



School of Law

KELO, DIRECTED GROWTH, AND MUNICIPAL INDUSTRIAL POLICY

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Kelo, Directed Growth, and Municipal Industrial Policy

by Steven J. Eagle *

Abstract

This article explores trends towards increased local government land use regulation to spur economic development and towards partnering with private redevelopers. It notes that while Kelo v. City of New London has intensified these trends, the use of condemnation for retransfer for private redevelopment endorsed by Kelo is only one tool by which local government advances what the author terms municipal industrial policy. While Kelo expresses confidence in the ability of courts to distinguish between permissible economic development takings primarily for public benefit and impermissible takings primarily for private benefit, the author maintains that any such distinction is illusory.

The article also explores how public choice considerations augur in favor of unnecessary and inefficient condemnations. Finally, it suggests some alternatives that would better effectuate urban redevelopment while avoiding unfair and inefficient exercises of eminent domain. There include greater recognition of fractional property interests, and facilitating owner participation in post-condemnation redevelopment. Other salutary alternatives are localizing neighborhood redevelopment control, and making blight redevelopment open and transparent by replacing condemnation with abatement and foreclosure.

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Introduction

This article explores two problematic and related developments in the relationship between the State and owners of property in land. One is government’s increased intervention in land use, with its regulatory focus shifting from sanctioning nuisance to sanctioning owners who do not use their lands to further government economic objectives.

The other development is increased governmental alliances with private redevelopers. This has substantial merit, but increases the possibility that private property rights would be impaired by the overreaching of private actors, as well as by the State itself.

The role of eminent domain in this process of economic fine-tuning, which I refer to as municipal industrial policy, is important and worthy of special attention. Its avatar is the Supreme Court’s controversial 2005 decision in *Kelo v. City of New London*.¹ But condemnation is only one of an array of powerful tools used by government to direct and subsidize growth. Others include land use controls, now much more discretionary than was the case under traditional Euclidean zoning, such as impact and linkage fees, direct

¹ 545 U.S. 469 (2005).

government expenditures and subsidies, indirect “tax expenditures,”² and the conversion of individual property into regulatory property.

While the Supreme Court asserts that the elements of its takings jurisprudence possess a “common touchstone,”³ it has not focused on government powers pertaining to land use as a coherent whole. For instance, the Court refuses to confront the anomaly resulting from its prohibition of state or local discrimination against out-of-state competitors and its acquiescence in subsidies to in-state competitors that have the same economic effect.⁴

While eminent domain historically has been justified by precluding rent seeking by landowners, the more serious danger might be presented by private interests attempting to engage in secondary rent seeking through participation in urban revitalization. *Kelo* facilitates government efforts to suppress primary rent seeking by landowners, but provides only conceptually incoherent and practically unenforceable protections against secondary rent seeking by erstwhile redevelopment partners.⁵ From an economic perspective, the dangers of secondary rent seeking, when added to the information problems inherent in centralized planning, make it likely that the effect of *Kelo* will be a reduction in social welfare.

At the same time that government’s tools have become more powerful and more devolved upon its private partners, its aims in controlling land use have become more ambitious. Within the past century, government’s purview has grown from the alleviation of public nuisance through the police power, to the prevention of public nuisance through zoning, to the affirmative reshaping of land uses through “directed growth.” I use this term to encompass expansion of traditional zoning powers for social and ecological purposes, advancing what often is termed “smart growth,” and also the concomitant aggres-

² See *infra* Part I.G.

³ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). The Court added, however, that “our regulatory takings jurisprudence cannot be characterized as unified.” *Id.*

⁴ See *infra* Part II.D.6.

⁵ See *infra* Part II.D.

sive use of eminent domain, spending, and taxation powers to reshape regional economics. Attempts at “urban revitalization” are emblematic of this approach.

In some measure, directed growth offsets “fiscal zoning,” by which localities attempt to zone in “good” tax ratables and to discourage “bad.” Often, this has coincided with socioeconomic exclusionary zoning.⁶ However, contemporary “urban revitalization” often is deliberately upscale, and emphasizes the creation of jobs, housing, shopping, and amenities such as cultural and entertainment facilities and fine restaurants that appeal to the affluent. Unlike the move towards “smart growth,” which seeks primarily to deflect private capital from remunerative but deemed socially undesirable “sprawl,” directed growth for urban revitalization must entice private capital.

Enticing development funds means forming alliances with lenders and developers—in effect, to leverage government enticements into private action. While efforts towards “public-private partnerships” go back much further,⁷ the movement towards “governing at a distance”⁸ was popularized some 15 years ago, in David Osborne and Ted Gaebler’s widely-noted metaphor that government should steer and private entities should row.⁹ Similarly, Nikolas Rose and Peter Miller have noted:

Liberal mentalities of government do not conceive of the regulation of conduct as dependent only upon political actions: the imposition of law; the activities of

⁶ See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 723 (N.J. 1975) (*Mount Laurel I*) (requiring developing municipalities to accept their fair share of affordable housing). “Sizable industrial and commercial ratables are eagerly sought and homes and the lots on which they are situated are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs.” *Id.*

⁷ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (declaring unconstitutional the delegation of legislative powers to the President and trade associations, who would work together to establish fair competition rules for the respective trades, under the National Industrial Recovery Act of 1933).

⁸ Benjamin J. Richardson, *Enlisting Institutional Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives*, 28 N.C. J. Int'l L. & Com. Reg. 247, 249 (2002).

⁹ DAVID OSBORNE AND TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1992). “As they unhook themselves from the tax-and-service wagon, [political leaders] have learned that they can steer more effectively if they let others do more of the rowing. Steering is very difficult if an organization’s best energies and brains are devoted to rowing.” *Id.* at 30.

state functionaries or publicly controlled bureaucracies. . . . Liberal government identifies a domain outside “politics”, and seeks to manage it without destroying its existence and its autonomy. This is made possible through the activities and calculations of a proliferation of independent agents And it is dependent upon the forging of alliances.¹⁰

The expansion of government’s role and its expanded use of private alliances are considered in this article largely in the context of eminent domain for retransfer for private urban revitalization, sometimes referred to here as “private-to-private” transfers.¹¹ The revitalization of the Fort Trumbull area of New London, Connecticut, the project at issue in *Kelo*,¹² quickly became a cause célèbre. However, *Kelo* is more a catalyst than a cause of public unease. As its proponents suggest, the case is a rather modest extension of existing Supreme Court doctrine,¹³ and, given the “full arsenal of government regulatory powers over property,” arguably “the least offensive of government's property-related powers.”¹⁴

Other methods by which legislators and administrators affect land use, and land ownership, involve open subsidies and diversion of tax revenues. The courts have countenanced tax expenditures on behalf of preferred developers, through devices such as “tax increment financing” (TIF).¹⁵ Furthermore, even though the Supreme Court recently decoupled the Takings Clause from the Due Process Clause,¹⁶ it has never retreated from its

¹⁰ Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOC. 173, 180 (1992).

¹¹ See *infra* Part II.A.

¹² *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹³ Nicole Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 103 (2006) (“The holding in *Kelo* was not unexpected: in *Berman v. Parker* and again in *Hawaii Housing Authority v. Midkiff*, the Court had made clear that federal judicial review of eminent domain should be extremely deferential.”).

¹⁴ Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1416 (2006).

¹⁵ See *infra*, Part I.G.

¹⁶ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (holding, inter alia, that due process inquiries are “logically prior to and distinct from” takings analyses). See also, *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F3d 851 (9th Cir. 2007) (confirming viability of landowners’ independent due process claims after *Lingle*).

eagerness to uphold eminent domain in situations where police power remedies are far closer related to the asserted ills that condemnation undertakes to cure.¹⁷ Finally, government has leveraged land use controls so as to create regulatory property rights in third persons with respect to land already owned by others.¹⁸

The principal problem with *Kelo*, from the perspective of preserving private property rights, is not its imprimatur on the expansive use of eminent domain as such, but rather that the threat of eminent domain induces landowners to accept “voluntary” sale or the surrender of other rights. The methods employed for directing growth have a synergistic relationship. The more government uses direct subsidies, tax expenditures, the police power, and the takings power in concert to reshape land use, the less property owners are deemed to be surprised by its actions, and the less cogent their arguments would seem to acclimated legislators, officials, and judges. Thus, as Circuit Judge Stephen Williams put it, “regulation begets regulation.”¹⁹

The popular uproar over *Kelo* was engendered precisely because most people had no awareness of the increasing use of eminent domain and the other techniques discussed here.²⁰ Also, evicting a family from its home strikes a particular resonance when compared with other transgressions of property rights.

While the “steer and row” metaphor of Osborne and Gaebler is attractive, the relationship between those who guide government policies and those who execute them is far more subtle than that. Those who row are far more familiar with the equipment needed, the shoals and currents along the way, and destinations reasonably achievable than those at the helm and somewhat removed from the action. The “activities and calculations of a

¹⁷ See *infra* Part II.C.3.

¹⁸ See *infra* Part I.E.

¹⁹ *District Intown Properties L. P. v. District of Columbia*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring in judgment) (“Although the Takings Clause is meant to curb inefficient takings, such a notion of “reasonable investment-backed expectations” strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.”).

²⁰ See *infra* Part I.

proliferation of independent agents,” to which Nikolas Rose and Peter Miller refer, include computations of self gain as well as fealty to the government entity employing their services.²¹ The symbiosis between local officials and real estate developers is but perhaps the best known of the multiplicity of roles that the various public and private actors play. In determining the validity of a private-to-private condemnation, it takes but a modicum of knowledge of public choice theory to discern that simple nostrums of “pretext” and “primary vs. incidental beneficiary” are not apt to be efficacious.²²

Since land use regulation affects the production of economic goods and the movement of goods and people (including commuters) from one state to another, the contemporary view is that the federal government has a constitutional basis to impose land use constraints on a massive scale.²³ That view has been endorsed by the Supreme Court’s cases from *Wickard v. Filburn*,²⁴ through, most recently, *Gonzales v. Raich*.²⁵ Nevertheless, the federal government has shied away from engaging in land use regulation for the most part, even with respect to issues where interstate commerce and national security loom large.²⁶ Environmental regulation has been the principal exception, although, as a leading supporter has acknowledged, there is an uneasy fit between their

²¹ Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, BRIT J. SOC., June 1992, at 173, 180.

²² See *infra* subsection II.D.1..

²³ See Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, ____ VA. L. REV. ____, ____ (2008) (forthcoming), available at SSRN, abstract=1031173. The 18th century meaning of “regulate” was not the modern usage of governance through detailed rules, but rather to facilitate, *i.e.*, to “make regular.” See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139-40 (2001).

²⁴ 317 U.S. 111 (1942) (upholding federal regulation of wheat grown for personal consumption because of the aggregate effect of such activities on national demand for the crop).

²⁵ 545 U.S. 1 (2005) (upholding federal regulation of home-grown marijuana because of the impact on national demand for the drug). *Cf.* *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding federal school gun regulation does not “substantially affect” interstate commerce enough to support constitutional regulation under the Commerce Clause).

²⁶ See, *e.g.*, the National Telecommunications Siting Policy contained in the Telecommunications Act of 1996, codified at 47 U.S.C. §332(c)(7) (2000) (imposing procedural, but not substantive, standards for review of proposed telecommunications towers). See generally, Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L.

central concerns and the commercial nexus of the Commerce Clause upon which most environmental regulations are upheld.²⁷

However, federal regulation and subsidies have had substantial effects on land use that may not have been intended. The role of the Interstate Highway System and the Federal Housing Administration in the creation of the suburbs is a clear example.²⁸ In addition, federal wetlands regulation precludes development in some areas,²⁹ as does the Endangered Species Act.³⁰

Given these federal interventions in land use determinations, it is useful to ask why the federal government does not play a greater role. One constitutional bulwark against federal land use controls is the Constitution and its long-established traditions, which are part of the fabric of what the Court calls “our federalism.”³¹ Beyond that is the moral, but, nevertheless practical, concept of subsidiarity.³² This entails the devolution of power from both the national³³ and regional³⁴ governments to localities.

REV. 445 (2005) (noting national security and commerce considerations in ensuring an adequate array of cellular communications towers).

²⁷ RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 37 (2004).

²⁸ See Michael Lewyn, *Campaign of Sabotage: Big Government's War Against Public Transportation*, 26 COLUM. J. ENVTL. L. 259, 273-75 (2001).

²⁹ See Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-407; Federal Water Pollution Control Act Amendments of 1972, Tit. IV § 404, 33 U.S.C. § 1344. Environmental regulation remains heavily centralized despite some state administration. See Jonathan Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 URB. LAW. 1003 (2006).

³⁰ The Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(2)(B) (2007). See also, *GDF Realty Investment, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of en banc review) (describing the majority's holding that because “takes” of an endangered species threaten the “interdependent web” of all species, their habitat is subject to federal regulation by the Endangered Species Act, as “craft[ing] a constitutionally limitless theory of federal protection”).

³¹ See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

³² See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994) (defining subsidiarity as the “notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved.”).

³³ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

In the growing debate over the federal role in land use regulation, the interstate commerce clause and the dormant commerce clause doctrine often are summoned.³⁵ In the context of conservation and environmentalism, federal regulation supporters invoke the dormant commerce clause by citing wetlands' impact on national commerce.³⁶ Opponents claim that federal wetlands regulation is comparable analytically to the regulations struck down in *Lopez*,³⁷ and that state governments or private parties are better able to conserve these sensitive ecosystems.³⁸ Looming on the horizon are federal taxes, caps and efficiency requirements pertaining to energy use, that together might result in smaller building lots and homes, with less exurban development and more suburban infill.³⁹

Traditionally, scholarship has focused on discrete governmental powers regarding uses of land and the structure of property rights that underlies them. But their interrelationship is very important and recently has come under renewed study, particularly, in the urban revitalization context.⁴⁰ It should be noted as well that some of the impetus for urban revitalization results from unwillingness to confront urban infrastructure problems by

³⁴ See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996). “[O]nly those functions necessary for metropolitan governance should be shifted to regional institutions. The remaining local government activities—including much local land use regulation, local taxation, and the direct provision of most traditional local services—should remain at the local level. *Id.* at 1165-66. For a more skeptical view, see Eric T. Freyfogle, *Eight Principles for Property Rights in the Anti-Sprawl Age*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 777, 787-89 (1999).

³⁵ See *infra* Part II.D.6.

³⁶ Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 36 (1999) (citing the federal interest in keeping waterways navigable and reducing interstate externalities, but suggesting that neither of these support federal regulation of “isolated wetlands”).

³⁷ *Id.* at 40.

³⁸ *Id.* at 40-62 (Other approaches include the use of fiscal instruments (for example, subsidies and taxes), direct government provision or purchase of public goods, and the creation or recognition of property rights in environmental resources.).

³⁹ See *infra* text surrounding notes 204-207 for a discussion on the propriety of environmental regulation by the government.

