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## Eminent Domain and Racial Discrimination: A Bogus Equation

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*Eminent Domain and Racial Discrimination: A Bogus Equation: Hearing Before the U.S. Comm'n on Civil Rights*, Aug. 12, 2011 (Statement of J. Peter Byrne)

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

Eminent Domain and Racial Discrimination: A Bogus Equation

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This hearing addresses claims that the use of eminent domain for economic development unfairly and disproportionately harms racial and ethnic minorities. These claims draw on the history of urban renewal prior to the 1960's, when many African Americans and others were displaced by publicly funded projects that bulldozed their homes in largely failed attempts to modernize cities. Justice Clarence Thomas's dissent in *Kelo v. City of New London* further argued that the use of eminent domain for economic redevelopment would inevitably harm minorities and the poor.<sup>1</sup>

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

Eminent domain is a crucial legislative power exercised by governments around the world and dating back at least to Roman times. It empowers government to acquire property in specific locations for the construction of networks and the assembly of large tracts even when private owners do not wish to sell or holdout for excessive payment. Under our constitution, owners are protected by the requirement that government pay them "just compensation." The meaning of the Takings Clause of the Fifth Amendment relating to taking property for "public use" long has been controversial, but no U.S. Supreme Court decision contradicts the holding of *Kelo* that public use includes publicly approved condemnations for economic redevelopment of economically distressed areas. The quality of the redevelopment projects varies, but recent successful projects can be found from the Ferry Building in San Francisco to Times Square in New York.<sup>11</sup> Economic revitalization of urban areas will tend to aid poor minorities who disproportionately dwell in cities, by increasing employment and tax revenues for education and other city services.

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

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

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

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

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

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

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

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<sup>i</sup> 545 U.S. 469, 521-22 (2005).

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

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

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

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

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

<sup>vii</sup> Edward A. Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 *GEO. L.J.* 1027 (2008).