Condemnation of Low Income Residential Communities Under the Takings Clause

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Many and varied voices today are calling for narrowing the scope of "public use" in the Takings Clause. In doing so, they primarily seek to limit, in varying degrees, the constitutional authority of government to use eminent domain for urban redevelopment. For critics, found both on the right and on the left, easy recourse to condemnation unduly diminishes the regard due private property or permits monied interests to leverage government power for their own ends. The critics have been successful in recent years, as several state courts have narrowed their interpretations of public use in their state constitutions. A striking example is Michigan, where the state supreme court recently overruled unanimously its "notorious" *Poletown* decision and held under the state constitution that a local government could not condemn land in order to turn it over to a private developer, even if the initiative would advance the public interest by creating many jobs and expanding the tax base.[1] Now the U.S. Supreme Court has held that eminent domain may be used for economic redevelopment under the federal Constitution, at least in some circumstances, but popular backlash threatens a crude legislative response.[2]

Although the critics have raised some valid concerns, the limitation of public use advocated and, to some extent, accomplished seems wrong-headed. In this paper, I choose as my focus condemnation for urban redevelopment of residences of low income people, whether modest homeowners or renters. There are several reasons for this choice. Advocates for limiting eminent do-

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1. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).
2. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

main often invoke the harms suffered by low income urban residents when their homes are bulldozed.[3] Poor residents, often ethnic or racial minorities, historically have disproportionately suffered from condemnations and seem vulnerable in the local political process. While I agree that such residents deserve additional legal protection, I think that the critics have grasped the wrong end of the problem in advocating strengthened substantive judicial oversight of the purposes of redevelopment projects. Low income residents would be better protected by improving the procedures required before eminent domain may be used, and by changing the interpretation of "just compensation," than they would be by limiting the meaning of public use. Understanding the resulting losses and contrasting them with those of other landowners whose property might be condemned also seems important for assessing the fairness or justice of using eminent domain for economic redevelopment. Eventually, such a focus also may help to clarify what types of losses through eminent domain should raise constitutional concerns.

Local governments need broad powers of eminent domain to survive, and to support their poor residents in the competitive economy of the 21st century. Indeed, it seems likely that adopting most interpretations of public use advanced by property rights proponents would aid land investors and harm poor residents. Such measures would not protect any defensible understanding of property rights.

In Part 1 of this paper, I describe the evolution of interpretation of the "public use" clause that authorizes the use of eminent domain for urban redevelopment. In Part 2, I chart the effort to narrow the scope of public use in order to eliminate or police redevelopment by condemnation. In this part, I present and analyze the arguments for such reinterpretation and the new rules suggested for how public use should be understood. I also sketch the changing economic and political situation of cities that lead them to take this activist approach to positive economic planning. I conclude that courts cannot justify limiting condemnation through policing the purposes for which condemnation is sought. In Part 3, I argue for expanded procedural protections before

3. The NAACP, along with the AARP and others, filed a brief *amicus curiae* in the U.S. Supreme Court in *Kelo*, arguing that permitting eminent domain for economic redevelopment "will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged." Brief of Amici Curiae NAACP, et al., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

condemnation can deprive people of their homes. I also argue for the justice of changing our interpretation of "just compensation" to pay homeowners for the psychic and community losses they suffer through displacement.

I.

PUBLIC USE FOR ECONOMIC REDEVELOPMENT

Current controversy has revived ancient debate about whether the term "public use" in the Takings Clause limits government from using condemnation for economic redevelopment. During the 19th century, courts debated whether the term required government (or the public in some other incarnation) to actually use or occupy the expropriated property.[4] Courts that required actual use and possession by government were plainly concerned, as a matter of political or legal theory, that it was unconscionable for government to take property from one private individual and give it to another.[5] This is the same intuition that drives courts today. Later, I wish to examine how weighty a consideration it should be, at least when the prior owner is compensated. But most courts in the past were not at all consistent, as courts generally found that the necessity for assembling land for canals and railroads and other projects owned by private actors persuasively justified the use of eminent domain.[6]

Courts were not driven to this narrow view by either the language or history of the Takings Clause. As many courts recognized in the 19th century, the term "use" in common speech could just as well mean purpose or benefit.[7] Moreover, the founding generation seems not to have been troubled by concerns or debate about the types of projects or goals for which eminent domain could be used. Early state courts that had fashioned limitations upon what a public use could be struggled to accommodate condemnations where a private person would own the expropriated land, such as the Mill Acts (permitting lower private mills to build works that flood upstream land of another) or railroad and canal construction, because they saw such mea-

4. *See generally,* DAVID DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS (Foundation Press 2002).

5. The classic quote is by Justice Chase: "[A] law that takes from A and gives to B" *Calder v. Bull*, 3 U.S. 386, 388 (1798). *Calder* was not an eminent domain case and did not involve compensation.

6. *See, e.g., Hairston v. Danville & Western Ry.*, 208 U.S. 598 (1908).

7. *E.g.,* 1 N. Webster, American Dictionary of the English Language (1st ed. 1828)(meanings of "use" include "advantage" and "production of benefit").

sures as vital to a growing economy. Such courts answered the objection to forcing transfer of property to a private person by emphasizing either that the public might use the property (as in traveling with a private common carrier) or that the public would benefit from the private transfer; mills, railroads and canals were accessible to the public and created economic growth that benefited all.

But it appears more likely that the term "public use" was never intended to act as any restraint upon the power of eminent domain at all. In a careful analysis of the original understanding of the term, Matthew Harrington concluded that the term was descriptive rather than prescriptive.[8] After looking at English and colonial condemnation practices, early state constitutions, and the drafting history of the Fifth Amendment, he found that "the drafters did not intend to impose a substantive limit on congressional expropriations [but] intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures)."[9] If this view is right, as it seems to be,[10] the power of eminent domain should be limited by the standards of the Due Process Clause to the same extent as any legislative authority. This would give coherence and weight to the Supreme Court's modern but otherwise unstable equation of the scope of the power of eminent domain and of police power.[11]

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8. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245 (2002). Harrington's quibble with the term "Takings" Clause stems from his insistence that it should be called the "Compensation" clause because it was intended to require compensation, not to limit a power the Framers viewed as inherent in legislatures. *Id.* at 1286-87. This view has sometimes been expressed in the regulatory takings debates as well.

9. *Id.* at 1248.

10. Dean Treanor has noted that the first state constitutions did not require compensation but only that the property owner or the legislature consent to the expropriation. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 789 (1995). Harrington argues persuasively that the framers of these early constitutions probably believed that legislative control of the eminent domain power would protect citizens from its arbitrary employment. 53 HASTINGS L. J. at 1276.

11. Thus, *Berman v. Parker*, 348 U.S. 26 (1954) equates "public use" with the scope of the police power, justifies it on the deference courts owe to legislative judgments, but Harrington's analysis gives historical and textual reasons for the equation. Scholarship claiming a literal, restraining meaning for "public use", seems to aggressively interpret vague references against highly-colored claims of background commitment to largely unviable property rights. *See* Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 4 MICH. ST. L. REV. 878, 898-901 (2004).

The law has developed, however, on the assumption that "public use" provides a firm but vague standard for substantive review of eminent domain decisions. Thus, state court decisions looked in different directions on different facts, with many odd and inconsistent distinctions.[12]

Remarkable, however, has been the consistency of the United States Supreme Court, which never has found an exercise of eminent domain to violate the public use requirement.[13] Early on, the Court eschewed any reliance on a "literal" reading of "public use."[14] Moreover, in many of these older cases the Court upheld exercises of eminent domain which had as their palpable purposes economic development and in which the condemned property would end up in private hands with little or no public access.[15] The Court justified its deference to state and local determinations of public use based upon the great variety of needs and conditions across the country.[16]

States continued to construe their own versions of "public use" in a variety of ways. An important 20th century milestone was the acceptance of the idea that eminent domain could be employed for slum clearance, even if the property would be given to private developers for more valuable development, because the removal of "blighted" properties was itself a "public use."[17] This

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12. *See* DANA & MERRILL, *supra,* note 4, at 193-98.

13. In *Missouri Pacific Ry. Co. v. Nebraska,* 164 U.S. 403, 416 (1896), the Court set aside as violation of the Due Process Clause an order of a state agency requiring a railroad to allow private parties to build a grain elevator on the station grounds, but emphasized that the order was not nor was claimed to be an exercise of the power of eminent domain. *See also Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 241 (1984).

14. *See, e.g., Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531 (1906)("inadequacy of use by the public as a universal test")(per Holmes, J.).

15. *Strickley,* 200 U.S. at 532; *Clark v. Nash* 198 U.S. 361 (1905); *Fallbrook Irrigation Dist v. Bradley,* 164 U.S. 112 (1896); *see also Head v. Amoskeag Mfg. Co.,* 113 U.S. 9 (1885)(limiting holding to conflict of rights among riparian users, but noting statutory purpose to secure "the advantages inuring to the public from the improvement of water power and the promotion of manufactures").

16. *Rindge Co. v. Los Angeles County,* 262 U.S. 700, 705-06 (1923); *Clark v. Nash, supra,* 198 U.S. at 367-68.

17. *New York City Housing Authority v. Muller,* 270 N.Y. 333, 1 N.E. 2d 153 (1936). The courts viewed slum clearance as an aspect of public health, a perspective that had much influence on the mistakes of urban renewal. The *Muller* court wrote about slums:

> The public evils, social and economic of such conditions, are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expendi-

approach was entirely consistent with progressive thought of the time, in its faith in scientific planning and modern design. But at the same time, it withdrew legal protection for the property interests of poor residents to an exceptional degree, since the houses of better off people would not be blighted, almost by definition.

