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The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities

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THE WHOLESALE DECOMMISSIONING OF VACANT URBAN NEIGHBORHOODS: SMART DECLINE, PUBLIC-PURPOSE TAKINGS, AND THE LEGALITY OF SHRINKING CITIES

BEN BECKMAN^{*}

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^{*} J.D., Cleveland-Marshall College of Law (expected May 2010). I welcome all comments at beckman12@gmail.com. This Note benefited immensely from comments by Professor Alan Weinstein and Professor Christopher Sagers. Professor Kunal G. Parker provided an engaging exploration of the topics in American intellectual history that appear in the paper. The deft editorial guidance of Margaret Sweeney and Emily White Kirsch was an immeasurable aid. I fleshed out the piece’s central idea in several extremely helpful conversations with my good friend and classmate, Ed Herman. Lastly, this paper owes a great debt to my enduringly patient wife, Alison Day. Thank you all. All mistakes are mine alone.

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Rather than a permanent construction, one must take American urbanism as an essentially temporary, provisional, and continuously revised articulation of property ownership, speculative development, and mobile capital.

—Architects Charles Waldheim and Marilí Santos-Munné¹

Forget what you think you know about this place. Detroit is the most relevant city in the United States for the simple reason that it is the most unequivocally modern and therefore distinctive of our national culture: in other words, a total success. . . . This makes Detroit the revealed “Capital of the Twentieth Century,” and likely the century ahead.

—Wayne State University Professor Jerry Herron²

If they stay where they are I absolutely cannot give them all the services they require.

¹ Charles Waldheim & Marilí Santos-Munné, *Decamping Detroit*, in *STALKING DETROIT* 104, 108 (George Daskalakis et. al. eds. 2001).

² Jerry Herron, *Three Meditations on the Ruins of Detroit*, in *STALKING DETROIT*, *supra* note 1, at 33, 33.

—Detroit Mayor Dave Bing³

I. INTRODUCTION

Detroit has lost nearly one million residents since 1950,⁴ and over one-third of its residential parcels languish unoccupied.⁵ Mayor Dave Bing has publicly declared his intent to relocate residents from the most woefully vacant areas so that the city can direct its infrastructure and service investments to more-viable neighborhoods.⁶ Should the law permit fiscally stressed cities like Detroit to shut down obsolete neighborhoods by compelling their citizens to move?

In a word, yes. When population density plummets and the available tax base can no longer support the oversized infrastructure of an earlier era, cities owe their citizenry a reorganized urban geography.

An analogy to commercial real estate is helpful.⁷ Faced with rising vacancy rates and falling demand for retail space, smart shopping-mall owners consolidate their remaining tenants into adjacent suites and shutter or demolish the vacant portion of the property.⁸ Landlords hope that these measures will align supply with demand and promote synergies among the remaining tenants.⁹ Unlike private landlords, city officials typically respond to rising vacancy rates and falling demand for urban real estate by raising taxes, cutting back on basic services, or both. Tax increases are no longer an effective option for cities struggling with outmigration-induced¹⁰ budget

³ Christine MacDonald, *Bing: I'll Move Some Residents*, DETROIT NEWS, Feb. 25, 2010, at A4.

⁴ See U.S. BUREAU OF THE CENSUS, RANK BY POPULATION OF THE 100 LARGEST URBAN PLACES, LISTED ALPHABETICALLY BY STATE: 1790-1990 (1998), <http://www.census.gov/population/www/documentation/twps0027/tab01.txt>.

⁵ John Gallagher, *Many Are Gone, But More Remain*, DETROIT FREE PRESS, Feb. 20, 2010, at A9.

⁶ Alex P. Kellogg, *Detroit's Smaller Reality: Mayor Plans to Use Census Tally Showing Decline as Benchmark in Overhaul*, WALL ST. J., Feb. 27, 2010, at A3; MacDonald, *supra* note 3.

⁷ The analogy between the operational context of a shrinking city and the management imperatives of a shopping-mall landlord is Rybczynski and Linneman's. Witold Rybczynski & Peter D. Linneman, *How to Save Our Shrinking Cities*, 135 PUB. INT. 30, 35-36 (1999) [hereinafter *Shrinking Cities*].

⁸ See, e.g., Jesse Tinsley, *New Look, Stores Boost Center: Wal-Mart Store Joins the Lineup at Severance Mall*, PLAIN DEALER (Cleveland), Jan. 30, 1999, at B1 (highlighting the renaissance of a formerly troubled shopping mall after a substantial demolition and reconfiguration).

⁹ *Shrinking Cities*, *supra* note 7, at 35-36; see also Jesse Tinsley, *Chain Stores Say Mall Isn't in Their Plans: Future Uncertain for Severance Town Center 3 Years After Anchors Left*, PLAIN DEALER (Cleveland), Apr. 2, 1997, at A1 (discussing the economic interdependence of shopping mall tenants, the detrimental effect of vacancies, and the mall manager's awareness of the issue).

¹⁰ The Oxford English Dictionary defines the intransitive verb "outmigrate" to mean "[t]o leave one country or place to make one's home in another." OXFORD ENGLISH DICTIONARY 1025 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). I use "outmigration" in this sense but specifically use it to refer to the population exodus from vertical cities—both to those

gaps, just as landlords in weak markets cannot sustainably redistribute fixed operating costs by raising rents.¹¹ Similarly, service cutbacks exacerbate the exodus from central cities in the same way that a nonresponsive landlord drives tenants away. These municipal responses further skew the already troublesome supply/demand imbalance in the urban land market, stranding remaining occupants in deepening geographic isolation.¹²

Accepting that population does not inexorably increase over time, proponents of smart decline argue that the scope of government should contract when population levels fall.¹³ Professors Deborah E. Popper and Frank J. Popper define “smart decline” as “leaving behind assumptions of growth and finding alternatives to it.”¹⁴ They also state that “smart decline requires thinking about who and what remains. It may entail reorganizing or eliminating some services and providing different ones. It may involve promoting certain land uses and landmarks more as historical remnants than as sources of growth.”¹⁵

One example of smart decline is the proposal that we shrink central cities that exhibit significant vacancy rates.¹⁶ Professors Witold Rybczynski and Peter D. Linneman argue that the geographic size of older American cities is no longer sustainable, given today’s low demand for urban land.¹⁷ In cities with significant vacancy problems, shrinking the municipal jurisdiction would conserve public resources by streamlining service delivery and reducing oversized infrastructure systems.¹⁸

cities’ suburbs and to the horizontal cities of the demographically growing American South and West.

¹¹ *Shrinking Cities*, *supra* note 7, at 36; *see also* Ebony Reed, *East Side Vote Can’t Carry School Tax; Pinkney Advises Against Trying for Tax Again in February*, PLAIN DEALER (Cleveland), Nov. 6, 2004, at B1 (quoting campaign manager who suspected that earlier police and fire department layoffs contributed to defeat of municipal school tax request); Mike Tobin, *Campbell Plans to Cut 700 Jobs*, PLAIN DEALER (Cleveland), Nov. 24, 2003, at A1 (reporting mayoral intent to lay off police, fire, and EMS workers because of falling municipal revenues and loss of population); Mike Tobin & Lila J. Mills, *Layoff Talk Took Toll on Tickets: Some Arrests Fell, Sick Time Soared Before Safety Forces Lost Jobs*, PLAIN DEALER (Cleveland), Mar. 7, 2004, at A1 (discussing decline in quality of safety services resulting from layoffs in public safety department).

¹² *See* Olivera Perkins & Tom Breckenridge, *Our Shrinking City Looks Down the Road*, PLAIN DEALER (Cleveland), Aug. 19, 2007, at A1 (telling the story of one city block’s only remaining resident in a neighborhood that was once a densely populated, mixed use community).

¹³ *See generally* Deborah E. Popper & Frank J. Popper, *Small Can Be Beautiful*, PLANNING, July 2002, at 20.

¹⁴ *Id.* at 21-22.

¹⁵ *Id.*

¹⁶ *See generally* *Shrinking Cities*, *supra* note 7.

¹⁷ *Id.* at 31, 34.

¹⁸ *Id.* at 36-37.

The contradiction between smart decline and the American infatuation with growth often breeds resistance to the prospect of shrinking our vacant cities.¹⁹ For instance, despite some observers' approbation of Mayor Bing's announcement,²⁰ cynics have already accused him of bad faith.²¹ But smart decline has a strong internal logic, and a few American cities have preceded Detroit in considering municipal contraction as a smart-decline strategy.²² For instance, officials and local stakeholders in Youngstown, Ohio have collaboratively developed a plan to shrink the urban footprint through voluntary owner relocation and targeted municipal investment.²³ With any municipal-contraction plan, however, a small number of unwilling owners could destroy the projected efficiency gains by refusing to relocate.

Eminent domain is a legitimate last-resort strategy in support of well-conceived plans to contract municipal boundaries. By raising the possibility of eminent domain, the proposal that we shrink our cities does more than merely challenge

¹⁹ See, e.g., Ken Dilanian, *Some Voice Concern Over Mayor's Priorities*, PHILA. INQUIRER, Jan. 24, 2001, at B1 (chronicling criticisms of Philadelphia mayor for spending on blight removal rather than emphasizing population growth to increase municipal tax yields); Tony Dokoupil, *Cutting Down to Size*, NEWSWEEK, Nov. 27, 2009, <http://www.newsweek.com/id/224646> (describing public castigation of Genesee County Treasurer Dan Kildee, a prominent advocate for decommissioning of abandoned buildings through land banking); Brentin Mock, *Can They Save Youngstown?*, NEXT AM. CITY, Fall 2008, <http://americacity.org/magazine/article/can-they-save-youngstown/>.

²⁰ Editorial, *Bing's Detroit: An End to Illusions, But Room for Hope*, DETROIT FREE PRESS, Mar. 24, 2010, at A8; Editorial, *Bing's Vision*, DETROIT NEWS, Mar. 24, 2010, at A12; Daniel Howes, *Bing Sets Sights on 4 Detroit Priorities*, DETROIT NEWS, Mar. 25, 2010, at B4; Kellogg, *supra* note 6 (quoting Rip Rapson, president of a national foundation active in community-development work in Detroit, in support of Mayor Bing); Darren A. Nichols & Leonard N. Fleming, *Mayor Bing: "Together We Can Reinvent Detroit."* DETROIT NEWS, Mar. 24, 2010, at A1 (noting that a majority of the Detroit City Council support the mayor's land-use vision); Rochelle Riley, *Detroit Missing a Larger-Than-Life Leader*, DETROIT FREE PRESS (Mar. 24, 2010), at A2; *Thinking About Shrinking: Detroit's Future*, ECONOMIST, Mar. 27, 2010, at 36.

²¹ MacDonald, *supra* note 3 (quoting Ron Scott, a community activist who contends that the mayor is working to provide business interests with large tracts of urban land); David Whitford, *Postcard: Downsizing Detroit*, TIME, Mar. 29, 2010, at 4 (reporting that a Michigan newspaper likened Bing's plan to the removal of the Cherokee nation across the Trail of Tears).

²² See, e.g., Tom Breckenridge, *A New Take on Urban Renewal; Plans Build on Anchor Projects in 6 Parts of City*, PLAIN DEALER (Cleveland), Nov. 25, 2007, at B1 (describing targeted community investment in Cleveland); Cynthia Burton, *City Spells Out Plan to Take Philadelphia Beyond Blight: Demolition of Eyesores, Better Neighborhood Maintenance, and Community Involvement Are Part of a \$250 Million Effort*, PHILA. INQUIRER, Nov. 2, 2000, at A1 (describing massive demolition initiative in Philadelphia); Thomas A. Finnerty, Jr., *Youngstown Embraces Its Future*, PLANNING, Aug./Sept. 2003, at 14, 14 (describing planned voluntary obsolescence of vacant neighborhoods in Youngstown, Ohio); Carolina Reid, *Neighborhoods in Bloom: Measuring the Impact of Targeted Community Investments*, COMMUNITY INVESTMENTS, Winter 2006, at 24, 24 (describing targeted community investment in Richmond, Va.).

²³ Finnerty, *supra* note 22, at 14.

American assumptions about growth.²⁴ Such municipal-contraction proposals also threaten cherished understandings of property rights, particularly thoughts about the sanctity of the home.²⁵ Nonetheless, in appropriate urban contexts, smart decline through municipal contraction is good policy, and eminent domain is needed to execute it.

A few words on vocabulary are in order. In legal discourse, the terms “eminent domain,” “condemnation,” “expropriation,” and “compulsory purchase” are synonymous.²⁶ “Expropriation” and “compulsory purchase” are primarily used in British English, while “eminent domain” and “condemnation” are exclusively American phrasings.²⁷ I use all of these synonyms interchangeably.

“Municipal contraction” means the reduction of the city’s jurisdictional authority by “deannexing” portions of its present land area. In legal discourse, “annexation” refers to “[a] formal act by which a nation, state, or municipality incorporates land within its dominion.”²⁸ Urban planners and land-use lawyers use “deannexation” as its antonym.²⁹

“Wholesale decommissioning” refers to the geographically targeted comprehensive extinguishment of private ownership. Wholesale decommissioning makes municipal contraction possible by enabling the city to relinquish jurisdiction over the now-vacant land area. The phrase intends to evoke an image of the city shutting down an entire neighborhood, albeit a virtually empty one.³⁰

A “smart-decline taking” is an exercise of eminent domain that furthers a wholesale-decommissioning strategy. Professor Frank Michelman has defined a “taking” as “constitutional law’s expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation.”³¹ This Note is principally concerned with those takings that arise from the State’s exercise of eminent domain, either directly or through the State’s designee. To put a finer point

²⁴ For a discussion of the ways in which municipal contraction challenges American assumptions about growth, see Popper & Popper, *supra* note 13, at 21-22 and see also *Shrinking Cities*, *supra* note 7, at 40, 43-44.

²⁵ See D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 295-300 (2006) (discussing impact of eminent domain in the residential context); see also *Supreme Court’s Kelo Decision and Potential Congressional Responses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 74 (2005) [hereinafter *H. Hearings*] (email from Margaret Cobb, Atlanta, Ga.) (invoking the sanctity of the home as a source of comfort in a post-9/11 world).

²⁶ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 189, 195-96, 312, 342 (2d ed. 1995).

²⁷ *Id.*

²⁸ BLACK’S LAW DICTIONARY 104 (9th ed. 2009).

²⁹ See, e.g., *Rural Water Dist. No. 4 v. City of Eudora*, 604 F. Supp. 2d 1298 *passim* (D. Kan. 2009); Michael B. Kent, Jr., *Public Utilities, Eminent Domain, and Local Land Use Regulations: Has Texas Found the Proper Balance?*, 16 TEX. WESLEYAN L. REV. 29, 35 (2009); *Shrinking Cities*, *supra* note 7, at 41.

³⁰ See, e.g., Waldheim & Santos-Munné, *supra* note 1, at 105.

³¹ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1165 (1967).

on it, this Note addresses the distinction that property-rights advocates have developed to delegitimize certain types of takings. This distinction divides condemnations into disfavored-yet-legitimate takings—the direct-government-use and common-carrier takings—and ostensibly illegitimate public-purpose takings. The property-rights movement unequivocally places economic-development takings in the illegitimate category. The status of blight-remediation takings is ambiguous but tends toward legitimacy.

In locating smart-decline takings in this landscape, I treat them as a form of economic-development taking. While it is possible that a city might characterize its smart-decline takings as blight remediation, this rhetorical move smacks of a cynical formalism that exploits—rather than transforms—the ambiguities that riddle current American takings law. Following the U.S. Supreme Court’s very deferential decision in *Kelo v. City of New London*,³² state restrictions on eminent domain will provide the principal obstacles to proponents of smart-decline takings.³³ In some states, legislative action may be needed to remove particularly constricting limitations adopted in *Kelo*’s wake.³⁴ But repeal of overly stringent state restrictions on eminent domain will founder without a viable alternate method of preventing abuse. Accordingly, clearing the path for smart-decline takings in some states will require a comprehensive solution to the problem of eminent-domain abuse. The ideal solution to that problem is to include reasonable subjective value in just-compensation awards and to evaluate the public-use requirement using a Kaldor-Hicks efficiency standard.³⁵ These measures prevent both unjust governmental seizure of private property and selfish exploitation of the public fisc by economic-rent-seeking holdout owners.

Part II of this Note argues that wholesale decommissioning of declining urban neighborhoods, including smart-decline takings, is the appropriate policy response in cities that have experienced decimating population losses. Part III addresses the four principal arguments that eminent-domain opponents advance to show that public-purpose takings—of which smart-decline takings are a variant—are illegal. These arguments involve policy concerns, interpretations of American law, notions of natural or universal law, and the role of that set of cultural ideals most aptly described as the American tradition. Part IV explores the ways in which the wholesale-decommissioning concept opens new avenues for a lasting resolution of the American eminent-domain controversy. Part V contains some concluding reflections, especially regarding the fate of the decommissioned land.

II. WHOLESALE DECOMMISSIONING AND RESPONSIBLE URBAN LAND-USE STRATEGY

Over the past sixty years, a persistent mismatch has emerged between falling municipal revenues and rising municipal expenses. Smart-decline policy provides a

³² *Kelo v. City of New London*, 545 U.S. 469 (2005).

³³ John J. Costonis, *New Orleans, Katrina and Kelo: American Cities in the Post-Kelo Era*, 83 TUL. L. REV. 395, 412-20 (2008).

³⁴ For a discussion of the legal impediments and citations to the relevant state law, see *id.*

³⁵ For a fuller discussion of Kaldor-Hicks efficiency and its application to the eminent domain controversy, see *infra* Part II.D.

necessary alternative to the failed attempts to resolve this financial conundrum. In particular, municipal contraction through wholesale decommissioning offers the most responsible land-use strategy in vacant urban neighborhoods. To achieve the fiscal benefits of this approach, however, municipalities may need to expropriate the property of unreasonable holdout landowners.

A. The Emergence of the Urban Fiscal Mismatch

Historically, American cities coalesced in response to the scarcity of transportation. The physical character of older American cities reflects this now-outdated principle. Professors Rybczynski and Linneman have labeled these older urban aggregations “vertical cities,” perhaps because of the densely packed multi-story downtown buildings that the surface-transportation challenge engendered.³⁶ In vertical cities, workforce housing is situated close to workplaces and to the retail outlets serving the family’s daily needs. Businesses cluster together in a central district to facilitate communication on foot. Public institutions and cultural assets are centrally located and connected to neighborhood districts by arterial transportation links, particularly mass transit.³⁷ In contrast, so-called “horizontal cities” developed after the automobile provided private ground transportation to the broad spectrum of Americans. Horizontal cities are characterized by automobile-focused transportation infrastructure, spatial segregation of differing land uses, and geographic dispersion of community assets and business activity.³⁸

In the middle of the twentieth century, cheap automobiles,³⁹ rising wages,⁴⁰ and countervailing government policies⁴¹ shattered the spatial imperative that created the older vertical cities. But distasteful urban realities such as racial tension,⁴² crime,⁴³

³⁶ *Shrinking Cities*, *supra* note 7, at 33-34.

³⁷ *Id.* at 34.

³⁸ *Id.*

³⁹ See, e.g., JON C. TEAFORD, *THE TWENTIETH-CENTURY AMERICAN CITY* 98-99 (2d ed. 1993) (discussing the meteoric increase in American automobile ownership after 1950 and the elimination of the traditional necessity that workers live within walking distance of the worksite).

⁴⁰ *Shrinking Cities*, *supra* note 7, at 30 (discussing the decimation of the manufacturing capacity of international industrial rivals during the Second World War and America’s postwar prosperity).

⁴¹ Federal and state land-use policies supported outmigration by subsidizing the costs of suburban real estate developers. MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY STABILITY* 35-46 (1997). Federal tax policy encouraged sprawl by rewarding families for buying rather than renting a home, 26 U.S.C. § 163(h)(2)(D) (2006), and encouraging homebuyers to purchase increasingly larger homes as their economic circumstances improved, 26 U.S.C. § 121 (2006); 26 U.S.C. § 1034 (repealed 1997).

⁴² See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 88-96 (1993) (reporting on persistent racism and its impact on regional housing choices in Detroit); Peter H. Rossi, *Urban Revolts and the Future of American Cities*, in *CITIES UNDER SIEGE: AN ANATOMY OF THE GHETTO RIOTS, 1964-1968*, at 405, 408 (David Boesel & Peter H. Rossi eds., 1971) (discussing white dismay at urban race riots in the wake of the civil rights movement).

⁴³ See TEAFORD, *supra* note 39, at 134-36.

poor schooling,⁴⁴ lack of green space,⁴⁵ and overcrowding⁴⁶ persisted. Advances in personal transportation eliminated the centripetal force holding vertical cities together and left these pre-existing centrifugal forces unchecked. When retreat from these negative elements became an option, many vertical-city households decamped for more palatable lifestyles in the suburbs.⁴⁷ As their customers and employees opted to move, urban businesses found it convenient, or even essential, to follow.⁴⁸ These recent developments are in marked contrast to the urban explosion of the prior seventy-five years.⁴⁹ Rising vacancy in core cities is particularly striking because every metropolitan region in America increased its population in the latter half of the twentieth century.⁵⁰

Because the urban built environment⁵¹ developed to support populations much larger than present levels, abandoned buildings and vacant lots have become the archetypal manifestation of vertical-city decline.⁵² Today, most vertical cities are plagued by tremendous overcapacity in both land area and infrastructure.⁵³ Significantly, the individualized nature of relocation decisions rendered urban population and job losses discontinuous within the geography of the affected cities.⁵⁴ The patchwork of vacancies scattered across the municipal fabric make the city's outsized, aging infrastructure increasingly inefficient to operate and creates a significant drain on municipal resources.⁵⁵

Outmigration of residents and companies also creates a challenging mismatch between tax receipts and municipal outlays. As affluent individuals and profitable

⁴⁴ See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 120 (2d ed., Harper Perennial 1992) (1991) (discussing the educational funding disparities between cities and their suburbs).

⁴⁵ JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 363-64 (1991) (sketching the connection between sprawl and the American longing for a connection to nature).

⁴⁶ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 268-71 (Modern Library 1993) (1961).

⁴⁷ TEAFORD, *supra* note 39, at 98.

⁴⁸ *Id.* at 105-07.

⁴⁹ See U.S. BUREAU OF THE CENSUS, *supra* note 4.

⁵⁰ *Shrinking Cities*, *supra* note 7, at 33.

⁵¹ The "built environment" is "[t]hat portion of the physical surroundings created by humans as opposed to the natural environment." *DICTIONARY OF BUILDING PRESERVATION* 71 (Ward Bucher ed. 1996).

⁵² Christina Lindsey, *Smart Decline*, PANORAMA, 2007, at 17, 18. available at http://www.design.upenn.edu/new/cplan/panorama2007_files/articles/pdfs/lindsey.pdf; ANN O'M. BOWMAN & MICHAEL A. PAGANO, *TERRA INCOGNITA: VACANT LAND AND URBAN STRATEGIES* 1-2, 91-93 (2004).

⁵³ Popper & Popper, *supra* note 13, at 21.

⁵⁴ *Shrinking Cities*, *supra* note 7, at 37.

⁵⁵ Timothy Moss, "Cold Spots" of Urban Infrastructure: "Shrinking" Processes in Eastern Germany and the Modern Infrastructural Ideal, 32.2 *INT'L J. URB. & REGIONAL RES.* 436, 436-37 (2008).

businesses depart, property values fall, and cities experience revenue losses.⁵⁶ Simultaneously, the remaining urban population, being poorer, is in greater need of economic assistance.⁵⁷ This combination of lower municipal revenues and increased municipal expenses raises the cost of government per citizen.⁵⁸ Core cities become less competitive than suburbs on tax rates and service quality, which induces further departures in a vicious cycle of abandonment and decline.⁵⁹

B. Smart Decline Helps Rectify the Fiscal Mismatch Confronting Vacating Cities

The self-reinforcing momentum of outmigration dooms any hoped-for return to the prototypical vertical city of historical memory.⁶⁰ The bustling American metropolises of yesteryear reached their zenith in a postwar economic environment where the United States was the only global industrial power that retained its manufacturing capacity.⁶¹ In hindsight, these cities were themselves temporary phenomena destroyed by changed economic circumstances.⁶² Ignoring this macroeconomic reality, municipal officials typically respond to worsening fiscal realities by developing aggressive economic-development agendas. For instance, Mayor Eddie A. Perez argued before Congress that “[o]ne of the most important responsibilities of any local city government is to provide for economic and cultural growth of that community.”⁶³ And proponents of urban eminent domain routinely invoke the prospect of municipal growth to legitimize condemnations.⁶⁴ Mayor Bart Peterson went so far as to say that “the availability of eminent domain has probably led to more job creation and home ownership opportunities than any other tool that there is at the local level.”⁶⁵

⁵⁶ *Shrinking Cities*, *supra* note 7, at 36.

⁵⁷ *Id.* at 35.

⁵⁸ *Id.* at 37.

⁵⁹ *Id.* at 36-37.

⁶⁰ See ROBERT M. FOGELSON, *DOWNTOWN: ITS RISE AND FALL, 1880-1950*, at 6-7 (Yale Univ. Press 2003) (2001); *Shrinking Cities*, *supra* note 7, at 34-35.

⁶¹ See *Shrinking Cities*, *supra* note 7, at 30.

