

Comment on Carpenter and Ross (2009): Eminent Domain and Equity—A Reply

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I appreciate the opportunity to reply to the commentary on my article, co-authored with John Ross, “Testing O’Connor and Thomas: does the use of eminent domain target poor and minority communities?” (Carpenter and Ross, 2009). Analyses of eminent domain use in the urban studies literature are notably sparse, particularly compared with the legal literature. This is a striking paucity given the extent of eminent domain use in the urban context—both historically and contemporaneously. We hope others—in addition to the commenting author—will devote attention to this issue, particularly in the form of empirical analyses.

Our focus was, and remains, on the use of eminent domain for the purpose of transferring property from one private owner to another (which most often occurs in redevelopment settings) and the effects that stem from it. We leave to others the issues surrounding redevelopment that occurs without eminent domain (which it does, extensively), including the use of community benefits agreements, community equity shareholding and other similar vehicles in such projects.

For readers interested in these and other options, Norquist (2004) provides an excellent review of methods by which parties involved in redevelopment can enter freely into mutually beneficial contracts or arrangements separate from the state power of eminent domain.

We do not claim to be disinterested observers of the issue of eminent domain; indeed, we find it remarkable that anyone could be when discussing a power of the state so consequential. Within a legal framework, our view (personally and the view of the Institute for Justice) is that eminent domain should only be allowable for public use, which is when the property is held by and made available to the public. As we discussed in our article, the courts have transformed public use into public purpose, thereby allowing eminent domain to be used for the transfer of property from one private owner to another under the belief that its new use will result in greater public benefit. We disagree with this broader understanding of the Fifth Amendment to the U.S. Constitution and subscribe to the former, narrower interpretation of ‘use’.

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We approach the issue of eminent domain from the libertarian perspective of individual rights. We do so not out of political calculation, but because we subscribe to long and commonly held beliefs that individual property rights sit at the core of all of our inalienable human rights. In deciding in favour of property owners fighting eminent domain for private development in *Norwood, OH*, that state's Supreme Court put it well

The rights related to property—i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty. Believed to be derived fundamentally from a higher authority and natural law, property rights were so sacred that they could not be entrusted lightly to “the uncertain virtue of those who govern.” As such, property rights were believed to supersede constitutional principles. “To be protected and secure in the possession of [one's] property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.” As Chief Justice Bartley eloquently described more than 150 years ago: “The right of private property is an original and fundamental right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are derivative—mere incidents to the political institutions of the country, conferred with a view to the public welfare, and therefore trusts of civil power, to be exercised for the public benefit. Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection—the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of

personal security, personal liberty, and private property (*Norwood v. Horney*, pp. 13–14; legal citations and other notations omitted).¹

Within a socio-political framework, we are highly sceptical that the use of eminent domain for redevelopment could produce benefits that outweigh the deleterious effects to those displaced. In our original article, we examined only the inequitable demographic effects, but others—as the commenting author also cited—have addressed the negative psychological, sociological and physiological effects of eminent domain on those who lose their homes, communities, networks and support systems (Bartik, 1986; Fullilove, 2005). True, the displaced owners (renters may or may not receive any dispensation) receive compensation, but to view such compensation as commensurate with the loss of home and community is a severely reductionist view of the value of one's home, business and community. As the Ohio State Supreme Court also noted in its finding against the use of eminent domain for economic development

For the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made (*Norwood v. Horney*, p. 3).

Moreover, time and again, redevelopment projects involving eminent domain result in unfulfilled promises and outright failures. For example, West Palm Beach county officials in 1987 sought to turn 385 acres of properties with homes into a private golf course—in a county with more than 170 existing golf courses. When three families refused to sell, county officials in 1999 approved eminent domain to take the

properties. After the last residents left in 2002, the project languished and eventually failed in 2005; this, too, during a period of economic growth.

In another example, in 1998 retail giant Nordstrom wanted to open a new department store in downtown Cincinnati. However, Walgreens pharmacy already occupied the building space Nordstrom desired. Eager to accommodate Nordstrom, the City worked with developer Eagle Properties to condemn another property one block away to move Walgreens to a new location—the exact location where CVS (a Walgreens competitor) already operated and had no interest in moving. CVS successfully sued to stop the condemnation for its competitor's benefit. The City then condemned a number of small businesses operating on four separate parcels across the street from CVS so that the City could in turn give that property to Walgreens, except that an earlier agreement signed—but apparently not read—by city officials required the City to leave vacant the parcel just condemned for Walgreens so that Eagle Properties could attract additional 'upscale' retail to the corner adjacent to the new Nordstrom. As the City scrambled, the plans for the Nordstrom build fell through and the vacant lot where Walgreens originally stood languished and deteriorated, eventually taking the form of an unsightly hole in the ground. The City eventually paved over the site and used it as a parking lot. Our colleagues at the Castle Coalition (2006) have collected these along with a number of such cases.

