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# "We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation

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# “WE SHALL NOT BE MOVED”: URBAN COMMUNITIES, EMINENT DOMAIN AND THE SOCIOECONOMICS OF JUST COMPENSATION

JAMES J. KELLY, JR.†

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## INTRODUCTION

The current debate over eminent domain as a tool to facilitate economic development shifts between two starkly unattractive alternatives. Property rights advocates insist that if strict limitations are not placed on the ability of governments to condemn private property and transfer it to private parties, then homes, small businesses, and entire communities face capricious annihilation by state and local politicians and their well-heeled patrons.<sup>1</sup> Their slogan "a man's home is his castle" expresses the inviolability of all private property rights as the fundamental

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<sup>1</sup> See, e.g., Petition for Writ of Certiorari at \*25–26, *Kelo v. City of New London*, 125 S. Ct. 2655 (2004) (No. 04-108), 2004 WL 1659558; Castle Coalition-About Us, <http://www.castlecoalition.org/profile/index.html> (describing the need of home and small business owners to stand up to "greedy governments and developers who seek to use eminent domain to take private property for their own gain.") (last visited Sept. 16, 2006).

check on authoritarianism.<sup>2</sup> Defenders of local governments, on the other hand, warn that elimination of eminent domain as an effective redevelopment tool will isolate older communities by thwarting any efforts to coordinate investment.<sup>3</sup> In their view, the mobility of residents and businesses forces local jurisdictions to act as entrepreneurial as Fortune 500 companies in their recruitment and retention of taxpayers.<sup>4</sup>

Both views speak to the survival of urban neighborhoods, but neither offers a paradigm of land ownership that fosters authentic community development. The social and economic health of an urban neighborhood necessitates a certain amount of collective action that reflects both the interdependence of its stakeholders and its symbiosis with other parts of the region.<sup>5</sup> Residents' contributions to their own homes and to the community at large are secured by their private ownership of those investments, and ultimately by their uninhibited choice to remain part of or exit from those communities.<sup>6</sup> For reflective community advocates then, the conceptual dichotomy of the neighborhood as either a confederacy of castles or an expendable division of a municipal corporation fails to offer a satisfactory model for true community development.

By a 5-4 margin, the Supreme Court recently upheld the exercise of eminent domain at issue in *Kelo v. City of New London*,<sup>7</sup> dashing the hopes of many private property rights advocates for a revival of the federal public use restriction. The

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<sup>2</sup> See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 140–41 (Oxford Univ. Press 1992) (expressing strong support for the notion that property rights are an essential aspect of personal liberty and quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)).

<sup>3</sup> See, e.g., Brief of Amicus Curiae of the Mayor and City Council of Baltimore in Support of Respondents at \*24–25, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2005 WL 166940 (arguing that residents of East Baltimore “have been isolated for decades from opportunities for meaningful employment and economic advancement”). For a discussion of eminent domain’s role in coordinating intensive investment in deteriorating neighborhoods, see *infra* Part I.C.2.

<sup>4</sup> See Patricia E. Salkin & Lora A. Lucero, *Community Redevelopment, Public Use, and Eminent Domain*, 37 URB. LAW. 201, 208–09 (2005) (quoting AM. PLANNING ASS’N, POLICY GUIDE ON PUBLIC REDEVELOPMENT (2004), <http://www.planning.org/policyguides/pdf/Redevelopment.pdf>).

<sup>5</sup> See, e.g., *id.* at 226 n.194 (quoting CONN. GEN. STAT. § 8-186 (2005)).

<sup>6</sup> See generally ELY, *supra* note 2, at 43 (explaining that “the doctrine that property ownership was essential for the enjoyment of liberty has long been a fundamental tenet of Anglo-American constitutional thought”).

<sup>7</sup> 125 S. Ct. 2655, 2668–69 (2005).

political backlash against that decision, however, has spawned a swarm of federal and state legislative initiatives to curtail condemnation for transfer to private parties.<sup>8</sup> As the *Kelo* opinion itself implied, protection of condemnees against undue hardship should come from the States' enactment and application of their own statutes and constitutions.<sup>9</sup> Unfortunately, many of the bills currently pending amount to little more than ham-handed attempts to overrule *Kelo* legislatively.<sup>10</sup> Legislatures can be more proactive, precise, and comprehensive than courts in their legal pronouncements.<sup>11</sup> Statutory acts can balance the legitimate public needs for land acquisition against "the hardship that condemnations may entail, notwithstanding the payment of just compensation."<sup>12</sup> Drafting appropriate statutory solutions, however, requires a thorough understanding of the common principles of market liquidity that underlie both the condemnor's insistence on compulsory transfer and the condemnee's assertion of irreparable harm.

In theoretical terms, eminent domain is the government's assertion that all private property rule entitlements must yield to liability rule liquidation in the face of public need.<sup>13</sup> The

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<sup>8</sup> Thirty state legislatures have enacted further restrictions on eminent domain since the rendering of the *Kelo* decision. Legislative Action Since *Kelo*, <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf> (last visited Sept. 15, 2006). Even those closest to the movement against eminent domain abuse have questioned its substantive gains in this arena. See e.g., Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, 9 MICH. ST. L. REV. (forthcoming 2006), available at [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=868539](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=868539) (asserting that more than half of the laws enacted provide little or no meaningful protection for private property owners).

<sup>9</sup> *Kelo*, 125 S. Ct. at 2668.

<sup>10</sup> See Patricia E. Salkin & Margaret Lavery, *Zoning and Land Use Planning*, 34 REAL EST. L.J. 375, 375–76 (2005).

<sup>11</sup> Frank Michelman concluded his classic article, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, with a discussion of why legislative reforms are needed to address the problem of just compensation for governmental action that impact private property rights. 80 HARV. L. REV. 1165, 1253–58 (1967). Because any sophisticated systematic resolution of eminent domain controversies requires a greater remedial menu than the judicial dichotomy of property rule negative injunction or liability rule damages award, it is this Article's contention that legal theory will tend to generate nuanced solutions that presuppose legislative enactment. See *infra* notes 29–36 and accompanying text.

<sup>12</sup> *Kelo*, 125 S. Ct. at 2668.

<sup>13</sup> The terminology of property rules and liability rules originates with a classic law review article commonly referenced as "The Cathedral." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of*

condemning authority's use of condemnation makes sense when the public goal, by its nature, involves the placement of land into a public trust. On the other hand, when a public objective can be satisfied by less coercive means, it is the liability rule of compensated compulsory transfer that may need to give way. In such situations, a more robust understanding of the just compensation requirement would move beyond computation of cash awards and shape the way in which government achieves public objectives when condemnation would cause irreparable harm.<sup>14</sup> Courts and legislatures evaluating and fixing the property rule/liability rule boundary for land rights as against

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*the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972) (discussing when property rules give way to liability rules in the context of the exercise of eminent domain). In their article entitled *Pliability Rules*, Abraham Bell and Gideon Parchomovsky offer a concise description of the range of entitlement alternatives:

In analyzing how the law protects entitlements, Calabresi and Melamed divided the universe of legal remedies into three modalities of protection: property rules, liability rules, and inalienability rules. They defined the three modalities as follows. Property rule protection confers upon the entitlement holder the exclusive power to determine the price nonholders would have to pay for using the protected asset or right. Thus, all transfers of entitlements protected by a property rule must be consensual; all attempts to transfer the entitlement nonconsensually would be met with an injunction. Liability rule protection, by contrast, gives the nonholder the power to take the entitlement without the consent of the entitlement holder and pay a price to be determined by a third party, typically a court or the legislature. The entitlement holder would not be able to enjoin third parties from taking her entitlement; instead, she would have to settle for damages. Finally, inalienability rules bar all transfers of the entitlement, whether consensual or nonconsensual.

Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002) (citations omitted).

<sup>14</sup> See *infra* Part I.A.2. Substantive due process bars unnecessary takings of fundamental rights not only because their free exercise is essential to a functioning democracy, see *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)), but also because their loss is uncompensable. See *id.* at 726 (discussing the “[Supreme] Court’s substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights” many of which “involv[e] the most intimate and personal choices a person may make in a lifetime”) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992))). Although substantive due process does not bar the condemnation of homeownership property, residents who face the loss of community, their investment in which is crucial to social capital, should not have to rely on public use jurisprudence alone to protect them from liquidation. See *infra* Part I.A.2.

the government must look not only to the public need for eminent domain but also to the nature of the loss imposed on condemnees.

In the context of urban redevelopment of owner-occupied residential land, the government's need to intervene in the real estate market must contend with the homeowners' inability to enter into the market and fully replace what was taken. To illustrate both why and how urban redevelopment of homeowner property can and should be transformed, this Article will take advantage of recent legal scholarship by Abraham Bell and Gideon Parchomovsky breaking down the boundaries between property and liability rules,<sup>15</sup> and articulating a theory of property rooted in the value of stable ownership.<sup>16</sup>

To many homeowners deprived of both residence and community, no cash award can qualify as "just compensation."<sup>17</sup> When the government enjoys a thick market to meet its public objective, it should not drive condemnees into a thin, or non-existent market to try to replace what they would lose in the taking. Rather than submit redevelopment plans, however, to the property rule veto of every single homeowner,<sup>18</sup> a community

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<sup>15</sup> For a comprehensive treatment of these conceptual boundary issues, see Bell & Parchomovsky, *supra* note 13, at 4–5. For two interesting liability rule responses to the eminent domain dilemma, see Michael A. Heller & Roderick M. Hills, Jr., *The Art of Land Assembly* (forthcoming) (manuscript at 2, on file with author), available at <http://www.law.uchicago.edu/Lawecon/workshop-papers/Heller.pdf>, and Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 1003 (2004), both of which offer collective and individual mechanisms for increasing condemnee autonomy in eminent domain's traditional liability rule approach. For a discussion of each of these proposals, see *infra* Part I.C.3.

<sup>16</sup> See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 615 (2005). Bell and Parchomovsky point out the importance of combining property-rule and liability-rule approaches in compensating the condemnee for the part of his or her loss not covered by the receipt of market value. See *id.* at 604–05. They also acknowledge the debt that their approach to subjectively valued property owes to Peggy Radin's theory of property and personhood. See *id.* at 542. *But see id.* at 550–51 (attempting to distance themselves from Radin's labor intensive analysis of particular subject-object relationships). For insight into Radin's influence, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (explaining that personhood "serve[s] as an explicit source of values for making moral distinctions in property disputes"). In setting out broad categories for condemnee compensability, the current Article will draw upon these theoretical resources to fashion an argument for communal homestead protection against urban redevelopment eminent domain. See *infra* Part I.C.4.

<sup>17</sup> See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1111–12 (1981) (exploring cases where no amount of money could compensate the aggrieved owner for his or her injuries).

<sup>18</sup> For a discussion of the stagnation that can be induced by overlapping

governance model should be enacted to transcend the property rule/liability rule dilemma.

I propose a pair of legislative reforms that offer a productive, if not placid, interface between community stakeholders and the governmental authorities responsible for development planning. Residents of a distressed urban neighborhood should be empowered both to assert rights of continuing residency that cannot be liquidated through redevelopment eminent domain processes and, through the pooling and exchange of such rights, to shape collectively any redevelopment of their community. Specifically, community members' legal rights of long-term residency in their current homes should not be subject to eminent domain pursuant to a required redevelopment plan until the majority of them have approved the plan.<sup>19</sup> Through this Homestead Community Consent ("HCC"), these residents, as a group, will be offering their homes for sale in exchange for a plan that will truly improve their community. To solidify the ownership of the redevelopment by these homestead residents and other inhabitants who have actual, if not legally protected, long-term residencies in the neighborhood, continued membership in the community should be assured by amending relocation laws to guarantee these core community members an alienable Community Residency Entitlement ("CRE") to replacement housing in the redeveloped district.<sup>20</sup> With the

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property rule entitlements, see Mark D. West & Emily M. Morris, *The Tragedy of the Condominiums: Legal Responses to Collective Action Problems After the Kobe Earthquake*, 51 AM. J. COMP. L. 903, 904 (2003) (noting that in common interest communities, "rights of exclusion become distributed among so many owners that it becomes too difficult to agree to develop the property to a higher use"); Michael Heller, *Empty Moscow Stores: A Cautionary Tale for Property Innovators*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 189-90 (Charles Geisler & Gail Daneker, eds., 2000) (discussing problems that arise "[w]hen too many owners have . . . rights of use").

<sup>19</sup> Statutory changes to the planning requirements already present in many state laws delegating condemnation authority to the public authorities responsible for so-called "public-private takings" could augment collective condemnee autonomy. Examples of such statutory provisions are found in many states: CONN. GEN. STAT. ANN. §§ 7-600, 7-603 (1999); GA. CODE ANN. §§ 8-4-2, 8-4-4 (2006); MO. ANN. STAT. § 99.820 (2001); N.C. GEN. STAT. ANN. § 160A-504 (2006); 35 PA. STAT. ANN. § 1709 (2003). For a discussion of the Homestead Community Consent Reform, see *infra* Part II.B.

<sup>20</sup> The Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970 already offers protection of residents' rights to remain in the same metropolitan area. 42 U.S.C. § 4626 (2000). In guaranteeing residents the right to return to the redeveloped neighborhood, the proposed reform would substantially



enactment of both reforms, resident homeowners would collectively control their rights to sell their individual homes in order to improve their community, and each resident would have personal control over his or her right to remain a member of that community after redevelopment. Together, these two participatory processes can convert an instrument of societal infamy into an opportunity for community transformation and healthy reconnection with the surrounding market.

The first part of the Article will discuss the current constraints on eminent domain generally and construct a theory that maps out public necessity and just compensation as complementary limitations on eminent domain that flow from the market limitations facing the condemnor and condemnee, respectively. A broad understanding of "public use" can work with a more robust reading of "just compensation" to constrain eminent domain as against homeowners without depriving them of the tools they need to redevelop their neighborhoods. The second part of the Article examines the details of Homestead Community Consent and Community Residency Entitlements as respective reforms on state planning requirements and federal relocation law.

## I. THE SOCIOECONOMICS OF JUST COMPENSATION

Eminent domain banishes all pure property rule entitlements to the realm of the hypothetical.<sup>21</sup> The image of an obstinate owner of a particularly indispensable piece of private property whimsically frustrating the satisfaction of a public need undercuts all claims for the sanctity of in-kind entitlements. Private property advocates have responded to the inevitability of eminent domain authority by insisting that such governmental liquidation be limited to cases of genuine "public use."<sup>22</sup>

A judicial review of a public use determination offers a homeowner condemnee only two outcomes: the home is inviolable and can only be obtained with the owner's consent, or

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constrict the geographical area that could provide qualified permanent relocation sites for those displaced long-term residents of certain projects that use federal funds and eminent domain. *See infra* Part II.B.2.

<sup>21</sup> All private property is subject to eminent domain. 1A NICHOLS ON EMINENT DOMAIN § 3.02 (3d. ed. 2006).

<sup>22</sup> *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166–69 (Harvard Univ. Press 1985) (articulating the public use limitation in terms of a restrictive notion of public goods).

the home is gone and the cash value it has for others takes its place. The stark difference between property rule and liability rule, between protective injunction and compensatory damages, seemingly affords no middle ground. In the case of eminent domain, courts make the choice with no reference to landowners' varying experiences of the loss inflicted by condemnation.<sup>23</sup>

Legal theorists, however, have recognized hybrid forms of ownership and dubbed them pliability rule entitlements.<sup>24</sup> Some have sought to combine features of property and liability rules to offer fair and efficient resolutions to issues such as eminent domain.<sup>25</sup> Pliability rule proponents engineer entitlement protections that offer valuation alternatives to the liability rule approach of judicial appraisal without inflicting the holdout problems and other transaction cost issues associated with property rule entitlements.<sup>26</sup> To reinforce individual autonomy without enabling exaggerated claims of subjective value, Lee Anne Fennell has proposed systems of "revealing options."<sup>27</sup> In their approach to the eminent domain question, Michael Heller and Rick Hills have softened the express consent element of property rule entitlements through collective bargaining.<sup>28</sup>

Although these two approaches differ substantially, they both are sufficiently innovative and complex as to require legislative creation. Courts applying crucial constitutional phrases may not be the only, or even the best, means of

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<sup>23</sup> See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324, 326 (1893) (explaining that the computation of compensation only concerns the value of the land and does not concern the owner's personal loss).

<sup>24</sup> See generally Bell & Parchomovsky, *supra* note 13, at 5 (describing pliability rules as being more flexible than liability and property rules).

<sup>25</sup> See Fennell, *supra* note 15, at 1002–03; Heller & Hills, *supra* note 15, at 3; discussion *infra* Part I.C.3 (providing a proposed pliability rule approach to neighborhood eminent domain).

<sup>26</sup> Bell and Parchomovsky apply the "pliability" terminology that they created to a wide variety of entitlements that mix property and liability rule features across time or with respect to various non-owners. Bell & Parchomovsky, *supra* note 13 at 25–26. This Article's focus will be on those types of pliability rules that manifest both property and liability rule features at the same time with respect to the same set of non-owners.

<sup>27</sup> See Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401–02 (2005) (suggesting that the problem of subjective valuations can be improved by requiring property owners to preset prices for potential entitlements to their land); *supra* note 15 and accompanying text and discussion *infra* Part I.C.3.

<sup>28</sup> See Heller & Hills, *supra* note 15, at 1–2, 5 (arguing that the community of property owners should decide by consensus whether or not urban renewal is appropriate); discussion *infra* Part I.C.3.

determining how compensability should restrain eminent domain.<sup>29</sup> Nevertheless, a richer understanding of the fundamental limits of eminent domain will lead to helpful solutions, even if the courts are ultimately dependent upon the legislature to implement these limits.<sup>30</sup>

#### A. *Legal and Equitable Constraints on Eminent Domain*

Although popularly described as an express grant of constitutional authority,<sup>31</sup> the governmental power to compel transfer of private property for its own needs is, as a matter of law, an indispensable and implicit aspect of sovereignty.<sup>32</sup> Eminent domain's historical roots predate any modern notion of governmental authority as flowing from the consent of the governed. It has never depended upon constitutional text for fundamental legitimacy.<sup>33</sup> The principle that, at the need of the sovereign, dominion shall become usufruct has survived the spread of democracy with largely the same limitations of public

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<sup>29</sup> See Michelman, *supra* note 11, at 1165–69 (questioning the reliance on judicial interpretations of what amounts to “compensation” and emphasizing that the government should determine how “compensation” should be computed and distributed among society).

