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WHAT IS PROPERTY? PROPERTY IS THEFT: THE LACK OF SOCIAL JUSTICE IN U.S. EMINENT DOMAIN LAW

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INTRODUCTION
The individual right of property is not simply an economic right. . . . Individual property rights are also about self-expression, self-governance, belonging, and civic participation. A proper theory of constitutional protection of property should therefore be concerned about possible abuse of government power when cities condemn land, especially residential land, to enable projects whose benefits redound substantially to private entities. Monetary compensation, even when it satisfies the constitutional requirement of being “just,” is not always enough to make the dispossessed landowner whole.¹

This is not an article against eminent domain per se. In fact, when used responsibly, the power of eminent domain can produce economic and social benefits for a community and residents within the community. When, however, a government abuses its


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power of eminent domain, the economic and social costs to the affected individuals and neighborhoods, combined with the moral costs, far outweigh the benefits. When that abuse occurs, the government, and often the courts, have failed in their obligation to create and maintain a just social system.

This Article contends that social justice is largely absent in eminent domain law, particularly in the context of blight removal\(^2\) and economic development condemnations. Government takings too often result in an undue burden on poor people and communities of color in a way that resembles Discovery-era takings of land from American Indians. In the periods of colonization and western expansion of the United States, as well as in recent takings, the lack of social justice has had a profound effect: the disproportionate burden and exploitation of people who have the fewest resources—legally, politically, or economically—with which to resist the intrusion of eminent domain. Rooted in a historical framework of social justice, this Article examines the pervasive injustice in the realm of eminent domain. Specifically, the Article critiques the too often unchecked power of governments\(^3\) to declare neighborhoods "blighted," or merely in need of revitalization, so that jurisdictions can hand the land over to private entities for "better" uses. Such action divorces eminent domain from principles of social justice in a way that is inconsistent with the values upon which American society purports to function.

\(^2\) Blight removal that provides measurable benefits to residents in decaying communities is not objectionable; however, the incentive to characterize areas in the United States as "blighted" has not come from a desire to improve the community for the benefit of the people living there or to improve their standard of living. See Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 55 (2005).

\(^3\) Though more than forty states have passed some type of eminent domain reform that limits the ability of local governments to take private property for blight reform or economic development, many of the new laws fail to define blight or economic development, and thus, do little to place stricter controls on these types of condemnations. See generally CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (2009), available at http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Item=129.
Socrates once pondered, "justice, if only we knew what it was." When we add the modifier social the task becomes more challenging. What do we mean by the term social justice, and how does that concept fit within American jurisprudence? More to the point, to what extent do we find social justice reflected in American property jurisprudence and in the arena of eminent domain? Lawyers, politicians, activists, theologians, and everyday citizens use the term social justice to call for legal, political, and social change. One would think that a phrase so ubiquitous would have a common meaning, but such is not the case. Still, most people claim to know justice when they see it. But rather than some absolute meaning, judgments about that ideal tend to reflect the image of the seeker looking in the mirror. Moreover, notions of what should be done in the name of justice tend to change as society changes. Despite such daunting considerations, it is imperative that we examine the principle of social justice in the context of U.S. eminent domain law so that we can determine whether current eminent domain law upholds or undermines our country's commitment to justice.

The first part of this Article examines private property rights and the tension between individual and governmental interests. The second part explores the ideals and evolution of justice and social justice. This Section gives historical account of justice and social justice to provide a framework for those principles as they relate to eminent domain law. Part III looks at the introduction of social justice into American jurisprudence and addresses two ways in which social justice has been advanced in the United States: through social movements and through legal reform. In this Section, I give examples of how those vehicles have led to legal protections for the most vulnerable in society and assert that the same can be done for those unduly burdened by blight removal and economic development condemnations. Part IV discusses the development of case law in the area of eminent domain. This Part discusses the government dispossession of tribal lands, a seeming presage to the application of eminent

domain today. It also covers the origins of eminent domain and the intersection of social justice with the Fifth Amendment Takings Clause. Part V examines the development of urban renewal and economic development policies that led to the shaping of eminent domain law by legislatures and courts, culminating in the Supreme Court’s ruling in *Kelo v. City of New London*. This Section concludes that legislatures and courts have an obligation toward social justice in governmental takings but that they have ignored this obligation at the great expense of poor people and people of color. Part VI reviews the national debate that has erupted since *Kelo* in the form of social movements and legal reform. There, I suggest that while these actions represent a significant effort to reverse the negative impact of *Kelo*, they are not enough to bring justice to all communities, including poor communities and communities of color.

In conclusion, I posit that, while not all eminent domain is bad, circumstances exist under which the use of eminent domain is inherently unjust. These circumstances include the historical and current use of blight as a pretext for the displacement of entire communities of color and economic development condemnations that transfer private property to private interests for profit. Eminent domain within these frameworks violates basic notions of justice and constitutes a betrayal of our nation’s sense of fairness. Until all citizens—regardless of race, income, or any other distinction—can protect their communities from unjust intrusions of eminent domain, the most vulnerable in our society will continue to be exploited by more powerful interests in the name of civic progress and economic development.

\[5\] 545 U.S. 469 (2005).
I. WHAT IS PROPERTY IN THE CONTEXT OF EMINENT DOMAIN?

The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.6

"Every tenant of 602 West 132nd street has deep roots in the community, and many households have multiple generations living in the same home. One man, now in his nineties, has been living in the same apartment since the 1950s."7 Most all of the residents in the thirty-one unit, six-story apartment building—seniors, "an assistant teacher, a few home health care attendants, restaurant and fast food workers, a print shop employee, a police officer, and a nurse, to name a few"—know who lives in every apartment.8 The mostly African American, Mexican, Dominican, Puerto Rican, Ecuadorian, and Honduran families have lived there for over thirty years—some even were born in the building. The most recent residents arrived over twenty years ago.9

Apartment building 602 on West 132nd Street is located in a West Harlem neighborhood known as Manhattanville, a neighborhood in which Columbia University is planning a seventeen-acre expansion for a "mixed-use academic center."10 Reportedly, Columbia will acquire and then demolish building 602 and neighboring properties after New York City uses its eminent domain powers to obtain the land. Much of the neighboring land is industrial, but more than 400 low-income

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7 Coalition To Preserve Community, Columbia's Expansion Would Destroy Hundreds of Homes; Tenants in These Properties Are United in Their Intent To Stay, http://www.stopcolumbia.org/content/view/55/66 (last visited Apr. 5, 2010) [hereinafter Coalition To Preserve Community, Columbia's Expansion]. The Coalition To Preserve Community describes itself as a grassroots organization "dedicated to promoting the vitality and diversity of [its] neighborhoods and to preserving the residential character of [its] community." Coalition To Preserve Community, What We Stand For, http://www.stopcolumbia.org/content/view/31/44/ (last visited Apr. 5, 2010) [Coalition To Preserve Community, What We Stand For].
8 Coalition To Preserve Community, Columbia's Expansion, supra note 7.
9 See id.
residents\textsuperscript{11} are also in the zone of demolition.\textsuperscript{12} Protestors argue that the project will also alter neighboring communities, which are "among the most vibrant and diverse low-income neighborhoods in the world."\textsuperscript{13}

On the other hand, Columbia University characterizes the expansion as an attractive academic urban environment that will blend in with the surrounding community.\textsuperscript{14} According to Columbia, its "smart growth" plan will create thousands of new jobs for area residents, preserve the culture and vitality of Harlem, and also provide new research, teaching, and other benefits to the university.\textsuperscript{15} Concerning the residents who will be displaced by the expansion, Columbia has given the assurance that it "has made a commitment to relocate residents of these units to equal or better housing in the area."\textsuperscript{16}

Is Columbia University's planned expansion an appropriate use of eminent domain? Columbia states that it has sought to negotiate purchases of property from affected property owners and that eminent domain is being used only with property owners who have refused to sell.\textsuperscript{17} Residents say that eminent

\textsuperscript{11} See Coalition To Preserve Community, Columbia's Expansion, supra note 7. The Coalition To Preserve Community website reports that, of the 400 residents, approximately 140 families will be displaced. Id. Since 2003, many of the residents have been in the Tenant Interim Lease (TIL) program, which allows tenants the chance to purchase their homes from the city at an affordable price and then operate them as low-income cooperatives. Id. "[T]he current average income for households in the TIL program is under $10,000 per year . . . ." Id.

\textsuperscript{12} See id. Columbia University's website on the project states the following: There are 135 occupied residential units in the project area . . . . Residents in the Tenant Interim Lease (TIL) program will retain their "sweat equity" toward ownership and will have the opportunity to own their units sooner. The University will provide these TIL residents replacement housing, and it will ensure a net 10 percent increase in such affordable units. Columbia will also provide moving and relocation assistance to interested residents. Columbia University, Manhattanville in West Harlem, http://neighbors.columbia.edu/pages/manplanning/index.html (last visited Apr. 5, 2010).

\textsuperscript{13} Coalition To Preserve Community, Columbia's Plan Would Cause Thousands of Families Living Outside the Expansion Zone in Harlem and Washington Heights To Be Displaced, http://stopcolumbia.org/content/view/53/65/ (last visited Apr. 5, 2010).

\textsuperscript{14} Columbia University, Manhattanville in West Harlem, http://neighbors.columbia.edu/pages/manplanning/index.html (last visited Apr. 5, 2010).

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} See id. Columbia also states that it has not requested the use of eminent domain with respect to occupied residential properties and that the only properties at issue for eminent domain are commercial. See id.
domain is not appropriate and even assert that Columbia intentionally “blighted” the area by purchasing properties and then neglecting them. In addition, residents claim that Columbia’s negotiations with property owners did not amount to arms length negotiations because owners of property felt threatened and coerced into selling their property.

As to the residents in building 602 who will be displaced, Columbia University certainly intends to assuage anger and fear and, indeed, to provide comfort through its promise of “equal or better housing.” What Columbia’s promise of relocation does not recognize, however, is the overwhelming sentiment that one’s house is more than just a piece of property that can be taken and then replaced. For most, a house is a home, filled with symbolic meaning. A home represents a person’s centering place in the community and in the world. A home provides shelter and security in both literal and figurative ways. For many, a home also represents a sense of accomplishment. Researchers have found that people all over the world feel a common connection to their homes, whether those homes are huts or mansions.

Similarly, a neighborhood represents more than simply the place in which a home is located. A neighborhood provides resources for survival, including people, places of worship, schools, small businesses, and other organisms that create a community.

Most people believe that they have a right to live wherever their resources can take them. That is, most believe that they have a right to own and exert control over their property, even while acknowledging that private rights sometimes conflict with the government’s rights to exert some regulation over private property. At the core of this tension is the question of whether an individual’s right to private property represents a fundamental right. Though this remains a contentious issue of

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19 See Coalition To Preserve Community, Columbia’s Expansion, supra note 7.
21 Id. at 3–4.
22 Dr. Fullilove refers to a neighborhood as a “commons,” meaning the “social, political, cultural, and economic networks that [function] for both individual and common good.” Id. at 1–2.
constitutional law, compelling arguments exist that private property rights constitute fundamental rights. As such, any infringement on private property rights must be carefully scrutinized, especially where vulnerable citizens are concerned—such as the residents of West Harlem.