⁴⁰ See Schragger, *supra* note 23, at *6 (noting that “a central theme in both [Takings Clause and Commerce Clause cases] is the appropriate level of constitutional oversight when cities seek to attract and keep capital inside their borders.”).

attacking the underlying externalities through Pigovian taxes.⁴¹ These devices may be superior to the pattern of condemnation and subsidies for mega-projects to booster a fledgling economy. Often, existing regulations have unintended and unfortunate consequences that themselves create problems for which redevelopment is the proffered solution. Thus, mega-projects may be justified by the inclusion of affordable housing, the lack of which is largely attributable to prior land use regulations.⁴²

This article suggests that government intervention in municipal growth comes with a host of problems and inefficiencies, many of which have little hope of solution in our current state. Part I provides some basic descriptions and observations about the tools by which government increasingly attempts to direct growth. Part II begins with a discussion of *Kelo* then moves on to a problem inherent in certain municipal industrial policy initiatives, secondary rent-seeking. Next, the article presents some important considerations that transcend particular directed growth devices. After this comes a discussion of various failed attempts at overseeing municipal power. Part II then concludes with suggestions for achieving fairness and municipal restraint in projects involving condemnation for economic revitalization.

I. Government Tools for Directing Growth

State and local governments have many tools available for shaping land use. Those controls intended to enhance economic growth are emphasized here. Of course, development tools often advance the goals of economic and political interest groups, and

⁴¹ See, e.g., Jonathan Remy Nash, *Economic Efficiency versus Public Choice: The Case of Property Rights in Road Traffic Improvement*, forthcoming _____, available at http://ssrn.com/abstract_id=1071186, at *40 (“the generation of new roadway capacity remains the dominant government response to the problem of traffic congestion. The absence of the emergence of property rights—through the implementation of congestion pricing regimes or otherwise—strongly suggests, in turn, that the public choice story for the evolution of property rights dominates the efficiency story.”).

⁴² See, e.g., Edward L. Glaeser, Joseph Gyourko, & Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 (2005) (attributing the difference between the \$600/sq. ft. price of Manhattan condos and the \$300/sq. ft. production costs to “regulatory taxes” (i.e., the cost of regulatory restrictions)).

sometimes work at cross purposes. It is useful to preface an analysis of these tools with a tale.

A. The Migration of Pfizer from Ann Arbor to New London

In January 2007, Pfizer, Inc. announced that it was closing its “storied” research laboratories in Ann Arbor, Michigan, and, in the process, laying off 2,100 people.⁴³ Patent protection was expiring on many leading drugs, and the pharmaceutical industry’s science engine appeared stalled.⁴⁴ “The shift is exacting a human toll, as big drug companies like Pfizer lay off thousands of chemists, casting a pall over what was once a secure, well-paying profession.”⁴⁵

State officials were surprised by the announcement that Pfizer’s Ann Arbor facility would close. Although the city is best known as home of the University of Michigan, with over 38,000 employees,⁴⁶ Pfizer had been Ann Arbor’s largest taxpayer, contributing \$4 million a year. “At a press conference later in the day [of the announcement], local officials pledged to fight for scientists to stay in the area. Later, they pledged \$8 million in interest-free loans for start-ups run by laid-off scientists or existing companies that hire them.”⁴⁷

For the time being, Michigan’s loss is Connecticut’s gain. Pfizer offered about half of the Ann Arbor researchers internal transfers, mostly to its other large research facility in Groton, Conn. In addition to the 160-acre Groton lab, which employs 4,000 professionals, Pfizer also has the “Groton/New London research facility” on a 29-acre site

⁴³ Avery Johnson, *As Drug Industry Struggles, Chemists Face Layoff Wave*, WALL ST. J., December 11, 2007 at A1.

⁴⁴ *Id.*

⁴⁵ *Id.* “As pills like Lipitor made out of elements from the periodic table prove harder to come by, pharmaceutical research is being superseded by the newer field of biotechnology. The latter relies mostly on biologists who make proteins from live cells.” *Id.* at A1.

⁴⁶ See Ann Arbor: Economy <http://www.city-data.com/us-cities/The-Midwest/Ann-Arbor-Economy.html> (last visited Dec. 18, 2007) (noting that the University employs 30,574, and the University of Michigan Health Centers an additional 7,645).

⁴⁷ Johnson, *supra* note 43.

located on peninsula at New London, across the Thames River.⁴⁸ The New London site is headquarters to Pfizer Global Research & Development (PGRD), the world's largest pharmaceutical research and development facility, housing over 2,000 professionals.⁴⁹

Pfizer and Connecticut apparently have enjoyed a close relationship. Pfizer's decision to build the New London site, announced in February 1998, came immediately after the state pledged over fifteen million dollars for economic revitalization and a state park in the surrounding area.⁵⁰ Later, the company explained: "To help revitalize the historic port city of New London where we opened our PGRD headquarters in 2001, Pfizer has collaborated with civic and business leaders, nonprofit organizations and community groups to create new jobs, revive the city's cultural institutions and enhance the local environment."⁵¹

Just as Pfizer's migrations from chemical- to biological-based research and from Michigan to Connecticut created winners and losers, its "collaboration" to enhance New London imposed winners and losers as well. Some of the latter were long time residents of the Fort Trumbull area of New London, adjacent to the new PGRD headquarters. They were the moderate- and middle-income residents of a long-established neighborhood with views of Long Island Sound and the Thames River. One, Wilhelmina Dery, had lived in her house since her birth in 1918. Another, Suzette Kelo, was a registered nurse who prized her house for its water views.⁵² Their homes were condemned by the city for the purpose of providing amenities such as upscale hotels and shopping that would complement the new Pfizer global research headquarters.

So it was that Michigan and Ann Arbor taxpayers subsidized efforts to ameliorate the economic effects of the dislocation resulting from Pfizer's relocation—a move that was, in turn, subsidized by taxpayers in Connecticut and New London.

⁴⁸ http://www.pfizer.com/research/rd_locations/centers_innovation.jsp (last visited December 13, 2007).

⁴⁹ <http://www.pfizer.com/research/> (last visited December 13, 2007).

⁵⁰ *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

⁵¹ <http://www.pfizer.com/research/> (last visited December 13, 2007).

⁵² *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

B. Property Rights and the Police Power

Private property, with its residual landowner who bears the gains and losses from a parcel's use, is the best regime for the generation of wealth.⁵³ In addition to an economic construct, private property is an institution that enhances liberty.⁵⁴ William Pitt famously declared that the owner of the meanest hovel could bar his door to the King,⁵⁵ a sentiment reiterated in John Adams' admonition to a jury that "an Englishman's dwelling House is his Castle."⁵⁶ James Madison believed that the primary function of government, and thus the Constitution, was to secure citizen's property rights.⁵⁷ Perhaps it is in recognition of this rich tradition that governments hesitate to make confiscatory regulations too plain. Thus, an efficient transfer of property from its former owner to a government designee, "cashing out regulations," is much more apt to be considered a taking than a more circuitous and inefficient one.⁵⁸

As this article illustrates, government regulation of property has gone from the reduction of negative externalities to the increase in positive externalities. The use of eminent domain for urban revitalization is one technique employed for this purpose. This de-

⁵³ See RICHARD PIPES, *PROPERTY AND FREEDOM* (2000).

⁵⁴ See Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 779 (1964). See generally Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 *GEO. J.L. & PUB. POL'Y* 77 (2002).

⁵⁵ Ken Gormley, *One Hundred Years of Privacy*, 1992 *WIS. L. REV.* 1335 (1992) (quoting William Pitt, *Speech on the Excise Bill*, in 15 *HANSARD PARLIAMENTARY HISTORY OF ENGLAND* 1307 (1753-1765)). "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" *Id.* at 1358.

⁵⁶ *Id.*

⁵⁷ James Madison, *Property*, 1 *NAT'L GAZETTE*, Mar. 27, 1792, at 174, reprinted in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 478 (1867) (declaring that "government is instituted to protect property of every sort; . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." (emphasis in original)).

⁵⁸ See William A. Fischel, *Exploring the Kozinski Paradox*, 67 *CHI-KENT L. REV.* 865, 878 (1992). The "paradox" is based on an observation by Judge Alex Kozinski that "the very fact of the inefficiency—that the tenant is not given too great a stake in the property—saves most rent control schemes from potential unconstitutionality. After all, efficiency would be maximized by giv-

vice was upheld by the United States Supreme Court in 2005, in *Kelo v. City of New London*.⁵⁹ The firestorm of adverse public reaction that *Kelo* engendered resulted not from a disputation about the aggregate pecuniary wealth of the community, but rather from the apparent unfairness and deprivation of dignity.⁶⁰

C. Euclidean Zoning to Discretionary Planning: Flexibility at a Price

Property owners sometimes attempt to benefit themselves by shifting costs associated with use of their land to others. The common law dealt with this negative externality problem through private and public nuisance law. To deal with the problem *ex ante* rather than *ex post*, localities imposed comprehensive zoning regulations almost a century ago. Zoning then spread as a popular way to segregate historically nuisance-laden property, such as industry, from the property-owners who typically complained, such as residents.⁶¹ The Court broadly approved comprehensive zoning in *Village of Euclid v. Ambler Realty Co.*⁶² Traditional Euclidean zoning establishes use, area, height, setback, and similar restrictions. While the categories are rigid, landowners meeting the requirements are entitled to development “of right.”⁶³

During the past few decades, innovations such as cluster zoning and floating zones have brought more flexibility to zoning. The epitome of flexibility, the planned unit development, allows for mixed uses with varied physical components and infrastruc-

ing the tenant a fee simple interest in the property.” *Id.* at 866 (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1297 n.24 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)).

⁵⁹ 545 U.S. 469 (2005).

⁶⁰ See JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT*, 157, 172 (2008).

⁶¹ Also embodied in early zoning ordinances was more than a tinge of racism. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 31, 40-41 (Charles M. Haar & Jerold S. Kayden eds., 1989) (quoting SEYMOUR I. TOLL, *ZONED AMERICA* 29 (1969)).

⁶² *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶³ See AM. PLAN. ASSN., *A Glossary of Zoning, Development, and Planning Terms*, 94 (Michael Davidson & Fay Dolnick, eds., 1999). (Euclidean zoning is “[a] convenient nickname for traditional as-of-right or self-executing zoning in which: district regulations are explicit; residential, commercial, and industrial uses are segregated; districts are cumulative; and bulk and height controls are imposed”).

ture. An example is the large development consisting of a regional shopping center, office and residential towers, and accessory uses. The tradeoff is that while almost any sort of development is permitted, none is permitted of right.⁶⁴ All elements of planning must be reviewed and approved by local government, vastly increasing the possibility of corruption and regulatory takings.⁶⁵

The model legislation upon which most American land use ordinances are crafted requires that zoning and similar ordinances be drafted “in accordance with a comprehensive plan.”⁶⁶ As commentators long have noted, this requirement often is honored in the breach.⁶⁷ The local review and approval process is largely impervious to general principles of judicial review, since it does not involve objective factors, or even adding up points on a linear scale to arrive at some generally specified minimal total. Instead, it involves discerning thousands of discrete and largely incommensurable variables. This results in almost unfettered deference to legislative judgment.

⁶⁴ See, e.g., Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 480-81 (2007) (noting that local government can use flexible zoning techniques such as planned unit developments (PUDs) to provide general project approval while maintaining “considerable discretion and flexibility.”).

⁶⁵ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 264 (1985) (“The risks of intrigue [regarding political land use determinations] becomes clearer if we recall that most systems of land use control are not normally self-executing. Instead, they set out in very general terms the desired ends . . . [t]hereafter the operation of the system depends upon discrete applications . . . often in response to some highly particularized request An enormous slippage thus occurs . . .”).

⁶⁶ ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP’T OF COMMERCE, *A STANDARD CITY PLANNING ENABLING ACT* § 3(1928). See Section 3 of that act provides in part that ordinances shall be drawn “in accordance with a comprehensive plan.”

⁶⁷ See Charles M. Haar, “*In Accordance With a Comprehensive Plan*,” 68 HARV. L. REV. 1154 (1955) (lamenting and reviewing the common failure of local legislatures to base land use regulations on comprehensive planning and the failure of courts to analyze the presence or absence of planning in their adjudications of zoning); John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351 (1993). “Given the importance of land use and the central legal role of comprehensive planning, one would expect state statutes to carefully define a comprehensive land use plan and to provide a predictable, reliable and effective method of land use planning. Surprisingly, this is not the case in the majority of states . . .” *Id.* at 352. See also, Arnold, *supra* note 64, at 466-67 (observing that local comprehensive plans in most jurisdictions do not serve less as binding directives for future development than as guidelines that have some influence).

Developers, and courts, often want to know the bottom line about what a locality would consider acceptable. Unfortunately, bureaucratic secrecy and a desire to avoid pigeonholing lead the government to reveal little about the reasoning behind their decisions. Developers working in a regime without development of right are typically forced to muster up a plan for the land and submit it to the city with their fingers crossed.⁶⁸

As officials increasingly have realized their power to use zoning to achieve municipal goals, their focus has shifted from minimizing negative externalities to maximizing the positive externalities that accompany certain commercial districts. What was once a simple tool to prevent police power evils has evolved into a complex gadget for guiding and shaping growth.

D. Eminent Domain

The power of government to condemn private property for public use has been regarded in the United States as an inherent attribute of both the national and state governments.⁶⁹ Governments have historically exercised eminent domain power through condemnation to acquire land to build infrastructure and other projects used by the public. This includes roads, sewers, municipal plants, and parks. The Fifth Amendment protects citizens from tyrannical eminent domain practices by providing: “[N]or shall private

⁶⁸ See Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 683 (2005) (asserting that the “major problem that bedevils [regulatory takings] law is that an ideologically fragmented U.S. Supreme Court has refrained from articulating usable rules that might enable lower court judges and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion.”). See also, Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 URB. LAW. 941 (2000) “As most planners will tell you, however, that [making a ‘final’ determination] is not a planner’s job. The planner’s job is to draw an abstract plan and then determine whether a specific development proposal meets its requirements. Anyone who thinks that he can get a planning agency to formally tell him what he CAN do on his land simply doesn’t understand the planning process.” *Id.* at 954.

⁶⁹ See *Kohl v. United States*, 91 U.S. 367, 371-72 (1875) (“Such an authority [to appropriate lands or other property] is essential to [the United States] independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed ... No one doubts the existence in the State governments of the right of eminent domain The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.”).

property be taken for public use without just compensation.”⁷⁰ In adjudicating takings claims, the Fifth Amendment requires that courts determine whether (1) the claimant owned a cognizable property interest that was taken,⁷¹ and whether just compensation has been paid.⁷² Furthermore, a government act constituting a taking for private use is void even if compensation is paid.⁷³

While contested,⁷⁴ the Fifth Amendment’s “public use” requirement has been interpreted by the U.S. Supreme Court broadly, so as to mean “public purpose.”⁷⁵ In *Kelo*, it attributed this view to the impracticality and inadaptability of a test that requires literal “use by the public.”⁷⁶ Additionally, courts “have defined [public purpose] broadly, reflecting [their] longstanding policy of deference to legislative judgments in this field.”⁷⁷ This has resulted in permissible condemnation for a variety of purposes, such as blight removal,⁷⁸ the elimination of a land oligopoly,⁷⁹ and economic revitalization.⁸⁰

In *Armstrong v. United States*,⁸¹ the Supreme Court proclaimed that the Takings Clause was “designed to bar Government from forcing some people alone to bear bur-

⁷⁰ U.S. CONST. amend. V.

