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**Transforming the Urban Landscape:
Gentrification and the Post-*Kelo* Power of Eminent Domain**

By


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INTRODUCTION

American cities are changing. After decades of economic decline and urban decay, many cities are experiencing a slow return of middle and upper class suburbanites to urban neighborhoods. Neighborhoods that were once “run-down” and shunned by suburban dwellers are now perceived as good investments that, once renovated, can be sold to young professionals. In cities all over the nation, high-rise condominiums are appearing, old warehouses and even schools are being converted into “studio apartments,” riverfronts are turning into “riverwalks,” neighborhoods are being labeled “historic districts,” and pavement is being removed to expose the cobble-stone underneath. These changes are not limited to residential areas alone. Many companies,

firms, partnerships, and proprietorships are rejecting the manicured suburban office parks and returning to “downtown.” With the arrival of new businesses comes the hotels, restaurants, convenience stores, and of course, Starbucks. It is all part of a strange trend that commonly referred to as “gentrification.”

Since the 1920s, city governments and private parties have implemented urban renewal projects and urban “revitalization” initiatives in order to combat urban “blight” and attract middle and upper class individuals “back” to the city. However, they were largely met with only limited success or failure. As cities continued to decline, city planners and many in the public saw a need for a more expansive power of eminent domain that could be used to effectively fight “blight” and urban decay. Through the decades the power of eminent domain evolved into powerful tool, indeed the principal tool, used to enact change in American cities. However, efforts to “clean up” American cities have had a disproportionate effect on the urban poor and minorities in particular. These effects include displacement, loss of community, and loss of local business.

In 2005, the Supreme Court held in *Kelo v. New London* that takings for economic development are constitutional.¹ This holding announced the broadest interpretation of “public use” to date and created an expansive, almost absolute, power of eminent domain. In this paper I argue that the ongoing gentrification movement combined with an expansive eminent domain power will disproportionately affect low-income urban residents and minorities. Effects include displacement, loss of community, and inadequate compensation.

¹*Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005) (Majority found that the taking of private residential property by the city of New London for private development was constitutional under the Fifth Amendment.).

Part I of this paper will explore various definitions of gentrification, briefly discuss the history of urban decline, and put a face on who is “returning” to the city. Part II will focus on the evolution of eminent domain and the impact of *Kelo* on the urban poor and minority community. Part III will explore various alternatives that will help to protect the property rights of the poor and minorities and how displaced individuals and families could be better compensated.

I. GENTRIFICATION: CHANGING THE URBAN LANDSCAPE

A. *Defining Gentrification and Urban Renewal*

Black’s Law Dictionary defines the term “gentrification” as “the restoration and upgrading of a deteriorated or aging urban neighborhood by middle-class or affluent persons, resulting in increased property values and often in displacement of lower-income residents.”² Despite this seemingly clear definition, scholars have and continue to debate one another about what exactly constitutes “gentrification.” Much of this debate depends on political ideology and moral views held by scholar.³ In his article, *Two Cheers for Gentrification*, J. Peter Byrne defines gentrification as “a process which people of higher incomes move into lower income urban areas and seek to change its physical and social fabric to better meet their needs and preferences.”⁴ Byrne views gentrification as a process of positive change that ultimately is beneficial to residents in urban neighborhoods and the city at large. In contrast, authors John Powell and Marguerite Spencer in their article, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of*

² Blacks Law Dictionary 304 (2nd pocket ed. 2001).

³ For an analysis of the “conservative” and “liberal” perspectives, see Geoff Wagner, *Virtue and Vice: A Reassessment of Gentrification*, 7 J.L. Soc’y 271 (2006) (Wagner argues that in order to begin a “productive conversation” about gentrification, scholars need to “shy away from the insincere rhetoric of the past” and take a serious look at the issue.).

⁴ J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405, 406 (2003).

Impoverished Urban Dwellers of Color, concentrate on the negative impact that gentrification can have on low-income residents by emphasizing displacement, class conflict, and racial tension.⁵ In regard to race, Powell and Spencer make reference to the “white face” of gentrification and assert that any “definition of gentrification . . . must take whiteness and white privilege into account.”⁶ Therefore, they view gentrification as a movement of middle-class or affluent white persons that often results in the displacement of low income minority residents. How gentrification is defined often depends on whether the scholar views gentrification to be a positive change or a negative change for the community.

Definitions by other scholars are often much more complex. For example, while participating in a panel discussion concerning gentrification in the city of Detroit, Dr. John J. Betancur included seven “elements” from various definitions of gentrification in his interpretation. These elements include a combination of social changes, such as changes in consumer taste and changes in the construction industry, along with abstract concepts like the “rent gap” and the “middle class revolution.”⁷ Betancur stated that “gentrification is a complex process involving all of these factors in different ways.”⁸ Moreover, he added that, “Some of them are causes. Some of them are factors. Some of

⁵ See John A. Powell and Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *How. L.J.* 433 (2003).

⁶ *Id.* at 439.

⁷ Symposium, *Gentrification in Detroit: Renewal or Ruin?* 4 *J.L. Soc’y* 45, 47-48 (2002) (Dr. John J. Betancur included the following “elements” or “factors” from differing interpretations of gentrifications: (1) changes in taste of consumers, (2) changes in the construction industry, (3) the recovery of areas of slum or blight through urban renewal, (4) emphasis on improving the tax base, (5) the “rent gap”, (6) the middle class revolution, and (7) recovery of property in valuable locations or historic preservation.).

⁸ *Id.* at 48.

them are results.”⁹ According to Betancur’s interpretation, gentrification involves a complex interplay between many different variables that are unique to every city.

Another source of disagreement among scholars is the role of government in the gentrification movement. The definition in Black’s Law Dictionary indicates that those who are doing the gentrifying are “middle-class or affluent persons.”¹⁰ This definition gives the appearance that gentrification is a process that stems from the voluntary actions of private individuals. Certainly, this impression is at least partially correct. Many middle and upper class suburbanites do voluntarily move into inner city neighborhoods for various reasons such as the excitement of city life, the centralized location, or the older architecture. Indeed, if one were to ask urban newcomers what role the government played in their decision to move into the city, most would probably respond that the government played no role at all.

However, while gentrification may appear to be a movement of “middle-class or affluent persons,” this appearance masks the critical role that government has played in changing the economic and racial demographics of cities. Federal, state and local governments have intervened in a variety of ways to attract middle and upper class suburbanites to inner city neighborhoods. Often state and local governments will intervene directly by offering incentives such as, for example, first-time homebuyers programs, settlement cost forgiveness programs, grants and loans for purchasing urban real estate, and rezoning formally industrial property for residential neighborhoods.¹¹

⁹ *Id.*

¹⁰ Black’s Law Dictionary, *supra* note 1.