II. THE ORIGINS OF SOCIAL JUSTICE IN THE WESTERN WORLD

Anum and Enlil named me
to promote the welfare of the people,
me, Hammurabi, the devout, god-fearing prince,
to cause justice to prevail in the land,
to destroy the wicked and the evil,
that the strong might not oppress the weak,
to rise like the sun over the black-headed (people),
and to light up the land.

This Article focuses on the nexus of social justice and American jurisprudence, specifically in the context of blight removal and economic development condemnations exercised under eminent domain law. The understanding of that interconnection benefits from examining the meaning and application of justice. An exhaustive treatment of the concept of justice is beyond the scope of this Article. Rather, this Article will touch on key historical origins of justice and social justice in western society in order to frame the place social justice holds in eminent domain jurisprudence today.

Throughout most of the world, and certainly in the United States, the principle of justice has undergirded the foundations of social order and legal systems. After all, the concept of justice has a long history in American jurisprudence and an even longer history in western religions and philosophy. The word “justice”

23 See Bret Boyce, Property as a Natural Right and as a Conventional Right in Constitutional Law, 29 Loy. L.A. Int’l & Comp. L. Rev. 201, 201 (2007).
26 An expanded scope would also be needed to explore nonwestern conceptualizations of justice.
first arises in early religious codes, such as the Code of Hammurabi, the Covenant Code, and the Deuteronomic Code. Scholars have concluded that in ancient times, the word “justice” was associated with a wide range of meanings so that even then, there existed a general lack of agreement as to its scope. Hence, people have discussed and disagreed about the meaning of justice for thousands of years. To add complexity, justice has many facets and is perceived through a variety of lenses, though each perspective carries the common theme of a social or institutional responsibility.

A. Four Lenses of Social Justice: Religious, Philosophical, Mythological, and Legal

When approached through a religious lens, justice often includes an action as well as an outcome. In other words, justice in faith language, requires followers to live out the meaning of justice, not merely to expect just results. For example, Hammurabi charged the people “to cause justice to prevail in the land . . . that the strong might not oppress the weak.” In the Hebrew Bible, prophets beckon the people “to do justice” and to “let justice roll down like waters.” Moreover, particular care is taken of those on the margins of society: “When you gather the grapes of your vineyard, do not glean what is left; it shall be for the alien, the orphan, and the widow. Remember that you were a slave in the land of Egypt; therefore I am commanding you to do this.” In the New Testament, Jesus Christ affirms the call to protect the most vulnerable as he says:

For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger

27 See Hammurabi supra note 25.
28 See, e.g., Exodus 23:2, 23:6 (Revised Standard); Amos 5:24 (Revised Standard).
29 See, e.g., Deuteronomy 16:18, 24:17 (Revised Standard).
30 See Thomas L. Leclerc, Yahweh Is Exalted in Justice: Solidarity and Conflict in Isaiah 7 (2001). Similar to the Greek language, the Hebrew words mišpāṭ and sēḏaqā (righteousness) translate (depending on context) to the English word “justice.” At least nine other Hebrew words or terms have been associated with the word “justice.” Those words translate in English to steadfastness, faithfulness, kindness, sufficiency/peace, statute, commandment/ordinance, instruction/law, correction/warning, and completeness.
31 See Hammurabi supra note 25.
33 Amos 5:24 (New American Standard).
34 Deuteronomy 24:21–22 (New Revised Standard).
and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me. Then the righteous will answer him, ‘Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?’ [Jesus] will reply, ‘I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.’

Islamic law holds a worldview of justice, which includes as a main principle, to “construct a world of justice and laws” and, as instructed by the Qur’an, followers must pursue justice by treating everyone “justly, generously and with kindness” and when judging, “judge with justice.” Thus, the justice of religion involves a kinship, a shared responsibility toward others in a community. Both individuals in society and institutions share the responsibility of protecting vulnerable members of society and ensuring a just society. How would such an ethic of shared responsibility inform our approach to eminent domain today? What would these standards of social justice borne out of antiquity require of our modern day legislatures and courts as they consider the plight of the most vulnerable in the face of eminent domain actions?

From a philosophical lens, justice is the sine qua non of existence. According to Plato, justice unites the individual with society—without justice neither can exist and with justice, they can embrace. To extend Plato’s portrayal, injustice fractures the individual from society. American Indians experienced this type of fracturing when “discoverers” took tribal lands, just as many present-day low-income residents experience fracturing from their communities as a result of blight removal and economic development condemnations.

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38 See Plato, supra note 4.
Plato’s student Aristotle, in articulating the complexity of the concept, separated justice into the categories of “lawful” justice and “fair and equal” justice. Aristotle then explained the “fair and equal” concept in the dual frameworks of distributive and rectificatory justice. As defined by Aristotle, distributive justice relates to what people deserve and the notion of equality but more in terms of proportion to merit than equal distribution. Philosopher and theologian Paul Tillich criticized Aristotle’s concept of distributive justice. Tillich feared that, according to Aristotle’s concept, a person’s merit would be determined by their social status, which itself would be a combination of a person’s historical destiny and the degree to which they actualized their individual potential. Whereas Aristotle’s distributive justice “presupposes a hierarchy of standing and claims for a just distribution,” Tillich asserts that the word justice itself connotes equality. Tillich asks, “[h]ow is the hierarchical element in proportional justice related to the equalitarian element in it?” Tillich’s concern is that social status unfairly privileges some people’s claims over others. One could apply Tillich’s criticism to eminent domain abuse, where the social status and political connections of private developers unfairly privileges that group over less powerful, low-income residents.

Another philosophical theory that has direct relevance to the current state of eminent domain is utilitarianism. As advocated by John Stuart Mill, utilitarianism asserts that the moral worth of an action is determined by what produces the greatest happiness for the greatest number of people. Rationalizing
principles of justice from a utilitarian perspective, utilitarianism might seek to maximize utility throughout society by allocating the benefits and burdens of society based on what produces the most pleasure for the greatest number of people. When property is the resource being allocated, it too must serve a utilitarian purpose. Mill emphasized that private property serves a "means to an end," and that "[f]rom the utilitarian point of view, the right of private property is founded solely on the motives it affords to the increase of public wealth."  

Mill’s view represents a present-day rationale for eminent domain abuses in the form of economic development and blight removal condemnations. In fact, since Discovery-era takings, governments have justified property appropriations on the basis of someone else’s ability to make (what is perceived to be) a better or more profitable use of it. Private developers and local governments have rationalized the displacement of thousands of poor residents and people of color by pointing to the increased value of the neighborhood. The unfortunate consequence may be played out in West Harlem, where hundreds of residents who have lived in the community for decades will be displaced because the judgment was made that Columbia University’s expansion plan will, in the aggregate, produce the greatest benefit.

In his influential work, A Theory of Justice, John Rawls challenges Mill’s utilitarian theory and places justice at the core of philosophical moral theory. 48 In his work, Rawls introduces his theory of “justice as fairness,” which centers on “the usual sense of justice in which it is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims.” 49 In his subsequent work Justice as Fairness: Political not Metaphysical, Rawls clarifies that “justice as fairness” 50 is a
“political conception of justice,” meaning that it applies not only to individuals in society, but also to society’s institutions and how those institutions interlock into a unified cooperative social system.\(^{51}\)

Thus, the utilitarian theory of seeking the highest pleasure violates Rawls’s basic notion of the proper balancing of competing claims. Rawls asserts that “[t]he principle of utility subordinates persons to the common good” in a way that contradicts justice as fairness.\(^{52}\) In Rawls’s view, justice cannot be achieved through a system that allows, “at least in theory, that the greater gains of some . . . may offset the losses of others less fortunate.”\(^{53}\) In that way, Rawls advances a view of social justice that would not allow individuals or institutions to impose upon the vulnerable in society the lower prospects of displacement from home and community for the sake of promoting the profit of others.\(^{54}\)

Mythology is another lens through which we see the centrality of justice in society. The principle of justice had “cosmic validity” for Roman Stoics.\(^{55}\) Much of this cosmic significance is also reflected in Greek and Roman legends.\(^{56}\) The Greek and Roman goddesses Dike and Justitia, respectively, personified human and moral justice.\(^{57}\) When their mission of keeping mortals righteous proved impossible because of the

\(^{51}\) JOHN RAWLS, JUSTICE AS FAIRNESS: POLITICAL NOT METAPHYSICAL (1985), reprinted in WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS, supra note 4, at 340. Rawls’s political conception of justice as fairness presupposes two principles that direct how institutions realize the standards of liberty and equality: (1) each person must have “an equal right to a fully adequate scheme of equal basic rights and liberties,” which is compatible for all and (2) social and economic inequalities must “[attach] to offices and positions open to all under conditions of fair equality of opportunity; and . . . they must be to the greatest benefit of the least advantaged members of society.” Rawls concludes that “[t]he two principles together, when the first is given priority over the second, regulate the basic institutions which realize these values.” Id. at 341.

\(^{52}\) JOHN RAWLS, DISTRIBUTIVE JUSTICE: SOME ADDENDA (1968), reprinted in JOHN RAWLS: COLLECTED PAPERS, supra note 49, at 168.

\(^{53}\) Id.

\(^{54}\) See id. at 168–69.

\(^{55}\) See TILICH, supra note 43, at 55. Tillich also claims that “[j]ustice is based on a cosmic hierarchy.” Id. at 59.

\(^{56}\) Heraclitus, a Greek philosopher of the late sixth century B.C.E., related the movement of the cosmos with justice. See id. at 55.

intractable corruption of humans, they fled to the cosmos. The Western world continues to anthropomorphize them through Lady Justice, the iconic symbol of the legal system.

The idea of a cosmos-justice connection resonated with Thomas Sowell, who coined the phrase “cosmic justice.” According to Sowell, cosmic justice seeks to correct the random and unmerited misfortunes that arise from the cosmos. In distinguishing traditional justice from cosmic justice, Sowell describes traditional justice as an impartial process through which justice may be accomplished regardless of the outcome. This definition certainly finds resonance in our legal system, where most outcomes are deemed fair and just if they arise from a fair and impartial process. On the other hand, cosmic justice requires a higher standard. “Cosmic justice is not about the rules of the game.” Rather, cosmic justice requires a balance of outcomes. Similar to a contract remedy, it requires that the parties end up in the position they would have held but for their cosmic misfortune. As Sowell puts it, “Much of the quest for cosmic justice involves racial, regional, religious, or other categories of people who are to be restored to where they would be but for various disadvantages they suffer from various sources.” Inequalities that exist as a result of circumstance carry weight that tips the balance in favor of those so disadvantaged.

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58 See generally THOMAS SOWELL, THE QUEST FOR COSMIC JUSTICE (1999). Sowell acknowledges the challenge in defining social justice, saying, One of the few subjects on which we all seem to agree is the need for justice. But our agreement is only seeming because we mean such different things by the same word. Whatever moral principle each of us believes in . . . we are only talking in a circle when we say that we advocate justice, unless we specify just what conception of justice we have in mind. This is especially so today, when so many advocate what they call “social justice”—often with great passion, but with no definition.