<sup>30</sup> While it might seem bizarre to suggest that legislatures should be counted upon to restrict themselves as to which takings go “too far,” this Article’s proposals for eminent domain reform are not merely pleas for self-regulation. Most controversial condemnations are carried out by local and regional authorities that receive specifically delegated eminent authority from state governments. See *supra* note 19 (giving examples of statutes delegating the authority to condemn property to local authorities). Federal and state legislatures are currently considering a range of bills to limit, respectively, the funding and authority of local authorities to condemn private property for economic development. See Legislative Action Since *Kelo*, *supra* note 8.

<sup>31</sup> News media discussions of condemnations reflect the public’s lack of comfort with the idea that eminent domain is an implicit aspect of sovereignty. A recent *New York Times* article credits the Takings Clause itself as the source of eminent domain authority: “The issue is not whether governments can condemn private property to build a public amenity like a road, a school or a sewage treatment plant. That power is explicit in the takings clause of the Fifth Amendment, provided that ‘just compensation’ is paid.” John M. Broder, *States Curbing Right To Seize Private Home*, N.Y. TIMES, Feb. 21, 2006, at A1.

<sup>32</sup> See *United States v. Carmack*, 329 U.S. 230, 241–42 (1946) (explaining the government’s “federal sovereign power” to appropriate land for “public use”).

<sup>33</sup> See generally 1 NICHOLS ON EMINENT DOMAIN § 1.13 (2006) (tracing the origins of the term “eminent domain”). Although the earliest discussions of eminent domain are found in Grotius and Puffendorf, its use in English common law predates even those references. See Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1258, 1258 n.40 (2001–2002) (stating that the term “eminent domain” predates Grotius).

necessity and just compensation it has had from its original articulation.<sup>34</sup>

Although eminent domain activity is often carried out by the executive branch, the power to condemn land is vested in the legislature.<sup>35</sup> To take land for public use requires the enactment of a law.<sup>36</sup> That being said, the legislature has broad latitude to delegate its authority.<sup>37</sup> While state governments have the ability to vest plenary eminent domain in these local and regional authorities, they typically place significant substantive and procedural restrictions on their capacity to seize land.<sup>38</sup> As these quasi-public corporations are responsible for the most controversial condemnations, a complete legal theory of eminent domain will guide legislatures in structuring the planning processes through which these organizations act.

Such an understanding of eminent domain will center on the two classic restrictions on that power: Public Use and Just Compensation.<sup>39</sup> The ends of a compulsory transfer must be public, and the imposed costs, though at first private, must become public as well. While discussion of the latter requirement fills treatises with subsections on the scope and method of land valuation, public use jurisprudence has evolved more simply, if not more quietly, at the highest levels of the judiciary.

## 1. Public Use: The Limitation That Was

Although academic obituaries for the “public use” requirement have mounted over the last fifty years,<sup>40</sup> its decline

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<sup>34</sup> See Harrington, *supra* note 33, at 1247–48 (noting that American political theorists drew upon English legal traditions by naming legislative consent as the sole limit on the government’s power of eminent domain).

<sup>35</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (discussing the application of the separation of powers to the Takings Clause).

<sup>36</sup> See *id.* at 585, 587 (stressing that the power to condemn land must stem from the Constitution even during wartime emergencies).

<sup>37</sup> See *id.* at 588.

<sup>38</sup> See *City of Tacoma v. Zimmerman*, 82 P.3d 701, 704–05 n.6 (Wash. App. Div. 2004) (citing the relevant state statute, which limits cities’ powers of eminent domain). See generally N.J. CONST. art. VIII, § 3 (stating that condemnation of blighted areas is subject to various conditions and governmental regulations); COLO. REV. STAT. §§ 31-25-102 *et seq.* (detailing the relevant definitions and procedural steps for condemnation based on urban renewal).

<sup>39</sup> U.S. CONST. amend. V. The Fifth Amendment ends with the clause “nor shall private property be taken for public use, without just compensation.” *Id.*

<sup>40</sup> See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 190 n.5 (Yale Univ. Press 1977) (reexamining the idea that “any state purpose otherwise

was not straight downward from its original enactment.<sup>41</sup> Prior to the civil war, state courts showed great deference to legislatures' determinations that certain transfers to private parties constituted valid exercises of eminent domain.<sup>42</sup> In the nineteenth century the creation of an infrastructure for a growing national economy intensified the taking of land for canals, private mills and railroads.<sup>43</sup> The growing frequency of condemnations for transfer to private parties alarmed many judges.<sup>44</sup> Courts used both the takings clause and the evolving notion of "substantive due process" to reign in legislators' ability to interfere with vested economic rights.<sup>45</sup> By the time the Supreme Court marked the high point of substantive due process protection of economic interests with its decision in *Lochner v. New York*,<sup>46</sup> the restrictive understanding of "public use" was

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constitutional" should pass the "public use" limitation); EPSTEIN, *supra* note 22, at 161 (characterizing the "public use" clause as "invisible"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61-64 (1986) (noting that observers view the public use clause as a "dead letter" and discussing three cases which support that view); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 599 (1949) (documenting the "death" of the "public use" limitation).

<sup>41</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 394 (1798) (denouncing forced transfers between private parties on the basis of the due process clause). In early U.S. Supreme Court cases, the main constraint on takings for private use was the due process clause, and it was not until later in the nineteenth century that "public use" arose as a separate basis for invalidating governmental seizures. See James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 846 (2004) (stating that since 1872 courts have interpreted the "public use" language of the Fifth Amendment as preventing eminent domain for private purposes).

<sup>42</sup> See Ely *supra* note 41, at 850 (noting some state courts deviated from the general trend of interpreting the "public use" language of the Fifth Amendment as preventing the use of eminent domain for private purposes); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940) (discussing the broad construction of "public use" in the nineteenth century).

<sup>43</sup> See Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 901-05 (2004) (discussing the limited exception for transfers of land to private owners of common carriers such as railroads).

<sup>44</sup> See ELY, *supra* note 2, at 77-78 (arguing that although the courts initially did not challenge eminent domain, by the nineteenth century, they began curtailing the legislature's power to condemn land in response to the rapid commercial growth of that era); Nichols, *supra* note 42, at 618 (explaining that the narrowing of the concept of "public use" was due in part to an increased understanding by the courts of their role as "guardians of property rights").

<sup>45</sup> See ELY, *supra* note 2, at 77-78 (outlining the evolution of the courts' interpretation of substantive due process to safeguard property rights); Nichols, *supra* note 42, at 618.

<sup>46</sup> 198 U.S. 45, 64 (1905) (holding that a statute restricting the working hours of

already in decline.<sup>47</sup> The second half of the twentieth century saw the public use limitation grow quieter still as the Supreme Court approved government intervention in faltering land markets.<sup>48</sup> Any doubts that the current Court would once again second-guess public intrusion into the private sphere were somewhat quelled by the decision in *Kelo*.<sup>49</sup>

Whereas the Court's 1954 decision in *Berman v. Parker*<sup>50</sup> addressed the taking of unblemished property in an area that was indisputably blighted, *Kelo* involved the wholesale appropriation and redevelopment of a neighborhood that had not even been declared substandard under existing health and safety codes.<sup>51</sup> Ruling for the City of New London, the Court declined to impose substantive limits on the scope of ends justifying a compensated taking in a situation where the legislative ratification of those ends involved "a 'carefully considered' development plan"<sup>52</sup> and no untoward control by a particular private beneficiary.<sup>53</sup> Although the dissents were quite strident, one explicitly rejected the landowning Petitioners' reasonable certainty of public benefit standard and neither advocated the adoption of the Petitioners' academic supporters' means-end fit test that the Court had used in recent exaction matters.<sup>54</sup>

private employees was unconstitutional).

<sup>47</sup> See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896) (declaring that condemnations that serve a legitimate public purpose can be deemed takings for public use).

<sup>48</sup> See *Clayey*, *supra* note 43, at 907–08 (discussing the recognition of the removal of "blight" as a "public use"). See *generally* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984) (holding that taking property to correct a "malfunctioning" land market was constitutional); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (holding that taking property for the redevelopment of blighted areas was constitutional).

<sup>49</sup> See *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005) (reaffirming the Court's deference to legislative judgments of public purpose).

<sup>50</sup> 348 U.S. 26, 34 (1954).

<sup>51</sup> *Kelo*, 125 S.Ct. at 2664–65 (recognizing that "[t]hose who govern the City were not confronted with the need to remove blight").

<sup>52</sup> *Id.* at 2661.

<sup>53</sup> *Id.* at 2665–67 (refusing to accept the petitioners' contention that a bright line rule should be adopted to prevent the taking of private land for the purpose of private economic development). For further discussion of various means-based approaches to constraining eminent domain, see *infra* Part I.B.1.

<sup>54</sup> *Id.* at 2676 (O'Connor, J., dissenting) (stating that "the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer."); Brief Amicus Curiae of Professors David L. Callies, et al. in Support of Petitioners at \*21-27, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2803192 (urging the court to use "means-ends

Federal public use jurisprudence remains focused on the range of permissible government ends as opposed to the necessity of eminent domain as a means to those ends. For now, that scope is as broad as it has ever been.<sup>55</sup>

State constitutional limitations are a different matter. Private property advocates have had some significant recent successes in state appellate courts. In the case of *County of Wayne v. Hathcock*,<sup>56</sup> the Michigan Supreme Court repudiated its holding in the infamous *Poletown* case.<sup>57</sup> The court nominally rejected the would-be condemnees' arguments that the proposed taking for an industrial park violated Michigan's requirement that public corporations use eminent domain only as necessary.<sup>58</sup> Nevertheless, the *Hathcock* court voided the condemnation as a private-use taking because it failed to fit into one of the three private transfer exceptions that the Court, based on state constitutional law, constructed around the necessity of the taking to the accomplishment of a public purpose.<sup>59</sup> Rather than being drawn into a case-by-case review of the indispensability of every controversial condemnation, the Michigan Supreme Court set out broad principles for evaluating seizures for transfers to private

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scrutiny in public use cases"). See generally Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (supporting the means-based approach to constraining eminent domain).

<sup>55</sup> It is worth noting that, although the decision was 5-4, both of the Justices who have left the Court since the decision in *Kelo* were in the minority.

<sup>56</sup> 684 N.W.2d 765 (Mich. 2004).

<sup>57</sup> In overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), Michigan has banned the use of eminent domain for transfer to private parties except in the three exceptions outlined in Justice Ryan's famous *Poletown* dissent: (i) extreme public necessity (private utility dependent on specific land for its very existence); (ii) continual government oversight (legally enforceable public benefit); (iii) facts of independent significance (public objective not about the ends, but about the means itself). *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781-83 (Mich. 2004). Ilya Somin, while welcoming the *Hathcock* decision itself, has expressed concerns that the latter exceptions are so indistinct as to render the prohibition ineffective. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1027-34 (2004).

<sup>58</sup> *Hathcock*, 684 N.W.2d at 776-78 (analyzing MICH. COMP. LAWS § 213.23). It is quite possible that the *Hathcock* court rejected the statutory objections to the challenged condemnation so that it could reach the constitutional issues. See *id.* at 778.

<sup>59</sup> *Id.* at 783-84 (holding that "no one sophisticated in the law . . . would have understood 'public use' to permit the condemnation of defendants' properties for the construction of a business and technology park owned by private entities").

parties.<sup>60</sup> Its decision offers its counterparts in other states a categorical approach to “public use” that approves those ends that require eminent domain for their fulfillment notwithstanding the eventual transfer of the condemned land to a private party.<sup>61</sup>

Few state high courts, however, have issued interpretations of “for public use” that restrict eminent domain significantly more than the federal courts’ rational basis scrutiny.<sup>62</sup> In response to the public outcry against *Kelo*, however, their own state legislatures are considering constitutional amendments to prohibit condemnations for “economic development.”<sup>63</sup> But, like their federal counterparts, most state courts essentially regard condemnation bills as deserving no more review than regulatory statutes as long as compensation is paid.

## 2. Just Compensation: The Limitation Yet To Be

The Fifth Amendment at best implicitly requires that takings be “for public use.”<sup>64</sup> On the other hand, it expressly forbids expropriation “without just compensation.”<sup>65</sup> Yet courts have used only the former phrase to invalidate condemnations. Just compensation has been relegated to being a condition subsequent to eminent domain.<sup>66</sup> When the legislature has found

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<sup>60</sup> *Id.* at 781–83 (highlighting the factors discussed by Justice Ryan in his dissent in *Poletown*).

<sup>61</sup> More recently still, the Ohio Supreme Court unanimously rejected a condemnation based on the declared need to prevent future deterioration in a neighborhood. *Norwood v. Horney*, Nos. 2005-0227, 2005-0228, 2005-1210, 2006 WL 2096001, at \*4 (Ohio July 26, 2006).

<sup>62</sup> See, e.g., *Honolulu v. Sherman*, 129 P.3d 542, 575 (Haw. 2006) (affirming rational basis review of eminent domain); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 103 (R.I. 2006) (emphasizing that rational basis review should be applied to legislative takings). The Illinois Supreme Court’s decision in *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2002), is, however, another notable recent exception to use of rationality review.

<sup>63</sup> See Sandefur, *supra* note 8, at 706 (noting that after the *Kelo* decision, legislators in a majority of the states began working to amend their state constitutions).

<sup>64</sup> Cf. *Nichols*, *supra* note 42, at 616. (“Surely, if the framers of the Constitution had meant that property not be taken for private use at all, they would have said so.”). *But cf.* *Kelo v. City of New London*, 125 S. Ct. 2655, 2672 (2004) (O’Connor, J., dissenting) (arguing that “public use” is a meaningful restriction on takings); *id.* at 2678 (Thomas, J., dissenting) (arguing that if the “public use” clause was not interpreted restrictively, it would be “meaningless”).

<sup>65</sup> U.S. CONST. amend. V.

<sup>66</sup> To a claim that a municipality’s condemnation of a water utility franchise



that certain private property must be obtained "for public use," then just compensation becomes strictly a quantitative issue: How much money must the condemnor pay to the condemnee?<sup>67</sup> At least in seizures that do not implicate fundamental rights,<sup>68</sup> the courts presume that a cash award can be just compensation.

Courts have repeatedly affirmed that the concept of just compensation is an equitable one.<sup>69</sup> While the judiciary has largely left the issue of public use up to the legislature, the proper measure of just compensation remains within the purview of the courts.<sup>70</sup> Raising expectations for intervention even further, the Supreme Court has declared that the purpose of constitutionally mandated compensation is to make the owner "whole"<sup>71</sup> and to put him "in the same position monetarily as he would have occupied if his property had not been taken."<sup>72</sup> The courts have reduced these broad principles, however, to valuation rules that limit required indemnification to the fair market value of the taken property.

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was prohibited by the Contracts Clause, Justice Brewer, in his 1897 opinion in *Long Island Water Supply Co. v. Brooklyn*, responded:

All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation.

166 U.S. 685, 689 (1896).

By denying, in dictum, the "just compensation" clause any status as a bar against eminent domain, the *Long Island Water Supply* Court was merely emphasizing for "public use" as the only prior restraint on the authority to condemn. *See id.*

<sup>67</sup> *See* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314–15 (1987) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981), *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932), *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893), *United States v. Jones*, 109 U.S. 513, 518 (1883)).

<sup>68</sup> *See* Shelley Ross Saxer, *Eminent Domain Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 655 (2004) (discussing the heightened scrutiny given to takings that impact First Amendment rights); *infra* notes 144–147 and accompanying text.

<sup>69</sup> *See, e.g.*, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123–24 (1950); *Olson v. United States*, 292 U.S. 246, 254–57 (1934); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (illustrating the "natural equity" of just compensation).

<sup>70</sup> *Monongahela*, 148 U.S. at 327–28 (explaining that the "measure of compensation" is a "judicial and not a legislative question.").

<sup>71</sup> *Olson*, 292 U.S. at 255.

<sup>72</sup> *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

In *Monongahela Navigation Co. v. United States*,<sup>73</sup> the Supreme Court articulated a depersonalized view of the Fifth Amendment's guarantee of just compensation:<sup>74</sup>

There can . . . be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.<sup>75</sup>

The *Monongahela* Court excluded from the compensation calculation considerations of how the condemnation affected the property owner.<sup>76</sup> The only subject of the Fifth Amendment's guarantee of just compensation was the taken property itself.<sup>77</sup> The Court actually used this *in rem* understanding of the Takings Clause to protect the condemnee in *Monongahela* from the government's attempts to recapture the monetary value of the enhancement to the condemnee's remaining property occasioned by the planned public investment.<sup>78</sup> The Court's exclusive focus on the value of the property, however, quickly led to the adoption of fair market value as the quite limiting default rule for constitutionally mandated compensation.<sup>79</sup>

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<sup>73</sup> 148 U.S. 312 (1893).

<sup>74</sup> *See id.* at 325–26.

<sup>75</sup> *Id.* at 326.

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> U.S. *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 285 (1943) ("[T]he Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment."); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80–81 (1913) ("The owner must be compensated for what is taken from him, [and] that is done when he is paid its fair market value . . ."); *see also* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 22–23 (1949) (Douglas, J., dissenting).

The courts have not pretended that fair market value for taken property will reimburse condemnees for all losses as a result of the taking. In *Kimball Laundry Co. v. United States*,<sup>80</sup> Justice Frankfurter wrote:

The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.<sup>81</sup>

In rejecting the more subjective measure of use value for the objective standard of a property's exchange value on the open market, the Court acknowledged that some condemnees would not be fully compensated for their losses.<sup>82</sup> Analogizing to the unevenness of regulatory burdens validated in contemporary Takings Clause jurisprudence, Justice Frankfurter saw these unreimbursed costs as part of the price of citizenship.<sup>83</sup> Some people will suffer more because they will lose property that is particularly dear to them. To the extent that they are not made whole by payment of the property's fair market value, they can hope to benefit from the burdens that government places on others thereby maintaining the "average reciprocity of advantage."<sup>84</sup>

Of course the extensive jurisprudence in regulatory takings has established, however confusingly, that the extent to which individual citizens will be expected to bear such uncompensated

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<sup>80</sup> 338 U.S. 1 (1949).

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923)).

<sup>84</sup> *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

burdens has its limits.<sup>85</sup> If an uncompensated regulatory taking goes “too far,” then the government must pay compensation.<sup>86</sup> What then do the courts do about a condemnation that inflicts severe uncompensable losses?