¹¹ Audrey McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence, and the Obligations of the Police Power*, 8 U. Pa. J. Const. L. 1, 6-7 (2006).

Sometimes cities offer tax abatements to purchasers of inner city property.¹² In addition, state and local government often attempt to indirectly attract middle and upper class people through using its eminent domain power by demolishing “blighted” areas of the city and replacing them with public attractions such as sports stadiums, posh shopping areas, festive open markets or districts dotted with trendy restaurants and bars.¹³ Often state and local governments will provide “social and cultural amenities” such as museums, theatres, and symphonies.¹⁴ The purpose of these incentives and programs is to attract middle and upper class people to the city neighborhoods in order to “revitalize the tax base.”¹⁵

The federal government has also contributed to the gentrification movement through federally funded mortgage policies, federal “Empowerment Zone” incentives, and programs such as Housing for People Everywhere (HOPE VI).¹⁶ For example, the purpose of the HOPE VI program is to reduce concentrated areas of poverty by creating “mixed-income” areas.¹⁷ Under HOPE VI the federal government provides grants to cities for purpose of demolishing high-density public housing and replacing them with low-density mixed-income housing.¹⁸ In addition, vouchers are provided as an incentive to middle-class and higher income families.¹⁹ Since HOPE VI projects replaced high-

¹² Ises Fernandez, *Lets Stop Cheering, and Let’s Get Practical: Reaching a Balanced Gentrification Agenda*, 12 Geo. J. Poverty Law & Pol’y 409, 421-422 (2005) .

¹³ See generally Audrey McFarlane, *Who Fits the Profile?: Thoughts on Race, Class, Clusters, and Redevelopment*, 22 Ga. St. U.L. Rev. 877 (2006).

¹⁴ McFarlane, *The New Inner City*, Supra Note 11, at 10-11.

¹⁵ *Id.*

¹⁶ *Id.* at 419-420.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

density housing with low-density housing, the program “benefits middle-and higher-income families while displacing those of lower incomes.”²⁰

Due to its complexity, gentrification is a difficult term to define. Gentrification is a complex process that occurs on multiple levels. Gentrification is primarily an individual movement of middle and upper-class people to urban areas. However, this movement is facilitated by a montage of federal, state, and local programs and incentives. Although the term “gentrification” is rarely used by government organizations, clearly urban renewal projects and incentives are “gentrification supported and paid for by the government.”²¹ Whatever the disagreements among scholars as to what exactly constitutes gentrification, nearly all agree on two things. First, gentrification primarily benefits the middle and upper class. Second, gentrification results in the displacement of some or most low-income and poor residents.

B. *Decline of America’s Cities: History and Causes*

American cities experienced dramatic change during the middle to late twentieth century. A systematic “exodus” of middle and upper-class residents from the cities to the suburbs resulted in urban centers with large areas of concentrated poverty and slums that dominate the urban landscape.²² This out-migration of urban residents, commonly referred as suburbanization, had its beginnings in the early part of the twentieth century. However, this movement grew rapidly following World War II.²³ Through government incentives such as the G.I. bill and the Veterans Act, U.S. troops returning from the war bought up newly developed residential neighborhoods that were sprouting up outside of

²⁰ *Id*

²¹ Symposium, *supra* note 7, at 48.

²² Fernandez, *supra* note 12, at 411.

²³ *Id.*

the cities.²⁴ In the booming post-war American economy, this exodus continued unabated through the latter 1940s and early 1950s. The civil rights era and desegregation quickened the pace of suburbanization, especially in southern cities. “White flight” and middle-class flight from the cities in response to desegregation in the 1960s and forced integration through bussing in the 1970s resulted in a distinctly American phenomenon where predominantly lower-class black or Hispanic urban centers are surrounded by a donut of predominately middle and upper-class white suburbs.

Other forces contributed to suburbanization as well. The decline in manufacturing in American factories forced many workers to look elsewhere for employment and negatively impacted a major source of tax revenue.²⁵ The “rise of the automobile” and the federal highway system allowed people to live further away from their employment and gain easier access to cheaper land in the countryside.²⁶ Also, many people were drawn to the suburbs due to changes in housing tastes and the availability of cheaper financing because of federal mortgage insurance.²⁷

Suburbanization and the exodus of the middle and upper-class to the suburbs had a profound impact on most American cities. Foremost, the loss of significant portions of middle and upper-class residents resulted in “lower tax revenue and a decrease in services for city dwellers.”²⁸ The decline in tax revenue and abandonment caused “urban blight” where many urban structures fell into disrepair.²⁹ Loss of tax revenue also reduced the

²⁴ *Id.*

²⁵ McFarlane, *The New Inner City*, supra note 11, at 8.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Fernandez, supra note 12, at 411.

²⁹ *Id.*

amount of funds available for important social institutions such as education and for urban infrastructure like roads and sanitation.

Moreover, the decrease in demand for urban land reduced property values which thereby further decreased the tax base.³⁰ Due to lower property values, working-class and lower income residents moved into the now suddenly more affordable neighborhoods abandoned by the middle and upper classes. These intra-city migrations geographically increased the size of the area of cities where poverty was concentrated. This decline in America's urban centers was accompanied by a dramatic increase in crime, unemployment and dissatisfaction among urban residents.

C. *Return to the City—Who are the Neo-urbanites?*

In response to the decline of America's cities, state and local governments implemented incentive programs and urban renewal projects to attract middle and upper class people back to the inner-city.³¹ While many cities found it difficult to entice higher income individuals and families to move "back" into urban neighborhoods, most cities have enjoyed at least limited success.

There are at least three principal reasons why middle and upper class suburbanites choose to move into inner-city neighborhoods. First, many neo-urbanites choose to live in the city because urban areas offer "social and cultural opportunities" that cannot be duplicated in the suburbs. Although suburban neighborhoods may be "safer and cleaner," suburban living has "little to offer in the way of arts, culture, and history."³² City-life offers easier and more frequent access to such attractions as museums, theatre, symphonies, parks, open markets, locally owned restaurants and bars, and, in some cities,

³⁰ McFarlane, *The New Inner City*, supra note 11, at 9.

³¹ Fernandez, supra note 12, at 411.

³² *Id.*

ethnic neighborhoods like “Chinatown” or “Little Italy.”³³ Along with cultural attractions, many people are attracted to the excitement of city-life. Trendy bars, clubs, and shopping districts offer excitement, glamour, and fun that are usually not found in the bland suburbs. Moreover, many neo-urbanites are attracted to the older architecture.³⁴ Most cities are rich with older buildings and architectural styles that are rarely found in the suburbs or rural areas.