⁶² See FOGELSON, *supra* note 60, at 5-8; TEAFORD, *supra* note 39, at 6, 96, 168-69; *Shrinking Cities*, *supra* note 7, at 30, 39.

⁶³ *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11(2005) [hereinafter *S. Hearings*] (testimony of Mayor Eddie A. Perez, Hartford, Conn.).

⁶⁴ See, e.g., Gregory V. Jolivet, Jr., Note, *Kelo v. City of New London: A Reduction of Property Rights but a Tool to Combat Urban Sprawl*, 55 CLEV. ST. L. REV. 103 (2007).

⁶⁵ *H. Hearings*, *supra* note 25, at 31 (testimony of Mayor Bart Peterson, Indianapolis, Ind.); see also *id.* at 40 (prepared statement of Mayor Bart Peterson, Indianapolis, Ind.) (arguing that eminent domain was needed to prevent owners’ economic capture of publicly funded development subsidy in Smyrna, Ga.); *S. Hearings*, *supra* note 63, at 135 (testimony of Mayor Eddie A. Perez, Hartford, Conn.) (arguing that eminent domain for economic development enhances opportunities for individuals to enter the “ownership society,” thereby assisting people in their realization of the American Dream).

For the most part, though, growth-oriented economic-development initiatives spend current revenue in an attempt to recreate the population growth that was the *sine qua non* of America's great historical cities. Tax abatement, gentrification, slum clearance, urban-growth boundaries, urban homesteading, land banks, aggressive annexation, and the formation of regional governments have all been advocated as ways to subsidize central-city growth. To preserve urban living as a desirable option for the affluent, planners use their eminent-domain authority to selectively remove unsightly aspects of the urban experience. If an opportunity to attract a blockbuster commercial or mixed-use real estate development project appears, municipal land-use officials often use compulsory purchase to assemble the required contiguous acreage.

C. Eminent Domain and the Case for Shrinking Vacant Cities

Professors Rybczynski and Linneman break with current planning orthodoxy by disparaging the headlong scramble for chimerical additional growth.⁶⁶ Instead, we should recognize that the attractiveness of vertical-city landownership has fallen precipitously.⁶⁷ Once we forsake the unrealistic growth aspirations of conventional municipal boosterism, wholesale decommissioning offers several practical benefits to struggling central cities. Shrinking the municipal geography to comport with current demand will consolidate the scope of the city's service obligations.⁶⁸ The resultant reduction in expenses may be the most effective means of correcting urban fiscal imbalances and increasing the quality of life for municipal citizens.⁶⁹

Ultimately, Rybczynski and Linneman envision deannexation of the affected area—and perhaps its eventual sale to a private developer.⁷⁰ But the wholesale decommissioning of an urban neighborhood will require either the revocation of all occupancy permits in the affected area or the extinguishment of all private title. Revocation of occupancy permits—which can be viewed as a “regulatory decommissioning”—has significant strategic disadvantages. Individual citizens do not generally bargain away rights to the government in negotiated exchanges. Accordingly, regulatory decommissioning offers far less opportunity for market solutions as an alternative to governmental compulsion. A mere revocation of occupancy rights does not provide authority to demolish the vacated structures. And vacant buildings degrade urban communities while municipalities struggle to enforce the building code and other laws against absent owners.⁷¹ Extinguishment of private title is the better course because it enables the demolition of all improvements, which, in turn, facilitates governmental supervision of the decommissioned area. Finally, a regulatory decommissioning does not block potential compensation claims

⁶⁶ *Shrinking Cities*, *supra* note 7, at 38.

⁶⁷ *Id.* at 34.

⁶⁸ *Id.* at 41-42.

⁶⁹ *See generally id.*

⁷⁰ *Id.* at 41-42.

⁷¹ Becky Gaylord, Editorial, *How City is Losing Fight Against Blight*, PLAIN DEALER (Cleveland), June 8, 2008, at G1; Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 191-92 (2008).

because affected owners can seek to recover for the effective denial of all economically viable use of their property.⁷²

The tax savings, service improvements, and other benefits of smart decline can be threatened by holdout problems as readily as recalcitrant owners can thwart conventional development agendas. If cities wish to reap the full benefit of a municipal contraction strategy, compulsory purchase may be unavoidable. Eminent domain allows proactive, geographically targeted acquisitions within a timeframe that minimizes municipal holding costs. While the city must compensate owners in the decommissioned area and pay to demolish the affected structures, service delivery costs would be much reduced in the absence of occupancy.

More importantly, the efficiency of municipal service delivery would increase as the city removed fatally empty neighborhoods from the service area.⁷³ For instance, portions of the municipal water system could be shut down.⁷⁴ Relocating property owners to occupied neighborhoods will allow city departments to be more responsive to the same number of constituents without requiring additional municipal revenues.⁷⁵ By accepting the irreversible decline of some neighborhoods, municipalities can focus their redevelopment efforts on filling the vacant properties in viable neighborhoods, thereby, strengthening those neighborhoods.⁷⁶ Furthermore, economic development in the vibrant parts of the city presents greater opportunities for public-private partnerships with existing stakeholders.⁷⁷ It will also be easier to attract new private enterprise to these fortified neighborhoods.⁷⁸

Admittedly, it is psychologically unsatisfying to dispossess individual property owners solely because the government that supports their claim of title is abandoning the neighborhood. These owners kept faith with the city as an engine of civic virtue when their neighbors or predecessors-in-interest departed. It seems cruel to dispossess owners who have already suffered the grinding despair that accompanies the deterioration of once-vibrant urban neighborhoods when the constituent residents, businesses, and civic institutions depart.⁷⁹ It is also true that some businesses and organizations will be unlikely to prosper in a shift to more densely occupied neighborhoods. In relocating to more vibrant neighborhoods, businesses may lose a locational monopoly that is critical to their competitive advantage. And churches and other member-based neighborhood organizations may have a difficult time maintaining a cohesive membership if that membership disperses to different neighborhoods.

⁷² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *see also Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

⁷³ *See Shrinking Cities*, *supra* note 7, at 37.

⁷⁴ *See Moss*, *supra* note 55.

⁷⁵ *See Shrinking Cities*, *supra* note 7, at 37.

⁷⁶ *See id.* at 42.

⁷⁷ *See, e.g., Reid*, *supra* note 22, at 24-25.

⁷⁸ *Id.*

⁷⁹ *See Sandra Livingston, Sam Fulwood III, & Bob Paynter, A "Suburban Paradise" Lost: Bustling and Full of Life, Mount Pleasant Once Was a Family-Oriented, Friendly Place to Live*, *PLAIN DEALER* (Cleveland), Dec. 9, 2007, at A16.

Nonetheless, there is a significant free-rider problem associated with allowing owners to remain in an area where municipal service delivery is drastically inefficient. Other members of the community suffer a reduction in service quality and an increase in taxes to subsidize services to geographically isolated owners.⁸⁰ Conversely, the benefits of relocation for both the individual and the community would be significant. Individuals relocating to other municipal neighborhoods would benefit from the safety, vitality, and amenities of fully occupied neighborhoods.⁸¹ If the displaced owners chose new sites within the shrunken city limits, the municipal efficiencies gained from the contraction would benefit these transplants as much as the existing occupants of the viable neighborhoods.

More research is needed to develop a specific understanding of the financial and geographic preconditions that render a municipal-contraction proposal socially efficient. Analyzing the existing cost data to attribute current service and infrastructure costs to discrete urban geographies is a critical first step.⁸² City officials will also need to develop reasonably accurate data on vacancy levels within those geographies.⁸³ If a neighborhood has both high municipal costs and high vacancy, the second level of investigation will involve appraising the fair market value of all privately held real estate in the potential decommissioned area.

If the neighborhood's share of municipal costs, capitalized over some appropriate period, exceeds the fair market value of the neighborhood's real estate by a large margin, the neighborhood might be a candidate for decommissioning. The final step in the analysis will be to project the level of heightened compensation that the municipality might expect to pay to implement its decommissioning strategy. To accurately project these subjective costs, the planning team should determine which neighborhood owners have a legitimate claim to heightened compensation, estimate the size of the idiosyncratic-value premium for those owners, and determine the likelihood that each owner will refuse a negotiated sale. If the net social benefit remains high after deducting these estimated subjective-value costs, the wholesale-decommissioning strategy is Kaldor-Hicks efficient and should be pursued.⁸⁴

⁸⁰ *Shrinking Cities*, *supra* note 7, at 37.

⁸¹ JACOBS, *supra* note 46, at 44-53.

⁸² In Ohio, a useful data source is CMTY. RES. PARTNERS & REBUILD OHIO, \$60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES (2008), http://communityresearchpartners.org/uploads/publications//FullReport_everythingbutcitysections.pdf.

⁸³ Interested persons in Detroit have undertaken some elements of this analysis already. *See, e.g.*, Whitford, *supra* note 21.

⁸⁴ Even if the cost-benefit analysis suggests that wholesale decommissioning is not a prudent strategy, the data produced can be put to other good uses by the municipality. In one intriguing option, establishing the per-property costs of the status quo would enable a system of user fees to be created as an alternative to municipal contraction through condemnation. (I thank Prof. Alan Weinstein of Cleveland-Marshall College of Law for conveying the germ of this idea.) With clear data on the costs of service delivery and infrastructure maintenance to a particular address, such a system of user fees could reduce or replace the current property-tax system. The fees of landholders who, for idiosyncratic reasons, desire to remain in isolated urban areas could be increased to offset the additional costs that they currently impose on the majority as free riders. This user-fee system for municipal revenues might also be selectively

D. Kaldor-Hicks Efficiency and the Legitimacy of Condemnations

Professors Nicholas Kaldor and J.R. Hicks were both eminent twentieth-century economists. In 1939, each scholar separately published an article in *The Economic Journal* addressing one of the foremost debates in contemporary economics.⁸⁵ Both Kaldor and Hicks were responding to a problem explored by Professor Lionel Robbins in an earlier *Economic Journal* article.⁸⁶

Professor Robbins was troubled by the assumption inherent in utilitarian economics that every human being has an equal capacity for economic satisfaction.⁸⁷ Economists studying the social utility of economic arrangements—most notably Professor A.C. Pigou in his landmark book on utilitarian economics, *The Economics of Welfare*⁸⁸—assumed that all human beings possessed the same ability to appreciate the satisfaction of their individual tastes.⁸⁹ Those individual tastes might differ, but each person's potential for happiness was the same.⁹⁰ Professor Robbins' trouble was that this assumption—which Professor Pigou deemed essential to the utilitarian economists' normative assessment of competing economic policies⁹¹—“rested upon ethical principle rather than upon scientific demonstration.”⁹² For Professor Robbins, acknowledging the value-laden nature of the equal-capacity-for-satisfaction assumption meant “that economics as a science could say nothing by way of prescription. . . . It was not possible to say that economic science showed that free trade was justifiable, that inequality should be mitigated, that the income tax should be graduated, and so forth.”⁹³ In an era marked by an abiding enthusiasm for scientific advancement, Professor Robbins and other economists preferred normative claims that carried the imprimatur of scientific validity.⁹⁴

Initially crestfallen, Professor Robbins realized upon reflection that he had merely rendered explicit a normative assumption that undergirded the economic-policy arguments he was making.⁹⁵ He conceded that human beings are—strictly

employed in areas where the forecasted benefits of neighborhood decommissioning fall short of the substantial net social gain needed to justify eminent domain proceedings.

⁸⁵ J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and InterPersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939).

⁸⁶ Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635 (1938).

⁸⁷ *Id.* at 636.

⁸⁸ A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

⁸⁹ Hicks, *supra* note 85, at 697.

⁹⁰ Robbins, *supra* note 86, at 636.

⁹¹ Hicks, *supra* note 85, at 697-98; Robbins, *supra* note 86, at 636-37.

⁹² Robbins, *supra* note 86, at 637.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 638.

speaking—unequal in both endowments and desires.⁹⁶ He also felt, however, that, “in most cases, political calculations which do not treat them *as if* they were equal are morally revolting.”⁹⁷ By treating this normative assumption—and the assumption of equal capacity for satisfaction that flows from it—as an article of faith that motivated his scientific inquiries, Professor Robbins salvaged all he thought he could of the scientific in his approach. If others disagreed with his normative premise, he would have to meet them with the tools of normative inquiry, not with the scientific method.⁹⁸ Accordingly, Professor Robbins responded to Professor Pigou by propounding “the necessity for independent and systematic study of the ends which prescriptions based on economics might serve,” for which he was roundly—and, he hoped to show, undeservedly—condemned.⁹⁹ Professor Robbins summed up his 1938 *Economic Journal* rebuttal essay by saying, “I think that the assumption of equality comes from outside, and that its justification is more ethical than scientific.”¹⁰⁰ He ended by saying that “the real difference of opinion is not between those who dispute concerning the exact area to be designated by the adjective scientific, but between those who hold that human beings should be treated as if they were equal and those who hold that they should not.”¹⁰¹

Professor Kaldor’s piece appeared the following September. Even as he agreed with Professor Robbins that the claim of equal capacity for satisfaction was non-scientific, Professor Kaldor questioned an assumption shared by both Professor Robbins and his critics. Before Professor Kaldor’s article, economists on both sides of the social-utility debate agreed “that the scientific justification of [social-utility] comparisons determines whether ‘economics as a science can say anything by way of prescription.’”¹⁰² Professor Kaldor argued, instead, that it was possible to show—even absent proof that all citizens possess equal capacity for satisfaction—that certain economic policies should be pursued and others discontinued.¹⁰³ For example, policies that increase physical production moot the issue of equal capacity for satisfaction because such policies create new wealth to compensate persons negatively affected by the policy change.¹⁰⁴ As Professor Kaldor put it, the economist does not need to show that “nobody in the community is going to suffer. In order to establish his case, it is quite sufficient for him to show that even if all those who suffer as a result are fully compensated for their loss, the rest of the community will still be better off than before.”¹⁰⁵ Professor Kaldor specifically sought to redeem the prescriptive capacity of economists, despite uncertainty about

⁹⁶ *Id.* at 635.

⁹⁷ *Id.*

⁹⁸ *Id.* at 638-39.

⁹⁹ *Id.* at 639-40.

¹⁰⁰ *Id.* at 641.

¹⁰¹ *Id.*

¹⁰² Kaldor, *supra* note 85, at 549 (quoting Robbins, *supra* note 86, at 637).

¹⁰³ *Id.* at 550.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

human beings' relative capacity for happiness. The genius of his solution is that it applies to many economic-policy issues, including the legitimacy of governmental condemnation of private property.

Professor Hicks published a slightly longer piece in the very next issue of *The Economic Journal*.¹⁰⁶ Following critiques of Professor Pigou's book, Professor Hicks' article incorporated Professor Kaldor's elegant resolution of Professor Robbins' specific problem into a broader rehabilitation of the social-utility tradition. Professor Hicks sought to rescue the social-utility tradition from the marginalized status to which Professor Robbins reluctantly condemned it—that of a mere “interesting ethical postulate.”¹⁰⁷

Social-utility theorists, as Professor Hicks understood them, are concerned with the relative economic efficiency of various economic systems in maximizing the quantity of satisfaction available to individuals and to society as a whole.¹⁰⁸ But it is precisely in making such evaluations that the assumption of an equal capacity for satisfaction injects the subjective values of the investigator into the analysis.¹⁰⁹ For Professor Hicks, Professor Kaldor's great achievement was in demonstrating that the question of individuals' relative capacity for satisfaction is actually irrelevant to many evaluations of the relative efficiency of economic systems.¹¹⁰ The critical insight is that, regarding individuals, satisfaction is not always a zero-sum game.¹¹¹ Certainly there are situations where an increase in one individual's satisfaction will cause a simultaneous decrease in satisfaction for someone else. But in other instances, an individual's satisfaction can increase without a negative impact on anyone else.¹¹²

Professor Hicks extended Professor Kaldor's observation to define the set of “optimum” economic systems, each characterized by the absence of no-cost opportunities to improve any individual's satisfaction.¹¹³ There is a multiplicity of such systems—each manifesting a different distribution of the total available wealth.¹¹⁴ But each optimum system shares the essential characteristic that “every individual is as well off as he can be made, subject to the condition that no reorganisation [sic] permitted shall make any individual worse off.”¹¹⁵ In a suboptimal system, by contrast, “[s]ome at least of the individuals in the system can have their wants satisfied better, without anyone having to make a sacrifice in order to achieve that end.”¹¹⁶

¹⁰⁶ See Hicks, *supra* note 85.

¹⁰⁷ *Id.* at 698.

¹⁰⁸ *Id.* at 698-99.

¹⁰⁹ *Id.* at 699.

¹¹⁰ *Id.* at 700.

¹¹¹ *Id.*

¹¹² *Id.* at 700-01.

¹¹³ *Id.* at 701.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Professor Hicks noted that in pre-existing economies, “no simple economic reform can be a permitted reorganisation [sic] in [the economic] sense, because it always inflicts a loss of some sort upon some people.”¹¹⁷ To resolve this difficulty, Professor Hicks—and Professor Kaldor before him¹¹⁸—postulated a hypothetical comprehensive just-compensation regime, saying that “we can always suppose that special measures are taken through the public revenue to compensate those people who are damaged.”¹¹⁹ In words that provide the essential germ of the test that the American judiciary should adopt in the eminent-domain context, Professor Hicks summed up by saying, “A ‘permitted reorganisation’ [sic] [in economic terms] must thus be taken from now on to mean a reorganisation [sic] which will allow of compensation being paid, and which will yet show a net advantage. The position is not optimum so long as such reorganisation [sic] is possible.”¹²⁰ To adopt this economic test, judges evaluating the legitimacy of a contested condemnation would do well to require a showing that the taking will provide a quantifiable net public benefit, even after the owner is justly compensated. Because of the consequences for the private individual and the potential for abuse, courts should require the condemning authority to prove this point by clear and convincing evidence.

III. PUBLIC-PURPOSE TAKINGS AND THE LEGALITY OF SHRINKING CITIES

Public-purpose takings are challenged on four key grounds: purported violations of the positive law of the United States, purported violations of universal natural law, non-conformity with the American tradition, and incompatibility with sound public policy. Of these objections, the first three are erroneous.¹²¹ The policy-based critiques have the greatest merit, but they can be addressed by just-compensation reform and a requirement that government prove the Kaldor-Hicks efficiency of the condemnation by clear and convincing evidence.¹²²

A. *Public-Purpose Takings Are Consistent with American Positive Law*

Eminent-domain opponents argue that public-purpose takings violate the plain meaning of the U.S. Constitution and the legitimate Supreme Court precedents. Both arguments disregard the complex interplay between American law and the economic health of the nation.

1. Plain Meaning and Property Rights

The Takings Clause of the Fifth Amendment to the U.S. Constitution addresses the federal power to take private property through eminent domain: “nor shall private property be taken for public use without just compensation.”¹²³ The phrase “public use” is not defined in the Constitution, and its ambiguity is the source of the

¹¹⁷ *Id.* at 706.

¹¹⁸ Kaldor, *supra* note 85, at 551 n.1.

¹¹⁹ Hicks, *supra* note 85, at 706.

¹²⁰ *Id.* at 706.

¹²¹ See discussion *infra* Part III.A-C.

¹²² See discussion *infra* Part III.D.

¹²³ U.S. CONST. amend. V; *Barron v. Mayor of Balt.*, 32 U.S. 243, 250-51 (1833).

eminent-domain controversy. Some opponents of public-purpose takings argue that the Constitution's requirement of public use bars all government takings that are justified solely in terms of economic benefit.¹²⁴ These critics often insist that the public-use requirement restricts takings to situations involving direct use of the land by a government entity following the expropriation.¹²⁵ They quote Justice Samuel Chase's memorable chestnut from *Calder v. Bull*¹²⁶—that “a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it”¹²⁷—as support for a strict reading of the public-use requirement.¹²⁸ What is rarely noted, however, is that Justice Chase's epigram is dictum in an estate dispute.¹²⁹ He made the remark to illustrate a general point about due process of law, not to precisely delineate the limits of the government's power of eminent domain.¹³⁰

Senator John Cornyn has stated that “the protection of homes, small businesses and other private property rights against government seizure and other unreasonable government interference is a fundamental principle and core commitment of our Nation's Founders.”¹³¹ But economic growth was the vital concern of the Framers, not the affirmation of fixed property rights in any absolute sense. The Framers wanted a federal government with sufficient power to overrule the growth-retarding practices of particular colonial and state governments. At the same time, they sought to prevent the national government from enacting economically repressive measures of its own.¹³² After independence, barriers to economic prosperity developed under the ineffectual Articles of Confederation, such as debilitating interstate tariffs and the inability to satisfy national debts. Often, these barriers resulted from state political elites exploiting the weakness of the Articles of Confederation for local advantage; a sort of state-level rent-seeking that is loosely analogous to the behavior of unreasonable holdout owners in the urban land-assembly context. The desire to

¹²⁴ See, e.g., *H. Hearings*, *supra* note 25, at 115 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.); *id.* at 51 (testimony of Rep. Trent Franks, Ariz.); *id.* at 50 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.); *S. Hearings*, *supra* note 63, at 26 (testimony of Sen. Jon Kyl, Ariz.); *id.* at 25 (testimony of Sen. Jeff Sessions, Ala.); see also *id.* at 6 (statement of Susette Kelo, New London, Conn.) (arguing that the plain meaning of the Constitution bars the taking of homes in situations like hers).

¹²⁵ See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 510 (2005) (Thomas, J., dissenting).

¹²⁶ *Calder v. Bull*, 3 U.S. 386 (1798).

¹²⁷ *Id.* at 388.

¹²⁸ See, e.g., *Kelo*, 545 U.S. at 494, 502 (O'Connor, J., dissenting); *Davidson v. New Orleans*, 96 U.S. 97, 102 (1878); *H. Hearings*, *supra* note 25, at 73 (email from Leon Howlett, Glendale, Ky.).

¹²⁹ *Calder*, 3 U.S. at 386-87.

¹³⁰ See *id.* at 387-89.

¹³¹ *S. Hearings*, *supra* note 25, at 5 (statement Sen. John Cornyn, Tex.); see also *id.* at 64 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

¹³² JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 43-45 (3d ed. 2008).

remedy the economic defects of the Articles of Confederation was a major impetus for the federal Constitution.¹³³

A narrow reading of the public-use requirement denies the legislature the power to subordinate private property rights to collective economic needs.¹³⁴ But governmental mediation of individual and communal interests has shaped the American economy from its very beginnings. For example, the Commerce Clause gives Congress overarching authority to regulate interstate commerce for the benefit of the national economy, even if its enactments are adverse to particular citizen interests.¹³⁵ The Constitution explicitly empowers Congress to modify individual property interests in other instances as well, most notably in bankruptcy.¹³⁶

Expounding on the scope of the Commerce Clause in *Gibbons v. Ogden*,¹³⁷ Chief Justice John Marshall, a noted Federalist during and after the ratification period, used judicial review to prevent individual rights from imposing an undue burden on community interests. In *Gibbons*, the plaintiff sought enforcement of a Hudson River ferry-service monopoly granted by the state of New York against a rival operator based in New Jersey.¹³⁸ The case is most frequently cited for the proposition that Congress has plenary power to regulate interstate commerce. But Chief Justice Marshall also stated that the community's interest in a flourishing commercial life was of sufficient importance to justify depriving the monopoly holder of his legislatively granted right.¹³⁹ Chief Justice Marshall confirmed the Federalist commitment to governmental involvement in communal economic advancement, stating:

Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities . . . by establishing a uniform and steady system.¹⁴⁰

Opponents of public-purpose takings mistakenly characterize Justice Chase's Due Process argument as an interpretation of the Takings Clause. They also ignore the central importance of economic rationality to the national project conceived by the Federalists during the Revolution and successfully implemented with the

¹³³ *Id.* at 38-39.

¹³⁴ *But cf.* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (redistributing title from lessor to lessee to effect a greater diversity of land ownership).

¹³⁵ U.S. CONST. art. I, § 8, cl. 3.

¹³⁶ *See, e.g., id.* at cl. 4 (granting Congress the power to enact bankruptcy laws).

¹³⁷ *Gibbons v. Ogden*, 22 U.S. 1 (1824) (voiding state grant of monopoly right to individual).

¹³⁸ *Id.* at 1-2.

¹³⁹ *Id.* at 66. For a modern exposition of the connection between wealth in the form of government largess, like the ferry monopoly, and traditional property, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778-79 (1964). Professor Reich also offers some interesting insights into the consequences of regarding property as merely a form of government largess. *See id.* at 779.

¹⁴⁰ *Gibbons*, 22 U.S. at 13.

ratification of the federal Constitution. Accordingly, the argument that public-purpose takings offend the plain meaning of the U.S. Constitution is mistaken.