Berman v. Parker,[18] decided 50 years ago next month, marks a decisive break. Giving a green light to ambitious urban renewal plans in Southwest Washington DC, the unanimous Court equated public use with the police power, essentially denying constitutional limits on the ends to be served by eminent domain, and embraced deference to legislative judgments about choice of means or details already well established in the Court's interpretation of the Due Process Clause. The urban renewal that followed represents the largest concerted effort to stem the tide of urban economic decline in our history, and left an ambiguous legacy that colors appraisals today of the deferential approach to interpretation of public use.[19] Many persons, disproportionately black and poor, lost their homes, and the public housing, highways, and commercial development that replaced them often have been seen as representing a sterile and socially naïve approach to urbanism. It is useful to note that urban renewal on this grand scale ended because of legislative decisions ending federal subsidies, protecting residents, and requiring prior consideration of historic and environmental resources.[20]

Midkiff[21] adds little to the applicable principles, beyond the adherence of three current justices. The Hawaiian legislation in the case, which empowered certain categories of leaseholders to buy the fee interest in their residences through an indirect eminent domain scheme, was adopted to some extent to provide tax protection to the selling owners, and imposed only abstract losses on the prior owners who were in no sense singled out. The deci-

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ture of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums.

Id. at 254.

18. 348 U.S. 26 (1954).

19. *See* Nicole Stelle Garnet, *The Public Use Question As A Takings Problem*, 71 GEO. WASH. L. REV. 934, 946-48 (2003).

20. Statutes that curbed the excesses of urban renewal and related highway construction include the National Historic Preservation Act, 16 U.S.C. 470, *et seq.*, Section 4(f) of the Department of Transportation Act, 49 U.S.C. 3303{c}, and the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*

21. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

sion affirms the broad scope of public purposes that could be served and the nearly complete deference that courts should pay legislative determinations that condemnation further some conceivable public interest.[22] Perhaps, it is significant that the advantage to the public at large here was entirely economic, i.e. to improve the competitive functioning of the private land market, while *Berman* also contained some aesthetic and humanitarian purpose.[23]

So one could reasonably assume by the mid-1980's that substantive public use review in federal courts was as etiolated a provision as substantive due process review in economic cases or commerce clause limits on federal legislation. "Today, nearly all courts have settled on a broader understanding that requires only that a taking yield some public benefit or understanding. This

22. *Midkiff's* formulation on these points is stark. A takings need only be "rationally related to a conceivable public purpose." 467 U.S. at 241. Likely success in its goals should not be required: "empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Id.* at 243.

23. The language of two additional Supreme Court decisions seems to drive stakes into the heart of any restrictive reading of public use. In *Ruckelshous v. Monsanto Co.*, 467 U.S. 986 (1984), the Court rejected an argument that a federal statute forcing the manufacturer of a pesticide to publicly disclose a trade secret did not serve a public use, even though "the most direct beneficiaries" of the requirement were the manufacturer's competitors who could avoid "costly duplication of research and streamline the registration process, making new end use products available to consumers more quickly." *Id.*, at 1014-15. The Court affirmed that the requirement need have only a "conceivable public character" and that determination of the "optimum amount of public disclosure to the public is for Congress, not the courts to decide . . . ." *Id.*

Equally dismissive was *Nat R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992), involving a public use challenge to the Interstate Commerce Commission's order to one private railroad to convey to another ownership of a stretch of track, based on findings that transfer would enhance Amtrak service over the tracks because the transferee would maintain the condition of the track better than the transferor. The Court noted the similarities to *Midkiff* and *Berman*, in that "condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged." *Id.* at 422. The Court proceeded to apply the settled law, "[T]here can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objective." *Id.* at 422-23.

Both cases arguably involved some more concrete use of the condemned property by the public than do economic redevelopments. *Ruckelshous* approved public disclosure of information that, at least in theory, could be used by any member of the public, and *National Railroad Passenger* facilitated use by a publicly controlled common carrier. But neither opinion hinted at any consideration of such a formalistic approach to public use, and emphasized only the advancing of the public interest.

reading equates public use with "public interest."[24] The leading scholarly analysis of public use, then and now, by Professor Thomas Merrill, found that federal decisions since *Berman* had uniformly found a public use, although the state courts were somewhat less consistently deferential.[25] Merrill thought this development acceptable both because of the inability of courts to ground limits on the legislative power on principle and because the risks of misuse of eminent domain were rather low, given the preference of government to buy property consensually and avoid the added costs of litigation and political contention. Nonetheless, he worried about the risk of private actors hijacking the eminent domain process when the owner accorded the property a higher "subjective" value than the market, as may occur with residences or established businesses.

II.
REVIVAL OF CONSTITUTIONAL DEBATE ABOUT PUBLIC USE

In this section, I want to consider and critique the renewed efforts to restrict the constitutional meaning of public use. The cases and arguments are interesting, but the case for stricter reading is seriously flawed in logic, doctrine, and empirical assessment. This section attempts to state the arguments for narrowing public use, other than unfairness to the poor, and show their weaknesses. The following section then concentrates on the effects of condemnation for urban redevelopment on the poor residents who are displaced.

One preliminary point should be made, which is obvious but rarely remarked upon in these debates. State and local government entities are bound by state statutory definitions of "public use," typically incorporated into authorization for the use of eminent domain. Courts that hold that certain projects do not amount to a constitutional public use are not merely correcting some errant local government or special purpose public entity, but narrowing the scope of authority of the state legislature to define when eminent domain is appropriate. The Michigan Su-

24. DANA & MERRILL, *supra*, note 4, at 196.

25. Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61 (1986). Merrill's case survey has been updated, with entirely consistent results, in Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends*, 1986-2003, 39 REAL PROP. PROB. AND TRUST J. 251 (2004).

preme Court in *Hathcock*,[26] for example, not only set aside the actions of Wayne County, but expressly found that the Michigan legislature had misread the state constitution in authorizing the county to use eminent domain to achieve any "public purposes within the scope of its powers for the use or benefit of the public . . . ."[27] Not only should state legislatures be afforded deference in interpreting the meaning of public use, but concerns about specific abuses of power by local entities can be addressed politically by amending statutory authorizations. Wholesale withdrawal of constitutional authority is not the only remedy.

The battleground for public use can be understood to be the circumstances where owners attach a large value to their properties in excess of what they can receive under just compensation. These concerns are crystallized in the notorious *Poletown*[28] case, where the divided Michigan Supreme Court upheld a taking by the City of Detroit of an entire neighborhood, 465 acres, consisting of homes for 4,200 residents, as well as several schools and churches, to provide General Motors (GM) with a site meeting its specifications for construction of a new factory. Plainly anguished, and applying a higher standard of review than *Berman*,[29] the Court held that providing a site for a privately-owned factory, given the economic crisis into which Detroit had plunged, constituted a "public use" under the state constitution. The dissenters, and many critics, charged that the taking had been for the private gain of General Motors, with only incidental employment benefits for the people of Detroit. Justice Ryan, in his dissent, although acknowledging the unprecedented economic crisis facing Detroit, denied the relevance of *Berman* and argued that the Michigan constitution permitted condemnation of land for a new private owner only when it would be used as an "instrumentality of commerce" or in a "slum clearance."[30]

Poletown casts a long shadow. Memorialized in film and books,[31] the anguish of the people whose modest but functioning

26. *County of Wayne*, 684 N.W.2d at 765. The court first held that the proposed condemnation for economic redevelopment was within its statutory authority before it held that this exceeded the authority granted by the Constitution.

27. Michigan Comp. Laws §213.23 (2005).

28. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (1981).

29. The Court required that the City show that there was "substantial proof that the public is primarily to be benefited." *Id.* at 459.

30. *Id.* at 477.

31. Jeanie Wylie, Poletown: Community Betrayed (1989); Poletown Lives! (Documentary film produced and directed by George L. Corsetti, 1983). A brief but more balanced account of the controversy is provided by the Jenny Nolan, "Autoplant vs.

neighborhood was destroyed to create a site for a plant for the world's largest corporation seizes the moral imagination. The auto plant, moreoever, never fulfilled Detroit's expectations for employment. The Court's decision has been a regular element of the first year Property class since it was decided in 1981. Students invariably express outrage that the government could inflict such harm on innocent people. That sense of outrage stands also behind the litigation effort that has now succeeded in overturning the judicial imprimatur. But most people have misdiagnosed the problem.

First, arguing against use of eminent domain for redevelopment by simply invoking *Poletown* states a *non-sequitor*. The case would have seemed quite different if the land for the GM plant had been vacant and held for speculation. In such an instance, there would be no suffering from displacement nor uncompensated loss to residents from the destruction of their community. Investors would have been compensated fully for the market value of the property. At the same time, cities need the eminent domain power to assemble large sites if they are to compete with greenfield sites for economic development. Such authority not only allows them to serve their residents, but also provides some brake on urban sprawl.

Second, the case would have seemed equally tragic if Poletown had been taken for a publicly-owned facility with less economic value than a large privately-owned factory, such as a convention center or football stadium. There are numerous cases where communities the size of Poletown have been bulldozed for urban highways.[32] These highways are not more clearly in the public interest than a factory. But in none of these cases would the property owners have had a colorable claim that the project did not amount to a public use. The goals for such transportation projects nearly always include economic development.

