had a long and storied tradition of protecting the liberties of the people against all manner of attempted usurpations. And the liberty of property is no different. Indeed, one of the first great attempts to assert the liberties of the American colonists against British usurpations came in the famous challenge by James Otis in 1761 to the Crown's writs of

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4. Blackstone continues that only the legislature can "interpose and compel":

> If a new road . . . were to be made through the grounds of a private person, it might perhaps by extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. . . . the legislature alone, can [compel only] . . . . by giving him a full indemnification and equivalent for the injury thereby sustained. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.
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> *Id.*

5. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

6. *Id.* at 279. "[T]he cardinal achievement of the English in their constitutional struggles was to subdue the Crown under the law, particularly under the English constitution." *Id.* at 493–94.

assistance,[7] an event considered by John Adams to have given birth to the American independence movement.[8]

Private property rights deserve an equally forceful protection by the judiciary from the government's power of eminent domain. In the case of eminent domain, government officials are not just entering and "break[ing] locks, bars, and everything in their way."[9] They are *taking* the locks, bars, and everything in their way, as well as the house itself and the very land upon which the house sits. The Constitution limits such power only to instances where the taken property is to be put to public use, and it tasks the judiciary with ensuring that government power, including the power of eminent domain, is exercised only within constitutional limits. And yet, in the context of the forced transfer of property from those without power to those with it, that process fails because the judiciary defers too much to those who are doing the taking. And in recent times that process has failed badly because "judicial deference" has taken on an exalted status in the nation's courthouses.[10]

The United States, however, was not founded upon principles of deference. The structure of the government was instead designed to establish vigorously competing branches of government. Moreover, each branch is imbued with an interest in preventing the undue arrogation of power by the other branches. Such a check on the amassing of power was seen to be the best guarantor of liberty, and property, for the people.[11] But this fundamental vision of the proper role of

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7. *See* James Otis, Oral Argument Against Writs of Assistance (Feb. 24, 1761), *in* 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT, 151, 152 (Scott J. Hammond et al. eds., 2007):

> A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.
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> This wanton exercise of this power is not a chimerical suggestion of a heated brain.

8. *See generally* JOHN ADAMS & WILLIAM TUDOR, NOVANGLUS AND MASSACHUSETTENSIS: OR POLITICAL ESSAYS (1819).

9. *See* Otis, *supra* note 7, at 152.

10. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 55–61 (2015).

11. *See, e.g.*, THE FEDERALIST NO. 47, at 246 (James Madison) (Garry Wills ed., 1982)

government began to metamorphose over a century ago. Government power, instead of being the chief protector of the liberties and property of the people, transformed into the chief guarantor of the general welfare of the people, even if that meant that liberty and property had to step aside.[12]

It has been argued by some that the institution of private property, and the protections given to private property, serve only to protect the haves against the have-nots.[13] But when employed as designed, the institutions of private property really serve to protect the interests of the working and middle classes as much as anyone else. Nowhere is that seen more clearly than with eminent domain. If constrained to its constitutional limits, the power of eminent domain would pose only a limited risk to the rights of individuals.

It is not a coincidence that the expansive notions of state power espoused by the Progressives came into prominence at the same time as the constraints on the power of eminent domain were loosened.[14] A government that sees the individual rights in property as an obstacle to good government is not one that will be shy about

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("[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." (quoting CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 171 (Thomas Nugent trans., 1748)). It should also be quite clear that liberty and property were seen as coextensive by the Founders. *See, e.g.*, James Madison, *A Property in our Rights*, NAT'L GAZETTE, Mar. 29, 1792, at 174 ("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.").

12. Thus, for example, President Roosevelt put the "freedom from want" and "freedom from fear" on an equal footing with the freedom of speech and religion. *See* Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941) (transcript available at http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm). With that, the freedoms in the Bill of Rights requiring government to refrain from infringing upon our liberties (e.g., "[c]ongress shall make no law," or "the right . . . shall not be infringed," or "nor shall . . .") become mandates for government to provide positive benefits to its people.

13. *See, e.g.*, Abraham, *supra* note 2; KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 22 (1884), *transcribed from* 1 MARK/ENGELS SELECTED WORKS (Samuel Moore trans.,Progress Publishers1969), https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf ("[M]odern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.").

14. *See* Somin, *supra* note 10, at 47–54; Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 SW.U. L. REV. 569, 635 (2003) ("[W]hereas private contracts and private property had once been seen as fundamentally different than projects having a special public nature, like railroads—and consequently, free from government interference—now all behavior was seen as having public ramifications justifying government control, to serve the 'popular will.'").

using the power of eminent domain. That the ideals of progressivism and individual liberty were seen as mutually incompatible can be seen, for example, in the writings of Woodrow Wilson. In 1887, as a professor at Princeton University, he wrote:

> [A]ll idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests. The thesis of the state socialist is, that no line can be drawn between private and public affairs which the State may not cross at will; that omnipotence of legislation is the first postulate of all just political theory.
> . . . .
> . . . must not government lay aside all timid scruple and boldly make itself an agency for social reform as well as for political control?[15]

Later, while campaigning for the presidency, he said, "that property as compared with humanity, as compared with the vital red blood in the American people, must take second place, not first . . . ."[16] With the rise of progressivism in the United States and the concomitant understanding that government should play a much larger role in promoting collective action for the public good, fealty to principles of individual rights, and especially economic and property rights, began to wane.[17]

Under progressive thought of the sort espoused by Wilson, notions of individualism and private property were seen as impediments to social improvement.[18] But the reformers were badly mistaken if they believed that the lessening of restraints on government interference with individual rights and property would inure solely to the benefit of the poor and working classes. The result was quite the opposite. The regulation of property under the Progressives evolved from regulations designed to protect health and safety to regulations designed

15. Woodrow Wilson, Socialism and Democracy (1887) (unpublished essay), http://www.origin.heritage.org/initiatives/first-principles/primary-sources/woodrow-wilson-on-socialism-and-democracy.

16. AUGUST HECKSCHER, WOODROW WILSON: A BIOGRAPHY 260 (1991).

17. *See, e.g.*, Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731 (2004); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

18. This is still thought, apparently, by some today. *See, e.g.*, Abraham, *supra* note 2.

to protect established and privileged neighborhoods from excessive development—and infiltration by the poor. Justice Sutherland's tirade against parasitic apartment buildings in *Euclid v. Ambler* was a harbinger of much more to come.[19]

As private property has become more and more malleable in the hands of government actors, it has become more of a target of the entrenched political class for the benefit of that class. The owners of private property, and the general public, have suffered. And, as will be shown, the property owners who have suffered the most have been those with the least—the working class, the poor, and minorities. Put simply, the erosion of rights in property has hurt those with the least property far more than those with the most.[20]

I. THE RISE OF EMINENT DOMAIN

The use of the sovereign power of eminent domain to condemn private property has been the most visible manifestation of the tendency of government to harness private property for the private good of government-favored special interests. While often couched in terms of improving the lives of the poor, the reality has been a dispossession of the poor from their homes and neighborhoods. Thus, working-class homes are condemned for shopping centers and factories for the ostensible purpose of creating jobs or increasing tax revenues, but in reality condemnation is for the purpose of enriching favored developers and multinational business enterprises.[21] Even today,

19. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (upholding zoning laws, noting "the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite").

20. Or, as Professor Kanner puts it, redevelopment means using the "coercive power of government to redistribute wealth from the deserving middle class and the few poor who own modest dwellings . . . to the undeserving rich." Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Roll"? A Response to Professor Dyal-Chand*, 31 U. Haw. L. Rev. 423, 447 (2009).

21. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (destruction of working-class neighborhood for General Motors plant); Kelo v. City of New London, 545 U.S. 469 (2005) (The ostensible purpose of the redevelopment (or destruction) of a middle-class neighborhood was to facilitate jobs. In reality, the project was for the benefit of the Pfizer corporation.); *see also* ILYA SOMIN, *supra* note 10, at 6 ("Documents obtained by *The Day* . . . show that the . . . condemnations were undertaken in large part as a result of extensive Pfizer lobbying of state and local officials."). For a longer list of cases where private property has been taken for the benefit of industrial and corporate interests,

middle-class private businesses can be taken for the benefit of other—and wealthier—private businesses. It is the Motel 6 being condemned for the Ritz.[22] And even entire neighborhoods of undesirables—the poor, the ethnic minorities, and those least able to mount meaningful political resistance—can be condemned in order to "revitalize" their neighborhoods. But this sort of "revitalization" simply disperses and displaces the powerless for the benefit of the powerful. The poor are shunted elsewhere, out of sight and out of mind. Once vibrant neighborhoods can become sterile office parks while new highways can tear asunder the social fabric of communities of color.[23] After decades of such marginalization of the poor for the public good, the broader public has had an epiphany: condemnation can happen anywhere to anyone. It is not only the blighted neighborhoods of the urban poor, but also the blight-free neighborhoods like Mrs. Kelo's, that can be targeted.[24]

Of course, "blight" has never really been much of an impediment to any sort of redevelopment taking because just about anything can be declared blighted due to factors as varied as "diversity of ownership" to peeling paint.[25] And even with many post-*Kelo* reforms, not much has changed with blight justifications for eminent domain, because the chasm between what the public considers to be blight and what the takers consider to be blight is vast. After all, if the reader lives in a single family suburban home surrounded by other individually owned homes, there is diversity of ownership. And heaven forbid

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see Kanner, *supra* note 20, at 467 nn.185–203.

22. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting) ("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."). For a rare instance of a court beating back such an attempt, see, for example, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130–31 (C.D. Cal. 2001), holding a government condemnation in order to retain Costco and stop "future blight" unlawful.

23. *See, e.g.*, ERIC AVILA, THE FOLKLORE OF THE FREEWAY: RACE AND REVOLT IN THE MODERNIST CITY 14 (2014) ("[I]f future anthropologists want to find the remains of people of color in a postapocalypse America, they will simply have to find the ruins of the nearest freeway."). Avila argues that the growing resistance to urban highways that began in the 1960s still pitted the white elites against poor minority communities.

24. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

25. *See generally* James S. Burling, *Blight Lite*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, January 9–11, 2003, at 3, 43, 2003 WL SH053 ALI-ABA 3, 43 (noting that one of the standard factors for determining blight is "diversity of ownership" and general dilapidation); SOMIN, *supra* note 10, at 84 (discussing expansion of meaning of "blight").

a neighbor has too many leaves on her tennis court, even if that neighbor is a member of Congress from an upscale San Jose neighborhood.[26]

There is in the United States something of a backlash. Once seen as a benevolent tool of social improvement, resistance to eminent domain is growing. Long-simmering resentments by minority communities have become more visible and have spilled into nonminority territory. Judicial and legislative skepticism of the motivations of condemning authorities is growing. With the Supreme Court's decision in *Kelo*, sporadic efforts to contain the abuses of eminent domain became a movement.[27] But will that movement last? Despite reforms, there is an inexorable tendency of condemning authorities and their allies to seek again the power to take.[28] The role of private property as a bulwark of individual liberty is not yet secure.

The Fifth Amendment in the United States Constitution says: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[29] In theory, confining the use of condemnation to those projects that serve a public use, combined with the payment of just compensation, should limit the ability and incentives of government actors to abuse the power of eminent domain. In practice, a potent combination of ambitious government actors, politically connected developers, and a willingly complicit judiciary has called into question the effectiveness of these constitutional limitations. As will be shown, the term "public use" has been transformed into a mere aphorism that has little to do with the "public" and sometimes not even much to do with "use." And government condemnors have striven mightily to put the prefix "un-" in front of "just compensation."[30]

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26. *See* RANDAL O'TOOLE, THE BEST-LAID PLANS: HOW GOVERNMENT PLANNING HARMS YOUR QUALITY OF LIFE 80 (2007).

27. *See, e.g.*, SOMIN, *supra* note 10, at 135–80 (summarizes political responses to *Kelo*); *see, e.g.*, Jennifer Zeigler, et al., *50 State Report Card*: *Tracking Eminent Domain Reform Litigation Since Kelo*, INST. FOR JUST. (Aug. 1, 2007), http://www.ij.org/wp-content/uploads/2015/03/50_State_Report.pdf. *But see* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006) (arguing that the legislative response has often been ineffectual and coopted).

28. *See, e.g.*, Brad Kuhn, *It's Baaacckkkk. . . . Redevelopment Returns to California*, CAL. EMINENT DOMAIN REPORT (Sept. 28, 2015), http://www.californiaeminentdomainreport.com/2015/09/articles/redevelopment/its-baaacckkkk-redevelopment-returns-to-california/ (chronicling the return of redevelopment in California).

29. U.S. CONST. amend. V.

30. For numerous examples of undercompensation for taken property, search for blog

The stories are legion of eminent domain being used to destroy working-class neighborhoods to make way for everything from automobile factories to undefined support for a pharmaceutical company to a baseball stadium to a Hollywood museum to a parking area for an upscale casino.[31] Sometimes after the neighborhoods are destroyed, the projects fail or never even get built in the first place.[32] These condemnations lead to a vexing question: where is the public use in privately owned factories, stadia, and museums, especially those that never get built?

II. THE TRANSFORMATION OF "PUBLIC USE" INTO "POLITICALLY USEFUL"

The *Kelo* decision ten years ago did not signal the Supreme Court's evisceration of the "public use" limitation on the power to condemn. That happened many years prior.[33] But it was the most visible

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posts with the title, *Lowball Watch*, in Gideon Kanner's blog, GIDEON'S TRUMPET [hereinafter Kanner, *Lowball Watch*], http://www.gideonstrumpet.info/ (last visited Dec. 19, 2016).

31. Kelo v. City of New London, 545 U.S. 469 (2005) (undefined support facilities for pharmaceutical company); County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 105, *cert. denied*, 376 U.S. 963 (1964) (Condemnation of homes for Hollywood museum; the landowner tried "to prove that the Hollywood Museum [was] merely a front of some kind under the guise of eminent domain and under the guise of a public body to put up a private enterprise . . ." The proof was not allowed. Although the land was condemned and the owner removed by alleged trickery, the museum was never built.); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d at 459 (Mich. 1981_ (automobile factory); Hector Becerra, *Decades Later, Bitter Memories of Chaves Ravine*, LA TIMES (April 5, 2012), http://www.articles.latimes.com/2012/apr/05/local/la-me-adv-chavez-ravine-20120405 (Mexican-American community removed for public housing that never materialized on the site of a future Dodger Stadium); s*ee* Wendy Horowitz, *Here Lies Liberty: Steve Anthony and His Fight Against Eminent Domain*, CENTRAL LIBRARY BLOG (Apr. 2, 2014), http://www.lapl.org/collections-resources/blogs/central-library/here-lies-liberty-steven-anthonys-fight-against-eminent. Lastly, Vera Coking fought the condemnation of her home by then-real estate mogul, Donald Trump, so it could be razed for a casino limousine parking area. *See* Manuel Roig-Franzia, *The Time Donald Trump's Empire Took on a Stubborn Widow—and Lost,* WASH. POST (Sept. 9, 2015), https://www.washingtonpost.com/lifestyle/style/the-time-donald-trumps-empire-took-on-a-stubborn-widow--and-lost/2015/09/09/f9cb287e-5660-11e5-b8c9-944725fcd3b9_story.html?utm_term=.0a08259f3930; *see also* Kanner, *supra* note 20.