⁷¹ See, e.g., *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) “It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.” *Id.* at 1096.

⁷² See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (noting that the Takings Clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”).

⁷³ See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

⁷⁴ See *Kelo v. City of New London*, 545 U.S. 469, 505-517 (2005) (Thomas, J., dissenting) (providing historical analysis of judicial interpretation of “public use”).

⁷⁵ See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

⁷⁶ *Kelo*, 545 U.S. at 479-80 (“Not only was the ‘use by the public’ test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society.”).

⁷⁷ *Id.* at 480.

⁷⁸ *Berman v. Parker*, 348 U.S. 26 (1954).

⁷⁹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

⁸⁰ *Kelo*, 545 U.S. 469.

dens which, in all fairness and justice, should be borne by the public as a whole.”⁸² *Penn Central* emphasized the Court’s goal of “determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”⁸³ The Court recently has reaffirmed that *Penn Central* remains the “polestar” of its takings jurisprudence,⁸⁴ and its fealty to what it now terms the “*Armstrong* principle.”⁸⁵ The *Armstrong* principle sounds more in due process than in property law, since its focuses on essential fairness in the correlation between ends and means rather than upon the property rights that are the subject of the inquiry.⁸⁶

Takings do not always arise by way of formal condemnation or physical occupation. Landowners are also entitled to just compensation when governmental regulation significantly diminishes their rights in the economic value of their property. In *Pennsylvania Coal Co. v. McMahon*,⁸⁷ the case generally regarded as the genesis of regulatory takings jurisprudence, the Court found that the owner of mineral rights and the right to support of the surface was entitled to just compensation when a Pennsylvania statute forbade subsidence affecting private residences, thus requiring that seams of coal be left in place. In Justice Holmes’ famously cryptic words, the regulation went “too far.”⁸⁸ Over fifty years later, in *Penn Central Transportation Co. v. City of New York*,⁸⁹ the Court set forth a multifactor, ad hoc, balancing test, focusing principally on the economic impact of

⁸¹ 364 U.S. 40 (1960).

⁸² *Id.* at 49.

⁸³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978).

⁸⁴ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

⁸⁵ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

⁸⁶ For elaboration, see Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 951-954.

⁸⁷ *Penn. Coal Co. v. McMahon*, 260 U.S. 393 (1922).

⁸⁸ *Id.*

⁸⁹ *Penn Central*, 438 U.S. 104 (1978).

the regulation, its interference with investment-backed expectations, and the regulation's character.⁹⁰

Subsequently, the Court has declared that a taking occurs whenever a regulation precludes all economic use of the land. In *Lucas v. South Carolina*, a property owner was awarded compensation after the state prohibited construction on his beachfront lots and thereby “denie[d] all economically beneficial or productive use of [the] land.”⁹¹ Importantly, the court limited the holding to only the economic uses that were “previously permissible under relevant property and nuisance principles.”⁹²

In *Pennsylvania Coal*, Justice Holmes discussed average reciprocity of advantage,⁹³ a concept referring to the fact that the detriment suffered by a landowner by dint of a regulation limiting the use of his land might be offset by the advantage gained from the fact that neighbors similarly are restricted. Euclidean requirements that homes be set back a specified distance from the road is a familiar example, as is the mutual benefit from continuation of revenues from tourism resulting from the preservation of façades in an historic district.⁹⁴ This type of regulation seems Pareto superior, in the sense that every property owner benefits. Therefore, the absence of an aggrieved landowner would free the government from an obligation to pay compensation.⁹⁵ The situation is one that would arise naturally in existing neighborhoods, but for the existence of transaction costs.⁹⁶

⁹⁰ *Id.* at 124.

⁹¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

⁹² *Id.* at 1029-30.

⁹³ *Penn. Coal*, 260 U.S. 393.

⁹⁴ *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (noting reciprocity of advantage in façade ordinance for French Quarter).

⁹⁵ *See also* WILLIAM A. FISCHER, REGULATORY TAKINGS 80-84 (1995) (Discussing the “benefit-offset principle,” which allowed the government to account for landowner benefits from the taking and reduce compensation accordingly. For example, a physical taking of property for a railroad, which would result in an increase to overall property value.).

⁹⁶ Indeed, the allure to prospective purchasers of housing subdivisions with stringent homeowner association controls is that they provide precisely this reciprocity of advantage.

Today, the focus has shifted away from Pareto superiority and universal benefits to Kaldor-Hicks moves that do not necessarily benefit the aggrieved property owner, but are thought to result in a net enhancement to social welfare.⁹⁷ As Linda Oswald has noted, although the *Penn Central* opinion did not mention “average reciprocity of advantage,” in denying compensation it did note that some landowners would be burdened more than others and that the historical landmark regulations could be “expected to produce a widespread public benefit and applicable to all similarly situated property.”⁹⁸ This formulation muddles the Armstrong principle and frustrates attempts to distinguish valid police power actions and invalid regulatory takings.⁹⁹

Simply put, in its original form, the rule stated that a land use regulation that resulted in benefits to *regulated landowners* roughly equal to the burdens imposed on them did not violate the United States Constitution. In its modern, corrupted form, however, the average reciprocity of advantage rule states that if a land use regulation results in benefits to *society as a whole* roughly equal to the burdens imposed upon the regulated landowners, no taking has occurred. As a result of this perversion, the average reciprocity of advantage rule has lost its former potency as a tool for distinguishing valid police power actions from invalid regulatory takings and instead has become a method for simply rubberstamping legislative acts.¹⁰⁰

E. Regulatory Property

Another method by which localities engage in industrial policy is through the creation of what Bruce Yandle and Andrew Morriss have called “regulatory property.”¹⁰¹ The term refers to “a property right created and allocated by a government entity, such as

⁹⁷ See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939) (deeming a policy superior if the aggregate of gains from it exceed the aggregate of losses, so that there is at least the potential that the winners could compensate the losers and still come out ahead).

⁹⁸ Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 *VAND. L. REV.* 1449, 1522 (1997).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Bruce Yandle and Andrew P. Morriss, *The Technologies Of Property Rights: Choice Among Alternative Solutions To Tragedies Of The Commons*, 28 *ECOLOGY L.Q.* 123 (2001).

a right to emit specified pollutants into the atmosphere under the terms of a permit issued by a government regulator.”¹⁰² Prime examples of regulatory property are transferable development rights, individual transferable quotas, such as for fishing, and transferable emissions permits.¹⁰³ Private property has value because the rights of owners are protected by the rule of law and because prospective purchasers bid for the resource. On the other hand, the value of regulatory property results from government restrictions on the otherwise lawful conduct of others.¹⁰⁴ If anyone is permitted to operate a taxicab, the right to do so has no market value. If only holders of government-issued medallions may operate cabs, as is the case in New York City, artificial scarcity gives medallions a market value of over \$225,000.¹⁰⁵

Another important example is the transferrable development right (TDR). It was well understood by the end of the eighteenth century that the value of ownership of land was in its use. As Lord Coke famously put it, “[w]hat is the land but the profits thereof?”¹⁰⁶ The right of development is a standard incident of ownership.¹⁰⁷ To be sure, one can argue at the margin whether development of a given parcel is injurious.¹⁰⁸ But in the TDR situation, the issue is not whether a given parcel is susceptible to more intense development, but whether the right to such development belongs to the landowner or the State’s designee.

¹⁰² *Id.* at 129.

¹⁰³ See Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 897 (2003).

¹⁰⁴ See Yandle and Morriss, *supra* note 101, at 144.

¹⁰⁵ *Id.* at 144, n.52.

¹⁰⁶ 1 EDWARD COKE, *THE INSTITUTES OF LAWS OF ENGLAND*, ch. 1 § 1 (1797) (1st Am. ed. 1812).

¹⁰⁷ See, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 123 (1985) (“The normal bundle of property rights contains no priority for land in its natural condition; it regards use, including development, as one of the standard incidents of ownership.”).

¹⁰⁸ See *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (“An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”).

In the not atypical case where land is zoned for four dwelling units per acre (DUA), but may be developed at six DUA if the owner acquires TDRs, the denser development is deemed not to injure the health, safety or welfare of the community. However, the right to the incremental units is taken from the landowner and is dispensed to another private owner as mitigation for what might otherwise be a compensable taking at another location.¹⁰⁹ What makes the TDR serve as mitigation (or partial compensation) is that the possessor of it is permitted to use land he acquires in a manner denied the seller due to artificial restrictions on use. In effect, the TDR converts in rem property into in personam property. That is to say, the conversion of the right of development from being one intrinsic to the land itself into one dependent upon the identity of the owner of the land.¹¹⁰

F. Direct Subsidies

States and localities also provide subsidies in order to attract or retain businesses.¹¹¹ These subsidies can be indirect, such as providing infrastructure such as roads,

¹⁰⁹ The TDR was popularized in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), where Justice Brennan declared that receipt of such rights would “undoubtedly mitigate” financial burdens of regulation that might otherwise constitute a taking. *Id.* at 137. However, the TDRs in *Penn Central* were to be used on the landowner’s own parcels in the vicinity. *See also*, *Fred F. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976) (holding the substitution of property rights with transferable development rights of uncertain or contingent value a deprivation of due process).

¹¹⁰ *See* Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (noting that the in rem nature of property rights requires third parties to expend resources to determine the attributes of these rights, thus arguing for their standardization).

¹¹¹ Such subsidies are widespread. *See* Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints On State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (“Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion. Scarcely a day passes without some state offering yet another incentive to spur economic development, often in an effort to attract a particular enterprise to the state.”). New York City, for example, spent about two billion dollars from 1994 to 2000 to subsidize large financial, media, and real estate companies, partly because they threatened to relocate. Testimony by James A. Parrott on “Government Subsidies, Living Wages and the Building Service Industry” before the City Council of the City of New York Labor Committee Hearing, July 25, 2000, available at <http://www.fiscalpolicy.org/testparrottjuly252000.htm>.

utility lines, or specialized job training programs,¹¹² or direct, such as the provision of tax advantaged financing or tax abatements.¹¹³ Since such subsidies intend to give in-state businesses an advantage over out-of-state competitors, it might be thought that they do not pass muster under the Commerce Clause.¹¹⁴

G. Tax Increment Financing

Municipalities generally finance capital improvements through the issuance of bonds.¹¹⁵ General obligation bonds are payable from taxes and secured by the issuer's full faith and credit—a pledge of its taxing power. Revenue bonds, on the other hand, are payable only out of the revenues derived from the project built with the bond proceeds, with the issuer's credit not pledged to repayment.¹¹⁶ Municipal bondholders typically do not have to pay federal income tax on the interest they earn.¹¹⁷ This enables the municipalities to issue the bonds at lower interest rates than other, taxable, bonds of similar risk.

Tax increment financing (“TIF”) is based on a modified form of the general obligation bond, in which only incremental tax revenues from the site of a specified project

¹¹² See James M. Banovetz et al., *Overview of Local Economic Development*, in *Main Street Renewal: A Handbook* 16, 18-23 (Roger L. Kemp ed., McFarland & Co. 2000).

¹¹³ *Id.* at 24-25. See also Robin P. Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 73-81 (introducing various methods of co-financing urban renewals, such as acquisition, development, and construction assistance, and tax-related assistance).

¹¹⁴ See Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965 (1998) “Although ‘[g]overnments have long used subsidies as economic-development tools,’ state awards of cash grants to businesses raise obvious dormant Commerce Clause problems. In case after case, the Supreme Court has relied on the Commerce Clause to strike down state laws that ‘favor local businesses over out-of-state businesses.’ On their face, state subsidies seem to violate this principle because their availability to targeted businesses invariably hinges on engaging in business operations within the subsidy-granting state.” *Id.* at 970-71.

¹¹⁵ See generally 64 AM. JUR. 2D Public Securities and Obligations § 11 (describing municipal bonds).

¹¹⁶ See generally 64 Am. Jur. 2d Public Securities and Obligations § 13 (describing general obligation and special obligation bonds).

¹¹⁷ I.R.C. § 103(a) (2000). See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

are pledged to bond repayment.¹¹⁸ TIF's central premise is that a municipality can expect property values, employment, and economic vitality within the community to increase as a result of bond funding of the development project. Therefore, the taxes generated by the enhancement in value should be used to pay back the funding.¹¹⁹ Accordingly, proponents of TIF consider it a self-financing mechanism.¹²⁰ The municipality benefits by the positive externalities generated by the project.

TIF projects first designate one or more parcels of land that are to be improved. Once designated, the tax revenues from the parcel of land are "frozen" at their current amount. All revenues up to the frozen amount remain as general revenues and go towards general spending. Revenues in excess of the frozen amount are committed to the interest and principal payments of the bonds used to revitalize the area.¹²¹ A city-appointed redevelopment authority often is in control of allocating the incremental funds to project costs. TIF projects do not always involve bond issuance. For example, a municipality may just use its own funds to finance a project, and then be reimbursed by the incremental tax revenues.¹²² Also, a developer could pay for the initial project costs and the municipality may later refund a portion of their costs with the TIF revenue.¹²³

¹¹⁸ From 1990 to 1995, 819 TIF securities were sold for a total dollar amount of \$10.2 billion. Craig L. Johnson, *The Use of Debt in Tax Increment Financing*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT 71, 73 (Craig L. Johnson & Joyce Y. Man eds., 2001). California accounted for over 80% of this TIF activity. *Id.* at 74.

¹¹⁹ Michael T. Peddle, *TIF in Illinois: The Good, The Bad, and The Ugly*, 17 N. ILL. U. L. REV. 441, 442 (1997).

¹²⁰ Alyson Tomme, *Tax Increment Financing, Public Use or Private Abuse*, 90 MINN. L. REV. 213, 216 (2005).

¹²¹ J. Drew Klacik & Samuel Nunn, *A Primer on Tax Increment Financing*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT *supra* note 118 at 15, 15.

¹²² See, e.g., 65 Ill. Comp. Stat. Ann. 5/11-74.4-4(j) (West 2005).

¹²³ Joyce Y. Man, *Determinants of the Municipal Decision to Adopt Tax Increment Financing*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 118 at 87, 93. This option may be more attractive for voters concerned with the imprudent government speculation. *Id.*

Almost all states have enabling acts permitting municipalities to utilize TIF.¹²⁴ These statutes often require a finding of “blight” and compliance with a “but for” test to justify the TIF district.¹²⁵ The finding of blight provides the requisite public purpose that justifies the use of public funds for private development.¹²⁶ The but for test asks whether increased real estate values, and consequent higher tax revenues, would have occurred without (but for) the government stimulus.¹²⁷ Failing either of these requirements might result in judicial nullification of the TIF district.