Finally, the justices of the Michigan Supreme Court agreed that the Poletowners would not have had a public use claim if their neighborhood plausibly could have been characterized as blighted.[33] Yet they would have lost all the community associa-

Neighborhood: The Poletown battle," The Detroit News, available at http://info.detnews.com/history/story/index.cfm?id=18&category=business (last visited February 16, 2005). I am indebted to Professor John Mogk for this reference.

32. For a classic account, concerning the condemnation of 1500 apartments for one mile of the Cross Bronx Expressway, *see* ROBERT A. CARO, POWERBROKER: ROBERT MOSES AND THE FALL OF NEW YORK, 850-94 (Vintage ed. 1975).

33. *Poletown Neighborhood Council*, 410 Mich. at 663-664.

tions and way of life, and GM could have been given the land. It might be said that a finding of blight provides a substantive criteria for condemnation, which lessens the chances that the taking is being done at the behest of a private party, but that simply relegates rent seekers to preying upon the poorest and least politically connected segment of society. As we have seen, blight is a socially constructed understanding of urban decay which rests on a doubtful analogy to a gangrenous limb and more closely describes a degree of disinvestment that can be addressed directly and without amputation.[34] Most American cities today contain vibrant historic districts that not long ago were considered blighted.

Arguments for imposing new substantive standards on legislative bodies to satisfy the public use requirement reflect a deep and perplexing inconsistency. What should trouble us about *Poletown* is not primarily the benefit to GM, which could have located its plant in the rural South, but the deliberate destruction of a living neighborhood, with all that entails. The benefit to GM may deepen the condemnees' sense that the government power displacing them is beyond their control, which certainly can enhance the pain. But if government officials are making a good faith, reasonable judgment that Detroit needs this plant for employment, and there is not another site, then the purpose for the decision seems no more objectionable than a taking to site a highway or prison. The reality is that attracting a large, new automobile factory creates entirely plausible and substantial economic benefits for a community.

The harms suffered by the property owners seem largely unrelated to the faults that the courts find with the condemnations. Whether a redevelopment proposal likely will achieve the results that a city plans for does not address the loss suffered by a homeowner who must relocate to another community. The homeowner would suffer just as much if the land was taken for a road or a prison, instances in which no court is willing to second guess the judgment of the condemnor as to whether the project is justified or where it should be located. Moreover, it seems perverse for the constitutional rule to encourage the government to retain ownership of and manage the housing or stadium project when

34. *See* Wendell E. Pritchett, *The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. AND POLICY REV. 1 (2003).

most believe that the private sector can better manage low income housing and sports venues, let alone automobile factories.

The view, that there is something seriously wrong about the consensus essentially eliminating substantive restrictions on compensated takings, starts with Professor Richard Epstein.[35] The litigation effort to restrict eminent domain by a stricter interpretation of public use has been spearheaded by public interest libertarian law firms that also have long been active in regulatory takings cases. The Institute for Justice created the Castle Coalition to press this issue and has publicized its work.[36] Plainly they respond to and invoke the losses suffered by small homeowners who must leave their homes and communities of many years, a loss that just compensation might never heal nor even attempt to heal, as discussed below. Small business owners also often cannot recover all their losses through constitutionally adequate compensation. The focus of their concern seems be that private interests will hijack the government's power of eminent domain through influence or corruption to obtain property either that they could not otherwise obtain or at lower prices than would be agreed to in a consensual transaction. For them the necessity of legislative authorization for the taking is inadequate; judges need a constitutional rule to filter good from bad exercise of eminent domain.[37] Their position is that economic redevelopment is not a public use *per se*, or, in the alternative, that courts should enquire closely whether the public benefits sought are reasonably certain to be accomplished.

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35. It is important to recall that Epstein's ethical objection to eminent domain stems from his broader objection to any form of wealth redistribution. RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND EMINENT DOMAIN, 162-66 (1985). A contending principle might be that measures that improve the public welfare ought not to be prohibited because they also redistribute wealth, if the basic rights of prior owner are respected.

36. *See* www.ij.org/private_property/index.html (Last visited February 16, 2005).

37. Some justifications for narrowly construing public use seem merely incantational. The South Carolina Supreme Court takes the view that even if a planned project has undeniable, significant economic benefits for a local government, eminent domain cannot be used because "the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases." *Georgia Dep't of Trans. v. Jasper County, South Carolina,* 586 S.E.2d 853, 856 (S.C. 2003), *quoting Karesh v. City Council of City of Charleston*, 247 S.E. 2d 342, 345 (S.C. 1978). Of course, an owner has no right to as he pleases with his property, even in South Carolina, but is subject to a broad array of common law and public law restrictions in the public interest. In any event, such a right has little connection with the meaning of public use. Property rights proponents have not made a convincing positive normative case against expropriation *per se*.

But concern about eminent domain is not an exclusive possession of the right. Ralph Nader and Allen Hirsch have also argued for heightened scrutiny of public use whenever taken land is transferred to a private party.[38] Nader fought for the Poletowners against General Motors and Detroit at the time of the condemnation. His argument here does give particular weight to the losses suffered by displaced residents, but the constitutional solution offered by his co-author and him is to apply strict scrutiny to the public use justification for such takings.[39] But, as I have argued, the losses suffered are essentially unrelated to the purpose pursued or the ultimate owner of the property taken.

On the other hand, it seems undeniably true that in many instances, the community will be better off, even after compensation is paid, if particular parcels are owned by A rather than B, particularly if A has the expertise and resources to combine them with other parcels to create a well-located site of an appropriate size for productive activity not otherwise feasible in that community. B's concerns about receiving less compensation than he thinks fair goes only to the question of whether the compensation is constitutionally just. Further, to the extent that courts are being asked to weigh in some intrusive manner whether the public benefits that a project will bring are large enough or of the right kind, they are being lured back to a Lochnerean inquiry into the wisdom of legislative measures. Indeed, such an approach bears a strong structural and ideological relation to an enhanced means-ends analysis in regulatory takings cases.[40] Moreover, no principled constitutional line can be drawn across such varying perceptions. This seems borne out by several recent cases.

The cases where courts have expanded the requirements for "public use" do sometimes present troubling facts, but offer inadequate constitutional solutions.[41] *99 Cents Only Stores v. Lan-*

38. Ralph Nader and Allen Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207 (2004). They also filed a brief *amicus curiae* in *Hathcock*, urging the court to overturn *Poletown*.

39. *Id.* at 224-25.

40. The Supreme Court rejected such inquiries in *Lingle v. Chevron, USA, Inc.*, 125 S.Ct. 2074 (2005).

41. Other significant recent cases include *Daniels v. Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002)(lack of public use in attempted voiding of a restrictive covenant to permit commercial use; less deference paid to determinations of public use by agencies without legislative power); *Southwestern Illinois Development Auth. v. Nat. City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002)(no public use in attempted taking for a

caster Redevelopment Agency,[42] is an important case because here a federal court purporting to follow *Midkiff* found that a taking served a purely private interest because the public interest advanced was pretextual. In that case, it appears that a county redevelopment agency sought to condemn land so it could void a lease with the plaintiff, in order to allow Costco to expand its store onto that adjacent site. The "power center" in which these stores stood was the prize accomplishment of the county's redevelopment efforts and the only shopping center in town with a "regional draw." The court characterized this as the "naked transfer of property from one private party to another."[43] The county argued that it needed Costco to remain in the center as an anchor to preserve its economic value to the county. The court rejected this contention, because of a lack of evidence in the record suggesting that this was the real reason or was plausible.[44] This, of course, entirely departs from *Midkiff's* admonition to courts to accept a "conceivable" public purpose and not to consider whether the taking would in fact achieve its purpose.

But what actually was constitutionally infirm in what the county attempted to do? The preservation of the success of the power center obviously was an important goal for the county and losing its anchor store would have been perilous. Of course, the county may have been wrong, Costco could have been bluffing, but it is hard to see how a court would be a better judge of that than the city, which had no non-economic reason to prefer one retailer to another and intended to put a lot of public money behind its judgment, by selling the land to Costco for $1. Given the serious public money being expended, one would also expect voters to evaluate critically the wisdom of such spending.

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parking lot for a raceway); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003)(no public use under state constitution in taking for mixed use development); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. 1998)(taking of residences for future vague enhancement of Trump casino not a public use). *See generally* Corey J. Wilk, The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003, 39 Real Prop. Prob. and Trust J. 251 (2004).

42. *99 Cents Only v. Lancaster*, 237 F.Supp. 2d 1123 (C.D. Cal. 2001).

43. *Id.* at 1129. It seems fair to surmise that Costco's insistence on expanding onto the site of the plaintiff may have reflected a desire to get rid of the plaintiff, which would compete with Costco on many products, out of the center. Such desires are unexceptionable in themselves and non-competition clauses are commonly enshrined in shopping center leases. Moreover, 99 Cents probably fought the case because of the advantage of being contiguous to Costco.

44. The discussion in the case is confusing because Lancaster sought to fit its account within the terms of preventing "future blight" in order arguably to place its action within the state enabling statute.