The inability of a condemnee to cover losses from the market has led courts to ignore the losses as irrelevant to the condemnation process.<sup>87</sup> If the market value compensation due is not itself adequate remuneration, the unquestioned necessity of the taking has required that it be deemed so. But when a condemnation’s public goal can be met by any number of means, the insistence that an owner’s subjective valuation be ignored rings hollow.

Some commentators have noted that the payment of cash premiums can deter government from overusing condemnation against owners who suffer uncompensable losses.<sup>88</sup> They point to the New Hampshire mill statute upheld in *Head v. Amoskeag Mfg. Co.*<sup>89</sup> as an attempt to redress systematic undercompensation.<sup>90</sup> That law called for owners whose lands were flooded by the establishment of private mills to be paid 150% of the market value of the lost property.<sup>91</sup> For those generally concerned about inefficient overuse of eminent domain, supercompensation forces government to internalize more fully the true costs of the taking.<sup>92</sup> For the owners themselves,

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<sup>85</sup> See *id.* at 413–16; *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

<sup>86</sup> *Pa. Coal*, 260 U.S. at 415 (1922); see also *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 141–42, 147–48 (1978) (Rehnquist, J., dissenting).

<sup>87</sup> See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5–7, 11–12, 14–15 (1949).

<sup>88</sup> See EPSTEIN, *supra* note 22, at 174–75, 184; Claeys, *supra* note 43, at 923–28; Merrill, *supra* note 40, at 90–93 (proposing to “increase costs in those situations where we wish to discourage the use of eminent domain” through the use of a surtax or bonus payment).

<sup>89</sup> 113 U.S. 9 (1885).

<sup>90</sup> See EPSTEIN, *supra* note 22, at 174–75; Claeys, *supra* note 43, at 923–28.

<sup>91</sup> See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 12 (1885) (affirming the judgment of the lower court that “upon payment or tender of the damages assessed by the verdict, with interest, and fifty per cent. added, . . . the company ha[d] the right to erect and maintain the dam”); Claeys, *supra* note 43, at 923 (noting that injured riparians would be entitled to receive “150% of their actual damages”).

<sup>92</sup> See EPSTEIN, *supra* note 22, at 174–75; Claeys, *supra* note 43, at 923–28. While commentators have recognized the just compensation requirement that the

however, the extra money may or may not enable them to replace what they have identified as their losses.<sup>93</sup>

The unnecessary taking of irreplaceable property then calls for an understanding of just compensation that goes beyond damage award calculation. The choice between ignoring subjective losses and paying for them in full excludes a variety of more productive alternatives. The express constitutional requirement of just compensation must be set free from its role as a quantitative afterthought in the decision to condemn. A full understanding of the appropriateness of eminent domain will cross-reference the land needs of both property owners and the public. The variety of possible matches calls for a two-dimensional mapping of public necessity and condemnee compensability.<sup>94</sup> The next two sections will offer categories under each of these parameters based upon a theoretical understanding of the particular need for land that makes eminent domain both essential and problematic.

## B. *A Socioeconomic Theory of Eminent Domain*

### 1. Public Necessity When Condemnors Face Thin Markets

Focusing on the last two words of the phrase “taken for public use,” courts have restricted their review of the propriety of condemnations to the legitimacy of the government’s purpose in seizing land.<sup>95</sup> The words “taken for,” however, suggest the expectation of some logical connection between the taking and the public objective. Some state delegations of eminent domain

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condemnor internalize costs monetarily, others point out that governmental decision makers respond more to their own political cost-benefit analysis than to public budgetary considerations generally. See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. (forthcoming 2006), available at [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=894378](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=894378).

<sup>93</sup> See Michelman, *supra* note 17, at 1111–12 (remarking that in many instances money can not compensate for lost property). For further discussion of condemnee ability to replace surpluses lost in condemnation, see *infra* Part I.B.2.

<sup>94</sup> See *infra* Part I.C.4, Figure 1.

<sup>95</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“[W]here the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”); *Berman v. Parker*, 348 U.S. 26, 32–33, 35–36 (1954) (holding that the elimination of substandard housing conditions satisfied the public use requirement and thus justified the exercise of eminent domain).

authority make “public necessity” an explicit prerequisite for its use and subject findings of necessity to *de novo* judicial review.<sup>96</sup> Other states have interpreted general public use language as requiring scrutiny of the choice of eminent domain as a means.<sup>97</sup> Most courts, however, question the legitimacy of a legislature’s choice of eminent domain as a means even less frequently than they will question the objective itself.<sup>98</sup> Recognizing increased local governmental activism in the era of public choice, legal commentators concerned about overuse of eminent domain have nevertheless continued to develop tests for condemnation legitimacy that focus on the market alternatives available to the condemnor.<sup>99</sup>

Twenty years ago, in his article *The Economics of Public Use*, Thomas Merrill articulated a model for understanding public use that invoked the distinction between property rules and liability

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<sup>96</sup> See MINN. STAT. § 117.075 (2006); VT. STAT. ANN. tit. 19, §§ 502–510 (2000); VT. STAT. ANN. tit. 24, § 2299(b)(1), § 2299(e) (1992); see also OHIO REV. CODE ANN. § 163.09 (2005) (rebuttable presumption of necessity).

<sup>97</sup> See *e.g.*, *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973) (en banc) (holding that the state had to justify its use of eminent domain against church property).

<sup>98</sup> See, *e.g.*, *Mich. State Highway Comm’n v. Vanderkloot*, 220 N.W.2d 416, 423–24 (Mich. 1974) (considering the necessity and purpose of widening a road); *Rueb v. City of Okla. City*, 435 P.2d 139, 141 (Okla. 1967) (per curiam) (analyzing in detail the need for an airport runway); *Portland v. Swanson*, 459 P.2d 879, 880 (Or. 1969) (per curiam) (limiting an analysis of the necessity of using eminent domain to whether fraud, bad faith, or abuse of discretion had been shown); *Capital Prop., Inc. v. R.I.*, 749 A.2d 1069, 1087 (R.I. 1999) (adopting the opinion of the lower court which held that the city acted in bad faith when it condemned a parcel as blighted without making the necessary findings of fact). For a legal history of the distinction between public use and public necessity showing greater judicial deference on the latter issue, see Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use”*, 32 SW. U. L. REV. 569, nn. 34–35 and accompanying text.

<sup>99</sup> See Fennell, *supra* note 15, at 984–85 (providing a method of questioning nuisance control); Garnett, *supra* note 54, at 980–81 (describing land use controls that the government could employ in public use challenges); Merrill, *supra* note 40, at 77–78 (discussing how “eminent domain is a more expensive way of acquiring resources than market exchange”). Alberto Lopez examines the jurisprudence of public use and just compensation as expressions of republican and liberal political theories. Alberto Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 243–45 (2006). John Fee, in his recent article, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783 (2006), also begins his analysis by examining public use. *Id.* at 800–03. Both Lopez and Fee ultimately conclude that a proper balance will be achieved through mandating increased monetary compensation to condemnees. Lopez, *supra*, at 299–301; Fee, *supra*, at 806–18.

rules articulated by Guido Calabresi and A. Douglas Melamed in their work, *Property Rules, Liability Rules and Inalienability: A View of the Cathedral*.<sup>100</sup> Calabresi and Melamed set out the difference between property rule entitlements, which can protect their holders against unwanted transfers through injunctions, and liability rule entitlements, which require their holders to accept a cash equivalent as a substitute for their property.<sup>101</sup> When eminent domain is approved, the owner, along with every other stakeholder in the property, loses his or her ability to decline the sale, and only the adjudication of the sale price issue remains.<sup>102</sup> Although strong property rule entitlements are the norm in land ownership,<sup>103</sup> eminent domain reminds all property owners that their rights are always subject to at least one form of liability rule liquidation.

Merrill applied to the public use question Calabresi and Melamed's central insight that liability rules are suitable for reducing the inefficiently high transaction costs associated with property rule entitlements.<sup>104</sup> His basic model proposed that the "for public use" requirement should constrain the condemnor if, and only if, the free market is sufficiently thick to make

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<sup>100</sup> Calabresi & Melamed, *supra* note 13.

<sup>101</sup> *See id.* at 1105–06.

<sup>102</sup> Eminent domain is not the only instance of the government forcing a person to accept monetary compensation for the loss of unique property. The standard judicial remedy for the negligently caused loss of something irreplaceable, such as a limb, is not an injunction against the tortfeasor to make the victim literally whole, but the award of a money judgment in favor of the victim against the person responsible for the loss.

<sup>103</sup> *See* Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L.J. 2175, 2187 (1997) (suggesting that property rules are the default because their advantages outweigh their disadvantages). Few forms of property ownership can match real estate for strength as a property rule entitlement. Debtors are generally given significant opportunities to redeem their land holdings from involuntary liquidation. Contracts dealing with land are regularly enforced through injunctions requiring specific performance.

<sup>104</sup> *See* Merrill, *supra* note 40, at 74 (asserting that where a market exists for what the government wants, eminent domain should not be invoked). *See generally* Calabresi and Melamed, *supra* note 13, at 1110 (explaining that "market valuation of [an] entitlement is deemed inefficient," so liability rules instead of property rules are often employed). In the last ten years, there has been a lively scholarly debate about the advantages of liability rules over property rules. *See* Bell & Parchomovsky, *supra* note 13, at 15–17; Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 773–74 (1996); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 450–51 (1995); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1748–53 (2004).

invocation of eminent domain unnecessary.<sup>105</sup> If the governmental authority's identified public objective could be met only by the acquisition of a particular piece of land, the lack of any acceptable substitutes could tempt an aware owner of such a unique parcel to engage in strategic bargaining and "hold out" for an astronomical sum.<sup>106</sup> But for the availability of eminent domain, the thinness of the condemnor's market (i.e., the lack of alternatives to a negotiated agreement with a particular owner) puts the private landowner at the head of a monopoly, one that has the power to exact its surplus and more from the public fisc.

On the other hand, if the would-be condemnor finds itself with a large number of purchase opportunities that will more or less equally meet the public goal, then the use of eminent domain may be unnecessary.<sup>107</sup> The owners of at least some of the properties will be competing with one another to sell, and the use of eminent domain will be superfluous.<sup>108</sup>

In testing this basic model, Merrill classified more than two hundred judicial opinions into six separate categories.<sup>109</sup> A simpler categorization of eminent domain based on public necessity can sort most or all governmental seizures of land into three classes.<sup>110</sup> The first category, which I will refer to as "Public Trust," comprises those largely uncontroversial

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<sup>105</sup> See Merrill, *supra* note 40, at 77–81 (implying that use of eminent domain in a thick market would be pointless because it is more expensive than a free market exchange). Merrill went on, however, to refine his analysis in anticipation of three objections to his basic model. First, and most interestingly for the project of the current Article, he acknowledged that condemnees' subjective losses—not compensated and, therefore, not internalized by the condemning authority—may be high enough to make certain condemnations inefficient and, therefore, overused from an efficiency perspective. *Id.* at 82–84.

<sup>106</sup> See *id.* at 75.

<sup>107</sup> See *id.* at 77–78 (stating that market exchange is a more efficient tool than eminent domain when dealing in thick markets).

<sup>108</sup> See *id.* As Merrill pointed out, since the government internalized administrative costs would naturally deter such unnecessary use of eminent domain, the basic model would predict little need for judicial intervention. See *id.*

<sup>109</sup> See *id.* at 93–102. The first five had descriptive titles such as "Assembly" and "Expanding Existing Facilities," but Merrill conclusively labeled the last category "Thick Markets." *Id.* at 97–101.

<sup>110</sup> These three categories roughly correspond to the three exceptions articulated by Justice Ryan in his dissent in *Poletown*, and adopted in *Hathcock*. As exceptions to a general prohibition against condemnations for private transfer, the *Hathcock* categories are designed to exempt a limited number of worthy condemnations. See *supra* note 57. I set out my classification, on the other hand, to cover all uses of eminent domain regardless of public or private acquisition. See *infra* Part I.C.4.



dedications of land to a public purpose.<sup>111</sup> Local governments, however, are increasingly offering their coercive purchasing ability as just one of many incentives to attract or retain private investors. As the economic development spurred by such takings generally affects an area far beyond the condemned district, I will call it "Subsidy Inducement for Regional Economic Development."<sup>112</sup> Finally, there are cases in which eminent domain is used to overcome collective action problems that thwart the efficient pooling of land ownership interests. Unlike with economic development promotion, in which the land is incidental to the public purpose, the public authorities here are focused on the land itself but only wish to intervene briefly so as to stimulate market forces. The heart of urban redevelopment, "Anti-Blight Investment Coordination," will be discussed in the next section.<sup>113</sup>

Certain types of public projects always require the acquisition of land.<sup>114</sup> In the uncontroversial case of the need for a site for the erection of a new governmental building, the question of alternatives to the acquisition of land produces a straightforward response: There are none. Public enterprises, like their private counterparts, take up space. If the government is to have its building, it needs land upon which to construct it.<sup>115</sup> No other case could better illustrate Justice William Paterson's assertion of the fundamental indispensability of the "despotic power" of eminent domain: "[The] government could not *subsist* without it."<sup>116</sup>

Of course if every condemnation case involved such a straightforward governmental need for land, there would be no controversy over "public use." For more than two centuries privately owned utilities and so-called "common carriers" have

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<sup>111</sup> See *infra* notes 114–15, 118–19 and accompanying text.

<sup>112</sup> See *infra* notes 121–28 and accompanying text.

<sup>113</sup> See *infra* Part I.C.2.

<sup>114</sup> Merrill, *supra* note 40, at 75 (providing an example of an oil pipeline project requiring land acquisition because there was only one feasible route).

<sup>115</sup> Of course, there may be many different sites that would be suitable for the government's purposes. Some of them may be owner occupied and others may only be absentee owned. In public trust cases, the decision of which site to be used should be made by the governmental authority subject to an impact study that would weigh the costs of displacement. See *infra* Part I.C.2.

<sup>116</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795) (emphasis added).

also been authorized to condemn the land they require.<sup>117</sup> Even those commentators with the strictest interpretation of public use recognize that a compulsory transfer need not result in title in the name of a governmental entity to be legitimate.<sup>118</sup> Here the public need is satisfied not so much by actual possession as by public access. Yet the inescapable need for land is the same. The fact that securing the former requires full title and obtaining the latter only an easement does not, in itself, matter.<sup>119</sup> They both entail acquisition of an interest, possessory or non-possessory, in that ubiquitous yet unique good: land. All projects that require the placing of land in a public trust should have broad access to the sovereign's traditional eminent domain authority.<sup>120</sup>

The truly significant conceptual break in public use cases comes with the move to the contemporary local government practice of offering eminent domain land acquisition services as an inducement and subsidy to businesses making siting decisions for major development investments.<sup>121</sup> Fierce competition among localities to attract job producing business investment has led city, county and state governments to put together packages of

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<sup>117</sup> See ELY, *supra* note 2, at 75–77 (discussing the use of eminent domain for the canals, wharfs, and trains).

<sup>118</sup> The Mill Act cases, in which publicly accessible, private mills were allowed to flood adjoining land upstream to fulfill a community economic need, enjoy broad approval. See EPSTEIN, *supra* note 22, at 170–75; Claeys, *supra* note 43, at 919–28. Railroads and pipelines offer more contemporary examples of relatively uncontroversial “private” deployments of eminent domain. *Wayne County v. Hathcock*, 684 N.W.2d 765, 795–96 (Mich. 2004).

<sup>119</sup> Conversely, the fact that bare title, or even full possession and control, will remain in the name of an acknowledged governmental entity does not, in and of itself, place the condemnation in this first category labeled “Public Trust.” A local government with broad authority may decide that the acquisition of prime real estate for itself may be an excellent way to secure a stream of future revenue. While this may be one of several valid public investment strategies, nothing about the underlying public objective requires the governmental acquisition of any specific parcel or, indeed, any parcel at all. See *supra* note 114 and *infra* note 119 and accompanying text.

<sup>120</sup> The availability of many different parcels that might satisfy a particular public objective should not deprive the government of the ability of eminent domain, rather a process to review its impact on the various sets of potential condemnees is in order. See *infra* note 219 and accompanying text.

<sup>121</sup> ROBIN PAUL MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* 13–14, 95–97 (Univ. of Pa. Press 1991) (providing examples of benefits governments bestow upon private corporations and developers, including tax subsidies, financing, and the promise of the government's power of eminent domain).

incentives.<sup>122</sup> Tax breaks and low-interest financing often form the bulk of the subsidies used to woo potential investors.<sup>123</sup> But, for those industries that could benefit from the services of a buyer's broker with true clout, eminent domain land acquisition becomes another inducement option.<sup>124</sup> A municipality that can compel land transfer for a private project may well be able to capture for itself, in the form of reduced tax abatements, much of the private enterprise's costs savings over voluntary land purchase.

Although fostering economic development is undoubtedly a legitimate public purpose,<sup>125</sup> the aforementioned advantages of offering other people's land for sale encourages the overuse of eminent domain toward that end.<sup>126</sup> Certainly some businesses will have land needs that are so vast or so specific as to make voluntary land acquisition prohibitively expensive. But a city may be able to achieve its economic development goals by seeking out other businesses that require only tax incentives. Yet the lack of legal constraints on condemnation may not encourage takers to explore these options.<sup>127</sup> The theoretical possibility that eminent domain might be indispensable to a municipality's economic development goals cannot justify a conclusive presumption in favor of condemnation as a legitimate means of meeting the goal.<sup>128</sup>

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<sup>122</sup> ALAN ALTSHULER & DAVID LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 241 (2003).

<sup>123</sup> See *id.* See generally BERNARD FRIEDEN & LYNNE SAGALYN, DOWNTOWN, INC. 133-71 (1990) (providing an overview of how city officials make deals to encourage project development).

<sup>124</sup> See MALLOY, *supra* note 121, at 95-97.

<sup>125</sup> See, e.g., *State ex rel. Brown v. City of Warr Acres*, 946 P.2d 1140, 1144 (Okla. 1997) (noting that economic development was recognized as a legitimate public purpose in *Burkhardt v. City of Enid*, 771 P.2d 608, 611 (Okla. 1989)); see also *Brown*, 946 P.2d at 1146-49 (Kauger, J., concurring) (citing support from various state courts that recognize economic development as a legitimate public purpose).

<sup>126</sup> MALLOY, *supra* note 121, at 95-97 (1991).