Second, economic changes such as “rent hyperinflation” and a higher cost of living have persuaded some people to move to urban areas.³⁵ Also, some now view urban real estate as a good investment where “improvement and renovation not only make the neighborhoods more aesthetically pleasing, but also more admirable and therefore more attractive to would-be home buyers.”³⁶

Finally, demographic shifts have contributed to the gentrification movement.³⁷ The transformation of the American economy from a manufacturing based economy to a service industry economy has created a “creative class” of professionals with high salaries and expendable incomes.³⁸ This new professional class is consumer oriented with expensive tastes in products, gourmet foods, and “high-end services.”³⁹ Moreover, in recent decades the number of affluent adults without children has increased and many professionals are waiting until well into their thirties to have children.⁴⁰ The result of this change in demographics is a professional class of affluent people either without children

³³ See generally, McFarlane, *The New Inner City*, Supra Note 11, at 10-11.

³⁴ Fernandez, supra note 12 at 411.

³⁵ *Id.* at 413.

³⁶ *Id.* at 414.

³⁷ McFarlane, *The New Inner City*, Supra Note 11, at 13-16.

³⁸ *Id.* at 14 (This “creative class” is made up of people who do “creative work” such as scientists, engineers, artists, musicians, designers, knowledge-based professionals.).

³⁹ *Id.*

⁴⁰ *Id.*

or with young children who prefer to live in trendy urban areas with close access to shopping districts, bars and restaurants, and cultural attractions.

Therefore, the typical neo-urbanite is a young middle or upper class professional with expendable income that is drawn to the city from the suburbs by the convenience, cultural opportunities, and excitement of city life. These newcomers are predominately white and were raised in the suburbs. Often, the new arrivals are the children and grandchildren of former generations who fled the cities in the 1950s and 1960s. While welcomed by city officials, their arrival constitutes a “double insult – a ‘one-two’ knock-out of urban dwellers of color.”⁴¹ White flight and the loss of the middle-class caused low-income and urban neighborhoods to become “undervalued.”⁴² The return of middle and upper class white suburbanites threatens low-income and minority communities of being pushed-out as property values increase and the costs of living rises.⁴³ Over time, predominately low-income and minority neighborhoods become predominately middle-class and white.⁴⁴ Ultimately, low-income residents and minorities pay the heaviest price of gentrification.

II. EMINENT DOMAIN: THE TOOL OF THE GENTRIFICATION MOVEMENT

A. *The Power of Eminent Domain*

Eminent domain is “the power of government to force transfers of property from owners to itself.”⁴⁵ The power of eminent domain is among the most intrusive powers wielded by federal, state, and local governments. The Fifth Amendment of the U.S.

⁴¹ Powell and Spencer, *supra* note 5, at 436-430.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Jesse Dukeminier & James E. Krier, Property 1093 (5th ed. 2002).

Constitution includes the language, “. . . nor shall private property be taken for public use, without just compensation.”⁴⁶ Therefore, in order for a taking to be constitutional, the government must utilize the property for a “public use,” and the property owner must receive “just compensation.” However simple these concepts may appear, the public outcry⁴⁷ in response to U.S. Supreme Court’s decision in *Kelo* illustrates the shared belief by most Americans that the right to own property is of fundamental importance and central to our way of life. Much of the controversy surrounding the *Kelo* decision centers on the majority’s broad interpretation of “public use.” In a 5 to 4 decision, the *Kelo* court held that economic development to raise tax revenue constitutes “public use,” even if the property seized is transferred to private parties.⁴⁸ Some scholars warn that this expansive interpretation of “public use” opens the door to influence by private corporations and developers that will result in the abusive use of eminent domain power by local and state governments.⁴⁹ In addition, scholars have raised serious concerns about whether displaced residents truly receive “just compensation” for their homes.⁵⁰

Eminent domain is a coercive governmental power that, more often than not, results in the displacement of residents and local businesses. From the mid-19th century to the present, the power of eminent domain has evolved from a power that could be

⁴⁶ U.S. Const. amend V.

⁴⁷ See Asmara Teckle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-Balancing of Power Between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 Cornell J.L. & Pub. Pol’y 187, 188 (2006) (Noting that the *Kelo* decision “spurred a level of public outrage unlike any scene in modern times to prior rulings of the court.”); See also, Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 Colum. L. Rev. 1412, 1413-14 (2006) (Illustrates that the *Kelo* holding was unpopular across the political spectrum from conservatives and libertarians to liberals and progressives.”).

⁴⁸ *Kelo*, 545 U.S. at 483-87.

⁴⁹ See generally Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1 (2006).

⁵⁰ See Jeffrey T. Powell, *The Psychological Cost of Eminent Domain Takings and Just Compensation*, 30 Law & Psychol. Rev. 215 (2006) (Arguing that the market value for their homes does not compensate the displaced owner’s “actual net loss.”).

exercised only under very narrow circumstances to a broad and encompassing power.⁵¹ It is perhaps no coincidence that this expansion of the eminent domain power occurred during the mid and late 20th century as city officials increasingly saw a need to “revitalize” their cities. Indeed, one could argue that the gentrification movement helped to spur the meaning of “public use” to its present broad interpretation. The combination of the gentrification movement and the Supreme Court’s broad interpretation of “public use” in *Kelo*, will inevitably result with more displacement of working-class and poor urban residents with few remedies available for the displaced. In short, the interpretation espoused by the majority in *Kelo* will become the most powerful tool of the gentrification movement.

B. *The Evolution of “Public Use”*

Like many of the clauses in the U.S. Constitution, it is difficult to firmly establish the original intent behind the Takings Clause as intended by the “founding fathers.”⁵² From the founding of the Republic to the mid-twentieth century, the “law of eminent domain was full of inconsistencies.”⁵³ These inconsistencies were due primarily to the absence of a clear definition of the phrase “public use.”⁵⁴ This absence was caused by a “lack of litigation that could have been used to flesh out a clear meaning.”⁵⁵ However, toward the end of the 19th century, courts “predominately” interpreted the phrase

⁵¹ See Eric L. Silkwood, *The Downlow on Kelo: How an Expansive Interpretation of the Public Use Clause has Opened the Floodgates for Eminent Domain Abuse*, 109 W. Va. L. Rev. 493 (2007).

⁵² Wendall E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 9-10 (2003) (Noting that the founding fathers “left little guidance on the meaning of the term” public use.).

⁵³ *Id.* at 9.

⁵⁴ Silkwood, *supra* note 51 at 497-98.