What about injury to the plaintiff? As a constitutional matter, it is hard to see why we should care. The city offered to buy out the plaintiff's lease for its market value plus additional amounts to cover moving expenses and lost goodwill, presumably something quite close to the damages that a landlord would suffer for (efficiently) breaching the lease. While 99 Cents Store was being "singled out" by the city in some sense, the criteria was straightforwardly economic. Surely, its corporate "feelings" do not pluck any constitutional strings![45] However much the efforts of Lancaster to maintain the value of the center may resemble making sausages, nothing in the constitution should be seen to prevent it.[46]

Hathcock v. Wayne County,[47] demands attention as the decision reversing *Poletown.* The case involved an attempt by Wayne County to assemble land for a business and technology park, immediately south of the newly renovated airport, intended to stimulate the depressed economy of the greater Detroit area. After buying nearly 1,000 acres consensually, the county sought to take by eminent domain the remaining 300 acres of the project area held in scattered lots by several owners. The takings were authorized by a state statute requiring that they be "necessary" for the "use or benefit of the public." The Michigan Supreme Court held the proposed takings unconstitutional, ruling that, in the absence of blight, government *per se* cannot take property and transfer it to a private owner regardless of the amount or certainty of the economic benefit to the public.[48]

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45. Business corporations simply lack the capacity to entwine their property with their "personhood." *Margaret J. Radin, Property and Personhood,* 34 STAN. L. REV. 957 (1982).

46. Professor Garnet suggests that *99 Cents Only Stores* shows "the salutary role that a heightened means-ends [analysis]" could play. Nicole Stelle Garnet, *supra,* note 19 at 967. But the court breezily dismissed the city's plausible claim that catering to Costco was necessary to protect the center, a bet on which it was prepared to expend both money and political capital. The court's hasty rejection of the city's claims undermines Professor Garnet's belief that greater judicial involvement will enhance the public interest.

The Supreme Court in *Kelo v. City of New London,* 125 S.Ct. 2655 (2005), fingered *99 Cents Only Store,* as a case of "one to one transfer of property, executed outside of the confines of an integrated development plan" that ought to be viewed "with a skeptical eye." *Id.* at 2667, n. 17. That seems fair, but should not entail a reflexive conclusion that such condemnations cannot substantially further the public welfare.

47. *County of Wayne,* 684 N.W.2d 765.

48. I do not know how the court would apply this rule to leases of taken facilities by the government to private users, which can range from 99-years ground leases, as in *Kelo,* to short term leases of small retail spaces.

The *Hathcock* opinion is depressingly formalistic and opaque, finding only (doubtfully) that the Michigan courts did not interpret "public use" to include "benefit" at the time the current state constitution was adopted in 1963.[49] Thus, there is little analysis of what values such a ruling serves and its costs. The property owners in the case were not neighbors in a thriving residential neighborhood, as in *Poletown.* Several owned merely vacant land held for speculation and thus were fully compensable by damages. At the same time, the decision burdens local governments trying to generate economic activity in a state that last year ranked 48th in the creation of new jobs. There is no claim in the opinion that the project Wayne County was pursuing was other than a sensible, carefully considered, democratically approved attempt to create some economic synergy in the right place.

The court did purport to consider three practical arguments other than economics to justify the takings. First, it rejected the idea that assemblage of the entire area under one owner was necessary for the project, based upon its observation that "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce."[50] This seems not to have been a problem of factual record, as such, but a sweeping conclusion that since controlling an entire area is not necessary for all economic development, it is never necessary - a conclusion infirm in logic. It is difficult to understand why the law should privilege the inexpert views of a court on the necessity of unified control in any particular case over the contrary view of the state (through its authorizing statute) or the county that is prepared to pay for the land. The reality, of course, is that sometimes unified control over a site is necessary and sometimes it is not.

Second, the court was troubled by a lack of continuing public oversight to ensure that the land taken would continue to serve public needs after being conveyed to private businesses. But the county wants to lure economic activity and cannot accomplish that goal if it sets too rigid rules for making profits or threatens

49. The court seems not to have considered whether those who adopted the 1963 constitution might have read "public use" in light of *Berman,* the mass of state cases following it, or the interpretation implicit in the Michigan legislation authorizing takings for public benefit.

50. *Id.* at 783.

penalties for failure.[51] In any event, the County did act pursuant to a plan that a developer would need to follow. Oversight is always a question of degree.

Lastly, the court noted that its ruling does not invalidate the clearing of blighted slums as a public purpose. Ironically, this ruling insures that very poor people can continue to be displaced from their communities for redevelopment by private developers. The court's justification for this is only that they had approved such takings for urban renewal before the 1963 constitution was adopted. The opinion as a whole is wooden and obtuse about both constitutional law and urban realities.

Finally, *Kelo v. City of New London*,[52] has taken on great significance since a divided Supreme Court affirmed a decision adhering to established law deferring to legislative determinations of "public use." A divided Connecticut Supreme Court *en banc* upheld New London's taking of several homes and two businesses as part of a redevelopment of a waterside site to enhance its economic potential for the benefit of the entire city. The court employed a *Berman* type analysis, concluding that federal and Connecticut interpretations of "public use" were identical. The court plainly was impressed by the care in the planning that went into the decision to develop this sort of mixed use and marina project adjacent to a new Pfizer "global research center." The court canvassed the recent decisions taking a harder line against eminent domain for economic redevelopment, but concluded that each dealt with "outlier" facts and did not change the traditional manner of review.

Justice Zarella's dissenting opinion may be the most careful opinion yet justifying greater judicial activism in eminent domain.[53] After agreeing that a court should defer to a legislature's statement that its announced purpose would constitute a public use, he stated that a court should go on to examine what the "actual use" of the property would be and require the city to establish by clear and convincing evidence that proposed public

51. This is a difficult matter that deserves more extended consideration: what should government constitutionally be required to do to increase the chances that taken land will be used for purposes that advance the public welfare. State authorizing statutes sometimes specify such matters.

52. *Kelo*, 125 S.Ct. 2655.

53. He would have been better off omitting a largely mythic history of property rights and eminent domain. It is a gross simplification to claim that "protection of private property is the principal aim of our society." *Id.* at 577. Also he places the adoption of the first takings clauses *after* concern about overuse for canals, etc.

benefits would in fact be realized.[54] The dissent felt that the greater uncertainty of securing public benefit from economic redevelopment than from traditional public projects justified the courts in applying a "heightened standard of judicial review . . . to ensure that the constitutional rights of private property are protected adequately . . . ."[55]

Although Justice Zarella should be commended for actually trying to articulate the real issues here, his analysis is faulty. He found two distinctions between takings for economic development and "traditional takings." First, he argued that "traditional takings almost always are followed by an immediate or reasonably foreseeable public benefit."[56] He seems confused here, as his examples show. The destruction of slum housing might indeed be soon followed by "relocation of project area residents and demolition of substandard structures," but a net public benefit may never come from what can also be viewed as a tragedy. Can we say that there is a public benefit if the displacees dwell in worse housing and the land lies unused? A dam can be an environmental disaster and a military base a jumping off point for tragedy. In short, the dissent confuses immediately putting condemned property to a public use, which is largely a matter of definition, with immediately securing a public benefit, which is always less certain.

Second, Justice Zarella argues that the public benefit that comes from a "conventional taking typically flows from the actions of the taking party" rather than a private transferee. This is demonstrably wrong in the cases of condemnation for railroad lines, canals, and mills, which are privately built and run. But it may also be wrong in cases of facilities that continue to be owned by the government. Nearly all will be occupied and used by government officials different from those who authorized the expropriation. Some require that they be used by private persons to create public benefit, such as roads or port facilities. Even takings that create purely public facilities managed by the government may never create any public benefit. The general point is that securing future benefits from any activity of government requires complex and uncertain predictions about the future behavior of many public and private persons. Requiring certainty prevents action.

54. *Id.* at 583.
55. *Id.* at 587.
56. *Id.* at 578.

The dissent also claims that takings for redevelopment raise a peculiar problem of government acting to aid powerful private interests. Many commentators have identified such "rent seeking" as the root problem with redevelopment takings.[57] No doubt this problem is real; Professor Merrill carefully explains the advantages to a private interest in getting the government to use eminent domain on its behalf rather than securing the property through a consensual deal.[58] What seems missing from these concerns is comparison with some acceptable baseline of realistic governmental action. Is the threat of undue private influence greater in eminent domain than in land use regulation or economic subsidy? After all, in this case, New London was going to lease the land to be taken to a developer for $1 per year, not an uncommon arrangement to promote the economic objectives of the project, yet a far greater benefit to that developer than using eminent domain to acquire it in the first place.[59] Similarly, New London was going to rezone the area, greatly enhancing its value to the developer. As we know, a city can rezone land bringing serious loss to the present owner who generally is not entitled to any compensation. If fact, nearly all legislation has substantial distributional consequences, and private interests maintain armies of lobbyists to try to capture benefits and fend off costs. There seems no reason to suppose that eminent domain presents risks of a different type or magnitude than any legislation, nearly all of which appropriately get low levels of judicial scrutiny. Moreover, nearly every government project using eminent domain, even entirely traditional public uses, like building a military base, can have significant distributional consequences that private interests will contend over.

What does raise special concern in *Kelo* is that relatively low income people will be displaced from their homes. This fact is featured prominently in news accounts of the case and in the petition for certiorari.[60] Yet it plays no role in Justice Zarella's dis-

57. *Id.* at 579.

58. *See* Merrill, *supra*, note 25.

59. Similarly, in *99 Cents Only Stores*, Lancaster was going to pay $3.4 million for the land and another $150,000 plus to break the plaintiff's lease, and then sell the land to Costco for $1. *99 Cents Only v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1126 (C.D. Cal. 2001).