<sup>127</sup> Several commentators, however, have noted that eminent domain's political unpopularity, along with the procedural requirements imposed by delegation statutes, acts as an effective check on eminent domain's overuse. See generally Merrill, *supra* note 40, at 77 (reasoning that procedural requirements and administrative costs can make the exercise of eminent domain more expensive than "market exchange").

<sup>128</sup> Ultimately though, a municipality should not be deprived of the ability to condemn land, even that of a community united in opposition, when such condemnation is absolutely necessary to the economic sustainability of other local

Determining the true propriety of a condemnation is no more than half over, however, after consideration of public necessity. The thickness of a condemnor's market can only provide the first part of the analysis of eminent domain legitimacy. The placement of a public objective into one category or another will not, by itself, determine whether or not it can serve as a justification for land seizure. The condemnation not only acquires a unique good to satisfy a public objective but also deprives someone or something of that unique good.<sup>129</sup> The adequacy of the cash compensation offered as part of the compulsory transfer unavoidably depends on the condemnee's ability to cover his losses in the markets available. Just as public necessity is evaluated by the thickness of the condemnor's market, the possibility of just compensation can only be established by examining the liquidity of the condemnee's market for substitutes.<sup>130</sup> Those types of public takings that can be replaced by less coercive means must be evaluated against the interests of affected private property holders.

## 2. Lack of Just Compensation When Condemnees Face Thin Markets

In defending the importance of property rules against those who favor liability rules, Abraham Bell and Gideon Parchomovsky have structured a theory of property as promoting

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communities similarly situated. See *supra* notes 112–14 and accompanying text.

<sup>129</sup> Note, *Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts*, 60 IND. L.J. 389, 398 (1985).

<sup>130</sup> As the analysis moves from the market thickness for condemning authorities seeking to realize one or more public objectives to that of natural person condemnees seeking to regain that which has been taken from them, a question is raised about whether subjective evaluation of property should even be considered in determining market thickness. Someone might argue that if a house is taken and there are plenty of houses “just like it” available for purchase, then the condemnee's replacement market is thick by any reasonable understanding of the term. While I argue below that surpluses that provide social benefit deserve special consideration, my minimal criterion for consideration of subjective appreciation of property in assessing market thickness is one of intelligibility. Cf. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736 (1973) (“The property owner with a common nonfungible surplus is normally sensitive, not hypersensitive, and consequently not likely to be the best avoider of losses of that surplus.”). A person whose attachment to a particular object cannot be understood through rational discourse or broadly shared empathy can be safely dismissed as suffering from fetishism. For Peggy Radin's explanation of “The Problem of Fetishism”, see Radin, *supra* note 16, at 968–70.

the goods that flow from stability of ownership.<sup>131</sup> Liability rules that employ exchange value as the measure of damages fail to protect rational gaps between an owner's reserve price and their market price.<sup>132</sup> Preservation of these private surpluses,<sup>133</sup> even against governmental elimination, can foster socially beneficial activities that raise use value but do not necessarily increase exchange value.<sup>134</sup>

For instance, a homeowner who has confidence that she can never be forced to move against her will may spend a great deal of time getting to know her neighbors. Whereas one who feels she may well be displaced on short notice might not bother to invest in relationships with an uncertain future. For the stable homeowner, the development of productive and rewarding interaction with her fellow community members will not only make her value her property more highly, it will also increase the social capital of the community.<sup>135</sup> In setting out constraints for eminent domain, truly just compensation will reflect the need to strengthen those forms of ownership that convert increased stability into social dividends.<sup>136</sup>

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<sup>131</sup> See Bell & Parchomovsky, *supra* note 16, at 552 (arguing that "a property system with stable rights increases the value of assets to . . . owners").

<sup>132</sup> See *id.* at 567-68, 587.

<sup>133</sup> In discussing surpluses lost by condemnees, I will focus on the so-called consumer surplus, that is, the "amount" by which the owner's subjective valuation exceeds the fair market value. I will not address the distribution of the so-called social surplus, or the amount of increase in the value of the property occasioned by the condemnation itself. Suffice it to say, I believe that current law requiring that any private benefit from a condemnation be merely incidental to the stated public purpose provides adequate protection against misdirection of this value. See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-62 (1896); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896); *Phillips v. Foster*, 211 S.E.2d 93, 96 (1975). Analogous law is well-established in the protection of tax expenditure subsidies of charitable organizations. See, e.g., *Redlands Surgical Serv. v. Comm'r*, 113 T.C. 47, 73-74 (1999), *aff'd*, 242 F.3d 904 (9th Cir. 2001).

<sup>134</sup> Bell & Parchomovsky, *supra* note 16, at 557-58.

<sup>135</sup> A voluminous amount of literature has risen up around the concept of "social capital" and its importance to community development. See, e.g., WILLIAM R POTAPCHUK, ET AL., *BUILDING COMMUNITY: EXPLORING THE ROLE OF SOCIAL CAPITAL AND LOCAL GOVERNMENT* (1998); Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6.1 J. OF DEMOCRACY 65 (1995), available at <http://xroads.virginia.edu/~HYPER/detoc/assoc/bowling.html>. For a recent discussion of how the Dudley Street Neighborhood Initiative actually used eminent domain in its strategy to build social capital in an impoverished community, see Michele E. Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 790-93 (2005); *infra* notes 189, 267.

<sup>136</sup> Empirical research has validated many of the social and economic benefits

Just as the last section evaluated the ability of the government to meet its public objectives as a market participant, this section will look at the ability of condemnees to preserve their surpluses in the market with nothing but the fair market value of their property. Condemnees deprived of fundamental rights find little or no solace in their condemnation awards. The Fifth Amendment's ban on takings without just compensation might be construed to join other protections of these freedoms. At the other end of condemnee market thickness, land speculators can be fully restored to their pre-taking positions through payment of their fair market value. As indicated previously, redevelopment of urban neighborhoods presents just compensation's middle case of the uprooting of long-time homeowners. It will be discussed in the next section.<sup>137</sup>

When owners are forced to take fair market value for property which they value more highly than the market does, the taking deprives them, at least temporarily, of their surplus, that is, the difference between their reserve price and the fair market value. Several writers have pointed out that the general failure to compensate condemnee surpluses can foster overuse of condemnations due to the inaccurate efficiency calculation.<sup>138</sup> From a fairness perspective, even a socially efficient taking may disproportionately place its burdens on a select few.<sup>139</sup> Both

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commonly associated with stable homeownership. See GEORGE MCCARTHY ET AL., *THE ECONOMIC BENEFITS AND COSTS OF HOMEOWNERSHIP* 1-4, 32-35 (2001), <http://housingamerica.org/docs/RIHAwp01-02.pdf>; WILLIAM M. ROHE ET AL., *THE SOCIAL BENEFITS AND COSTS OF HOMEOWNERSHIP* 1-2 (2000), <http://housingamerica.org/docs/RIHAwp00-01.pdf>.

<sup>137</sup> See *infra* Part I.C.

<sup>138</sup> See EPSTEIN, *supra* note 22, at 161-81; Merrill, *supra* note 40, at 82-85; James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 864-65 (2004). A Kaldor-Hicks efficiency calculation could take consumer surpluses into account in judging the cost of the taking without actually compensating them if the taking were to go forward. Although the actual compensation approach of Pareto cost-benefit analysis would seem to be more favorable to condemnees, a method that assesses consumer surplus purely for the purpose of determining whether or not a condemnation should take place may be preferable to one in which consumer surplus is not assessed at all. Indeed, I will argue later in the Article that a system that offers communal in-kind compensation for consumer surpluses may be preferable to both of these other alternatives from a community development point of view. See *infra* Part I.C.2.

<sup>139</sup> To repeat Justice Black's often quoted description, the Takings Clause was drafted "to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For an analysis of the staying

justice and efficiency concerns call for a deeper understanding of the natures of the consumer surpluses and how, if at all, they should be protected.

Surpluses can result from an owner's singular appreciation from his property. Some owners may own land that suits their particular needs.<sup>140</sup> To the extent enjoyment of their properties is not widely shared, fair market value may not reflect how they value their own properties. Some owners' valuation may be so idiosyncratic as to be unintelligible.<sup>141</sup> Others, however, may simply have unique needs.<sup>142</sup> For instance, a person confined to a wheelchair may value his current home for its accessible design. More ambulatory buyers may be indifferent to its special features. Because these less sensitive buyers are so much more numerous, the market price will not reflect the utility that he and others similarly disabled would find in the property. If this general lack of appreciation does not adversely impact supply however, this lower market price may not be a severe problem in a condemnation situation.

For many such inframarginal minority condemnees, the surplus will not be lost for long. If their replacement markets are sufficiently thick, they should find exactly what they particularly appreciated about their former property in another property at a substantially similar price.<sup>143</sup> Not all individualized valuations

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power of this statement, see William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153-54 (1997).

<sup>140</sup> Bell & Parchomovsky illustrate a substantially similar point about surpluses with the example of a harpsichordist who has developed unique abilities related to her instrument. Bell & Parchomovsky, *supra* note 16, at 568.

<sup>141</sup> See Radin, *supra* note 16, at 969-70.

<sup>142</sup> Unique invulnerabilities can also occasion surpluses. Someone who stands 6' 5" and weighs 280 lbs. may not mind living in an area known for frequent street level robberies. The market value of his home, however, would reflect the fact that most buyers would be more directly impacted by the crime rate. If his home were condemned, he would be able to replicate his surplus to the extent he could relocate to a similar house in a similar neighborhood. For a discussion of how statutory law has come to protect owner-occupants' surpluses, see *infra* Part II.A.1.

<sup>143</sup> Albeit in the context of nuisance law, Ellickson has recognized this important but often neglected point about the taking of surpluses "when property is fungible; the owner can recover lost surplus by repurchasing the lost item at market prices." Ellickson, *supra* note 130, at 736. Epstein also acknowledges that replacement cost can lie below the subjective valuation of a condemnee and that, therefore, some condemnees can be made whole at something closer to market price. See EPSTEIN, *supra* note 22, at 183-84 ("If the replacement cost lies between the general market value and some higher subjective valuation, then compensation is

are sentimental; some are very practical and replicable. Payment of a subjective loss premium to these condemnees would be just that, a premium. Only those condemnees who are unable to regain what they lost can truly claim the sort of undercompensation that might render fair market valuation inefficient or unjust or both.

When eminent domain is used to deprive a citizen of property inextricably connected to a fundamental right, cash compensation may not lead to the restoration of the fundamental right.<sup>144</sup> For instance, a municipality that wishes to prevent a property owner from using his property for a legal but politically unpopular activity might simply condemn the property. An attempt by the owner to buy a replacement property might end the same way. Here the law imposes injunctive limits on eminent domain, even if some other public objective is concocted to cover the true purpose behind the taking.<sup>145</sup> Instead of describing the uncompensability of the loss of liberty as a violation of the “just compensation” clause, the cases emphasize either eminent domain’s confinement to property rights<sup>146</sup> or general substantive due process restrictions on all government action.<sup>147</sup> Nevertheless, the general ban on such takings ratifies the view that these rights are quite literally priceless. The stability of the ownership of these entitlements is so fundamental to the functioning of our democracy that even a more forceful conception of “just compensation” might still play a supporting role to more traditional defenses.

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adequate because it permits the owner to duplicate the condemned facilities and thus regain the [surplus] . . .”).

<sup>144</sup> See Saxer, *supra* note 68, at 691.

<sup>145</sup> See generally *id.* at 655–84 (noting that the constitutional protection for First Amendment land uses is anything but absolute). Radin notes the relevance of substantive due process to the protection of personal property rights. In the context of residency, she cites the U.S. Supreme Court’s decision in *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–506 (1977), which “found a substantive due process right to live in one’s home with one’s extended family, hence a substantive due process limitation on the power of local government to zone for occupancy by nuclear families only.” Radin, *supra* note 16, 1005–06 n.172.

<sup>146</sup> 1A NICHOLS ON EMINENT DOMAIN § 2.1[4] (2006) (stating that “[r]ights of a citizen which are not property rights cannot be taken by eminent domain” and providing the right to vote as one chooses as an example of this concept).

<sup>147</sup> Saxer, *supra* note 68, at 654 (advocating “that courts should distinguish between the government exercising eminent domain and the government using typical land use regulation and should impose stricter constitutional limitations on the eminent domain power”).



For some property owners, a condemned parcel may be merely a fungible investment, but for many, the exchange value is the only value the property has.<sup>148</sup> Other more particular investors may look at the fair market value condemnation award as quantitatively adequate and qualitatively inadequate, but only because cash does not have the same risk and reward prospects that their real estate had. These owners experience the threat of condemnation essentially as a prepayment risk.<sup>149</sup> The unplanned liquidation of their holding requires them to seek new investment opportunities. Their replacement purchases may or may not even involve land. Their uncompensated losses from condemnation, in any case, extend no further than the transaction costs involved in reinvestment.

Generally speaking, the strengthening of property rules correlates with our natural inclination to favor ownership stability. Empirical research in the fields of cognitive psychology and behavioral economics has shown widespread tendencies among all sorts of property owners to hold on to their entitlements.<sup>150</sup> Even prices that exceed what they would have paid to obtain the item in the first place do not induce them to part with it.<sup>151</sup> The documentation of these "endowment effects" reveals a world stubbornly supportive of stable ownership.

Daniel Kahneman and Amos Tversky have accounted for these disparities between willingness to pay and willingness to accept as cases of loss aversion.<sup>152</sup> We are more willing to forgo future gains than to voluntarily incur losses because our minds

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<sup>148</sup> Using the terminology Madeline Morris sets out in her article, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 831-33 (1993), the in-kind enjoyment component of a true investor's property rule entitlement is superfluous.

<sup>149</sup> Unlike the creditor's more well-known problem of default risk, being repaid late or not at all, prepayment risk measures the anticipated disadvantage of being repaid earlier than expected and that an optimal substitute investment may not be readily available, at least not without cost.

<sup>150</sup> See generally RICHARD THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 66 (1992) (suggesting that owners are generally more "reluctant to part with their endowment" than buyers are "unwilling to part with their cash").

<sup>151</sup> See *id.*

<sup>152</sup> See Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AM. PSYCHOLOGIST 341, 341-42 (1984). Of course, in one sense, we would expect every rational person to be averse to losing something, but Kahneman and Tversky's account might be better described as aversion to uncompensated losses. It reflects a distrust in compensation even when the amount offered for an item is equivalent to the most the person himself would be willing to pay to acquire the item.

process prospective disadvantages differently than potential advantages, exaggerating the former to the neglect of the latter.<sup>153</sup> Money, as the ultimate embodiment of potential advantage, will always come up short as a result of such biases.<sup>154</sup> But it does not suffer alone. Property bought specifically for resale will also not produce as great a degree of loss aversion as property bought for use.<sup>155</sup>

Interestingly, for a socioeconomic perspective on eminent domain, differences between an owner's reservation price and his or her own maximum purchase price become more pronounced when substitutes are not generally available,<sup>156</sup> when the proposed loss is occasioned by human actions rather than naturally caused,<sup>157</sup> and when the entitlement holder has control over its sale, or at least the expectation of such control.<sup>158</sup> For homeowners suddenly facing condemnation by their local

<sup>153</sup> See *id.*

<sup>154</sup> "Money itself does not create an endowment effect . . ." Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1236 (2003).

<sup>155</sup> "Loss aversion does not affect all transactions. In a normal commercial transaction, the seller does not suffer a loss when trading a good . . . Loss aversion is expected to primarily affect owners of goods that had been bought for use rather than for eventual resale." THALER, *supra* note 150, at 72 n.3.

<sup>156</sup> Wiktor L. Adamowicz, Vinay Bhardwaj and Bruce Macnab, *Experiments on the Difference between Willingness To Pay and Willingness To Accept*, 69 LAND ECON. 416, 418 (1993) (noting that Hanemann's "substitute hypothesis" theory can be tested "within an economic methodology"); W. Michael Hanemann, *Willingness To Pay and Willingness To Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635, 635 (1991); Jason Shogren, et al., *Resolving Differences in Willingness To Pay and Willingness To Accept*, 84 AM. ECON. REV. 255, 255-58 (1994) (illustrating Hanemann's "substitution effects" theories).

<sup>157</sup> Michael E. Walker et al., *Disparate WTA-WTP Disparities: The Influence of Human versus Natural Causes*, 12 J. BEHAV. DEC. MAKING 219, 221 (1999).

<sup>158</sup> See Jeffrey L. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1575-76 (1998). Rachlinski and Jourden try to establish empirically that liability rule entitlements are less likely to give rise to endowment effects than property rule entitlements. Although private land ownership is a liability rule entitlement with respect to the government's needs, it is generally thought of as a property rule entitlement. The widespread expectation of security of tenure may be more important than the technical legal reality in terms of establishing an endowment effect. In other words, well-settled "public use" jurisprudence in favor of eminent domain may not change the fact that people do not expect their land to be taken from them. David Dana has recently connected the popular revolt against eminent domain abuse to the fact that white, middle-class homeowners now see themselves as vulnerable to compulsory takings. David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo 2* (Northwestern Law & Econ. Research Paper No. 917891, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917891](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917891).

government, then, one should expect to see genuine resistance to compulsory transfers notwithstanding the fact that the price offered may exceed what those homeowners would be willing to pay for the property themselves.<sup>159</sup> Because it is a quasi-rational behavior that splits our understanding of how people “rationally” value goods, loss aversion itself may not serve as a reliable independent basis for setting compensation.<sup>160</sup> Nevertheless, any attempt to set boundaries for liability rule liquidation, as opposed to setting actual compensation rates, should note how deeply rooted our desire for ownership stability is, at least in certain contexts.<sup>161</sup>

A socioeconomic understanding of just compensation<sup>162</sup> does not limit this foundational constraint on governmental authority to the measure of cash equivalents for property entitlements. Even if substantive due process offers adequate protection from eminent domain infringement on fundamental rights, the prohibition on takings without just compensation also should be understood as a barrier to the uncompensable liquidation of basic

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<sup>159</sup> The lack of truly broad-based community resistance to condemnations often stems from the fact that the WTA/WTP disparity is generally finite and can be overcome by large compensation packages given to owner occupants, as opposed to absentee owners, in the form of generous relocation benefits. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. (forthcoming 2006) (manuscript at 25–30, available at [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=875412](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=875412)); *infra* part II.A.1.