2. Public-Purpose Takings and Supreme Court Precedent

Eminent-domain opponents also argue that public-purpose takings are contrary to Supreme Court precedent. But these precedent-based objections misplace the origin of the public-purpose-takings doctrine. For instance, Dana Berliner—a lawyer for the Institute for Justice, the pre-eminent property-rights advocacy group—erroneously told the Senate Committee on the Judiciary that “[t]he expansion of the public use doctrine began with the urban renewal movement of the 1950s.”¹⁴¹ Contrary to Ms. Berliner’s assertion, the Supreme Court conflated public use and public purpose as early as 1896.¹⁴²

The distinction between public use and mere public benefit restrained the governmental exercise of eminent domain for roughly a century. Starting in the late 1800s, the growing infrastructure needs of economically important, wholly private industries—such as mining and agriculture—prompted a nascent public-purpose interpretation of the public-use requirement. The earliest public-purpose cases approved condemnations to facilitate the expansion of infrastructure for activities that judges considered beneficial to the broader community. These cases explicitly viewed the takings issue through the lens of economic growth.¹⁴³ As a jurisprudential matter, it is a small step from these economic-growth takings to the economic-redevelopment takings condoned after 1954.¹⁴⁴

a. *The Supreme Court and the Promotion of Economic Growth*

*Fallbrook Irrigation District v. Bradley*¹⁴⁵ opened a new era in Takings Clause jurisprudence, asserting that the Fifth Amendment’s public-use requirement is met if the resulting change in land use produces a significant social benefit. In *Bradley*, a California landowner—Ms. Bradley—refused to pay an assessment levied by the

¹⁴¹ *S. Hearings, supra* note 25, at 37 (prepared statement of Dana Berliner, Institute for Justice, Washington, D.C.).

¹⁴² *See* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

¹⁴³ *See, e.g.,* *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32, 36 (1916) (approving state eminent domain proceeding transferring the water rights of a business with water-intensive manufacturing processes to a hydroelectric power company preparing to construct a dam on the ground that the power generated provides a public benefit of the highest order); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 608 (1908) (approving state eminent domain proceeding compelling a landowner to cede ownership to a railroad for an extension of track to reach a single private industrial customer on the ground that the local mercantile community would benefit from the expanded loading facilities that would result).

¹⁴⁴ For the chain of precedent from *Berman* to *Bradley*, see *Berman v. Parker*, 348 U.S. 26, 35-36 (1954) (urban renewal as economic development) (citing *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552, 555 (1946) (hydroelectric dam as economic development) (citing *Hairston*, 208 U.S. at 607 (1908) (rail freight facilities as economic development) and *Strickley*, 200 U.S. at 531 (mining as economic development) (citing *Clark*, 198 U.S. at 361 (1905) (irrigation ditch as economic development)) (citing in turn *Bradley*, 164 U.S. at 159 (1896) (comprehensive irrigation project as economic development)))).

¹⁴⁵ *Bradley*, 164 U.S. at 112.

local irrigation district and the district foreclosed on her property.¹⁴⁶ In the resulting U.S. Supreme Court case, Ms. Bradley argued that “the use for which the water is to be procured is not in any sense a public one, . . . and *the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the State.*”¹⁴⁷ Thus, the meaning of the phrase “public use” in the Fifth Amendment’s Takings Clause determined the proper judicial resolution of Ms. Bradley’s federal constitutional claim.

i. The Court’s Incorporation Blunder

In 1896, the Fifth Amendment did not protect Ms. Bradley against a state eminent domain action because the Court had not yet incorporated the Takings Clause against the States.¹⁴⁸ Before the ratification of the Fourteenth Amendment,¹⁴⁹ the federal constitutional limitations on eminent domain, like all of the Bill of Rights’ protections for individuals, did not apply to state- and local-government actions.¹⁵⁰ In fact, the Supreme Court did not extend the Takings Clause to cover state expropriations until 1897.¹⁵¹

The establishment of irrigation as a public use in California by state constitution, state statute, and state judicial decision could have made *Bradley* a very simple case. In addition to these favorable elements, the California Supreme Court had already approved the use of eminent domain in the irrigation context.¹⁵² On a strict reading, the California statute would have satisfied the requirements of the Fourteenth Amendment’s Due Process Clause. In *Davidson v. New Orleans*,¹⁵³ the Court noted:

If private property be taken for public uses without just compensation, it must be remembered that, when the [F]ourteenth [A]mendment was adopted, the provision on that subject, in immediate juxtaposition in the

¹⁴⁶ *Id.* at 154, 159. For a fascinating general history of the *Bradley* litigation and its precipitating events, see Kay Russell, *The Fallbrook Irrigation District Case*, 21 J. SAN DIEGO HIST. 23 (1975), available at <https://www.sandiegohistory.org/journal/75spring/fallbrook.htm> (last visited Apr. 8, 2010).

¹⁴⁷ *Bradley*, 164 U.S. at 156 (Peckham, J., majority opinion) (paraphrasing plaintiff’s argument in Court’s opinion) (emphasis added).

¹⁴⁸ *See id.* at 158; *see also* *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

¹⁴⁹ U.S. CONST. amend. XIV, § 1.

¹⁵⁰ *Compare* *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. 233 (1810), *with* *Barron v. Mayor of Balt.*, 32 U.S. 243 (1833).

¹⁵¹ *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 241 (incorporating the Takings Clause as a restriction on state power through the Fourteenth Amendment’s Due Process Clause); *see also* *United Bldg. & Constr. Trades Council of Camden County v. Camden*, 465 U.S. 208, 215 (1984) (stating that “a municipality is merely a political subdivision of the State from which its authority derives . . . what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State” (citation omitted)).

¹⁵² *Bradley*, 164 U.S. at 159.

¹⁵³ *Davidson v. New Orleans*, 96 U.S. 97 (1878).

[F]ifth [A]mendment with the one we are construing [i.e., the Fourteenth Amendment], was left out, and this [due process language] was taken.¹⁵⁴

Thus, *Davidson* explicitly bars the application of the federal Takings Clause to state condemnation actions because the Fourteenth Amendment paraphrases the Fifth Amendment's Due Process Clause, but omits the latter's Takings-Clause language. And Justice Rufus W. Peckham, writing for the *Bradley* majority, cited *Davidson* multiple times in *Bradley*.¹⁵⁵

The *Davidson* Court did admit that some state condemnations might be so egregious as to violate the Fourteenth Amendment's Due Process Clause, echoing Justice Chase's language describing the federal Due Process standard almost eighty years earlier:

It seems to us that a statute which declares in terms, *and without more*, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.¹⁵⁶

The Court seems to contemplate—just as Justice Chase likely did in *Calder*—a private law enacted by the legislative body to transfer title in land without any assertion of broader social benefit. Even the most ardent eminent-domain proponents would condemn this sort of blatant legislative chicanery.

In any event, the centrality of the textual comparison between the Fifth and Fourteenth Amendments to the *Davidson* holding suggests that—at least as of 1877—the Fourteenth Amendment's Due Process Clause did not extend the Takings Clause to the states. In fact, the Court did not explicitly incorporate the Takings Clause against the states until *Chicago, Burlington & Quincy Railroad Co. v. Chicago* in 1897.¹⁵⁷

It is perhaps overly technical to insist that *Bradley*'s extension of the Takings Clause to the states through the Due Process Clause of the Fourteenth Amendment lacks sound doctrinal basis because *Bradley* preceded *Chicago, Burlington & Quincy Railroad Co.* by one year. Nonetheless, property-rights advocates might justifiably attack *Bradley*'s disregard of precedent and reliance on the as-yet-unarticulated incorporation of the Takings Clause. Justice Peckham ascended to the Supreme Court on January 6, 1896,¹⁵⁸ only months before the *Bradley* opinion's release on November 16.¹⁵⁹ Thus, critics might minimize the *Bradley* holding as sloppy jurisprudence by a novice Associate Justice. To the extent that property-rights advocates are motivated by a libertarian worldview, however, they should refrain

¹⁵⁴ *Id.* at 105.

¹⁵⁵ *Bradley*, 164 U.S. at 157-58, 170, 177.

¹⁵⁶ *Davidson*, 96 U.S. at 102 (emphasis added).

¹⁵⁷ *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (applying the Takings Clause as a restriction on state power through the Fourteenth Amendment's Due Process Clause).

¹⁵⁸ 2 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 705 (Thomas T. Lewis & Richard L. Wilson eds. 2001).

¹⁵⁹ *Bradley*, 164 U.S. at 112.

from a general disparagement of Justice Peckham's jurisprudence. Nine years after *Bradley*, he wrote the majority opinion in *Lochner v. New York*,¹⁶⁰ the keystone of the libertarian substantive-due-process doctrine.

ii. Judicial Equation of Public Purpose and Public Use

The Supreme Court had no occasion to directly interpret the public-use requirement until 1875.¹⁶¹ Condemnations by the federal government in the early nineteenth century rarely caused controversy. During this period, federal authorities primarily used eminent domain to acquire property for direct government use.¹⁶² The constitutionality of these takings was beyond reproach, and there was correspondingly little reason for litigation regarding the issue to reach the Supreme Court.¹⁶³ States were far more active users of eminent domain at this time, but they were not bound by the Takings Clause until 1897.¹⁶⁴ Consequently, it was not until *Kohl v. United States*¹⁶⁵ that the Court asserted that only direct government use justified a taking. There, the Court stated that “[t]he proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right.”¹⁶⁶

In 1885, the Court indirectly reaffirmed this doctrinal boundary in *Cole v. La Grange*.¹⁶⁷ Parsing a Takings Clause analogue in the Missouri State Constitution,¹⁶⁸ Justice Horace Gray stated that the clause “clearly presupposes that private property cannot be taken for private use. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever.”¹⁶⁹

In *Bradley*, the Court abruptly changed course. Justice Peckham asserted that direct government use of an improvement, such as the irrigation system at issue, is not a necessary condition for a finding of public use.¹⁷⁰ This statement directly

¹⁶⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶¹ *See Kohl v. United States*, 91 U.S. 367 (1876).

¹⁶² *See, e.g., United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896) (approving federal government condemnation to secure the site of the Gettysburg National Historic Battlefield); *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. 233 (1810).

¹⁶³ Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617-18 (1940).

¹⁶⁴ *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding just compensation to be part of the due process of law incorporated against the states by the Fourteenth Amendment); *cf. Barron v. Mayor Balt.*, 32 U.S. 243 (1833).

¹⁶⁵ *Kohl*, 91 U.S. at 367.

¹⁶⁶ *Id.* at 373-74.

¹⁶⁷ *Cole v. La Grange*, 113 U.S. 1, 7-8 (1885).

¹⁶⁸ *Compare* MO. CONST. of 1865, art. 16 (“[N]o private property ought to be taken or applied to public use without just compensation”), *with* U.S. CONST. amend. V, cl. 4 (“[N]or shall private property be taken for public use without just compensation”).

¹⁶⁹ *Cole*, 113 U.S. at 8 (citations omitted).

¹⁷⁰ *Bradley*, 164 U.S. at 161-62.

contradicts the standard of direct governmental use enunciated in *Kohl* and *Cole*, yet Justice Peckham provided no analysis to justify his rejection of the precedent.¹⁷¹ The California State Constitution explicitly defined the “sale, rental or distribution” of water “to be a public use,” and the California Supreme Court had already declared the irrigation statute compatible with the state constitution.¹⁷² Thus, denied any other constitutional claim, Ms. Bradley asserted that the California statute violated federal Due Process:

It is claimed, . . . that the citizen is deprived of his property *without due process of law*, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. *In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government.*¹⁷³

Having laid out Ms. Bradley’s claim and established the Court’s jurisdiction, Justice Peckham then asked, “Is this assessment, for the non-payment of which the land of the plaintiff was to be sold, levied for a public purpose?”¹⁷⁴ It is the first of several instances in which he interchangeably used “public purpose,” “public use,” and “public interest.”¹⁷⁵

The *Bradley* majority framed the case as a conflict between overall economic growth and individual property rights.¹⁷⁶ Justice Peckham worked hard to convey the importance of the economic opportunity at hand:

While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State.¹⁷⁷

The Court concluded that all California landowners should pay to create an irrigation system to serve particular private parties. It reasoned that forgoing the economic activity that the irrigation would generate was unthinkable and held that

¹⁷¹ *Id.* at 158-62.

¹⁷² *Id.* at 159.

¹⁷³ *Id.* at 158 (emphasis added); *see also* U.S. CONST. amend. XIV, § 1.

¹⁷⁴ *Bradley*, 164 U.S. at 158.

¹⁷⁵ *See generally id.* at 158-61.

¹⁷⁶ *Id.* at 152-53.

¹⁷⁷ *Id.* at 161.

“we have no doubt that the irrigation of really arid lands is a *public purpose*, and the water thus used is put to a *public use*.”¹⁷⁸ Despite the fact that the local irrigation district served other private individuals at a cost to Ms. Bradley, the U.S. Supreme Court found that the taking was justified because the resulting agricultural-productivity gains fostered economic activity and augmented the food supply.¹⁷⁹

In subsequent eminent-domain decisions, the Court subordinated individual ownership rights by applying *Bradley*'s public-purpose rationale in diverse factual circumstances to satisfy the exigencies of a growing economy.¹⁸⁰ For instance, in the twenty years following *Bradley*, public-purpose doctrine greatly expanded the power of eminent domain for irrigation purposes.¹⁸¹ In 1896, the Court broke with precedent and compelled Ms. Bradley to help finance construction of a comprehensive system of irrigation on the property of others.¹⁸² Nine years later, the Court employed the same rationale to force an owner to permit alteration of an existing irrigation ditch on his property to benefit unrelated parties.¹⁸³ After two decades, the Court had sufficiently expanded the doctrine to require an owner to accept construction of a drainage ditch across his own previously undisturbed land for the economic benefit of others.¹⁸⁴

b. A New Role for the Court—Economic Regulation

The Supreme Court's takings jurisprudence in support of socially beneficial private infrastructure presaged the expansion of the public-purpose rationale to serve the emerging discipline of urban planning. That discipline arose in response to the

¹⁷⁸ *Id.* at 164 (emphasis added).

¹⁷⁹ *Id.* at 161, 164.

¹⁸⁰ *See, e.g.,* *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923) (upholding an eminent domain action to dispossess an owner of land used to build a scenic highway spur despite the fact that the highway stopped abruptly at the county line and hence was useless as a public thoroughfare); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32, 36 (1916) (examining a hydroelectric power case); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606-07 (1908) (explaining a railway siding case); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (allowing an eminent domain action to compel a property owner to grant an easement to enable mining companies to bring lucrative mineral deposits to market efficiently).

¹⁸¹ *See* *O'Neill v. Leamer*, 239 U.S. 244, 254 (1915) (approving state eminent domain proceeding compelling one landowner to grant an easement for construction of a new drainage ditch across his land to reclaim wetlands owned by others on the ground that draining the affected area would benefit multiple landowners and improve public health and welfare); *Clark v. Nash*, 198 U.S. at 370-71 (1905) (approving state eminent domain proceeding compelling one landowner to expand his existing irrigation ditch to serve one adjacent landowner on the ground that supporting the value and fertility of the second parcel constituted a public use).

¹⁸² *Bradley*, 164 U.S. at 161.

¹⁸³ *Clark*, 198 U.S. at 370-71.

¹⁸⁴ *O'Neill*, 239 U.S. at 254.

runaway growth of American cities in the late nineteenth century.¹⁸⁵ One of the most daunting political tasks of the urban heyday was the creation of a new legal order to mitigate the harmful excesses of this demographic and economic growth.¹⁸⁶ Justified as a means to regulate—rather than to solely promote—economic growth, the new rules significantly impacted American property rights.¹⁸⁷

The most significant municipal effort to regulate the physical growth of cities in this period was the enactment of municipal zoning laws. Before zoning ordinances, the common law of nuisance constrained a property owner in a less absolute manner by preventing owners from using their property in ways that interfered with the quiet enjoyment of their neighbors.¹⁸⁸ Nuisance cases are decided after a case specific facts-and-circumstances inquiry. Ordinances codifying the categorical pronouncements of a professional class of land-use planners gave municipal officials a powerful new tool to comprehensively direct the physical development of their cities. Governments justified compulsory zoning laws and the discretionary power of unelected planners by saying that scientific application of universal planning principles could prevent “undesirable” land-use patterns. Modern-day eminent-domain critics frequently question whether public officials actually know better than private users when it comes to land-use planning.¹⁸⁹

Private-autonomy concerns notwithstanding, the Supreme Court supported the extension of planning authority over private owners in *Village of Euclid v. Ambler Realty*.¹⁹⁰ In *Ambler*, the property owner alleged significant real-estate depreciation after the city enacted zoning legislation that barred a more lucrative industrial use on

¹⁸⁵ For the argument that the nineteenth-century American city was an engine of economic and physical growth driven by unrestrained private choice, see SAM BASS WARNER, JR., *THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH* 4 (1968).

¹⁸⁶ ELY, *supra* note 132, at 8.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

¹⁸⁹ See, e.g., *H. Hearings*, *supra* note 25, at 77 (email from Mary Cortes, Camden, N.J.) (arguing that Camden, N.J. residents know better than the city’s planners what is best for their neighborhood); *S. Hearings*, *supra* note 63, at 143 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (recounting experience of Lawnside, N.J. residents—an historic black community dating back to the 1700s—who were “pretty happy with the lives we’ve carved out for ourselves” and dismayed that the planning authorities never consulted them during the planning process); *id.* at 72 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (quoting Justice Stevens, author of the *Kelo* majority, as saying, essentially, that the market knows best); *id.* at 25 (testimony of Sen. Jeff Sessions, Ala.) (“Sometimes, those good mayors out there who are determined to move their cities forward become less concerned about a person’s constitutional right to their property and more concerned about making the city a better place to live, *in their idea of what is best.*” (emphasis added)). For a seminal argument in the modern property-rights movement’s assault on the wisdom of planners, see generally BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1974).

¹⁹⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

the land in favor of less profitable residential uses.¹⁹¹ The Court upheld the zoning regulation because it was substantially related to the public's general welfare.¹⁹²

Despite this victory for growth regulation, zoning laws failed to prevent the fiscal mismatch now gripping many vertical cities.¹⁹³ Zoning laws are a passive control on property, inoperative until private actors seek to alter existing land uses. Thus, zoning as a land-use control depends upon growth and investment. The passivity of zoning controls explains why they are unable to address the disinvestment that characterizes urban decline.

To address urban disinvestment, planners developed a slum-clearance model that involved the condemnation and demolition of unmaintained buildings.¹⁹⁴ In *Berman v. Parker*,¹⁹⁵ the Supreme Court considered the sufficiency of a comprehensive blight-removal plan as a public-purpose rationale for the taking of private property. A group of private owners objected to the condemnation of their department store, which was well-maintained despite being located within the blighted area.¹⁹⁶

For the Supreme Court, the legislature's assertion that reversing neighborhood decline required comprehensive slum clearance provided a valid public purpose that trumped the interests of the individual owners.¹⁹⁷ Justice William O. Douglas, substituting the phrase "public welfare" for Justice Peckham's "public interest" and "public purpose," eloquently captured the expansiveness of the public-purpose requirement:

The concept of the *public welfare* is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.¹⁹⁸

This highly permissive approach to governmental takings is a long way from the *Kohl* Court's early holding that eminent domain was legitimate only if the

¹⁹¹ *Id.* at 384.

¹⁹² *Id.* at 395.

¹⁹³ For the argument that lawmakers enacted—and judges upheld—zoning laws to reinforce geographic inequality between cities and suburbs, see generally David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

¹⁹⁴ See generally Joseph Heathcott, *The City Quietly Remade: National Programs and Local Agendas in the Movement to Clear the Slums, 1942-1952*, 34 J. URB. HIST. 221 (2008).

¹⁹⁵ *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁹⁶ *Id.* at 31.

¹⁹⁷ *Id.* at 34.

¹⁹⁸ *Id.* at 33 (emphasis added) (citation omitted).

government employed the citizen's property for its direct use.¹⁹⁹ But Justice Douglas' analysis is only a short distance from the *Bradley* Court's equation of public benefit and public use.²⁰⁰

In *Kelo*, the Supreme Court reiterated that the ostensible public purposes advanced by the legislature to support an eminent domain action are not susceptible to substantive judicial review.²⁰¹ The case involved the taking of non-blighted residences in an economically depressed, but unblighted, neighborhood in conjunction with a comprehensive economic-redevelopment plan for the area.²⁰² The majority of the contested properties were in the right-of-way of planned new roadways and, therefore, might have been justifiably condemned under the direct-government-use test first enunciated in *Kohl*.²⁰³ The City of New London's attorneys downplayed this argument to provide the Court with an opportunity to rule on whether economic-development plans permit the taking of property from one private party for transfer to another.²⁰⁴ The Court obliged, holding such takings constitutional provided that the redevelopment plan emerges from an inclusive planning process,²⁰⁵ bears no indication of an illegitimate attempt to benefit specific private parties,²⁰⁶ and state law does not restrict public-purpose takings.²⁰⁷

Writing for the majority, Justice John Paul Stevens made what prospectively appeared to be a commonplace observation about condemnations for economic-development purposes: "[N]either precedent nor logic supports [the contention that economic development is not a public use]. Promoting economic development is a traditional and long-accepted function of government."²⁰⁸ Justice Stevens explicitly cited *Bradley* and several of its progeny in support of these assertions.²⁰⁹

¹⁹⁹ *Kohl v. United States*, 91 U.S. 367, 373-74 (1875).

²⁰⁰ *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 157-58, 163 (1896).

²⁰¹ *Kelo v. City of New London*, 545 U.S. 469, 487-89 (2005).

²⁰² *Id.* at 483-84.

²⁰³ George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 808-09, 809 n.22 (2008).

²⁰⁴ *Id.*

²⁰⁵ *Kelo*, 545 U.S. at 484.

²⁰⁶ *Id.* at 486-87.

²⁰⁷ *Id.* at 489.

²⁰⁸ *Id.* at 484.

²⁰⁹ In *Kelo*, Justice Stevens cited *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (cited at *Kelo*, 545 U.S. at 480 n.10); *O'Neill v. Leamer*, 239 U.S. 244, 253 (1915) (cited at *Kelo*, 545 U.S. at 483 n.11); *Hairston v. Danville & W.R. Co.*, 208 U.S. 598, 606-07 (1908) (cited at *Kelo*, 545 U.S. at 482); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (cited at *Kelo*, 545 U.S. at 480, 483 n.11, 484, 486 n.16); *Clark v. Nash*, 198 U.S. 361, 367-68 (1905) (cited at *Kelo*, 545 U.S. at 480 n.9, 483 n.11); and *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896) (cited at *Kelo*, 545 U.S. at 480).

Although *Kelo* broke little new doctrinal ground,²¹⁰ the decision generated an unexpected firestorm of controversy.²¹¹ Responding to the outcry, virtually every state considered whether to restrict public-purpose takings.²¹² Some states rejected the deferential *Kelo* approach.²¹³ There are several possible explanations for the divergence of state and federal law. State actors may have proven more sympathetic to incorrect formulations of the philosophy of property rights advanced by eminent-domain opponents.²¹⁴ The expansionist mythology of the American frontier may be more sacrosanct in the eyes of states, the majority of which owe their existence to national expansion.²¹⁵ Finally, the pragmatic concerns attendant upon every exercise of eminent domain may loom larger in the minds of state officials.²¹⁶ Lawmakers seeking to curb eminent-domain abuse often focused on compensation reform.²¹⁷ States that instead fixated on a category-based approach to public use merely revived the theoretical difficulties that accompany any effort to narrowly define “public use” in a post-*Bradley* world.²¹⁸

c. Promoting Economic Growth and the Resulting Judicial Conundrum

As discussed above, Justice Peckham’s *Bradley* opinion elides the distinction between “public use,” public benefit,” and “public purpose.” We have also seen that the *Bradley* Court cites the practical needs of a growing economy, rather than precedent or legal reasoning, as justification for the expropriation of private property. Despite the weaknesses of the *Bradley* opinion that created the public-

²¹⁰ Thomas W. Merrill, *Six Myths About Kelo*, 20 PROB. & PROP. 19, 19-20 (2006).

²¹¹ For one admission of surprise at the outcry provoked by the *Kelo* opinion, see S. Hearings, *supra* note 63, at 14 (testimony of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.). For a representative cross-section of the voluminous post-*Kelo* debate, see generally AM. BAR ASS’N, SECTION OF STATE AND GOV’T LAW, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²¹² Costonis, *supra* note 33, at 399; see also Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799 (2008); Christopher W. Smart, *Legislative and Judicial Reactions to Kelo: Eminent Domain’s Continuing Role in Redevelopment*, PROB. & PROP., Mar.-Apr. 2008, at 60-62.

²¹³ See, e.g., OR. REV. STAT. § 195.305 (2009); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); Shelby C. Stone, Comment, *Two Tales of One City: Eminent Domain Post-Katrina and a Response to Kelo*, 53 LOY. L. REV. 115, 142-47 (2007) (discussing Louisiana constitutional amendments passed in response to *Kelo*); see also Costonis, *supra* note 33, at 412-20; Eagle & Perotti, *supra* note 212, *passim*; Smart, *supra* note 212, at 60-62.

²¹⁴ See *infra* Part III.B.

²¹⁵ See *infra* Part III.C.

²¹⁶ See *infra* Part III.D.

²¹⁷ See, e.g., Harris K. Weiner, *Eminent Domain and Economic Development: Rhode Island General Assembly Addresses Kelo v. City of New London*, 57 R.I.B.J. 13, 13 (describing Rhode Island’s choice to impose just-compensation minimum of 150% of fair market value for economic-development takings).