⁵⁵ *Id.* (Noting that two primary reasons for this lack of litigation: (1) large amounts of publicly owned land was still available for public projects, and (2) when the government did have to use the power of eminent domain, “it either used that power for a clear public purpose, such as construction of roads or highways, or it was used in situations where there was a strong colonial precedent . . .”).

narrowly.⁵⁶ Looking at the plain meaning of “public use,” courts generally “permitted a taking of private property only when that land would literally be used by the public.”⁵⁷ Underscoring this interpretation was the deeply held belief that it was “unconscionable” to take property from one private citizen and give it to another private citizen.⁵⁸

The 1920s saw the beginnings of the age of “urban renewal.”⁵⁹ During this decade a building boom enticed middle and upper-class residents to move to newly developed areas further away from city centers.⁶⁰ This early suburbanization movement resulted in many older urban residential areas, occupied mostly by immigrants and minority groups, to deteriorate and become run down. City leaders, “Progressive Era” reformers, and developers saw a need to combat the growing menace of urban “blight.”⁶¹ Underlying this movement was “ethnic prejudice” against newly arrived immigrants such as Italians and European Jews as well as African-Americans who were migrating in great numbers to northern cities from southern states.⁶² These urban reformers published books and articles about urban “blight” and created a public discourse concerning the problem.⁶³ Realtors and developers around the country attempted to implement redevelopment plans but enjoyed only limited success. These efforts were largely private efforts to redevelop urban neighborhoods many urban property owners refused to sell.⁶⁴

⁵⁶ *Id.* at 498.

⁵⁷ *id.*

⁵⁸ J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 *UCLA J. Envtl. L. & Pol’y* 131, 133 (2005).

⁵⁹ See Pritchett, *supra* note 52 at 13-21.

⁶⁰ *Id.* at 13 - 14.

⁶¹ *Id.* at 18 (Illustrating the general impression of “blight” during this time, the author explains that, “As the term originally described plant diseases, the evocation of blight created a vision of a plague spreading across the city, moving from one neighborhood to the next.”).

⁶² *Id.* at 20.

⁶³ *Id.* at 16.

⁶⁴ *Id.* at 19.

Though ineffective, the urban renewal initiatives of the 1920s laid the groundwork for the expansion of the eminent domain power. The public discourse convinced many Americans that the owners of “blighted” properties were “not due the same respect” as other property owners because their properties “imperiled city residents and taxed the finances of city government.”⁶⁵ Therefore, since these owners were “acting against the public interest,” eminent domain was necessary to seize blighted property and redevelop it for the good of the general public.

During the Great Depression, another important development occurred that facilitated the expansion of the eminent domain power. New Deal legislation created the Public Works Administration (PWA) which “implemented the nation’s first significant public housing program.”⁶⁶ The PWA constructed thousands of public housing units for working-class Americans who had lost their homes. Moreover, the Federal government unwittingly became an instrument of slum clearance. The failing market caused many owners of tenement housing and apartment properties to lose their tenants.⁶⁷ Unable to pay their taxes and meet their expenses, many owners were happy to sell their property to the only purchaser who would buy it, the Federal government. During this time, the Federal government actively demolished substandard buildings and replaced them with public housing to mitigate the effects of the Great Depression. Because of the New Deal, the Federal government was implementing redevelopment projects in a way that urban reformers in the 1920s had been unable to do. These government initiatives convinced many urban renewal proponents that expanding the “public use” doctrine would be a powerful tool for implementing urban renewal programs. Government condemnation of

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 23.

⁶⁷ *Id.* at 22.

property through the eminent domain power proved to be far more effective than the largely private efforts of the 1920s.

The Supreme Court's 1954 decision in *Berman v. Parker*⁶⁸ proved to be decisive for the interpretation of "public use." In a unanimous decision, the Supreme Court dramatically changed the scope of the eminent domain power by significantly expanding the meaning of "public use." In *Berman*, the appellant challenged the condemnation of his property by the City of Washington D.C. under the District of Columbia Redevelopment Act of 1945.⁶⁹ The act gave city authorities the power to take private property in "blighted" areas of the city for redevelopment projects.⁷⁰ The appellants argued that the Act violated their Fifth Amendment right to due process because their property was neither blighted nor "slum housing," but well kept commercial property.⁷¹ Moreover, the appellants argued that the taking did not constitute "public use" because the property was to be put under the management of private agency.⁷² Stating that the "concept of public welfare is broad and inclusive," the Court held that the condemnation and redevelopment of blighted areas was within the police power of the municipal government.⁷³ The Court determined that even if the property was not blighted, it could be seized because in order to effectively fight urban blight, the "area must be planned as a whole."⁷⁴ In addition, the Court asserted that it is constitutional for a government to turn

⁶⁸ *Berman v. Parker*, 348 U.S. 26 (1954).

⁶⁹ *Id.* at 28.

⁷⁰ *Id.*

⁷¹ *Id.* at 31.

⁷² *Id.*

⁷³ *Id.* at 32 - 33.

⁷⁴ *Id.* at 34.

the property over to a private agency once the “public purpose has been established” because the “public end may be as well or better served” by a private entity.⁷⁵

The *Berman* decision was significant for three reasons. First, it signaled to cities across the country that the power eminent domain exercised freely to redevelop “blighted” urban areas. Second, the Court’s “broad and inclusive” interpretation of “public use” significantly increased the scope and purposes for which the power of eminent domain could be implemented by municipal governments. Finally, by equating “public use” with the police power, the Court “embraced deference” to legislative determinations about what constitutes “public use” and thereby laid the groundwork for a rational basis standard of review for cases challenging such takings.⁷⁶

The Supreme Court’s decision in *Berman* indicates that a dramatic shift had taken place in “public use” doctrine. This shift was the culmination of over two decades of “legal reform” led by urban renewal advocates.⁷⁷ By showcasing social ills caused by urban “blight” such as high crime, drug and alcohol abuse and substandard living conditions, renewal advocates helped to convince city leaders and politicians that eminent domain could be used as a powerful tool in eradicating “blight” for the benefit of the public. Though renewal advocates had acted with good intentions, the expansive interpretation of the public use clause opened the door to abuse by city leaders and planners. While urban renewal programs implemented through eminent domain could be used to fight urban decay and aid the poor, it could also be used to change the ethnic,

⁷⁵ *Id.* at 33 - 34.

⁷⁶ *Byrne, Condemnation* supra note 58, at 136.

⁷⁷ See generally Pritchett, supra note 52 (Arguing that from the 1920s to the 1940s renewal advocates changed that meaning of the Public Use Clause by arguing that the “cities were in crisis and that only major changes in property law could prevent urban decline.”).

racial, or class composition of urban areas. As a result, urban renewal programs in the 1950s and 1960s had a disproportionate impact on African-Americans and the poor.⁷⁸

The timing of the *Berman* decision is of great importance. During the 1950s, the suburbanization movement was in full swing and middle and upper class urban residents were flooding into suburban neighborhoods. Moreover, the Civil Rights Movement was well under way. Interestingly, 1954 was the also same year as *Brown v. Board of Education*. Racism and fear of integration quickened the tempo of “white flight” to the suburbs in many American cities. It was during this time of great demographic change that many city leaders turned to urban renewal to stop this out-migration to the suburbs.⁷⁹ It became standard practice for city planners to target predominately black neighborhoods for condemnation to build interstate highways, public parks, more expensive housing, or public attractions such as arenas and stadiums. This practice was so common that urban renewal was often referred to as “Negro removal.”⁸⁰ While intended to be a tool used to fight urban decay, “urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods, and helped entrench racial segregation in the inner city.”⁸¹ One scholar estimates that during the 1950s and 1960s the urban renewal movement displaced some “177,000 families and another 66,000 individuals, most of them poor, and most of them black.”⁸²

⁷⁸ *Byrne*, *Condemnation* supra note 58, at 136.