<sup>160</sup> On fairness grounds, it would not make sense to pay condemnees more than fair market price for a property if they themselves would not have paid more than that to purchase it in the first place. Efficiency calculations based on preference theory are somewhat more paralyzed by WTA/WTP disparities. On what basis does a cost-benefit analyst choose WTA over WTP, or vice-versa, as the condemnee’s “true” valuation of the property? For a discussion of how the existence of endowment effects undermines the Coase Theorem, see Rachlinski & Jourden, *supra* note 157, at 1554–56.

<sup>161</sup> Daphna Lewinsohn-Zamir, *The Choice between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEXAS L. REV. 219, 251–57 (2001).

<sup>162</sup> I call my understanding of eminent domain as constrained by just compensation socioeconomic, precisely because it recognizes the relevance of neoclassical economic analysis even as it tries to move beyond impoverished notions of human relationships to land which have led to simplistic applications of that paradigm. For a more comprehensive critique of reductionist tendencies in law and economics, see Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23–25 (1989) and Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 452–53 (1974). For a description of the emerging socioeconomic approach to law, see Robert Ashford, *What is Socioeconomics?*, 41 SAN DIEGO L. REV. 5, 5–7 (2004).

civil liberties. In more typical condemnation scenarios, landowners' ability to enter the market and restore themselves to a pre-taking position must factor into the determinations of whether and how eminent domain is deployed.

### C. *Applying the New Theory to Urban Redevelopment*

Thus far, the comparison of market thickness for condemnor and condemnee has yielded outcomes largely consistent with those parts of eminent domain jurisprudence that have broad support. Public goals that involve the placement of unique property into public trust justify the use of eminent domain, except when fundamental rights are unduly burdened.<sup>163</sup> On the other end of the spectrum, Merrill's survey and a recent update of it have both showed a significant, if not categorical, limitation on the use of eminent domain when public goals can be achieved through less invasive means.<sup>164</sup> The true test of this Article's, or any, theory of eminent domain, however, will be its effectiveness in sorting out matters in which the ability of the market to satisfy the needs of the public and the private landowner is not so clear.

Urban redevelopment presents these ambiguities for both condemnor and condemnee. The need to coordinate investment in the revitalization of deteriorated neighborhoods calls for significant governmental action,<sup>165</sup> although the involvement is far more temporary than that which characterizes public trust situations. Long-term residents face serious incalculable losses, yet not necessarily those associated with fundamental liberties of bodily integrity and free speech. These conflicting needs cannot be resolved properly within the traditional property rule/liability rule dichotomy of injunctive relief and monetary damages. The support of stable ownership provided by property

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<sup>163</sup> See *supra* Part I.B.1.

<sup>164</sup> See Merrill, *supra* note 40, at 109–11 (concluding that the self regulating nature of eminent domain will ensure that it is not used if there are other “means” by which to achieve proposed goals); Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 REAL PROP. PROB. & TR. J. 251, 261–66 (2003) (testing the results of Merrill's study to determine whether eminent domain is self regulating).

<sup>165</sup> See Paul C. Brophy and Jennifer S. Vey, *Seizing City Assets: Ten Steps to Urban Land Reform* 5–8, (The Brookings Institution & CEOs for Cities, Research Brief, 2002), available at <http://www.ceosforcities.org/rethink/research/files/brophyveyvacantsteps.pdf>.

rules must contend with the public need for reducing barriers to investment coordination. Only a coherent pliability rule structure can balance these competing concerns properly.<sup>166</sup>

### 1. Residents' Two-Fold Loss in Neighborhood Condemnation

If urban redevelopment agencies condemned only investment properties that could be readily replaced, then perhaps there would not be any need to consider less invasive means of carrying out community revitalization goals. It may be neither efficient nor just to protect a speculating owner from being forced to accept the fair market value of properties needed to create a new neighborhood.<sup>167</sup> Not all types of land ownership, however, can be so easily dismissed. Homeowners have a fundamentally different relationship to the land they occupy.<sup>168</sup> Their property is their residence.<sup>169</sup> Legal literature on the value of property rule entitlements has continuously held up the long-term homeowner as an example of a property owner for whom a fair market value condemnation award might fall short of restoration to his or her pre-taking position.<sup>170</sup> Public health studies have

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<sup>166</sup> See Bell & Parchomovsky, *supra* note 13, at 5. A pliability rule is a form of entitlement expression that expressly blends aspects of property rules and liability rules. See *id.*

<sup>167</sup> Instead, concern might be more appropriately focused on the tenants displaced by the widespread renovation. For a discussion of rights of non-owning residents, see *infra* Part II.C.

<sup>168</sup> See D. Benjamin Barros, *Home as a Legal Concept*, 46 S. CLARA L. REV. 255, 302–03 (2006) (explaining that the political involvement and civic action of homeowners is often based in large part on their desire to preserve the value of their homes).

<sup>169</sup> Homeowners, both as judgment debtors and, to a lesser extent, as mortgagors, have long enjoyed special protection from the liability rule liquidation known as foreclosure. See George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289–91 (1950). For an analysis of residential ownership as a protected international human right in the context of foreclosure, see Lorna Fox, *The Idea of Home in Law*, 2 HOME CULTURES 25, 26–27 (2005).

<sup>170</sup> See generally Fee, *supra* note 99, at 790–91 (listing the aspects of homeownership not accounted for in market appraisals) Fennell, *supra* note 15, at 958–59, 962–67 (discussing the uncompensated increment as composed of the subjective premium and a chance at surplus from transfer); Merrill, *supra* note 40, at 82–85 (providing a possible solution to the problem of “subjective loss”); Michelman, *supra* note 17, at 1111–12. Radin has held up the home as the “moral nexus between liberty, privacy, and freedom of association.” Radin, *supra* note 16, at 991. In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795), Justice Patterson observed that the government could not subsist without the use of eminent domain; in the same way, a person looks to the home as his or her place in the world. For a full treatment of the special legal status of the home, see Barros,

explored both the physiological and psychological effects of the sudden loss of home and community due to condemnation.<sup>171</sup> In the mid-20th century, urban renewal uprooted thousands of residents from their sustaining communities.<sup>172</sup> The belated public backlash to those abuses instituted safeguards (discussed below) but stopped short of giving homeowners individual veto power over neighborhood redevelopment.<sup>173</sup> While urban communities would benefit from increasing homeowner autonomy in eminent domain, the protection must be tailored to empower residents to support the viability of their communities.<sup>174</sup>

A longstanding neighborhood resident experiences a two-fold loss in condemnation: the attachment he or she had to the home itself and his or her connection to the surrounding community. In many instances, long-time homeowners in a severely

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*supra* note 168, at 255–56 (examining “the legal concept of home and how homes often are treated more favorably by the law than other types of property”).

<sup>171</sup> See Marc A. Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359–79, 376 (James Q. Wilson ed., 1966) (discussing the fact that “[g]rieving for a lost home is . . . a widespread and serious phenomenon following the wake of urban dislocation”); MINDY THOMPSON FULLILOVE, ROOT SHOCK 11–14 (Random House 2004); Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions From the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516, 1516–17 (1996); Marisela B. Gomez & Carlos Muntaner, *Urban Redevelopment and Neighborhood Health in East Baltimore, Maryland: The Role of Institutional and Communitarian Social Capital*, 15 CRITICAL PUB. HEALTH 83, 85 (2005) (summarizing research conducted by Fullilove that “showed that residents had the need to rebuild social ties that had become fractured through the process of redevelopment”); Lee Rainwater, *Fear and the House as Haven in the Lower Class*, 32 J. AM. INST. PLANNERS 23, 27–30 (1966).

<sup>172</sup> Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 745 (1971) (explaining that homes of “the poor, the near poor and the lower middle class” are primarily the ones being demolished).

<sup>173</sup> See *infra* Part II.A.

<sup>174</sup> Eduardo Peñalver has recently written about the significance of “in-kind” compensation for eminent domain, see Eduardo M. Peñalver, “In-Kind” Just Compensation (July 14, 2006), [http://www.concurringopinions.com/archives/2006/07/in\\_kind\\_just\\_co.html](http://www.concurringopinions.com/archives/2006/07/in_kind_just_co.html), and that the dignity of the home supports one’s ability to flourish within a community. Addressing this latter point in a working paper, Peñalver contrasts two understandings of the “home as castle” metaphor: “despotic dominion” and “inherent dignity.” Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle 2* (Fordham Law Legal Studies, Research Paper No. 108, 2006), available at [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=881100](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=881100). Only the latter understanding, he argues, supports a check on eminent domain abuse that reflects the proper balance of private and public needs with regard to land. *Id.* at 4–5.

deteriorated neighborhood remember the time when their community was a vibrant, desirable place to live. Many of them knowingly passed up the opportunity "to get out while the getting was good." Some owners may have delayed moving out because of the personal fondness they had for their homes themselves. Houses serve as powerful forms of self-expression.<sup>175</sup> Even as neighborhood crime increases and the physical attractiveness of other houses declines, a homeowner might not be quick to abandon such a home with which he or she strongly identifies.

The perseverance of those who remain through serious decline, however, can only be explained as commitment to the community itself.<sup>176</sup> A house can be an expression of identity; true community membership, on the other hand, is a constitutive part of one's identity. As some commentators have pointed out, communities cannot be defined solely by geographic boundaries.<sup>177</sup> Even if someone's neighborhood is not his or her only self-defining community, it is an extremely important one for many. Residents of socially and economically isolated communities can form bonds that are as strong as they are central to survival.<sup>178</sup> As often as not, their survival of the neglect and deterioration of their neighborhood has galvanized remaining homeowners' commitment to the community.

In her recent book, *Root Shock*, Dr. Mindy Fullilove shares the stories of those who lost their homes, communities, and feeling of security in the mid-twentieth-century calamity that

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<sup>175</sup> Cf. Fullilove, *supra* note 171, at 1519 (stating that homes symbolize "the accumulation of many relationships and much history").

<sup>176</sup> Cf. John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 64-65 (1984) (noting that waves of arsons and the demolition of the community church and other essential buildings displaced most Poletown members, but those who remained in existing areas of Poletown continued organizing).

<sup>177</sup> See GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 110-11 (1998) (criticizing local government law for defining community solely by arbitrary geographic boundaries). The current Article's promotion of sub-local governance structures for blight elimination is not meant to suggest that all community can be reduced to residential neighborhood relationships; rather, it is to acknowledge that stable ownership of land plays an indispensable role in the sustaining of a particular, but very important, type of community.

<sup>178</sup> See Dennis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 702 (1992); Gomez & Muntaner, *supra* note 171, at 92 (stating that a community with strong community bonds "feel[s] empowered to control its own outcome").

was Urban Renewal.<sup>179</sup> Dr. Fullilove defines root shock as “the traumatic stress reaction to the destruction of all or part of one’s emotional ecosystem.”<sup>180</sup> Referencing the work of Jane Jacobs, she describes a person’s neighborhood as the setting in which they meet basic emotional and physical needs.<sup>181</sup> The sudden deprivation of this context can itself be a threat to the community member’s sense of self.<sup>182</sup> Throughout the work Dr. Fullilove explores the continuing human cost of that liquidation. Her encounters with persons who witnessed their communities literally torn apart document their incompensable loss of sense of place in the world.<sup>183</sup>

A homeowner’s appreciations for hearth and neighborhood can both serve as examples of surplus, the excess of consumer valuation over the exchange value of fair market price. The therapeutic literature concerning the victims of urban renewal certainly brings to mind the lasting pain present in the word “recovery.” The phrase “surplus recovery,” however, makes almost no sense at all in discussions of the response to the personal losses of both home and community that residents displaced by urban renewal condemnations undergo. Once it is gone, it is gone. The market cannot offer anything to replace it. Yet, under current law, an economic development authority, faced with the choice between a viable residential neighborhood and an abandoned factory site for locating a new biotechnology facility, could condemn the former instead of the latter assuring the displaced residents that “just compensation” would prevent them from suffering unduly.<sup>184</sup> Redevelopment experts offer little more comfort to residents of poor neighborhoods when they

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<sup>179</sup> See FULLILOVE, *supra* note 171, at 7; Fullilove, *supra* note 171, at 1518 (sharing a story of a mining disaster that destroyed the homes of eighty percent of residents of the town and where many “struggled to cope, but the loss of the anchoring community left [them] adrift”). See generally Fried, *supra* note 171, 370–76 (providing a detailed discussion of the grief patterns of families that have lost their homes and have had to relocate).

<sup>180</sup> FULLILOVE, *supra* note 171, at 11.

<sup>181</sup> *Id.* at 17–20.

<sup>182</sup> *Id.* at 20.

<sup>183</sup> *Id.* at 108, 180. Her own road to the problem came through her work with victims of the AIDS epidemic in Harlem. *Id.* at 108, 180.

<sup>184</sup> See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 135–37 (2004) (noting that the failure to account for such “community externalities” in takings decisions points to an “incompleteness of current theory and doctrine”).



tell them that they are being displaced to make way for new and beautiful homes for others, as opposed to cutting-edge commercial activity.<sup>185</sup> A neighborhood subjected to renewal is not a community reborn if its residents are forced out and all connection to the past is paved over.

When the cities of Detroit and Hamtramck offered the Poletown neighborhood as the future site of a new factory for General Motors, there was no room in the plan for the continuation of that community.<sup>186</sup> Generally speaking, any use of eminent domain as an inducement of regional economic development will subjugate the needs of the residents and dissolve their connections to one another.<sup>187</sup> Redevelopment of neighborhoods as viable residential areas, however, need not result in permanent loss, even if eminent domain plays a more vital role in clearing blight than in attracting jobs. Eminent domain in support of reconnecting the land to adjacent functioning housing markets need not destroy a community of committed homeowners.

Interestingly, the need for authentic neighborhood redevelopment may set one aspect of the homeowner's surplus against the other. If a community's future viability depends on its property owners pooling land resources, then a homeowner's attachment to her property may need to give way to her desire to see her community reborn. Her willingness to make such a sacrifice presupposes of course that she will still be a member of the new community.

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<sup>185</sup> Mixed-use being the mantra of current redevelopment policy, residents facing displacement are told that their land will be remade to support both commercial and residential uses. Marisela Gomez, *Demanding a Better Deal*, 144 SHELTERFORCE (2005), available at <http://www.nhi.org/online/issues/144/organize.html>. The University of Baltimore Community Development Clinic is currently representing the Save Middle East Action Committee, a nonprofit group of residents, many of them homeowners, of an East Baltimore neighborhood being cleared to make way for a biotechnology facility and New Urbanist housing development. For a discussion of how the alienable Community Residency Entitlement responds to this reality, see *infra* notes 270–272 and accompanying text.

<sup>186</sup> See Bukowczyk, *supra* note 176, at 62 (noting that the area “slotted for acquisition and demolition” was “more viable as a neighborhood than other parts of the district”).

<sup>187</sup> *Cf. id.* at 63–64 (explaining that eminent domain and the demolition of Poletown community institutions resulted in a general feeling of despair that Poletown was approaching its end).

## 2. The Public Need for Investment Coordination in Blighted Areas

In an intensely subdivided urban neighborhood, owners' property values are directly impacted by the investment decisions of the neighboring property owners in the community.<sup>188</sup> Some form of eminent domain will prove itself indispensable to the success of strategies that involve intense, focused public investment in the physical redevelopment of severely deteriorated and undercrowded neighborhoods. For such neighborhoods, reconnection to the market involves assuring those who can choose to live elsewhere that they are better off joining a community that is experiencing a new and dramatic upsurge. Leveraging of private investment, therefore, often requires intensive coordination that presupposes the acquisition of all parcels in the target area, both the blighted and the code compliant.<sup>189</sup> Just as individual properties with many owners can serve as exemplars of the anticommons,<sup>190</sup> blighted

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<sup>188</sup> WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 45–46 (Duke Univ. Press 2001).

<sup>189</sup> In the early 1990's, Dudley Neighbors, Inc., the nonprofit community land trust created by the grassroots organizing efforts of the Dudley Street Neighborhood Initiative ("DSNI"), petitioned and received from the Boston Redevelopment Authority the power to condemn privately-owned vacant land in a large section of the Roxbury Neighborhood. PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE RISE AND FALL OF AN URBAN NEIGHBORHOOD* 141 (South End Press 1994). Although many in the neighborhood were all too familiar with the abuse of eminent domain authority in Boston's urban renewal days, the community decided that they needed to reclaim this power for themselves in order to realize the transformation of the community that DSNI's planning process was articulating. *Id.* at 126, 133. Rather than force community residents into the urban renewal dilemma of being herded into public housing complexes or being displaced altogether, DSNI wanted the condemnation power to go to its subsidiary land trust so that there could be permanently affordable homeownership opportunities on land made vacant by widespread decay, arson and demolition. *Id.* at 120. The main reason that the Dudley Street Neighborhood Initiative sought and secured eminent domain authority from the Boston Redevelopment Authority was to be able to have "critical mass" in its development strategy. *Id.* at 117–18.

<sup>190</sup> The excessive fractionation of property more efficiently held in a unified form has been described as anticommons. Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998). Although Michelman introduced the term in legal literature, it is only relatively recent scholarship by Michael Heller that has brought "anticommons" into frequent usage. *Id.* at 667–68. The tragedy of the anticommons is the inverse of the tragedy of the commons. *Id.* at 623–24. Where the situation of too many persons with unrestrained use privileges leads to overconsumption, underconsumption plagues those properties for which too many persons have overlapping rights to

neighborhoods also can be seen as the victims of over-fractionation.<sup>191</sup>

Given the pain caused by forced displacement, voluntary land assembly may seem to be a more appropriate coordination strategy, at least with regards to the acquisition of homeowner property. Under such a compromise, absentee owners would be forced to transfer their land at fair market value. Owner occupants, however, would be "compelled" to sell their land, but at a price they thought was fair, thereby protecting their surplus.<sup>192</sup> But, just as with all such thin market land assembly situations, a rent-seeking holdout can assert his or her monopolistic power to dictate price and capture subsidy.<sup>193</sup> Public developers may be forced to pay out not only the gain the unsubsidized market would attribute to the land assembly, but also some of the subsidy money the government and foundations invested because of the project's social and political significance. Having publicly subsidized developers bargain with individual holdouts for voluntary sale does not make for sound public policy. Even those who would argue that the speculator should participate in the land assemblage surplus would not rush to justify his attempts to extort public subsidies from project officials afraid of the political consequences of acquisition failure.