²¹⁸ Costonis, *supra* note 33, at 409-10.

purpose justification, its longevity offers the best available explanation for the *Kelo* majority's portrayal of the precedent as incontrovertible. One of the curiosities of the *Kelo* opinion is that the Court's more-liberal members took an uncharacteristically rigid approach to the relevant precedent, while its more-conservative members downplayed the importance of that prior case law in their dissents. Some time after the decision, in a highly unusual public comment, Justice Stevens stated that he disfavored the practical consequences of his own judicial opinion.²¹⁹ For Stevens, *Bradley*'s persistence dictated an inescapable result despite his personal misgivings.

The attractiveness of the economic-growth idiom explains *Bradley*'s endurance as legal precedent. Appeals to social utility hold powerful rhetorical force, especially when an economic-growth opportunity is involved. Consider Justice Oliver Wendell Holmes, Jr.'s disposition of an eminent-domain case benefiting a private utility company:

In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to [generate electricity] is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. *If that purpose is not public, we should be at a loss to say what is.*²²⁰

To further buttress his legal conclusion, Justice Holmes cited a string of cases that themselves rely upon *Bradley* as precedent.²²¹

It is tempting to reject *Bradley* and its progeny because of this policy-based jurisprudence. In pursuit of the commendable goal of ending eminent domain abuse, such a rejection of judicial precedent would upend previously settled questions about the legitimacy of condemnations to support power generation, railroad transportation, and other key segments of the American economy.²²² Uprooting so much precedent is a daunting prospect for judges, not to be undertaken lightly. In the 1980s, Professor Bernard H. Siegan—one of the progenitors of the property-rights movement—lost a federal appellate judgeship largely because he advocated a

²¹⁹ Tony Mauro, *Five Ways Appellate Courts Can Help the News Media*, 9 J. APP. PRAC. & PROCESS 311, 315 (2007).

²²⁰ *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (emphasis added).

²²¹ In *Mt. Vernon-Woodberry*, 240 U.S. at 32, Justice Holmes cited *O'Neill v. Leamer*, 239 U.S. 244, 253 (1915); *Hairston v. Danville & W.R. Co.*, 208 U.S. 598, 607 (1908); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); and *Clark v. Nash*, 198 U.S. 361, 367-68 (1905).

²²² *H. Hearings*, *supra* note 25, at 78 (prepared statement of Edward H. Comer, Edison Electrical Institute, Washington, D.C.) (warning Congress not to disturb "traditional" definitions of "public use" in ways that would forestall land assembly by utility companies, arguing among other things that "electricity is closely tied to growth in the economy, not only paralleling that growth, but facilitating it through improvements in workplace and energy efficiency").

judicial rejection of decades of precedent to resurrect the *Lochner* era's substantive-due-process doctrine.²²³

Excising the pre-*Berman* cases from the public-purpose debate conveniently avoids the confrontation between the growth facilitation so central to American expectations of government and the equally important emphasis in American thought on individual autonomy. In her testimony before the House Subcommittee on the Constitution, Ms. Berliner illustrated the conflict between defining public use in absolute terms and preserving the power of eminent domain where its use is vital to economic growth.²²⁴ She initially contended that "public use" means public ownership, saying, "Public use is—most people find it to be fairly clear, and to mean use and ownership by the public as opposed to some sort of possible public benefit."²²⁵ When pressed, however, she offered a more expansive view of the requirement, saying, "I think that the kinds of things that eminent domain could be used for would be actual public ownership, public utilities, common carriers and to deal with things like abandoned property or public nuisances, but not for private commercial development beyond that."²²⁶

But thorough analysis of precedent prevents selective reading of the Supreme Court's pronouncements on the public-purpose takings question. Reconsidering the critique of *Berman*-style economic-redevelopment takings, the true objection is to the government's assertion of net social gain rather than a claim that eminent-domain disputes should not be subjected to this sort of economic calculus. Economic redevelopment lacks the unalloyed excitement that accompanies economic-growth proposals in previously undeveloped areas. Many times, a proposed land-use plan shuffles around a few streets and consolidates some parcels—all to facilitate the replacement of the existing structures with some higher-value use. It is easier to regard power generation, irrigation, and the like as socially beneficial, perhaps because Americans view a redevelopment proposal as an admission that the first attempt to order the social consumption of land was a failure. Irrigation plans and redevelopment plans are both grounded in economic-efficiency concerns, but only the redevelopment plan carries with it this taint of defeat. The claim that the Supreme Court misread the relevant case law is untenable to anyone unwilling to reject our modern economy. Rather, the argument should be that the Court improperly calculated condemnation's social benefits in certain eminent-domain cases. Compensation that properly values the loss to displaced owners and a Kaldor-Hicks-efficiency analysis of those purported social benefits preserves needed flexibility for condemning authorities while preventing injustice to individual landholders.

B. Natural Law Permits Public-Purpose Takings

The most philosophically profound argument against public-purpose takings is that they violate the natural law of property. This argument appears in three

²²³ Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES, Apr. 1, 2006, at B8.

²²⁴ *H. Hearings*, *supra* note 25, at 46, 53 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.).

²²⁵ *Id.* at 46.

²²⁶ *Id.* at 53.

variations, each fatally flawed. First, the argument that property rights are essential to democracy contradicts the modern understanding of political participation, an understanding that John Locke's writings on consent fostered in pre-Revolutionary American thought. Second, the assertion that property rights are inviolable natural rights blurs the distinction between English "ancient rights" and universal rights grounded in natural law. Moreover, it proves too much, for if private property rights were inviolable, *no* exercise of eminent domain would be justifiable. Third, the claim that property rights are inherent in the rule of law proves too little because a legal regime can support private property rights in every way necessary for maximum social utility without rendering them absolute. Accordingly, the natural-law objections to public-purpose takings are founded in error.

1. Property Rights and Democratic Citizenship

Proponents and opponents of public-purpose takings agree that people have "important autonomy interests" in their property.²²⁷ Opponents go farther, however, and suggest that property ownership is essential to independent democratic citizenship. Professor Steven J. Eagle, for instance, states that "[o]wnership of one's home, and also ownership of one's business, gives a sense of independence that permits and encourages participation in civic and political life as a full member of the community, and not as a supplicant dependent upon government largess."²²⁸

a. Property and Civic Identity

In the English common-law tradition, property was the source of autonomous civic identity. Common law theorists thought independent property rights safeguarded the capacity for resistance to autocratic royal power and created individual agency in more mundane political activities. As Professor Hendrik Hartog noted:

In the seventeenth and eighteenth centuries property was defined not simply as material possessions but as all the attributes of personality that created individuality. . . . It was the quality, the permanence, and the security of an individual's property rights that gave him political significance.

Property, then, was a guarantee of independence. Without it there was no protection from "the political dependence upon others which constitutes corruption." The autonomy that property made possible was not simply a form of resistance to interference or intervention. It was closely tied to the very possibility of an individualized personality, to a classical notion of citizenship.²²⁹

²²⁷ *S. Hearings*, *supra* note 63, at 15 (testimony of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (testifying as a proponent of public-purpose takings); *accord H. Hearings*, *supra* note 25, at 25 (prepared statement of Michael Cristofaro, New London, Conn.) (testifying as an opponent of public-purpose takings); *S. Hearings*, *supra* note 63, at 29 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.).

²²⁸ *S. Hearings*, *supra* note 63, at 63 (prepared statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

²²⁹ HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 23-24 (1983) (citation omitted); *see also*

These pre-Revolutionary notions of property differ greatly from the modern understanding. During that time, one's inherited social standing was a part of one's property. Contemporary theorists saw an individual's property and his civic personality, in the sense of his capacity for individual political action, as conterminous.²³⁰

Some participants in early debates over American suffrage used the physical dependency inherent in propertylessness to justify restricting the franchise. Political theorists thought that individuals without property were vulnerable to pressure from their providers.²³¹ More fundamentally, thinkers such as John Adams saw these individuals as "incapable of making independent, rational decisions."²³² Locke subverted this paradigm by suggesting that individual agency depends upon rational understanding, not property ownership. Professor Holly Brewer traces the radicalism of Locke in this regard, noting, for instance, that Locke "gave examples of women who, based on their experience, used their reason well. . . . In short, his argument was that a 'country gentle-woman' has greater understanding than a learned clergyman versed in syllogisms."²³³ Experience, not property, is the source of reason in the Lockean formulation.²³⁴ As Professor Brewer says, "Locke clearly accentuated reason, or mental independence, as critical to freedom, but he correlated this mental independence only weakly with physical independence, or property ownership."²³⁵

Furthermore, property ownership might create political sycophancy rather than a salutary independence from government. Tracing the connection between ownership and submission to authority, Locke wrote that "every man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it."²³⁶ Property ownership might also press owners toward corrupted servility to despotic power.²³⁷ For instance, the country gentry that opposed royal power in eighteenth-century England was dependent upon Royal and Parliamentary power to enforce its prerogatives against the lower classes.²³⁸ This dependence restrained the radicalism of English dissident elites.²³⁹ In America, by contrast, local elites maintained their privileges

J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 507 (1975).

²³⁰ HARTOG, *supra* note 229, at 24.

²³¹ *Id.*

²³² HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 43 (2003); *see also* HARTOG, *supra* note 229, at 24.

²³³ BREWER, *supra* note 232, at 96-97.

²³⁴ *Id.*

²³⁵ *Id.* at 92.

²³⁶ PETER LASLETT, *TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS* 336 (1963).

²³⁷ POCOCK, *supra* note 229, at 508.

²³⁸ *Id.* at 508-09.

²³⁹ *Id.* at 508.

within colonial society with less assistance from the distant power of the Crown.²⁴⁰ It is no coincidence that American elites were correspondingly more prone than their English peers to a radicalization of political views.²⁴¹

b. Locke, Political Legitimacy, and Property

Some modern defenders of private property claim that the Lockean social contract gives rise to an absolute right to private property.²⁴² Numerous commentators favorably quote Locke's statement, "Lives, Liberties, and Estates, which I call by the general Name, Property" as evidence that the philosopher's compact theory of government represents an eighteenth-century wellspring of property rights.²⁴³ Roger Pilon—a Cato Institute scholar—uses Locke's formulation of the social contract to argue that the power of eminent domain has no valid source in a contract theory of government.²⁴⁴ One modern day eminent-domain opponent quoted Samuel Adams, who justified colonial resistance to the Crown in seemingly Lockean terms when he said, "Among the natural rights of the colonists are these: first, a right to life; secondly, to liberty; thirdly to property; together with the right to support and defend them in the best manner they can."²⁴⁵

Locke was unquestionably a part of the intellectual milieu of the Revolutionary generation.²⁴⁶ But his primary contribution to Revolutionary political theory was to provide justifications for the rejection of the British monarchy and a philosophical source for the new states' sovereignty.²⁴⁷ Locke secularized the doctrine of consent, a means of legitimating political authority that John Milton and others derived from Protestant theology.²⁴⁸ These thinkers developed the doctrine from the principle that all people were born equal and, therefore, were free to choose obedience to a just ruler and—more pertinently for contemporary Anglo-American dissidents—resistance to an unjust one.²⁴⁹ Consent theory deemphasized the connection between

²⁴⁰ *Id.* at 507-09.

²⁴¹ *Id.* at 509.

²⁴² See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 7-18 (1985).

²⁴³ See, e.g., *S. Hearings*, *supra* note 63, at 63 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (quoting Locke's *SECOND TREATISE OF GOVERNMENT* without citation); see also *H. Hearings*, *supra* note 25, at 112 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.) (contending that Locke reduces all rights to property).

²⁴⁴ *H. Hearings*, *supra* note 25, at 112 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.).

²⁴⁵ *Id.* at 92 (prepared statement of Scott A. Mahan, Ardmore, Pa.) (citation omitted).

²⁴⁶ Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 *AM. POL. SCI. REV.* 189, 189-90 (1984). But see James Philip Reid, *The Irrelevance of the Declaration*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN AMERICAN LAW* 46, 71 (Hendrik Hartog ed., 1981).

²⁴⁷ BREWER, *supra* note 232, at 97; Lutz, *supra* note 246, at 192-93.

²⁴⁸ BREWER, *supra* note 232, at 101.

²⁴⁹ *Id.* at 92, 101.

property ownership and political participation, significantly reducing the role of property in the maintenance of individual freedom.²⁵⁰ The conclusion that even the propertyless were capable of both agency and resistance exploded “the fragile connection between property, independence, and reason.”²⁵¹ By doing so, consent theory discredited classical thinkers’ attempts to justify hierarchical political relationships on the basis of property ownership. Thus, contrary to the assertions of property-rights advocates, Locke’s work—particularly his writings on the role of consent in legitimating the sovereignty of government—reduced the importance of property ownership for democratic citizenship.

c. American Republicanism in the Absence of a Landed Gentry

Revolutionary leaders valued Locke’s contribution to consent theory, but Montesquieu was more influential than Locke in the development of American constitutional thought.²⁵² As Professor Brewer noted, “In eighteenth-century North America, students were more likely to be familiar with [Locke’s] *Essay concerning Human Understanding* and *Some Thoughts concerning Education* than with his treatises on government.”²⁵³ After using Locke to establish political legitimacy, state leaders structured their new governments in classical republican—not Lockean—terms.²⁵⁴ Largely through the writings of Montesquieu, Machiavellian ideas about the tension between virtue and corruption became fundamental tenets of American Revolutionary politics.²⁵⁵ Machiavelli explained the failure of the Roman Republic as the triumph of political corruption—itsself caused by imperial expansion—over the public virtue that was necessary for republicanism to persist.²⁵⁶

The self-restraint that constitutes public virtue in the classical republican theory of government requires each citizen to acknowledge his membership in the class of either the One, the Few, or the Many.²⁵⁷ The republican citizen is expected to temper his individual self-interest to actualize his class-determined role in civil society, while leaving to the other classes those activities and expressions inherent in their role within the polity.²⁵⁸ Corruption begins when members of any class place self-interest over the fulfillment of their appointed roles. And classical theory held that corruption, if left unchecked, would lead to the downfall of the republic.

Colonial Americans were predisposed to anxiety about corruption and its consequences.²⁵⁹ After all, the presence of native communities within and beyond

²⁵⁰ *Id.* at 44.

²⁵¹ *Id.*

²⁵² POCOCK, *supra* note 229, at 527; Lutz, *supra* note 246, at 190, 192-93; *see also* POCOCK, *supra* note 229, at 518 (noting that Federalist ideas about representative government were Hobbesian rather than Lockean).

²⁵³ BREWER, *supra* note 232, at 97.

²⁵⁴ POCOCK, *supra* note 229, at 527; Lutz, *supra* note 246, at 192-93.

²⁵⁵ POCOCK, *supra* note 229, at 527, 545; Lutz, *supra* note 246, at 192-93.

²⁵⁶ POCOCK, *supra* note 229, at 510.

²⁵⁷ *Id.* at 516-17.

²⁵⁸ *Id.* at 515-16.

²⁵⁹ *Id.* at 509.

colonial borders provided a ready analogue for the Germanic barbarians that emerged from the wilderness to sack the corrupted Roman Empire.²⁶⁰ And the combination of physical isolation from Great Britain and increasingly active attempts by the Crown to project imperial power across that divide only increased the colonists' sense that American civic virtue lay besieged.²⁶¹ Revolutionary intellectuals imagined that the political model of the free republic would prevent the overreaching that had corrupted the mother country.²⁶²

The American Revolutionaries hoped that an aristocratic few would emerge naturally in post-colonial society.²⁶³ The colonies lacked an existing class of nobility because "an ancient aristocracy was hard to establish in a new society and a manorial nobility did not seem to thrive under settler conditions."²⁶⁴ The consensus among American political thinkers was that any artificially created aristocracy would be a captive agent of the appointing governor.²⁶⁵ The obsequiousness of such a false aristocracy would render it incapable of providing the independent check on the one that republican theory demanded.²⁶⁶ When the natural aristocracy presupposed by republican theorists failed to emerge, however, it precipitated a crisis in American political thought.²⁶⁷

Undergirding the classical conception of republican socio-political balance was the understanding that one's property was the indicator of one's class. The Federalist response to the absence of aristocrats in the New World republic was to argue for an undifferentiated body politic governed on Lockean consensual principles.²⁶⁸ As we have seen, those principles reject any link between property ownership and civic capacity.²⁶⁹ Because the class deference inherent in classical-republican virtue was absent from this model, the architects of the new national government anticipated the unrestrained expression of factional ambition by erecting structural safeguards to prevent the dominance of any one faction.²⁷⁰ Importantly,

²⁶⁰ PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* 40-41, 45-46, 66 (2008) (describing colonists' fear of native attack); *see also* MICHAEL L. NUNNALLY, *AMERICAN INDIAN WARS: A CHRONOLOGY OF CONFRONTATIONS BETWEEN NATIVE PEOPLES AND SETTLERS AND THE UNITED STATES MILITARY, 1500S-1901*, at 24-62 (2007) (cataloguing voluminous eighteenth-century incidents of native violence against individual colonists and communities).

²⁶¹ POCOCK, *supra* note 229, at 509.

²⁶² *Id.* at 511.

²⁶³ *Id.* at 514.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 514-15.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 515-17.

²⁶⁸ *Id.* at 520-21.

²⁶⁹ *See* discussion *supra* Part III.B.1.a.

²⁷⁰ POCOCK, *supra* note 229, at 522 (citing THE FEDERALIST NO. 10 as the "locus classicus" of this structural shift).

“the capacity of this structure for absorbing and reconciling conflicting interests is without known limits.”²⁷¹ Further, the separation of powers to address the needs of interest-group politics could be justified in familiar republican terms, allowing the American elite to deceive even themselves as to the sweep of their ideological transformation.²⁷²

Thus, the American departure from the stratification, deference, and pre-determined social roles of classical republicanism necessitated the investiture of all citizens with both civic identity and political opportunity as birthrights. This recapitulation of classical republicanism set the stage for the Jacksonian democratic reforms that would eventually lead to universal suffrage. Lockean consent theory had earlier proven essential to American justifications for the rebellion against the British Crown. By turning again to Lockean consent theory to justify interest-group politics and resolve the crisis in republican political thought, the founders of the American republic struck a blow that would ultimately remove property as a precondition of political life. As this intellectual history shows, the American democratic experiment did not emphasize the purported conjunction of property ownership and civic identity. Rather, it refuted that connection in unequivocal terms.

2. Property Rights, Natural Rights, and Natural Law

Some eminent-domain opponents argue that private property is a natural right, implying that ownership rights are absolute. Cicero defined natural law as “right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. . . . This law cannot be contradicted by any other law, . . . [and] in all times and nations this universal law must for ever reign.”²⁷³ Senator Sam Brownback provides a typical property-as-natural-right formulation: “Even before the existence of the United States, William Blackstone stated that ‘the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.’”²⁷⁴ But if Blackstone’s inviolable private right is to garner the force of Cicero’s natural law, it must be universal law, applying to all societies in all historical periods.

The nexus in the Anglo-American mind of property rights, personal liberty, and the opportunity for economic advancement has a long history, dating back at least to Magna Carta.²⁷⁵ In 1215, British nobles compelled King John to agree that he could not seize the lands or crops of his subjects without compensating them for their

²⁷¹ *Id.*

²⁷² *Id.* at 525.

²⁷³ 16 CICERO IN TWENTY-EIGHT VOLUMES 211 (Clinton Walker Keyes trans. 1977).

²⁷⁴ *S. Hearings*, *supra* note 63, at 46-47 (opening statement of Sen. Sam Brownback, Kan.) (alteration in original); *see also id.* at 64 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (arguing that property rights and human rights are indistinguishable); *id.* at 25 (testimony of Sen. Sam Brownback, Kan.) (arguing that one of the reasons *Kelo* was so contentious was because it seemed to imply that one’s property was “not sacred”); Roger Pilon, *Town of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. REV. 101, Part II.A (2005).

²⁷⁵ ELY, *supra* note 132, at 13.

losses.²⁷⁶ Thus, the compensation requirement has limited Anglo-American eminent domain for almost eight hundred years. The length of a tradition, however, is insufficient to confer upon it the moral legitimacy of natural law. For instance, slavery—practiced in America and its predecessor colonies for over two hundred years²⁷⁷—was grounded in a tradition dating back to ancient times.²⁷⁸ American slave owners justified the enslavement of Africans by denying the humanity of the enslaved population.²⁷⁹ Unchecked prejudice, not natural law, provided the theoretical framework for treating human slaves as property.

In American legal theory, the very act of European discovery dispossessed Native Americans.²⁸⁰ But the European explorer planting his flag upon a desolate beachfront effects a dispossession every bit as violent as any seizure of a Briton's lands or corn by the British monarch.²⁸¹ To the extent that they bothered, Anglo-American colonial theorists justified disregard for native title by citing the superiority of European agricultural cultivation over the natives' more pastoral modes of existence.²⁸² That assertion of superiority relies on utilitarian notions about productive land use, not any universal claim based upon natural law.²⁸³ As an ironic aside, eminent-domain opponents who cite both Locke and natural law should beware, as Locke's writings unequivocally condone colonial expropriations of native real property.²⁸⁴

The American colonists did not sense a contradiction between their claims against the British government and their treatment of other cultures. The "natural rights" of the founding generation were their British constitutional rights under Blackstonian common law, rather than a set of universal rights derived from classical natural law.²⁸⁵ Justifying their resistance to the Crown as a Lockean withdrawal of consent following abuse of their historical rights, the Revolutionaries fought to restore their rights as Englishmen—not to usher in a new era of universal human rights.²⁸⁶ The genocidal treatment of Native Americans and the enslavement of

²⁷⁶ *Id.*

²⁷⁷ JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 56-57, 58, 218 (7th ed. 1994).

²⁷⁸ JUNIUS P. RODRIGUEZ, *CHRONOLOGY OF WORLD SLAVERY* 1, 4 (1999).

²⁷⁹ WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 304-08 (1968).

²⁸⁰ *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

²⁸¹ *Compare* Magna Carta (1215), *with Johnson*, 21 U.S. at 574.

²⁸² WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 69, 77-81 (1983); *see also* DIANA WHITE HORSE CAPP, *BROTHER AGAINST BROTHER: AMERICA'S NEW WAR OVER LAND RIGHTS* (2002).

²⁸³ CRONON, *supra* note 282, at 77-81.

²⁸⁴ *Id.* at 78-80.

²⁸⁵ Reid, *supra* note 246, at 48, 61, 68, 72, 75, 85, 87-88, 89. For an illuminating discussion of the distinction between the Lockean social contract arising out of the hypothetical state of nature and the distinctly British original compact between Crown and subject, which Locke also wrote about, *see id.* at 72-77.

²⁸⁶ *Id.* at 48, 61, 68, 72, 75, 85, 87-88, 89.

imported Africans presented no ideological contradiction for the colonists. Those matters were outside the scope of the liberties that the revolutionaries fought so hard to redeem.²⁸⁷ Thus, while there certainly was some correspondence between patently British original rights and universal rights derived from natural law, there were important distinctions as well. The European indifference to Native American land claims and the endorsement of chattel slavery in the New World undermine the moral absolutism of the natural-law argument against eminent domain in American cities.

Libertarian assertions that property rights founded in natural law formed the centerpiece of the American constitutional project oversimplify the contemporaneous intellectual ferment. And the violations of natural law at the inception of the Anglo-American property system in North America doom any effort to cloak American real-estate title with absolute immutability based on the universalist principles of natural law. Moreover, the argument that natural rights derived from the English common law provide an inviolate right to property proves too much. An inviolate right to property would render the Takings Clause superfluous, for compensation is unnecessary if government cannot take private property in the first place. Accordingly, natural-law objections to public-purpose takings are also not well taken because they would curtail actual-use takings clearly within the powers granted by the Constitution.

3. Property Rights and the Rule of Law

Property-rights advocates argue that an unconditional right to private property is an essential characteristic of the rule of law. Professor Eagle framed this point by saying that “[t]he rule of law is inconsistent with the notion that everyone’s property is up for grabs.”²⁸⁸ In her testimony before the House Subcommittee, Ms. Berliner implied that if some residents wish to remain in an area, the government has to let them.²⁸⁹ And Michael Cristofaro, one of dispossessed homeowners in New London, stated:

In the end, it’s not about the money—it is the loss of choice. With economic development in a free market, the property owner chooses whether or not to sell. In a free market, the price is determined by what the market will bear. Choice belongs both to the one selling—and the one buying. By keeping the threat of eminent domain in the municipal “toolbox” of economic development, government takes away a fundamental right of its citizens to choose.²⁹⁰

Emphasizing this theme of individual autonomy, Professor Eagle argued that, when interpreting the Takings Clause, the elision of public use, public benefit, and

²⁸⁷ *Id.* at 53-54.

²⁸⁸ *S. Hearings, supra* note 63, at 17 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.); *see also id.* at 29 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.); *id.* at 4 (statement of Sen. John Cornyn, Tex.).

²⁸⁹ *H. Hearings, supra* note 25, at 47 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.).

²⁹⁰ *Id.* at 25 (prepared statement of Michael Cristofaro, New London, Conn.).

public purpose “transmutes fee simple ownership into conditional ownership. In effect, the individual . . . now becomes a tenant at will.”²⁹¹

Those who maintain that public-purpose takings circumvent the Fifth Amendment’s public-use requirement are saying that property is not relational. This objection implicitly projects an anachronistically modern understanding of the public/private distinction backward into history.²⁹² The objection also invokes the discredited Blackstonian myth of ownership as unqualified dominion.²⁹³ Even opponents of public-purpose takings concede that property rights, from whatever source derived, are not absolute.²⁹⁴ Throughout history, private ownership has conditioned—and been conditioned by—the owner’s relationship to the rest of society.²⁹⁵ Accordingly, Professor Eagle’s implicit equation of fee simple title and unqualified dominion proves too much because it suggests that condemnations ought to be banned outright. Mr. Cristofaro’s emphasis on the potential for coercion likewise applies in all eminent-domain cases.