Id. at 3.

59 Id. at 5.

60 See id. at 9.

61 See id. at 12.

62 Id.

63 Id. at 15.

64 Sowell notes that cosmic justice enters the legal realm in some instances, such as in American criminal trials in which life circumstances may be considered before sentencing a murderer—even if such circumstances had no direct bearing on the crime. See id. at 10. Sowell acknowledges that the job of unpacking all of the considerations connected to cosmic injustice is “staggering and superhuman” as “[t]here is no ‘standard’ history that everyone has or would have had ‘but for’
How, then would cosmic justice treat those who have been exploited by laws that allow governments to take private land and give it to others to use in a way that is deemed more productive? Similar to Rawls's justice as fairness, it seems that cosmic justice would require a balancing of competing interests and the elimination of arbitrary distinctions. In eminent domain law, cosmic justice would not only mean an end to using "blight" as a pretext to exploit the poor and people of color, it would also mean implementing policies to restore communities in a way that would allow low-income residents to stay and enjoy the benefits of such improvements.

The legal lens of justice emerged from a blend of the religious, philosophical, and even mythological lenses—though these antecedents may not always find harmony with each other. Ultimately, "rules" and "laws" come from the codification of values concerned with fair dealing. The preamble to the U.S. Constitution states that, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The inscription over the Supreme Court building assures "Equal Justice Under Laws." Portrayals of Lady Justice most often depict a blindfolded woman with measuring scales in one hand and a sword in the other.

It seems from the Constitution’s preamble that the framers concerned themselves not only with establishing “[t]he fair and proper administration of laws,” as stated in one definition of justice, but also with the broader, even paternalistic goal of establishing some sort of harmony or unity among citizens. Of course, at that time, the range of citizens with whom the framers concerned themselves consisted of a narrowly defined, homogeneous group of white male landowners. Nevertheless, the language suggests a desire to incorporate a core value into our legal and social structure. The Supreme Court inscription sends a similar message: that the Court will rule without favor to peculiar circumstances of particular groups, whose circumstances can be ‘corrected’ to conform to some norm. Id. at 13, 15. While prejudicial decision making may account for many inequalities, other inequalities exist simply because some people have more or less than others through no design of their own.

6 U.S. CONST. pmbl. (emphasis added).
identity or status. Lady Justice holds comparable significance. Her blindfold symbolizes justice meted out impartially; the scales represent the careful balancing of the strengths and weaknesses of each position; and the sword symbolizes the power of Reason and Justice. Yet, despite this fundamental and inspiring ideal that permeates all aspects of society, justice too often has unequal application in the law. This disparity emerges in eminent domain law, where both process and outcome yield injustice. That reason, among others, makes the inquiry of social justice and its relation to eminent domain law all the more essential.

B. Contemporary Social Justice

Justice is a social virtue—it tells us how to order our relationships, what we must rightly do for one another—and so our hope must be that we can all agree about what justice demands of us, that everyone can feel that his or her legitimate claims have been met. A successful theory would persuade people to regulate their intuitive sense of justice by its principles and allow this hope to be realized.

As illustrated through ancient texts, the concept of justice as it relates to society is not new. Justice has always had a social component. David Miller reminds us that "justice is a social virtue." Sowell posits that "All justice is inherently social" and that the primary feature that distinguishes social justice is the reaction to the inequities of income and wealth. While a bit myopic, Sowell’s view finds resonance at a most basic level. That is, the reaction connected with social justice often comes from collective action designed to force change in a certain part of society. As citizens started attributing the responsibility of justice to institutions, the contemporary meaning of social justice surfaced.

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69 See id. at 21.
70 SOWELL, supra note 58, at 3.
In the early part of the nineteenth century, justice qualified mostly as an individual virtue, not a corporate one.\textsuperscript{71} The concept of justice primarily belonged in “an established framework of property rights which might \ldots{} include property in other human beings”\textsuperscript{72} and basically consisted of “not cheating, stealing or breaking contracts.”\textsuperscript{73} Around the 1840s, the modern concept of social justice emerged with the industrialization of France and Britain.\textsuperscript{74} “The potentially revolutionary idea underlying the concept of social justice was that the justice of a society’s institutions could be challenged not merely at the margins but at the core.”\textsuperscript{75} Thus, social justice encompassed the treatment of all types of injustices, including those associated with the practices of the power structures and institutions of society. By the early twentieth century, the concept of social justice had become a part of the standard discourse among social theorists, who championed the idea that social and economic institutions should be subject to public critique.\textsuperscript{76} The dichotomy between individual behavior and corporate behavior was highlighted by the American theologian Reinhold Niebuhr in his classic text \textit{Moral Man and Immoral Society}.

Written in the aftermath of the horrors of World War I, Niebuhr challenged the Western world’s self-understanding of justice as being not just an individual virtue, but also an institutional one.\textsuperscript{78} The theory of social justice that developed during the nineteenth and early twentieth centuries has persisted, though many now view social justice as synonymous with, or merely an expanded version of, distributive justice.\textsuperscript{79} Contemporary definitions of distributive justice seem to focus solely on things, as in “the fair distribution of resources among members of society,” even where “differences in treatment are justifiable on grounds relevant to the distinction.”\textsuperscript{80} Others have stated that

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  \item \textsuperscript{71} See Brian Barry, \textit{Why Social Justice Matters} 4 (2005).
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at 5.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} See Miller, \textit{supra} note 68, at 4.
  \item \textsuperscript{77} Reinhold Niebuhr, \textit{Moral Man \& Immoral Society: A Study in Ethics and Politics} (1932).
  \item \textsuperscript{78} See id.
  \item \textsuperscript{79} See, e.g., Miller, \textit{supra} note 68, at 2.
  \item \textsuperscript{80} Jeffrey Gaba, Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause, 40 Creighton L. Rev. 569, 576–77 (2007).
\end{itemize}
equating social justice with distribution suggests a concern "with the ways in which a range of social institutions and practices together influence the shares of resources available to different people."\(^{81}\)

The problem with equating social justice with the contemporary meaning of distributive justice is that it limits the power of social justice. And, to echo Tillich's concern, distributive or proportional justice has a hierarchical quality that privileges some over others because of status. Thus, distributive justice overemphasizes the concern with resources and underemphasizes the concern with the innate right of every person to be treated with respect and dignity. Distribution of resources does represent a partial definition of social justice, but it does not fully encompass the broad concept. Social justice refers to more than material things. Social justice also demands equal opportunity, the redress of past wrongs, the protection of the oppressed and disenfranchised, and basic self-determination. Social justice connotes action, just as traditional justice has since ancient times. Social justice means that, on individual and institutional levels, people are treated fairly—in a "just" way—in a way that does not differentiate on the basis of class, race, ethnicity, or neighborhood.

III. SOCIAL JUSTICE AND AMERICAN JURISPRUDENCE

Q: Don't you think [the colonies] would submit to the stamp-act, if it was modified, the obnoxious parts taken out, and the duties reduced to some particulars, of small moment?
A: No, they will never submit to it . . . \(^{82}\)

One could argue that the United States was created in good measure out of a drive for social justice. Many of the early immigrants made the perilous voyage to the New World because they were being persecuted in their European homelands on the basis of their religious or political beliefs. Once the colonies were established, the first widespread challenge to English rule was

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\(^{81}\) MILLER, supra note 68, at 11.

\(^{82}\) Unofficial Transcript of Benjamin Franklin's Testimony Before Parliament (Feb. 13, 1766), in EYEWITNESS TO AMERICA: 500 YEARS OF AMERICA IN THE WORDS OF THOSE WHO SAW IT HAPPEN 63 (David Colbert ed., 1997).
triggered by Parliament's imposition of the Stamp Act of 1765.83 This revenue measure required that stamps be attached to all printed and legal documents used in the colonies—including leases, licenses, deeds, and even newspapers and pamphlets.84 Protests swept across the colonies and ultimately led Parliament to repeal the act in March 1766.85 While this controversy was resolved, it marked the beginning of a social justice movement that culminated in the American Revolution.86

Some jurists today view social justice as a central value in American jurisprudence. Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit described the law as a means to an end—a means to promote values that would allow all people to live in a just society.87 In his view, social justice is an appropriate goal of judicial decision making and, further, constitutes a "substantive legal principle that pervades all aspects of the law."88 He argues that while strict constructionists view the U.S. Constitution merely as a technical document that apportions responsibilities among governmental branches, a more accurate vision of the document includes an inherent commitment to social justice.89 Judge Reinhardt recalls that the drafters of the Constitution referred to it as an "experiment" in government and that it contained "unjust compromises," such as the slave trade and the provision that legally—though not morally—reduced blacks to three-fifths of a man.90 He also chronicles Justice William Brennan's acknowledgment of the role of social justice as a core value in American jurisprudence: "The Constitution embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being."91 In keeping with social justice as a fundamental core

85 Id. at 145–47.
86 See GINSBERG & LOWI, supra note 83, at 16.
88 Id. at 20.
89 See id. at 20–21.
90 See id.
91 Id. at 22 (quoting William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23 (Jack N. Rakove ed., 1990)).
element of American democracy, Reinhardt argues that the rights of the minority are as central to the Constitution as the rights of the majority.\textsuperscript{92} This view conflicts with the application of U.S. eminent domain laws, which typically favor dominant social groupings.

Justice Sandra Day O'Connor agreed with the centrality of minority rights to the Constitution in her powerful dissent in \textit{Kelo v. City of New London},\textsuperscript{93} the infamous case in which the U.S. Supreme Court endorsed a local governmental transfer of private property to a private entity for economic development. In her dissent, Justice O'Connor expressed her disquiet over the resulting likelihood that local authorities could take any property for the gain of another private party. But her concern went beyond process to the probable outcome—that the beneficiaries would be those “with disproportionate influence and power in the political process, including large corporations and development firms.... [T]he victims would be] those with fewer resources .... The Founders,” she asserted, “cannot have intended this perverse result.”\textsuperscript{94} Justice Thomas addressed the impact on those on the margins of society even more directly by predicting that the results of the \textit{Kelo} decision “promise to be harmful.”\textsuperscript{95} Recognizing the intangible value of a home, Justice Thomas acknowledged that “no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.”\textsuperscript{96} Justice Thomas warned that extending the concept of public use to include “any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”\textsuperscript{97} 

\textsuperscript{92} See id. at 22.
\textsuperscript{93} 545 U.S. 469 (2005). The \textit{Kelo} case will be discussed in more detail \textit{infra} Part V.
\textsuperscript{94} Id. at 505 (O'Connor, J., dissenting).
\textsuperscript{95} Id. at 521 (Thomas, J., dissenting).
\textsuperscript{96} Id.
\textsuperscript{97} Id.
A. Social Movements for Social Justice

Social movements both create pressure to force governments to change and catalyze the changes in dialogue necessary for social internalization of new norms. Over time, these changes can be reflected in new law or policy or in changes in the interpretation of existing legal and constitutional standards.\(^9\)