32. *See* Gideon Kanner, *Eminent Domain Projects that Didn't Quite Work Out*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, Jan. 8–10, 2009, at 17, 2009 WL SP006 ALI-ABA 17.

33. *See* Ilya Somin, *Putting Kelo in Perspective*, 48 CONN. L. REV. (forthcoming 2017) (symposium on *Kelo*), https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2850695##.

manifestation of the phenomenon and one that managed to capture the public's attention when the press discovered the plight of elderly widows and pensioners who were being thrown out of their homes for some vaguely defined benefit of a multinational pharmaceutical conglomerate. The public was justifiably outraged at a practice that many of us in the business of defending landowners have known about for a long time. The public learned that crony capitalism was alive and well in city halls, county offices, and state bureaucracies across the land.[34]

It didn't begin this way. In the early years of the republic, the notion of a forced-government transfer of land from one private owner to another private owner was something of an anathema. Probably the earliest American case dealing with private takings is *Giddings v. Brown*, a Massachusetts decision from 1657, in which the Supreme Court held that "[t]he right of property is . . . a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable."[35] Beginning with *VanHorne's Lessee v. Dorrance*[36] and *Calder v. Bull*,[37] the Supreme Court routinely criticized the notion of private takings. In *Calder*, Justice Chase wrote:

> [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 . . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[38]

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34. For a sense of the public outrage, see, for example, Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, http://www.nytimes.com/2005/06/24/us/for-homeowners-frustration-and-anger-at-court-ruling.html?_r=0; Jonathan V. Last, *The Kelo Backlash: What the Supreme Court Touched Off with Its Eminent Domain Decision*, THE WKLY. STANDARD, Aug. 21, 2006, http://www.weeklystandard.com/the-kelo-backlash/article/13716; SOMIN, *supra* note 10, at 3 ("Polls showed that over 80 percent of the public disapproved of the Court's ruling, and it was also denounced by politicians, activists, and pundits from across the political spectrum.").

35. PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 16 (1899), https://www.archive.org/details/englishcommonla00reingoog.

36. VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795).

37. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

38. *Id.* at 388–89.

Likewise, Justice Story wrote for the Supreme Court in *Wilkinson v. Leland*,[39]

> [t]hat 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. . . . We know of no case in which a legislative act to transfer the property A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been consistently resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.[40]

These early cases involved *uncompensated* takings,[41] a fact which has led some to question whether the "A-to-B" proscription that Judge Chase discussed should apply to *compensated* takings. But the principle against A-to-B transfers was extended to a compensated transfer in the 1848 case of *West River Bridge v. Dix*.[42] In *Dix*, a private bridge was condemned for free public use. Concurring, Justice McLean wrote,

> It is argued, that, if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended.[43]

However, as the exigencies of industrialization came to the fore, this ethic began to crumble. First came the mills requiring dams for waterpower. And then came the railroads that were to stitch the nation together on steel rails. For these purposes, the mills and railroads needed land; and not just any land, but land in very particular

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39. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

40. *Id.* at 658. This proscription against private takings is consistent with Blackstone's admonition against a "set of individuals" taking private property even for a public purpose like a road. *See supra* note 3. While he continued that the government, and only the government, may take private property for such purposes, he did not say that government may take from one individual just for the benefit of another individual or set of individuals; to do so would have made his invection nugatory.

41. Or in *Calder*, 3 U.S. (3 Dall.) 386, it involved a legislative incursion in an inheritance dispute.

42. West River Bridge v. Dix,47 U.S. (6 How.) 507, 537 (1848).

43. *Id.* at 537 (McLean, J., concurring).

places. Mills had to be at favorable spots next to rivers. And railroads had to get from point *A* to point *B* with a minimum of deviations. While some mills and railroads made deals and bought land from willing sellers, others were either less patient or less willing to subject themselves to the vicissitudes of market transactions. And governments—which were often controlled by the railroads or other land-hungry industrial concerns—were willing to accommodate those industrialists who wanted other people's land without the bother of free-market transactions. In this era, the prohibition of private A-to-B transfers began to erode and the concept of public use became more elastic. Railroads, after all, were open for *use* by all members of the *public* who could pay the freight. Thus, for example, in *Hairston v. Danville & W. R. Co.*,[44] the Court held:

> The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.[45]

Some states and state courts were more receptive to these private takings by railroads and mills than others. But the trend was towards a more liberal interpretation of the Public Use Clause in order to facilitate industrial development.[46]

The coup de grace for the Public Use Clause as a meaningful check on the government's power to effect A-to-B transfers came in the 1954 decision of *Berman v. Parker*.[47] That case involved an effort at so-called "slum clearance" in Washington, D.C. The plan was to remove the dilapidated tenements and crumbling infrastructure and replace them with a planner's vision of utopia—shiny new office buildings, public squares, and perhaps some new housing for the poor. Well, actually, perhaps not for the last of those three. To accomplish this nirvana on earth, entire city blocks had to be acquired, razed, and rebuilt into new shining city on the hill by private developers. But, the owner of a department store objected. He claimed that his

44. Hairston v. Danville & W. R. Co., 208 U.S. 598 (1908).

45. *Id.* at 608.

46. *See* Timothy Sandefur, *Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 SW. U. L. REV. 569, 599–609 (2003) (extended historical treatment of eminent domain by mills and railroads).

47. Berman v. Parker, 348 U.S. 26 (1954).

building was a perfectly fine building; it was not a tenement and not a slum.[48] How could the city take his property and turn it over to a private developer and call that "public use"? The case eventually made its way to the Supreme Court.

That was where the Supreme Court manifested its peculiar brand of genius. In a decision written by the very progressive and very liberal Justice William O. Douglas, the Court held that "public use" really meant the "public purpose."[49] In other words, the public did not have to actually "use" the taken property in any literal sense, so long as the public's "purpose" was served by the project. And what could have been more in the public interest than slum clearance? But this was not the only left turn taken by the Court. The Court essentially said that the government's eminent domain power was coterminous with "police power," which is the power to regulate. In other words, whatever the government could regulate, it could take. This was an important conflation of power, because it also meant that the courts should not second-guess decisions to condemn any more than they should second-guess the details of day-to-day regulations. By 1954 it had already been well established that the courts would defer to government decisions pertaining to regulations of economic affairs.[50] This standard of deference meant that a court would overturn an economic regulation in only the most extraordinary of circumstances. And so it was in *Berman*, where Justice Douglas put forward an aphorism that is breathtaking both in its degree of condescension and its surrender to government power:

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48. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).

> The two cases [that became *Berman v. Parker*] were brought by Max Morris, the owner of a department store, and Goldie Schneider, who owned a hardware store down the street. Both stores were located on 4th Street, which was then a lively commercial area with various shops and stores, and neither of the buildings was considered to be substandard or deteriorating. Fourth Street at the time was a hub of black and Jewish life, and one of the few areas in the city, then segregated, that displayed a measure of racial harmony. It was the site of the city's first integrated parade, and the mostly Jewish stores on 4th Street relied on business from black residents.

Id. at 451–52. Lavine recounts that while there were serious concerns about bad conditions in and around "alleys" that characterized many neighborhoods in Washington, D.C., the twenty-three thousand people living in these areas were not all anxious for their redevelopment.