But government can justifiably modify the rights of the freeholder when external costs reach a sufficient magnitude. The government should mediate individual behavior when it poses externalities—by preventing realization of a public good or itself generating a negative externality—above a certain threshold.²⁹⁶ Admittedly, locating the boundary between public interest and private property is fraught with difficulty.²⁹⁷ But Ms. Berliner’s uncompromising insistence on the fulfillment of individual expectations, if it unduly compromises the public good, abuses the public fisc. Indulgence of such abuse causes harm to the polity as a whole.

C. *The American Tradition Should Not Prevent Smart-Decline Takings*

Some opponents of eminent domain argue that public-purpose takings violate fundamental American values.²⁹⁸ Continuous growth and individual property

²⁹¹ *S. Hearings, supra* note 63, at 64 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

²⁹² Chris Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219, 225-26 (2006).

²⁹³ GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 3-4 (2006).

²⁹⁴ See, e.g., *H. Hearings, supra* note 25, at 47 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (indicating that the taking of abandoned property is legitimate, thus evidencing her beliefs both that property rights are not inviolate and that property is relational); *S. Hearings, supra* note 63, at 112 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.) (arguing that eminent domain is suspect on principle and should be disfavored, but admitting that the practicalities require it to mediate between individual and communal interests in holdout situations).

²⁹⁵ Sagers, *supra* note 292, at 245-46.

²⁹⁶ For an argument that American courts should adopt an explicit social-obligation norm as a touchstone of American takings jurisprudence, see ALEXANDER, *supra* note 293, at 223-35.

²⁹⁷ See Sagers, *supra* note 292, at 229-30.

²⁹⁸ *H. Hearings, supra* note 25, at 74 (email from Margaret Cobb, Atlanta, Ga.) (contending that “[n]othing is more sacred to Americans than their land and their freedoms to worship as they please, and maintain privacy and opportunity”); *id.* at 63 (prepared statement

ownership are such vital elements of American self-understanding that some observers will regard wholesale decommissioning as antithetical to our defining political mythology.²⁹⁹ The national creation story sees physical expansion, economic growth, and individual property rights as central to public morals and democratic freedom.

Federalist thinkers analyzing the nation-building project through the lens of classical republicanism solved the conundrum of the absent American aristocracy. They fused the Lockean notion that civic identity is independent of property ownership with a system of structural checks against interest-group factionalism. Revolutionary thinkers also recapitulated the societal role of property by suggesting that imperial corruption could be postponed indefinitely, even in the face of geographic expansion, by the broad distribution of property ownership among the citizens.³⁰⁰ The resultant agrarian republicanism combined with the millennialist and utopian strands of colonial thought to forge a powerful ideological impetus for westward expansion.³⁰¹ By “ideological,” I mean deriving from “a partial vision of the world that appears to its proponents as well as to its victims as a universal vision.”³⁰² The power of ideology explains how ideas about the way American society should be ordered—even if not accurate predictors of the social results that will flow from implementing those ideas—can motivate social action based on their apparent validity.

A regularly expanding supply of previously unowned land is the easiest context in which to balance the possessory interests of existing owners with the ideological desire to expose current non-owners to the putatively moralizing effects of land ownership.³⁰³ In the late 1820s, American clergyman and frontier intellectual Timothy Flint coined the phrase “fee simple empire” to describe what he saw as the moral and aesthetic superiority of life on small Western farms.³⁰⁴ Flint thought that widespread Western property ownership inculcated a set of values superior to both

of Dr. Eni Foo, Ardmore, Pa.) (sharing that immigrant restaurant owners’ eminent domain experience undermined their belief in America as a “land of freedom and justice, free from fear”); *id.* at 63 (email from Jim Campano, Somerville, Mass.) (arguing that condemnation of occupied residential property for economic development is “un-American” and “akin to going back to the days of kings and royalty when they could just come in and throw you out on the street”); *S. Hearings*, *supra* note 63, at 126 (testimony of Gopal K. Panday, Long Branch, N.J.) (asking Congress to stop politicians using eminent domain in contravention of “our ‘Basic Entrenched Values’ and ‘Private Property’”); *id.* at 27 (testimony of Sen. Jon Kyl, Ariz.) (labeling private property “a bedrock of who we are” as Americans).

²⁹⁹ For a discussion of the role that growth plays in American self-image, see POCOCK, *supra* note 229, at 507.

³⁰⁰ *Id.* at 511.

³⁰¹ *Id.* at 511-13.

³⁰² Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 94 (1984).

³⁰³ For a graphical representation of the expanding-pie concept, see EPSTEIN, *supra* note 242, at 4. For additional discussion of the concept and its place in the American self-understanding, see also POCOCK, *supra* note 229, at 528.

³⁰⁴ HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH 140, 280 (1950) (quoting Timothy Flint, *Book Review of Alexander Hill Everett’s AMERICA*, in 1 WESTERN MONTHLY REVIEW 169, 169-70 (July 1827)).

the amoral existence of harried, unpropertied Northern mill workers and the corrupted planter indolence of the Southern plantation system.³⁰⁵ Scholars have since used the phrase to describe the peculiarly American premise that the geographical expansion of individual property rights could preserve the moral character of a democratic polity.³⁰⁶

The American colonial arrangement, with a comparatively fluid social order and vast natural resources, presented the tantalizing possibility that non-owners could acquire property without a redistribution of the lands and other wealth of existing owners. This paradigm necessarily required negotiations with—or forcible dispossession of—the Native Americans previously occupying the land.³⁰⁷ Despite the anxieties incident to the clash between native and European culture, the attractiveness of the available economic opportunities helped populate the British colonies.³⁰⁸ And property played an essential role in the project of preserving the civic virtue of the new polity. For instance, the free alienation of property was an essential and novel element of Revolutionary thought. Noah Webster noted that property transfer was essential to preserving the virtuous dynamism of the fee simple empire, writing that “[a]n equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic*.”³⁰⁹

But with growth in American cities grinding to a halt and even reversing itself, the potential for amelioration of underlying material inequalities by way of an ever-expanding pie evaporates. Further, the present circumstances of poor homeowners in distressed parts of America’s urban core directly contradict the notion that property ownership leads to a virtuous prosperity. If historical results suggest that property ownership fails to produce the political benefits ascribed to it, the prospect of such benefits, at least in situations where the failed promise is evident, should not be deployed to prevent efforts to remedy the consequences of our false hope. There is nothing but our own ideological preconceptions to deny that smart decline is a viable response to our present circumstances.³¹⁰ Acceptance of neutral or declining demand for urban land is jarringly unprecedented in the American consciousness, but need not remain so. As Professors Popper and Popper note:

³⁰⁵ *Id.*

³⁰⁶ See, e.g., POCOCK, *supra* note 229, at 538-42; SMITH, *supra* note 304, at 133-44.

³⁰⁷ See generally DEE ALEXANDER BROWN, BURY MY HEART AT WOUNDED KNEE (1971); CRONON, *supra* note 282.

³⁰⁸ ELY, *supra* note 132, at 10; see also *H. Hearings*, *supra* note 25, at 74 (email from Margaret Cobb, Atlanta, Ga.) (contending that property rights were one of the key reasons that Europeans settled America); *id.* at 61 (prepared statement of Carla J. Zambelli, Haverford, Pa.) (arguing that freedom of speech, freedom of religion, and the right to own property drew European settlers to the American colonies); *S. Hearings*, *supra* note 63, at 63 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (contending that the promise of fee simple title was a key inducement to immigrants from Europe to the colonies).

³⁰⁹ POCOCK, *supra* note 229, at 534 (citation omitted).

³¹⁰ For a discussion of ideology’s disorienting effect, see Gordon, *supra* note 302, at 94.

Our history and our planning have given us a sense that the U.S. population is on a permanent roll, that it will inevitably continue to increase nearly everywhere. This belief has in it a strong element of myth. . . . [T]he American infatuation with growth has always meant overlooking an important chunk of reality.³¹¹

Fee simple empire, the American descendant of classical republicanism, is one variant of what Professor Robert W. Gordon has called evolutionary functionalism.³¹² By evolutionary functionalism, Professor Gordon means the overarching idea “that the natural and proper evolution of a society . . . is towards the type of liberal capitalism seen in the advanced Western nations . . . , and that the natural and proper function of a legal system is to facilitate such an evolution.”³¹³ The promise of fee simple empire breaks down in American cities precisely because of its excessively deterministic explanation of historical processes.³¹⁴ By retaining historical notions of fee simple empire in our collective consciousness, we needlessly inhibit our ability to envision forward-thinking policy solutions to the property abandonment that is eviscerating our aging cities.

D. Public-Purpose Takings—The Public-Policy Concerns

Policy-based objections to public-purpose takings take three forms: objections to procedure, disavowal of benefit, and disputed costs. All three concerns can be resolved through compensation reform and the adoption of a Kaldor-Hicks-efficiency test for public use.

1. Procedure-Focused Policy Objections

Procedural objections focus on the private owner’s ability to rebut the government’s asserted justification for the condemnation. They are grounded in the argument that the owner lacks sufficient opportunity to dispute the purported costs and benefits of the expropriation. In some cases, the government’s abuse of the process can give its version of the costs and benefits an unfair rhetorical advantage. For instance, government officials sometimes deliberately obscure the planning process to reduce public participation.³¹⁵ Condemning authorities can also make selective use of experts, disparaging the conclusions of independent studies that support the private-owners’ points of view.³¹⁶ The city and the developer often agree

³¹¹ Popper & Popper, *supra* note 13, at 20.

³¹² Gordon, *supra* note 302, at 94.

³¹³ *Id.* at 59.

³¹⁴ POCOCK, *supra* note 229, at 537; Gordon, *supra* note 302, at 94.

³¹⁵ *S. Hearings*, *supra* note 63, at 158-59 (testimony of Andrea C. Zinko & Jody Casey, San Diego, Cal.) (detailing misinformation by authorities and lack of notice related to redevelopment project involving eminent domain in “the most heavily minority and lower income community” in San Diego, Cal.).

³¹⁶ *H. Hearings*, *supra* note 25, at 64 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (stating that township officials commissioned Urban Land Institute study group to validate eminent domain proposal, but dismissed the group as “experts [who] had never understood the Ardmore situation” when study results recommended historic preservation over eminent domain); *see also id.* at 93 (testimony of Scott A. Mahan, Ardmore, Pa.) (recounting the same events).

to the details of a development project before announcing the deal, rendering the subsequent public hearings perfunctory.³¹⁷ When the planning authorities disempower private citizens in these ways, it can be hard for an individual owner to know where to turn for information and assistance.³¹⁸ The U.S. Supreme Court resolved these concerns by requiring in *Kelo* that any development plan used to justify a public-purpose taking be the product of a participatory planning process.³¹⁹

Some observers criticize public-purpose takings because they disproportionately affect the poor, the elderly, and racial or ethnic minorities.³²⁰ These critics note that disadvantaged groups rarely participate in advance discussions about the decision to employ eminent domain, despite frequently being among the dispossessed.³²¹ In addition to their absence from the planning process, these groups are ill-equipped to contest an eminent domain action. As the NAACP's Hilary O. Shelton noted, "Condemnation in low-income or predominantly minority neighborhoods is often easier to accomplish because these groups are less likely or are often unable to

³¹⁷ *S. Hearings, supra* note 63, at 91 (prepared statement, Institute for Justice, Arlington, Va.); *see, e.g., H. Hearings, supra* note 25, at 93 (prepared statement of Scott A. Mahan, Ardmore, Pa.) (describing Ardmore, Pa. hearings where the township officials ignored witnesses, who were granted no more than three minutes each to testify); *id.* at 64 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (describing same Ardmore, Pa. hearings).

³¹⁸ *H. Hearings, supra* note 25, at 131 (letter from Thomas J. Picinich, New London, Conn.) (communicating inability to obtain assistance from city government and referral instead to the redevelopment agency that was condemning his home). Utah has created an eminent-domain ombudsman to give citizens assistance and information when their property is threatened with eminent domain. *S. Hearings, supra* note 63, at 21 (testimony of Sen. Orrin Hatch, Utah).

³¹⁹ *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

³²⁰ *See, e.g., H. Hearings, supra* note 25, at 56 (prepared statement of Rep. John Conyers, Jr., Mich.) (echoing NAACP's concern that the burdens of eminent domain fall disproportionately upon minorities, elderly and poor); *S. Hearings, supra* note 63, at 4 (statement of Sen. John Cornyn, Tex.) (echoing the same concern); *see id.* at 12 (statement Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (stating that racial and ethnic minorities are affected more frequently and more profoundly by eminent domain); *see also H. Hearings, supra* note 25, at 68 (prepared statement of Ken Taylor, Wayne, Pa.) (noting disproportionate impact of Ardmore, Pa. eminent domain on areas "where people of color live and shop" and suggesting that "the municipalities in this area are unwittingly participating in an economic form of discrimination for the sole purpose of generating greater tax revenues."); *S. Hearings, supra* note 63, at 143-45 (statement Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (citing instances of eminent domain actions against minorities); *id.* at 44 (statement of Linda Brnicevic & Cameron McEwen, Bound Brook, N.J.) (noting that eminent domain action following record flood was not stopped despite the fact that the predominance of Hispanics among affected Bound Brook, N.J. property owners led to U.S. Department of Justice civil rights action against the city).

³²¹ *See, e.g., H. Hearings, supra* note 25, at 44-45, 49 (testimony of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (admitting that the NAACP's major objection to eminent domain is the lack of participation in the eminent domain decision-making process by minorities and their resulting disempowerment); *S. Hearings, supra* note 63, at 26, 27 (testimony of Sen. Jon Kyl, Ariz.) (arguing that the under-representation of poor in the development planning process is an insoluble problem).

contest the actions either politically or in our Nation's courts."³²² But political disempowerment lurks in all eminent-domain scenarios, not just those involving public-purpose takings. Statutory increases to the amount of compensation paid would both discourage municipalities from targeting the powerless and more equitably offset the burden of condemnation in those cases where municipalities used eminent domain.

Perhaps the most common objection to eminent-domain procedures is that they impose excessive costs on individuals who wish to challenge the government's action.³²³ First, attorney costs present an often-insurmountable obstacle for private challengers. A property owner contesting the facial legitimacy of a condemnation collects no money if successful; the owner's legal victory merely compels the government to stop its eminent-domain action.³²⁴ The absence of damages requires owners to fund their legal expenses directly, an option that may be beyond their means. An owner who only litigates to obtain additional compensation might offer an attorney a percentage of any increased award. But the economics of such engagements are not attractive to most attorneys.³²⁵ Some advocates have suggested that prevailing property owners should be granted a statutory right to recover

³²² *S. Hearings, supra* note 63, at 12-13 (statement Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.).

³²³ *See, e.g., H. Hearings, supra* note 25, at 131, 132 (letter from Thomas J. Picinich, New London, Conn.) (complaining that he must post a deposit with the court before appealing compensation award for his home while still obligated to make mortgage payments to his private lender); *id.* at 97 (email from Andrina Sofos, Daly City, Cal.) (complaining that she must defend against condemnation of her commercial property with her own money while the city allegedly uses "HUD grants" to fund its legal costs); *id.* at 75 (prepared statement of Rosemary Cubas, Philadelphia, Pa.) (noting that low-income residents are forced to fight off eminent domain effort with limited resources that would otherwise have been used to reinvigorate the neighborhood); *id.* at 74 (email from Leon Howlett, Glendale, Ky.) (arguing that "those of us with little resources will suffer most" in the face of bullying abuse of eminent domain by local government); *S. Hearings, supra* note 63, at 103 (testimony Bruce R. MacCloud, Long Branch, N.J.) (describing personal and financial costs associated with his decision to fight eminent domain action); *id.* at 77 (statement of Don & Lynn Farris, Lakewood, Ohio) (citing loss of productivity in their business while they fought eminent domain).

³²⁴ *See, e.g., H. Hearings, supra* note 25, at 131, 132 (letter from Thomas J. Picinich, New London, Conn.) (reporting difficulty finding vigorous legal representation); *id.* at 23-24 (prepared statement of Michael Cristofaro, New London, Conn.) (describing discouragement from attorneys who saw no way to undertake the representation but through "large retainer fees" that the Cristofaros "wouldn't be able to recoup" from the city even in a winning case); *S. Hearings, supra* note 63, at 102 (testimony of Dorothy E. Littrell, Ogden, Utah) (citing attorney costs as motivation for her pro se representation in eminent domain fight in Ogden, Utah).

³²⁵ *Compare S. Hearings, supra* note 63, at 26 (testimony of Sen. Jeff Sessions, Ala.) (noting that the costs to contest an eminent domain proceeding through trial are likely to exceed even a contingent fee amount on any additional compensation obtained for the private owner), *with id.* at 28 (testimony of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (arguing that Congress should focus on increasing compensation awards because a prohibition of public-purpose takings would present no opportunity to structure a contingency fee).

attorney fees.³²⁶ Statutory attorney fees, however, risk a flood of litigation. Idiosyncratic value awards force the government to fairly compensate the dispossessed owner, and a Kaldor-Hicks-efficiency standard ensures that governments will not commence unjustified condemnations. These solutions maximize the incentives for negotiated sales between owners and governments, thereby reducing the need for compulsory purchases in the first place. Thus, these solutions reduce the risks associated with a statutory resolution of the attorney-fee challenge by reducing the instances in which the parties will resort to litigation.

Standing problems also present considerable obstacles for property owners. Professor Eagle argues that federal courts wrongly delay standing for property claims couched in constitutional terms.³²⁷ For instance, a property owner cannot claim a constitutional violation until the city formally initiates eminent-domain proceedings, even when the city announces the possibility of eminent domain years in advance. In addition to being unable to prospectively challenge the legitimacy of the taking itself, owners cannot contest the adequacy of a compensation award until they have received confirmation of the putatively inadequate amount from the condemning authority.³²⁸

The resulting temporal uncertainty presents affected property owners with a Hobson's choice about the maintenance of their property.³²⁹ If they do not invest, they risk foreclosure and building-code enforcement because the mere announcement of the government's intent to use eminent domain does not suspend

³²⁶ *H. Hearings, supra* note 25, at 148 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (noting that contingent fees do not help business or residential tenants, as they will not collect beyond their actual costs, and arguing for statutory recovery of attorneys' fees for successful private litigants).

³²⁷ *S. Hearings, supra* note 63, at 68 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

³²⁸ *See, e.g., H. Hearings, supra* note 25, at 132 (letter from Thomas J. Picinich, New London, Conn.) (complaining as a homeowner forced to make mortgage payments of \$1,200 per month for two years following the seizure and demolition of his home to preserve his rights to contest his compensation award in court); *id.* at 100-01 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (indicating that extended litigation timeline to challenge any compensation award means that their business would fold long before their claim was resolved).

³²⁹ *See, e.g., id.* at 147 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (arguing for earlier grant of federal standing to relieve owners' uncertainty while waiting for their taking claims to ripen and noting that delay in eminent domain proceedings leaves owners and commercial tenants at risk that "any funds expended on maintenance or upkeep may be wasted if the building will eventually be torn down"); *id.* at 100 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (complaining that condemning authority maintained a cloud of uncertainty that prevented prudent decision-making by private owners); *S. Hearings, supra* note 63, at 44 (statement of Linda Brnicevic & Cameron McEwen, Bound Brook, N.J.) (complaining of municipal authority to seize flooded residential and commercial property at any time during or after the U.S. Army Corps of Engineers' completion of a flood control project, leaving the affected property owners to contemplate whether to repair the flood damage while facing the prospect of eminent domain for a ten- to fifteen-year timeframe); *id.* at 42 (testimony of Robert Blue, Hollywood, Cal.) (noting that the prospect of eminent domain has discouraged his family from making investments in their business or its premises for two years).

the owner's mortgage, property-tax, or maintenance obligations. But if an owner does invest and the threatened seizure occurs, current compensation law makes no allowance for the investment or attempted use that the condemnation cuts short.

When *Kelo* was before the Connecticut Supreme Court, Justice Peter T. Zarella dissented from the majority's approval of New London's condemnations.³³⁰ Justice Zarella argued that the government should have to prove by clear and convincing evidence that the purported benefits were likely to materialize.³³¹ By putting the condemning authority to its proof at the outset, a clear-and-convincing evidentiary standard coupled with a Kaldor-Hicks-efficiency test for public use enables courts to quickly map the dispositive issues and take the evidence necessary for their resolution.³³² Thus, armed with an effective rule of decision, courts could grant standing earlier and alleviate a significant financial burden on individuals challenging condemnations.

2. Benefit-Focused Policy Objections

Even in instances where fair procedures are scrupulously observed, critics note that government officials frequently overvalue the projected economic gains from public projects.³³³ Despite lofty promises of economic stimulus and job creation, economic-development projects involving eminent domain often underperform.³³⁴ Eminent-domain opponents argue that economic-development projects can be done without employing eminent domain at all.³³⁵ Critics also insist that smaller economic-development projects—which are less likely to need eminent domain for land assembly—are more likely to succeed.³³⁶ In some cases, cities use eminent

³³⁰ *Kelo v. City of New London*, 843 A.2d 500, 574-602 (Conn. 2004) (Zarella, J., dissenting in part), *aff'd*, 545 U.S. 469 (2005).

³³¹ *Id.* at 596.

³³² For a fuller discussion of the judicial mechanics of this proposal, see *infra* Part IV.A.

³³³ See, e.g., *S. Hearings*, *supra* note 63, at 30 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.); see generally Louis De Alessi, *Implications of Property Rights for Government Investment Choices*, 59 AM. ECON. REV. 13 (1969).

³³⁴ See, e.g., *H. Hearings*, *supra* note 25, at 143 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (observing that economic-development benefits are frequently overstated); *S. Hearings*, *supra* note 63, at 39 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (noting that Toledo, Ohio condemned 83 homes and 16 businesses in 1999 to facilitate expansion of DaimlerChrysler automotive plant only to see significantly less than expected job growth); see also *id.* at 102 (testimony of Dorothy E. Littrell, Ogden, Utah) (noting that Ogden, Utah has debts of \$76 million on projects that failed to live up to economic-development expectations); *id.* at 90 (prepared statement of Institute for Justice, Arlington, Va.) (observing that economic-development benefits are frequently overstated).

³³⁵ See, e.g., *H. Hearings*, *supra* note 25, at 131 (letter from Thomas J. Picinich, New London, Conn.) (noting that, while his home was ostensibly needed to create a four-lane access road to the new Pfizer complex and other to-be-determined development, the existing two-lane road “had previously easily handled traffic from the much larger Naval Underwater Sound Lab”); *S. Hearings*, *supra* note 63, at 90 (prepared statement of Institute for Justice, Arlington, Va.).

³³⁶ See, e.g., *S. Hearings*, *supra* note 63, at 77 (testimony of Don & Lynn Farris, Lakewood, Ohio) (suggesting that smaller projects are less risky and better engage citizens as

domain for a project despite a successful private project nearby that has no coerced land sales.³³⁷ In other cases, the developer never builds the end use that ostensibly justified the condemnation.³³⁸ Furthermore, the use of eminent domain to attract companies pits communities against one another, meaning that the loss of tax base in another—perhaps equally distressed—community offsets the economic benefit realized by the condemning authority.³³⁹ Business relocation decisions are distorted when government subsidy—including low-cost land assembly through eminent domain—encourages businesses to relocate to areas that are not naturally advantageous for the company.³⁴⁰

Professor Richard A. Epstein doubts that government officials can be trusted to set aside personal motives and quash high-profile proposals that lack true social benefits.³⁴¹ Public officials frequently overinvest in projects to burnish their image.³⁴² Eminent domain should not be used to execute projects that, while creating the impression of bold leadership, produce only a marginal net social benefit. Such projects are not Kaldor-Hicks efficient and would be barred if courts

agents of community improvement); *id.* at 43 (testimony of Robert Blue, Hollywood, Cal.) (citing local newspaper article stating that smaller projects are more likely to succeed).

³³⁷ *See, e.g., id.* at 58-59 (letter from Bart Didden, Port Chester, N.Y.) (stating that Port Chester, N.Y. was condemning his land, despite his signed lease and approved building permits to construct a new CVS drugstore, so that the village could convey the land to a “preferred developer” who planned to install a Walgreens drugstore on the property); *id.* at 42 (testimony of Robert Blue, Hollywood, Cal.) (noting that the property owner across the street is pursuing a comparably-sized redevelopment project with no government subsidy, including no eminent domain).

³³⁸ *H. Hearings, supra* note 25, at 74 (email from Leon Howlett, Glendale, Ky.) (noting that, after assembling 1,500 adjacent acres for a Hyundai factory, county condemned his 110-acre farm—only to see Hyundai opt for a site in Alabama); *id.* at 68 (email from “Daniel,” Rock Hill, Mo.) (recounting Rock Hill, Mo. aldermen’s designation of neighborhood as blighted with no subsequent redevelopment despite passage of nearly a decade and condemnation on another occasion—purportedly to build community center—that resulted in sale to private developer); *id.* at 23 (prepared statement of Michael Cristofaro, New London, Conn.) (describing New London’s expropriation of his parents’ first home for a sea wall that was never built); *id.* at 10 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (“The homes [in New London, Conn.] are—some of them are being taken for something or another. No one knows what. Some of the homes are being taken for an office the developer already [has] said it’s not going to build.”); *S. Hearings, supra* note 63, at 39 (testimony Dana Berliner, Institute for Justice, Washington, D.C.) (noting lack of construction activity at condemned New Cassel, N.Y. site that church congregation intended to build new church on, forcing church to rent elsewhere for years).