Often, more than one path will lead to the desired destination of protecting the rights of the most vulnerable. In American society, two distinct paths have emerged in achieving social justice: social movements and legal reform. The two paths are not mutually exclusive; in fact, some nexus usually exists. Social movements "disrupt" established paradigms, refocus conventional perspectives, and ultimately help to create new norms.\(^9\) Often, the collective action inherent in social movements challenges existing political, social, or legal practices that unjustly burden marginalized groups. For that reason, social movements play an important role in achieving social justice. That is true even if social movements do not lead to legal reform, but very often social movements do foster legal reform:

That is because movements disrupt and help reformulate the social order on which the law and the courts ultimately depend. Even without the formal authority to make law, social movements have the power to change the meaning of law and to alter the normative climate in which laws are interpreted and understood.\(^10\)

Thus, it is helpful to look at some examples of how social movements and legal reform have transformed the legal and political climate and led to greater social justice. The civil rights and environmental justice movements illustrate social movements in the interest of African Americans and low-income people who experienced institutionalized oppression and exploitation. Residential housing reform of the 1970s illustrates legal reform fueled by injustices committed on the basis of race and class. All of the examples demonstrate how governments

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\(^10\) Id. at 949.
and courts can be forced to change and how, as stated by Professors Soohoo and Stolz, new laws, policies, or constitutional interpretations emerge, which reflect those changes.\(^{101}\)

1. The Civil Rights Movement

The most impactful social movement in the United States in the past fifty years has been the civil rights movement. Not only did that movement challenge the legitimacy of laws that allowed for institutionalized racial discrimination, it also opened the door ultimately for the first African American President of the United States. Remarkably, the civil rights movement's early progression was juxtaposed against the Supreme Court's contemporaneous 1954 decision in *Berman v. Parker*,\(^{102}\) a case which created a new paradigm in eminent domain legal theory. As discussed later in this Article, the Supreme Court endorsed blight removal condemnations in *Berman*, thereby paving the way for economic development condemnations—both of which disproportionately impact poor people and people of color, making eminent domain a contemporary civil rights issue.\(^{103}\)

Some historians chart 1953 as the start of the civil rights movement—that is, when Blacks succeeded in a mass boycott against the segregated bus system in Baton Rouge, Louisiana.\(^{104}\) The Baton Rouge boycott inspired other boycotts, including the famous Montgomery bus boycott,\(^{105}\) and led to "a decade of disruption."\(^{106}\) In the period between 1953 and 1960, the foundation of the civil rights movement was built, thus providing the structure for the sit-ins, marches, and other mass action that followed.\(^{107}\)

The civil rights movement will stand among the most transformational events in United States history. Millions of people in the South and other parts of the country sacrificed their property, their freedom, and even their lives in order to

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\(^{101}\) *See* Soohoo & Stolz, *supra* note 98, at 477–79.


\(^{103}\) *See infra* Part V.


\(^{105}\) The lesser-reported Baton Rouge boycott served as a model and motivation for the famous Montgomery bus boycott of 1955, as well as the bus boycotts in Tallahassee and Birmingham in 1955 and 1956. *Id.* at 40.

\(^{106}\) *Id.* at 195.

\(^{107}\) *See id.* at 194.
dismantle unjust laws and practices. Even before the movement resulted in legal reform under the auspices of landmark cases and legislation such as *Brown v. Board of Education*, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, it turned the American social structure on its head. Mass protests and boycotts highlighted the symbols of oppression for all of America and the world to see and demanded reform. After the Civil Rights, Voting, and Fair Housing Acts were passed, Blacks realized personal freedoms that previously had been reserved for Whites only. Cities could no longer legally keep residential housing, schools, parks, and other public facilities off limits to Blacks.

The civil rights movement also resulted in a change in the political landscape. Before the Civil Rights and Voting Rights Acts, Blacks remained politically disenfranchised, and less than one hundred Blacks held elective office in states targeted by the Voting Rights Act. By 1989, the number of elected officials in these states had increased to 3,265. Within months of Congress passing the Voting Rights Act, a significant number of new Black voters had been registered; between 1964 and 1988, African American voter registration in the Deep South had increased from twenty-two percent to sixty-five percent. By 1982, 5,160 African Americans held elective office and in 1984, Birmingham and Atlanta had African American mayors.

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113 Johnson's directive "produced the Voting Rights Act of 1965—arguably the most influential piece of civil rights legislation since Reconstruction." Id. at 1472.
115 Id.
116 Id. at 928 & n.85 (citing Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 43 (Bernard Grofman & Chandler Davidson, eds., 1992)).
117 MORRIS, supra note 104, at 287.
1990, "thirty-nine of the 535 United States congressmen were African American or Latino," and that number increased to fifty-nine by 1992.117

Social movements tend to resist containment and the civil rights movement was no different. Other excluded groups, such as American Indians, women, and farm workers, used the civil rights movement as an example and organized within their own communities.118 Groups outside of the United States were even influenced by the movement, as demonstrated by the anti-apartheid activists in South Africa119 and the antinuclear movement in Europe.120 In more recent years, activists have drawn upon the legacy of the civil rights movement to push for legislation against hate crimes, to advance equal rights for the gay, lesbian, and transgendered persons, and to reform environmental laws.

2. The Environmental Justice Movement

Issues in environmental law have striking parallels to issues in blight removal and economic development condemnations. As in eminent domain cases, poor people and people of color "bear the brunt of environmental hazards."121 Within fourteen impoverished and pesticide-laden miles in California, nineteen children were diagnosed with cancer within a five-year period.122 In a small African American town surrounded by chemical plants and oil refineries in Louisiana's "Cancer Alley," residents suffer from an unusually high number of cancers and other health

117 Zouras, supra note 113, at 928.
118 See MORRIS, supra note 104, at 288.
119 See Robert J. Cottrol, Brown and the Contemporary Brazilian Struggle Against Racial Inequality: Some Preliminary Comparative Thoughts, 66 U. PITT. L. REV. 113, 116 (2005) ("[T]he struggles for human dignity in other societies ... were fed and continue to be fed by the example of the Civil Rights movement in the United States. The movement against apartheid in South Africa drew inspiration from the fight against Jim Crow in the United States. The movement for equal rights for Catholics in Northern Ireland saw parallels with the Afro-American fight against American segregation.").
120 See MORRIS, supra note 104, at 288.
122 Id. at 621.
ailments. Poor Indian reservations across the country are targeted as potential sites for toxic waste incinerators, garbage dumps, and radioactive waste disposal sites.123

A recent study that uses 2000 census data124 found that people of color reside in fifty-six percent of the neighborhoods within less than two miles of commercial hazardous waste facilities (host neighborhoods); racial disparities exist in nine out of ten Environmental Protection Agency (“EPA”) hazardous waste sites; in forty of the forty-four states with hazardous waste facilities, people of color make up the majority of residents in host neighborhoods; and, in 2007, more people of color resided in areas with commercial hazardous sites than in 1987.125 In light of the persistent racial injustices concerning hazardous waste sites, sociologist Robert Bullard noted at a recent Earth Day celebration,

Let us all celebrate Earth Day 2007, but let's not forget that there is still much work to be done to ensure that the environment of all Americans is protected—without regard to race, ethnicity, income, or the ability of individuals to hire lawyers, technical experts, and “vote with their feet” to escape unhealthy environments. Some communities have the wrong complexion for protection.126

The environmental movement started as a conservation movement in the 1970s with an initial focus on species preservation and wilderness protection issues.127 Environmentalists knew of problems in urban communities of color but intentionally chose to focus attention elsewhere. In a

123 Id. at 622.
124 The study Toxic Wastes and Race at Twenty: 1987–2007: Grassroots Struggles To Dismantle Environmental Racism in the United States, was led by environmental justice scholars from Clark Atlanta University, the University of Michigan, the University of Montana, and Dillard University, and it was commissioned by the United Church of Christ (“UCC”). See ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987–2007: GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES i (2007), available at http://www.ejrc.cau.edu/TWART-light.pdf.
125 The study found that race outweighs poverty as the most significant indicator for commercial hazardous waste facility locations. Id. at x.
1971 survey to national members, the Sierra Club asked, "Should the Club concern itself with the conservation problems of such special groups as the urban poor and ethnic minorities?" The majority of the membership voted against such involvement, with fifty-eight percent either strongly or somewhat opposed to the idea. Then, in 1982, the residents of Warren County, North Carolina, decided to wage a protest against their governor's decision to bury 60,000 tons of highly toxic polychlorinated biphenyls ("PCB") in the community of Afton, located in Warren County. The residents contacted national civil rights leaders, church leaders, and environmental leaders, who joined together in protesting the landfill. And, there in Warren County, the environmental justice movement was born.

In 1982, Warren County was the poorest county in the state of North Carolina, with a population that was sixty-four percent African American. Eighty-four percent of the county's African American population was located in Afton. North Carolina officials justified their selection of Warren County to house the highly hazardous chemical landfill by stating that the county provided a secure site for the toxins. Closer examination, however, revealed that a nearby water table made Warren County an inappropriate site. Despite unprecedented protests by residents, members of Congress, civil rights leaders, church leaders, and environmental activists and over 500 arrests, North Carolina placed the landfill in Afton, Warren County.

The publicity of the Warren County landfill galvanized action within various sectors, including the religious community. Notably, in 1987, the United Church of Christ commissioned a report which found that "[c]ommunities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents." The study further

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128 See Cole, supra note 121, at 620 n.1.
129 Id.
130 See Robert D. Bullard, Environmental Racism PCB Landfill Finally Remedied but No Reparations for Residents (Jan. 12, 2004), http://www.ejrc.ca.gov/assets/eqrdb.htm (last visited Apr. 6, 2010).
131 Id.
132 Id. Starting in 2001, state and federal agencies spent $18 million to detoxify or neutralize contaminated soil in the Warren County PCB landfill. Id.
found that while socio-economic status factored greatly in the placement of commercial hazardous waste sites, race was the most significant indicator of placement. Partly in response to the UCC report, the EPA created the Office on Environmental Equity in 1991. The UCC report also prompted an executive order in 1994, which mandated that federal agencies incorporate environmental justice into all federal work and programs. Thus, the environmental justice movement began with the public recognition of two basic concerns: "first, the disproportionate siting of environmental hazards or undesirable land uses in minority-populated and low-income areas, and second, the discrimination in the decision-making process that leads to such disproportions." In 2004, however, the EPA acknowledged that the momentum had stalled when an EPA Inspector General's report concluded that the agency had not developed a clear vision or plan for including environmental justice in its daily operations. In 2006, the EPA Inspector General issued another report that found that the agency had not conducted environmental justice reviews of its programs.

Even though environmental justice activists have expressed dissatisfaction with federal government action, the environmental justice movement has redefined the popular understanding of environment to mean "where we live, work, play, worship, go to school, as well as the physical and natural world." This new paradigm has brought attention to environmental injustices in communities all across the United States and has influenced environmental movements in other parts of the world.