49. *Berman*, 348 U.S. at 32 (segueing a discussion of the power of eminent domain "executed for a public purpose" to "the application of the police power to municipal affairs").

50. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 n. 4 (1938).

> 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.*[51]

And to remove any doubt about the degree to which the Court was determined to remove the judicial branch from any meaningful oversight of the Public Use Clause, the Court established a standard of review of extreme deference:

> 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, . . . or the States legislating concerning local affairs. . . . 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.[52]

With *Berman*, it was all over except for the details. The next time the Court focused on the Public Use Clause was in *Hawaii Housing Authority v. Midkiff*.[53] At a time when "land reform" was all the rage in Latin America and supported there by the United States,[54] the State of Hawaii had its own version of land reform. Rather than helping any landless peasants in Hawaii, this land reform was aimed at

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51. *Berman*, 348 U.S. at 33 (emphasis added).

52. *Id.* at 32.

53. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

54. The previous dalliance with land reform in the United States occurred on Puerto Rico where sugar plantations, already made less viable by a World War II era condemnation for naval purposes, were condemned for redistribution to farmers. *See* Puerto Rico v. E. Sugar Assocs., 156 F.2d 316 (1st Cir. 1946).

helping middle-class homeowners who were leasing the land under their homes from the Hawaiian land trusts. Hawaii's Land Reform Act of 1967 was designed to help these homeowners wrest the underlying fee from the large Hawaiian land trusts—whose purpose was to benefit Native Hawaiians. In fact, as Professor Kanner explains, "The property owner in this case, the Bishop Estate-Kamehameha Schools was a charitable trust (holding the lands of Bernice Pauahi Bishop, the last member of Hawaiian royalty) operating for the benefit of native Hawaiian children educated by the Kamehameha schools."[55] In other words, this was really a sort of antipublic use, taking land from a charitable trust and giving it to the not-so-deserving homeowners with votes. Following the precedent of constitutional minimalism set down in *Berman*, the Court refused to find this private to private land transfer to be unlawful.

And then there was *Kelo*.[56] The condemnees in *Kelo* were not the mere ethnic shop owners of *Berman*. They didn't own department stores. But they were simply middle-class homeowners who lived in ordinary little homes in a very ordinary (and unblighted) neighborhood.[57] But, alas for them, they didn't happen to own a multinational pharmaceutical concern that could dangle politically advantageous dreams of economic revitalization before the politicians of New London, Connecticut.[58] New London undoubtedly was a tired little city that had seen better days. Its unpretentious circumstances clearly didn't match the ambitions of those in charge. It was difficult for the city to resist Pfizer's beguiling promises. After all, all that stood between New London becoming a city headquarters for a major international player and its economically distressed status quo was a neighborhood of some expendable middle-class residents.

The decision in *Kelo* was not any sort of radical change in the doctrine that had evolved from *Van Horne's Lessee* and *Calder* to *Berman* and *Midkiff*. What set *Kelo* apart was that it could no longer be

55. Gideon Kanner, *Is the 'Public Use' Pendulum Reaching the End of Its Swing?*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation 709, 711 (Aug. 22–24, 2002) 2002 WL SH018 ALI-ABA 709.

56. Kelo v. City of New London, 545 U.S. 469 (2005).

57. *Id.* at 475 (homes were unblighted). *See also* SOMIN, *supra* note 10, at 12 (description of neighborhood).

58. *See Kelo*, 545 U.S. at 473–75; SOMIN *supra* note 10, at 16–19 (outlining Pfizer's role in the redevelopment).

denied that the Public Use Clause was worth less than the parchment it was written on. The pretense was gone. And the public was outraged because it was not as familiar as lawyers were with the manner in which the courts can build one small doctrine-eviscerating precedent on top of another to ultimately transform the meaning of one thing to something completely different.[59] And so with *Kelo* the veil was lifted, and everyone knew that "public use" meant "public interest," which meant whatever damn-fool thing the politicians thought was a good idea to do with peoples' homes and lives at the moment.

III. THE "PUBLIC USE" IN REMOVING THE POOR FROM CITIES

It didn't take long before the idealistic notions of *Berman*, that eminent domain could be used to make cities "sanitary" and "spiritual," led to a perverse understanding that the best way to beautify a city was to remove that which was ugly. And not to put too fine a point on it, what was ugly was not white and upper middle class. By the time of *Kelo*, the criticisms of eminent domain were becoming widespread.[60] It finally began to dawn on people that urban redevelopment had turned from a salutary mechanism for societal improvement to something more sinister. In her *Kelo* dissent, Justice O'Connor, the author of *Midkiff*, noted that if eminent domain could be used for mere economic development, then the weak and politically powerless would become victims of progress, not its beneficiaries.[61] Justice Thomas

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59. Of course, the public should know better than to think words mean what the mean. *See* LEWIS CARROL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 124 (1882):

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

60. *See, e.g.*, MICHAEL MALAMUT, PIONEER INST., THE POWER TO TAKE: THE USE OF EMINENT DOMAIN IN MASSACHUSETTS (2000) (White Paper No. 15); Steven M. Crafton, *Taking The Oakland Raiders: A Theoretical Reconsideration of The Concept of Public Use And Just Compensation*, 32 EMORY L.J. 857 (1983); David Kochan, *"Public Use" And The Independent Judiciary: Condemnation in An Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998); Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate A "Public-Private Taking": A Proposal to Redefine "Public Use"*, 200 L. REV. MICH. ST. U.-DET. C. LAW 639 (Fall 2000); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 4 (2003); Laura Mansnerus, Note, *Public Use, Private Use, And Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983); Derek Werner, Note, *The Public Use Clause, Common Sense, and Takings*, 10 B.U. PUB. INT. L.J. 335 (2001).

61. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).

likewise noted that the poor are unable to "put their lands to the highest and best social use [and] are the least politically powerful."[62]

Moreover, poor and minority communities had borne the brunt of redevelopment pain since *Berman*.[63] In fact, Justice Thomas noted that of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, sixty-three percent were racial minorities.[64] Commentators have noted the same. Wendell Prichett wrote that "[b]light was a facially neutral term infused with racial and ethnic prejudice."[65] Sometimes even in the absence of an intent to remove minorities, it is the inevitable result of supposedly race-neutral redevelopment because today's redevelopment cannot be divorced from the policies that led to urban concentrations of minorities in the first place.[66] Indeed, urban renewal had become pejoratively known as "Negro removal."[67] African-American novelist and social critic James Baldwin criticized urban renewal as nothing more than "move the Negroes out."[68] Thus, whether or not urban redevelopment was a "public use," it certainly had the effect of transferring what little wealth some minority communities had to more politically favored interests.

At least with *Berman* there was the pretense that those removed from the redeveloped neighborhood would be able to move back into new public housing. That, at least, could have been relevant to the

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62. *Id.* at 521 (Thomas, J., dissenting).

63. *Id.* at 522.

64. *Id.*

65. Pritchett, *supra* note 60 at 6.

66. See LELAND T. SAITO, THE POLITICS OF EXCLUSION: THE FAILURE OF RACE-NEUTRAL POLICIES IN URBAN AMERICA 4–5 (2009):

> Economic redevelopment and the demolition of a building or neighborhood take place within a history of explicit racial inequality. This inequality manifested itself as racial exclusion, which created concentrations of racial minorities in residential and commercial areas. . . . urban renewal efforts that disproportionately destroyed minority communities, policies of racial steering by real estate agents that support racial segregation, and historic preservation policies that ignore the social history of minorities. . . . As a result, race-neutral policies are only one part of a long chain of events that contribute to racialized consequences.