Even the iconic 'win' for eminent domain supporters has proven to be a failure. The city of New London promised grand new developments that required the taking of Susette Kelo's house and those of her neighbours. Yet as of this writing, Kelo's neighbourhood remains barren land, overgrown with grass and weeds, and there is discussion

of turning it into a bird sanctuary (Benedict and Bullock, 2010). The Pfizer facility that represented the anchor of the redevelopment is being shuttered. As New London's local paper described

The announced closing of the New London site eight years after it opened to great fanfare came as a blow to a city that had counted on Pfizer's multimillion-dollar facility to help revive its fortunes (Howard, 2009, para. 4).

Even in some of the highest-profile redevelopment 'success' stories in which eminent domain played a critical part, the truth is far from what eminent domain enthusiasts would have one believe. One of those is Times Square. In the early 1980s, William Stern headed the government agency in New York that used eminent domain as part of the Times Square redevelopment. Although the redevelopment of Times Square has been celebrated as a triumph of 'urban planning', 'public-private partnership', the wise use of the power of eminent domain and an example of the intelligent intervention of government into private real estate markets, Stern calls it all a myth.

In 1983, when I went to work for Governor Mario Cuomo as chairman and chief executive of New York State's Urban Development Corporation (UDC), I was convinced I knew how government planning could transform the Times Square I saw at that time to what it is today. The truth is, however, almost none of the grandiose plans my colleagues and I created and aggressively spearheaded ever came to fruition. Our extravagant plans actually retarded development. The changes in Times Square occurred despite government, not because of it. Times Square succeeded for reasons that had little to do with our building and condemnation schemes and everything to do with government policy that allowed the market to do its work, the way

development occurs every day nationwide. By lowering taxes, enforcing the law, and getting out of the way instead of serving as real estate broker, the government incentivized investment and construction and encouraged the rebirth of Times Square to what it is today (Stern, 2009, p. 2).

Another widely cited ‘success’ story is Baltimore’s Inner Harbor renewal that redeveloped waterfront properties with new stadia, an aquarium, a convention centre, hotels, shops, restaurants, bars and other attractions of the ‘post-modern’ city we referenced in our original article. Economist Stephen Walters and Louis Miserendino (2008) acknowledge that the project appears to be quite successful, but it is actually a deceiving distraction from the true state of the city beyond the Inner Harbor area: dilapidated housing and crumbling infrastructure, pervasive poverty, unsafe streets and a stagnant economy. Walters and Miserendino write

Voting with their feet, Baltimoreans continue to flee these problems by the thousands. The city’s population has declined by over a third since 1950, and the redevelopment of the Inner Harbor—kicked off by the opening of Harborplace in 1980 and the Aquarium in 1981—did not end the exodus. The city lost 6.5 percent of its residents in the 1980s and 11.5 percent in the 1990s; though intercensus population estimates are a subject of some dispute, the Census Bureau has put the decline at 3 percent over 2000–06, perhaps reflecting the loss of over 4,400 housing units during the same period. More alarmingly, Baltimore’s total private-sector employment base fell 12.7 percent (a loss of 46,800 jobs) during the 1990s and another 10.4 percent (33,600 jobs) over 2000–07. By contrast, private-sector employment in the surrounding suburbs soared 25.1 percent in the 1990s and another 13.9 percent since. (p. 3).

Moreover, Walters and Miserendino agree that some sort of redevelopment was necessary for the Inner Harbor area; however, they argue that Baltimore’s redevelopment strategy has long been deeply flawed and eminent domain’s contribution to its renewal has been, on net, negative

In a nutshell, the city’s lack of progress on so many fronts is a direct by-product of its failure to understand and treat the real source of its problems: hostility to private property rights and a resulting flight of capital that largely drained the city of its economic lifeblood. In this view, the aggressive use of eminent domain is not part of the solution to Baltimore’s many problems but another manifestation of their root cause. (Walters and Miserendino, 2008, p. 4).