Environmental justice and eminent domain cases share unfortunate similarities. In both situations, the most likely targets are communities with low-income residents and people of

134 See id.
135 See Bullard, supra note 126.
136 Id.
137 Kelly D. Lynn, Note, Seeking Environmental Justice for Cultural Minorities: The South Lawrence Trafficway of Lawrence, Kansas, 12 KAN. J.L. & PUB. POL'y 221, 225 (2003).
138 See Bullard, supra note 126.
139 See id.
140 Bullard, supra note 130.
141 The movement in the U.S. influenced global initiatives such as the 1992 Rio Earth Summit and the World Summit on Sustainable Development ("WSSD") held in Johannesburg in 2002. Id.
color. As noted by Professor Bullard, "There is nothing inherent about black communities that make them more suitable land uses for dumps and other locally unwanted land uses," except that these communities typically lack the political, legal, and economic resources to fight the intrusion of toxic landfills—and eminent domain. Furthermore, local governments justify their choice of location by promoting the anticipated significant economic benefits to the area.

The civil rights and environmental justice social movements illustrate the symbiotic nature of social movements and legal reform. While social movements were key to galvanizing support for reform, lasting change required legal action—as demonstrated positively in the case of civil rights and more slowly (in recent years) in the field of environmental justice.” Once legal reforms are adopted, legal scholars observe that reforms are frequently difficult to sustain without the support of a broader social movement. That is largely because, even after new legal rules restructure societal relations, changes in belief systems come slowly.

B. Legal Reform for Social Justice Through Housing Reform

Effective legal reform, like politics, is the art of the possible.

As noted, social movements frequently need legal reforms to enforce them. In the housing arena, legal reforms came in the form of housing codes and the judicially mandated implied warranty of habitability, both of which revolutionized housing law in the 1960s and 1970s. Prior to the advent of the implied warranty of habitability, landlords had no incentive to provide decent, habitable housing for residential tenants and the doctrine of caveat lessee controlled. According to the doctrine, tenants had no right to habitable housing, and the landlord had no obligation to make even the most basic and necessary repairs

142 See id.
143 See Soohoo & Stolz, supra note 98, at 477.
145 Id. at 424.
during the lease period.\textsuperscript{147} Of course, this did not present an insurmountable problem for tenants who either had the money to have repairs made (by the landlord or someone else) or those who had the ability to make repairs themselves. It did, however, present a problem for low-income tenants who had no market power of their own and could not afford to hire someone to attend to maintenance problems. Even if they could afford a maintenance person, routine maintenance issues were the least of their worries. As a result, low-income tenants in urban areas often found themselves in substandard housing for which they paid standard rent. Tenants had to withstand conditions such as broken windows and locks, faulty wiring, broken heating, ventilation, and air conditioning systems, inoperable or broken plumbing, uncollected garbage, inoperable light fixtures, the presence of vermin, falling plaster, and the presence and/or odor of raw sewage. The greatest indignity was that the law protected the landlord from liability for allowing such conditions to exist.

Finally, in the 1970s, public interest lawyers turned their efforts to the courts on behalf of tenants. Courts began to re-evaluate the legitimacy of using the doctrine of caveat lessee as a default rule in residential leases. As has been the case when confronted with other blatantly inequitable laws and policies, judicial action resulted in two revolutionary reforms: (1) the judicial adoption of the implied warranty of habitability, through which landlords impliedly covenant to maintain their residential premises for lease in a habitable and safe condition throughout the duration of the lease, and (2) the judicial adoption that a tenant’s obligation to pay rent is dependent on the landlord’s compliance with the implied warranty of habitability.\textsuperscript{148} Prompted by public interest concerns about the human dignity of low-income tenants, courts have undertaken the obligation to require that rental housing meet a certain minimum standard of quality.\textsuperscript{149}

As noted by Professors Soohoo and Stolz, legal reform is oftentimes more effective with the reinforcement of a broader social movement. In a graphic residential housing story called

\textsuperscript{147} See id.
\textsuperscript{148} See id. at 426–27.
\textsuperscript{149} One way this obligation is met is through the warranty of habitability; though this application of contract doctrine is viewed as a significant advance in theory, some assert that courts have failed to order needed repairs. See id. at 427.
“Rat Day,” Professor Gary Bellow illustrates how legal reform and grassroots social movements can work together to achieve powerful results for low-income residents. The story begins with a man seeking help from a legal services office for an eviction notice. The man explains to the lawyer that he lives in a large run-down building owned by a wealthy downtown banker. The building has many problems, such as poor plumbing and heat, broken windows, and lots of rats. The man reports that the rats get into the food and the bed and that a small baby down the hall was bitten by a rat.

The story then presents the lawyer with two choices. The first option being the traditional approach of litigating a warranty of habitability claim, which may or may not result in an improvement of the quality of housing stock. If the tenant wins, he gets to stay in the rat-infested building, and if he loses, he is evicted. The second choice is characterized as the “lawyering for social change approach,” which integrates social and legal action. Choosing the latter approach, the lawyer used the rat problem as an organizing tool and worked with the tenant to organize a meeting with other tenants. Nearly all of the people who attended complained about rats, and they agreed to file a formal complaint with the city’s housing office. After a city housing inspection and a $100 citation to the landlord, the tenants found the conditions unimproved and the city no longer responsive to their complaints. The tenants met again and agreed on a “Rat Day” plan. They would ask an exterminator to service the building on a particular day on the promise that they would pay for the extermination services if the landlord refused to pay. The tenants found an exterminator willing to proceed with that arrangement, and they further agreed that if their plan worked, the exterminator would service their entire street for several months.

On the chosen day, the tenants cleared out and vacated their apartments, held a block party in front of their building, and informed the press of the event. When the exterminator finished at the end of the day, the organizing group distributed plastic gloves to the tenants, who entered the building and brought out

150 “Rat Day” is fictional but is based on Professor Bellow’s experiences with the Community Action Agency of the United Planning Organization in Washington, D.C. The following story is an abbreviated version of “Rat Day” as found in Cole’s article on environmental poverty law. Cole, supra note 121, at 679–82.
the dead rats they found in their apartments. As the pile of rats grew larger, crowds gathered, including the media. The organizing group held a press conference and recounted their experiences with their landlord and the city. They gave out the landlord's home and office addresses and the phone numbers for city officials. That night, television news stations reported the event, as did the newspaper the next morning. Within a short time, the landlord paid the exterminator's bill in full, and the mayor's office pushed the city's housing office to increase its enforcement work.

The "Rat Day" story illustrates the power of legal action combined with a grassroots social movement. Even though the tenant may still need legal assistance to defend the eviction notice, broader issues were addressed through the social change scenario.\textsuperscript{151} And, the lawyer likely improved the tenant's chances of success in the legal arena by using "social justice lawyering" because it enabled the judge to see a pattern of landlord abuses in the same building.\textsuperscript{152}

The civil rights, environmental justice, and housing reform initiatives all concerned the most vulnerable members of our society. In these cases, the people adversely affected, along with their advocates, found that they could fight exploitation by using a mix of social movement organizing and legal reforms. This two-pronged approach to social justice would be used again when those living on the margins of our society found themselves under assault by abuses of eminent domain.

IV. THE DEVELOPMENT OF AMERICAN CASE LAW IN THE AREA OF EMINENT DOMAIN

A man's home may be his castle, but that does not keep the Government from taking it.\textsuperscript{153}

A. The Origins of Eminent Domain

Sovereigns have long enjoyed the privilege of appropriating property from citizens, but the first recorded characterization of that power came in 1625 when the Dutch jurist Hugo Grotius

\textsuperscript{151} See id. at 682.
\textsuperscript{152} See id.
\textsuperscript{153} Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991).
described a sovereign's inherent power to take private property for its own use without the consent of the owner of the property as "eminent domain." The concept formally found its way into American jurisprudence by way of the Fifth Amendment to the U.S. Constitution, which was ratified in 1791 and authorizes the government to obtain private property. Unlike the unconstrained authority described by Grotius, the Fifth Amendment's Takings Clause qualifies governmental power by stating, "nor shall private property be taken for public use, without just compensation." That constraint, however, postdates the United States beginnings of taking private property from American Indians, which often occurred without the consent of the owner and without compensation.

B. American Indians

Both federal and state governments have had a long and inauspicious history of taking land from one owner and transferring it to another for what the government deemed to be a more beneficial use. Indigenous people have been the victims of governmental takings for centuries, often without the benefit of compensation. At one time in history, tribal governments or individual tribal citizens owned "every single tract of land" in certain areas of the United States. A look at this history demonstrates how western conceptions of property rights, free markets, economics, and utilitarianism have devastated some cultures. Thus, any discussion about the disposition of property in the United States must consider American Indian title, as it "is the original link in almost all land titles in the United States."
Many discussions of the dispossession of tribal land start with the well-known case of *Johnson v. M'Intosh*, in which the United States Supreme Court established the "doctrine of discovery" as the law of the American state and federal governments. The doctrine of discovery declared that, in the pursuit of the discovery of "new" lands, European nations, and later American governments, gained real property rights to land already owned and occupied by American Indians. The theory originated with Pope Innocent IV in the thirteenth century, when he sanctioned "the taking of non-Christian, or infidel, lands by Christian soldiers during the crusades." When European nations began exploring the New World, they adopted the papacy's earlier commentary as legal justification for claiming occupied tribal lands.

Certainly, *Johnson* represents the Supreme Court's actual adoption of the doctrine of discovery; however, American colonial governments and courts' familiarity with the doctrine began when the English Crown used it to colonize America and to obtain tribal lands. Prior to *Johnson*, new American states adopted constitutions that included the power of discovery and preemption over tribal lands. In addition, early state courts upheld state sovereignty and jurisdiction over tribal lands pursuant to Discovery-era legal theory, thereby concluding that "states could grant a limited fee title in Indian lands without the consent of the tribe, even while the tribe was still occupying and using the land." Thus, by the time *Johnson* came along, the Supreme Court's holding, while historic, was long anticipated in light of the new America's experience with discovery.

Asia also suffered under "the geo-political land grab that became known as colonization." *Id.*

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161 21 U.S. (8 Wheat.) 543 (1823).


163 *See id.* at 5.


165 *See id.* at 414–16.

166 *See Miller, supra* note 160, at 21.

167 *See id.* at 33–37 (discussing the inclusion of Discovery principles in the constitutions of New York, North Carolina, Tennessee, Georgia, Virginia, and Connecticut between 1776 and 1796).

168 *Id.* at 37–40.

169 *Id.* at 39.
In *Johnson*, the Court considered whether tribes had the power to transfer title of tribal lands to private individuals. Answering with a resounding "no," Chief Justice Marshall opined that the appropriate rule of law regarding the acquisition and transfer of property was the doctrine of discovery and that the doctrine allowed a discovering country to rely on the title given by discovery, regardless of whether indigenous people occupied the lands. Marshall then reasoned that the American states, and then the United States, acceded to the "absolute title" in tribal lands that the Crown had—subject only to the tribe's right of occupancy.