⁷⁹ Pritchett, supra note 52, at 37.

⁸⁰ *Id.* at 46 – 47 (Noting that in the urban renewal project that was the subject of *Berman*, that “of the 5,900 units of housing that were constructed on the site, only 310 could be classified as affordable to the former residents of the area. By the 1960s, the formerly black neighborhood was majority white.”).

⁸¹ *Id.* at 47.

⁸² Amanda W. Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82, N.Y.U. L. Rev. 177, 201 (2007) (Quoting Bernard J. Frieden & Marshal Kaplan, *The Politics of Neglect* 24 (1975)).

In *Hawaii Housing Authority v. Midkiff*,⁸³ decided thirty years after *Berman*, the Supreme Court did not narrow its interpretation, but instead “chose to reiterate its holding in even broader terms.”⁸⁴ In *Midkiff*, the appellants challenged the Land Reform Act of 1967, the purpose of which was to break up the “land oligopoly” of a few landowners who had ownership of the vast majority of land since the time that the Hawaiian Islands were a feudal kingdom.⁸⁵ The properties were then to be transferred to lessees living on the estates. Citing *Berman*, the Court reaffirmed that the Public Use clause is “coterminous with police power”⁸⁶ and upheld that takings as constitutional. The holding is significant given that the properties were transferred to private parties⁸⁷ and were not “blighted” but in “perfectly good shape.”⁸⁸ The *Midkiff* decision illustrated the Court’s deferential approach toward legislative determinations about what constitutes “public use” and displayed the broad scope of the Public Use clause.

A few years before *Midkiff*, the Michigan Supreme Court held in *Poletown Neighborhood Council v. City of Detroit*⁸⁹ that governmental taking of private property for the purposes of economic development was constitutional. In *Poletown*, the City of Detroit used its power of eminent domain to condemn a residential neighborhood referred to as “Poletown”⁹⁰ in order to make room to construct a large factory for General Motors. In all, the project displaced some 3,438 persons and required the destruction of 1,176

⁸³ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁸⁴ Bell & Parchomovsky, supra note 47, at 1419.

⁸⁵ *Midkiff*, 467 U.S. at 232 – 234.

⁸⁶ *Id.* at 240.

⁸⁷ *Id.* at 243 – 44 (Court stated that it has “long ago rejected any literal requirement that the condemned property be put into use for the general public.” Deferring to the decision of legislature, the Court found that the “unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified.”).

⁸⁸ Bell & Parchomovsky, supra note 47 at 1419.

⁸⁹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

⁹⁰ Johnson, supra note 47, at 204 (Noting that “Poletown” was a “historic neighborhood composed primarily of 3,438 elderly lower-class Polish and African-American residents . . .”).

structures.⁹¹ The City contended that the “controlling public purpose” of the taking was to “create an industrial site which will be used to alleviate and prevent conditions of unemployment and fiscal distress.”⁹² The appellants argued that the taking was “not a public use because General Motors is the primary beneficiary of the condemnation.”⁹³ Citing *Berman*, the Court took a deferential approach and held that the taking passed scrutiny because the city wished to use the power of eminent domain to “accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.”⁹⁴ Moreover, the Court concluded that the benefit to General Motors was “merely incidental.”⁹⁵

By holding that economic development constituted “public use”, the *Poletown* decision announced the most expansive interpretation of the Public Use clause to date. Traditionally, urban renewal programs targeted slums and high crime neighborhoods for the purpose of fighting “blight” and urban decay. However, while “Poletown” was a working-class neighborhood, it was not “blighted” and posed no hazard to the community.⁹⁶ The purpose of the taking was to fight unemployment through the creation of 6,150 new jobs⁹⁷ and to raise tax revenue. This decision would become an important “reference point” for other courts and may have “blazed the trail that ultimately led to the Supreme Court ruling in *Kelo*.”⁹⁸

The facts underlying *Kelo* are similar to the facts in *Poletown*. In *Kelo*, the City of New London, which had been designated a “distressed municipality” in 1990, initiated

⁹¹ *Poletown*, 304 N.W.2d at 464.

⁹² *Id.* at 458.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Johnson, *supra* note 47, at 206.

⁹⁷ *Poletown*, 304 N.W.2d at 464.

⁹⁸ Bell & Parchomovsky, *supra* note 47, at 1420.

a revitalization plan with the purpose of promoting economic development.⁹⁹ The plan included a “small urban village” comprising of restaurants and shopping stores, a U.S. Coast Guard Museum, a “riverwalk,” a marina, and a 90,000 square foot Pfizer research facility.¹⁰⁰ The plan would require the destruction of 115 privately owned structures to make room for the new various developments.¹⁰¹ Like *Poletown*, the purpose of the takings was for economic development in a city that had suffered considerable economic decline over the preceding decades. Moreover, also like *Poletown*, the properties that were to be seized were not “blighted or in poor condition” but were “condemned only because they happened to be located in the development area.”¹⁰² Petitioners¹⁰³ argued that the takings did not constitute “public use” and urged the Court to “adopt a bright-line rule that economic development does not qualify as a public use.”¹⁰⁴ The Court reiterated that the “public use” doctrine is to be defined “broadly.”¹⁰⁵ Applying the deferential approach first announced in *Berman*, the Court stated that although the purpose of the project was not to remove blight, the city planners “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.” Moreover, it matters not that the principal beneficiary of the project is a private corporation and that the public will not have access to much of the proposed development area. The plan will provide “appreciable benefits to the community,

⁹⁹ *Kelo*, 545 U.S. at 473-74.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 475.

¹⁰³ *Id.* (There were 9 petitioners in all who all together owned 15 properties. Among these 9 were Susette Kelo who had bought her waterfront house in 1997 and had made considerable improvements on it and Wilhelmina Dery who was actually born in her house in 1918 and lived there her entire life, including the 60 years of marriage spent with her husband, Charles, who was also a petitioner.).

¹⁰⁴ *Id.* at 484.