³³⁹ *S. Hearings, supra* note 63, at 31 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.); *id.* at 18 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.)

³⁴⁰ *Id.* at 17 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

³⁴¹ EPSTEIN, *supra* note 242, at 7-18; *see also* Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561 (1986) (reviewing EPSTEIN).

³⁴² De Alessi, *supra* note 333, at 19-20.

interpreted the public-use requirement as requiring such efficiency. Officials sponsoring municipal-contraction proposals prove their own humility by acknowledging the strategic value of retreat. Rapacious or megalomaniacal public officials are unlikely to pursue a wholesale-decommissioning strategy because it lacks both glamour and immediate profit. Also, the cost-savings justification for smart-decline takings is less prone to overstatement than inherently more speculative revenue-enhancing proposals because the municipality's historical capital expenditure and operating expense records are readily available.

In the condemnation context, a pervasive conflict of interest heightens the risk of bad-faith governmental behavior. The opportunity to exercise eminent domain in furtherance of projects that produce collective benefits tempts local government officials to downplay their obligation to safeguard the interests of each individual citizen.³⁴³ As Senator Jeff Sessions remarked, "The city, let's be frank, has a conflict of interest. The city is going to get a lot more property tax, and the county and the State will if you have got an expensive home or an expensive development there than a middle-class home."³⁴⁴ Professor Eagle concurred, noting:

The path of least resistance for state legislators is to avoid making hard choices concerning taxes, social need, and among programs competing for public funding. It is easier to encourage distressed cities to profit from condemning homes and small businesses, assembling their small lots into large parcels more attractive to commercial development, and transferring these at nominal cost as a subsidy for businesses that might bring jobs and taxes. In a real sense, then, condemnation for economic development is of direct financial benefit to the State.³⁴⁵

³⁴³ *S. Hearings, supra* note 63, at 18 (statement Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (noting that the condemning authority's tendency to focus on the logic and quality of the deal, as between that authority and the private developer, ignores the inadequacy of compensation received by individual condemnees).

³⁴⁴ *Id.* at 25 (testimony of Sen. Jeff Sessions, Ala.); *see also H. Hearings, supra* note 25, at 59 (prepared statement of American Farm Bureau Federation, Washington, D.C.) (suggesting that states' interest in maximizing local revenues will limit their interest in denying local governments an opportunity to increase the value of the property tax base by discouraging eminent domain abuse); *id.* at 101 (testimony of Dorothy E. Littrell, Ogden, Utah) (arguing that redevelopment agencies provide an opportunity for elected officials to don a different hat and avoid accountability to the electorate); *id.* at 79 (statement, Dan Freier, Minneapolis, Minn.) (arguing that mayor's support of eminent domain that will adversely affect affordable housing is driven by the mayor's desire for a marquee project to support his upcoming run for a Minnesota State Senate seat); *id.* at 17-18 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (noting that cities and states, because of their dependence upon tax revenues, have an incentive to be obsequious toward private development partners).

³⁴⁵ *S. Hearings, supra* note 63, at 65 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.); *see also id.* at 13 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (noting the self-interest that motivates state and local governments to "replace areas of low property value with those with higher property values"); *id.* at 7 (statement of Susette Kelo, New London, Conn.) (arguing that taking of her home and others was simply to increase municipal tax revenues).

Justice Sandra Day O'Connor argued in her *Kelo* dissent that it is hard to separate redevelopment-taking gains that accrue to the city from those that benefit the private developer.³⁴⁶

Used wantonly, eminent domain exposes the government to accusations that the development proposal is merely an expression of preference for certain land uses.³⁴⁷ As Mr. Shelton observed, "Many studies contend that the goal of many of these displacements is to segregate and maintain the isolation of the poor, minority, and otherwise outcast populations."³⁴⁸ A related concern is that eminent domain constitutes a reverse wealth transfer from the less fortunate to those at the top of the local political and economic hierarchy.³⁴⁹ Justice O'Connor's oft-quoted remark eloquently conjures the image of a grasping government bent on reverse wealth transfers: "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."³⁵⁰ The Institute for Justice warns that eminent domain for economic development opens the door to land speculation by the city itself.³⁵¹ All too often the actions of local condemning authorities confirm these

³⁴⁶ *Id.* at 70 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (quoting O'Connor's *Kelo* dissent at 545 U.S. at 502); *see also id.* at 17 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

³⁴⁷ *See, e.g., H. Hearings, supra* note 25, at 69 (prepared statement of Ken Taylor, Wayne, Pa.) (asserting that public-purpose takings constitute "a financially-motivated class, [sic] war"); *id.* at 61 (prepared statement of Carla J. Zambelli, Haverford, Pa.) (calling public-purpose takings "economic segregation and class warfare"); *id.* at 59 (prepared statement of American Farm Bureau Federation, Washington, D.C.) (noting that agricultural use, because it generates a lower return on investment in land, is more vulnerable to eminent domain for economic development); *id.* at 42 (testimony of Michael Cristofaro, New London, Conn.) (arguing that the New London redevelopment plan sought the replacement of poor and middle-class homeowners by a residential elite); *S. Hearings, supra* note 63, at 7 (statement of Susette Kelo, New London, Conn.) (arguing that the New London redevelopment plan sought the replacement of poor and middle-class homeowners by a residential elite). Notably, good national data regarding the prevalence of eminent domain was not available when Congress was considering legislative responses to *Kelo*. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 13-14 (2006) (GAO-07-28), *available at* www.gao.gov/cgi-bin/getrpt?GAO-07-28; *see also* Jesse Saginor, Eminent Domain and Its Use as an Economic Development Tool 279 (2006) (unpublished Ph. D. dissertation, Cleveland State University), <http://proquest.umi.com/pqdweb?did=1172122571&sid=10&Fmt=6&clientId=3951&RQT=309&VName=PQD&cfc=1>.

³⁴⁸ *S. Hearings, supra* note 63, at 12 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.).

³⁴⁹ *Id.*; *see also id.* at 69 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.); *id.* at 26 (testimony of Sen. Jon Kyl, Ariz.); *id.* at 17 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

³⁵⁰ *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting). For favorable citations to Justice O'Connor's remark, *see, e.g., S. Hearings, supra* note 63, at 4 (statement of Sen. John Cornyn, Tex.).

³⁵¹ *S. Hearings, supra* note 63, at 88 (prepared statement of Institute for Justice, Arlington, Va.).

fears.³⁵² Nowhere is it clearer than in the accusations of reverse wealth transfer that the core injustice in most eminent-domain abuse cases is a compensation problem, not a scope-of-the-takings-power problem. Requiring condemning authorities to adequately compensate the affected owners renders accusations of wealth transfer untenable. The owners' wealth will change its form, but the overall value of that wealth remains the same.

Another common charge against public-purpose takings is that they constitute a conspiracy of government officials and private elites to dispossess ordinary citizens.³⁵³ As Professor Eagle observed about Justice Stevens' inclusionary planning process in *Kelo*:

³⁵² See, e.g., *H. Hearings*, *supra* note 25, at 69 (prepared statement of Stanford Cramer, Harrisburg, Pa.); *S. Hearings*, *supra* note 63, at 137 (testimony of Daniel P. Regenold, Cincinnati, Ohio) (noting that Evendale, Ohio employed the threat of eminent domain to gain control over owners because it was advised that "everyone was doing it"); *Id.* at 44 (statement of Linda Brnicevic & Cameron McEwen, Bound Brook, N.J.) (recounting story of Bound Brook, N.J., where city officials responded to the worst flood on record by commencing eminent domain to replace the flooded residential and commercial buildings with "a private developer's office park"); *Id.* at 37 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (arguing that *Kelo* has only encouraged governments to take property for private development and listing examples).

³⁵³ See, e.g., *H. Hearings*, *supra* note 25, at 142 (news article submitted by Bart Didden, Port Chester, N.Y.) (submitting newspaper article detailing the unseemly connections between village officials, a private developer, and local attorneys condemning land for economic-development project); *id.* at 131 (letter from Thomas J. Picinich, New London, Conn.) (claiming, as a homeowner, that "a Pfizer executive's wife organized the theft of my neighborhood"); *id.* at 103 (testimony of Brian Calvert, Derby, Conn.) (accusing "multi billionaire company" of colluding with government to use eminent domain to obtain land at below-market prices); *id.* at 100 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (complaining that condemning authority allowed developer to miss several planning deadlines while significantly altering project scope); *id.* at 77 (email from Nick Ericson, Duluth, Minn.) (accusing Duluth Housing Redevelopment Authority of preferential letting of contracts in connection with public housing at private homeowner's expense); *id.* at 63 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (relating opinion that township's efforts to condemn their restaurant was intended to convey title to "a powerful and rich developer"); *id.* at 62 (email from Rosa Sutton Holmes, Riviera, Fla.) (bemoaning the taking of a close friend's property in West Palm Beach, Fla. for the benefit of other private owners, CSX Transportation, and the State of Florida without proper payment); *S. Hearings*, *supra* note 63, at 138 (testimony of John Seravalli, Daytona Beach, Fla.) (complaining that St. Louis, Mo. ground lessees made sizable contributions to local politicians in exchange for condemnation of ground lessor's underlying land and title transfer to ground lessees); *id.* 124-25 (letter from Barbara J. Morley, Lincoln, Neb.) (complaining of expropriation to benefit "the politically powerful" who delayed and then constructed a failed low-income housing project, despite owner's significant plans for redevelopment and fresh investment); *id.* at 103 (testimony of Bruce R. MacCloud, Long Branch, N.J.) (reporting city's selection of private developer—subsequently imprisoned for bribery and extortion of public officials elsewhere—as the beneficiary of redevelopment plan that employed eminent domain extensively); *id.* at 83 (testimony of Michael B. Hetzel, Shady Cove, Or.) (reporting developer's use of political connections to expropriate twenty-year owner's property to create dead-end street into gated residential subdivision despite owner's voluntary offer to sell and subsequent thirty-percent price reduction); *id.* at 81-82 (letter from Wright Gore III, Freeport, Tex.) (reporting that well-connected developer never approached waterfront property owners with offer for voluntary purchase, instead inducing city officials to employ eminent domain); *id.* at 77 (statement of

This description seems somewhat naïve. In most communities, political, commercial and financial elites are personally well-acquainted and connected through a multitude of social, civic and professional relationships. One hand washes the other. This does not necessarily imply corruption or overt favoritism. Nevertheless, in the nature of things, the well-connected have a decided advantage. For these groups, the raw material of both civic and personal gain is often the property of the less well-off and less well-connected.³⁵⁴

This sort of abusive civic conspiracy can arise as easily in a direct-government-use, common carrier, or blight-remediation taking as in an economic-development taking.³⁵⁵ Once again, including subjective value in the amount of compensation paid provides a solution by reducing the profitability of collusive land deals.

3. Cost-Focused Policy Objections

Cost-centered arguments against public-purpose takings focus on either the social costs of rendering property rights ephemeral or the inadequacy of the compensation granted to the affected property owner. Individual fairness is central to my proposed resolution of the eminent-domain controversy. Accordingly, I postpone its treatment until the full discussion of that solution in Part IV of this Note,³⁵⁶ addressing only the social-cost objections here among the policy considerations associated with the scope of the public-use requirement. A common pragmatic objection to eminent domain is that security of ownership encourages individual owners to husband scarce

Don & Lynn Farris, Lakewood, Ohio) (reporting that mayor and private developer signed memorandum of understanding to use eminent domain to support developer's project without public discussion); *id.* at 56 (statement of Dr. Mark T. Dahl, Afton, Minn.) (suggesting that subdivision developer and former planning commissioner requested mayor and city council to condemn land of other private owners to provide an intended subdivision with a second access road); *id.* at 49 (opening statement of Sen. Sam Brownback, Kan.) (noting that Norwood, Ohio initiated condemnation action using a blight study commissioned by the developer who stood to take title to the properties after their condemnation).

³⁵⁴ *S. Hearings, supra* note 63, at 17 (statement of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.); *see also H. Hearings, supra* note 25, at 110-11 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.); *S. Hearings, supra* note 63, at 69 (testimony Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.); *id.* at 30 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.) (describing how private parties can identify "arbitrage opportunities" in real estate markets and extract excess value through an opaque partnership with government involving eminent domain and subsequent aggregation of parcels); *id.* at 8 (statement of Susette Kelo, New London, Conn.) (asking Congress to send a message to "special interests" that benefit from eminent domain abuse).

³⁵⁵ *See, e.g., S. Hearings, supra* note 63, at 127 (statement of Daryl Penner, Kansas City, Mo.) (decrying condemnation of 70-year-old tuxedo-rental store with large downtown clientele and significant square footage to make way for new sports arena and 18-story corporate headquarters favored by civic elites); *id.* at 126 (testimony of Gopal K. Panday, Long Branch, N.J.) (arguing that city's blight designation is a falsehood designed to transfer private property to the hands of a favored developer).

³⁵⁶ *See infra* Part IV.C.1.

resources and to deploy those resources in value-maximizing ways.³⁵⁷ Eminent domain arguably imposes demoralization costs on the community by destroying the incentive to productivity that secure private ownership generates.³⁵⁸ As Mr. Shelton observed:

The incentive to invest in one's community financially and otherwise directly correlates with the confidence in one's ability to realize the fruit of such efforts.

By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken, and there will be even less incentive to engage in community-building and improvement.³⁵⁹

It is important to recall that wholesale decommissioning is economically justifiable only where the husbandry and useful employment of urban land has largely ceased.³⁶⁰ Used judiciously, eminent domain in response to urban abandonment is more likely to spur investment than to retard it.

Manhattan's colonial history provides a useful example of how eminent domain can catalyze productive investment. New York's unique colonial charter gave the municipal corporation control over significant real-estate holdings.³⁶¹ This control became a major source of municipal power and the management of its real estate became the principal activity of colonial city government.³⁶² In its humble early years, New York City granted land to private citizens with an understanding that the city would repossess the property if the recipient failed to either develop the property as required or maintain the improvements on an ongoing basis.³⁶³ This creative use of land grants and eminent domain mobilized private enterprise toward certain

³⁵⁷ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 32 (7th ed. 2007).

³⁵⁸ Michelman, *supra* note 31, at 1165; see also *H. Hearings, supra* note 25, at 75 (prepared statement of Rosemary Cubas, Philadelphia, Pa.) (arguing that eminent domain discourages low-income communities trying to improve their surroundings); *id.* at 73 (prepared statement of Cristina Huerta Rodriguez, Ogden, Utah) (expressing hesitancy to make desired improvements such as planting a garden, interior painting, and installing new carpet because of uncertainty regarding their continued ownership); *id.* at 71 (email from John & Barbara Bernwell, St. Louis, Mo.) (decrying uncertainty generated by Rock Hill, Mo. eminent domain action as the cause of prevarication as to whether or not they should build a deck and wheelchair lift to assist the handicapped husband in entering and leaving the home); *S. Hearings, supra* note 63, at 76 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (characterizing eminent domain for economic development as "socially demoralizing"); *id.* at 42 (testimony of Robert Blue, Hollywood, Cal.) (noting that the prospect of eminent domain has discouraged his family from making investments in their business or its premises for two years).

³⁵⁹ *S. Hearings, supra* note 63, at 13 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.).

³⁶⁰ *Shrinking Cities, supra* note 7, at 34.

³⁶¹ HARTOG, *supra* note 229, at 21-23.

³⁶² *Id.* at 33-34, 43.

³⁶³ *Id.* at 51-52.

desired economic activities, particularly the development of public infrastructure such as streets and wharfs.³⁶⁴ Reinforcing the city government's stewardship role, colonial New York could repossess its waterlot grants if the owner failed to develop and maintain the property in a manner beneficial to the community as a whole.³⁶⁵

An emphasis on productive use as a justification for ownership reinforces the understanding of America as a democratic meritocracy founded on personal responsibility and hard work.³⁶⁶ Professor Michelman called this theory of property a "social functionary" approach.³⁶⁷ As he noted, "an owner viewed as a social functionary seems to have no moral claim [to property]. . . . The justification for his ownership is his functional, not his personal merit. His province is to husband, cultivate, and manage in the interest of all."³⁶⁸ If landowners know that fallow urban property might be subject to seizure, they will be more likely to use the land productively themselves or sell it to someone who will. At the same time, the constitutional requirement of just compensation for any taking redeems for them the personal wealth that the property represents in their hands. Wholesale decommissioning produces social-functionary benefits at the community level, as well. The strategy geographically concentrates those parties who are willing to invest in urban markets.³⁶⁹ This concentration will foster synergies between private parties and allow government to support those parties at lower cost.³⁷⁰

IV. SMART DECLINE, JUST COMPENSATION, AND KALDOR-HICKS EFFICIENCY

Eminent-domain abuse is real. Unfortunately, that abuse is not limited to public-purpose takings. Considering eminent domain in the smart-decline context deflates obfuscatory rhetoric and reframes ossified debates about public-purpose takings. The adoption of a Kaldor-Hicks-efficiency test will focus judicial attention on a comparison between the gains to society from the taking and its harm to individual owners. Combining this focus with an insistence on full economic recovery by the dispossessed owners will prevent eminent-domain abuse, regardless of the intended subsequent use of the land.

A. Public Use, Judicial Competence, and a Proposed Solution

In one glaring instance of eminent-domain abuse, the Susquehanna Area Regional Airport Authority sought to condemn the business property of Stanford Cramer, a private airport-parking operator at the Harrisburg, Pennsylvania airport.³⁷¹

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *But see S. Hearings, supra* note 63, at 41 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (contending that eminent domain contradicts American values of hard work and independence).

³⁶⁷ *See generally* Michelman, *supra* note 31, at 1206-08.

³⁶⁸ *Id.* at 1207.

³⁶⁹ *Shrinking Cities, supra* note 7, at 34-35.

³⁷⁰ *Id.*

³⁷¹ *H. Hearings, supra* note 25, at 69 (prepared statement of Stanford Cramer, Harrisburg, Pa.).

Ostensibly, the Airport Authority needed the private operator's property for "airport purposes" or "for a cargo facility and airport repair area," but one inevitable consequence of the condemnation would be to establish a parking monopoly for the airport-owned parking facility.³⁷² In a vivid illustration of the conflict-of-interest problem that permeates this area of the law, the Airport Authority board voted on whether to condemn property.³⁷³ The taking in this instance is a direct-government-use taking, not a public-purpose taking, but the odor of injustice hangs as heavily here as in any other case. As the property owner put it, "Although the [*Kelo*] ruling does not directly impact my case, it has done so indirectly. The ruling has put a spotlight on all eminent domain cases and how unfair the process can be."³⁷⁴

Consider also Daryl Penner's case in Kansas City, Missouri, where eminent domain forced his tuxedo-rental business to exchange large quarters in a competitively advantageous downtown location for premises at a distant mall.³⁷⁵ Despite being subsequently used for economic redevelopment, the city seized Mr. Penner's land in a blight-remediation taking, not a *Kelo*-style economic-redevelopment taking.³⁷⁶

Among the myriad stories of eminent-domain abuse that emerged in the wake of *Kelo*, none presents a more poignant argument for the subjective value of land than Mississippi landowner Mark Bryant's letter to Congress. His plaintive request is so rich with troublesome valuation problems that it is worth quoting at length:

Our family owns a tract of land that has been in our family for generations. My father had inherited this land from his mother who had inherited it from her parents. The foundation stones of the log cabin occupied by my great-grandparents still remain on the property underneath a magnolia tree that is one of the largest most people have ever seen. It has been my dream that one day I would build a house on that property for my family. That dream is now destroyed.

An oil company [told us they were planning a pipeline] through our property. We informed them at the time that we were not interested in selling the land or in granting an easement. They told us that if we didn't agree, they could take the land by eminent domain. Some other families in the area did not want to give up their land either, but gave into [sic] coercion and the threat of eminent domain court proceedings which they could ill afford.

My family and I chose to try and fight the effort, . . . We knew that this company's pipeline was not a public utility, and the only ones who would benefit from this venture would be the company's stockholders. . . . Our attempt to force the company to prove "public use" was futile. . . .

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 70.

³⁷⁵ *S. Hearings, supra* note 63, at 127 (letter from Daryl Penner, Kansas City, Mo.).

³⁷⁶ *Id.*

We believe that this taking was unnecessary, that this company modified or changed the route of this pipeline to avoid other properties prior to bringing their legal proceedings against us, even though they denied in court that they could not [sic] change the route for anyone. It is believed that the company favored the well-connected in determining the final route of this pipeline. The route does not cross the state in a straight line, but zig-zags across the countryside, avoiding some properties entirely, for no apparent reason.

My father served in this nation's military and retired to our farm in Mississippi to raise three sons on land that he hoped to leave to them. My mother, his widow, is 77 years old and had hoped to spend the twilight years of her life knowing that this land would pass to her sons to build their homes on. I cannot describe how heartbroken she was when she realized that the old magnolia tree would be cut down, and that the ancestral home site would be wiped away by bulldozers. My two brothers and I have also served this country and had hopes of raising our families on this land. That won't happen for me and my family. The place where I had planned on building a home, the best part of the property, will have a pipeline running through it, and the "just compensation" for losing this dream of a future home is not enough to buy a similar tract of land with such an ideal home site somewhere else. My father, my brothers, and I wore uniforms and protected this nation, believing that this nation's government would, in turn, protect our rights. We were mistaken.

The legal system called us "defendants," yet we had done no wrong to be accused of, except that we had resisted the will of powerful men. Our land had been "condemned," yet there was no slum. The land was plentiful with trees, many planted by hand by my family, and wild game.

This experience has left us with no faith in our legal system and no confidence in our government or our laws. Our government has given the power of eminent domain to private entities whose only god is money and whose only motive is profit.³⁷⁷

Mr. Bryant's letter recapitulates all of the major objections to eminent domain. He is the quintessential sympathetic owner. First, he frames his plea in compelling fashion. His plainspoken exposition of the issues lends his viewpoint credibility. He lays out a clear and rational claim to idiosyncratic value, touching on the family's husbandry of the land and the sentimental value of the homestead. Simultaneously, Mr. Bryant employs a mystical tone that subtly invokes sacred symbols. The image of the expansive magnolia tree shading the ancestral cornerstone gives physicality to his dream of eventually building his own home on the site. Mr. Bryant also characterizes his adversaries as disciplines of Mammon, aligning himself allegorically with the Christ that threw the money-changers from the temple. He also poignantly juxtaposes his family's military service for the common good with

³⁷⁷ *Id.* at 52-53 (statement of Mark Bryant, Smith County, Miss.).

an implied vision of eminent domain as a betrayal ostensibly in furtherance of that common good.

Having established a rapport with the reader, Mr. Bryant skillfully presents the eminent-domain action as an affront to human dignity. The condemnation disturbed his previously settled expectations regarding possession and use. Again, he particularizes the loss imposed on the family with a vision of bulldozers plowing up the ancient foundation and felling the cherished magnolia tree. In Mr. Bryant's case, the offense is compounded by the indignity that a proud and innocent man feels at being labeled a defendant. Most egregiously, the condemnation detrimentally impacts the family, particularly his elderly and widowed mother.

Amplifying his grievance, Mr. Bryant asserts that the condemning authority has unclean hands. "Powerful men" had the ear of government and were lined up against this family. Mr. Bryant advances the notion that some owners had sufficient political clout to influence the pipeline's route, and he does so in terms that convey his frustration at not being able to uncover and foil the scheme. He closes by accusing the government of breaking its obligation to honor the best aspirations of individual citizens in exchange for their allegiance. The reader is left with a distinct sense that this property owner has been wronged.

Mr. Bryant adroitly delegitimized the condemnation that his family suffered. But the effectiveness of his narrative critically depends on a compelling set of underlying facts. Jurors understand ancestral homesteads and multigenerational ownership and can put a price on those things. Jurors can also discern undue political influence, evaluate the obligation of government to serve the governed, and discount the government's version of social utility appropriately. In Mr. Bryant's case, it is likely that a jury would assign a large dollar amount to his assertions of idiosyncratic value. Accordingly, under the legal test that I propose, only an exceptionally beneficial project with little prospect of success in any other location would produce enough net economic benefit to make an expropriation of Mr. Bryant's land an optimizing transaction in Kaldor-Hicks-efficiency terms. The tragedy of Mr. Bryant's story is that he lost his property in exchange for inadequate compensation and to a land use that did not benefit society. Preventing future injustices of this sort requires just-compensation reform and a Kaldor-Hicks-efficiency standard to determine what constitutes public use.

In *Kelo*, Justice Stevens declined to adopt Justice Zarella's clear-and-convincing evidentiary standard,³⁷⁸ worrying that it would draw the federal judiciary into "empirical debates over the wisdom of takings."³⁷⁹ But the judicial branch—and particularly the trial jury—is in a far better position than any executive agency or legislative body to evaluate the credibility of the parties' claims. Executive and legislative actors must formulate prospective rules without the ballast of a specific fact situation, whereas the judiciary can heuristically resolve eminent-domain challenges on a case-by-case basis.