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block use. *Id.* at 639, 675. Frequently, the transaction costs involved in coordinating these rights prevents full utilization of the resource. *Id.* at 674.

<sup>191</sup> *Cf. id.* at 685–86 (stating that the breaking up of Indian lands by the government led to extreme fractionation). This does not mean that overfractionation of property interests necessarily caused, or even significantly contributed to, the decline. Recovery and reconnection to the market, however, may require a degree of collective action not possible without third-party coordination. Indeed, once these barriers have been overcome, the market may support the very same lot sizes and dispersal of ownership interests.

<sup>192</sup> Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 *YALE L.J.* 2091, 2096 (1997) (citing an old Roman law practice by which those who had taken another's property could keep it if they could pay the plaintiff's estimate of its worth). Such a self-assessment was limited only by rules against perjurious testimony. *Id.*

<sup>193</sup> *Cf. id.* at 2093 (stating that "liability rule[s] [are] typically adopted to counter the monopoly position of the holder of the asset"). A genuinely inframarginal property owner is not willing to sell his or her property for any price generally available from buyers participating in the market. *Cf. id.* at 2093–94 (stating that liability rules are adopted only when beneficial transactions may be stalled because an individual holdout power is so large).

### 3. Pliability Rule Approaches to Neighborhood Eminent Domain

Seeing the temptation that such a system would place before even long-suffering homeowners, legal academics have developed more effective ways of monetizing homeowner surplus. Ellickson suggests that supplemental damages could be awarded to displaced long-term homeowners following a legislated schedule based on the length of residency.<sup>194</sup> This approach has many of the same cost internalization benefits of the supercompensation provided for by the New Hampshire Mill Act.<sup>195</sup> Instead of increasing compensation above market value based on the taking's benefit to a private party, Ellickson's proposal would provide a moderate check on condemnations that cause harm to particularly sensitive condemnees. Although both of these approaches innovate within the liability rule framework, neither offers injunctive protection against overuse of eminent domain. More recent legal scholarship has broken through a conceptual wall separating property rule and liability rule remedies. These responses offer resident owners legal mechanisms for blocking certain types of condemnation without enabling them to profit through strategic use.

Lee Anne Fennell has applied Saul Levmore's method of self-assessed valuation<sup>196</sup> to the problem of condemnees at risk of losing large surpluses.<sup>197</sup> She proposes that legislatures allow landowners to adjust their own property tax bills based on their willingness to submit their property to condemnation and private transfer.<sup>198</sup> By foregoing part of a tax break, they would be assuring themselves of bonus payments over and above market-price at the time of condemnation.<sup>199</sup> In rejecting the tax credit altogether, they would effectively be purchasing an injunction

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<sup>194</sup> See Ellickson, *supra* note 130, at 736–37. Ellickson was discussing displacement in the context of constructive eviction due to nuisance, but the principles have applicability to just compensation considerations in eminent domain.

<sup>195</sup> See *supra* notes 91–93 and accompanying text.

<sup>196</sup> See Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 771 (1982) (stating that self-assessment utilizes those parties best able to accurately value the property interests while foregoing the inherent risks of inaccuracy and corruption).

<sup>197</sup> See Fennell, *supra* note 15, at 995–96.

<sup>198</sup> *Id.* at 997.

<sup>199</sup> *Id.*

against any attempt to invoke eminent domain for a proposed private use.<sup>200</sup>

In theory, Fennell's self-valuation reform separates rent-seeking holdouts from genuinely inframarginal homeowners. By requiring a person who claims that no amount of money could part him from his land to put money behind his dedication, the adjustable tax bill thwarts those who would like to play hard to get but do not want to pay in advance for protection from eminent domain.<sup>201</sup> This analysis, however, assumes that all such assessment decisions are made in ignorance of plans for forthcoming condemnations.

The importance of transparency in planning and the general inability of local governments to act with stealth make it very likely that condemnation will be suspected long before it is actually declared. Rent-seeking landowners may learn in advance of a forthcoming condemnation and elect their protection in time to cash in. Moreover, whether sincere or merely strategic, an individual owner under Fennell's proposal has the right to buy an absolute veto over any redevelopment project requiring his or her land.

Fennell restricts her landowner protection to only those instances of eminent domain for private transfer "where public use is unclear."<sup>202</sup> Yet, in these instances, eminent domain's ability to effect curative land assembly is completely at the mercy of individual landowners' tax payment decisions. Actually implementing such a system may lead to an underuse of eminent domain for blight elimination.

Recognizing the need for a form of land transfer coordination specifically focused on the issue of excessive fragmentation of property rights, Michael Heller and Rick Hills have devised a governance solution.<sup>203</sup> To overcome the collective action problem

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<sup>200</sup> See *id.* at 997-98. Under Fennell's proposal, only governmental use and private transfers that meet an involved balancing test would be exempt from a landowner's right to block it. See *id.* at 995-98.

<sup>201</sup> See *id.* at 996.

<sup>202</sup> *Id.* at 995. Fennell diagnoses condemnations for private use and ownership as chronically undercompensating the condemnees. After describing the elements of the "uncompensated increment," she deploys regulatory takings analysis to determine which circumstances would justify the uncompensated taking of the "uncompensated increment." *Id.* at 1003-04. Landowners passing up on the tax break would be buying this more conservative public use standard of review.

<sup>203</sup> See Heller & Hills, *supra* note 15, at 13-14. For a discussion of the legal academy's embrace of governance as a progression beyond "the false dilemma

without complete liability rule liquidation, they have drawn upon a transaction cost solution discussed by Coase: the firm.<sup>204</sup> Heller and Hills propose Land Assembly Districts (“LAD”) as a new way to construct consent for land assembly purposes.<sup>205</sup> For a neighborhood in need of redevelopment, the local government would take advantage of the proposed legislative reform to declare a LAD, essentially putting a detailed purchase proposal to a condemnee referendum.<sup>206</sup> By imposing a collective decision-making process similar to that available in condominium owners’ associations or labor unions, the government could allow a group of property owners to decide whether or not to assemble their land.<sup>207</sup>

This innovative approach straddles the line between property rule and liability rule approaches. It is a true pliability rule structure.<sup>208</sup> If the stakeholders in the LAD need unanimity to accept a purchase offer, their property rule entitlements are preserved along with all the holdout behavior associated with them. If, on the other hand, only a tiny fraction of LAD members need to find an offer acceptable, to bind the whole group, the structure looks much more like traditional eminent domain liquidation. A simple majority vote requirement would split the difference and “empower” the LAD member with the median

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between centralized regulation and deregulatory devolution,” see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343 (2004).

<sup>204</sup> Coase’s theory of the firm recognizes that reduction of transaction costs is the driving principle behind creation of corporate entities. See Ronald Coase, *The Nature of the Firm*, 4 ECONOMIC 385, 390–91 (1937).

<sup>205</sup> See Heller & Hills, *supra* note 15, at 13–15 (joining a LAD would provide owners with collectively greater power and “some share of the gains from assembly”).

<sup>206</sup> See *id.* at 13–14.

<sup>207</sup> *Id.* at 23. The model for self-governance advocated by Heller and Hills, as well as this Article, is one of direct control through referendum. For an article that advocates supermajority resident representation on the redevelopment agency board itself, see Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 752–54 (1994) (referring to the Dudley Street Neighborhood Initiative as “the best known example of resident-controlled redevelopment”). Barbara Bezdek has proposed that both the financial benefits and ongoing control of redevelopment be given to residents through stock ownership in private-public ventures. Barbara Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. (forthcoming 2006) (manuscript at 64–68, on file with author).

<sup>208</sup> See Bell & Parchomovsky, *supra* note 13, at 25.

reservation price to cast the crucial vote.<sup>209</sup>

Heller and Hills offer the Land Assembly District as a replacement for all eminent domain processes aimed at eliminating the anticommons problem of "target fragmentation."<sup>210</sup> By rendering the condemnation decision-making process corporate, as opposed to governmental or individual, Heller and Hills have largely overcome the problem of individual holdouts.<sup>211</sup> At the same time, their proposal would not only restore some modicum of condemnee autonomy but would also allow the condemnees to use collective bargaining to recapture some, if not all, of their surplus.<sup>212</sup>

More importantly, the Land Assembly Districts proposal appears to overcome the central epistemic problem of indemnifying owners for loss of surplus. As Richard Epstein has pointed out, an individual owner in an extreme seller's market has a strong incentive to exaggerate the extent to which his or her subjective valuation of the property exceeds fair market value.<sup>213</sup> In a land assembly situation, an owner asked to state his or her subjective value of the property is being invited to engage in holdout behavior. By comprising the potential

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<sup>209</sup> It's not clear how Heller and Hills would deal with the fact that differences among parcels might obscure attempts to bribe just enough voters to approve the transfer to the detriment of the undercompensated minority. Let us suppose that a declared Land Assembly District contains sixty percent rowhouses and forty percent fully-detached homes. The would-be developer might offer the rowhouse owners a premium above fair market value and make up the difference by offering the owners of the detached houses even less than fair market value. The plan might be approved but nearly half the homeowners would have been more fully compensated by a judicial determination of their property value in a traditional condemnation action. For a normative analysis of vote-buying in special district elections, see Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1364-68 (2000).

<sup>210</sup> Heller & Hills, *supra* note 15, at 18.

<sup>211</sup> Heller and Hills recognize that their process will not work in areas where the median member (i.e., the deciding participant in a simple majority vote) is also a holdout. These "holdout neighborhoods," as they call them, are particularly problematic in target uniqueness situations. In their view of "target fragmentation" and "target uniqueness", the gains in the former coming from assemblage are rightly recaptured by the LAD members, while a neighborhood's attempt to capture the value of their land's unique value, say for an airport site, would be as extortionate as if carried out by a single landowner. *Id.* at 17-18.

<sup>212</sup> I describe Land Assembly Districts as increasing condemnee autonomy rather than resident autonomy because it is not entirely clear if Heller and Hills wish to restrict participation to homeowners. The first part of the draft article continually refers to "landowners," *id.* at 3-6, while in the latter part, the term "neighbors" is more frequent. *Id.* at 22-23.

<sup>213</sup> See EPSTEIN, *supra* note 22, at 183-84.

holdouts into a collective bargaining unit and empowering them to fix a price by majority rule, Heller and Hills are depriving each of them of the means by which he or she might try to acquire a disproportionate amount of the gain from land assembly.

Heller and Hills' collective autonomy approach to redevelopment seems to focus exclusively on the issue of the sufficiency of the individual cash compensation offered to the condemnees.<sup>214</sup> Although Land Assembly Districts offer an effective way to calculate the monetary value of a median landowner's consumer surplus, they do not deal with the qualitative inadequacy of cash compensation for the loss of home and community.<sup>215</sup> Land Assembly Districts' distinctively communal restoration of condemnee autonomy can truly preserve social capital if the subject of bargaining moves away from individual cash compensation. To build community, the neighborhood governance approach to land assembly should instead focus on collective bartering of homeowner properties in exchange for public goods particularly valued by the existing community members.

#### 4. Enacting "Pliable" Restraints Responsive to Both Condemnor and Condemnee Market Thickness

The proponents of the just discussed pliability approaches find it necessary to segregate conceptually eminent domain as used for redevelopment from eminent domain for acquisition of a specific site for a government building or a public road. Building on the work of Thomas Merrill, each system focuses on the thickness of the market available to the would-be condemnor for achieving a particular public objective. Each proposal is limited to a particularly controversial set of eminent domain activities.<sup>216</sup>

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<sup>214</sup> See Heller & Hills, *supra* note 15, at 6–8.

<sup>215</sup> See *id.* at 27 (noting that even when homeowners are paid a large premium above fair market value, they still refuse to sell, suggesting that money can not compensate them for their loss). Although Fennell includes the loss of autonomy as part of her uncompensated increment, she recognizes that cash compensation for the loss would be in "the wrong currency." Fennell, *supra* note 15, at 959, 961.

<sup>216</sup> Fennell distinguishes true public use condemnations from condemnations that could be blocked under her system by subjecting the "taking" of the uncompensated increment to the regulatory takings test found in Penn Central. Fennell, *supra* note 15, at 981–92. Heller and Hills reserve the use of Land Assembly Districts for cases of "target fragmentation," in which investment coordination is the primary public objective, as opposed to "target uniqueness" situations where the condemnor faces a thin market for meeting the public objective.



As previously noted, exploring the propriety of eminent domain requires consideration of the thickness of both condemnor and condemnee markets. Neither Fennell nor Heller and Hills devote significant attention to targeting their innovations at particular sets of condemnees.<sup>217</sup> Nothing about their proposals depends on categorical differences in condemnee experiences of eminent domain. I have illustrated how the socioeconomics of just compensation justify attention to condemnee market thickness in the same way that the Economics of Public Use showed the relevance of condemnor market thickness. Having examined categories for each, we are now ready to map out the full range of possible interactions between “public use” and “just compensation” and insert appropriate entitlement protections. The following chart arranges these various outcomes along the condemnor necessity and condemnee compensation axes:

**FIGURE 1: MAPPING AVAILABILITY OF EMINENT DOMAIN BASED ON CONDEMNOR & CONDEMNEE NEED FOR LAND**

Just Compensation & Condemnee Market Thickness→	SURPLUS IMPLICATES FUNDAMENTAL RIGHT NOT RECOVERABLE THROUGH MARKET	SURPLUS NOT RECOVERABLE THROUGH MARKET (RESIDENT HOMEOWNERS)	NO SURPLUS OR SURPLUS RECOVERABLE THROUGH MARKET (LAND INVESTORS)
Public Necessity & Condemnor Market Thickness↓			
Public Trust <sup>218</sup>	Eminent Domain (“ED”) prohibited absent compelling interest	ED permitted; impact study required as to site selection <sup>219</sup>	ED permitted
Subsidy Inducement for Regional Economic Development	ED prohibited	ED with impact study only if compelling public need for land acquisition; <sup>220</sup> otherwise community governance	ED permitted
Blighted Area Investment Coordination	ED prohibited	ED permitted only through community governance	ED permitted

Heller & Hills, *supra* note 15, at 17–18.

<sup>217</sup> Fennell consistently describes her would-be condemnees as “property owners” and “landowners.” Fennell, *supra* note 15, at 995, 997, 999. As previously noted, Heller and Hills are less clear in their draft article about which stakeholders control the Land Assembly District. *See supra* note 212.

<sup>218</sup> To fit in this category, the public objective behind the condemnation must

Resident homeowners should have the authority not only to help create but also to ratify the redevelopment plan. Moreover, even if by collectively subjecting themselves to eminent domain they necessarily lose those surpluses associated with their individual parcels, their relationship to the land and, more importantly, to one another, should be preserved. As shown in the second part of the Article, this equilibrium achieved through the targeted subjection of eminent domain to community governance can be established by statutory reforms to existing structures. The resident ratification requirement, which I call Homestead Community Consent, can be built into the community planning requirements already featured in many of the state statutes delegating eminent domain authority to the special public and quasi-public authorities that tend to be the biggest users of it for redevelopment purposes.<sup>221</sup> Preservation of those surpluses flowing from the community can be achieved by an amendment to federal relocation laws to guarantee long-term residents comparable housing on the same land that the homeowners among them collectively relinquished.<sup>222</sup>

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necessitate the placement of a real property interest into some form of public trust. Strictly speaking, a government may be able to meet this test and still enjoy a market thick with equally suitable sites. Nevertheless, the condemning authority should have discretion as to which property to select subject to an impact study process if potential condemnees as a group tend to face recognizable, uncompensable losses.

<sup>219</sup> John Fee has also suggested that any condemnation of homeowner land be preceded by an impact statement process. Fee, *supra* note 99, at 801–02. For an example of a proposed administrative process using cost-benefit analysis of displacement inducing condemnations, see Adam Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal To Reform HUD Displacement Policy*, 2001 L. REV. MICH. ST. UNIV. DETROIT COLL. OF L. 901, 940–41 (2001). At the 2005 Brigham-Kanner Conference, Tim Iglesias presented his ideas for an Eminent Domain Impact Statement to address the “Egregious Eight” threats to public interests. Timothy Iglesias, *The Egregious Eight: Reforming Eminent Domain To Protect Public Interests* (Oct. 29, 2005) (handout on file with author).

<sup>220</sup> Given that the public purpose of economic development does not per se require the acquisition of land, the authority would have to establish both that the proposed development project needs the identified land in particular and that no other, less particular projects could substitute for the identified project in achieving economic development. Otherwise, the authority would be forced to bargain with the community collectively to buy them out. See *infra* part II.C.3.

<sup>221</sup> See, e.g., CONN. GEN. STAT. ANN. §§ 7-600, 7-603 (1999); GA. CODE ANN. §§ 8-4-2, 8-4-4 (2006); MO. ANN. STAT. § 99.820 (2001); N.C. GEN. STAT. ANN. § 160A-504 (2006); 35 PA. STAT. ANN. § 1709 (2003).

<sup>222</sup> For a discussion of this proposed Community Residency Entitlement, see *infra* Part II.C.2.

## II. "JUST LIKE A TREE THAT'S PLANTED BY THE WATER . . .": THE RIGHT OF RESIDENTS BOTH TO RENEW AND TO REMAIN

A workable theory of eminent domain will validate broadly accepted conclusions as to the legitimacy of eminent domain in straightforward situations as well as persuasively sort out more controversial cases. Merrill conducted a review of more than three hundred judicial opinions to show that courts were already interpreting "public use" in a manner consistent with his basic and refined models of condemnor market thickness.<sup>223</sup> Although his article generally supported the broad reading of "public use" to include a wide variety of permissible governmental ends, he also illustrated how his call for increased attention to the availability of alternatives to eminent domain as a means of achieving those ends would rein in abusive condemnation practices.<sup>224</sup>

Since the current Article's extension of that approach into just compensation has pointed out the suitability of legislative and administrative protections, a review of eminent domain in the urban redevelopment context should—and, in fact, does—reveal examples of statutory and regulatory reforms designed to protect condemnees from significant uncompensated losses. These attempts at addressing the inequities of condemnation offer foundations for future reforms. Furthermore, a market thickness examination of the public objectives behind urban redevelopment outlines room for alternatives to traditional eminent domain. The overlap then between condemnees' remaining unmet needs and local authorities' ability to meet public goals—without unchecked ability to compel land transfers—provides fertile ground for the compromises necessary to transform eminent domain into an appropriate instrument of authentic community development.