¹⁰⁵ *Id.* at 480.

including—but by no means limited to—new jobs and increased tax revenue.”¹⁰⁶ The Court determined that there is no “principled way” to distinguish economic development “from the other public purposes that we have recognized.”¹⁰⁷ Stating for the first time that economic development constituted a “public use,” the Court held that the takings did not violate the public use requirements of the Fifth Amendment.

The *Kelo* decision is, thus far, the most expansive interpretation of the “public use” doctrine announced by the Supreme Court. In the last century and a half, the “public use” doctrine has evolved from a very narrow, almost literal interpretation to one so broad that it is difficult to conceive of a urban development plan that would not constitute “public use.” This expansive interpretation proved to be one of a number of decisions made by the conservative Court that has generated considerable controversy.

C. Controversy – *Kelo v. City of New London*

Kelo created a wave of controversy. A diverse variety of *Kelo* detractors representing a cross-section of American politics and academia have criticized the holding.¹⁰⁸ Behind much of the criticism lies the fear that, like the urban renewal projects of the 1950s, 1960s, and 1970s, the power will be used to the detriment of inner city minorities and poor for the benefit of the middle and upper classes and influential

¹⁰⁶ *Id.* at 483.

¹⁰⁷ *Id.* at 484.

¹⁰⁸ See Bell & Parchomovsky, *supra* note 47, at 1423 – 1425 (Describing some of the common criticisms of *Kelo*, the authors note that: Libertarians dislike the decision because imperils the “sanctity of private property”; Liberals perceive the decision as sanctioning the “wrong kind of wealth redistribution: from poor to rich—from small homeowners . . . to large corporations” and also that such takings will disproportionately harm ethnic minorities and the poor; “Communitarian thinkers” believe that takings for economic development threaten “existing communities and may often cause them to unravel”; Economists argue that “extensive use of eminent leads to inefficient government projects, breeds corruption, and erodes private property rights”; and in response to criticism and public outcry, politicians, both federal and state, “have rushed to introduce various bills aimed at restricting the government’s power to use eminent domain to spur economic development.”).

corporations. Moreover, scholars argue that the expansive eminent domain power will open the door to abuse by city planners corrupted by corporate influence.

Perhaps the most powerful criticisms of *Kelo* come from the stinging dissents of Justice O’Conner and Justice Thomas. O’Conner opined that, for all practical purposes, the majority’s decision “delete[d] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”¹⁰⁹ She argued that implementing “economic development takings” that benefit private actors for the purpose of “incidental public benefit” effectively ends “any distinction between private and public use.”¹¹⁰ Moreover, she disagreed with the majority’s analysis of *Berman* and *Midkiff*. While acknowledging that in both cases the Court affirmed takings that benefited private parties, she distinguished these cases pointing out that the purpose behind the takings was to eliminate two particular social harms; one being “extreme poverty” cause by blight in *Berman*, and the other being the “oligopoly” of rich landowners in *Midkiff*. She explained that in both cases “a public use was realized when the harmful use was eliminated.”¹¹¹ She added that since these takings “directly achieved a public benefit, it did not matter that the property was turned over to private use.”¹¹² The takings in *Kelo* did not result any such direct public benefit.

In his separate dissent, Justice Thomas argued that the legislatures should not be afforded “almost insurmountable deference” when deciding what constitutes public use.¹¹³ He emphatically asserted that “a court owes no deference to a legislature’s

¹⁰⁹ *Kelo*, 545 U.S. at 494 – 500.

¹¹⁰ *Id.* at 494.

¹¹¹ *Id.* at 500.

¹¹² *Id.*

¹¹³ *Id.* at 517-18.

judgment” of what is “quintessentially a legal question.”¹¹⁴ Thomas indicated that he believes that eminent domain takings demand higher scrutiny by the courts. In addition, Thomas warned that the decision would have harmful consequences for the poor and African-Americans in particular. Asserting that urban renewal projects have “long been associated with the displacement of blacks,” he predicted that the majority’s holding would only “exacerbate these effects.”¹¹⁵

Critics of *Kelo* agree with Thomas that the *Kelo* decision will exacerbate the effects of eminent domain takings on the urban poor and minorities. This “relaxed” eminent domain power means that such takings “will occur frequently and gather up considerably more land.”¹¹⁶ City planners will more frequently implement urban renewal programs that will certainly “target” minority neighborhoods resulting in the “downfall of minority Americans’ private property rights.”¹¹⁷ Low-income and minority communities will be disproportionately affected because developers often prefer poorer areas where property costs are lower and the residents wield less political influence.¹¹⁸ Unless safeguards are put in place by state legislatures, the urban renewal initiatives will inevitably alter more communities and displace more minority residents.

Another criticism of *Kelo* is that it opens the door to abuse by city planners influenced by corporate interests. Rich and powerful corporations can easily curry favor with legislators and politicians, who often depend on corporate money for support during

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 522 (Noting, among other statistics, that 63% of all people removed in urban renewal projects between 1949 and 1963 were non-white and that 97% of the individuals removed by the project upheld in *Berman* were black.).

¹¹⁶ Silkwood, *supra* note 51, at 519-520.

¹¹⁷ *Id.*

¹¹⁸ Goodin, *supra* note 82, at 203.

election campaigns.¹¹⁹ This could result in city planners looking out more for the interests of their corporate benefactors, rather than for the people whom they represent. Also, municipal development corporations often “lack objectivity” because their focus is on the profitability of the project.¹²⁰ Some critics argue that using eminent domain for private development projects presents an unnecessary risk of abuse, since “private parties can ordinarily assemble property using secret buying agents.”¹²¹

Another concern of *Kelo*, noted by Justice O’Conner in her dissent, is that economic development takings confer no “direct” public benefit. This is one way that economic development takings differ from urban renewal takings under *Berman*. The direct public purpose behind urban renewal takings was (and is) to remove urban blight. As discussed above, in many instances city governments abused the eminent domain power under *Berman* as a method to change the ethnic and class make-up of certain residential areas. However, many city governments also used the power of eminent domain for its intended purpose. For example, by initiating programs for the construction of government subsidized housing developments or replacing substandard housing with affordable housing for low-income residents. Under these circumstances urban renewal takings did confer a direct public benefit. However, economic development takings under *Kelo* directly benefit private developers, realtors, and corporations who will earn large profits off of such projects. The “public” will only be indirectly benefited through increased tax revenue, increased real estate value, and perhaps a stronger local economy.

Moreover, the urban poor and minority groups will enjoy few direct benefits from economic development takings. Many urban poor and minority residents will be either

¹¹⁹ Johnson, *supra* note 47, at 199.