While by no means novel with regard to principles applied to the disposition of tribal land, the *Johnson* decision was nevertheless of great consequence for several established reasons. First, it put the imprimatur of the Supreme Court on the doctrine of discovery as established American law. Next, it has been noted that *Johnson* acknowledged that under the doctrine, Indian tribes lost two essential rights, the first being the right of free alienability:

that is, the right to sell their real property to whomever they wished for whatever amount they could negotiate. In addition, Indian tribes lost significant sovereign powers because of [the Doctrine of] Discovery. They lost the political right to deal commercially and diplomatically in the international arena with any country other than their "discoverer."

In the end, *Johnson* nearly eliminated the property interests of all Indian tribes when it refused to apply established principles of property ownership to the tribes. "Rather than recognizing that tribes, as the original owners of the lands, had the power to grant fee simple title to an individual or another sovereign, the Court simply reclassified the tribe's original property interest" as merely an occupancy right, which the federal government could extinguish. Clearly, the Court's action constituted a taking of property, even if no one called it

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170 Id. at 65–67.
171 Id. at 66.
172 Id. at 67–68.
173 See Leeds, supra note 2, at 61.
174 Id.
eminent domain. Regrettably, stark parallels exist between the dispossession of Indian lands and the current trend in eminent domain law as it relates to blight and economic development cases.\textsuperscript{175}

C. \textit{The Fifth Amendment Takings Clause and Social Justice}

Must the government fulfill a social justice obligation when it takes property and, if so, from where does that obligation arise? Unfortunately, the answer to those questions cannot be determined by looking to the intent of the drafters of the Fifth Amendment. Little historical evidence exists regarding the intent that gave rise to the drafting and adoption of the Takings Clause.\textsuperscript{176} While contemporary evidence suggests that the drafters intended the Takings Clause to limit government regulatory authority of private property, no contemporaneous evidence suggests as much.\textsuperscript{177} To add to the mystery, the Takings Clause distinguishes itself as the singular Amendment in the Bill of Rights that no state requested.\textsuperscript{178} Some go so far as to suggest that current use of eminent domain powers conflicts with the framers' intent.\textsuperscript{179}

In addition, Supreme Court rulings have failed to clarify or articulate any clear conceptual basis for the Takings Clause.\textsuperscript{190} In fact, 1922 marked the first time that the Supreme Court expressly stated that the Takings Clause acted to limit government regulatory authority.\textsuperscript{181} Subsequent cases also failed to either illuminate the foundational basis of the Clause or give any clear interpretation of it until 1960, when Justice Black made a remarkable statement about the Takings Clause. In \textit{Armstrong v. United States}, Justice Black stated, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

\textsuperscript{175} See id. at 66–67.
\textsuperscript{176} Gaba, supra note 80, at 571; see also Boyce, supra note 23, at 248.
\textsuperscript{177} See Gaba, supra note 80, at 571.
\textsuperscript{178} Id. at 572.
\textsuperscript{179} See Leeds, supra note 2, at 54 (citing Nancy K. Kubasek, \textit{Time To Return to a Higher Standard of Scrutiny in Defining Public Use}, 27 RUTGERS L. REC. 3 (2003) ("arguing that framers' intent would not permit current state of takings law")).
\textsuperscript{180} See Gaba, supra note 80, at 574.
\textsuperscript{181} Id. at 571, 573.
public as a whole.”182 The phrase “fairness and justice”183 may provoke thoughts of Rawls’s theory of “justice as fairness” and such interpretation is inviting. One might imagine that the societal unrest during the height of the civil rights movement inspired Justice Black to consider the inequities resulting from governmental takings. Or maybe Justice Black considered the annihilation of entire neighborhoods during the urban renewal programs of the 1950s, when the government used eminent domain powers to remove African American homes in order to build highways or to allow for private development. Those are appealing explanations, especially given the author of the statement about “fairness and justice.”184 But, even as the phrase “justice and fairness” has been repeated in Supreme Court opinions, evidence does not suggest that the Supreme Court has intentionally insinuated the principle of justice into takings jurisprudence. That said, however, given the language used by the Court, no reason exists to exclude a social justice obligation from government takings.

V. THE ROAD TO KELO

The development of the discourse of blight reflected an evolution in the proper uses of eminent domain. . . . [T]he urban renewal scheme was . . . novel, both in form and scope. It authorized the transfer of land from one group of private owners to another group that would use it for practically the same purposes, and it envisioned the transfer of large amounts of real estate in an effort to reshape the urban landscape. Urban renewal was a major undertaking that required . . . an alteration of the relationship between property owners and the state.185

183 While Justice Black said “fairness and justice,” subsequent declarations by Supreme Court justices have modified the phrase to “justice and fairness.”
184 Early in his political career, Hugo Black was a member of the Ku Klux Klan. See Tinsley E. Yarbrough, Mr. Justice Black and His Critics 84 (1988). Once appointed to the Supreme Court, however, he was considered a member of the liberal wing of the Court and in a number of cases voted to establish civil rights for Blacks. See id. In Chambers v. Florida, Justice Black expressed his interpretation of constitutional protections in this way: “Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.” 309 U.S. 227, 241 (1940).
A. Urban Renewal, Blight, and Economic Development

With the genesis of urban renewal cases in state courts in the 1930s, redevelopment advocates perfected the argument that in order to save cities from further decline and complete crisis, governments had to condemn property and give it to those who would find more suitable uses. \(^{186}\) While renewal advocates did not always have uniform goals for redevelopment, they generally agreed that urban renewal required an expansive vision of eminent domain authority. \(^{187}\)

The idea of "public-private takings" \(^{188}\) was not novel; in fact, urban renewal proponents borrowed the concept from a nineteenth century practice of taking private property for the benefit of privately owned mining companies, electric and gas projects, and general manufacturing concerns. \(^{189}\) When challenged by landowners as an abuse of eminent domain powers, state courts took differing views on whether such takings met the public use requirement. Some courts interpreted public use literally to mean that the public should have direct access to the taken property. \(^{190}\) Other courts formulated a more liberal interpretation of public use, which included any use that promoted the general welfare of the community. \(^{191}\) Though these inconsistencies existed, many legal scholars believed that relevant precedents limited the power of eminent domain to situations where the general public received direct benefits. \(^{192}\) Urban renewal, as envisioned by the elite group of advocates, required this broader application of public use. \(^{193}\)

"To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a

\(^{186}\) See generally N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 270 N.Y. 333 (1936).

\(^{187}\) See Pritchett, supra note 185, at 3.


\(^{189}\) Id. at 506.

\(^{190}\) Id. at 507.

\(^{191}\) Id. at 506.

\(^{192}\) Pritchett, supra note 185, at 3.

\(^{193}\) See id.
discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums.\textsuperscript{194} As defined by the Committee of Blighted Areas and Slums, blight was “an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped.”\textsuperscript{195} In reality, renewal advocates used the concept of blight as a stratagem to redistribute property ownership for purposes of urban revitalization. Local governments deemed areas desired by real estate developers as “blighted,” thus justifying condemnation and transfer of the property to developers for a more productive use.\textsuperscript{196}

This one word—blight—changed the legal landscape of eminent domain. Before urban renewal, industrialization provided sufficient justification for expansive applications of the public use doctrine. Most everyone viewed industrialization as a good and necessary aspect of a developing nation. Blight, however, was another matter. Since its emergence into the American lexicon in the early nineteenth century, the term “blight” has lacked precise meaning,\textsuperscript{197} even while it has maintained a consistent association. Later, federal law delegated the definition and determination of blighted areas to state governments, who in turn granted redevelopment corporations and local governments broad authority in identifying blighted areas.\textsuperscript{198}

The massive migration of African Americans to northern states between 1940 and 1950 had a significant impact on urban demographics and on how blight was defined. In that decade, 1,500,000 Blacks migrated north in hopes of employment and

\textsuperscript{194} Id.
\textsuperscript{195} Noreen E. Johnson, Blight and Its Discontents: Awarding Attorney’s Fees to Property Owners in Redevelopment Actions, 93 MINN. L. REV. 741, 747 (2008). The Committee of Blighted Areas and Slums was created by Herbert Hoover during his tenure as Secretary of Commerce. See id.
\textsuperscript{196} See Pritchett, supra note 185, at 3.
\textsuperscript{197} See generally Colin Gordon, Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight, 31 FORDHAM URB. L.J. 305 (2004). “In most states, [blight] reflects the ‘laundry list’ of health and safety concerns that often serves as the only statutory definition.” Id. at 320. See also Pritchett, supra note 185, at 16 (“The term [blight] was first used by the Chicago school of sociology . . . . to describe plant diseases.”). Thereafter, renewal proponents argued that blight “was a disease that threatened to turn healthy areas into slums.” Id. at 3. Pritchett asserts that “[b]light was a facially neutral term infused with racial and ethnic prejudice.” Id. at 6.
\textsuperscript{198} Gordon, supra note 197, at 312.
opportunity. By 1940, ninety percent of Blacks who had left the South lived in urban areas, with forty-seven percent living in New York, Chicago, Philadelphia, Detroit, Cleveland, and Pittsburgh. "By 1950, over 9,000,000 blacks lived in urban areas, marking the first decade in American history that more blacks lived in cities than in rural areas."

It was against this backdrop in the 1940s that states adopted redevelopment acts, under which renewal advocates, politicians, and institutional leaders pursued dual goals. One goal involved the selection of properties with profit potential, regardless of whether the properties were dilapidated; the other goal involved the relocation of people of color. "While race was always central to definitions of blight, after the great migrations of World War II, race played an increasingly important role in city planning.... [The expanding minority black and Latino ghettos were the main concern of business leaders and urban politicians.]" Remarkably, in New York City, as in many other cities, redevelopment advocates gained approval to clear well-maintained areas that even they admitted did not meet the standard of blighted. Citing the thousands of dollars that they had invested in their neighborhood, the African American residents in one New York City community asserted, as did many other minority urban dwellers, that they were the victims of "Negro clearance." While the residents' complaints delayed the project, it nevertheless went forward.

B. State and Federal Shaping of Eminent Domain Law

Berman v. Parker represented the culmination of a decades-long methodical effort by urban renewal advocates to reshape the contours of eminent domain jurisprudence. In

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200 Id.
201 Id. (quoting RAYMOND N. D'ANGELO, THE AMERICAN CIVIL RIGHTS MOVEMENT: READINGS AND INTERPRETATIONS 8 (2001)).
202 See Pritchett, supra note 185, at 31–32.
203 See id. at 32.
204 Id. at 33.
205 See, e.g., id. at 34; see also Jackson, supra note 199, at 670.
206 See Pritchett, supra note 185, at 34.
208 Pritchett, supra note 185, at 1–2.
1952, the District of Columbia Redevelopment Land Agency ("DCRLA") proposed a massive clearance project that lasted twenty years and resulted in the dislocation of "over 20,000 impoverished black residents and replaced their homes with office buildings, stores, and predominantly middle-income housing." During the process, the DCRLA condemned a department store that was not blighted, but was located on land needed for the accomplishment of DCRLA's plan. The department store owner sued to enjoin the taking, but the judge upheld the District of Columbia's redevelopment plan and authorized the condemnation "to the extent that [it] is reasonably necessary to the accomplishment of the asserted public purpose." The court, however, questioned the stated public purpose of the plan and viewed the DCRLA's authority as granted by the Redevelopment Act as overly broad in that it could amount to the ability to "seize and sell whole sections of the city." In so concluding, the court upheld the law as constitutional but restricted DCRLA's condemnation authority, leading both parties to appeal to the Supreme Court.