67. Pritchett, *supra* note 60, at 47.

68. See James Baldwin, *Negro and the American Promise*, PBS (1963), http://www.pbs.org/wgbh/americanexperience/features/bonus-video/mlk-james-baldwin/, speaking to a teenager who was losing his home:

> They were tearing down his house, because San Francisco is engaging—as most Northern cities now are engaged—in something called urban renewal, which means moving the Negroes out. It means Negro removal, that is what it means. The federal government is an accomplice to this fact.

Court and planners, who figured that only 1,345 families would be displaced, that there was other adequate housing in the city, and that five hundred new units would be built nearby.[69] Lavine notes that of the four thousand residents in one particular area, ninety-seven percent were black and no more than thirty-six hundred were supposed to be housed in the new development.[70] Unfortunately, for the residents, the low-income housing did not materialize.[71] Nor did subsequent redevelopments in a host of cities do anything positive for the residents who were thrown out of their homes.[72]

IV. THE PUBLIC USE IN REDISTRIBUTION

In *Midkiff*, the Court found that there was a public use along with public interest in the redistribution of assets from the land trust to private homeowners with mere land leases.[73] But was there? The legislation applied only to existing homes; it opened up no new land for development. That is, no one other than the private homeowners and land lessees gained a single home from the Hawaii Land Reform Act of 1967. The legislation did not turn the 48.52% of government-owned land (an oligopoly itself) to the citizens for development, although the concentration of land in the *government* was a highly significant factor in the state's high land prices.[74]

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69. *See* Lavine, *supra* note 48, at 449. Lavine also notes that the planners apparently forgot to consider the four thousand families *already* on the waiting list for decent low-cost housing.

70. *Id.* at 448.

71. See Kanner, supra note 30, at 455–56:

> The housing actually built there, instead of bettering the lot of the slum dwellers whose plight figured so prominently in Justice Douglas' opinion as justification for the taking, turned out to be aesthetically sterile and so pricey that by 1969 it inspired a rent strike by affluent tenants.

The residents were instead forced to move into "worse slums elsewhere in the District of Columbia that commanded higher rents." *Id.* at 456. Of the fifty-nine hundred new residences built in the area all of three hundred ten were "affordable." *Id.* at 455 n.127.

72. *See* Kanner, *supra* note 20, at 435 n.48. (citing sources for estimates that 2.38 million urban housing units were destroyed by redevelopment, and by the 1960s, "some 111,000 families and 17,800 businesses were being displaced by urban redevelopment annually.").

73. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984) ("[T]enants 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."); *id.* at242 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

74. *See* STATE OF HAW. LEGIS. REFERENCE BUREAU, REPORT NO. 3, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS (1967) (basis of the 48.52% figure); *see also* DAVID L. CALLIES,

The drafters of the Hawaii Land Reform Act of 1967 perhaps saw a net value in that the Act called for a compensation scheme that would have paid less than market value for the properties by basing income appraisals on controlled rents and ignoring the reversionary interest in the land.[75] The homeowner and leaseholders would have had an opportunity to purchase the land under their homes at bargain rates. Transferring condemned formerly privately owned interests in land to other private landowners at reduced prices serves a public use only if we accept that there is a public use in A-to-B transfers or if there is a "public use" in the majoritarian politics of robbing Peter to pay Paul.[76]

But, assume for the sake of argument that the Act did result in full payment to the landowning charitable estates as required by the Constitution. If that were the case, all the State would have done here was to buy interests in land and sell them to the homeowners at the same price. This isn't land redistribution, the purported public use endorsed by the Court in *Midkiff*. Instead it's just a complicated real estate transaction facilitated by the coercive power of the State.

But this begets another problem—the scheme didn't work all that well.[77] There was no guarantee that the homeowner-beneficiaries of the scheme could afford the now more valuable property. In reality, some became landlords. Some found it necessary to sell their now

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REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 173–74 (1984) (noting impact of land use controls on land prices); Summer J. La Croix & Louis A. Rose, *Public Use, Just Compensation, and Land Reform in Hawaii*, 17 RES. L. ECON. 47, 48 (1995), http://www.economics.hawaii.edu/sumnerfiles/LaCroix.Public.Use.1995.pdf ("[C]oncentration of ownership was not the cause of land's high prices . . . . Rather, the wholly overlooked causes of the high prices of land were severe natural and governmental restrictions on the supply of residential land.").

75. *See* La Croix & Rose, *supra* note 74, at 49 ("The required compensation was based on below-market controlled lease rents, and excluded the lessor's share of the reversionary interest in site-specific improvements."). The controlling of lease rents, moreover, was motivated by the desire "to reduce the basis for the calculation of leased-fee compensation under the [Land Reform Act]." *Id.* at 66. This undercompensation scheme was declared unconstitutional in 1979. *Id.* at 67.

76. This is essentially what happened. *See* La Croix & Rose, *supra* note 74, at 71 (noting the land reform bills "passage was indeed driven by the economic interests of the lessees as well as by Democrats' ideological opposition to the large estates.").

77. *See* Debra Pogrund Stark, *How Do You Solve A Problem Like in* Kelo*?*, 40 J. Marshall L. Rev. 609, 630 (2007):

> A powerful argument could be made that the public was more harmed by the Land Reform Act as amended than benefited by it. As such, the Court should have found that the Act as amended did not satisfy the public use requirement and was unconstitutional. . . . a closer look at the facts in the *Midkiff* case provides a telling example of the problems with judicial deference . . .

higher-value homes (with the land) and move elsewhere on the island. Indeed, the lure to sell was inescapable when a Japanese investor, later dubbed Honolulu's "worst neighbor," went from house to house from the back of his limousine, with his agents going to the homes with cash offers—whether the homes were for sale or not.[78] As the owners moved elsewhere on Oahu, they in turn pushed up the prices of other island homes. The net result was that land prices more than doubled in the five years after *Midkiff*, with the inflationary spiral reverberating throughout the island.[79] Indeed, the net effect of this eminent domain scheme was not just to transfer wealth from a charitable trust for Hawaiian children to affluent homeowners, but also to transfer wealth from the affluent homeowners and to very wealthy Japanese investors. That may not have been what the Hawaiian legislature intended, but that's what they got. When the power of eminent domain is abused, there can be some very unintended consequences.

V. TIF AND THE PERVERSION OF INCENTIVES

Even assuming that the original motivations of urban planners was benevolent, that state of affairs didn't last. Why not? The planners of the early to mid-twentieth century had an organic view of social improvement. If the "blight" could be removed from a city, that city would prosper, just like a plant could be restored to health if the dead and dying leaves were removed. The problem is that these planners, coming from the upper echelons of society, didn't fully grasp that when they saw blight, others saw functioning neighborhoods with often vibrant communities.[80]Those "blighted" communities may

78. *See* David Thompson, *The Worst Neighbor on the Block: Genshiro Kawamoto*, HAW. MAG., Jan. 9, 2014, http://www.honolulumagazine.com/Honolulu-Magazine/January-2014/The-Worst-Neighbor-on-the-Block-Genshiro-Kawamoto/index.php?cparticle=1&siarticle=0#artanc (noting that Kawamoto's massive cash-based land acquisitions created a "one-man inflationary spiral."); *see also* Kanner, *supra* note 20, at 431 n.33.

79. *See* Annual Residential Resales Data for Oahu, Oahu Historical Data, HONOLULU BOARD OF REALTORS, http://www.hicentral.com/oahu-historical-data.php (last visited Jan. 22, 2017) (showing the average median price of a single family residential home rose from one hundred fifty-eight thousand dollars in 1985 to three hundred fifty-two dollars in 1990; in 2015 the median price was seven hundred thousand dollars).