The experiences and study of people like Stern, Walters and Miserendino lead them to reject the use eminent domain in redevelopment because of its negative effects. By contrast, the commenting author seems to believe that such effects can be blunted through “community-controlled equitable redevelopment”, in the form of “community benefits agreements” and “community equity shareholding”. Yet, within a legal framework, such communitarian structures are irrelevant. When public ‘use’ is interpreted as broadly as courts do, a CBA does nothing to change the process. Property is still seized through the power of the state from one private owner and transferred to another private owner (whether privately held or structured with private shareholders) for the latter’s use. Home and business owners are still displaced against their will.

Within the socio-political framework, we find it to be a naïve notion that such communitarian structures somehow ameliorate the downside effects of eminent domain in redevelopment. Traditionally, the benefits

from the properties involved in the takings are largely accrued by the developer and then the subsequent property owners, occupants and those who use the space. Just adding organised interests into the mix does not change the perversion of the process that relies on eminent domain—it simply spreads the benefits around to groups experienced enough to negotiate their piece of the take.

Left out are the politically disenfranchised who simply want to keep their properties. To think that such people would necessarily be represented by organised interests assumes that the benevolence of such groups and that the interests of such groups are effectively aligned with those of the property owners and occupants. However, the aforementioned project in Times Square puts the lie to such assumptions. Stern observes that, in the midst of the redevelopment project

I began to see the negative implications of government-directed projects like this—the influence peddling, cronyism and corruption, especially when eminent domain is involved. Using eminent domain for private development gives the private sector the opportunity to wield public power—which is more or less for sale—in order to benefit privately. (Stern, 2009, pp. 8–9)

Specific to CBAs, the commenting author rightly noted the Atlantic Yards redevelopment in New York. Although CBAs are supposedly representative of the community

In the Atlantic Yards CBA a few groups—all already publicly supporting the project—pursued individual concerns rather than including the community as a whole in a comprehensive negotiation (Markey, 2009, p. 385).

And that was not the only problem. According to Sheikh, there were questions

about the enforceability of the CBA because government authorities in charge of approving the project were not conditioning project approval on the fulfillment of the CBA

Indeed, rather than viewing the CBA as a means for increasing community involvement in public–private projects, many saw the Atlantic Yards CBA as a developer's tool for buying a perception of public support for a controversial project (Sheikh, 2008, p. 225).

Sheikh notes that subsequent CBAs in New York—specifically the Bronx Terminal Market and Yankee Stadium—were similarly problematic. Government officials largely drove the CBAs, allowing barely any input from community groups. Sheikh concludes that

CBAs have highlighted the failure of state and municipal governments to be responsive champions for their citizens' interests when tackling private projects needing public involvement (Sheikh, 2008, p. 226).

When municipalities have the power to use eminent domain freely, as in New York, it is naive to expect them to be responsive to or to use the CBA for anything more than a “tool for buying a perception of public support for a controversial project” (Sheikh, 2008, p. 225).

Not only do CBAs offer no greater protection to those targeted for removal, they introduce their own distortions to a project where eminent domain is involved—making the process more beholden to powerful interests, not less. Instead, we believe that stronger protections for the disenfranchised are individual rights protected by a Constitution that means what it says and property owners empowered to represent their own interests through the ability to say ‘no’. This, we contend, is a more

effective way to create economic growth and opportunity in cities.

To take one example, Curt Pringle (2007), former mayor of Anaheim, CA, described how his city pursued a large redevelopment initiative without eminent domain. Unlike an earlier failed attempt in which a previous administration used eminent domain, Anaheim's current project is thriving. As Pringle explained

All of this development occurred without the city putting any pressure on any landowners to sell their property. The development of private properties has been completely at the discretion of the individual property owners. Not only did the city not use the formal power of eminent domain to take property, there was no subtle use of the power local governments possess to make business and property ownership difficult. Anaheim put the policies and regulations in place that we thought would help bring new activity to the area, streamlined permitting processes and requirements, and have then excitedly watched as the private sector responded (Pringle, 2007, p. 9).

This private-sector response led to a quadrupling of property values, billions of dollars of private-sector investment, an increased demand for more intense high-end office space, 7000 homes and a variety of restaurants and new retail space. According to Pringle

There is no doubt that the absence or removal of a threat of condemnation encourages economic development, chiefly because property owners and developers feel secure in their investment (Pringle, 2007, p. 12).