II. Government Direction of Development--Promise and Peril

Considering governments’ history as both a regulator of land use and promoter of economic development, its growing role in promoting industrial policy through land use comes as no surprise.¹²⁸ Supporters of governmental involvement in land development have traditionally cited to market failures to justify intervention. In the context of takings for economic development, private developers cannot secretly assemble large tracts of land necessary for beneficial projects.¹²⁹ The government provides the condemnation power critical in avoiding transaction and hold-out costs.¹³⁰

Critics of governmental involvement in land development have countered that allowing states and localities to become players, as well as umpires, in the development

¹²⁴ See Colin Gordon, *Blighting the Way*, 31 *FORDHAM URB. L.J.* 305, 314 (2004) (noting that as of 2000 only Delaware and North Carolina had not passed TIF statutes and that West Virginia’s had been declared unconstitutional. *Id.* at 314 n. 79 (citing *Boone Cty. v. Cooke*, 475 S.E.2d 483, 494 (W. Va. 1996)).

¹²⁵ Tomme, *supra* note 120, at 220.

¹²⁶ *Id.* at 220 (citing Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT*, *supra* note 118, at 31, 37).

¹²⁷ *Id.* at 221.

¹²⁸ See *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 767 n.30 (1980) (“regulation of land use is perhaps the quintessential state activity”); *Kelo*, 545 U.S. at 484 (“Promoting economic development is a traditional and long accepted function of government.”).

¹²⁹ See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 75 (1986).

¹³⁰ *Id.*

game has a number of unsettling elements.¹³¹ First, as government money or assistance becomes readily available, opportunities for inefficient rent-seeking behavior increase. Second, government direction of economic growth is not apt to be efficacious, a fact readily acknowledged by the *Kelo* opinion's author, Justice John Paul Stevens.¹³² Also, there is an inherent tension between government in its regulatory capacity and government in its proprietary capacity. Finally, accurate post-project review is nearly impossible and the judicial response to municipal industrial policy has been disjointed, at best.

The remainder of this article discusses the tendency for governments to promote industrial policy by partnering with private parties, with a focus on private-to-private condemnations as exemplified by *Kelo*. The article also suggests solutions that facilitate the achievement of the public policy goals sought through private-to-private redevelopment compensation by giving the owner a role in the process,¹³³ or by adopting a foreclosure sale-based redevelopment alternative to condemnation.¹³⁴

A. *Kelo* Exemplifies a Growing Trend

*Kelo v. City of New London*¹³⁵ became a quickly-celebrated Supreme Court opinion.¹³⁶ In a narrow sense, *Kelo* concerns limitations on the rights of landowners to retain their land. Looked at from a broader perspective, however, *Kelo* is a particularly visible manifestation of municipal industrial policy. Pfizer epitomizes the “demand side” of condemnation for private revitalization, or what Professor Merrill calls a “secondary rent seeker.”¹³⁷ The City of New London and State of Connecticut, correspondingly, represent the “supply side,” in effect selling eminent domain services and reaping some of the benefits. In the most egregious cases, localities advertise that they would exercise their emi-

¹³¹ See, e.g., Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development In The 21st Century*, 22 GA. ST. U. L. REV. 895 (2006).

¹³² See *infra* notes 344-345 and accompanying text.

¹³³ See *infra* Parts II.E.1-II.E.3.

¹³⁴ See *infra* Part II.E.4.

¹³⁵ 545 U.S. 469 (2005).

¹³⁶ See ELY, *supra* note 60, at 158.

ment domain powers for a fee.¹³⁸ In any event, while localities and redevelopers deal, landowners like Mrs. Kelo are displaced.

One of the principal reasons why *Kelo* resounded as it did was that it exemplified the rapid growth in municipal use of eminent domain for retransfer for private economic development. This development was brought to light partly through a widely-noted 1998 account in the *Wall Street Journal*, which noted that, although it has been a “device used for centuries to smooth the way for public works such as roads, and later to ease urban blight,” condemnation recently “has become a marketing tool for governments seeking to lure bigger businesses.”¹³⁹ In a follow-up story in late 2004, the same reporter noted:

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren’t tracked nationally, but even retailers themselves acknowledge that the explosive growth in the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.¹⁴⁰

In reality, although *Kelo* is emblematic of government’s growing role in directing growth, the tactic used therein is just one of many. The resulting firestorm of adverse public reaction narrowly focused on whether economic development constituted “public use,” but perhaps would have been better to address government’s entire toolbox.¹⁴¹

¹³⁷ Merrill, *supra* note 129, at 85-88.

¹³⁸ *Southwestern Ill. Dev. Auth. v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002) (“SWIDA advertised that, for a fee, it would condemn land at the request of ‘private developers’ for the ‘private use’ of developers.”).

¹³⁹ Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 (quoting Jeffrey Finkle, head of the Council for Urban Economic Development in Washington, D.C.).

¹⁴⁰ Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1.

¹⁴¹ See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006).

B. Rent-Seeking and Its Consequences

A primary justification for eminent domain is to prevent rent-seeking behavior of landowners.¹⁴² Specifically, a landowner may try to hold-out for a higher price after learning that a developer is trying to assemble parcels in the area. Eminent domain allows the municipality and developer to engage in efficient projects by avoiding the landowner's strategic bargaining based on a bilateral monopoly. Ironically, for projects that involve transfer of property to a private party, another form of rent seeking may entail an even greater cost. Secondary rent-seeking occurs when redevelopers and businesses compete to acquire a share of the increased property value that results from condemnation. Facially, this seems more problematic than individual landowners expropriating a share of the increased value of *their* property.

1. The Loss in Incommensurable Property

Citing "serious practical difficulties" with more subjective measures of value, the Supreme Court long has defined "just compensation" in terms of fair market value.¹⁴³ "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."¹⁴⁴ Judge Richard Posner has succinctly analyzed the difference between constitutional compensation, or market value, and full compensation by saying that "market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners ... value their property at more than its market value (i.e., it is not "for sale")."¹⁴⁵

From an economic perspective, the failure of government to take subjective value into account means not only that the condemnee almost certainly receives less than the property was worth to him, but also that the value of the asset to the condemnee may well

¹⁴² See Merrill, *supra* note 129, at 74-77.

¹⁴³ United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

¹⁴⁴ *Id.*

be more than its value to the condemnor, for which the condemnee's subjective value is an externality.¹⁴⁶ Thus, the net result of the condemnation may be to make society worse off. The fact that expropriation of market value is accompanied by the uncompensated destruction of subjective value imposes what Frank Michelman termed "demoralization costs" on landowners.¹⁴⁷ But, as Professor Michelman dryly added, "[p]erhaps this is not the sort of harmful consequence which has usually been deemed relevant in utilitarian accounting."¹⁴⁸

Allowing governments to ignore property owners' subjective value increases the spread between the compensation paid and the eventual post-project property value. Accordingly, the resulting "rent" rises and encourages more forceful secondary rent-seeking behavior. As Professor Thomas Merrill noted in his seminal article, the rule limiting the condemnee's compensation to fair market value may lead to secondary rent-seeking, as redevelopers vie to obtain the gains incumbent in assembling small parcels into superparcels with higher aggregate value.¹⁴⁹ "In this way, eminent domain, an instrument designed to overcome rent-seeking behavior associated with thin markets, may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid."¹⁵⁰

¹⁴⁵ *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

¹⁴⁶ *See, e.g.*, Merrill, *supra* note 129, at 83.

¹⁴⁷ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). "Demoralization costs" are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. *Id.* (footnote omitted).

¹⁴⁸ *Id.* at 1214 n.98.

¹⁴⁹ Merrill, *supra* note 129, at 86.

¹⁵⁰ *Id.*

2. The Importance of Public Choice

F. A. Hayek noted that, given the decentralization of knowledge in society, it is preferable that there be dispersed decision-making loci, namely markets.¹⁵¹ Working against the advantage to the public of allocations through markets is the tendency of industry groups to seek acquiescent government regulation by capturing control of the regulatory agencies ostensibly designed to oversee them.¹⁵² “Modern public choice theory regards all organized groups demanding services from political institutions . . . as being subject to a unitary logic of collective action.”¹⁵³

The pervasiveness of modern capture theory translates into increased influence for organized interest groups, such as developers, relative to the influence of “mere” unorganized market participants, such as homeowners. This scenario encourages governmental officials to transfer rents, the inchoate assembly value of condemnees, to developers who might return the favor with campaign contributions and other incentives.¹⁵⁴

A manifestation of secondary rent-seeking and capture is the possible evolution of the government-redeveloper relationship into a form of partnership. This may lead to a

¹⁵¹ See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). See also Reza Debadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325, 1367-69 (2006) (discussing “market-based institutional solutions” and the public choice work of James Buchanan).

¹⁵² See Richard J. Pierce, Jr. et al., ADMINISTRATIVE LAW AND PROCESS 18 (4th ed. 2004) (“An agency is captured when it favors the concerns of the industry it regulates, which is well-represented by its trade groups and lawyers, over the interests of the general public, which is often unrepresented.”). The seminal works are George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-13 (1976).

¹⁵³ Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 Chi.-Kent L. Rev. 1039, 1069 (1997).

¹⁵⁴ Certain aspects of the Internal Revenue Code also provide incentives for municipalities to practically give land away to private developers, as the following example shows. To retain the tax-exempt status of municipal bonds, a municipality may not simply serve as the conduit for bond proceeds that are transferred to a private party. I.R.C. § 141(b) sets the threshold for permissible transfers to private parties at 10%. As a result, municipalities wishing to transfer condemned land to private parties for economic revitalization, and seeking the lower interest rate that accompanies a tax-exempt bond, have incentive to sell the land for less than 10% of what the municipality borrowed and paid (typically they pay fair market value). See Daniel Knepper, Note, *Eliminating the Federal Subsidy in Kelo: Restricting the Availability of Tax-Exempt Financing for Redevelopment Projects*, 94 GEO. L.J. 1635, 1654-56 (2006).

redeveloper being chosen for a project not because of any reputation for efficiency or quality, but rather because of a symbiotic relationship with local officials. The resulting inefficiencies might outweigh any benefit to be gained from the condemnation or project as a whole. However, such inefficiencies might raise the ire of the electorate, or lead to the commencement of ultimately untenable projects.¹⁵⁵

Given that public officials, like market participants, are susceptible to self-interest considerations, analysis is required in any given case to determine whether municipalities or the market is the “least worst” in serving the perceived need.¹⁵⁶ This article suggests that courts should review private-to-private takings with a meaningful scrutiny since any purported “public use” might be overshadowed by the desire to reward a particular redeveloper.¹⁵⁷

The Supreme Court in *Kelo* sought to avoid a blanket endorsement of economic development takings by enunciating a “pretext” exception. Unfortunately, its current eminent domain jurisprudence does not provide lower courts with the appropriate tools to distinguish between a takings primarily intended to benefit private and public entities.¹⁵⁸

¹⁵⁵ See *infra* Parts II.C.1 and II.D.5

¹⁵⁶ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 204 (1994). In the context of providing just compensation, Professor Glynn Lunney notes that neither the majoritarian nor interest group models of legislative process result in a balanced consideration of public needs. Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 770 (1993) (“Analysis of the legislative process suggests that competition between the very many and the very few with respect to property is the principal circumstance that would, if unchecked, lead to such systematic mistakes. Under the majoritarian model, the majority-driven legislature is likely to give inadequate weight to the interests of the minority scapegoat. As a result, a majority-driven legislature will systematically fail to compensate the scapegoat, even when such compensation is appropriate, and will systematically act to burden the scapegoat for the benefit of the majority, even when such action is not desirable. Under the interest group model, on the other hand, the minority group is likely to have disproportionate influence on the legislature's decision. As a result, an interest group-driven legislature will systematically fail to act to burden the minority group for the benefit of the majority, even when such action would have been desirable.”).

¹⁵⁷ See *infra* Part II.D.1. See, e.g., Merrill, *supra* note 129, at 85-88 (proposing that courts should enjoin projects where subjective losses appear excessive in relation to the proposed benefits). The problem of double effect further compounds the reviewability of such preferences. See *infra* Part II.D.2.

¹⁵⁸ See *infra* Part II.D.1.

3. Predatory Rent Seeking Through Threatened Condemnation

Kelo appears to open the door for a new and potentially destructive form of secondary rent seeking. Heretofore, that concept has been applied to developer efforts to capture the assembly gains that inure from the condemnation of numerous small parcels and their aggregation into one large parcel susceptible to extensive and intense development.¹⁵⁹ Given the lax review of public use implicit in *Kelo*,¹⁶⁰ the stage is set for developers to wield their inchoate right to condemn parcels by extorting a large fraction of the owners' subjective value as a condition for *not* exercising eminent domain.

Such was the situation in *Didden v. Village of Port Chester*,¹⁶¹ where a parcel was condemned after the owner refused to pay the village's private redeveloper \$800,000 to refrain from exercising his power to obligate the village to condemn. Some of the plaintiff's land was within the boundaries of a large redevelopment project. The pharmacy chain CVS had attempted to negotiate a store lease with the redeveloper, but the deal fell through when the space offered CVS was inadequate.¹⁶² CVS then entered into a lease with the plaintiff, and the threat and subsequent condemnation followed.¹⁶³

The U.S. district court held the suit time barred, but added that “[t]hreats to enforce a party's legal rights are not actionable. Thus, even if Defendants did request payment in exchange for relinquishing the legal right to request condemnation, Plaintiffs have no recourse.”¹⁶⁴ Furthermore, applicable state law “does not require the condemner

¹⁵⁹ Merrill, *supra* note 129, at 75.

¹⁶⁰ See *infra* Part II.D.1.

¹⁶¹ *Didden v. Village of Port Chester*, 322 F.Supp.2d 385 (S.D.N.Y. 2004), *aff'd* 173 Fed. Appx. 931 (2nd Cir. 2006), *cert. denied*, 127 S.Ct.1127 (Jan. 16, 2007) (NO. 06-652). The author joined in an amicus brief urging the grant of certiorari, 2006 WL 3610985.

¹⁶² *Didden v. Village of Port Chester*, 304 F.Supp.2d 548, 553 (S.D.N.Y. 2004).

¹⁶³ *Id.* Note that this level of compensation seems particularly generous when considering the special benefits doctrine, which allows municipalities to reduce compensation to account for project-induced value increases, particular to the affected condemnee, that accrue in the non-condemned parcel. See John J. Costonis, “Fair” Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1041 (1975) (discussing different state approaches to benefit set-offs).