A burden-shifting approach would incorporate Kaldor-Hicks efficiency into a judicial paradigm that simultaneously tests the legitimacy of the government's proposed action and the reasonableness of the owner's asserted idiosyncratic value. First, the government should have the burden of demonstrating that the challenged

³⁷⁸ See *supra* text accompanying notes 329-30.

³⁷⁹ *Kelo v. City of New London*, 545 U.S. 469, 488 (quoting *Midkiff v. Haw. Hous. Auth.*, 467 U.S. 229, 242-43 (1984)).

condemnation will move the community closer to Professor Hicks' optimized economic condition. To do so, the government will need to posit some dollar amount as the compensation due to the complaining owner. If the government shows clearly and convincingly that the taking increases economic optimization at its posited compensation amount, the burden then shifts to the owner to contest that compensation amount. Owners might offer objective evidence, such as alternate appraisals of fair-market value, and subjective value, such as explanations of any idiosyncratic value. Then, the jury would weigh the credibility of the objective and subjective evidence as it would in any personal-injury case. Although the jury process will not be perfect, cities and owners presently argue the merits in the media, with no pressure other than public opinion to force the government to accept reasonable compromises. Juries can harness the common sense of the community to evaluate governments' claims of purported benefit and owners' claims of subjective value. This, the collective wisdom of the jury opposes the coercive power of the State.

The opposing risks of a grasping government and a holdout owner are present whether the proposed taking is to erect a new city hall, build a public highway, clear title to a nuisance-causing abandoned building, or decommission a neighborhood. Direct-government-use, common-carrier, and blight-remediation takings all bring the same opportunities for abuse. An affront to individual dignity or public subsidy of an unneeded project is neither more nor less likely in these areas than in the economic-development-takings context.

For instance, critics charge that the power of eminent domain encourages cities to browbeat landowners on price.³⁸⁰ This perverse incentive exists regardless of the purported reasons for the condemnation. Mark Bryant's case did not involve a public-purpose taking, but rather a common-carrier taking to benefit a private natural-gas-distribution company. In another instance of common-carrier eminent-domain abuse, a different natural-gas-distribution company employed threats of eminent domain—and numerous other questionable tactics—in an effort to install a potentially profitable pipeline in rural Tennessee that was arguably unnecessary for the public good.³⁸¹ In both situations, the property owners did not face a *Kelo*-style economic-redevelopment taking. Rather, they faced a common-carrier taking to benefit a publicly-regulated utility. The prevalence of the “bogus blight” cases also illustrates the difficulty of *a priori* legal definition of public use.³⁸²

³⁸⁰ See, e.g., *H. Hearings*, *supra* note 25, at 50, 51 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.); *S. Hearings*, *supra* note 63, at 91 (prepared statement of Institute for Justice, Arlington, Va.).

³⁸¹ *S. Hearings*, *supra* note 63, at 146-48 (prepared statement of Sumner Trousdale Opposing Pipeline, Tenn.).

³⁸² *Id.* at 73-74 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (stating that condemning authorities frequently mischaracterize eminent domain for economic development purposes as economic development for blight remediation purposes); see, e.g., *H. Hearings*, *supra* note 25, at 92-93 (prepared statement of Scott A. Mahan, Ardmore, Pa.) (reporting that Ardmore was not blighted when the takings occurred); *id.* at 76 (email from Donald J. Umhoefer of Menomonee Falls, WI) (reporting village's use of dubious blight designation to threaten eminent domain in furtherance of economic development); *id.* at 64 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (reporting that ULI study recommending historic preservation rather than eminent domain caused township officials to rush through a blight designation for the area “using a very vague definition and

It is tempting to suggest a ban on *Berman*-style blight-remediation takings as well as *Kelo*-style economic-redevelopment takings.³⁸³ But it is very hard to develop a principled ground on which to reject these sorts of public-purpose takings that does not undermine the Court's justification for economic-growth takings such as in the irrigation, hydroelectricity, and mining cases. Justice Peckham approved public-purpose takings to support growth, explicitly conflating "public use" with "public purpose" and "public interest."³⁸⁴ Even admitting the shakiness of *Bradley*'s doctrinal foundation, a century of precedent is a lot to uproot in a legal system that values *stare decisis*. And limited government—despite its analytical seductiveness—may not be a sufficiently compelling objective to justify forgoing economic growth. Fortunately, we can split the horns of these jurisprudential and policy dilemmas by correcting the ways in which the law calculates just compensation.³⁸⁵ Instead of confining municipal bullying to a few hard-to-define contexts, it makes more sense to develop an approach to eminent domain that substantially removes the bullying behavior in all cases.

B. The Political Utility of Smart-Divide Takings

The rhetoric of property-rights advocates evokes deep strands of American myth that spring from the pro-growth mentality of fee simple empire. Consider this passage from Ms. Berliner:

legal loophole. Anyone in its rightful [sic] mind would not believe that Ardmore was 'blighted'; *S. Hearings, supra* note 63, at 138 (testimony of John Seravalli, Daytona Beach, Fla.) (complaining that St. Louis, Mo. designated apartment buildings as blighted on questionable grounds with the collusion of the building owners so as to permit condemnation of the buildings and the underlying land followed by redevelopment of the properties by the building owners); *id.* at 137 (testimony of Daniel P. Regenold, Cincinnati, Ohio) (reporting that Evendale, Ohio obtained questionable blight designation so that it could use the threat of eminent domain as negotiating leverage during its land assembly process); *id.* at 126 (testimony of Gopal K. Panday of Long Branch, N.J.) (arguing that city's blight designation is a falsehood designed to transfer private property to the hands of a favored developer); *id.* at 124 (letter from Barbara J. Morley, Lincoln, Neb.) (describing abusive blight designations in Lincoln, Neb. involving manipulating the boundary of a redevelopment area to affect the admixture of blighted and non-blighted properties and noting that one such charade resulted in a "blighted area" that included Warren Buffett's home); *id.* at 77 (statement of Don & Lynn Farris, Lakewood, Ohio) (reporting that Lakewood, Ohio homes were considered blighted for lack of two-car attached garages, two full bathrooms, central air, and other upscale amenities); *id.* at 7 (statement of Susette Kelo, New London, Conn.) ("My neighborhood was not blighted; it was a nice neighborhood where people were close.").

³⁸³ Compare *H. Hearings, supra* note 25, at 114 (prepared statement of Dr. Roger Pilon, Cato Institute, Washington, D.C.) (arguing that allowing blight-remediation takings unjustifiably expands government power), with *id.* at 51 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (arguing that *Kelo*-style "eminent domain for private parties" will spawn "infinitely more abuse").

³⁸⁴ See generally *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 12, 158-61 (1896).

³⁸⁵ *S. Hearings, supra* note 63, at 20 (testimony of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (arguing that Congress can legislate on the meaning of just compensation under its Section 5 powers granted by the Fourteenth Amendment).

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses that they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because localities find condos and malls preferable to modest homes and small businesses. . . . *Using eminent domain so that another, richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.*³⁸⁶

The government's tendency to inadequately define the social benefits of economic-development takings provides great latitude for emotionally compelling stories to contradict the economic efficiency of the taking. The empirically rigorous justification for smart-decline takings clears the field of overheated rhetoric and allows for an honest assessment of the issues involved. By short-circuiting the rhetoric while presenting the same property-rights claims from the affected individual owners, smart-decline takings enable a look past the rhetoric to the underlying legal issues.

For decades, conservatives have argued that nuisance law can address urban blight. With some modernizing adjustments—such as community-based receivership actions to remove spot blight in viable neighborhoods and land banking for communities with broad redevelopment needs *and* foreseeable demand for urban land—nuisance law can likely do much of the job.³⁸⁷ But in cities that have lost a huge proportion of their population—such as Cleveland, Detroit, Buffalo, and other vertical cities—even land banking cannot offset the city's excess infrastructure-maintenance and service-delivery costs. Eminent-domain opponents miss a valuable opportunity to curtail abusive government takings when they neglect to challenge municipal pursuit of an unrealistically nostalgic growth agenda.³⁸⁸

Smart-decline takings resonate with conservative arguments for smaller government. Wholesale decommissioning, by shrinking the city's infrastructure footprint, necessarily reduces the scope of the local government. Eminent domain assists wholesale-decommissioning efforts by unequivocally extinguishing private property rights. Smart-decline takings are validated by a rigorously empirical justification of demonstrated cost savings for the public and improved opportunities for the individual. Wholesale decommissioning also eliminates public subsidy of terminally defunct neighborhoods. Unlike the present economic-development shell games decried by Professor Eagle, smart decline helps balance the municipal budget without imposing external costs on other jurisdictions. By addressing the fiscal

³⁸⁶ *Id.* at 41 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (emphasis added).

³⁸⁷ *See generally* Samsa, *supra* note 71.

³⁸⁸ For an example of a property rights advocate showing deference to the prevailing pro-growth mentality, see *S. Hearings*, *supra* note 63, at 41 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.) (“Congressional action [to contain the *Kelo* result or otherwise curb eminent domain abuse] will not stop progress.”).

mismatch, smart-decline takings also offer at least the prospect of tax reductions—another conservative touchstone—without compromising service quality. For all of these reasons, smart-decline takings are more likely to win conservative support than conventional economic-development takings.

In another reversal of traditional roles in the eminent-domain debate, the strongest resistance to the wholesale decommissioning of desolate neighborhoods may come from liberals concerned about government desertion of urbanites grappling with already tenuous circumstances. For instance, Mr. Shelton contended that:

[T]o the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, *and even assuming a proper motive on the part of government*, the effect will likely be to upset organized minority communities.

This dispersion both eliminates established community support mechanisms and has a deleterious effect on those groups' ability to exercise what little political power they may have established.³⁸⁹

In contexts where conditions warrant wholesale decommissioning, population densities are so low that any discussion of existing community-support mechanisms or local political power becomes macabre.

Viewed more closely, smart-decline takings provide individual owners stranded in economic isolation through no fault of their own with a way out by giving them financial value in exchange for their ownership interests. Genuine compensation reform gives good-faith owners a real opportunity for a richer community life elsewhere in the city. For those owners who profess a preference for the isolated lifestyle prevalent in barren urban neighborhoods, appropriate levels of compensation will enable them to move to a truly rural environment. With proper remuneration restoring much of the individual agency lost through the compulsory purchase, just compensation will ameliorate liberals' social-justice concerns about smart-decline takings.

The Kaldor-Hicks-efficiency standard, when combined with just-compensation reform, will also remedy a common problem: municipalities frequently use eminent domain to cover up their incompetence as assemblers of land.³⁹⁰ Watching

³⁸⁹ *Id.* at 13 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (emphasis added).

³⁹⁰ *H. Hearings, supra* note 25, at 144 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (reporting that the District condemned an existing shopping center with viable mix of stores to erect new shopping center with no new anchor tenant and assuming the availability of HUD funds despite earlier sanctions for repeated mismanagement of federal funds); *id.* at 92-93 (prepared statement of Scott A. Mahan, Ardmore, Pa.) (relating discovery of plan to condemn his business premises by letter); *id.* at 76 (email from Donald J. Umhoefer, Menomonee Falls, Wis.) (relating discovery of plan to condemn his home by certified letter); *id.* at 72, 73 (prepared statement of Cristina Huerta Rodriguez, Ogden, Utah) (noting that local homeowners discovered in their morning newspaper that the city was going to acquire their property to facilitate construction of a Wal-Mart Supercenter—by eminent domain, if necessary—and describing boorish city behavior such as daily phone calls urging them to sell “voluntarily,” false deadlines or incorrect reports that neighbors had voluntarily sold, and abusive language during negotiating meetings); *id.* at 71 (email from John & Barbara

documentary interviews of the parties in *Kelo* taken after the Supreme Court's decision, it is impossible to ignore the cocksure and even entitled demeanor of the individuals working for the government.³⁹¹ On the other side, Susette Kelo's bellicose tone conveys the impression of someone provoked into fighting as much for its own sake as for any deep-seated philosophical objections. Ms. Kelo learned of the city's plans to seize her home through her local newspaper rather than a respectful face-to-face conversation with a city employee. Noting this public-relations blunder and the contemptuous self-assurance of the city employees interviewed, one has to wonder if New London could have avoided the litigation entirely with a more tactful negotiating approach.

Consider also Mr. Cristofaro's description of New London's blundering approach to acquiring his parents' second home after taking his parents' first home by eminent domain for a sea wall that was never built:

Nevertheless, when the Fort Trumbull development was proposed, no one from the city even bothered to come and talk to him. Now, he's from the old country. He just wants to be treated like an individual, with some human dignity. Instead, they came with harassments, intimidations, and just outright threats.³⁹²

The fact that the elder Mr. Cristofaro was a retired city employee with twenty-seven years of service compounded the insult.³⁹³ Surely someone in city government had a relationship with this former employee that might have led to a consensual sale.

Contrast New London's approach with Representative Trent Franks' story of an enlightened public official's avoidance of eminent domain through adroit negotiations. In a case involving public land assembly for an impending dam construction project, one owner rebuffed repeated envoys offering to purchase his property.³⁹⁴ Eventually, the project director personally visited the man and asked

Bernwell, St. Louis, Mo.) (decrying wastefulness of Rock Hill, Mo. eminent-domain action); *id.* at 63 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (describing township letter to longtime local business owners informing them of imminent arrival of appraiser to determine condemnation value of property and summoning them to appear before a township official to be told their rights); *S. Hearings, supra* note 63, at 9 (statement of Rev. Fred Jenkins, N. Hempstead, N.Y.) (reporting that N. Hempstead allowed his congregation's building permit application to remain pending for roughly eighteen months while failing to inform congregation of town's plans to condemn partially built church that congregation had purchased with intent to complete).

³⁹¹ DUKE UNIV. SCH. OF L., DISTINCTIVE ASPECTS OF AMERICAN L. SERIES, *KELO V. CITY OF NEW LONDON*, 545 U.S. 469 (2005), www.distinctiveaspects.org (2006); *see also* Gerald Torres, *Eighty-Third Cleveland-Marshall Fund Visiting Scholar Lecture: Legal Change*, 55 CLEV. ST. L. REV. 135, 145 (2007) (arguing that the New London government was "out of step with the community" and exhibited "civic disrespect" by acting to further corporate economic goals rather than citizen interests).

³⁹² *H. Hearings, supra* note 25, at 23 (testimony of Michael Cristofaro, New London, Conn.).

³⁹³ *Id.*

³⁹⁴ *Id.* at 52 (testimony of Rep. Trent Franks, Ariz.).

why he would not sell.³⁹⁵ Recounting the private owner's reply, Representative Franks said:

[The property owner] said my mother was born in that back room. He says my grandfather homesteaded this property, and I was born there, and my grandfather, when he built this place and built that hearth, he lit the fire, and it hasn't gone out since. And it's not going out on my watch.

Sometimes we fail to remember that there's more than just economic considerations in people's concern for their property.

Now, I understand the way that they resolved that was that they paid him for the house, and they picked the entire thing up and left the fire burning and moved it to a place that was acceptable to him.³⁹⁶

One striking aspect of the eminent-domain debate is that one of the most active opponents of eminent-domain abuse, the Institute for Justice, has given very little thought to compensation reform. Before the House Subcommittee, Ms. Berliner said, "[J]ust compensation is not our main area. In general it's important that people be left in a position that's not worse than the one they started in. But beyond that, the technicalities of how to put that together is something we could discuss. It's a complicated issue."³⁹⁷ Does the property-rights movement's neglect of compensation reform blind them to a market-based solution to eminent-domain abuse? The prospect of just compensation—coupled with the transaction costs of the condemnation proceeding itself—made it worthwhile for Senator Franks' hydroelectric power administrator to move the hearth-tender's house. Including the dollar value of the unextinguished hearth fire in the homeowner's just compensation would harness the power of the free market, another conservative panacea, to curb governmental enthusiasm for eminent domain without banning outright this occasionally legitimate tool.

Holding cities to the same standard of competence as private developers by making their land-assembly successes more dependent upon their aptitude in negotiating at voluntary prices may result in many cities exiting the land-development game entirely. This might not be a bad thing. Instead of spending public dollars rearranging title to existing landed assets, cities might deploy their economic-development budgets to support local entrepreneurship, improve educational opportunities, reduce the local tax burden, or otherwise generate new wealth for citizens.³⁹⁸ A shift to wealth-creation strategies rather than land-redistribution strategies, while perhaps more difficult for public officials, also reduces the frequency of eminent-domain proceedings' inherent governmental conflict of interest.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 52 (testimony of Dana Berliner, Institute for Justice, Washington, D.C.).

³⁹⁸ *S. Hearings, supra* note 63, at 77 (statement of Don & Lynn Farris, Lakewood, Ohio) (commenting that resources used to fight eminent-domain battle could have been better deployed improving the neighborhood).

By increasing compensation protections without completely barring public-purpose takings, sensible eminent domain reform would still allow local governments to catalyze private land development in their jurisdiction. For example, municipal government could provide funding assistance to developers negotiating with high-compensation sellers. Cities could mitigate developers' assembly-failure risk by offering developers an opportunity to "put" partially assembled projects to the city's land bank at a modest discount from objective fair market value. As a last resort, the government could still employ eminent domain when the owner's insistence on a clearly unreasonable valuation threatened a project with substantial verifiable positive externalities.

C. Identification and Resolution of the Dispositive Legal Issues

Having removed distracting symbolic appeals from the discourse and given all sides reasons to renew the dialogue about eminent domain, an opportunity arises for genuine resolution of the two legitimate issues driving Americans' concerns about governmental takings. First, Americans want to know that they are being treated fairly by their government, and adequate compensation for the seizure of property is essential to that impression of fairness. Viewed in this light, a person denied access to adequate compensation by insufficient process is actually making an insufficient-compensation objection. Second, Americans want to know that their government is not compelling them to bargain away their land for frivolous, uncertain, or nefarious reasons.

1. Fair Remuneration for the Property Owner

Commentators almost always discuss condemnation's harm to individual owners in terms of the monetary award's failure to compensate for the owner's loss.³⁹⁹ In the most easily corrected cases, owners receive an insufficient dollar value for their properties' objective fair market values. The discrepancy might emerge because the government's threat of eminent domain artificially depresses the owners' selling prices.⁴⁰⁰ Alternatively, the government's demolition or neglect of nearby structures

³⁹⁹ *H. Hearings, supra* note 25, at 98 (email from Andrina Sofos, Daly City, Cal.) (admitting that she would not be objecting if the government paid "the right price" for her commercial property).

⁴⁰⁰ *See, e.g., id.* at 131 (letter from Thomas J. Picinich, New London, Conn.) (reporting harassment by brokers threatening eminent domain if he did not agree to sell his home); *id.* at 100 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (reporting threat of eminent domain in concert with developer's bid for roughly half of privately-appraised value); *id.* at 78 (email from Gail Hunter, Midwest City, Okla.) (reporting capitulation to a "voluntary" sale after repeated threats that she would get less if she forced the city to condemn her home because of the asserted likelihood of the three appraisers "to side with the city"); *id.* at 77 (email from Nick Ericson, Duluth, Minn.) (reporting condemnation for less value of property listed for sale); *S. Hearings, supra* note 63, at 137 (testimony of Daniel P. Regenold, Cincinnati, Ohio) (reporting that Evendale, Ohio obtained questionable blight designation so that it could use the threat of eminent domain as negotiating leverage during its land-assembly process); *id.* at 79 (statement of Dan Freier, Minneapolis, Minn.) (reporting that developer made a "low ball offer" for his apartment building and a concurrent threat of eminent domain if he didn't accept the offer).

often detracts from the appraised value of the owners' properties.⁴⁰¹ In the most egregious cases, the government actively obstructs the private owners' efforts to obtain full value for their properties.⁴⁰² Disagreement about price is intrinsic to all compulsory purchase actions. Courts can readily resolve disputes about objective value by using familiar techniques of administrative review.

Some critics argue that the real harm of a public-purpose taking is the loss of the owner's idiosyncratic interest in the property.⁴⁰³ Admittedly, subjective-value claims

⁴⁰¹ *H. Hearings*, *supra* note 25, at 131 (letter from Thomas J. Picinich, New London, Conn.) (reporting negative effect of city's neglect of already-assembled properties on homeowner's appraisal); *id.* at 100 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (reporting that the government allowed city-owned buildings to deteriorate, including partial demolitions, one building's roof collapsing, and the establishment of a semi-permanent construction zone on Main Street to the detriment of remaining businesses, so as to lower the value of the privately held property in the area).

⁴⁰² *See, e.g., id.* at 131 (letter from Thomas J. Picinich, New London, Conn.) (reporting negative effect of city's destructive asbestos sampling on homeowner's appraisal); *id.* at 131-32 (letter, Thomas Picinich, New London, Conn.) (reporting valuation of properties using distant comparables rather than prices paid in adjacent voluntary sales for the same land-assembly project, resulting in a downward shift in appraised value from \$230,000 to \$130,000); *id.* at 74-75 (email from Gylbert Coker, New York City, N.Y.) (expressing frustration with his mother's inability to collect the compensation owed to her by New York City for a condemnation of her Harlem property in 1990 and indicating that his family endured a similar struggle to collect compensation in the 1940s for condemned property in Florida); *id.* at 73 (prepared statement of Cristina Huerta Rodriguez, Ogden, Utah) (describing discrepancy between appraised land value for condemned property at \$2.15/sf, Wal-Mart's alleged willingness to pay \$7.00/sf, and comparable vacant commercial land selling for \$14.00/sf in the vicinity); *id.* at 72 (prepared statement of Cristina Huerta Rodriguez, Ogden, Utah) (describing low valuations received from city appraisers and improperly-performed reappraisal after she challenged the initial valuations).

⁴⁰³ POSNER, *supra* note 357, at 56; *see also S. Hearings*, note 63, at 30 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.) (noting that non-consensual property sales are not self-justifying); *see, e.g., H. Hearings*, *supra* note 25, at 113 (letter from Thomas J. Picinich, New London, Conn.) (reporting expropriation despite investment of time and money restoring home); *id.* at 63 (prepared statement of Dr. Eni Foo, Ardmore, Pa.) (reporting intended reliance on condemned restaurant business for retirement income); *id.* at 42 (testimony of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (emphasizing that compensation, to be adequate, must account for the vital importance of social networks on the lives of poor people because of their greater propensity to barter for services such as babysitting or meeting a repairman at the residence); *id.* at 22-23 (testimony of Michael Cristofaro, New London, Conn.) (describing his parents' immigration from Italy, purchase of a home, installation of gardens and vineyard, taking of that home by New London by eminent domain for a sea wall that was never built, purchase of another home, brother's return to the second home with wife and children to be closer to the grandparents after twenty years in the Air Force, and New London's taking of that second home by eminent domain for the Pfizer project); *S. Hearings*, *supra* note 63, at 42 (testimony of Robert Blue, Hollywood, Cal.) (describing the importance of location to his three-generation family business in Los Angeles, Cal., saying, "We have many returning customers who remember our location more than our name—they remember the luggage store 'near the corner of Hollywood and Vine'"); *id.* at 29 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.) (arguing that an individual's home or business serves as a "center of family life, a repository of individual

will occasionally present thorny valuation issues. In some relatively straightforward cases, the legally-defined scope of just compensation omits verifiable situation-specific costs such as relocation expenses⁴⁰⁴ or the loss of a favorable lease.⁴⁰⁵

memories, and an extension of the owner's personality" as well as a financial asset); *id.* at 25 (testimony of Sen. Sam Brownback, Kan.) (noting that, for many farmers, their land may only be worth a relatively small amount used as a farm, but it is an integral part of who they are and they may be adamantly opposed to selling it); *id.* at 15 (statement of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (noting that people have "important aspects of their personal identity invested" in their property); *id.* 13, 19 (statement and testimony of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) (emphasizing that compensation, to be adequate, must account for the vital importance of social networks on the lives of poor people because of their greater propensity to barter for services such as babysitting or meeting a repairman at the residence); *id.* at 8-9 (statement of Pastor Fred Jenkins, North Hempstead, N.Y.) (describing investments of time and money by N. Hempstead, N.Y. church congregation to purchase land and partially-constructed church, clear the site of debris, obtain construction financing, and apply for building permits before losing the property through eminent domain); *id.* at 7 (statement of Susette Kelo, New London, Conn.) (describing improvements and personalizing touches she made to her home).