60. Petition for Writ of Certiorari to the Supreme Court of Conn., at 2, *Kelo v. City of New London*, 843 A.2d 500, (No. 04-108) ("Petitioners have poured their labor and love into their homes. They are places where people have lived for years, have raised their families, and have grown old.").

sent, or in any of the opinions tightening the vice on public use. Moreover, Zarella and the *Hatchcock* opinion go out of their way to reaffirm the blight cases. Thus, the campaign against eminent domain has the curious disjuncture that the remedies offered provide at best tangential benefits to the most conspicuous and sympathetic victims of the measures. Rather, the decisions and the arguments seem to serve highly abstract judgments about the symbolic value of secure property rights that cannot survive critical scrutiny.

The U.S. Supreme Court's opinions in *Kelo* raise too many interesting issues to be dealt with in an afterthought. Although the Court squarely rejected petitioner's argument that economic development cannot be a public use, the Court did not expansively equate public use with the police power but essentially scrutinized the record for indicia that the project reasonably could be thought to have a substantial public benefit.[61] Justice O'Connor's dissent embraces the petitioner's argument, and thus labors to distinguish *Berman* and *Midkiff* as involving only the elimination of harmful land uses, and caricatures the Court's opinion as holding that government can take from A and give to B so long as the use is "upgraded".[62] While she may rightfully be concerned about the propriety of some redevelopment projects, she does not thoughtfully examine whether they may better be checked by judicial limitations on the ostensible purposes for eminent domain than by process-based protections. The visceral, indeed, paranoid public reaction to *Kelo*, fomented to an extent by O'Connor's intemperate rhetoric, has substituted for a season the shouting of simplistic slogans and frenetic lobbying for scholarly weighing of ends and means.

III.

REDEVELOPMENT TAKINGS AND THE URBAN POOR

In preceding sections, I have tried to frame more precisely concerns about the harms caused by eminent domain. My contention has been that there should be no serious constitutional objection to using eminent domain for economic redevelopment, even if the taken property ends up in the control of private developers. The arguments of property rights advocates and supportive judges seriously miss the mark. But one must confront

61. *Kelo*, 125 S.Ct. at 2666-67.
62. *Id.* at 2671, 2673-74.

directly the special harm of displacement from one's home, which sever residents from places and communities bound up with their identities and social possibilities. As developed below, these harms may be visited more drastically on the poor, and current constitutional law gives them less protection.

While the Takings Clause requires just compensation for the property taking, it steadfastly has ignored the more complex losses imposed by residential displacement. As explained more fully below, condemnees generally receive only the fair market value of the property taken, but no damages for consequences of displacement, including moving expenses, the likely higher cost of replacement housing, and personal losses. Poor residents often own little property of value, but suffer disproportionately from a forced move. This imbalance poses two problems for the poor. First, it encourages government to choose too readily the places where low income people live as the location for new projects that can be accomplished through eminent domain, because taking those places is less costly. Second, low income residents must bear a higher percentage of their losses. In this section, I offer interpretations of the Takings Clause that may ameliorate these concerns.

But concern about unfairness of constitutional compensation to poor residents does not lead directly to the conclusion that the poor should oppose the use of eminent domain for urban economic redevelopment. Urban governments most likely to pursue redevelopment are also the most consistent champions of poor residents, who continue disproportionately to live in cities. Increases in employment and tax base sought through such redevelopment often rebound to the benefit of the poor, since they are most dependent on the capacity of urban government to provide services and benefits and will benefit disproportionately from locating new economic activity in cities. Thus changes in the approach to eminent domain must hold in tension sometimes conflicting concerns lest they make poor residents worse off than before. It may help to clarify this point before turning to remedies for the distortions in just compensation law.

A. *The Stake of the Poor in Urban Redevelopment*

Poor people and racial minorities long have borne a disproportionate share of the burden of expropriation for urban redevelopment. The urban renewal programs that formed the core of national urban policy from 1945 to the 1970's often was charac-

terized aptly as "Negro removal," as they often purposefully replaced low income black communities with higher income, largely white residential developments.[63] In *Kelo*, the NAACP, joined by the AARP and the Southern Christian Leadership Council, argued that using eminent domain for economic redevelopment "will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged."[64] The nub of the argument was that since low value property was being put to higher value uses, poor people would be dispossessed more often.[65] This view seems simplistic.

It makes sense that a city trying to enhance the economic value of its fabric would eliminate the dwellings to which its poorest residents have been relegated. These are lowest market value developments, and, characterized as "blight," their removal in itself long has been considered an acceptable goal for a taking, regardless of what replaced them.[66] And it also seems predictable that, everything else being equal, expropriation would fall upon those with the least power in the local political process. During the heyday of urban renewal in the 1950's and 60's, poor minorities lacked political power, even in cities where their numbers might have justified it, and this exposed them to removal.[67] But permitting eminent domain to remove blight but not more broadly to permit economic redevelopment, as was assumed at that time, ensures that property taken for redevelopment will dis-

63. Between 1949 and 1963, 63% of all families displaced by urban renewal were non-white and 56% of the non-white families were poor enough to be eligible for public housing (although usually none was available). BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES, 28 (MIT Press 1989). In Baltimore, for example, urban renewal and highway project demolition displaced 10,000 families, 90% of whom were black. *Supra,* note 60 at 29.

64. Brief of Amici Curiae NAACP, et al. at 3, *Kelo* v. *City of New London,* 843 A.2d 500, (No. 04-108). The brief discloses no embarrassment from the fact that the property owners in the case do not fall within these categories.

65. *Id.* at 3-4. Bizarrely, the brief does not quarrel with *Berman* or the many blight cases in which nearly all those displaced were black and poor. *See id.* at 16-18.

66. *New York City Housing Authority, supra,* note 17. Designations of blight or slum conditions by redevelopment agencies have been treated as conclusive by courts. *Kaskel v. Impellitteri,* 115 N.E. 2d 659 (1953). In the period before serious relaxing of "public use," developers would look for the "blight that's right," an area with development potential that could be characterized with a straight face as blight, often gerrymandering the boundaries of a project to include some substandard residential buildings. FRIEDEN & SAGALYN, *supra,* note 63, at 23. Findings that a project would clear away blight or slums also helped unlock the coffers of federal urban renewal funds. 42 U.S.C 1441.

67. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1, 51 (2003).

place the poorest residents. Today, it seems probable that any exercise of eminent domain that disproportionately harmed members of a racial minority would violate the federal Fair Housing Act.[68]

Nonetheless, since low income people continue to reside disproportionately in cities, their future prospects are linked with those of the nation's cities. They should want their cities to exercise eminent domain if it can accomplish overall economic stimulation. The social and economic prospects for urban low income residents necessarily depend on the ability of cities to maintain their economies both for employment opportunities and for the revenue capacity of the city to provide education, housing, and other services needed to advance.[69] During the 20th century, the economic prospects for cities deteriorated dramatically. Early in the century, dependence in manufacturing on fixed place rail and harbor transportation concentrated industry and immigration in city centers. The rise of trucking on modern highways, along with improvements in electrical transmission destroyed the competitive advantage enjoyed by cities in manufacturing, even as southern blacks streamed into northern cities in search of disappearing jobs.[70] Federal aid and urban renewal were early efforts to address this fundamental economic problem.[71] But federal aid to cities has declined precipitously, placing most of the burden of providing services on state and local governments.[72]

Cities have in fact become successful promoters of real estate development within their borders, and in the process have clawed their ways back from the precipices of insolvency that threatened many older cities not many years ago. They have done this through shrewd redevelopment and public subsidies

68. 42 U.S.C. 3601 et seq. Section 3604(a) makes it "unlawful . . . [t]o make unavailable or deny . . .a dwelling to any person because of race, color, religion,. . .or national origin." Most courts hold that *violations* of the FHA can be made out by showing that the challenged acts have a discriminatory effect on protected persons. *See, e.g., Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), Cert. Denied, 434 U.S. 1025 (1978). The NAACP would far better use its resources in developing this theory than in embracing libertarian property arguments.

69. J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L. J. 405 (2003).

70. *See generally*, Douglas W. Rae, City: Urbanism and Its End (Yale University Press 2003); Fred Siegal, The Future Once Happened Here: New York, D.C., L.A. and the Fate of America's Big Cities (Free Press 1997).

71. *See* Jon C. Teaford, The Rough Road to Renaissance; Urban Revitalization in America, 1940-1985 (Johns Hopkins University Press 1990).

72. *See, e.g.,* Ian Urbina, *Bush Budget Would Cut Millions From City's Social Services*, N.Y.Times, Feb. 9, 2005, at B3.

that have attracted substantial private investment. Redevelopments of waterfronts, no longer suitable for containerized shipping, into residential and recreational centers, for example, have brought tourists, new residents and businesses downtown. Of course, not all such efforts have been successful, but enough have been to provide a new model of urban redevelopment.

Some of these efforts have displaced existing residents. But it is naïve to suggest that urban communities are stable in the absence of redevelopment. Far more people, of course, have left older cities due to industrial disinvestment and the large array of public and private inducements to move to suburbs than have been displaced by redevelopment.[73] American cities in the 1960's and 1970's witnessed flight from central sites and urban decay that have no precedent outside of war.[74] Urban economic projects attempt to provide greater economic stability to declining places by bringing employment and new residents to where people already are.[75] Even the Poletown project, however misguided, was an attempt to provide stability to Detroit at the sacrifice of a neighborhood; to give more people a reason to stay. It is understandable but far too limited to consider the plight of those forced to leave by condemnation without consideration of those forced to leave by disappearing jobs, community, and hope.