Forty years ago, public dissatisfaction with the use of eminent domain for urban redevelopment inspired a series of reforms that continue to protect property occupants today.<sup>225</sup>

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<sup>223</sup> Merrill, *supra* note 40, at 94–97. As previously noted, this study was recently replicated. Wilk, *supra* note 164, at 257–61 (evaluating Merrill's initial study to reveal any relevant changes that have taken place in the courts' analysis of public use); see also *infra* note 108 and accompanying text.

<sup>224</sup> Merrill, *supra* note 40, at 69–71.

<sup>225</sup> See, e.g., Paul Bass and Douglas W. Rae, *Eminent Disdain*, N.Y. TIMES, July 9, 2005, at A13 (providing an example of public dissatisfaction with the use of

Federal relocation assistance and state planning legislation offered comparatively little additional autonomy for absentee owners faced with condemnation. Instead these important but incomplete changes targeted those most devastated by eminent domain: resident stakeholders facing displacement. Their focus on those most personally attached to the land provides the foundation for the reforms still needed today.

### A. *The Unfinished Work of the Revolt Against Urban Renewal*

Urban planning experts can adduce any number of cogent arguments for the appropriateness of eminent domain as part of a given redevelopment project and still be silenced by the inevitable historical rejoinder: urban renewal. The quarter-century that followed the enactment of the National Housing Act of 1949 witnessed the discarding of many vital urban communities to make way for sterile single-use projects that frequently never reached completion.<sup>226</sup> The populist backlash against urban renewal made urban redevelopment experts much more sensitive to public relations issues and led to the birth of the contemporary community development movement's emphasis on resident empowerment.<sup>227</sup> Despite a governmental agenda to promote style over substance, the specific responses to the eminent domain abuses of the urban renewal era suggest important future limitations on the ends, means and consequences of condemnation.

#### 1. Undercompensation and the Uniform Relocation Act

The U.S. Supreme Court has ruled that "[j]ust compensation rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."<sup>228</sup> For all the

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eminent domain in 1959 and explaining that reforms are still needed today).

<sup>226</sup> FRIEDEN & SAGALYN, *supra* note 123, 133–47 (noting how minority communities were displaced in order to make way for large, single-use projects, such as highways); FRUG, *supra* note 177, at 133–35.

<sup>227</sup> See Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH U. J.L. & POL'Y 709, 713–14 (2000).

<sup>228</sup> See *United States v. Miller*, 317 U.S. 369, 373 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923); *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923); Jeremy P. Hopkins, *Just Compensation: Elementary Principles and Considerations To Ensure the Property Owner Is Made Whole*, in ALI-ABA, CONDEMNATION 101:

outrage over the disregard of the "public use" clause, more than one private property advocate has pointed out that there might be comparatively little concern over eminent domain if condemnors provided compensation that condemnees openly acknowledged to be just.<sup>229</sup> By largely restricting required compensation to the value of the property taken, the courts have abandoned any pretense that just compensation entails full condemnee indemnification. Victims of urban renewal frequently received little or no meaningful recompense for their relocation costs and their severance from the land and the community it supported.<sup>230</sup> Urban redevelopment turned a page with the passage of federal legislation in 1970 to address the former. The problem of the loss of community, however, still preoccupies those who wish to defend, improve, or eliminate the use of eminent domain in urban redevelopment.<sup>231</sup>

While appropriately rewarding holdouts might seem complex and elusive, urban renewal reformers found no such difficulties in reimbursing relocation costs. In enacting the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970 ("Uniform Relocation Act" or "URA"), Congress provided for monetary and service assurances of proper relocation to victims of federally financed eminent domain condemnation.<sup>232</sup> If the condemning authority could not establish the existence of comparable replacement housing<sup>233</sup> that

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FUNDAMENTALS OF CONDEMNATION LAW AND LAND VALUATION (2006).

<sup>229</sup> See Fennell, *supra* note 15, at 960 & n.13.

<sup>230</sup> See Hartman, *supra* note 172, at 749–50 (outlining the early evolution of relocation adjustment payments, which in 1956 only provided a "reimbursement for moving expenses" at "a maximum of \$100 per family").

<sup>231</sup> See Hellegers, *supra* note 219, at 941–42 (2001). This Article proposes the required completion of a community impact statement prior to redevelopment. *Id.* at 956.

<sup>232</sup> 42 U.S.C. §§ 4601–4655 (2000).

<sup>233</sup> The term "comparable replacement dwelling" means any dwelling that is: (A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

42 U.S.C. § 4601(10); *Dean v. Martinez*, 336 F. Supp. 2d 477, 491 (D. Md. 2004) (citing 42 U.S.C. § 4601(10)).

relocatees could afford, even with their stipends, then the agency could itself provide "housing of last resort."<sup>234</sup>

The URA facilitated, without dictating, responses to the compensation gaps of market land valuation. Not only did relocation costs have to be paid, but there also had to be planning to make sure that persons could use the money to regain what they had lost due to the condemnation. The Uniform Relocation Act only required that the condemning agency produce a plan that the funding agency found satisfactory;<sup>235</sup> and failed to give condemnees, either directly or indirectly through meaningful judicial review, any means to control relocation.<sup>236</sup> Yet, it gave condemning agencies a public relations kit for dealing with anxious residents of redevelopment districts.<sup>237</sup>

By offering money above and beyond the fair market value of the condemned properties, redevelopment officials can erode the base for any organized discontent. Ellickson recognized the URA system as a conduit for making bonus payments to soften opposition to major capital projects.<sup>238</sup> In Baltimore, the recent expansion of an internationally reknowned medical campus into an adjacent deteriorated neighborhood has occasioned an instance of "supplemental" URA benefits to induce condemnee cooperation.<sup>239</sup>

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<sup>234</sup> See 42 U.S.C. § 4626 (2000); 49 C.F.R. § 24.404 (2005).

<sup>235</sup> 42 U.S.C. § 4630 (2000).

<sup>236</sup> See *Dean*, 336 F. Supp. 2d at 490–91 (stating that HUD's statutory obligation to displaced tenants does not require the agency to "affirmatively provide" comparable housing).

<sup>237</sup> For a recent discussion of how relocation assistance is used to quiet resistance to eminent domain, see Garnett, *supra* note 159, at 25–30.

<sup>238</sup> See Ellickson, *supra* note 130, at 737 n.195.

<sup>239</sup> In 2002, Baltimore's City Council amended East Baltimore's urban renewal to authorize the condemnation of thirty acres of land in a neighborhood known as Middle East to make way for a mixed-use project featuring a biotechnology industrial park in the area adjacent to Johns Hopkins Hospital. Eric Siegel, *City Acquiring 70 Houses in Step Towards Biotech Park*, BALT. SUN, Dec. 26, 2002, at 1B. In addition to replacement housing assistance payments required by the URA, both homeowners and renters are eligible for "supplemental benefits." See E. BALT. DEV., INC., RELOCATION PLAN FOR E. BALT. DEV. PROJECT 12–25 (2004). Funds for these extra payments are being provided by the Annie E. Casey Foundation and Johns Hopkins University, the latter of which will be the anchor tenant for the biotech park. Given that a homeowner has far stronger standing to obstruct a condemnation proceeding than a month-to-month tenant would, it is not surprising that the additional benefits for homeowners greatly exceed those going to the tenants. Although the Uniform Relocation Act is the most substantial governmental reform brought about by the backlash against urban renewal, its orientation remains

The URA provided a means of appeasing condemnees with individual cash payments. It also recognized that cash by itself was insufficient. Even if the government had to build substitute facilities or "housing of last resort," persons displaced by federally funded condemnation activity had an entitlement to in-kind compensation, that is, comparable housing in the same metropolitan area.<sup>240</sup> This requirement applies equally to all manner of land seizures. Authorities who build highways are just as bound by its provisions as those who wish to plan the next NASCAR mecca.<sup>241</sup> Those long-term residents whose homes are taken to make homes for others, however, should not be satisfied with comparable housing that allows them to keep their jobs. After redevelopment is completed, they should be entitled to last resort housing on the same land they all called home prior to condemnation. Even if they do not regain the houses they valued, they would be able to move forward together as a new community.

## 2. Imposed Conformity and Community Participation in Planning

Urban renewal stands out among twentieth century instances of public and private oppression of marginalized communities. Confident in the superiority of their modern drawn cityscapes over the tangled, haphazard slums they wished to clear, urban renewal experts failed to see how reasonable minds would not welcome their proposals. Federal planning requirements slowed the process somewhat, but did not require any substantial community consultation.<sup>242</sup> The urban renewal cadre of downtown business leaders and planning experts eliminated chaos and imposed modern progress in its place.<sup>243</sup>

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focused on assuring the feasibility of redevelopment projects.

<sup>240</sup> 42 U.S.C. § 4626 (2000); *see also* 49 C.F.R. § 24.404(b) (2005).

<sup>241</sup> Indeed, because highway construction is the main occasion for federally funded eminent domain, the Department of Transportation, not the Department of Housing and Urban Development, issues regulations under the URA. 7 FED. PROC., L. ED. § 14:327 (2006).

<sup>242</sup> Promoters recognized as early as 1954 the need to make urban renewal more "workable" by encouraging citizen participation in redevelopment planning. *See* Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 870 & n.25 (2000).

<sup>243</sup> *See* MALLOY, *supra* note 121, at 103-04, 121 (using downtown Indianapolis as an example of an area where expensive revitalization projects such as the

Using funding for highway, university, office space, or stadium projects, condemnation planning officials deployed eminent domain to eliminate demographic as well as code enforcement crises.<sup>244</sup> The continuing influx of African-Americans into aging urban districts led planners to target their neighborhoods for redevelopment.<sup>245</sup> Redevelopment officials accommodated, ratified, and reinforced white citizens' general unwillingness to live in neighborhoods with sizeable black populations by shepherding poorer condemnees into public housing projects.<sup>246</sup> Building out from the Euclidean zoning approach of segregating different classes of land use, urban renewalists used eminent domain, highways, and public housing towers to compartmentalize minorities and minimize any conflict that might have come with diversity.<sup>247</sup>

In the *Death and Life of Great American Cities*, Jane Jacobs, an activist fighting urban renewal in New York City's Greenwich Village,<sup>248</sup> offered a critique of the monolithic approach to planning that made urban renewal so barren.<sup>249</sup> Her vision of city life, which would be well-described as "the being together of strangers,"<sup>250</sup> called upon planners to celebrate, rather than

construction of two office buildings, a hotel, and a major sports arena have taken place).

<sup>244</sup> A decade before the Poletown project, the city of Hamtramck used eminent domain to remove African-American residents. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 938 n.40 (2004). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (arguing that the black ghetto was created by whites during the first half of the twentieth century in order to isolate growing urban black populations, and how this segregation continues today).

<sup>245</sup> See FRIEDEN & SAGALYN, *supra* note 123, at 28–29, 52.

<sup>246</sup> Gerald Frug refers to this, in the words of Arnold Hirsch, as "the making of the second ghetto." See FRUG, *supra* note 177, at 133; MASSEY & DENTON, *supra* note 244.

<sup>247</sup> See FRIEDEN & SAGALYN, *supra* note 123, at 28–30, 39–40 (showing that in order to minimize the conflict that might arise from the cohabitation of white and black citizens, urban renewalists would not do business with African-Americans, and would price newly built apartments high, in order to keep African-Americans out of the area).

<sup>248</sup> See Herbert Gans, *The Failure of Urban Renewal*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 538 (James Q. Wilson ed., MIT Press 1966).

<sup>249</sup> See generally JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES* (Random House 1993) (1961) (critiquing current planning policies that, Jacobs claims, were destroying existing inner-city communities, and advocating a "mixed-use aesthetic" that preserves the uniqueness of individual neighborhoods).

<sup>250</sup> IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237



suppress, the diversity of activities and uses that support the "sidewalk ballet"<sup>251</sup> she observed on her own street.<sup>252</sup> Diversity of activity is the key to promoting neighborhood vitality, as Jacobs saw it.<sup>253</sup> As natural generators of diversity, cities needed plans that facilitated, rather than stifled, stabilizing heterogeneity.<sup>254</sup> Officials and experts would not be able to conceive such plans without active citizen participation.

Just as with relocation assistance, community consultation also became part of urban renewal's standard operating procedure. Just five years after its enactment, the Housing Act of 1949 was amended to require citizen consultation in order to make redevelopment "workable."<sup>255</sup> The creation of citizen advisory groups was a fairly transparent public relations ploy that came to serve as a negative example for the community development movement that would arise in urban renewal's wake.<sup>256</sup> As Audrey McFarlane notes, in summarizing the leading theoretical analysis of governmental efforts to increase community involvement, "participation is meaningful only to the extent that one has the power to affect the outcome of the development process."<sup>257</sup>

With the flourishing of the community development movement, community participation in even large scale revitalization projects has evolved considerably.<sup>258</sup> New Urbanism in particular places broadly inclusive design charrettes at the center of its approach to planning.<sup>259</sup> Yet, for urban

(Princeton University Press 1990); see also JACOBS, *supra* note 249, at 38.

<sup>251</sup> JACOBS, *supra* note 249, at 66.

<sup>252</sup> *Id.* at 66-70; see also YOUNG, *supra* note 250, at 237-40 (noting that in a city with diversity of activity, one can see a variety of people interacting with one another on the streets).

<sup>253</sup> JACOBS, *supra* note 249, at 531; see also YOUNG, *supra* note 250, at 237-40 (noting that when there is diversity of activity, residents tend to have more commitment to and care for their neighborhoods).

<sup>254</sup> JACOBS, *supra* note 249, at 531-32; see also YOUNG, *supra* note 250, at 238-40 (arguing that in the ideal city, groups will overlap and intermingle without becoming homogenous).

<sup>255</sup> See McFarlane, *supra* note 242, at 870.

<sup>256</sup> See *id.* at 870-72.

<sup>257</sup> *Id.* at 920-22; Sherry Arnstein, *Eight Rungs on the Ladder of Citizen Participation*, in CITIZEN PARTICIPATION: EFFECTING COMMUNITY CHANGE 69, 72-73 (Edgar S. Cahn & Barry Passett eds., 1971).

<sup>258</sup> See Salsich, *supra* note 227, at 709-10 (describing the use of new community planning techniques that are designed to "engage a broader segment of the community" in the development process).

<sup>259</sup> See *id.* at 711 n.13; Charles C. Bohl, *New Urbanism and the City: Potential*

redevelopment programs such as HOPE VI, ultimate and complete control still remains locked at the top.<sup>260</sup> As with supplemental cash compensation to residents, public relations oriented community consultation reforms have succeeded in keeping urban redevelopment projects “workable.”

### 3. Two New Forms of Residency Protection

Two complementary statutory reforms are needed to enhance the protection of residents from eminent domain in urban redevelopment. First, community members should not have any of their substantial rights of residency liquidated by eminent domain until they have approved the redevelopment plan for their neighborhood. This Homestead Community Consent requirement would best be enacted as an amendment to redevelopment planning requirements in state enabling statutes.<sup>261</sup> It would explicitly exempt condemnations for true public ownership and possession, and even those for transfer to private common carriers that guaranteed long-term public benefits in exchange for their required use of the land.<sup>262</sup>

To ensure that resident planners are confident that they are creating a community for themselves and their long-time neighbors, I further propose that federal and state relocation protections be reformed to ensure that long-term residents of redevelopment areas be given an alienable right to comparable replacement housing in the new development. Like its Homestead Community Consent partner, the Community Residency Entitlement would not apply to traditional invocations

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*Applications and Implications for Distressed Inner-City Neighborhoods*, 11 HOUS. POL'Y DEBATE 761, 765 (2000). Ironically, New Urbanists have built their best known sizable developments away from America's older cities. *See id.* at 781 (explaining that “the type of urbanism required to attract a diverse group of renters and home buyers today” is not that which was found in America's “older cities”). Land assembly in previously developed communities has proven too difficult. The most well-known New Urbanist developments in the inner-city have been constructed on the smaller pieces of land left behind by the HOPE VI program's demolition of public housing projects. *See id.* at 768–70.

<sup>260</sup> *See* Susan Bennett, *The Possibility of a “Beloved Place”: Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 304 (2000).

<sup>261</sup> *See e.g.*, CONN. GEN. STAT. ANN. §§ 7-600, 7-603 (1999); GA. CODE ANN. §§ 8-4-2, 8-4-4 (2006); MO. ANN. STAT. § 99.820 (2001); N.C. GEN. STAT. ANN. § 160A-504 (2006); 35 PA. STAT. ANN. § 1709 (2003).

<sup>262</sup> For discussion of this “public trust” exemption, see *supra* notes 110–20 and accompanying text.

of eminent domain for true public needs as described earlier. For revitalization projects, however, these two protections together create a land acquisition, redevelopment, and relocation that is not only "workable" but also genuinely constructive of community.

## B. *Homestead Community Consent*

### 1. Genuine Community Participation Entails Homestead Stakeholder Consent

In restoring community autonomy without facilitating individual holdouts, the Homestead Community Consent reform would foster a genuine dialogue between redevelopment officials and resident stakeholders. Although contemporary planners are steeped in group facilitation techniques to make community participation in planning feasible, no amount of openness in communication style can create decision-making power where none exists.<sup>263</sup> In order for resident planners to "buy-in," their approval must have more than mere public relations value. It must be determinative of the plan's authorization.<sup>264</sup> Even if their sanction is not the only one needed, they should not be forced to yield their individual homes until they themselves have envisioned and ratified the future of their neighborhood.<sup>265</sup>

The dialogue between these residents and those proposing redevelopment would tend to prioritize public goods valued by the existing residents, but not to the exclusion of the investment

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<sup>263</sup> See McFarlane, *supra* note 242, at 920–22, 925; Arnstein, *supra* note 257, at 72–73.

<sup>264</sup> Although the referendum mechanism is offered here as indispensable to any meaningful community consent to the exchange of resident land for a redevelopment plan, a parliamentary system of decision-making need not dominate the discussions that lead to the plan. For a critique of Robert's Rules of Order in favor of consensus building, see LAURENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 3–5 (1999). Advocates of charrettes for the creation of community plans have identified consensus building as a preferred mode of discourse. See JAMES A. SEGEDY & BRADLEY E. JOHNSON, *THE NEIGHBORHOOD CHALETTE HANDBOOK: VISIONING & VISUALIZING YOUR NEIGHBORHOOD'S FUTURE*, <http://www.louisville.edu/org/sun/planning/char.html> (last visited Aug. 29, 2006).