¹²⁰ *Id.*

¹²¹ See Kelly, *supra* note 49, at 4.

directly displaced if their property is condemned through eminent domain, or indirectly displaced because of the increased property values and costs in the neighborhood.¹²² Also, gentrification, urban renewal and economic development are “affluent attraction” policies that target middle and upper class suburbanites.¹²³ As a result, the urban poor and minorities are often excluded from the posh shopping districts, trendy bars, and other attractions.¹²⁴ One could be argued that urban residents are conferred a direct benefit through new employment opportunities. However, as in the case of the General Motors facility in *Poletown*, the number of individuals actually employed by the company sometimes falls far below than the number originally promised.¹²⁵ Also, many jobs will be taken by suburbanites willing to suffer through long commutes, not local residents who reside nearby.

While *Kelo* certainly has its fair share of critics, not all scholars take such a negative view. To some scholars, the “criticisms of *Kelo* are ill conceived and misguided” since the government can “achieve any land use goals through the powers of regulation and taxation without paying compensation to the aggrieved owner.”¹²⁶ Other scholars take a more centered approach arguing that, like urban renewal, economic development takings could confer direct and indirect public benefits on poor urban

¹²² See Fernandez, *supra* note 12, at 415 -416 (Discussing direct and indirect displacement).

¹²³ See McFarlane, *Who Fits the Profile?* *supra* note 13 (Explaining that urban poor are excluded from urban redevelopment projects and that the principal “users of the new development are disproportionately white and affluent.”).

¹²⁴ *Id.*

¹²⁵ Johnson, *supra* note 47, at 208 (Noting, though General Motors predicted that 6,150 new jobs would be created, by 1988 only 2,500 workers had been employed and that even during the “apex of the economic expansion of the 1990s, the plant employed on 3,600 workers, a figure equivalent to less than 60% of the jobs initially promised.”).

¹²⁶ See generally Bell & Parchomovsky, *supra* note 47 (Discussing the governments powers of regulation and taxation and argue that “eminent domain is the government power least pernicious to property owners as it is the only one that guarantees them compensation.”).

residents if the expansive power of *Kelo* was tempered by reforms.¹²⁷ Finally, at least one scholar argues that urban “revitalization” efforts should not target only urban blight because to do so disproportionately burdens the poor.¹²⁸ Like the takings in *Kelo*, economic development takings can occur in any urban space, including middle and upper-class neighborhoods that are not blighted. Under this argument, this is fairer to poor residents who should not have to disproportionately shoulder the burden of takings under the eminent domain power.

As indicated by the amount of controversy and outcry, the holding in *Kelo* is problematic. This expansive power of eminent domain will become the ultimate tool for the gentrification movement. Today proponents of urban “revitalization” have at their disposal the ability to alter the urban landscape in a way that the renewal advocates of the 1920s could only dream of. *Kelo* provides governments with a practically unlimited power of eminent domain that is justifiable as long as a public benefit is conferred. That is, any public benefit small or large. Under this new version of the Public Use doctrine, “it is hard to imagine any development plan that would fail.”¹²⁹ Virtually any development can “be said to generate some benefit to the public.”¹³⁰ Basically, this decision creates an eminent domain power without proper checks and balances to curtail abuse by government officials. Since local and state governments often delegate eminent

¹²⁷ See Byrne, *Condemnation* supra note 58 (Noting that better compensation and implementing procedural provisions that mandate the government to consider impact on the local community could remedy some of the negative effects of economic development takings and maximize public benefits.).

¹²⁸ See Goodin, supra note 82 (Arguing that state legislation in response to *Kelo* that prohibits the use of eminent domain for economic development generally but allows it for the development in blighted areas “improperly burden poor and minority communities and imbalances the political process by which the rules on eminent domain for development are established.”).

¹²⁹ Silkwood, supra not 51, at 516.

¹³⁰ *Id.*

domain power to development corporations,¹³¹ it is these entities that will come up with development schemes and decide which urban spaces are best for economic development. In a sense, by allowing takings for economic development, *Kelo* has opened the door to the infusion of the power of eminent domain with private enterprise and capitalism. The purpose behind economic development projects will be to build either attractions for middle and upper class suburbanites such as shopping centers, riverwalks, and restaurant districts or facilities and office buildings that benefit private corporations. If the development is residential, the history of urban renewal shows that developers will often replace “slum” and low income housing with more expensive housing or high-rise condominiums, thereby displacing the original residents who can no longer afford to live in the neighborhood. Moreover, the developers will gobble up neighborhoods located in areas where the appreciation in value will be greatest, such as along riverfronts. Whether commercial or residential, the impetus behind economic development projects will be profit for the private corporations and developers and to generate income for the municipality.

However, urban poor and minority groups will benefit little from such projects. Economic development projects will gentrify only certain urban areas and neighborhoods where developers anticipate high profits. Poor residents directly in the path of such projects will be displaced, either directly or indirectly, and forced to move to another low-income area of the city. Moreover, such takings will occur more frequently, displacing more people and destroying more communities. Also, poor residents will be excluded from the new shopping and restaurant districts which cater to middle and upper class customers. Any benefits conferred to the poor will be indirect.

¹³¹ *Id*

That is not to say that an expansive eminent domain power cannot confer benefits on the poor or the public. While it is certainly true that this power can be used for public projects such as schools, roads, government subsidized housing, sanitation, etc. It is equally true that this power in combination with the gentrification movement can be used for projects that benefit primarily private corporations and the middle and upper classes at the expense of the urban poor and minority groups. The intent behind the gentrification movement is to “clean up” the neighborhood. This “cleaning up” process usually means moving out an “undesirable” population and condemning low-income housing. Unfortunately, as illustrated by the urban renewal movement of the 1950s, 1960s, and 1970s, undesirable populations usually consist of the urban poor and minority groups. Moreover, the urban poor and minorities have few tools available to stop unwanted intrusions on their properties and communities and the displaced residents receive inadequate compensation. The situation of our American cities has resulted in a class struggle for the urban landscape.

III. REMEDIES AND REFORMS: BETTER PROTECTION FOR THE PROPERTY RIGHTS OF THE URBAN POOR

A. Protecting Property Rights

Perhaps the essence of the problem with the *Kelo* decision is that conveys local and state governments a near absolute power of eminent domain with too few checks on the power. Also, there are few remedies available to displaced residents. As a result, scholars have suggested various alternatives that would limit the unlimited application of eminent domain and provide displaced residents with adequate compensation.

Scholars have proposed a number of creative alternatives that could offer better protection for low-income urban residents against economic development takings. First,

some scholars have proposed applying a different standard of scrutiny for economic development takings. Some have suggested that a “heightened scrutiny” is necessary to determine whether there exists a “fit between the use of eminent domain and the purposes government claims to be seeking”¹³² Other scholars have proposed eliminating the deferential approach currently applied by the Supreme Court under the rational basis standard and apply the strict scrutiny standard.¹³³ These scholars argue that the “taking of a home is more than an ordinary economic right” and should be considered a fundamental right.¹³⁴ However, these arguments may be mute because the Supreme Court has given no indication that any higher scrutiny than rational basis should apply in economic development takings.