The cities also have created structures that give greater voice and more tangible benefits to low income residents. Substantial grass roots protests emerged in reaction to urban renewal and highway construction, eventually halting large top-down redevelopment. Cities found that they could undertake large projects only with the informed consent of affected citizens and eventually allowed neighborhood voices a place at the bargaining table.

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73. The population of Cleveland, for example, declined from 915,000 in 1950 to 478,000 in 2000, a striking decrease but not untypical for northern industrial cities. New London, Connecticut, had lost 10% of its population and thousands of jobs in the 1990's, compared to the 115 parcels of land taken in the project challenged in *Kelo*, 125 S.Ct. 2655.

74. The most notorious example is New York City's South Bronx, where crime and drugs led to a wave of arson the effects of which have been compared to those from the bombing of German cities in World War II. TEAFORD, *supra,* note 71, 206-07. *See generally* JILL JONNES, SOUTH BRONX RISING: THE RISE, FALL, AND RESURRECTION OF AN AMERICAN CITY (Fordham University Press 2002).

75. For a large scale defense of adopting policies to support community economic stability, *see* THAD WILLIAMSON, DAVID IMBROSCIO, AND GAR ALPEROVITZ, MAKING A PLACE FOR COMMUNITY: LOCAL DEMOCRACY IN THE GLOBAL ERA (Routledge 2002).

One respected study concluded: "Public-private deal making was critical for the rebuilding of downtown."[76]

Cities have greater need for exercising eminent domain than suburbs or rural areas because they are least likely to have large tracts of vacant or undeveloped land available for new ventures. They need more often to assemble large sites from smaller, previously developed parcels. Urban land assembly costs will be higher. Government can overcome these handicaps by using eminent domain to assemble substantially-sized tracts at strategic locations. Familiar examples that most would consider successful are the Inner Harbor in Baltimore and Times Square in New York. Making eminent domain for economic redevelopment unconstitutional would strike at the heart of a process that has contributed to urban regeneration since the 1970's.

Poor city dwellers would benefit most from more jobs within or near the city. We continue to suffer from a striking imbalance between job creation on suburban fringes and persistent unemployment and poverty within urban cores and older, inner ring suburbs, particularly among African-Americans.[77] Moreover, attracting higher income residents to urban areas would break down some of the isolation which exacerbates the social deprivation of the underclass. For example, the educational accomplishments of poor inner city children may improve when they mix with children from more affluent homes that hold higher expectations for schools. Higher tax revenues permit greater expenditures on education and other supportive social services. To the extent that the plight of poor citizens has been aggravated by the flight of the middle class and employment to the suburbs, its return to the city can aid them.[78]

Sometimes, poor urban residents are the direct beneficiaries of redevelopment expropriations. For example, the Dudley Street Neighborhood Initiative formed a community development corporation in Boston that condemned thirty acres of privately owned land for a much admired, community controlled, mixed use development of affordable housing and local businesses.[79]

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76. FRIEDEN & SAGALYN, *supra,* note 63, at 316.

77. *See, e.g.,* Michael A. Stoll, "Job Sprawl and the Spatial Mismatch Between Jobs and Blacks," February 2005, *available at* http://www.brookings.org/index/reports.htm.

78. I develop this theme in the context of gentrification in Byrne, *Two Cheers for Gentrification, supra,* note 69.

79. Elizabeth A. Taylor, *The Dudley Street Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061 (1995).

The project could not have achieved its goals without land assembly through eminent domain.[80] In truth, benefits to low income people from redevelopment usually is more indirect, from an improved economy, but political organization can help poor residents get direct, but collateral benefits, such as set asides of affordable housing units.[81] Below, I address procedural reforms that could give condemnees greater voice in redevelopment projects.

It is unclear the extent to which property rights advocates view use of eminent domain, to develop low income housing by community development corporations, to raise less concern about public use than development of market rate housing or commercial space by profit seeking firms. It certainly could be argued that the benefit to the public from subsidized housing is direct while the benefit from market rate housing comes indirectly from economic stimulus. But subsidized housing likely will be built and managed by community development corporations or their even more private agents, so the government would need to look to private actors to achieve public ends. Experience has shown that private parties, including non-profits and community development corporations, do a better job of creating and producing subsidized housing than do public housing authorities. It would be perverse for constitutional rulings to drive innovative housing and development programs back to comparatively inefficient government ownership.

Anecdotes and conjecture are an inadequate basis upon which to assess the benefits and failures of redevelopment. There is an urgent need for empirical studies to understand better the role played by eminent domain in overcoming holdouts in the reinvigoration of depressed communities, accomplishing smart growth, and redeveloping brownfields. Unfortunately, judicial decisions and public debate seem to be proceeding largely on the basis of lively anecdotes rendered by partisans.

Before leaving the topic of harms and benefits to the poor from redevelopment, I need to touch upon another conceptual

80. *Id.* at 1080.

81. An example of this is the Arthur Capper/Carrollsburg project in Washington, DC. This is a Hope VI project replacing older public housing (rather than an exercise of eminent domain), but residents were able to obtain a firm commitment to replacing each public housing unit in the new development one for one, even as the city develops another 525 subsidized units and 300 market rate units. *See* District of Columbia Housing Authority, Arthur Capper/Carrollsburg, *available at* http://www.dchousing.org/hope6/arthur_capper_hope6.html (last visited Aug. 22, 2005.).

issue. Urban living is even more intensely contextual than rural or suburban living. People live in denser housing that is disconnected from natural geographical elements. The value of private space depends even more on location; the character of any location depends on numerous municipal services and cooperation on so many different levels that clear distinctions between public and private spheres seem forced. People spend more time in public space and the enhancement of its amenity value is more acute. Thus the balance between public and private rights in cities has tilted more toward the public throughout history. Cities have been more prone to regulate housing standards and land use, and employ eminent domain, than rural areas. Accordingly, property owners have less reasonable expectations of being free from civic action. As we consider below, however, this also magnifies the loss they suffer when displaced from their communities.

B. *Procedural Rights for Residents*

Even if poor residents as a group ought to support urban redevelopment programs, they also still are most likely to be displaced by them, as discussed above. In other words, poor residents want successful programs but are concerned about where they occur. Post urban renewal redevelopment projects generally attempt to avoid large displacements and involve residents and grass roots representatives more fully in the negotiation process.[82] In an ideal world, one might mandate that poor residents ought not to be more likely than all residents to be displaced and would be guaranteed a fair share of the benefits from any redevelopment program. But the economic reality is that poor residents are likely to be concentrated in low value enclaves that repel private investment. Moreover, private capital can be induced to take on the risks of investment in such locations only on the prospect of substantial returns.

If a central problem for poor residents is a lack of political power, it may be possible to construe the Takings Clause to mandate procedures that can amplify their political voices. Important statutes have required decision makers to weigh more carefully the various costs of demolition. The National Environ-

82. A recent study found a consensus among local officials that large scale urban development projects "should proceed only if their negative side effects were negligible, or at least fully mitigated." ALAN ALTSHULER AND DAVID LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 43 (Brookings Institution Press 2003).

mental Policy Act requires consideration of the environmental impacts of a project and of alternatives before a federal project is begun.[83] The National Historic Preservation Act requires an agency to consider adverse effects on historic resources, including neighborhoods eligible for inclusion in the National Register of Historic Places, before undertaking a project,[84] and Section 4(f) of the Transportation Act requires highway officials to take numerous steps to avoid or minimize harming various lands, such as wildlife refuges, public parks, and historic resources.[85]

Such statutes will affirmatively protect some neighborhoods against thoughtless destruction, by directing attention to environmental or historical resources.[86] Even more, they provide models for collecting information and considering more carefully the costs of eliminating functioning communities. For example, EPA already expressly considers disproportionate effects on poor and minority communities in assessing the environmental effects of projects that it undertakes that are subject to NEPA.[87] Such statutory procedures also provide opportunities for voice by the existing residents to explain the value of current communities. The legal and political mobilization of residents facilitated by such statutory procedures effectively changed the power balance in transportation planning and construction, ending the urban highway construction craze of the 1950's and 60's.[88] Residents of

83. 42 U.S.C. 4321 et seq. Numerous states have adopted similar provisions for actions by state and local governments. For example the California Environmental Quality Act, Cal. Pub. Res. Code sec 21000 *et seq,* requires early consideration of environmental consequences of using a site planned for condemnation for some public use. Failure to conduct prior environmental analysis can lead to dismissal of an eminent domain action. *Burbank-Glendale-Pasadena Airport Auth v. Hensler,* 233 Cal.App.3d 577 (1991).

84. 16 U.S.C. 461 et seq.

85. 49 U.S.C. 303.

86. Interestingly, an Environmental Impact Statement was prepared and challenged as insufficient in federal court concerning the Poletown project. *Crosby v. Young,* 512 F.Supp. 1363 (E.D. Mich. 1981). The court rejected the plaintiffs' contention that the EIS failed to consider reasonable alternate sites for the GM plant, because it held that the proposed alternates were not feasible. *Id.* at 1379. However, the inquiry never engaged with the costs of displacement, except to note that some alternates were rejected because they would displace more people. What should be required in the future is a public inquiry into whether the benefits of the project exceed the costs of displacement, so the political process will explicitly address it.

87. *See Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (Apr. 1998), *available at* www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf (last visited Aug. 22, 2005).