<sup>265</sup> In most cases, the homestead community would consist entirely of neighborhood homeowners, including cooperative tenants and condominium unit owners. As we have just seen, however, rent regulated tenants would also have the long-term property rights normally extinguishable by eminent domain. They, too, would participate as homestead stakeholders.

coordination that would re-establish connections between the neighborhood and the city as a whole. A community's culture and history of struggle and survival could be expressed in the public art.<sup>266</sup> Murals, sculptures, and green spaces could reflect a community that still lives rather than regretfully memorializing one that had to be put out of its misery. As residents and experts alike wrestled with market realities, features that would draw newcomers to the area, as residents, merchants, and customers, would also have to be acknowledged.

Although the approval vote requirement would give homeowners unusual authority, the discussion between officials and residents would not necessarily be one way. While the homestead community would collectively control land resources vital to the project, the redevelopment officials would presumably control where and how to spend the financial subsidies for any project.<sup>267</sup> If community residents were completely happy with their neighborhood's present condition, they might with one voice tell the experts to go spend their money elsewhere. Indeed a fundamentally healthy neighborhood would not need the use of eminent domain to bring about its revitalization. For this reason, the Homestead Community Consent reform would act as a procedural check on the overuse of redevelopment-focused eminent domain. Homeowners in a severely distressed neighborhood, however, will know better than anyone how much help their community needs. If approached in the spirit, but not just the spirit, of partnership, these survivors will get to work on reconnecting the neighborhood with the city around it.

## 2. Corporate Alienability of the Land Promotes Community Strength

As with the Land Assembly District process, HCC would frustrate both genuine and bluffing individual holdouts. Persons who refused to consider giving up their current home for a wide range of improvements that would benefit all residents would presumably be so out of step with the community mainstream as

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<sup>266</sup> See MEDOFF & SKLAR, *supra* note 189, at 241–42.

<sup>267</sup> Audrey McFarlane shows how difficult it has been for meaningful community participation to be structured into the administration of federal community development funding, a resource to which neighborhood-based organizations have not had direct access since the passage of the Green Amendment in the late 1960s. See McFarlane, *supra* note 242, at 874.

to be ineffectual in its deliberations. Individuals who wished to engage in strategic bargaining for personal gain would find even less opportunity in a community decision-making process that focused on the community's redesign.

By making resident approval essential to the land assembly process, HCC develops social capital broadly recognized as essential to urban redevelopment. Although residents could express their views through elected representatives, the direct democracy approach of HCC draws upon community organizing's roots in the labor movement. Saul Alinsky wrote that "a People's Organization can arise only from the efforts of the people themselves."<sup>268</sup> Redevelopment, by its nature, will drastically change a severely distressed neighborhood.<sup>269</sup> Only if returning residents have themselves produced the new community will they ever be able to rejoin it and call it their own. The inevitable conflicts and compromises with officials will only build the connection to the neighborhood vision for which they had to fight.

The Dudley Street Neighborhood Initiative's combined emphasis on resident planning and community legal control of land resources has made their organization a model for community-based development in distressed neighborhoods.<sup>270</sup> The Homestead Community Consent process, by enhancing and communalizing residents' protection in urban redevelopment, creates a forum for this same kind of transformative conflict resolution. By giving residents a legal right to hold on to what they have, this resident control proposal offers them an opportunity to let it go for something that is better and that is truly theirs.

### C. *Community Residency Entitlement*

#### 1. Relocation to Truly Comparable Housing Entails the Right To Rejoin the Community

As discussed above, the Uniform Relocation Act was enacted to ensure some minimum provision for those displaced by the

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<sup>268</sup> SAUL D. ALINSKY, REVEILLE FOR RADICALS 175 (1946).

<sup>269</sup> See Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool For Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527, 528-29 (2001).

<sup>270</sup> ELISE M. BRIGHT, REVIVING AMERICA'S FORGOTTEN NEIGHBORHOODS, 77-110 (2000); see also *supra* notes 135 & 189.

federally funded use of eminent domain authority. Whether a highway, an office complex, or a mixed-income residential development forced resident condemnees out, they were all entitled to benefit from the condemning agency's plan to facilitate their relocation to comparable replacement housing. There is no reason why a private residential redevelopment availing itself of eminent domain authority should not have to offer eventual relocation into onsite replacement housing just because such a requirement would not apply to a highway project.

As shown above, the public need for the specific route of a highway and, thereby, for permanent displacement trumps the right of the resident to preserve his or her unique relationship to his or her home, the land and the community subsisting on that land.<sup>271</sup> The homeowner forced to make way for someone else's private residence receives no such justification. Nothing about the public benefit in such a case is fundamentally incompatible with the resident's right to permanent onsite replacement housing.<sup>272</sup>

Truly comparable housing is not just about square footage and proximity to one's place of employment.<sup>273</sup> It also involves the ability to maintain community relationships developed over decades. For transfers to private parties that do not constitute

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<sup>271</sup> Although the proposal for community preservation that I offer is incompatible with redevelopment projects that make no provision for residential redevelopment of the condemned plan, Parchomovsky and Siegelman propose complete relocation of a displaced community to a *different* site as the type of in-kind relief that should be generally required by any regime that claims the name of just compensation. Parchomovsky & Siegelman, *supra* note 184, at 138. Their *Selling Mayberry* article examines a rural case; the current piece focuses on urban redevelopment. The divergence of the two proposals probably reflects the different sets of constraints on, and possibilities for, relocation of urban and rural communities.

<sup>272</sup> That is to say, the publicly stated objective of bringing newly designed and built housing to the area does not conflict with residents returning post-redevelopment. If, however, the land is being seized to scatter an unwanted population, a community residency entitlement would help expose and, to some extent, thwart such practices. For a discussion of Urban Renewal as "Negro removal," see FRIEDEN AND SAGALYN, *supra* note 123, at 28-30; ROBERT HALPERN, *REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES* 67-71 (Columbia Univ. Press 1995); MASSEY & DENTON, *supra* note 244, at 56; Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1, 47 (2003).

<sup>273</sup> See *supra* notes 232-40 and accompanying text (summarizing existing guarantees under the URA).

the necessary establishment of a public trust, federal and state relocation should guarantee displaces the right to re-establish their memberships in their original communities. If the "needs" of such projects are not compatible with actually honoring such guarantees, then the market, rather than the agency, should be allowed to establish just compensation.

## 2. Individual Alienability of the Right To Rejoin the Community Fosters Efficient Valuation

Even long-time residents of the neighborhood will value the right to return to the redeveloped community differently. For some, the transformed community, even if it includes many of their neighbors and features many improvements that they approved, will just not be the same. Others may have been planning on leaving the neighborhood anyway. Many of those who have survived its hard times, however, may simply not be denied the opportunity to take part in its rebirth by anyone or for any reason. To facilitate productive planning, the Community Residency Entitlement proposal would allow redevelopment managers to buy out as many residents as they need to make permanent replacement housing offers to the rest.

For instance, let us imagine a distressed neighborhood that had 300 long-term households in an area of 1000 evenly distributed, identical rowhouse parcels. The planners, let us suppose, have a homestead stakeholder approved plan that uses twenty-five percent of the land for the expansion of a neighboring private university and reduces the density of the remaining land to 600 townhouses. Assuming that the project's aspirations to attract higher income residents limited the amount of housing that would be affordable to most of the original residents to 200 units, the planners could make buyout offers until they had purchased 100 Community Residency Entitlement releases.<sup>274</sup>

City officials wishing to use non-exempt eminent domain for projects that offer even less benefits, however, to the community

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<sup>274</sup> If they wished to pay everyone the same amount for giving up the right to onsite permanent replacement housing, the planners could hold a sealed offer auction in which the 100th lowest buyout offer would be the payout for the ninety-nine offers below it as well. Conducting an auction would not obligate the developers to make any payments; such auctions would be another form of group bargaining, albeit one in which the entitlement holders are competing with one another to sell their rights to return to the new community.

would apparently face an insurmountable barrier in the Homestead Community Consent phase. A “holdout neighborhood” would not have to be idiosyncratic at all to turn down a redevelopment plan that flattened all their homes solely to make for a “big box” retail center to serve adjacent communities to which they may or may not relocate. There would be nothing in it for them so there would be no reason to hand over their land. Exemptions for public trust creation would protect against a particularly obstructionist community holding an entire city hostage for a true public necessity but would not do so for an all too dispensable commercial use. With the combination of these proposed reforms, non-residential redevelopers would have to pay for the privilege of permanent displacement.

Although the proposed Homestead Community Consent procedures would prevent city officials favoring the development from procuring individual votes, they would still have a great deal of flexibility in timing the buyout of all the Community Residency Entitlement rights.<sup>275</sup> For those projects for which planners would prefer to have no residential component at all, the planning process requirements should allow officials to include a 100% CRE buyout in the plan to be approved by the Homestead Community, as long as all residents holding Community Residency Entitlement under the revised URA were allowed to vote as well.<sup>276</sup> Just as with the Land Assembly District process, if the median resident is satisfied as to the compensation offered, the “big box” would be built.<sup>277</sup>

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<sup>275</sup> The presumed difficulty in bargaining with a so-called “holdout” community may be overblown. In their case study of the environmentally occasioned relocation of the residents of Cheshire, Ohio, Siegelman and Parchomovsky focus their efforts on trying to account for the relative ease of the transaction. Parchomovsky & Siegelman, *supra* note 183, at 91–92.

<sup>276</sup> In the 100% buyout option, the Homestead Community Consent and Community Residency Entitlement processes would collapse into a single procedure all but indistinguishable from the Land Assembly District system, except as to the identity of those included. It would, however, have the advantage of decoupling the liquidation of resident surpluses from the pricing of individual properties. This separation would frustrate attempts to offer certain residents more than others in order to buy their votes. Relative differentials in payouts could still be pre-established by legislation according to criteria such as length of residency as suggested by Ellickson. Ellickson, *supra* note 130, at 735–37.

<sup>277</sup> Of course, under the theory I have presented in the first part of the Article, a community governance approach would not be mandated if the local authority could establish that local economic survival necessitated the taking of the identified land.



#### D. Anticipating Objections

##### 1. Why Autonomy for Resident Owners Only?

Although I have already set out my main justifications for the elevation of residency as a strong property rule entitlement, American law's general hostility toward any differential legal treatment based on status warrants a closer look at why homeowners and other long-term residents should receive apparently preferential treatment over others affected by urban redevelopment. As to the Homestead Community Consent, the proper comparison is between resident condemnees and non-resident condemnees. HCC focuses on the forced acquisition of property rights recognized in eminent domain proceedings. Month-to-month tenants, although residents who may be displaced by the condemnation, are not themselves condemnees. They do not have cognizable interests in the land that is being taken.<sup>278</sup> The CRE portion of the proposal grants special relocation rights to condemnees and other long-term residents that will not be granted to more recent arrivals or to non-resident displacees such as small business owners.

Although rhetoric assailing eminent domain abuse almost universally invokes the homeowner as the paradigmatic victim, small business owners are also mentioned.<sup>279</sup> The Uniform Relocation Act addresses many of the compensable losses suffered by commercial condemnees, but, businessmen, like homeowners, can form an attachment to their properties as well.

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See *supra* note 219.

<sup>278</sup> 2 NICHOLS ON EMINENT DOMAIN § 5.02[6][i] (3rd ed. 2006). Here I would distinguish, however, between interests in land that are recognized as deserving of equitable protection and those that are also regarded as requiring compensation in eminent domain. Long-standing tenancies protected by rent regulation have been held to be deserving of the equity of redemption under New York Law, as they have many of the attributes of home ownership with regard to security of tenure. 248 Sherman Ave, Corp. v. Coughlin, N.Y. L.J., July 20, 1999, at 26 (Sup. Ct. App. T. 1st Dep't 1999). Yet, a New York appellate court has also held that such statutory tenancies are not compensable in condemnation. Dormitory Auth. v. Davis, 276 A.D.2d 284, 285, 713 N.Y.S.2d 873, 873 (1st Dep't 2000). For purposes of Homestead Community Consent, statutory tenants should be included in the referendum with homeowners because they too have a relationship with the land that equity would protect through injunctive relief, as against private parties.

<sup>279</sup> See Martin Anderson, *The Federal Bulldozer*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 491, 497 (James Q. Wilson ed., MIT Press 1966); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 221-22 (2004).

Proprietors can spend the better part of a lifetime developing a business, investing themselves as well as their capital into its growth. Condemnation of lease<sup>280</sup> or ownership rights, however, will not devastate these personal attachments as they do in the residential context.<sup>281</sup> While a very small minority of businesses will be so dependent on their unique location that they will not be able to function at all, most will be able to use the compensation provided to adjust and survive unimpaired.<sup>282</sup>

A strong interconnection with the surrounding community will also foster effective representation for a business in the Homestead Community Consent process. If the business has drawn its customers from all over the city, but was strongly identified with the neighborhood, the residents will seek to provide for its return to the redeveloped area. Likewise, if the business served mainly the residents themselves, the owner should feel confident in his customers' advocacy. For other businesses, condemnation and relocation themselves should not prove unduly burdensome.

For severely distressed neighborhoods, the failure of either of the reforms to directly empower short-term residents is of greater concern. Personal crises and bad housing conditions often require poor tenants to move frequently, sometimes in and out of neighboring communities. The critiques of urban renewal

<sup>280</sup> It should be noted that a great many small business persons lease rather than own their land. Although their leases may be of such a length as to qualify them as condemnees, the need to be mobile and focus investment on operating, as opposed to real estate, capital illustrates the relative insignificance of stable land tenure for many merchants.

<sup>281</sup> See Fee, *supra* note 99, at 792–93. But see Mary L. Clark, *Reconstructing the World Trade Center: An Argument for the Applicability of Personhood Theory to Commercial Property Ownership and Use*, 109 PENN STATE L. REV. 815, 826–28 (2005) (noting that 9/11 memorial efforts illustrate how commercial property can be “de-commodified”).

<sup>282</sup> Mere survival may seem a poor excuse for not increasing protection. Frank Michelman, however, articulates the case for such an approach to determining the availability of specific relief against eminent domain.

[W]hat one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order . . . . Loss—even great loss—of the economic value of one's [holdings may] not as such violate those conditions. What does, perhaps, violate them is exposure to sudden changes in the major elements and crucial determinants of one's established position in the world . . . .

Michelman, *supra* note 17, at 1112–13 (citing Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 306 (1980)).

described above show how this lack of stability is worsened by abusive eminent domain and relocation practices.

## 2. Why Try To Preserve a "Ghetto?"

Neither of these proposals to empower residents of urban communities would be restricted to "so-called" blighted neighborhoods. Indeed, the prospect of dispensing with the dubious process of blight determination makes the community governance approach to land assembly all the more attractive. Yet, impoverished communities have the most to gain, or lose, in the struggle over the role of eminent domain in urban redevelopment.<sup>283</sup> Against the backdrop of mounting social science evidence denouncing geographic concentrations of poverty,<sup>284</sup> it would seem that urban redevelopment of the privately owned slum housing should follow the lead of the HOPE VI program and disperse poor people rather than facilitate their cohesiveness.

In response, I would point out that giving neighborhood residents a true choice as to whether or not they wish to leave their communities is not incompatible with deconcentrating poverty. Despite the popular understanding of the "teeming slum," most severely deteriorated neighborhoods are actually undercrowded, overwhelmed by vacant buildings and land.<sup>285</sup> Even if the city experts and the resident homeowners approve a plan that provides replacement housing for all existing residents, there will typically be plenty of real estate to establish a mix of incomes in the new neighborhood. Planners concerned about the marketability of the new community, however, may seek and receive homestead community consent to a plan that has less lower-income housing. The alienability of each resident's right to return can facilitate permanent relocation out of the

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<sup>283</sup> See Anderson, *supra* note 279, at 494–95; McFarlane, *supra* note 242, at 869–70.

<sup>284</sup> See PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 193–94 (Russel Sage Found. 1997) (noting that geographical, social and economic segregation is the cause of neighborhood poverty).

<sup>285</sup> For example, the planned acquisition of 3300 properties in a deteriorated residential neighborhood in East Baltimore was estimated to require the displacement of approximately 300 owner occupied households and 500 renters. Eric Siegel, *East-side Biotech Details Unveiled Directors, Compensation for Those Who Must Move To Be Announced Today*, BALT. SUN, Apr. 15, 2002, at 1A; see also Eric Siegel, *Biotech Park Moves Ahead*, BALT. SUN, Apr. 23, 2002, at 1A.

neighborhood, but will do so in a way that respects families' choices as to where they wish to live.

### CONCLUSION

Both the Homestead Community Consent and the Community Resident Protection processes require that redevelopment officials deal with residents' shared concerns. If the redevelopment agency works with neighborhood residents to forge a plan that responds to their needs and expresses their visions of community, then the land assembly will be approved. The owners of homestead rights will release their holds on their individual properties without dissolving their relationship with either the neighborhood land or one another. The more the redevelopment plan places the agency's other goals above the interests of the residents and the small businesses and newer residents they care about, the greater the compensation the agency will need to offer.

Few federal programs have ever begun with more optimism and acclaim than urban renewal did more than half a century ago.<sup>286</sup> The use of eminent domain in urban redevelopment to overcome the twin problems of anticommons and holdouts did, and still does, make sense. Urban renewal, however, failed to differentiate between what money could buy and what it could not buy. Residents whose lives, as they knew them, were threatened by urban renewal rose up and ended it.<sup>287</sup> Although memories of those struggles have begun to fade, the Supreme Court's recent *Kelo* decision has rekindled public concern over eminent domain abuse.<sup>288</sup> Those committed to true community development should seize the opportunity this popular backlash presents. Resident empowerment in the redevelopment process will strengthen older communities and attract a varied array of people and businesses to return to America's urban centers the

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<sup>286</sup> James Q. Wilson, *Planning and Politics: Citizen Participation in Urban Renewal*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 407 (James Q. Wilson ed., MIT Press 1966).

<sup>287</sup> See FRIEDEN & SAGALYN, *supra* note 123, at 54.

<sup>288</sup> See, e.g., Craig Gilbert, *Public Use Ruling has Political Backlash*, *MILWAUKEE J. SENTINEL*, Aug. 7, 2005, at A1 ("The ruling managed to strike nerves across the populist spectrum, stoking conservative suspicion of government, liberal suspicion of corporate interests and unfettered development, and fear among the urban poor of displacement.").

vital diversity which has been both their lifeblood and their most important contribution to world culture.