Some scholarship also appears to support Pringle's conclusion. Research on this specific question is limited, but Acemoglu and Johnson's (2005) comparative analysis across countries found that stronger property rights produce greater economic

benefits. Moreover, in a recent issue of *Economic Development Quarterly*, we examined whether eminent domain reforms instituted since Kelo have caused economic harm (Carpenter and Ross, 2010). As the commenting author noted, the Institute for Justice has advocated that state legislatures increase the protection of property rights by prohibiting the use of eminent domain for the private to private transfer of property as used in redevelopment. In response, city and state leaders predicted dire consequences to jobs, tax revenue and redevelopment if eminent domain laws were reformed. We tested the possibility of such effects by examining economic indicators before and after legislative or judicial restrictions on eminent domain across all states and between states based on the type of legislative/judicial change. Our results indicated no negative economic consequences resulting from limiting the use of eminent domain when examining economic indicators before and after legislative/judicial change. Moreover, adopting either moderate or major eminent domain reform appears to create no economic ill effects when analysing differences in trends based on the type of legislation passed or scope of judicial decision.

The commenting author raises the concern that certain eminent domain reforms that IJ has advocated will, as Dana (2006) warns, 'amplify' the very inequitable effects we pointed to in our original article. For example, IJ's model legislation allows for a 'blight exception' to barring the use of eminent domain for private-to-private transfer of property, provided that blight is defined very narrowly and that the designation can only be used on a property-by-property basis rather than on properties *en masse*. This merely acknowledges a police power already held by municipalities—the power to condemn properties that are unfit for human habitation or threaten health and safety, in other words, blight. Contrast this with broad

definitions of blight used by cities like Lakewood, OH, where an entire neighbourhood was deemed blighted because of, among other equally questionable standards, cracks in the sidewalk and the presence of weeds (D. B. Hartt Inc., 2002).

In this context, the notion that a narrow blight exception will worsen the inequitable effects of eminent domain is an assertion offered with no evidence, which, after years of the existence of reform legislation, would surely exist by now. Moreover, just as the factual account for this assertion is lacking, the assumptions behind it have logical problems. When blight is defined as 'unfit for human habitation' or a threat to health and safety, it is rather self-evident that those inhabiting such spaces will be impoverished. Thus, such residents live under the threat of eminent domain under any circumstance—whether for economic development or for genuine blight. However, by requiring that blight be designated on a property-by-property basis, owners in such neighbourhoods do enjoy increased protection, as municipalities can no longer blanket an entire neighbourhood or area with a single blight designation. Consequently, property owners—like those in the landmark *Berman v. Parker* (1954),² for example—with non-blighted properties in areas with truly blighted parcels would enjoy greater protections than they otherwise would.

This is especially true when the realities of the process of redevelopment and land assemblage—ignored by the commenting author—are taken into account. A critical feature of large-area redevelopment is land assemblage (Louw, 2008) and no developer seeking financing could hope to secure financing for a project unless he can guarantee that he can acquire, within a definite amount of time, every parcel of property that will be used for the project. If every piece of property in the proposed project area must meet a narrow definition of

blight, this guarantee will be difficult, if not impossible to make.

Finally, by citing the work of critical urban theorists in our original article, we did not, as the commenting author suggests, seek to enlist them into any cause or ascribe to them the libertarian beliefs we hold. Instead, we noted that urban theorists—including those who might subscribe to communitarian remedies for inequalities—appear to be looking critically at how governments act in redevelopment processes that result in racial/ethnic, socioeconomic and other inequities. We took note of that evolution of thought, found that eminent domain has largely seen no attention in such discussions and sought to contribute something unique and important. As stated earlier, we hope that others, regardless of ideology, will now consider this new addition to the discussion in subsequent analyses.

Although we all may wish it were not so, inequalities exist in the US (and elsewhere) and they always will. However, we believe that protecting the rights of individuals—including and especially their property rights—does more to protect against even more savage inequalities that come from marrying the inherently political processes of communitarian vehicles with the power of the state to take and redistribute property to cronies, insiders, activists and the politically and socially connected. The ability to say 'no' without fear of the state taking what is yours is, ultimately, the great equaliser.

Notes

1. *Norwood v. Horney* (2006) 110 Ohio St.3d 353, 2006-Ohio-3799.
2. *Berman v. Parker* (1954) 348 US 26.

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