At the Supreme Court, where DCRLA ultimately prevailed, the parties debated the meaning of blight and the legal and policy considerations for urban renewal. Absent from the arguments, however, was the broad social impact of the project: the fact that it would dislocate thousands of poor Blacks and restructure the racial landscape in Washington, D.C. The silence regarding the racial and social justice ramifications of the project is stunning given the timing of the Berman decision—just four months after the Court decided Brown v. Board of Education. "Brown began an era in which the Court rewrote much of the constitutional jurisprudence regarding individual rights . . . . The urban renewal program that the Court approved

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209 Id. at 41. The deplorable conditions of the Washington, D.C. neighborhood were well documented. Almost two-thirds of the homes were "beyond repair," over half did not have indoor plumbing, and most lacked central heating. See Brief for Better Government Ass'n et al. as Amici Curiae Supporting Petitioners at 23, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

210 Pritchett, supra note 185, at 41.

211 Id. at 42.

212 Id.

213 Id. at 43.

214 Id. at 44.

215 Id.
allowed cities to redistribute their populations, increasing residential segregation and thereby making the integration of schools far more difficult."216 In fact, the DCRLA project resulted in the development of nearly six thousand housing units, of which only about three hundred of the former residents could afford, thereby turning the formerly black neighborhood to majority white.217

Berman is remarkable not only for its outcome, but also because it completely restructured the condemnation terrain and entrenched the social injustices associated with takings jurisprudence. Takings that disproportionately impacted communities of color occurred prior to Berman, but in the years that followed, eminent domain was used to blatantly uproot entire communities of color under the euphemism of "neighborhood revitalization."218 That is disturbing on a number of levels, which Mindy Fullilove eloquently explains in her book Root Shock.219 Fullilove contends that urban renewal caused root shock—"the traumatic stress reaction to the destruction of all or part of one's emotional ecosystem"220—when each resident experienced the loss of the world around them. In addition, root shock occurred on a larger scale to generations of African Americans.221 Calling urban renewal the "butterfly in Beijing," Fullilove asserts that certain conditions among African Americans, such as drug addiction and the high levels of black male incarceration, are inextricably tied to the mass destruction of neighborhoods.222 She notes that the situation many African Americans find themselves in "cannot be understood without a full and complete accounting of the social, economic, cultural, political, and emotional losses that followed the bulldozing of 1,600 neighborhoods."223 Thus, the history of eminent domain has long been infused with racial overtones. And, just as the facially neutral term "blight" has come to signal racial inequities, evidence suggests

216 Id.
217 Id. at 46–47.
218 Id. at 47.
220 Id. at 11.
221 Id. at 20.
222 See id.
223 Id.
that eminent domain for economic development purposes also impacts communities of color and poor communities at a disproportionate rate. As reported to the U.S. House of Representatives in 2005, ninety-five percent of California properties targeted for economic redevelopment are Hispanic or Asian-owned, even though racial or ethnic minorities own only thirty percent of the businesses in that area. In New Jersey, officials in Mt. Holly Township targeted for economic development “a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township.”

C. Kelo v. City of New London—Permission To Plunder

The town of New London, Connecticut, had experienced a precipitous economic decline since the 1970s and desperately needed an economic revival. To that end, state and local officials began economic development planning, which eventually resulted in Pfizer Inc. announcing plans to build a research facility in the area. Although the city’s redevelopment plans did not initially involve the transfer of private land to Pfizer, Pfizer’s plans required more land than what was available and discussions with landowners revealed that few would voluntarily sell their homes. As a result, the town initiated condemnation proceedings based on the municipality’s eminent domain authority. The town did not allege blight as a reason for the condemnation, but rather proceeded on the basis of needing the land for economic development. Litigation ensued, and the U.S. Supreme Court upheld the taking as a valid public use of promoting economic development.


\[225\] Id.


\[227\] See id. at 473.

\[228\] See id.

\[229\] Id. at 475.

\[230\] Id. at 483–84.

\[231\] Id. at 488–89.
Public reaction to *Kelo* was both swift and extraordinary. Commentators decried the decision as one of the worst decisions to come out of the Supreme Court, while scholars questioned the constitutionality of the Court’s decision to classify economic development as a public benefit sufficient to satisfy the public use requirement.\(^2\) The decision also registered with mainstream America in a way that most court decisions do not. The strong reaction from the general public indicated that the public identified with the petitioners.\(^3\) It was as if the public was saying, “If the government can . . . seize [the homes of people in] this neighborhood, [then] nobody's home is safe.”\(^4\)

The curiosity of *Kelo* was that similar urban renewal initiatives to spur economic development had occurred in many blighted communities across the nation with no attendant uproar from those outside the immediately affected communities. Why then, was this situation different? It may be because the neighborhood and residents did not match the typical description of other communities that had been targeted for condemnation due to blight. The targeted neighborhood in New London was characterized as a “distressed municipality” based on its economic condition and high unemployment rate but had not been deemed blighted. In fact, it was an old whaling community and former manufacturing center just off the picturesque Thames River.\(^5\) Several families had lived in the neighborhood for generations.\(^6\) And, the residents also happened to be primarily white.\(^7\) While white working and middle-class communities had not been immune from economic development

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\(^2\) *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 371 (2007). Prior to *Kelo*, a number of state courts held that economic development constituted a permissible basis for condemnations as a matter of both federal and state constitutional law. Infamously, in 1981, the Michigan Supreme Court held in *Poletown* that the City of Detroit acted constitutionally when it condemned a stable, nonblighted neighborhood so that General Motors could build a new plant. *See id.* at 372. In 2004, however, the Michigan Supreme Court qualified its earlier reasoning, holding that economic development does not always constitute a public purpose that justifies condemnation. *See id.*

\(^3\) *See* Leeds, *supra* note 2, at 58.

\(^4\) *See* id.

\(^5\) *See Kelo*, 545 U.S. at 473.

\(^6\) *Id.* at 475.

\(^7\) *See* Janice Nadler et al., *Government Takings of Private Property: Kelo and the Perfect Storm*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 286, 305 (Nathaniel Persily et al. eds., 2008).
condemnations, the *Kelo* outcome ignited concerns that no property was safe. Fears were realized when, hours after the *Kelo* decision, cities across the United States began eminent domain proceedings for the purpose of economic development.238

D. *Kelo—Four Years Later*

Just four years after the Supreme Court ruled in favor of New London, Connecticut, the land surrounding the Pfizer corporate headquarters lies unused and covered with weeds. The hotel, stores, and condominiums envisioned as part of the community revitalization project were never built. In the fall of 2009, Pfizer announced that it would be moving its corporate headquarters from New London to the nearby town of Groton, taking 1,400 jobs with it.239 Notwithstanding, the City of New London and the State of Connecticut are left having to hold up their end of an agreement with Pfizer: paying eighty percent of the property taxes through 2011.240 Pfizer's actions demonstrate that the company's first priority was its own self-interest rather than a purported public good. Meanwhile, many of the original landowners, who fought to stay in their homes, have been irrevocably displaced because of the changing priorities of corporate interests.

Returning to New York City, the threat of displacement still hovers over the residents of apartment building 602 in West Harlem—though residents recently celebrated a significant victory. A New York appellate court dealt Columbia University a surprising blow in December of 2009 when it overturned a trial court's decision in favor of allowing the city to take property for

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238 For example, in Freeport, Texas, the city condemned several properties that housed waterfront shrimp processing businesses in order to replace them with marina development projects. *See* Thomas, supra note 25, at 47. The legal battle wages on in Freeport, Texas after nearly six years of litigation. After the City of Freeport applied for a permit to condemn property that housed a shrimp processing plant, the private developer now believes that the property slated for condemnation is not necessary for the redevelopment project. While the fate of the plant is still unknown, both parties have agreed to discuss the possibility of settlement. *See* W. Seafood Co. v. United States, 202 F. App'x 670, 672 (5th Cir. 2006).


the benefit of the university. The appellate court deemed the expansion proposal through the vehicle of eminent domain to be illegal. While the West Harlem community remains intact for now, the development company has appealed the decision to the highest state court of New York.

VI. RESPONSES TO KELO

We must resist. We must mount a campaign of resistance and fight back because if we don't, we will not be here, our children will not be here and we will not recognize this place. We have no other alternative but to fight back and we must do it together. And we must hear the voices of the people of color. You can't sit back. You have to speak out, even if it's to utter one sentence. Get up. Speak in your own language. Get up. Rise up . . .

A. Social Movement Responses

Social movements can affect change. A social movement prompted changes in civil rights laws and in people's attitudes toward racial minorities. A social movement attracted attention to environmental injustices within depressed communities of color. As has been noted, social movements cannot always create change alone, but such movements are important steps toward social justice. In the case of blight removal and economic development condemnations, a social movement is underway, in large part spurred by the Kelo case. One newspaper reported, "Susette Kelo lost her case—but started a movement to reform the law of eminent domain." Communities all across the country have organized to stop Kelo-like intrusions from destroying their neighborhoods. Soon after the Kelo decision, citizens used voter initiatives and referenda to get eminent

\[\text{REFERENCES}\]

\[\text{242} \text{ See id.}\]
\[\text{243} \text{ See id.}\]
\[\text{245} \text{ See Bruce Ramsey, Susette Kelo Lost Her Case—But Started a Movement To Reform the Law of Eminent Domain, SEATTLE TIMES, Feb. 18, 2009, at A9.}\]
domain on the ballot and in many cases, voted overwhelmingly to prohibit eminent domain for economic development.\textsuperscript{246} And, with the support of national property rights groups such as the Castle Coalition,\textsuperscript{247} grassroots organizations are springing up all over the country to fight the invasion of eminent domain. In New Rochelle, New York, activists organized a demonstration outside the Swedish embassy to protest the city's plans to condemn homes and businesses for the building of an IKEA store.\textsuperscript{248} Residents of Lakewood, Ohio held a "Blighted Block Party."\textsuperscript{249} In Harlem, New York, the Harlem Tenants Council has waged a very public and formidable battle against Columbia University.\textsuperscript{250}

Certainly, these movements represent social justice in action. But authentic social justice demands that all communities receive protection from injustice, particularly those communities where the most at risk in society reside. As Professor Leeds queried, "Where was the outrage when American Indian lands were taken to make way for new settlers, or when inner-city apartment buildings were taken for office buildings and parking garages?"\textsuperscript{251} This question is still relevant given that a recent report found that of 184 areas that have been approved for economic development condemnations, the residents were, on average, poorer, less educated, and more likely to be people of color.\textsuperscript{252}

\textbf{B. Legal Responses}

In \textit{Kelo}, the Court left open a very important door through which many state legislative initiatives have emerged. The Court said, "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings

\begin{footnotesize}
\begin{itemize}
\item[246] See Nadler et al., supra note 237, at 302–03.
\item[249] Id.
\item[251] Leeds, supra note 2, at 58.
\end{itemize}
\end{footnotesize}
To date, over forty states have passed some type of eminent domain reform that limits the ability of local governments to take private property for economic development. Some of the legislation fails to define blight or economic development, and thus, does little to place stricter controls on those types of condemnations. Other legislation has produced stronger reforms.