¹⁶⁴ *Didden*, 322 F.Supp.2d at 390 (internal citation omitted).

to negotiate with a private property owner in good faith prior to seeking to acquire title to the property.”¹⁶⁵

The district court also rejected the plaintiffs claim that the redeveloper’s threat to use his eminent domain power unless Didden transferred either \$800,000 or a partnership interest in the business amounted to an unconstitutional exaction under *Nollan* and *Dolan*.¹⁶⁶ “No exaction has occurred here. Plaintiffs have not had any conditions placed upon their property during their ownership that limit their ability to use their property.”¹⁶⁷

On appeal, the Second Circuit affirmed, in a summary order relying on *Kelo*’s grant of broad discretion to municipalities condemning land for redevelopment.¹⁶⁸ Likewise, it brushed aside any notion that the \$800,000 request was extortion, declaring “we agree with the district court that Appellees’ voluntary attempts to resolve Appellants’ demands was neither an unconstitutional exaction in the form of extortion nor an equal protection violation.”¹⁶⁹

Although the “requested” payment in *Didden* may have been justified by the fact that Didden’s property was not attractive to CVS without the city’s redevelopment efforts,¹⁷⁰ the court’s cavalier treatment of the issue presents municipalities with an alluring, powerful fundraising instrument. Unlike the secondary rent seeking where the redeveloper profits from part of the assembly value of the parcel actually redeveloped, *Didden* demonstrates the potential for exaction of the subjective value of all of the owners of parcels *exempted* from condemnation for redevelopment. The *Didden* case epitomizes the potential for abuse that accompanies the wide discretion granted to municipalities under

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 389 (discussing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

¹⁶⁷ *Id.*

¹⁶⁸ 173 Fed. Appx. 931, *2 (2nd Cir. 2006), *cert. denied*, 127 S.Ct.1127 (Jan. 16, 2007) (NO. 06-652).

¹⁶⁹ *Id.*

¹⁷⁰ *Didden*, 304 F.Supp.2d at 553.

any *Kelo* standard. *Didden* also raises the possibility that the initial designation of the re-development area might be over-expansive precisely to facilitate such exactions.¹⁷¹

Indeed, if we consider *Didden*'s parcel to be the inchoate regulatory property of the redeveloper, the plaintiff's ability to "purchase" the redeveloper's right to invoke condemnation seems akin to its being relegated to "Rule 4" of a Calabresi-Melamed analysis.¹⁷² As in *Spur Industries v. Del E. Webb Development Co.*,¹⁷³ the "wrongdoer" has the right to stay if he pays compensation. This would be an intriguing, albeit ominous, twist, since Rule 4 has never been used in a nuisance case since *Spur*.¹⁷⁴

4. Government Subterfuges: Efficiency and the Assembly Problem

One of the justifications for private-to-private condemnation transfers is that governments are not able to use the same subterfuges in assembling parcels that private developers typically employ.¹⁷⁵ Some scholars disagree.¹⁷⁶ Others believe that eminent domain should be used to overcome the assembly problem very sparingly.¹⁷⁷

¹⁷¹ The problem of condemnation of excess land is not limited to private-to-private transfers. *See, e.g., City of Bozeman v. Vaniman*, 898 P.2d 1208 (Mont. 1995) (declaring condemnation of land for highway off-ramp and rest area/visitor's center not for public use where 40% of planned building to be occupied by private Chamber of Commerce).

¹⁷² Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115-17 (1972).

¹⁷³ 494 P.2d 700, 708 (Ariz. 1972).

¹⁷⁴ Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1010 (2004).

¹⁷⁵ *See Merrill, supra* note 129, at 75 (noting that "assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.").

¹⁷⁶ Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 203-09 (2007) (noting that much private assembly still occurs through secrecy or bargaining, without the benefit of condemnation, so the holdout justification becomes weaker in the context of a taking for private development).

¹⁷⁷ Richard A. Epstein, *Justified Monopolies: Regulating Pharmaceuticals and Telecommunications*, 56 CASE W. RES. L. REV. 103, 130 (2005) ("There are no situations in which forced exchanges work as well as voluntary ones. But for these purposes, the central insight is that the eminent domain system functions more easily in some settings than it does in others. The best proposition on the effectiveness of the eminent domain power can be neatly summarized in a single sentence: it works well for big plots of land with high values that can be taken over in single

Governmental activities should reflect the informed will of the citizens. As such, they generally should be more transparent than private transactions and provide procedural due process for affected individuals. Legislatures should welcome this process to gauge public sentiment and evaluate the net societal benefit of redevelopment projects. In takings for economic revitalization, government officials may subordinate transparency to the interests of redevelopers from whom they exact rents.¹⁷⁸

Transparency and the provision of developers impose costs on potential condemners. Over 20 years ago, Professor Merrill suggested that these would compel government to engage in only efficient condemnations.¹⁷⁹ Today, however, the secondary rent-seeking and municipal exactions associated with private-to-private transfers provide additional encouragement for public officials to use their eminent domain authority.

Additionally, the political process may not benefit all citizens equally. One study of the use of eminent domain for urban renewal indicates that eminent domain better compensates owners of more valuable parcels.¹⁸⁰ It concludes:

The full-cost calculus of the relative efficiency of ED [eminent domain] and the free market in handling assemblies cannot be made without data on comparable market assemblies and on transactions costs, including labor inputs and forgone income on land due to delay in transferring it to a higher-valued use. Both components of transactions costs are likely to be higher under ED. Thus, both theoretical considerations and the evidence available leave unproved the case for the superior efficiency of ED.¹⁸¹

transactions. If the government wants to condemn land for a highway, the public use is allowable under any interpretation of the takings clause. On the other hand, when the government starts running condemnations at the micro level between private carriers, matters become somewhat more complex, even if we overlook any latent issues with the public use requirement. The transactions cost for per unit of condemnation becomes enormous.”) (internal citation omitted).

¹⁷⁸ See *supra* Part II.B.2 and *infra* Part II.D.5.

¹⁷⁹ Merrill, *supra* note 129, at 78 (“Legislatures, agencies, and private parties will rely upon eminent domain only when such reliance is efficient, that is when market exchange would consume more resources.”). However, Merrill delineated clear limits on this assumption. *Id.* at 79.

¹⁸⁰ Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 495 (1976). (Under eminent domain, “high-valued parcels systematically receive more than market value and low-valued parcels receive less than market value.”)

¹⁸¹ *Id.*

5. Secondary Rent-Seeking Induces Inefficient Competition

In both nation states and cities, officials use wasteful redistribution and showcase projects as ways of consolidating power.¹⁸² A 2005 study published by the Brookings Institution indicates that American cities have doubled their investment in convention centers despite a sharp drop in attendance.¹⁸³ These cities may be bulking up their infrastructure “in a type of arms race” with competing cities.”¹⁸⁴ Similarly, cities offer business incentives solely to win them from neighboring cities. Or, perhaps expansion decisions are “predicated on the assumption that ‘if you build it, they will come.’”¹⁸⁵ The public’s concern that officials do something to improve the local economy is the driving force behind business development subsidies,¹⁸⁶ even though tax incentives do not achieve their purpose.¹⁸⁷ The politics of showcase projects is not limited to the United States. In China, for example, the construction of showcase projects can bring national prominence to local officials, but result in massive demolition of residences, often without compensation.¹⁸⁸

Government enticements to business furthermore often merely offset economic benefits that could be gained elsewhere.¹⁸⁹ In this sense, subsidies negate good business

¹⁸² See, e.g., Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J. L. ECON. & ORG. 1, 1-2 (2005).

¹⁸³ Heywood Sanders, *Space Available: The Realities of Convention Centers as Economic Development Strategy* 1 (Brookings Inst. 2005).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 393 (1996) (asserting that “[i]n a political atmosphere dominated by concerns about economic vitality and jobs, elected officials face intense pressure to engage in the incentive competition.”).

¹⁸⁷ *Id.* at 397 (noting that “the proliferation of tax incentives has not produced the intended effect of expanding economic activity and employment in the competitor states.”).

¹⁸⁸ See Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the “Takings” Law in China*, 29 HASTINGS INT’L & COMP. L. REV. 1, 7-10 (2005).

¹⁸⁹ See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 Mich. St. L. Rev. 929, 942-43 (asserting that the City of Detroit perceived the construction of a General Motors assembly plant in the Poletown neighborhood as a way to obtain federal funds, that city taxpayers paid little to

decisionmaking. Subsidized businesses may also crowd out other businesses that would be more efficient in a particular area. Thus, while businesses naturally increase their level of subsidized activity in search of greater profits, this does not necessarily translate into increased societal benefit. Also, as the use of incentives becomes more frequent, businesses might come to expect them. Large corporations could pit states and municipalities in bidding wars that would create a vicious cycle of competition for rents, leaving those unwilling to bribe out of consideration.¹⁹⁰

The availability of federal funding exacerbates the inefficiency problem. To the extent that development funds come from the federal fisc, projects that exist largely to provide redeveloper rent result in less of a sting to local taxpayers. The events leading up to *Poletown Neighborhood Council v. City of Detroit*¹⁹¹ are illustrative. In *Poletown*, Detroit city officials, in their quest for federal funds, apparently gave little consideration to the social consequences¹⁹² of condemning a vibrant ethnic neighborhood of more than 1,000 homes to make room for a new Cadillac assembly plant.¹⁹³ The overall economic consequences of Detroit's action included a certain loss of jobs and development in the rural community in which GM otherwise would have settled.¹⁹⁴

wards the project, and that other localities were eager to offer cheaper land and equivalent tax advantages to GM).

¹⁹⁰ For example, Costco's senior vice-president for legal and administrative affairs recently was quoted as "acknowledg[ing] that 'probably dozens' of its projects involved eminent domain 'or the threat of it.' In a letter to a shareholder, he explained that if Costco didn't do the deals, 'our competitors for those sites ... and our shareholders would be the losers.'" Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, Wall St. J., Dec. 8, 2004, at B1, B4 (quoting Joel Benoliel).

¹⁹¹ 304 N.W.2d 455 (Mich. 1981).

¹⁹² See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 30 (1991) (noting "the destruction of roots, relationships, solidarity, sense of place, and shared memory" resulting from the city's action).

¹⁹³ Fischel, *supra* note 189, at 940-43.

¹⁹⁴ See Faith R. Dylewski, *Ohio's Brownfield Problem And Possible Solutions: What Is Required For A Successful Brownfield Initiative?*, 35 AKRON L. REV. 81, 96-97 (2001) (Noting that investment in brownfield sites, which is governmentally appealing because brownfields are "often located near central business districts, waterways, public transportation, and large populations of potential workers," is relatively more risky than greenfield investment. Thus, "the government must provide incentives in order to encourage private investment into brownfield sites.").

TIF projects, with their earmarked incremental taxes, also impose negative externalities on surrounding areas. Some economists believe that designating and funding a TIF project might result in depressed growth rates in the area.¹⁹⁵ Stimulating growth of a TIF project could come at a greater expense to the area as a whole. Failure of the “but for” test means that the tax revenues are being siphoned away from roads, schools, and other public amenities to go into private coffers. Even if the “but for” test is satisfied, using TIF to induce businesses to come to one area when they would have otherwise settled in a nearby area is inefficient for the overall combined area.¹⁹⁶

As municipalities compete to gain businesses, they engage in a zero-sum game, and ultimately harm themselves by opening the door for bidding contests. Ironically, it may well be that simple and inexpensive techniques, such as the “Dakota Roots” program used by South Dakota to match ex-residents with in-state jobs, are more effective. “The cost of these programs isn’t large, especially when compared with the millions in tax breaks and grants that are given to attract companies.”¹⁹⁷

¹⁹⁵ See Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URB. ECON. 306 (2000) (concluding that cities that adopt TIF have slower growth rates than cities that do not).

¹⁹⁶ If City A and City B, both in County Z, use public funds to compete for businesses then County Z as a whole may lose. See Joyce & Man at 95; Michael T. Peddle, *TIF in Illinois: The Good, the Bad, and the Ugly*, 17 N. ILL. U. L. REV. 441, 453-54 (1997); Greg LeRoy, et al., *Another Way Sprawl Happens: Economic Development Subsidies in a Twin Cities Suburb* (Jan. 2000) available at <http://www.goodjobsfirst.org/pdf/anoka.pdf> (discussing the City of Anoka’s use of TIF to attract businesses to the Anoka Enterprise Park and concluding “[t]he relocations do not represent a net gain in economic activity for the region or the state. The companies that relocated to the Park clearly had the ability to locate elsewhere without such a subsidy, and most if not all would have. Only one is known to have actively considered leaving the region. Therefore, from a regional perspective, the Anoka subsidies represent a transfer of property tax revenues away from public services and into free land for the companies.”).

¹⁹⁷ Connor Dougherty, *Ex-Residents Are Gone, But They’re Not Forgotten*, WALL ST. J., December 26, 2007, B1. “Most economic-development efforts focus on attracting new employers, often with a combination of tax breaks, cheap real estate and cash. Yet relocation consultants say that for companies thinking about moving to a state, one of the biggest concerns is having an adequate, well-trained work force.” *Id.*

C. Government as Land Use Development Director

As government shifts its land use focus from minimizing nuisance and protecting the health, safety, and welfare of its citizens to shaping its business landscape by promoting economic development, we must question whether government is best suited for this task. This section explores this question by addressing the greater flexibility of capital markets in allocating funds, the appropriate level of government suited to make certain decisions, the related problem of appropriate focus on parcel scale, the impossibility of making all (or most) people happy and the potential broader negative economic effects of an overarching government.

1. Inherent Limitations in Guiding Growth

Historically, government officials have been unable to efficiently allocate resources to promote economic development.¹⁹⁸ Professor Robert Cooter summarizes it in the international sphere:¹⁹⁹

With some exceptions, public officials have performed dismally in channeling investments to promote growth. To illustrate, in the last half of the twentieth century many poor countries pursued industrial policies that favored manufacturing over agriculture, heavy industry over light industry, dirty industry over clean industry, fishing and cutting wood over sustainable production, and domestic consumption over exports. Most economists view these policies as mistakes that slowed economic growth.²⁰⁰

In terms equally applicable to American municipal industrial policy, Cooter explains this poor performance to government's inability to predict technological and business trends.²⁰¹ The market, on the other hand, is better able to react to changing conditions and quickly allocate resources to the most promising endeavors.²⁰²

¹⁹⁸ See WILLIAM SCHWEKE ET AL., *BIDDING FOR BUSINESS* 35 (1994) (noting the scholarship opposed to using development incentives to attract new industry).

¹⁹⁹ Robert Cooter, *Innovation, Information, and the Poverty of Nations*, 33 FLA. ST. U. L. REV. 373 (2005).

²⁰⁰ *Id.* at 379.

²⁰¹ *Id.* at 373 (2005) ("Sustained growth occurs in developing nations through improvements in markets and organizations. Entrepreneurial innovation resembles biological mutation that is un-

Although government provision has been considered most appropriate for public goods,²⁰³ governments might be disposed to overproduce such amenities in the same manner that market actors are apt to undersupply them.²⁰⁴ Furthermore, many of what are deemed public goods, such as clean air, better might be viewed as a system of well-functioning property rights, through the internalization of pollution through common law actions for private and public nuisance.²⁰⁵

Apart from common law nuisance, government may impose regulatory measures to minimize harms such as pollution. While this could be done through command-and-control restrictions placed upon individual companies, economists almost universally agree on a much less involved role for the federal government.²⁰⁶ Rather than “rowing”

predictable before it occurs and understandable afterwards. It is unpredictable because it begins with the innovator possessing private information by which he earns extraordinary profits. It is understandable because it ends with the public figuring out the innovation and profits approaching the ordinary rate of return. These characteristics of innovation have important consequences for law and policy to foster economic growth. Specifically, government officials who rely on public information cannot predict which firms or industries will experience rapid growth. Consequently, industrial policies that promote growth are unlikely to succeed. . . . In contrast, secure property and contract rights, as well as effective business law (especially the laws regulating financial markets), create conditions under which competition naturally produces entrepreneurial innovation and nations become rich.”). *See infra* Part II.C.5 for further discussion on the value of a strong “rule of law.”