⁴⁰⁴ *S. Hearings*, note 63, at 13 (statement of Hilary O. Shelton, National Association for the Advancement of Colored People, Washington, D.C.) ("In fact, one study from the mid-1980s showed that 86 percent of those relocated by an exercise of eminent domain power were paying more rent at their new residence, with the median rent almost doubling."); *see also H. Hearings*, *supra* note 25, at 146 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (discussing inadequacy of Uniform Relocation Act's statutory compensation for business relocation expenses and the special hardship that relocated small businesses experience in trying to adjust to doing business in a new location); *id.* at 102 (email from Brian Calvert, Derby, Conn.) (noting that business owner would be amenable to relocate if able to replicate his current operating environment, but city-developer partnership has only offered "a pittance"); *id.* at 100-01 (letter from Carl & Arleen Yacobacci, Derby, Conn.) (describing inability to relocate their business with the funds that they expect to receive as compensation for the taking of their current premises and perfunctory relocation assistance from city officials); *id.* at 97 (email from Andrina Sofos, Daly City, Cal.) (describing lack of compensation for capital expenditures to bring commercial property into compliance with environmental regulations); *id.* at 75 (email from John Geither, Shawnee, Kan.) (reporting receipt of only 20% of his sandwich shop's relocation costs, despite eighteen months remaining on lease); *id.* at 72 (prepared statement of Cristina Huerta Rodriguez, Ogden, Utah) (describing improvements and personalizing touches added to their home that were disregarded by the relocation specialist assigned to their case as not pertinent to the compensation formula); *id.* at 71 (email from John & Barbara Bernwell, St. Louis, Mo.) (decrying unfairness of Rock Hill, Mo. eminent domain action to take their home when they have invested hard work and money to render the home suitable for them to age in place, especially the handicapped husband); *id.* at 68 (prepared statement of Ken Taylor, Wayne, Pa.) (attributing "steady reduction in affordable housing and shopping" in Ardmore, Pa., area to eminent domain's elimination of lower-rent residential and commercial structures); *id.* at 63 (email from Jim Campano, Somerville, Mass.) (recounting 1958 use of eminent domain during the urban renewal era to destroy a viable low-cost urban village in the West End of Boston).

⁴⁰⁵ *H. Hearings*, *supra* note 25, at 75 (email from John Geither, Shawnee, Kan.) (reporting a year of lost business before reopening sandwich shop in new location); *id.* at 4 (testimony of Rep. Jerrold Nadler, N.Y.) (noting that renters do not receive compensation for the loss of their leasehold interest); *S. Hearings*, *supra* note 63, at 127 (statement of Daryl Penner,

Simply expanding the definition of just compensation to include reasonable idiosyncratic value will allow affected owners an opportunity to prove and recover these losses. Cases where the land itself has idiosyncratic value are harder to monetize. While many owners view urban land as a fungible commodity, undercompensation of those owners who have genuine subjective reasons to value their property in excess of the fair-market price violates our sense of fairness.

The additional valuation can derive from many sources. An elderly resident may have raised his family in a home now surrounded by desolation. A business owner's custom improvements to her real property may be vital to her operations, may retain little resale value, and may be cost-prohibitive to relocate. A church's proximity to convenient arterial roadways may play a major part in filling the sanctuary on Sundays.

Eminent-domain opponents argue, however, that courts cannot determine the appropriate level of additional compensation in these situations.⁴⁰⁶ Professor Eagle argued that an accurate valuation of costs and benefits related to eminent domain is not possible, saying, "Since there is no way to determine how much the condemnee *really* values his or her residence or business parcel, and since subsidies are convoluted, there is no way to be sure that condemnation and retransfer to private developers adds to, or subtracts from, society's welfare."⁴⁰⁷ Senator Jon Kyl went so far as to say that just compensation cannot possibly offset the owner's loss, saying, "[W]hen you say at least you get paid in condemnation, . . . my response is [that] it is like the old thing, ['W]ell, other than that Mrs. Lincoln, how did you like the play?['] It is not exactly a good result. It is still taken from you."⁴⁰⁸

This interest, however, can be monetized in any number of ways.⁴⁰⁹ Courts routinely make equitable-compensation awards in other kinds of cases, even in wrongful death claims.⁴¹⁰ It is unreasonable to contend that property losses are less

Kansas City, Mo.) (decrying condemnation of 70-year-old tuxedo-rental store with large downtown clientele and significant square footage without adequate compensation to reflect the prime location, resulting in the inability to rent in the new development or obtain premises nearby); *id.* at 79 (statement of Dan Freier, Minneapolis, Minn.) (noting that renters of affordable units in his condemned apartment building will have difficulty finding comparably priced accommodations and that the compensation they will receive will not offset the higher rents they will likely have to pay).

⁴⁰⁶ See generally Barros, *supra* note 25.

⁴⁰⁷ S. Hearings, *supra* note 63, at 71 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.).

⁴⁰⁸ *Id.* at 27 (testimony of Sen. Jon Kyl, Ariz.).

⁴⁰⁹ H. Hearings, *supra* note 25, at 143 (prepared statement of Elaine J. Mittleman, Falls Church, Va.) (arguing that current compensation processes grant an inappropriate land assembly windfall to the end user); S. Hearings, *supra* note 63, at 122 (testimony Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (suggesting a compensation premium of one percent above fair market value for each year of continuous occupancy and a mechanism for distributing some of the land-assembly windfall to the dispossessed prior owners); *id.* at 73-74 (testimony of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va.) (arguing that persons dispossessed be allowed to "participate" in the redevelopment project).

⁴¹⁰ See, e.g., Credit Bureau Enters., Inc. v. Pelo, 608 N.W.2d 20 (Iowa 2000) (comparing to unjust enrichment).

amenable to valuation than the loss of life itself. The fact-finder can determine the propriety of heightened compensation by the usual inquiry into the particular circumstances of each case through the adversary system. Courts can also employ the techniques used to monetize tort awards to establish the appropriate dollar amount of additional compensation above fair market value to reflect the nature and duration of the affected owner's subjective investment.⁴¹¹ After a relatively small number of test cases, most disputes about proper compensation will be settled, thus mitigating any drain on judicial resources threatened by this approach.

Opponents might object that raising compensation awards to reflect idiosyncratic value will hinder the land assembly necessary for patently public uses such as roads and firehouses. The riposte to this argument is that the harm to the dispossessed owner is the same regardless of society's subsequent use of the property. If that subsequent use is sufficiently necessary to justify truncating the individual's property interests, then the resulting economic gain should be sufficient to fully offset the owner's loss.

Professor Eagle argued that idiosyncratic value creates a moral problem in eminent-domain cases, stating, "While owners typically are described as greedy holdouts, their unwillingness to sell often is based on their special attachment to the land resulting from sentimental reasons or the economic value derived from good will or customization of the land or building to suit their particular business needs."⁴¹² But most sentimental value and all customization expenses can be compensated for with money. Any argument that attacks public-purpose takings because the dispossessed owner's loss ostensibly cannot be fully monetized is overbroad. The Fifth Amendment plainly contemplates monetary compensation for direct-government-use and common-carrier takings. To argue that Susette Kelo's loss cannot be monetized while Stanford Cramer's,⁴¹³ Mark Bryant's,⁴¹⁴ or Darryl Penner's⁴¹⁵ can is to sketch a distinction that cannot be sustained.

For most urban real estate parcels, the assertion that no amount of money can compensate an owner for his or hers involuntary sale is specious. At some dollar value, whatever elements are idiosyncratically compelling about the location can be recreated or transplanted. Consider this exchange before the Senate Judiciary Committee:

Chairman Specter. Ms. Kelo, do you have a personal identity with your property; that is to say, will money compensate for the taking, as you see it, having been so close to it for so long?

Ms. Kelo. There are things that you can't—

Chairman Specter. Is money enough to take your property, Ms. Kelo?

⁴¹¹ See, e.g., *Martin v. United States*, 471 F. Supp. 6 (D. Ariz. 1979) (establishing an award by examining the valuation of harm).

⁴¹² S. *Hearings*, *supra* note 63, at 31 (written response of Prof. Steven J. Eagle, George Mason University School of Law, Arlington, Va. to a question submitted by Sen. John Cornyn, Tex.).

⁴¹³ See *supra* text accompanying notes 370-73 (explaining direct-government-use taking).

⁴¹⁴ See *supra* text accompanying note 376 (explaining common-carrier taking).

⁴¹⁵ See *supra* text accompanying notes 374-75 (explaining blight-remediation taking).

Ms. Kelo. No. There are some things that you just can't put a price on, sir.

Chairman Specter. Pastor Jenkins, is money sufficient to take your church?

Rev. Jenkins. Well, our property was not for sale and money cannot really pay back what we lost.⁴¹⁶

Can it really be said that these two owners, each of whose connection to the property existed for less than a decade, have such a fundamental attachment to the land that *no* amount of money would suffice to compensate them for its idiosyncratic value in their perspective?

At some dollar figure, the compensation would be sufficient to move the building itself. A large enough sum would enable Ms. Kelo to buy one of the planned new condos while living in a luxury hotel downtown or a bed-and-breakfast on the coast until the developer completed construction. At some level of compensation, Pastor Jenkins' congregation could recover its investment in the condemned property, buy and clear some other existing parcels, pay for any consultants or lobbyists needed to obtain building permits, and construct a new church. While the individual owner's legitimate interests in the property might not represent enough financial value to permit any of these specific outcomes, it is spurious to suggest that the monetary equivalent of those aggregated interests is an infinite number of dollars.

The implication is that the right to wealth stability is a basic value. When people say "property rights," they mean, in large part, the right to gain value from their land. The argument is that eminent domain threatens the American Dream, perhaps reasonably summarized as middle-class wealth creation through homeownership. Property creates wealth because it has value that appreciates and it can be leased or sold to realize that value increase. Choosing when to realize that value, and at what price, is central to the endeavor. When owners are in extreme geographic isolation in a formerly urban environment, they really ought to move, for their own benefit as well as that of the community. Inner-city homeowners may actually *wish* to be taken out of title,⁴¹⁷ but they face an irredeemably depressed value for their home—often their most significant financial asset—and almost complete illiquidity in the home-sale market. When accompanied by compensation sufficient to allow such residents to relocate to safe, affordable housing in a more vibrant neighborhood, smart-decline takings do not impose significant harms on these isolated inner-city residents.

2. A Legitimate Boon to Society

Defining the public-use requirement as the generation of a widely distributed positive externality is more likely to limit eminent-domain abuse than any effort to

⁴¹⁶ *S. Hearings*, *supra* note 63, at 19-20 (testimony of Susette Kelo, New London, Conn. & Rev. Fred Jenkins, N. Hempstead, N.Y.).

⁴¹⁷ See, e.g., Perkins & Breckenridge, *supra* note 12; David Runk, *Detroit Wants to Save Itself by Shrinking*, ASSOCIATED PRESS FINANCIAL WIRE (Mar. 8, 2010), available at http://www.huffingtonpost.com/2010/03/08/detroit-wants-to-save-its_n_490680.html (last visited April 10, 2010).

classify some such public goods as constitutional and others unconstitutional.⁴¹⁸ A person adequately compensated in the process of an inefficient project (one not Kaldor-Hicks efficient and, therefore, not a public use) does not complain *as a property owner*; rather, he or she complains—as we all should—*as a taxpayer*. And his or hers complaint is not that his or hers rights to use and alienate Blackacre are being trampled upon, but rather that his or hers tax dollars are being squandered.

But the fairness claims of individual owners to compensation for subjective value are in tension with the social-utility claims of the remainder of the community to efficient public services. The conflict can best be resolved by heightened compensation awards,⁴¹⁹ as illustrated by a consideration of the various options available in the Rawlsian original position.⁴²⁰ Philosopher John Rawls suggested that rights are distributed justly in a given political system if we would vouch for the fairness of that distribution *before* we knew our social position in that system.⁴²¹ Using this approach, property rights are justly distributed if we would find that their arrangement properly balances the competing interests of individual owners and the public at large. But we need to make this determination independent of our status as an individual owner subject to condemnation, an employee of the condemning authority, or an interested third-party taxpayer.

Let us assume that it would be highly beneficial to the city budget to force holdout owners to leave the most severely affected neighborhood in a vacant vertical city. There are two scenarios under current law:

If the law prohibits the use of eminent domain to remove unwilling sellers, the law leaves the recalcitrant owner in increasing isolation holding real estate assets that continue to plummet in value. The community-at-large must continue to bear the inefficiency costs of providing basic municipal services to that address.

If the law permits the use of eminent domain and requires the condemning authority to provide only conventional fair-market compensation, the law punishes the dispossessed owner for her stewardship of the property during the period of neighborhood decline by an inadequate recovery of her investment. The law relieves the community of the externalities associated with vacancy, but the community reaps a windfall by forcing

⁴¹⁸ Compare *H. Hearings*, *supra* note 25, at 56 (prepared statement of Rep. John Conyers, Jr., Mich.) (arguing for restrictive categorization of certain specified outcomes as “public use”), with *S. Hearings*, *supra* note 63, at 15-16, 116-20 (testimony of Prof. Thomas W. Merrill, Columbia University School of Law, New York, N.Y.) (asserting the futility of any effort to draw such a bright-line rule in general terms).

⁴¹⁹ See, e.g., Weiner, *supra* note 217, at 13 (describing Rhode Island’s choice to impose just-compensation minimum of 150% of fair market value for economic-development takings); see also Lawrence Blume, Daniel L. Rubinfeld, & Perry Shapiro, *The Taking of Land: When Should Compensation be Paid?*, 99 Q. J. ECON. 71 (1984) (advocating the view that just compensation be viewed as a form of publicly-administered condemnation insurance).

⁴²⁰ See MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 84-88 (2000); Michelman, *supra* note 31, at 1218-24.

⁴²¹ JOHN RAWLS, *A THEORY OF JUSTICE* 18-19 (1972).

the individual owner to sacrifice value that, while not marketable, resonates with reasonable understandings of economic loss.

There is, however, a third option available to state lawmakers:

If the law permits the taking, but requires the payment of heightened compensation, the law refunds the subjective costs incurred by the owner during her period of investment to her out of the social benefit (as represented by the tax revenue garnered from the community as a whole). If the municipal contraction plan does not make economic sense with the payment of heightened compensation, then the projected net social gain is not sufficient to justify dispossessing the owner who kept her faith with the city.

This approach to the conflict between individual property rights and collective social benefit in the eminent-domain context reframes the problem as one of reciprocal rights.⁴²² Individual owners have a right to their idiosyncratic preferences for discrete pieces of land. Other city taxpayers have a right to the efficient provision of city services. According to the Coase theorem, the legal assignment of a right is irrelevant if transaction costs are low.⁴²³ Denying the power of eminent domain gives the individual owner an irrevocable veto, exercised by simply naming a price beyond the efficiency gain to the city. While the appropriate level of compensation is critical to preserving the bargaining strength of the individual owner, eminent domain itself is necessary to compel the negotiation.⁴²⁴

Professor Hicks himself noted that “[t]he main practical advantage of our line of approach is that it fixes attention upon the question of compensation.”⁴²⁵ Hicks also acknowledged that the question of which situations deserve compensation is not a matter for economic science, but rather a question based on personal value judgments.⁴²⁶ The Fifth and Fourteenth Amendments to the U.S. Constitution require compensation in eminent-domain proceedings. And the personal value judgments that determine the amount of compensation ought to be those of the community at large, as represented by the lay jury.

Monetizing subjective value can be difficult in practice, but Professor Kaldor noted the importance of doing so in 1939. In a comment readily applicable to the eminent-domain context, he said, “[I]ndividuals might, as a result of a certain political action, sustain losses of a non-pecuniary kind . . . [such as] in cases where individuals feel that the carrying out of the policy involves an interference with their individual freedom.”⁴²⁷ Professor Kaldor went on to note, “Only if the increase in total income is sufficient to compensate for such losses, and still leaves something

⁴²² For a general discussion of the economic consequences of reciprocal rights, see R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

⁴²³ *Id.*

⁴²⁴ *Id.* at 16.

⁴²⁵ Hicks, *supra* note 85, at 711.

⁴²⁶ *Id.* at 711-12.

⁴²⁷ Kaldor, *supra* note 85, at 551 n.1.

over to the rest of the community, can [the political action] be said to be 'justified' without resort to interpersonal comparisons."⁴²⁸

The evaluation of an eminent-domain petition always involves a balancing of individual and communal interests. When the economic benefits to the community as a whole significantly outweigh the harm to the dispossessed owner, federal courts have consistently found a public purpose and permitted the taking.⁴²⁹ When municipal economic conditions are dire and urban land markets have failed, the same sort of Kaldor-Hicks efficiency arguments justify smart-decline proposals.⁴³⁰ Therefore, federal courts should permit takings for the public purpose of realizing an empirically supported comprehensive plan for municipal contraction.

On its face, the proposal that a city should abandon some of its neighborhoods appears to contradict the growth emphasis in the Supreme Court's public-purpose-takings doctrine. But smart decline resulting in a smaller city is predicated on the fact that the city is too big for the population that wants to live there.⁴³¹ By shrinking, the city reduces the tax burden it imposes on its residents, increases its ability to provide government services, and ultimately ameliorates the dysfunctional impact that urban vacancy has on metropolitan society.⁴³² Just as the recruitment of private investment to create quasi-public infrastructure serves a public purpose, the relocation of landowners to eliminate excess urban vacancy can yield significant public benefits.

Economic vitality is the overarching goal of the public-purpose rationale.⁴³³ When smart decline is as likely to revitalize the community as more conventional planning strategies, it would be nonsensical to declare growth-oriented takings valid public uses while rejecting smart-decline takings. Attempts to grow the current population of older cities to a level commensurate with their existing infrastructure are unlikely to yield significant results because those historical population levels were unsustainable anomalies.⁴³⁴ In vacant cities, municipal contraction should predictably increase economic vitality by enabling municipalities to increase their regional competitiveness on taxes and services.⁴³⁵

Furthermore, prospective estimates of the potential public benefit from conventional development projects are susceptible to exaggeration.⁴³⁶ The benefits of wholesale decommissioning are quantifiable with much greater precision because cities have ready access to their historical cost data regarding both service delivery and infrastructure maintenance. When supported by appropriate proof of the

⁴²⁸ *Id.*

⁴²⁹ *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

⁴³⁰ See Michelman, *supra* note 31, at 1174 n.18.

⁴³¹ *Shrinking Cities*, *supra* note 7, at 34.

⁴³² *Id.* at 39-42.

⁴³³ See *Kelo*, 545 U.S. at 484; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 164 (1896).

⁴³⁴ See FOGELSON, *supra* note 60, at 6-7; *Shrinking Cities*, *supra* note 7, at 34-35.

⁴³⁵ *Shrinking Cities*, *supra* note 7, at 42.

⁴³⁶ De Alessi, *supra* note 333, at 19-20.

possible cost savings, municipal contraction will represent a far less speculative source of net social gain than many growth-oriented public-development plans.⁴³⁷

Maximizing social utility in the difficult operating environment presented by vacant central cities improves the lives of citizens and empowers them to engage in the maintenance of the political and economic systems that ensure liberty. Municipal contraction supports this utility maximization by concentrating the city's remaining energies in preparation for stable, efficient governance without precluding future development. That public purpose is as essential as others that the Supreme Court has already endorsed.⁴³⁸

Because it restores a sustainable relationship between the supply and demand for urban land, wholesale decommissioning of vacant urban neighborhoods should fall within the permissive federal doctrine of public-purpose takings.⁴³⁹ The philosophical rationale for municipal contraction contains compelling arguments for the use of eminent domain under state law, where the public-use requirement has recently been defined much more narrowly than in the federal context. By highlighting the social utility of municipal contraction, proponents may convince states that eminent domain is an essential tool for revitalizing their outmoded urban centers.

V. CONCLUSION

Eminent-domain opponents are correct to identify condemnation law as an area of American law rife with injustice. Current doctrine allows local governments to run roughshod over the rights of ordinary Americans, but the locus of abuse is not the one that property rights advocates typically identify. By attempting a categorical approach to the meaning of the public-use requirement, they render their argument both over inclusive and under inclusive. Interpreting the public-use requirement as antithetical to all public-purpose takings unnecessarily forecloses the ability of the community to successfully complete essential projects—whether an irrigation network, a hydroelectric dam, or a wholesale decommissioning. Simultaneously, property-rights advocates turn a deaf ear to owners victimized by equally coercive takings in furtherance of unnecessary or unfair highway and fuel-pipeline projects. Finally, coupling the categorical approach with the elusive definitional boundary of blight remediation provides disingenuous condemning authorities with a means of circumventing the public-use requirement altogether.

⁴³⁷ *Id.* (discussing temptation of managers to overstate projected benefits and difficulty of overstating projected costs); *see also* Lefcoe, *supra* note 203, at 808 n.21 (quoting the New London project manager regarding the “very difficult” nature of conducting a cost-benefit analysis for the project contested in the *Kelo* case).

⁴³⁸ *See, e.g., Kelo*, 545 U.S. at 469 (finding a public purpose for municipal economic development); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (finding a public purpose for diffusion of fee simple title); *Berman*, 348 U.S. at 26 (finding a public purpose for blight removal); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (finding a public purpose for power generation); *Bradley*, 164 U.S. at 112 (finding a public purpose for irrigation of crops).

⁴³⁹ *See supra* Part III.

By conceding a Kaldor-Hicks-efficiency test for “public use” and focusing on obtaining more sensible compensation for affected property owners, property-rights advocates will more effectively forestall eminent-domain abuse. A scheme that properly compensates dispossessed owners for their loss—and grants them the opportunity for case-specific redress through the courts—would most plainly reflect the full economic value of competing land uses. By monetizing the idiosyncratic value of land to existing owners, compensation reform would more adequately remedy the harm caused in all eminent-domain cases. Such reform would also reduce the frequency of eminent-domain actions by reducing the opportunity for windfall profits. Ironically, resolving the compensation issue will reduce the frequency of takings by enabling courts to deploy free-market valuation principles to test whether public projects are truly justified on a cost/benefit analysis.

Requiring compensation for good-faith subjective value also forces governments to either become more adept at the land-assembly process or exit the business. Limiting government land-development activities reduces the scope of the eminent-domain power’s inherent governmental conflict of interest. At the same time, preserving the power of eminent domain will prevent truly abusive holdout owners from thwarting public projects deemed essential by the land-use markets themselves. Governments cannot use eminent domain to unjustifiably speculate in urban land if they must convincingly demonstrate net social benefit after fair remuneration to the harmed owners. And requiring that condemning authorities offer this evidence contemporaneously with the announcement of their redevelopment plan will save individual owners from years of indeterminacy in the shadow of a threatened condemnation. Such a requirement will also encourage diligent economic analysis by planners, saving municipalities from squandering their scarce resources on marginal redevelopment concepts.

Returning to the question posed at the outset of this Note, the law should allow shrinking cities—like Detroit, Cleveland, Buffalo, and Youngstown—to extinguish private title and shutter vacant neighborhoods through compulsory purchase. Law is sometimes slow to embrace new thinking from other academic disciplines, but it is time that the law accepted the senescence of the vertical city. But recognizing that such cities are no longer the dynamos they once were is not the same as admitting defeat. The American city has proven wildly successful in redistributing wealth and opportunity to tremendous numbers of its former residents. The onset of affluence enabled millions of Americans to improve their material circumstances by putting some distance between themselves and the discomfiting aspects of the urban experience. While the resulting isolation of less affluent citizens in the urban core creates moral and policy challenges, the reality is that most people with the means to leave are unwilling to live in distressed central-city neighborhoods.

Just as rational commercial landlords respond to adverse market conditions by reducing their gross leasable area to align supply with demand, cities should acknowledge the market evidence of their overcapacity and consolidate the municipal footprint. Using eminent domain to contract municipal boundaries is good public policy. Unlike the private landlord-tenant relationship, cities have a fiduciary obligation to their citizens to maximize the collective welfare. This concern for the common good makes the case for urban geographic reorganization even more compelling than the strictly economic motivations that cities and landlords share. A categorical definition of the public-use requirement, motivated by excessively ideological preconceptions about the meanings of property and growth

in the American experience, should not prevent cities from adopting smart decline as an overarching land-use strategy.

Deannexation raises interesting local-government issues regarding the fate of the decommissioned land. One issue is whether jurisdiction would revert to the county government, the state, or a special-purpose entity. In states like Ohio, counties have jurisdiction over unincorporated townships, but the novel concept of a formerly incorporated township will likely require new legal structures. A second major concern—assuming that one possible long-term outcome is the eventual sale of the deannexed property to a developer wishing to create a new, fiscally self-sufficient community—is the question of which government entity pockets the sale proceeds.

Cities could retain jurisdiction over the decommissioned land, but a principal attraction of deannexation is the freedom from financial obligation that the city might obtain. In this sense, municipal contraction provides central cities with unique access to a regional land-use and resource-management strategy. Unlike multilateral efforts toward regionalism, relinquishing municipal jurisdiction empowers central cities to force the unwanted land onto the regional agenda. Municipal contraction circumvents the principal obstacle to regionalism—the central city's unattractiveness to the suburban electorate. Thus, smart decline provides a fresh point of departure for conversations about regionalism as well. To those who would object to unilateral central-city action here, the rebuttal might be that the suburban-zoning, school-districting, and other decisions that dismembered the city were not taken collectively either. And the reason central cities are in trouble is that former occupants opted to withdraw from urban life.

The choice of millions of individual market actors to depart for the suburbs might suggest that central cities should be allowed to continue their freefall into decrepitude. But, unlike a bankrupt corporation that can simply be liquidated, cities have a tangible reality. The unavoidable persistence of the urban geography—in one form or another—suggests that healthy central cities are in the long-term interest of all members of a metropolitan region. The economic vitality of central cities has a significant impact on the economic fortunes of their surrounding regions. More importantly, further marginalization of central-city residents can only reinforce the culture of despair, incivility, and illegality gripping many urban neighborhoods. Abandoning children unlucky enough to be born into this environment is morally unacceptable. And maybe, just maybe, by shrinking the scope of its obligations geographically, the city can do a better job of preparing these innocent victims of urban decline. It is commonplace to say that we would move mountains for our children. Collectively, are we willing to move one another toward that end?