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WHY THE BLIGHT DISTINCTION IN POST-*KELO* REFORM DOES MATTER

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Professor Somin's response[1] to my article on post-*Kelo*[2] reform, *The Law and Expressive Meaning of Condemning the Poor after* Kelo,[3] makes several intriguing points. And it provides a more current take on takings reforms in the states, which are certainly still in flux.

Professor Somin, however, overstates the number of states that have flatly banned blight and economic development condemnations, and hence underplays the central importance of the distinction between "blighted" and non-blighted property in the post-*Kelo* reform legislation, initiatives and court cases. The Nevada initiative is not yet part of the Nevada Constitution;[4] a second round of voting will be required before it is ratified[5] (although perhaps the easy passage in the first round of voting suggests it will pass again). The Kansas statute still allows blight condemnations for serious housing code violations, which may not be that hard to find in the stock of urban rental housing in poor neighborhoods.[6] The statute, in practice, thus may not make it much more difficult to condemn these areas. And the South Dakota statute is ambiguous on this issue.[7] In any case, South Dakota has hardly been, or will hardly ever be, a major site of urban redevelopment initiatives. The fact remains, moreover, that post-*Kelo* at least twenty five states now set different standards for blight and non-blight/economic condemnations, even by Professor Somin's count.

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[1] Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. (forthcoming 2007), 101 NW. U. L. REV. COLLOQUY 195 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/15/ (link) (citations *infra* refer to the *Colloquy*).

[2] Kelo v. City of New London, 545 U.S. 469 (2005) (link).

[3] David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV 365 (2007), 101 NW. U. L. REV. COLLOQUY 5 (2006), http://www.law.northwestern.edu/lawreview/colloquy/2006/2/ (link) (citations *infra* refer to the *Colloquy*).

[4] Nev. Ballot Question 2 (enacted Nov. 7, 2006 as NEV. CONST. art. I, § 22 § 1) (link) (forbidding the "direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party").

[5] NEV. CONST. art. I, § 22 (link).

[6] S.B. 323, §§ 1–2, 2(e), 2006 Leg., Reg. Sess. (Kan. 2006) (signed into law May 18, 2006) (link) (private-to-private transfers authorized only when the property is "unsafe for occupation by humans under the building codes of the jurisdiction").

[7] H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006) (signed into law Feb. 27, 2006) (link).

Professor Somin also dismisses too quickly the expressive meaning of the distinction between blight and non-blight/economic development condemnations.[8] That the people who supported reform measures containing this distinction may have had many reasons for doing so is surely true, but the fact remains that a massive, national reform movement arose from a Supreme Court case concerning the condemnation of solidly middle-class, single-family-home property owners. Meanwhile, no reform came out of *Berman v. Parker*, a similar case years earlier concerning a poor, inner-city, heavily minority neighborhood in Washington, D.C.[9] I cannot prove it, to be sure, but I believe we would not have seen a *Kelo* backlash if the *Kelo* case had involved the same sort of area as *Berman*.

The *Law and Expressive Meaning* piece did not seek to answer the broader question of whether post-*Kelo* reform is bad or good for the poor, but as Professor Somin suggests,[10] that is indeed a very important and very difficult question. The answer in part depends on how the new laws will be enforced. We have a very poor understanding of how current takings laws are enforced and what they mean in terms of economic and social effects, because there have been no systematic studies yet. It is certainly possible that the debate over the actual implementation and social effects of the new laws will be equally dominated by anecdotal accounts rather than by careful, apolitical studies. As I have argued elsewhere,[11] even as a theoretical matter it is impossible to conclude whether a ban on all condemnations or a ban on only blight condemnations would benefit poor urban populations, which is why I believe that we should move beyond these two dominant forms of eminent domain reform.

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[8] Somin, *supra* note 1, at 201.

[9] 348 U.S. 26 (1954) (link).

[10] Somin, *supra* note 1, at 195.

[11] *See* David A. Dana, *Reframing the Debate over Eminent Domain*, http://ssrn.com/abstract=951552 (link). If we want eminent domain to select for good development, we should consider eminent domain reform that ties the availability of eminent domain to the characteristics of the development that will replace current land uses. One such reform would be an eminent domain test that would make eminent domain available when the anticipated new development would have features that are likely to contribute to reductions in the concentration in poverty. Or perhaps some other forward-looking criteria—something other than whether the new development would reduce concentrated poverty—should be folded into the criteria for the permissible use of eminent domain. What is important is that the debate over eminent domain focus not on flat eminent domain bans or restrictions on economic-development (that is, non-blight-removal) condemnations. Instead, it is important that we focus on what kinds of development, what kinds of communities we, as a society, as state and national polities, believe will best advance the public welfare. In other words, the debate over eminent domain reform—and in turn the law of eminent domain—needs to be reframed.