²⁰² Mark Taylor, *A Proposal to Prohibit Industrial Relocation Subsidies*, 72 TEX. L. REV. 669, 679-80 (“Economists have demonstrated that competitive markets lead to the most economically efficient allocation of resources. Governmental interference in competitive markets leads to misallocation of resources, in economic terms, if the interference prevents markets from reaching the most efficient level of production.”).

²⁰³ Public goods are non-rivalous, meaning that consumption by one individual does not prevent their consumption by others. They also are not excludable. *See* DAVID COLANDER, MICROECONOMICS 117 (3d ed. 1998).

²⁰⁴ *See* Steven J. Eagle, *Environmental Amenities, Private Property and Public Policy*, 44 NAT. RESOURCES J. 425, 426-30 (2004).

²⁰⁵ *See, e.g.,* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. No. 3 (forthcoming 2008), available at http://ssrn.com/abstract_id=1103984.

²⁰⁶ *Id.* at 190 (referencing a letter signed by over 2000 economists urging “global climate change be addressed through market-based policies such as an international emissions-trading agreement or a carbon tax rather than command-and-control regulation”). Letter from Kenneth J. Arrow et al. to American Economic Association (Jan. 3, 1997), reprinted in *Economists' Statement on Climate Change*, GLOBAL CHANGE, Feb. 1997, at

the pollution-control ship, government should instead “steer” the efforts of private business by providing price incentive instruments such as tradable emissions permits or Piggian taxes, such as a carbon tax.²⁰⁷ Thus, government’s role should be creating and guiding a “pollution market” rather than the much more controlling task of monitoring the pollution level of every participant.

For examples of the mishaps associated with government over-involvement in economic redevelopment, we simply need to look to two of the most controversial disputes in recent decades. In *Poletown*,²⁰⁸ actual construction of the GM assembly plant for which an ethnic neighborhood was condemned was delayed by two years.²⁰⁹ Today, in *Kelo*, numerous disappointments with the assigned redeveloper have made it uncertain whether the city will need to look elsewhere.²¹⁰ In addition to redeveloper-related project delays, external conditions may hamper government-sponsored revitalization. For example, neither public officials nor the courts may have the last word about Bruce Ratner’s large Atlantic Yards redevelopment project.²¹¹ Despite substantial planning, changing

<http://www.globalchange.org/econall/97may6g.htm> (on file with the Harvard Environmental Law Review).

²⁰⁷ See Yandle, *supra* note 101, at 190. See Osborne & Gaebler *supra* note 9 and associated text, for the “steer and row” metaphor.

²⁰⁸ 304 N.W.2d 455 (Mich. 1981).

²⁰⁹ Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, Dollars & Sense (July 2001).

²¹⁰ See, e.g., Kevin Dale, *Fort Trumbull Developer Asks FHA To Back \$11.5M Loan*, THE (NEW LONDON) DAY, Mar. 14, 2008 (reporting that the developer designated by the New London Development Corp. (NLDC), Corcoran Jamison (CJ), has sought federal financing in order to comply with the May 29, 2008 deadline to secure financing for an 80-unit complex of apartments and townhouses. The redeveloper had already missed a financing deadline and was granted a six-month extension under an amended agreement in December 2007. If CJ misses the May 29 deadline, the NLDC may proceed with assigning another redeveloper.).

²¹¹ See *Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir. 2008); see also *Develop Don’t Destroy Brooklyn Inc. v. Urban Development Corp.*, 2007 WL 2236473 (N.Y. Sup.) (Trial Order), 2007 N.Y. Slip Op. 30825(U) (Trial Order) (denying temporary restraining order halting demolition of buildings during challenge to Forest City project).

economic conditions likely will affect the project's timing, if not its final contours, including the promised affordable housing.²¹²

2. Harmonization of Scale and the Need for Subsidiarity

Government efforts to nurture and steer growth are premised on assumptions about the scale of the need for government involvement and the span of control of the decision-making government entity. Some governmental decisions are best made at a local level, while others are best made at a higher level. Subsidiarity is the “notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved.”²¹³ Locally promulgated zoning and other land use policies generally are consistent with subsidiarity, and opponents of federal zoning regulation have asserted that zoning is inherently local.²¹⁴ There is no need for the federal government to protect land uses preferred by local or state majorities, since states and cities will do so of their own accord.²¹⁵ Furthermore, local decision-makers can make nuanced decisions, subordinating even important interests where required by special circumstances.²¹⁶

²¹² See Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, March 21, 2008, at A1 (“Mr. Ratner, chief executive of Forest City Ratner, did not specify the kinds of delays possible, but suggested that construction could be put off for years. ... [but] he was confident about starting construction on a \$950 million basketball arena for the Nets by the end of the year.”).

²¹³ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 338-44 (1994) (explaining that values of “self-determination and accountability, political liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states” are furthered with subsidiarity).

²¹⁴ See, e.g., Patricia E. Salkin and Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government* (January 2008), available at <http://ssrn.com/abstract=1081492>.

²¹⁵ *Id.* at *54. “As the advocate for the state of Ohio explained in *City of Boerne*, ‘[i]f you agree with our argument [that RFRA is unconstitutional], I suggest that there will be fifty-one RFRA’s when all is said and done. The States aren’t going to stand idle.’” *Id.*, quoting *City of Boerne v. Flores*, oral arguments, available at http://www.oyez.org/cases/1990-1999/1996/1996_95_2074/argument/.

²¹⁶ *Id.* (noting that the Illinois RFRA was amended to ensure that it would not interfere with expansion of O’Hare Airport). See *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007).

While nuisance-based local land use regulation is compatible with similar regulation in other communities, local measures undertaken for economic development are apt to impede similar efforts elsewhere.²¹⁷ In the case of the redeployment of research assets by the Pfizer Company, which was a prelude to *Kelo*, Connecticut’s gain appeared to be Michigan’s loss.²¹⁸ At a more regional level, a county or state may suffer a net loss when two cities compete for business.²¹⁹ In addition, economic theory suggests that the redistribution of wealth is inconsistent with the limited scope of local government because residents may too easily evade such burdens by exiting to neighboring jurisdictions.²²⁰

The modern “city” as a cultural or economic locale may be dramatically larger than the polity that shares its name.²²¹ As such, “in contemporary metropolitan areas, the

²¹⁷ Just as the law of nuisance reinforces property rights by sanctioning land uses that unreasonably interfere with neighbors’ use of their land, zoning laws that ex ante preclude nuisance in one community generally are compatible with similar laws in others. On the other hand, laws seeking local advantage vis-à-vis other communities in attracting development are not compatible with similar enactments by neighboring jurisdictions. For a more general exposition, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122-24 (1969) (noting that “negative liberty” from interference by others is a right that might be universally enjoyed, but that “positive liberty” to receive nurture from others necessarily imposes correlative obligations upon them).

²¹⁸ See *supra* Parts I.A and II.A.

²¹⁹ See *supra* Part II.B.5 and *infra* Part II.D.6 for discussions of the economic and constitutional implications of intercity competition.

²²⁰ Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. L. REV. 1057, 1058-59 (2007) (Redistributive exactions, the theory goes, should be the exclusive domain of more centralized jurisdictions—state and federal governments—from which taxpayers cannot easily exit without simultaneously giving up jobs, friends, or lifestyle.”). See also JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE* 160-61 (2000).

²²¹ For census purposes, a Metropolitan Statistical Area (MSA) has “at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-01, *UPDATE OF STATISTICAL AREA DEFINITIONS AND GUIDANCE ON THEIR USES* 9, available at <http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf>. For example, the Baltimore-Towson, MD MSA includes not only the cities of Towson and Baltimore, but surrounding Anne Arundel, Baltimore, Carroll, Harford, Howard, and Queen Anne’s counties. *Id.* at 32. Approximately 83% of the U.S. population falls into an MSA. *Id.* at 9.

economically, socially, and ecologically relevant local area is often the region.”²²² This leads to the conclusion, famously asserted by Jane Jacobs,²²³ and recently reiterated by Professor Richard Schragger,²²⁴ that cities, and not states or even nations, are the economic engine of society. However, while Schragger draws from this the conclusion that municipal governments should commandeer growth without hesitation,²²⁵ Jacobs takes a quite different view. Although very much favoring the economic growth and general prosperity of cities, Ms. Jacobs saw that such development must be organic (bottom-up) and thus submitted an amicus brief castigating New London’s top-down efforts toward industrial policy in *Kelo*.²²⁶

From the outset of comprehensive zoning, the U.S. Supreme Court recognized that there had to be limitations on local control of land use.²²⁷ While city officials must answer only to their direct constituents, their decisions affect a much broader group of people. Compounding this problem is the fact that bustling “edge”²²⁸ and satellite cities, tapping into large cities’ economic prowess,²²⁹ are on the rise. Because of their size, these “boomburbs”²³⁰ “may prove well positioned to participate in comprehensive regional so-

²²² Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 2 (2000).

²²³ JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: THE PRINCIPLES OF ECONOMIC LIFE* (1984); JANE JACOBS, *THE ECONOMY OF CITIES* (1970).

²²⁴ Schragger, *supra* note 23.

²²⁵ Schragger, *supra* note 23, at *37 (asserting that “to the extent such a use of eminent domain [as in *Kelo*] is a plausible strategy for attracting economic development, it would be irresponsible for a city not to use it.”)

²²⁶ Brief of Jane Jacobs as Amica Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803191.

²²⁷ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (In regard to the city’s interest in separating industrial and residential uses, the court did not “exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”).

²²⁸ See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991).

²²⁹ Robert E. Lang & Patrick Simmons, “*Boomburbs*,” in *REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000*, at 101, 103 (Bruce Katz & Robert E. Lang, eds.).

²³⁰ A “boomburb” is a place with more than 100,000 residents that is not the largest city in its respective metropolitan area and has had double-digit population growth rates in recent decades. *Id.*

lutions” to problems such as “traffic congestion, sprawl, and stress on public services.”²³¹ Advocates for powerful and coherent government, such as Professor Gerald Frug, have asserted that the public had not “adequately addressed the fundamental reasons why American metropolitan areas have been fractured into a multiplicity of jurisdictions: schools, crime, housing, jobs, and taxes.”²³² Frug recommends that states require their cities to establish regional legislatures consisting of elected representatives from each city. Unlike past attempts at such two-tier local governments, these bodies would have binding authority and would focus on discrete issues that “undeniably affect[] people across the region and over which they have little control.”²³³ Notably, states would have to cede power to decide such issues as housing and education.²³⁴ Modeled on the European Union, this would allow cities to further their collective interests, while preserving local self-determination.²³⁵ Such a rationalization of government is problematic for at least two reasons. Americans have cherished local autonomy, despite experts’ views of its inadequacies. Also, as epitomized by the Soviet and Indian five-year plans, large spans of control result in decision makers having insurmountable problems in obtaining necessary information.²³⁶ Furthermore, there is no magic way to optimize the choices available even in a democratic society.²³⁷

at 101. *See also* ROBERT E. LANG & JENNIFER B. LEFURGY, *BOOMBURBS: THE RISE OF AMERICA’S ACCIDENTAL CITIES* (Brookings Institution Press 2007).

²³¹ *Id.* at 102.

²³² Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002).

²³³ *Id.* at 1792, 1832

²³⁴ *Id.* at 1832-33.

²³⁵ *Id.* at 1792-93.

²³⁶ *See* Hayek, *supra* note 151. “The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of a society is . . . a problem of the utilization of knowledge [which is] not given to anyone in its totality.” *Id.* at 519-20.

²³⁷ *See* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951) (demonstrating mathematically that the problem of determining a method of aggregating collective welfare is intractable). *See also*, Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219, 1221-22 (1994) (summarizing “Condorcet Paradox”).

3. Proper Scale of the Resource

The scale of the resources targeted for redevelopment is another important consideration with respect to government intervention in land development. Traditionally, the focus has been on redevelopment projects as a whole rather than the individual parcels of which it would be comprised. This was made clear in *Berman v. Parker*,²³⁸ where “transforming a blighted area into a ‘well-balanced’ community through redevelopment” outweighed the interest of an owner of an economically viable parcel.²³⁹

Most important, individual ownership interests seem implicitly subordinated to the notion that the superparcel that city officials and redevelopers see as the appropriate unit of property. By this measure, the typical residential parcel or small retail or other business parcel is viewed, in Michel Heller’s terminology, as an “anticommons” fragment.²⁴⁰ As such, the owner is seen as a troublesome obstructionist who blocks utilization of the superparcel, which now is *the* parcel.

For example, consider the assembly problem, which justifies condemnation as the best way to overcome the ability of one landowner to “hold-out” and refuse to sell his land for a project that would bring great overall benefit to the area as a whole.²⁴¹ Some definitions of “blight” even regard the fact that an area may have too many parcels.²⁴²

²³⁸ 348 U.S. 26 (1954).

²³⁹ *Kelo v. City of New London*, 545 US 469, 484 (2005) (quoting *Berman*, 348 U.S. at 33). *Kelo* also declared that it would be a “misreading of *Berman*” to suggest that it was limited to initial blight removal. 545 U.S. at 485, n.13.

²⁴⁰ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

²⁴¹ For a useful discussion of the problem of suboptimal results from condemnation for parcel assembly for development see Robert L. Scharff, *A Common Tragedy: Condemnation and the Anticommons*, 47 NAT. RES. J. 165, 176-84 (2007).

²⁴² *Concerned Citizens of Princeton, Inc. v. Mayor & Council of Princeton*, 851 A.2d 685, 702-03 (N.J. Super. Ct. App. Div. 2004) (upholding condemnation under statute that considered “diverse ownership” a characteristic indicating a “need for redevelopment”). N.J. STAT. ANN. § 40A:12A-5 (West 2007). For criticisms of blight as a justification for condemnation, 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, 3 (2003) (asserting that “[a] vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.”); Steven J. Eagle, *Does Blight Really Jus-*

Surely, keeping the spotlight on the redevelopment's benefits instead of landowners' individual plights bodes well for the project proponents.

Many government officials envision the tax dollars that they presume would be generated by superparcels and immediately assume they are better for the economy than diverse parcels. Critics of directed government growth disagree. For example, Jane Jacobs advocates a bottom-up process. She believes that cities are most successful when organic growth produces a network of symbiotic diverse parcels.²⁴³ *Kelo* exemplifies a top-down means at achieving an end, the superparcel. The focus of this article is evaluating this means, but it is also important to assess the end. Superparcels, possibly with a sole benefit of higher tax revenues, may not be as economically desirable as their recent popularity suggests.