88. ALTSHULER & LUBEROFF, *supra,* note 82, at 88.

Washington, for example, used procedural rights under the Transportation Act to stall and eventually defeat construction of highways through black neighborhoods in the 1970's.[89]

Drawing by analogy from these statutes, government could be forced to consider the costs of taking residents' homes, the relative value of alternate locations for a proposed project, and means of limiting the harm at the preferred site. As in NEPA and the NHPA, the emphasis should be on requiring study and disseminating information. This will have the advantage of invigorating political debate. The condemning authority might be required to find that the taking was "necessary" despite its awareness of the costs to the residents and its attempts to mitigate harm. While a court could assess the adequacy of the inquiry, the decision made should not be subject to review in substance, because the final decision whether to take property should be legislative. Such a process may also direct the attention of decision-makers to the value of functioning communities, even if poor; the blindness to these social assets was one of the greatest failings of urban renewal, as pointed out by Jane Jacobs.[90]

The provision of federal money to cover the costs of acquisition and demolition may make even more critical the need for procedures that expose the costs of displacement. Local leaders are more likely to disregard the socioeconomic costs of displacement when the federal government provides the bulk of funding. Professor William Fischel analyzes in a forthcoming paper how availability of federal dollars may distort the local political process in favor of eminent domain, since federal programs typically grant funds only for specific types of projects. Fischel is concerned that local officials might never consider alternate use of funds for redevelopment that would not have such large social costs. On a more specific level, another author has pointedly criticized the federal Community Development Block Grant pro-

89. *See D.C. Federation of Civic Assoc'n v. Volpe*, 459 F.2d 1231 (D.C. Cir 1971), cert. denied 405 U.S. 1030 (1972); Zachary M. Schrag, The Freeway Fight in Washington, D.C.: The Three Sisters Bridge in Three Administrations, 30 J. URB. HIST. 648 (2004).

90. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, 441 (Random House 1961).

gram for not requiring a community or the HUD to detail the expected socioeconomic costs of displacement.[91]

Process adequate to avoid systematic unfairness should be constitutionally required as a procedural element of "public use," before any condemnation of existing residences. Even if *Berman* correctly abandoned any substantive restraint on eminent domain, it stumbled on a facile trust in an idealized political process. Although the opinion trumpets the need to leave redevelopment decisions to the legislative process, the disenfranchised residents of Washington, DC, had no voice at all in Congress's approval of urban renewal, let alone the subsequent administrative decisions about where and how it should be conducted.[92] Although DC is an extreme case, urban renewal was characterized by top down, technocratic decisions about the scope and location of expropriation that employed federal money to break free from customary local political constraints.[93]

While interpretations of public use have most often been substantive, there is persuasive support for interpreting those words to create procedural protections. Matthew Harrison's historical analysis, discussed above, finds that the framers accepted eminent domain when the product of "legislative consent" rather than of executive imposition. They also rejected British notions of "virtual representation" in a distant Parliament where they elected no members. This original concern with eminent domain as the fruit of consent through actual representation supports interpretations ensuring vulnerable people a reasonable chance to be heard in the decision where to expropriate. This interpretation is consistent with that of Dean Treanor in his magisterial analysis of the original meaning of the Takings Clause, where he found that the framers mandated compensation in the case of physical appropriations because of concern that legislatures would undervalue the losses owners might suffer.[94] He goes on

91. Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901, 906.

92. Residents of Washington have no voting representative in either house of Congress, which directly governed until elected local government was established in 1974. The attempts of black residents to prevent the redevelopment of Southwest Washington, which was 76% black, are recounted in HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY; RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C., 151-69 (Johns Hopkins University Press 1995).

93. *See, e.g.,* Douglas W. Rae, *supra,* note 70, at 320-25.

94. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995).

to suggest that an appropriate modern "translation" of this original meaning would focus judicial scrutiny on "governmental actions that affect discrete and insular minorities in environmental justice cases."[95]

Moreover, scholarship about public use has emphasized concern with rent seeking and other failures of the political process, typically diagnosed through the lens of public choice theory. Professor Garnet in her carefully reasoned recent article argues generally for some heightened scrutiny for the fit between the use of eminent domain and the purposes government claims to be seeking, but directs her programmatic suggestions toward procedural protections that will enhance the ability of courts to perform this analysis.[96] While I disagree with her substantive analysis for the reasons given above, her arguments for greater procedural protection demonstrate the procedural core of the public use requirement. The Court in *Dolan v. City of Tigard*, for example, created both substantive and procedural barriers to regulators exacting property interests as mitigation before permits would be issued; the city was forced to hold an individualized inquiry, in which it bore the burden of proof, to establish "rough proportionality" between the harms addressed by the permit process and what the owner must convey.[97]

Professor Garnet raises concern about "quick take" statutes, which permit the government to use streamlined procedures for eminent domain when circumstances require urgent public action. She effectively notes that such statutes diminish the ability of residents to mobilize and argue against the taking of their homes before crucial decisions are made, and in *Poletown* the city did use quick take to ensure that its plan was "a *fait accompli* before meaningful opposition could be registered or informed opposition organized."[98] Indeed, it is difficult to understand why such provisions should ever be available to displace residents from their homes, at least without a showing of the gravest exigency, given the permanent scar of destruction of home and community. It is true that the Supreme Court long has held that "where adequate provision is made for the certain payment of

95. *Id.* at 876.

96. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 at 969-74.

97. *Dolan v. Tigard*, 512 U.S. 374, 391 and n. 8 (1994).

98. Garnett, *supra*, note 96 at 971, *quoting Poletown Neighborhood Council*, 304 N.W.2d at 470 (Ryan, J., dissenting).

the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just."[99] Nonetheless, if one accepts that payment of money cannot make residents whole for the loss of their homes and communities, the argument for substantial advanced notice and a hearing on the need to take a particular location seems compelling. After all, the relevant due process inquiry is whether a post deprivation hearing adequately protects cognizable interests.[100]

C. *Reassessing Compensation for Residents*

Rather than insist on a substantive interpretation of the public use requirement, it may be more efficacious to address the criteria for "just compensation." If public use is interpreted not to place substantive requirements in front of legislatures, then owners no longer are protected in any sense by a "property" rule within the meaning of Guido Calabresi's famous taxonomy.[101] If a court finds that the public use criterion has been met, or eviscerates the requirement entirely, then the residents' assets are protected only by a liability rule, offering damages for invasion of the owners' rights. Setting the measure of damages at different levels will change the level of protection afforded the owner and make the decision whether to take the property more or less efficient. It may also affect our judgment of whether the taking is just.

The traditional measure of "just compensation," however, does not provide complete damages to residents. It is familiar that the standard of "just compensation" is met by the payment of "market value." That is, in most cases, the government need only pay for the taken property what a willing seller would have taken from a willing buyer in the absence of eminent domain. The problem is that the government's resort to eminent domain

99. *Bragg v. Weaver*, 251 U.S. 57, 62 (1919); *see also Cherokee Nation v. S. Kan. Railway Co.*, 135 U.S. 641, 658-59 (1890).

100. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

101. Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). That is, if a Court decides that a proposed taking is not for a "public use," the government cannot force the owner to surrender ownership, but can gain a transfer only on a consensual basis. The distinction between property and liability rules is applied to several related problems in Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978).

indicates that the seller is not willing. Most condemnees receive less than their actual loss, since they are not willing to sell at the prevailing market price (like most property owners at any given time). In some cases this may be attributable to negotiation strategy or a simple belief by the owner that he can manipulate the valuation litigation to get a higher price. But it also can be attributed to what Professor Merrill has called a "subjective premium," a personal value that the owner places upon his property well above its market value.[102] In most cases, courts refuse to order any payment of such subjective losses. The consequence of this is that while in some cases there may be very little subjective loss, as in the case of unimproved land held for investment, in others there may be enormous subjective loss, as when a poor resident is driven from a community that is bulldozed.

There are many reasons why market value may not be just compensation for residents. A home is both a haven from the assaults of society and a locus where the webs of family and community grasp us. One need not be a Hegelian to appreciate that personal identity can be significantly bound up in a home, especially one of long standing, which may be associated in memory with departed loved ones or stirring personal events.[103] But in some cases, like *Poletown,* far more than an individual home is destroyed, namely an entire community and way of life centered on networked residences and community centers such as churches and shops. Thus, the loss to the individual is compounded, and may increase geometrically (rather than arithmetically) by the size and vitality of the community destroyed. The individual loses relationships and the social meaning that comes from a familiar place and community, which may amount to "root shock."[104] There may even be ways in which these local community efforts and networks might be considered to be property.[105]

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102. Merrill, *supra*, note 25, at 83-84.

103. *See* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 991-96 (1982).

104. MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World Ballantine Books 2004). In this recent book, an African-American psychiatrist attempts to describe and gauge the harm caused an individual from being uprooted from a community. The effect of the destruction of black neighborhoods on former residents is at the core of her concern.

105. *See* Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1 (2004).