80. *See, e.g.*, Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 773 (1991) ("Edifice Complex projects have come to be emphasized over those promoting social welfare because elites who pay the planning piper get to call the tune.");

very well have been poor, and dark, and burdened with unfamiliar tongues and strange cultural traditions. But that didn't make them the equivalent of an agricultural blight that must be excised from the community like fungus-infested trees near an apple orchard.[81]

But it takes more than a profound ignorance of the value of poorer communities to explain the headlong conversion of urban redevelopment as a tool for improvement into an instrument of neighborhood destruction. It took Tax Increment Financing, or "TIF." Economic incentives can explain a lot, and in this case TIF is that explanation. Tax Increment Financing draws lines around supposedly blighted neighborhoods and authorizes the local governmental entity in charge of curing the blight to earmark future property tax revenues within the targeted area to pay for the improvement. In other words, any increase in the tax base after redevelopment belongs to the redevelopment agency. Local redevelopment districts are no different from any other corporate, bureaucratic, or governmental enterprise that wants to prosper and grow. So the ostensible mission—"to improve the community" or "build a better tomorrow"—becomes a mission in name only. The real motivation is to increase the tax base.[82] With more money, who knows what great things can be accomplished?

One does not accomplish great things with a shortage of money. And one does not make money by spending money on the poor or overseeing neighborhoods filled with poor people. Bluntly put, if the poor can be replaced with tax-paying businesses and upper-income residents, a redevelopment district's books will look a whole lot better. And no self-respecting, empire-building bureaucracy will prosper if saddled by slums.

Pritchett, *supra* note 60, at 4 ("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'—groups of business and political leaders that promoted renewal—and they have examined the political debates over postwar housing policy. Other works have documented the impact of urban renewal in intensifying racial segregation and limiting the mobility of African-Americans."(footnotes omitted)).

81. For more on property rights and blight eradication see *Miller v. Schoene*, 276 U.S. 272 (1928), holding that the removal of cedar trees to save the apple trees was not a taking.

82. *See, e.g.*, George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 71 (2008) ("TIF financing is most attractive to communities where property values are rising rapidly so that any investment is likely to pay off and least attractive to communities where property values are flat or declining since the public investment might not be able to generate enough increment in the way of increased property taxes to amortize it.").

With the incentive of increasing the tax base, it was inevitable that the redevelopment districts would give birth to the redevelopment industry—builders and developers that specialize in acquiring "underutilized" property on the cheap (i.e., property inhabited by the poor in single-family homes or apartments) and converting them into thriving tax-generating concerns. Since it's not easy to alleviate the suffering of the poor, why even suffer the poor if you can have office complexes, high-end housing, shopping malls, and automobile factories? And if you throw into the mix the efficacy of routing highways through inner-city slums at behest of the highway-building lobby, it only makes sense that poor, urban neighborhoods are targeted for saving through destruction.

For better or worse, however, these projects often failed. The landscapes of American cities are littered by failed redevelopment projects, defunct shopping centers, empty office buildings, and rusting hulks where factories once loomed.[83] And no landscape is more littered by failure than the very heart of the New London experiment: today, Pfizer has abandoned New London, and where the homes once stood is not a field of dreams but a field of weeds inhabited by feral cats.[84] This is not surprising. Developments built by experienced business owners whose own capital is at risk should intuitively be more likely to succeed than those businesses built around the dreams of a planning department and financed by other people's money, e.g., taxpayer dollars. The redevelopers make their money, the poor are gone, and the cities are left with less than they had before.

But not to worry. Sometimes these failed projects are just the fodder for a new round of redevelopment.[85] The problem here is that projects conceived of and built by redevelopment agencies and their symbiotic developers are not necessarily projects that the free market would consider building. For private developers not subsidized by the mechanics of redevelopment, it might not make a lot of sense to build a shopping center or office complex in a former slum based on "build it and they will come" optimism or assurances of "build it and they will subsidize." Private unsubsidized developers

83. *See, e.g.*, Kanner, *supra* note 20

84. *See* SOMIN, *supra* note 10, at 235; *see also*, Kanner, *supra* note 20.

85. *See, e.g.*, Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292, 294 (N.Y. App. Div. 4th Dep't 2002) (condemnation of a business that was originally started on an older round of condemnation and redevelopment).

generally don't like to lose money.[86] Moreover, no sane redeveloper actually *guarantees* the success of a project developed with other people's money. The pretty drawings and scale renderings can be all that it takes to launch a redevelopment project. Reality can wait.

To be fair, even without the redevelopment agencies, poor neighborhoods are often attractive targets for infrastructure projects simply because the land is cheap and the projects can be accomplished before the displaced residents figure out how to mount a challenge—or even pay for the challenge. After all, why even try to build a highway through a collection of stately upper-class homes when the same highway can plow through a slum, giving rise to a project that both clears a slum and builds a highway, a power plant, or a dump?[87]

But even if the Public Use Clause has been stretched, even if condemnation serves an uglier side of America's toleration of the poor, and even if there are economic incentives to displace the poor, then at least there is the requirement to pay "just compensation" to make everybody whole again. But being made whole is in the eyes of the beholder.

VI. THE UNDERCOMPENSATION GAMBIT

Exactly what is just compensation? We can be pretty sure we know what compensation is. But what is "just"? Compensation is a real and pressing concern for a legion of condemnees across the land. No government wants to pay more for property than it is worth, nor should it. And more than a few seem happy to "save taxpayer money" and pay less for property than it is worth.[88]

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86. This is generally the case unless they employ the Trump model of business by bankruptcy.

87. *See, e.g.*, Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 366 (1992) (noting prevalence of toxic waste sites in minority neighborhoods).

88. *See, e.g.*, C. Jarrett Dieterle, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 FEDERALIST SOC'Y REV. 38, 38–39 (2016) ("In other words, governments attempt to dissuade landowners from holding out for more compensation by punishing those that do so, which results in governments getting away with systematic undercompensation in eminent domain proceedings. In essence, a sandbagging government says to landowners, 'if you think our initial appraisal is too low, just see how low we'll go if you take it to court!'"); Kanner, *Lowball Watch*, *supra* note 30; *see also* United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) ("The fact that 'just compensation' tends

The Supreme Court put compensation in terms of "fair market value," and what a "willing buyer would pay to a willing seller."[89] But these aphorisms give rise to more questions. What is "fair"? What does "willing" exactly mean? And why should "justice" always be defined by the "market"?[90]

To many owners, their homes have great intrinsic value that cannot be reflected by comparative sales of like properties. Emotional attachment, intrinsic value, and other purely subjective measures of worth cannot be completely divorced from justice. While it may not be realistic that all manifestations of emotional attachment can be given value, the failure to make any attempt can be dispiriting when property is condemned—and especially so when it is condemned solely for the purpose of making someone else rich. At oral argument in *Kelo*, Justice Scalia put it this way:

> What this lady wants is not more money. No amount of money is going to satisfy her. She is living in this house, you know, her whole life and she does not want to move. She said I'll move if it's being taken for a public use, but by God, you're just giving it to some other private individual because that individual is going to pay more taxes. I—it seems to me that's, that's an objection in principle, and an objection in principle that the public use requirement of the Constitution seems to be addressed to.[91]

But under the current regime of valuing properties in condemnation actions, appraisers must assiduously ignore any such subjective manifestations of value. But do they? Following *Kelo*, there has been considerable debate over whether home-owning condemnees have been undercompensated. Some argue that because appraisers must look only at "fair market value," such intrinsic value is ignored and

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systematically to undercompensate the owners of property taken by eminent domain underscores the fact that such a taking is not a wrongful act.").