4. Revitalization: The Chimera of Kaldor-Hicks Superiority

Municipal industrial policy does not exist in a vacuum. Rather, it attempts to make the community better off, that is to say, it attempts to maximize social welfare. However, as Kenneth Arrow observed, “the problem of achieving a social maximum derived from individual desires is precisely the problem which has been central to the field of welfare economics.”²⁴⁴ Unfortunately, as Richard Posner added, “[t]he happiness of millions of different people cannot be measured and aggregated for purposes of comparing the utility of alternative policies.”²⁴⁵

One approach by which policymakers might increase social utility is “Pareto superiority,” under which one allocation of resources is superior to another if at least one

tify Condemnation?, 39 URB. LAW. 833 (2007) (asserting doctrinal and practical superiority of nuisance abatement followed by benefit lien foreclosure if necessary); J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 141 (2005) (asserting that “blight” terminology obscures that decay in low-income neighborhoods “more closely describes a degree of disinvestment that can be addressed directly and without amputation.”).

²⁴³ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

²⁴⁴ Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 335 (1950).

person is better off under it than under the alternatives, and none is worse off.²⁴⁶ However, in a polity of many people with individual nuanced preference structures, this goal appears not to be attainable.²⁴⁷ The practical impossibility of obtaining universal consent lends support to a weaker form of Pareto superiority, the “Kaldor-Hicks principle.”²⁴⁸ Under this view, a policy is superior if its aggregate of gains exceed its aggregate of losses, so that there is at least the potential that the winners could compensate the losers and still come out ahead. The primary problem with Kaldor-Hicks is that it neither provides a basis for summing individual utilities, nor consolation to those who might be—but are not—compensated for being made worse off.

Modern municipal industrial policy, with its “steer and row” emphasis, attempts to engage markets to achieve growth.²⁴⁹ However, James Buchanan has argued precisely that “the market” is not the institution that determines the best, or even most efficacious, use of resources. In his view, “the ‘order’ of the market emerges *only* from the *process* of voluntary exchange among the participating individuals,” not from any centrally-known set of individuals’ utility functions.²⁵⁰ Indeed, individuals do not have preconceived sets of utility functions.

²⁴⁵ See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 33 (1983) (citing sources of Bentham’s Calculus of Felicity).

²⁴⁶ JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* 71-76 (1988).

²⁴⁷ For an interesting treatment of Paretian ethics, see Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980).

²⁴⁸ See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

²⁴⁹ See, e.g., OSBORNE & GAEBLER, *supra* note 9, at 282-83 (discussing various governance approaches and declaring that “government has no choice but to find a noncentralist approach. Our governments must consciously use their immense *leverage* to structure the market, so that millions of businesses and individuals have incentives to meet our health care, child care, job training, and environmental needs.”).

²⁵⁰ James M. Buchanan, *Order Defined in the Process of its Emergence* in James M. Buchanan, David Gordon, et al., *COMMENTS ON ‘THE TRADITION OF SPONTANEOUS ORDER’ BY NORMAN BARRY*, *LITERATURE OF LIBERTY*, vol. v, no. 4, pp. 5-18 (Winter 1982), available at Library of Economics and Liberty. 22 January 2008.
<http://www.econlib.org/library/Essays/LtrLbrty/bryRF1.html>.

Individuals do not act so as to maximize utilities described in *independently existing functions*. They confront genuine choices, and the sequence of decisions taken may be conceptualized, *ex post* (after the choices), in terms of "as if" functions that are maximized. But these "as if" functions are, themselves, generated in the choosing process, not separately from such process. If viewed in this perspective, there is no means by which even the most idealized omniscient designer could duplicate the results of voluntary interchange. The potential participants *do not know until they enter the process* what their own choices will be. From this it follows that it is *logically impossible* for an omniscient designer to know, unless, of course, we are to preclude individual freedom of will.

* * *

In economics, even among many of those who remain strong advocates of market and market-like organization, the "efficiency" that such market arrangements produce is independently conceptualized. Market arrangements then become "means," which may or may not be relatively best.²⁵¹

Consider, for example, *Berman v. Parker*,²⁵² where the Supreme Court upheld redevelopment that forced about 20,000 residents to move from the old Southwest Washington. The city's effort to revitalize the allegedly blighted area undid the many years of market ordering that created the diverse neighborhoods.²⁵³

5. New Institutional Economics

New Institutional Economics is based on the idea that a nation's commitment to the "rule of law" leads to economic success. An effective rule of law requires 1) "that government action be 'bound by rules fixed and announced beforehand,'" 2) rules to "be

²⁵¹ *Id.*

²⁵² 348 U.S. 26 (1954).

²⁵³ See Linda Wheeler, *Broken Ground, Broken Hearts: In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, A-1 ("If federal officials could erase blighted areas, they could build new housing that would keep the middle class from migrating to the suburbs. Eliminating poverty wasn't one of the goals, but getting it out of sight was." "The government's approach to remaking the city called for blunt tools; it wasn't going to promote renewal by carving out poor parts and preserving the rest. With rare exception, everything was to go. Chewed up with the hovels in old Southwest were solid Victorian row houses ... and blocks of thriving small businesses." "It had worked as a community because of the intricate layering of income levels that comes with a neighborhood that evolves over decades. Poor residents as well as new arrivals

known and certain, so that individuals can conform their behavior to those laws,” and 3) “equality in the sense that the law applies equally to all persons.”²⁵⁴ These foundations minimize arbitrary government decisions, which provides security for citizens’ investment and business decisions.²⁵⁵ Accordingly, a report issued by the World Bank in 1997 concluded that “countries with stable governments, predictable methods of changing laws, secure property rights, and a strong judiciary saw higher investment and growth than countries lacking these institutions.”²⁵⁶ These economic benefits likely translate into societal success.²⁵⁷

As the likelihood that governments will take private property increases, potential business owners may be more hesitant to invest time and resources into starting the business. Instead, they may invest in more passive activities or set-up shop in a neighboring jurisdiction less likely to condemn their property.²⁵⁸ Thus, takings in the name of economic redevelopment may cause “condemnation blight,”²⁵⁹ and achieve a quite opposite

could see industrious people right next door who held regular jobs and others who had become business owners, doctors and lawyers.”).

²⁵⁴ Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1 (2003) (citing F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133, 133-249 (U of Chicago Press, 1960); F.A. HAYEK, *THE ROAD TO SERFDOM* 72, 72-87 (U of Chicago Press, 1944)).

²⁵⁵ See Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109, 111 (2003) (“[T]he rule of law provides us with the stability and predictability in economic affairs required for agents to engage in entrepreneurial action—both in terms of exploiting existing opportunities for profit through arbitrage and the discovery of new profit opportunities through innovation. Absent the security and predictability provided by a rule of law, economic actors will shorten their time horizon of investment and economic progress will be thwarted.”) (internal citations omitted).

²⁵⁶ See RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 450 (Cambridge University Press 2002) quoting World Bank, *Entering the 21st Century: World Development Report 1999/2000* 23 (1999).

²⁵⁷ Boettke & Subrick, *supra* note 255, at 110 (positing that “there is a general pattern to be found between the adoption of the institutions that promote the wealth of a nation and the health and well-being of its people. In other words, life expectancy, infant mortality, educational opportunities, and health outcomes are well correlated with GDP.”).

²⁵⁸ Zywicki, *supra* note 254 at 21-24. See also *supra* note 147 for a discussion of demoralization costs.

²⁵⁹ See 4 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* ¶ 12B.17[6] (2006) (defining condemnation blight as the “debilitating effect upon value of a threatened, imminent or potential

goal by scaring businesses away from the area.²⁶⁰ Cities may do better to uphold a strong rule of law that allows business owners to trusts that their efforts will not be usurped.

A strong rule of law should limit government intrusiveness on economic activity.²⁶¹ An example is avoiding heavy regulation, with its inherent possibilities for corruption and arbitrariness.²⁶² To escape the burden of such regulation, businesses will engage in extra-legal ordering and predictability for future economic actors will suffer.²⁶³ With such heavy regulatory burdens, business owners are better off to operate outside the law by bribing government officials or running on the black market.²⁶⁴

The expansion of American land regulation from ex post sanctions on nuisance to promotion of economic development grants government officials more power to regulate citizens' business activities. This framework opens the door for extra-legal activity, such as bribes and kickbacks. What may be more troubling is that courts have permitted municipalities' apparently extortionate schemes.²⁶⁵

D. The Quest for Oversight of Governmental Development Efforts

This section considers judicial limitations and other mechanisms to control condemnation and development subsidies. Unfortunately, current judicial doctrine does not provide an adequate oversight device. The pretext standard proposed by *Kelo* must give

condemnation"). See generally, Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973).

²⁶⁰ Zywicki, *supra* note 254 at 21-22.

²⁶¹ *Id.* at 7-8.

²⁶² *Id.*

²⁶³ For example, Hernando de Soto's, the President of Peru's Institute for Liberty and Democracy, study on Peru's regulatory scheme revealed that a prospective business owner would have to work full-time for almost a year to complete the necessary administrative tasks to open a small business. *Id.* at 10 (citing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books, 2000)). Also, registration costs for the proposed one-worker business was \$1,231, which is thirty-one times the monthly minimum wage. *Id.*

²⁶⁴ *Id.* ("Not only does this make the businesses illegal, but it also denies the business the other benefits of legality, such as contract enforcement, the ability to pledge assets as collateral for a loan, and the like.")

great deference for the complex, subjective inquiry into governmental motivation, so future municipalities may easily sidestep a finding of pretext. Next, judicial review of legislative procedure, specifically the planning process, cannot ensure efficient projects and is also highly deferential. Going further, courts typically refuse to evaluate post-project success, primarily because of the inherent unknowns in such a multi-factored decision. Additionally, citizens might rely on the political process to constrain officials' use of condemnation, but this is frustrated by secondary rent-seeking. Finally, some commentators have suggested that business subsidies should be suspect under the dormant Commerce Clause as a barrier to free trade among the states.

1. The Pretextual Takings Illusion

Kelo asserts that a municipality could not constitutionally “take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”²⁶⁶ Justice Kennedy’s concurring opinion added: “A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”²⁶⁷

These reassurances are rhetorically satisfying, but fail to consider that public benefit and private benefit are inextricably linked. Absent bribes or kickbacks, it is difficult to imagine a scenario where a court confidently can discern pretext.²⁶⁸ One element that

²⁶⁵ See *supra* Part II.B.3.

²⁶⁶ *Kelo* at 478.

²⁶⁷ *Kelo* at 491 (Kennedy, J., Concurring).

²⁶⁸ Commentators have suggested that certain beneficiaries of governmental activity should be required to reimburse the government, similar to certain victims of governmental activity that are entitled to just compensation. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L. REV. 547, 549 (2001). Because governments would lose much of their usefulness if everyone that benefited by a public program had to repay, it is accepted that not all “givings” are necessarily “chargeable givings.” *Id.* at 605. In the context of a taking for redevelopment, municipalities ideally only grant land to private parties which they believe will provide corresponding benefits in the future. If these private parties follow through with their expected benefits, requiring a monetary payment upfront would be unfair and appear to be double-charging. Accordingly, such a “givings” framework would not adequately preclude the necessity to determine which transfers

adds to the difficulty in analyzing government motivations is that immediate and ultimate motivations might differ.

Critics of private-to-private condemnation have argued that there is a widespread possibility of abuse.²⁶⁹ Justice Stevens' *Kelo* opinion minimized the problem, saying that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot."²⁷⁰ But that presupposes that there is some objective scale on which to determine the primacy of private benefit. A good illustration of the problem is *99 Cents Only Stores v. Lancaster Redevelopment Agency*,²⁷¹ which was mentioned in *Kelo* as an example of judicial vigilance.²⁷²

In *99 Cents Only Stores*, Costco, a large "big box" retailer, had threatened to leave the city unless its smaller competitor's adjacent land was condemned and transferred to it. Lancaster instituted eminent domain proceedings against 99 Cents Only Stores' land, ostensibly on the ground that it was "blighted." The court declared:

[B]y Lancaster's own admissions, it is [sic] was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.²⁷³

The court also derided as speculative, inadequate, and not countenanced by statute the city's contention that the threatened loss of Costco could cause "future blight."²⁷⁴

for redevelopment impermissibly favored private parties. Further, impermissible favoritism is already addressed by the legal code, in that enriched parties must usually return illegal government handouts. Correlatively, bribes and gratuities given government officials in connection with their duties are sanctioned in the criminal law.

²⁶⁹ See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1009-1011.

²⁷⁰ *Kelo v. City of New London*, 545 U.S. 469, 487 (2005) (asserting also that "the hypothetical cases posited by petitioners can be confronted if and when they arise.").

²⁷¹ 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *dismissed as moot and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003).

²⁷² *Kelo*, 545 U.S. at 487 n.17.

²⁷³ 237 F. Supp. 2d at 1129.

²⁷⁴ *Id.* at 1130.

Apparently, Costco viewed its aggressive use of eminent domain as a competitive imperative.²⁷⁵

Nothing in *99 Cents Only Stores* suggests that redevelopment agency or city officials were bribed, or otherwise acted out of any motive other than the city's welfare. They were aware of the importance of retaining Costco, a principal tenant in the agency's most successful project and the only shopping center in Lancaster with a regional draw for customers. The court noted that these officials "[v]iew[ed] Costco as a so-called 'anchor tenant' and [were] fearful of Costco's relocation to another city."²⁷⁶ As the Lancaster city attorney candidly said, "99 Cents produces less than \$40,000 [a year] in sales taxes, and Costco was producing more than \$400,000. You tell me which was more important."²⁷⁷ Neither the U.S. district court opinion nor Justice Stevens' *Kelo* opinion noted any evidence that the officials' determination was wrong as a practical matter.

While Justice Stevens held *99 Cents Only Stores* out as the exception, it actually proves the rule. The city's justification of blight was pretextual, but its condemnation was not pretextual in the sense that Stevens used the concept. Certainly, tax revenues of \$400,000 per year, as opposed to the \$40,000 collected from the 99 Cents Store, greatly benefited Lancaster. The city simply made the mistake of not accentuating the increased vital additional public services that it would be able to provide as the *primary* reason for its inducement to Costco.

The conclusion that Lancaster's wrongful cover-up was gratuitous is supported by the U.S. Court of Appeals for the Second Circuit's recent opinion in *Goldstein v. Pataki*.²⁷⁸ There, the Second Circuit exposed how readily the *Kelo* "pretextuality" inquiry can

²⁷⁵ Costco's senior vice-president for legal and administrative affairs recently was quoted as "acknowledg[ing] that 'probably dozens' of its projects involved eminent domain 'or the threat of it.' He wrote that if Costco didn't do the deals, 'our competitors for those sites ... and our shareholders would be the losers.'" Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, Wall St. J., Dec. 8, 2004, at B1, B4 (quoting Joel Benoliel).

²⁷⁶ *Id.* at 1127.

²⁷⁷ Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, B1 (quoting David McEwan).