Also, the poorer a displaced resident, the less likely it is that she will receive full compensation for her loss. First, to the extent a poor person owns a fee simple, it is likely to be of relatively low market value, increasing the need to cope with a higher replacement cost. (Some slum property owners will welcome eminent domain as release from a hazardous investment.) Second, most poor people will not own a fee but have, at best, a leasehold. The government pays the value of the fee interests that it takes, and the parties divide the compensation according to their shares or lease provisions.[106] But the amount realized by a low income residential tenant will be low in any event, and likely will be zero. There are several reasons for this: the value of the leasehold must be offset by rent to be paid.[107] If a tenant holds on a month to month lease, no compensation will be due, even if local law permits eviction only for cause.[108] Also, if the lease contains a standard "condemnation clause," which terminates the lease upon the taking, no compensation need be paid.[109] Thus, the tenant suffers the inconvenience and collateral harms of displacement, while the landlord, who may be a nonresident investor, receives the full measure of his property's worth in the market. Third, for poor people, the value of social relations within the community may be a proportionately more valuable asset in their social portfolio than their financial investment in their residence; thus, the percentage of their loss that will be uncompensated under current law will be higher than for many more affluent residents. With fewer resources to manage their transition to some new affordable location, poor displacees may spiral downward in despair.[110]

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106. Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 U.C.L.A. L. REV. 1083 (1987).

107. *United States v. Petty Motor*, 327 U.S. 372, 381 (1945); *Great Atlantic and Pacific Tea Co. v. State*, 238 N.E. 2d 705, 710 (1968).

108. *In the Matter of Dormitory Auth. of the State of New York*, 699 N.Y.S. 2d 645, 646 (Sup. Ct. 1999).

109. *See, e.g., Pennsylvania Ave. Redevelopment Corp. v. One Parcel of Land*, 670 F.2d 289, 292 (D.C. Cir. 1981).

110. The special nature of the harm suffered by low income displacees is shown in the detailed study of those displaced from SW Washington. Although, contrary to expectations, nearly all found displacees lived in decent housing, many suffered from social disorientation; they had lost a sense of community built up from having lived in stable social conditions for a long time. Researchers found that the sense of community had not been reestablished and that 1/4 of the interviewees had not made single friend since moving. Their sense of alienation was pervasive and there was such a "shocking" amount of anomie that a majority thought children should not be

The Constitution does not say "market value," is says "just compensation." The goal is to put the owner "in as good a position pecuniarily as if his property had not been taken."[111] The Supreme Court defines "just compensation" as compensation that is fair both to the owner and to the public that has to pay, but nearly always limits condemnees to the market value of the property confiscated. It is black letter law that compensation is measured by the loss to the owner rather than the gain to the public. Yet the Court itself acknowledges that using the market value standard "does not necessarily compensate for all the values an owner may derive from his property."[112]

I need to consider further why these kinds of losses are not compensated, although they might be in a tort case. Of course, the condemnor by definition is not a wrongdoer, and the payment to the condemnee will come from the public fisc. At the same time, however, setting compensation nearer the actual costs to the residents will (theoretically) prevent excessive taking of their property. The focus has been limited to the value of the property lost rather than consequential damages. Plainly, this prefers those whose locational assets are capitalized in real estate to those whose assets consist of local knowledge, connections, and mutual affections.

The explanation for this preference in the cases frequently is explained in terms of ease of measurement.[113] The Court will not compensate the subjective values that an owner may have for his, for example, ancestral home. The market value of a house is relatively straightforward, but determining the value of lost emotional attachments is inherently unreliable and costly to investigate. Perhaps the poor suffer more from not considering their intangible losses, since this may cause their losses to be entirely neglected.

Some writers have suggested paying a premium above market value, say 150%, as a way to approximate their total loss through expropriation more closely. This is often defended as a way to take account of the compulsory nature of the taking without engaging in unreliable inquiries into subjective value. A multiplier

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brought into this world. DANIEL THURSZ, WHERE ARE THEY NOW? 100-01 (Health and Welfare Council of the National Capital Area 1966). Similar depression afflicted displacees from the West End of Boston after it was cleared in 1958-59. FRIEDEN & SAGALYN, *supra* note 63, at 34.

111. *Olson v. United States,* 292 U.S. 246, 255 (1934).

112. *United States v. 564.54 Acres of Land,* 441 U.S. 506, 511 (1979).

113. DANA & MERRILL, *supra,* note 4 *at* 175-77.

is no answer for the poor, however, since they will have little or nothing to multiply. Moreover, courts have not been receptive to incorporating such premiums in constitutional formulas.

In *Kimball Laundry*, Justice Frankfurter justified the failure generally to compensate for subjective losses on three grounds:

> 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 that 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. Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.[114]

The grounds here are objectivity, citizenship, and lack of public benefit. They are unconvincing either alone or together. First, while the price given by the market may provide a fair value in that it will be impersonal, the argument above has maintained that it leaves out values just as or more important to owners (as Frankfurter concedes) and unduly punishes the poor. This is most apparent in the case of poor, long term apartment residents.[115]

Second, he argues that loss of subjective value should be understood as a burden of citizenship like lost property value under the police power. The point is all rhetoric and no substance. Subjective values are far less likely to be diminished by zoning and environmental regulations than by eminent domain; regulations generally do not deprive owners of possession nor prohibit

114. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

115. This can be seen clearly when the resident is displaced from a rent controlled unit from which statutorily he cannot be evicted at the end of his term. *See In the Matter of Dormitory Auth. of the State of New York*, 699 N.Y.S. 2d 645 (Sup. Ct. 1999).

established land uses that are not nuisances.[116] Displacement of residents by police power regulations is rare and usually necessary for the safety of the residents.[117] It falls more readily on underdeveloped land, limiting future choices for development and thus affecting market value far more than subjective value.[118] More broadly, Justice Frankfurter offers no argument for why bearing subjective losses falls within the duties of citizenship while bearing market losses does not.

Third, the lack of public benefit in extinguishing subjective values argues for, rather than against, compensating them. To the extent that the requirement for compensation should be thought of as encouraging more efficient decisions to take property, because decision makers must take the costs into account in weighing the benefits of an expected redevelopment, ignoring subjective losses threatens to prompt takings that inflict more net harm than good. This likelihood is increased to the extent that subjective loss usually will not have offsetting public benefits. Finally, it is a fundamental principle that compensation is measured by what the property owner has lost rather than by what the government has gained.

Thus, some additional payments to poor residents, independent of the market value of the property taken, seem demanded both by fairness and by efficiency. My suggestion is that all residents displaced by eminent domain be entitled constitutionally to moving expenses and home loss payments, which the condemning authority can measure using some statutory formula based on the number of persons in a household. The court could in its constitutional interpretation require that "just compensation" compel that such losses be addressed and assess whether statutory formulas are adequate on their face, but need not assess whether they correctly compensate for subjective losses in specific cases.

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116. The protection of non-conforming uses from zoning changes reflects the law's reluctance to prohibit established uses. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS, 222-24 (Aspen Law and Business 2d ed. 2000).

117. A great furor erupted when the District of Columbia forced the evacuation by generally poor residents of an apartment building in scandalous physical condition. *See* Carol D. Leonnig, Tenants' suit Accuses D.C. of Prejudice in Evictions; Gentrification Causes Ouster Hispanics Say, Wash. Post, April 14, 2004.

118. *See, e.g., Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978)(loss of air rights for new construction not a taking when owner retains substantial economic use that represents its chief expectation); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)(losses from new zoning regulation on undeveloped land borne by owner).

Persons displaced by federal or federally assisted projects since 1970 are entitled by statute to payments for moving and other expenses.[119] Many states also provide statutory compensation to residents in excess of fair market value. California, for example, pays for actual moving expenses and additional payments to make up the difference between the market value of the property taken and the cost of a comparable replacement dwelling or rental.[120] The ability to administer such a program at the federal level would seem to undercut concerns about administrative capacity or fairness.

Paying the costs of resident relocation may not address the pain suffered from the compulsory displacement from home and community. In England, where all rights to compensation are provided by statute, displaced residents are entitled to "home loss payments" determined by formula.[121] The courts have made it clear that the purpose of home loss payments is "to make some compensation to a man [sic] for the loss of his home as opposed to the loss of any interest he might have had in the particular dwelling which he formerly occupied."[122] If a tenant is displaced who has no legal interest in remaining in his dwelling, the tenant has no claim to home loss payments, but may have a claim for "disturbance payments," which will pay moving expenses.[123]

While this does not get at all of the elements of loss suffered, it may be a reasonable and easily applicable surrogate that will

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119. Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4622 (2004), provides:

> Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the head of the displacing agency shall provide for the payment to the displaced person of—
>
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;
>
> (3) actual reasonable expenses in searching for a replacement business or farm; and
>
> (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $10,000.

120. CAL. GOV. CODE §§7262-64 (2005).

121. JESSE DUKEMINIER & JAMES KRIER, PROPERTY, 1115 (Aspen Publishers 5th ed. 2002). *See generally* JEREMEY ROWAN-ROBINSON & CLIVE BRAND, COMPULSORY PURCHASE AND COMPENSATION 235-41 (Gaunt Inc. 1995).

122. R. V. Corby District Council ex p. McLean, 1 W.L.R. 735, 736 (1975), *quoted in* Rowan-Robinson and Brown, *Id.* at 235-6.

123. *Id.* at 241-46.

cause decision makers to weigh the losses that they are inflicting on displacees and afford them more just compensation when they do so.

CONCLUSION

Recent complaints about the use of eminent domain to redevelop urban areas properly raise concerns about displaced residents. Proposals and decisions restricting the purposes for which condemnation may be used, however, both are wrong in principle and attack a problem distinct from the losses that raise the concern in the first place, while denying powers to government necessary to overcome economic and social disadvantages. Poor residents will be better protected by requiring more formal, public consideration of whether taking residences is necessary and by using a measure for just compensation that captures more fully the losses they actually suffer.