89. *See, e.g.*, Olson v. United States, 292 U.S. 246, 257 (1934) (It is the "amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." Likewise, the Court held that a condemnee is "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions.").

90. *Id.* at 257 (eminent domain fair market value and value of speculation).

91. Transcript of Oral Argument at 34–35, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 529436.

landowners are undercompensated.[92] Others argue that data suggests that undercompensation is not widespread[93] or that proposed solutions of premium payments are misguided.[94] So while there may be debate over whether there is undercompensation and how significant it may be, the fact is that many people like Mrs. Kelo do not want to sell. Period. Clearly, their subjective wants are not being met.

Moreover, it is not just investment in new infrastructure that can raise the value of land. The mere act of taking individual parcels and assembling them into a larger whole can add tremendous value apart from any spending on new infrastructure. After all, why would a TIF-incentivized redevelopment agency take a neighborhood and turn it into some corporate cash cow if they don't expect to profit handsomely from all their hard work?

Thus, each home in a neighborhood of single-family homes may have a certain discrete value if bought and sold as a single-family home. Add all these homes together, and the neighborhood will have an identifiable value. But when the parcels are assembled together and made susceptible to a more productive economic use, the total value of the former neighborhood can be greatly enhanced. It can be many times more valuable as assembled raw land than as a collection of single-family homes.[95] Yet, when such a neighborhood is condemned, the individual homeowners are paid only what the home is supposedly worth as a single-family home in a neighborhood of single-family homes. In other words, if the assemblage could only be accomplished via eminent domain, it is discounted for valuation

92. *See, e.g.*, Gideon Kanner, *"Fairness and Equity," or Judicial Bait and Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38, 42 (2011) ("While fair market value of the taken property is certainly a proper element of compensation, standing alone it ignores a variety of incidental economic losses that are inevitably inflicted by forcible displacement of people from their homes and businesses, and thus falls short of being genuinely just compensation.").

93. *See, e.g.*, Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 648 (2013) (arguing that it is not true that owners are unfairly undercompensated on intrinsic value and that state attempts to remedy undercompensation with bonuses are themselves unjust to the poor).

94. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006) (criticizes compensation-based solutions to constrain eminent domain because they may undermine political resistance to questionable projects and private takings may generate unique dignitary harms).

95. *See* John Gavin, *Estimating Assemblage Value to Help Buyers and Sellers*, NEREJ, Aug. 16–22, 2013, http://www.nerej.com/65220.

purposes.[96] Thus, the condemned owners get none of the assemblage value. That, of course, comports with the aphorism that compensation is measured by what the owner has lost, not what the taker has gained.[97] Because the individual homeowner is unlikely to obtain consent from all the neighbors to assemble the parcels together on a voluntary basis, such an assemblage value may be too speculative to factor into a calculation of fair market value.[98] But the condemning authority—and related private developer—will reap the benefit of such assembly. This breaks the social contract. Private beneficiaries of the condemnation get far more out of the condemnation than the home-owning condemnees, and it is not for the obvious benefit of the public as when land is taken for a road or school but for the private benefit of the redevelopers.

But this is not the worst of it. Government condemnors are notorious for simply paying as little as they can get away with, recognizing, correctly, that most small landowners lack the wherewithal to fight back. Indeed, Professor Gideon Kanner has been publishing a "lowball watch" for decades.[99] Professor Kanner catalogs numerous examples where condemning agencies have offered to landowners only a fraction of what those landowners were able to acquire after trial.[100] But most small landowners cannot afford a trial. After all, only a few states will reimburse landowners for their attorneys' fees, and then only if the landowner prevails by obtaining a significant increase over the government's offer. And there's more. There is a practice prevalent in some jurisdictions for condemning authorities to make one lowball offer, then threaten to withdraw that offer and replace it with a lower one if the landowners resist.[101]

One of the more egregious tactics was employed by the federal government in a massive acquisition of private property used to

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96. *See, e.g.*, Santa Clara Cty. v. Ogata, 240 Cal. App. 2d 262, 268 (Cal. Dist. Ct. App. 1966) ("The possibility of integrating parcels is a factor which may be considered in determining market value, provided such integration would have been reasonably practicable without the exercise of the power of eminent domain.").

97. United States v. Powelson, 319 U.S. 266, 281 (1943).

98. *Id.* at 275–76.

99. *See supra* note 30.

100. And, of course, the over legislative attempts to underpay cannot be ignored. See, for example, Hawaii's Land Reform Act of 1967 as described by La Croix & Rose, *supra* note 74.

101. *See generally* Jarrett Dieterl, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 FEDERALIST SOC'Y REV., Nov. 10, 2016, at 38, http://www.fed-soc.org/library/doclib/20161110_DieterleSandbagging.pdf.

expand the Everglades National Park. There were hundreds of rural landowners, almost all of modest means, whose property was slated for condemnation for inclusion in an expanded park. The U.S. National Park Service and U.S. Department of Justice employed a multipronged approach in condemning these lands.[102] First, the Park Service went to the various local towns with property slated for condemnation and persuaded the towns to downzone the desired properties. So instead of being able to build one home on a half-acre, the zoning now would allow only one home per ten acres, or only an agricultural use on the same property. This, of course, caused a drastic reduction in fair market value.

Next, the Park Service grouped the condemnees together so it could condemn multiple properties before a commissioner at once. (Unlike condemnations by state and local authorities, there is no right to a jury trial when the federal government condemns land.[103]) Most of the rural landowners were unrepresented. And, in fact, if any landowner hired an attorney, the federal government would drop the condemnation case with respect to that landowner. As a result, scores of landowners had their properties condemned without the benefit of an attorney. They were not sophisticated enough to know how to object to faulty appraisals, properly raise legal objections (such as the downzoning gambit), or hire independent appraisers. So these landowners were uniformly underpaid.

But the real kicker came next. After the federal government finished condemning the landowners who were unrepresented, it then went after those landowners who had hired attorneys. But by this time there were scores of valuations established with the unrepresented landowners. And these values were determined to be conclusive with respect to everybody else. In other words, everybody was allegedly shortchanged.

In other circumstances, landowners often are drastically undercompensated when an ongoing and successful business is condemned for one purpose or another. Most states simply refuse to compensate for business goodwill.[104] For example, a business person with a

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102. These allegations were made in *United States v. 480.00 Acres of Land*, 557 F.3d 1297 (11th Cir. 2009), *cert. denied*, 558 U.S. 1113 (2010).

103. This procedure is currently being challenged at the Sixth Circuit. *See* Brief of Plaintiffs-Appellants, Brott v. United States, No. 16-1466 (6th Cir. 2016), 2016 WL 3538863.

104. Darius W. Dynkowski, *Preparing a Business Damage Claim*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study,

successful bakery, automobile repair service, or tax preparation service may have built up a strong following in the neighborhood. This business goodwill can be of great value, and is often taken into account when a business is sold. Although business goodwill is often relevant to the dissolution of assets in the context of family law,[105] it is usually different when the government has to pay when it takes business goodwill. In many jurisdictions, the business owner is simply paid what the land and building is worth, disregarding the profitability and goodwill.[106] This can be devastating for the small business owner unable to find or utilize available property in the same neighborhood.