In one of the most aggressive reforms nationwide, Florida’s legislation severely limits both economic development and blight condemnations by imposing a ten-year waiting period on local governments before they can use eminent domain to transfer land to another owner. In 2006, Florida voters placed additional limitations on state action by approving a constitutional amendment that requires a three-fifths majority in both houses to make any exception to the waiting period. South Dakota previously prohibited outright the acquisition of private property via eminent domain “[f]or transfer to any private person, nongovernmental entity, or other public-private business entity.” South Dakota also gives the original owner the right of first refusal to buy the property back at fair market value if the condemned property is not used for the purpose it was taken for after seven years. More recently, the meaning of “blighted” was further redefined in South Dakota to require the individual property to be a danger to public health and safety. In 2006, South Carolinians overwhelmingly voted for a constitutional amendment that places greater restrictions on designating a property as blighted and “specifically prohibits

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256 FLA. STAT. § 73.013 (2009).
257 FLA. CONST. art. X, § 6; see also CASTLE COALITION, supra note 3.
259 Id. at § 11-7-22.2.
260 Id. at § 11-9-10.
municipalities from condemning private property for 'the purpose or benefit of economic development, unless the condemnation is for public use.' ”

The Governor of Georgia signed a similar bill into law, and Georgia voters subsequently approved a constitutional amendment that requires a vote of elected officials before property can be condemned for the purpose of redevelopment. Soon after, Georgia also modified the state’s eminent domain laws by prohibiting a “blighted” designation for property based on its esthetic condition. After two legislative commissions on the use of eminent domain, New Hampshire passed a constitutional amendment that says, “No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.” In addition, to be considered blighted, the property must be a menace to health and safety. Texas may be the next state to incorporate strong property rights protections into its Bill of Rights. In May 2009, the Texas House of Representatives unanimously passed a constitutional amendment aimed at reducing the effects of Kelo by defining public use as a use only by the government, the condemning authority, or the general public. In 2008, the Delaware legislature passed much stricter reform laws than the eminent domain restraints established in the Kelo decision. Those laws would have given protection to small businesses, farms and houses of worship from eminent domain, but the governor vetoed that legislation, and the legislature failed to override the veto. The legislature revisited the issue in 2009 and introduced another bill with similar

262 GA. CONST. art. IX, § II, para. VII; see also Berliner et al., supra note 255, at 441–42.
264 N.H. CONST. pt. I, art. XII-a (2006); see also Berliner et al., supra note 255, at 446 (noting two legislative commissions, which led to amendment).
language to the one in 2008. This time, the new governor signed the bill into law. The new law limits eminent domain to a more traditional meaning by allowing only uses such as roads and police stations.268

Other states that have passed reforms, such as Maine and Kentucky, have acted to bar or severely limit economic development condemnations while continuing to permit blight condemnations.269 This limited victory may prove illusory in that “[a]ll or virtually all condemnations designated as blight condemnations could be characterized as economic development condemnations, inasmuch as the end goal of blight removal is economic redevelopment.”270 Still, other states have done little or nothing to curb eminent domain abuse. As of 2009, New York had failed to pass eminent domain reform, but legislation is currently being considered by the legislature that may result in meaningful reform. New Jersey’s current laws use vague and subjective standards for determining when municipalities can take private property for private development. Such broad criteria led some to conclude that “most every New Jersey property is subject to acquisition,” and that “New Jersey is one of the nation’s worst eminent domain abusers.”271 Notably, in 2007, the New Jersey Supreme Court concluded that the state’s definition of “blighted” did not include property that was merely “not fully productive” and thereby created some limitation within which a municipality may apply a statute that allows for the redevelopment of land in a “stagnant” condition.272 Further change may be on the horizon as New Jersey currently considers several reforms to its eminent domain law. One such reform would place a twenty-four-month moratorium on any use of eminent domain by the state as a commission examines the state’s use of eminent domain.273 Remarkably, the State of Connecticut, home to the Kelo case, passed eminent domain

269 See Dana, supra note 232, at 376; see also Berliner et al., supra note 255, at 443–44.
270 Dana, supra note 232, at 369.
reform for the first time in 2007, but that reform has been criticized as doing little to change eminent domain practices in the state.\textsuperscript{274}

And so, in the midst of various levels of reform, many poor communities continue their struggle to exist. A national social movement against eminent domain abuses began only after the public witnessed a predominantly white community (New London) being victimized and suddenly, more entitled segments of society felt threatened. Legal reform has, in large part, been slow to address the injustice of carte blanche blight condemnations or to significantly limit economic development condemnations. While some states have enacted model eminent domain reform, other states have failed to address the issue altogether. Furthermore, reform efforts have essentially ignored the plight of displaced low-income residents who are left without affordable housing in a neighborhood of their choosing. In essence, "there has been no legal movement to help ensure that [residents] . . . are provided with better (or even as good) substitute housing. There has been no debate regarding measures that might ensure that the new blight-condemnation-facilitated development includes a substantial number of housing units for low-income households . . . ."\textsuperscript{275} Until such concerns become part of the eminent domain dialogue, social justice will not be achieved.

CONCLUSION

The power of eminent domain is not inherently bad. In certain circumstances, government takings can advance the welfare of a community and its residents. In some cases where a clear broader public interest exists, eminent domain powers may be legitimately used to obtain needed land. But even then, people may not be "made whole" in a process in which they lose their home and social connections which were the foundations of their life.

There are circumstances under which the use of eminent domain is inherently unjust. The first such circumstance is the historical and current use of blight as a pretext for the displacement of entire communities of color. This has been

\textsuperscript{274} See CASTLE COALITION, supra note 3.

\textsuperscript{275} Dana, supra note 232, at 378.
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evidenced by the thousands of African American and other minority neighborhoods that have been eliminated for the purpose of removing “blight.” Areas receive the moniker of “blighted” so that developers can claim the land for an ostensibly “better” use and cities can increase their tax base. In so doing, residents in communities targeted for blight removal are sent the message that—unlike better off, nonminority communities—their homes and neighborhoods are expendable. Existing residents are not treated in a way that recognizes them as valued citizens. In an environmental context, when local officials calculatedly place hazardous waste sites in communities of color, we call that environmental racism. In the realm of property jurisprudence, the intentional targeting of communities of color for “blight removal” constitutes eminent domain racism.

By giving state legislatures seemingly unlimited authority to define when blight condemnations can occur, courts have failed in their social obligation. Even as many states reform laws to address eminent domain abuses, most states have failed to define blight in a way that prevents the removal of entire neighborhoods on the basis of the complexion of those living there. This was true when federal and state governments condemned entire communities of color for “urban renewal,” and it continues to be true when governments condemn minority neighborhoods for present-day redevelopment. Such blight removal condemnations violate the notion of justice in that they result from arbitrary distinctions based on race and class, which allow for unjust outcomes. Such an approach is in direct conflict with Rawls’s view of “justice as fairness,” which is marked by the “elimination of arbitrary distinctions and the establishment, within the structure of practice, of a proper balance between competing claims.”

Takings for economic development constitute another circumstance of injustice in eminent domain. Just as the term blight has come to signify racial injustice, economic development condemnations also primarily impact poor communities and communities of color. Justices O’Connor and Thomas warned

that such takings would fall disproportionately on poor communities who have the least resources and power. Certainly, U.S. eminent domain history served as a reliable barometer for their premonition. As noted, a 2007 report found that the majority of areas recently approved for economic development condemnations consisted of residents who were, on average, poorer, less educated, and more likely to be people of color. And so, the pattern of injustice continues. This pattern represents a betrayal of western religion’s roots in which society and institutions share the responsibility of protecting vulnerable members of society and ensuring a just society. It also is injustice under the veil of utilitarianism (“greatest good for the greatest number”) and a betrayal of our nation’s sense of fairness. Rather than a theory of utility, social justice demands “justice as fairness,” justice that would not allow individuals or institutions to impose upon the poor and vulnerable in society the prospects of displacement from home and community for the sake of profiting others.

The abuses of blight and economic development condemnations also run counter to the higher standard of cosmic justice, which requires that the parties end up in the position they would have held but for their cosmic misfortune. In an eminent domain context, this would mean implementing policies which would ensure that the residents of poorer and minority communities would themselves reap the benefits of any “blight” removal and economic development that occurs in their neighborhood.

As it is, the present-day circumstances of injustice in eminent domain bear disturbing resemblances to Discovery-era takings of tribal land, which contradicts justice in any form. As noted, indigenous people were the victims of government takings long before the Supreme Court established the doctrine of discovery as American law. The Supreme Court’s acknowledgement of such, however, was of great consequence for reasons that also apply to the Court’s holding in Kelo. First, just as Johnson v. M’Intosh put the imprimatur of the Supreme Court on the doctrine of discovery, the Kelo decision gave the Court’s blessing on economic development takings, which enabled dominant social groups and economic development interests to

\[277\] See CARPENTER II & ROSS, supra note 252, at 6–7.
exploit disadvantaged communities nearly at will. Second, as Johnson acknowledged the loss to Indian tribes of the right of free alienability, Kelo has signified a similar loss for many Americans, that is, “the right to sell their real property to whomever they [wish] for whatever amount they [can] negotiate.” Such a legal environment seriously compromises the fundamental property rights of people living in poorer neighborhoods and communities of color.

Given these injustices, what is the way forward? A review of the civil rights struggle, the environmental justice movement, and housing reform demonstrate how social movements and legal reform can be vehicles for social justice for poor neighborhoods and communities of color. In the four years since the Kelo decision, social movements have surfaced all over the country to protest economic development condemnations. The fact, however, that a national debate about eminent domain abuse only erupted after the Court ruled in Kelo that a predominantly white neighborhood (New London) could be taken for economic development purposes raises the question of just how concerned the movement is about poor neighborhoods and communities of color, which have been exploited through eminent domain actions for decades.

A second potential recourse for social justice is legal reform. Since the passage of Kelo, a majority of states have enacted some type of eminent domain reform that impacts the ability of local governments to take private property for economic development. In some cases, this represents a significant effort to reverse the negative impact on poor people and communities of color, and it is tempting to believe that these movements will bring justice to all communities. The evidence, however, does not suggest as much as these reforms do not substantially redefine how jurisdictions may use blight. As a result, poor people and communities of color still find themselves as easy targets for unjust condemnations because of inadequate attention to these communities and inadequate laws to protect them. Until legislatures and courts act to ensure that some people alone do not “bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” the unjust legacy of Kelo will continue.

278 See Miller, supra note 160, at 67–68.
“Justice, if we only knew what it was,” queried Socrates. As it turns out, in the case of eminent domain law, we know what justice should be: the equal ability of citizens, regardless of race, income or any other distinction, to protect their home and community from unwarranted condemnation.