A second alternative is providing more procedural protections similar to those provided in the National Environmental Policy Act (NEPA).¹³⁵ Under NEPA, federal agencies are required to prepare Environmental Impact Statements (EIS) for federal actions that may “significantly affecting the quality of the human environment.”¹³⁶ The purpose of the Act is to make the agency consider possible impacts on the environment before funding, approving, or engaging in a project. In addition, the Act, through the procedures of the Administrative Procedures Act (APA), provides a forum where the public may voice concerns and agency decision may be reviewed.¹³⁷ Similar to NEPA, some scholars argue that government should have to prepare a Social Capital Impact

¹³²Byrne, *Condemnation* supra note 58, at 161 (Quoting Nicole Stelle Garnette, *The Public-Use Question as a Takings Problem* 71 *Geo. Wash. L. Rev.* 934, at 969-74.) .

¹³³ Johnson, supra note 47, at 213-214.

¹³⁴ *Id.*

¹³⁵ 42 U.S.C. §§ 4321 – 4370(f) (2006).

¹³⁶ 42 U.S.C. § 4332(c) (2006).

¹³⁷ Johnson, supra note 47, at 219 – 221 (Discussing in detail the provisions of NEPA).

Assessment (SCIAs)¹³⁸ before any economic development taking occurs. The SCIA would benefit those impacted by the taking by forcing the government agency to: (1) research and consider the impact of the taking on the local community, (2) consider alternative locations, (3) provide residents a forum to voice their concerns, and (4) provide judicial review of government decisions.¹³⁹ Such requirements would ensure that governments do not act arbitrarily when condemning private property through eminent domain.

A third alternative is pushing for legislative restrictions “limiting the government’s power of eminent domain to certain types of projects.”¹⁴⁰ Under this proposal the eminent domain power could be used for only certain types of takings. Also, in the wake of the *Kelo* decision, a number of state legislatures have limited the eminent domain power by mandating extra requirements for economic development takings. For example, in Florida the state legislature amended to Florida Constitution so that “[p]rivate property taken by eminent domain . . . may not be conveyed to a natural person or private entity except as proved by general law passed by a three-fifths vote of the membership of each house of the legislature.”¹⁴¹

In addition, it is worth noting that in *County of Wayne v. Hathcock*¹⁴² the Michigan Supreme Court reversed *Poletown* and held that in the absence of blight, the government cannot take and transfer property to private owners.¹⁴³ In making its

¹³⁸ *Id.* at 222-228 (Discussing in detail the various components and requirements of SCIAs.).

¹³⁹ *Id.* See also, Byrne, *Condemnation* supra note 58, at 159.

¹⁴⁰ Goodin, supra note 82, at 191-192.

¹⁴¹ Fla. Const. Art. X § 6(c) (2007).

¹⁴² *County of Wayne v. Hathcock*, 471 Mich. 445 (Mich. 2004).

¹⁴³ Byrne, *Condemnation* supra note, 58, at 146.

decision, the Court “evaluated the merits of the condemnation” and did not apply the rational basis standard.

A fourth alternative is to resist the taking through litigation. However, individuals and citizen groups face great difficulty when confronting “city and corporate giants” who are more organized and have seasoned lawyers at their disposal.¹⁴⁴ Nevertheless, public regular citizens teamed with public interest lawyers have been able to save their communities from eminent domain. In *Houston v. City of Cocoa Beach*¹⁴⁵ the residents of a historic black neighborhood were able stop the destruction of their community through a combination of “community empowerment” and complex litigation.¹⁴⁶

B. Just Compensation for the Displaced

Scholars have also proposed various alternatives to ensure that displaced persons are provided adequate compensation for their property. Currently, “just compensation” requires the government to pay fair market value. Some scholars argue that the fair market value does not “provide complete damages to the residents.”¹⁴⁷ Often, holdouts are unwilling to accept the fair market value offered by the government. This indicates that they believe that the property is worth more than what the government is offering.¹⁴⁸ Also, residents are not compensated for intangible value in property such as loss of community, emotional impacts, or the “root shock” of the loss of a familiar place. This can particularly prevalent in unique ethnic communities such as the Polish community in

¹⁴⁴ Johnson, *supra* note 47, at 202.

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¹⁴⁶ See Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 *Geo. J. on Fighting Poverty* 75 (1996).

¹⁴⁷ Byrne, *Condemnation* *supra* note 58, at 162 – 169. See also Powell, *supra* note – at 223-224.

¹⁴⁸ *Id.*

Poletown. In addition, renters who pay month to month payments pursuant to a lease often receive “no compensation.”¹⁴⁹

As a result of this inadequate compensation, scholars have proposed various alternatives that may help make residents “whole.” One alternative is to provide compensation that is above fair market value.¹⁵⁰ This would at least ensure that the resident was not under-compensated when paid the fair market value. A second alternative is to require the government to meet “the price named by the displaced landowner.”¹⁵¹ A third alternative is set up a program where the displaced owner could share in the profits generated by the new development.¹⁵² Other alternatives included payment for moving expenses¹⁵³ and compensation for psychological and emotional damages.¹⁵⁴

Implementing some of the above reforms may ensure that the eminent domain power is applied more equitably and only when necessary. If a resident is displaced, then providing adequate compensation may mitigate the effects of the forced removal and loss of property.

CONCLUSION

The history of urban renewal shows that an expansive power of eminent domain without adequate safeguards will have a disproportionate adverse affect on poor urban residents and minorities. The *Kelo* interpretation of “public use” has resulted in a near absolute power of eminent domain. The ultimate result of this power will be more

¹⁴⁹ *Id.*

¹⁵⁰ Johnson, *supra* note 47, at 214.

¹⁵¹ *Id.* (Author concedes that this is most likely impractical.).

¹⁵² *Id.*

¹⁵³ Byrne, *Condemnation* *supra* note 58, at 226.

¹⁵⁴ See Powell, *supra* note 50 (Assessing the emotional and psychological impact of displacement and advocating compensation for emotional injury.).

displacement, more communities destroyed, and more emotional trauma. Further, the urban poor and minorities will benefit little from gentrification and the displaced will receive inadequate compensation. While middle and upper class residents enjoy the amenities of urban life, the displaced will be “push out” to other low-income neighborhoods. In a sense, the property rights of the urban poor have been relegated to a second-class status. They carry the disproportionate burden of eminent domain takings on their shoulders. To add insult to injury, such takings are supposedly for the public benefit, which includes their benefit. However, those who benefit the most are corporations, realtors, and middle and upper class residents. Changes need to be made so that eminent domain is applied in a more equitable fashion and the property rights of all citizens are equally protected.