In one particularly egregious recent example, the owner of a successful soil excavation business was condemned in order to improve the levee system. That may well be a legitimate public use. But the landowner was being compensated only for the raw value of the land, not for its business value.[107] Even more galling, the landowner was charged by the levee district for dirt that had been excavated before

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Condemnation 101: How To Prepare and Present an Eminent Domain Case 251, 253 (Jan. 8–10, 2009), Westlaw SH018 ("Many jurisdictions do not permit compensation for business damages and the determination of whether business damages are compensable in a particular jurisdiction depends mainly on legislative grace or a broad interpretation of the jurisdiction's common law definition of just compensation. Moreover, in jurisdictions that allow business damages only certain elements of business losses are compensable."); *see* Note, *The Nature of Business Goodwill*, 16 HARV. L. REV. 135 (1902) (discussing "business goodwill" as definable property interest).

105. *See, e.g.*, Alicia Brokers Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 RUTGERS L. REV. 569 (1999); *see also* Helga White, *Professional Goodwill: Is It a Settled Question or Is There 'Value' in Discussing It?*, 15 J. AM. ACAD. MATRIM. L. 495 (1998).

106. *See* Lynda J. Oswald, *Goodwill and Going Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 284 (1991) ("A number of state courts and legislatures have begun to recognize that losses of goodwill, going-concern value, or profits are real losses for which the property owners should be compensated."); *see also* Gideon Kanner, *(Un)equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1090 n.110 (2007) ("Before the legislature made loss of goodwill compensable in eminent domain under some circumstances, the court got around that inconvenient statutory scheme by simply asserting that business goodwill, though incontestably property, is not 'the form of property' that is protected by the Constitution in eminent domain, implicitly suggesting that property, sort of like ice cream, comes in different flavors, some more and others less appealing to the courts.").

107. S. Lafourche Levee Dist. v. Jarreau, 192 So. 3d 214, 226 (La. Ct. App.), *writ granted*, No. 2016-00904 (La. Sept. 6, 2016), 2016 WL 4991620, and *writ granted*, No. 2016-0788 (La. Sept. 6, 2016), 2016 WL 5001347 (reversing "trial court determin[ation] that just compensation for the Jarreau tract included the fair market value of the property plus economic/business losses for lost profits associated with the value of the excavated dirt").

the condemnation but not removed until after. In other words, the district took the property so it could become the sole beneficiary of the business—without paying the business what it was worth.

This state of things is a long way from any recognizable measure of justice. But even if the landowners were paid more, with less cheating by condemnors and with some factors that take into account both the intrinsic value of property, its business value, and its assemblage, would that be enough? After all, if property is a fundamental right, the sense of dominion and autonomy represented by ownership cannot necessarily be cured by shoving a fistful of dollars into the homeowner's hands as the public enters his castle in order to demolish it for a Walmart or Costco.

VII. REFORM AT THE STATE LEVEL

The reaction to *Kelo* was swift. A number of states enacted reforms that attempted to limit the power of redevelopment. Some states actually adopted meaningful reforms.[108] Florida, for example, banned all economic-redevelopment takings of private property without a three-fifths vote of each house.[109] California, however, had a series of failures from ill-conceived reforms. An early attempt at reform was a ballot initiative brought by an individual who was unfamiliar with California law and that was written, for all practical purposes, for the State of Nevada. Another effort tried to package eminent domain reform with a ban on rent control.[110]Finally, by the time the reform advocates got their act together, the redevelopment industry mustered their own countermeasure, a "reform" that contained a few cosmetic but meaningless protections of homeowners while at the same time enhancing the power of redevelopment agencies.[111] In something of an "only-in-California" move, Governor Jerry Brown then proceeded to abolish redevelopment agencies in order to grab the TIF money to help solve one of the state's periodic

108. *See* SOMIN, *supra* note 10, at 141 (on legislative reform).

109. FLA. CONST. art. X, § 6(c) ("Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.").

110. *See* Sandefur, *supra* note 27, at 751.

111. *See* SOMIN, *supra* note 10, at 159, 175.

fiscal crises.[112] But be assured, the power is being restored, one measure at a time.[113]

State supreme courts have done better. Even before *Kelo*, the supreme court of Michigan reversed *Poletown*, a case where the same court previously upheld the condemnation of a working-class neighborhood to make way for an eventually-to-fail General Motors factory:

> 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 development] 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.[114]

And after *Kelo*, there was a spate of state court decisions taking reform seriously.[115] Yet, so long as the Supreme Court of the United States fails to reverse *Kelo*, the temptation of states to backslide will be strong.

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112. *See* California Redevelopment Ass'n v. Matosantos, 53 Cal. 4th 231 (Cal. 2011) (statutes requiring windup and dissolution of redevelopment agencies do not violate constitutional provision limiting State's ability to require payments from redevelopment agencies); Maura Dolan, et al., *California High Court Puts Redevelopment Agencies out of Business*, L.A. TIMES (Dec. 29, 2011), http://www.articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230 (noting political and tax reasons for abolition).

113. *See* Kuhn, *supra* note 28.

114. Hathcock v. Wayne City, 684 N.W.2d 765, 786 (Mich. 2004).

115. *See, e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) (citing Hathcock's criticism of economic development positively). Kentucky and Illinois's supreme courts have also pointed out that the economic development rationale provides no logical limits. The Kentucky Supreme Court noted that every new legal business provides some sort of benefit that could be described as economic development. City of Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) (quoting 26 AM. JUR. 2D *Eminent Domain* § 34, at 684–85 (1966)). Thus, if mere economic development is a public purpose, "there is no limit that can be drawn." *Id.* The Illinois Supreme Court dismissed the economic development rationale by explaining: "'If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of [an interest group's] ability to develop land cannot justify a surrender of ownership to eminent domain.'" Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10 (Ill. 2002) (quoting lower court decision).

CONCLUSION

The constitutional limitations on the government's power of eminent domain, when adhered to, redound to the benefit of all classes of Americans. As both Locke and Hobbs posited, a society without government will lead to the powerful taking advantage of the powerless.[116] Government serves to mediate that "war as is of every man against every man"[117] by controlling the instincts and abilities of some to take advantage of others. Remove that government mediation, and the result is war on the powerless. Make government an ally of some people in their war against other people, and the oppression becomes palpable. Nowhere is this more evident than when the limits on eminent domain are lifted.

The American experience has been that when the power of eminent domain is unchained, it will attack the most vulnerable: the poor, the working class, and minorities. The advantage will go to those who are rich, powerful, politically connected, and white.

The ability to use the political process for self-advantage lies with those with the strongest economic incentive to drive the politics. Redevelopment agencies and aligned developers have much to gain from private takings of the politically less organized. It is but one more classic example of rent-seeking, where laws can be crafted to favor those with a definable and large economic advantage in a political outcome (such as redevelopers) at the expense of those small, unorganized individuals with small, individual stakes such as working-class homeowners.[118]

As a result of the transmogrification of the late "Public Use Clause" into the "Politically Useful Clause," of the concomitant embrace of judicial abdication masked as "deference", and of the impetus to undercompensate, the constitutional limits on the taking of private property for private gain have been eviscerated. And it has not been the rich who have suffered. Post-*Kelo* reform has given hope to some. But unless and until the underlying causes of eminent domain abuse are rooted out, any respite may be but a temporary pause.

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116. Man "seeks out, and is willing to joyn [sic] in Society with others who are already united, or have a mind to unite for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, *Property*." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 123. (P. Laslett rev. ed., 1988).

117. THOMAS HOBBES, THE LEVIATHAN ch. 14 (1651).

118. *See, e.g.*, GORDON TULLOCK, *The Rent-Seeking Society*, *in* 5 THE SELECTED WORKS OF GORDON TULLOCK (2005).