²⁷⁸ 516 F.3d 50 (2nd Cir. 2008).

be vitiated. *Goldstein* involved the Atlantic Yards Arena and Redevelopment Project, which aims to give a National Basketball Association team, the New Jersey Nets, a home in Brooklyn, New York.²⁷⁹ The case arose when property owners within the twenty-two acre project site challenged the condemnation of their property as failing to serve a public use.²⁸⁰ The plaintiffs argued that the project's purported benefits, such as redress of blight and creation of affordable housing, were mere pretexts to disguise the "substantial" motivation of benefiting Bruce Ratner, the owner of the Nets who proposed the project and serves as the project's primary developer.²⁸¹ The Eastern District of New York held that the "pretext" argument was a valid basis for challenging a "public use," but dismissed the claim under Rule 12(b)(6). The court held that no reasonable juror could conclude the project's public benefits, agreed to by both sides, were "mere pretexts within the meaning of *Kelo*."²⁸² The Second Circuit agreed.

The Second Circuit decided that the plaintiff was arguing that public costs would greatly dwarf any possible public benefit, not arguing that there were *no public benefits*.²⁸³ The Court later put the "passing reference to 'pretext' in the *Kelo* majority opinion" into perspective by commenting:

[T]he issue of pretext must be understood in light of both the holding of the case, which, in permitting a taking solely on the basis of an economic development rationale, reaffirmed the "longstanding policy of deference to legislative judgments in this field," as well as the decision's self-identification with a tradition of public use jurisprudence that "[f]or more than a century . . . has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."²⁸⁴

After reviewing other cases suggesting that a pretextual public use was invalid, the Second Circuit noted that other cases questioning pretext all contained allegations of

²⁷⁹ *Id.* at 53.

²⁸⁰ *Id.* at 54-56.

²⁸¹ *Id.*

²⁸² *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007).

²⁸³ *Goldstein*, 516 F.3d 50, 58 (2nd Cir. 2008).

²⁸⁴ *Id.* at 61 (quoting *Kelo* at 480, 483).

*no public benefit.*²⁸⁵ It took this fact to show that courts refuse to second-guess legislatures' cost-benefit determinations. In refusing to inquire into officials' subjective motivations for approving the project, the *Goldstein* court notes that "[l]egislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns." Further, "the mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid because '[q]uite simply, the government's pursuit of a public purpose will often benefit individual private parties.'"²⁸⁶ This refusal to analyze *primacy* of benefit in the bilateral city-redeveloper context seems reminiscent of the earlier degradation of the concept of bilateral reciprocity of advantage.²⁸⁷

Perhaps one reason why *Goldstein* was unenthusiastic about exploring primacy of benefit was that this concept may make little sense to begin with. Should a taking become unconstitutional when a private party obtains a somewhat greater benefit than the city, even though the city also benefits substantially? If the city obtains a benefit that is large in absolute terms and also advantageous with respect to market conditions, why would the condemnation not be legitimate despite the private party's benefit?

Goldstein and *99 Cents Only Stores* might profitably be distinguished from the recent decision by the Pennsylvania Supreme Court finding that a taking was pretextual in *Middletown Township. v. Lands of Stone*.²⁸⁸ There, the issue was not the illusory primacy of benefit, but rather whether the township's true motive for condemnation was the provision of recreational facilities, which was permitted under state law, or the preclusion of development, which was not.²⁸⁹

²⁸⁵ *Id.* at 62.

²⁸⁶ *Id.* at 64 (quoting *Kelo*, 545 U.S. at 485).

²⁸⁷ See *supra* notes 98-100 and associated text.

²⁸⁸ 939 A.2d 331 (Pa. 2007).

²⁸⁹ *Id.* at 338 ("Because the law requires that the true purpose of the taking be recreational, it is not sufficient that some part of the record support that recreational purposes were put forth. But rather, in order to uphold the invocation of the power of eminent domain, this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual.").

2. Municipal Revitalization and the Doctrine of Double Effect

Added insight into problems of primacy of benefit and pretextuality might be derived from the doctrine of double effect, borrowed from Catholic theology.²⁹⁰ The doctrine holds that if the primary purpose of the action is legitimate (say, for example, the pursuit of a military target), then collateral damage is acceptable provided that the damage is not disproportionate to the aim pursued. The underlying moral principle is that the action should be regarded as privileged because of the legitimacy of the dominant purpose.²⁹¹

Cities may well glean from *Kelo*,²⁹² *99 Cents Only Stores*,²⁹³ and *Goldstein*²⁹⁴ that it is unnecessary and self-defeating to fabricate pretexts for condemnation, such as blight, and to proffer instead the presumably honest justification of economic rejuvenation. This is true because courts give government the benefit of the doubt in such cases,²⁹⁵ and because courts are ill-equipped to flush out impermissible private-to-private wealth transfers.

Thus, municipalities might justify condemnations with a vague rationale, such as “overall benefit to the city.” If such a justification fails for lack of specificity,²⁹⁶ municipalities might simply delineate their plan to achieve public benefits through the private party transfer. Such a plan is at risk for vitiation for lack of public use, but as highlighted by *Goldstein*, lower courts are hesitant to question a legislature’s determination that the city will primarily benefit. A more realistic approach might be to focus on a municipality’s underlying motivation for the transfer. For example, if the city makes a good faith determination that the public will experience a net benefit from a condemnation, a large

²⁹⁰ See, e.g., Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 130 (1972).

²⁹¹ *Id.*

²⁹² *Kelo v. City of New London*, 545 U.S. 469 (2005).

²⁹³ *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *dismissed as moot and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003).

²⁹⁴ *Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir. 2008).

²⁹⁵ See *infra* note 306.

²⁹⁶ See *infra* notes 311-325 and accompanying text.

private party gain should not preclude the transaction. Following the doctrine of double effect, the primary purpose of benefiting the city is legitimate and as long as damage to the city is not disproportionate, the condemnation should proceed.²⁹⁷ This holds true even though such a benefit to a private party would be prohibited without the legitimate dominant purpose, which was benefit to the city. Applied to *99 Cents Stores*, the court should have allowed the condemnation as long as the city's primary motivation was to benefit the city rather than Costco.²⁹⁸ This would be possible even if Costco benefitted more than the city. Ultimately, Costco's gain is a side effect of the city's good faith effort to promote the economic rejuvenation that normally accompanies a big-box store.

While the doctrine of double effect suggests that the primacy of private gain should not invalidate a project when officials genuinely are motivated by an objectively plausible conception of the city's welfare, the application of this principle is not without substantial adverse consequences. An important aspect of the rule of law is the generality principle which "requires that any action by the government be generally applicable to all similarly-situated individuals, rather than favoring some subsets of the population at the expense of others."²⁹⁹ For similar reasons, the rule of law asserts that governmental arbitrariness and favoritism would be reduced by separation of the legislative and judicial functions.³⁰⁰ Legislative and administrative acts that bear the appearance of favoritism undermine principles of justice. This is especially relevant where courts are not well situ-

²⁹⁷ See, e.g. *Poletown* at 458-59 (determining "[t]he heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user," and finding "the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto").

²⁹⁸ Additionally, Although there was no definitive developer for the Fort Trumbull area at the time *Kelo* was decided, the city's primary intent could still have been to benefit a private party. This could have been Pfizer or the to-be-named developer.

²⁹⁹ Zywicki, *supra* note 254, at 14.

³⁰⁰ *Id.* at 14-15 ("The rule of law requires both the promulgation of prospective rules to apply to future cases and to maximize social coordination as well as the equal and general application of these rules to situations as they arise. This process of *ex ante* promulgation and *ex post* decision-making requires two different bodies tasked for these different purposes.").

ated to evaluate ensuing citizen complaints about arbitrary government decisions, or those that strip owners of settled property interests.³⁰¹

As adjudicated using the spineless “pretext” standard, the current broad interpretation of the public use clause does not lend itself to a workable judicial standard. There is simply no reliable way to determine whether the political motivation behind a private-to-private wealth transfer comports with public use. Thus, in the event that a condemning municipality can show a tangible public benefit, courts will be powerless to invalidate the condemnation regardless of private party benefit. Inevitably, a private party gain will translate into at least some benefit for the public, and if this is enough to satisfy the public use clause then current judicial doctrine does not put any restraint on eminent domain power.³⁰² Further, if the focus is simply on maximizing land value, then “[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”³⁰³

3. Reliance on Planning, Public Use, and Judicial Review

The Supreme Court’s *Kelo* opinion placed great confidence in comprehensive planning as a device to stave off pretextual takings for private benefit.³⁰⁴ However, ad-

³⁰¹ *Id.*

³⁰² *See Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting) (“But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.”).

³⁰³ *Id.* at 503. *See also* Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 338 (2006) (“[t]he Court has constructed a process in which the constitutional mandate of ‘public use’ is reduced to unenforceable ‘hortatory fluff,’ as Justice O’Connor put it in her dissenting opinion, n14 because under that extreme level of judicial deference that is now said to be ‘the law,’ it is the functionaries of local executive and legislative branches of government that de facto dictate to the Supreme Court what is ‘public use’ within the meaning of the Fifth Amendment. This severely undermines the concept of checks and balances in this important area of constitutional law.”)

³⁰⁴ *Kelo*, 545 U.S. at 478 (“Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a ‘carefully considered’ development plan.”) (citing

herence to the forms of good planning does not ensure the integrity of the process.³⁰⁵ Conversely, judicial review of the substance of government planning implies a level of heightened scrutiny that is inconsistent with the Court's precedents, including *Kelo* itself, which stress deference to local and state autonomy in land use matters.³⁰⁶ A brief survey of a few courts' review of the planning process illustrates the difficulty inherent in judicial evaluation of procedural protections.

As Professor Nicole Garnett recently noted, the emphasis on the legitimizing role of planning in *Kelo* makes it attractive for courts to think of "planning as public use."³⁰⁷ She notes the great discretion inherent in the normal rational basis review,³⁰⁸ but adds:

That said, there are at least two reasons why the conceivability loophole of rationality review does not map easily onto a public use challenge. First, the government exercises the power of eminent domain to acquire property for real reasons, not speculative ones. Eminent domain laws universally require an ex ante statement of the "ends" justifying the condemnation. In most states, and for all takings by the federal government, eminent domain is a judicial proceeding. After satisfying the necessary prerequisites, the Taker files pleadings which, inter

Kelo, 543 A.2d 500, 536 (Conn. 2004)). Justice Kennedy's concurring opinion, while agreeing that "a presumption of invalidity is not warranted for economic development takings in general," asserted that a "more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings." *Id.* at 493 (Kennedy, J., concurring) An example of this may be the "covert heightened scrutiny" standard used to invalidate a permit denial for a group home in *City of Cleburne v. Cleburne Living Center*. 473 U.S. 432 (1985). See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988). The present author has argued in favor of meaningful scrutiny for deprivations of property rights more generally. See *Eagle*, *supra* note 86 at 951-54.

³⁰⁵ See, e.g., Douglas W. Kmiec, *Hitting Home-The Supreme Court Earns Public Notice Opining on Public Use*, 9 U. PA. J. CONST. L. 501, 504 (2007) ("At the time of [the *Kelo*] trial, the specific private beneficiaries had not even been identified and no development agreement had even been signed. Thus, it was not possible for the trial judge to have evaluated favoritism, let alone the question of whether the public benefits to be supplied by the as-yet-unidentified private party would be, as Justice Kennedy said, 'so trivial or implausible.'"). See also Kanner, *supra* note 303 at 338-43 (presenting a vivid account of what really happened in *Kelo*).

³⁰⁶ See *Kelo* at 480 ("Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); *Midkiff* at 241 (courts should not "substitute [their] judgment as to what constitutes a public use unless the use be palpably without reasonable foundation") (internal citation omitted).

³⁰⁷ Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443 (2007).

³⁰⁸ *Id.* at 451 (observing that courts decide "whether the takings advance conceivable public purposes, not necessarily the goals of articulated, thorough planning efforts.").

alia, describe the land to be taken, and, importantly, set forth the public use for which it is being taken. The purpose used to justify the taking must be pleaded with particularity in many states.³⁰⁹

Garnett later hypothesizes that “takings justified by the need for ‘economic development,’ but occurring outside of a comprehensive development plan, may become constitutionally suspect.”³¹⁰

As Garnett mentions, most states have statutes requiring municipalities to provide particular support regarding the public purpose for a condemnation.³¹¹ Because the statutes do not delineate specifics, judicial interpretation of the requirement is critical. Post-*Kelo*, courts have praised planning efforts and chided municipalities who forego them.³¹² Despite this, it does not appear that any court has enjoined a standard condemnation action for a city’s failure to submit anything more than a general project outline.³¹³

In *Franco v. National Capital Revitalization Corp.*, the District of Columbia Court of Appeals reversed the Superior Court’s decision to strike a landowner’s pretext defense as “legally insufficient.”³¹⁴ The appellate court remanded with guidance that judicial deference should be granted when the record shows “that the taking will serve ‘an overriding public purpose’ and that the proposed development ‘will provide substantial benefits to the public.’”³¹⁵ The court failed to indicate what criteria would be successful

³⁰⁹ *Id.* (internal citations omitted).

³¹⁰ *Id.* at 455. Note that citizens with property at risk of condemnation would have standing to challenge the adequacy of such planning. A similar right to challenge is critical in making the National Environmental Policy Act effective. 42 U.S.C. § 4332(c)(C) (2000).

³¹¹ *Id.* at 451 (citing 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ¶ 26A.02[1], nn.5 & 24 (2006))

³¹² *See, e.g., infra* text accompanying notes 322 and 324 .

³¹³ *But see* Southwestern Ill. Dev. Auth., 768 N.E.2d 1 (lack of economic evidence was one factor in invalidating a quick-take condemnation).

³¹⁴ *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160, 164 (D.C. App. 2007).

³¹⁵ *Id.* at 174.

in overcoming a pretext defense, but did note that *Kelo* did not make comprehensive plans a “constitutional standard.”³¹⁶

To support its contention that other courts have looked to the record for a demonstrable public purpose, the *Franco* court cited *Mayor of Baltimore v. Valsamaki*.³¹⁷ This Court of Appeals of Maryland case illustrates how the requirement of a comprehensive plan in condemnations can be alluring but impracticable. *Valsamaki* involved a “quick-take” condemnation of a downtown commercial property pursuant to the 1982 Charles North Urban Renewal Plan.³¹⁸ The condemnation petition simply stated the property would be used for “redevelopment purposes.”³¹⁹ During trial, city officials went only so far as saying the property was needed for business expansion and a “mixed-use development,” but there were admittedly “no specific plans.”³²⁰ These generalized statements certainly do not seem to be evidence of detailed planning, and are likely the bare minimum one could ever expect as justification for a condemnation.

Before concluding that the city’s plan was insufficient to establish an immediate public purpose, the court stressed that the diminished procedural due process protections in a quick-take condemnation warranted a heightened level of judicial review.³²¹ Nevertheless, the court noted in dicta that it looks for a “comprehensive development plan” in public purpose challenges to *regular* condemnation actions.³²² Interestingly, prior to this commitment, the court suggested that the City could have “establish[ed] the ‘public

³¹⁶ *Id.* at 175.

³¹⁷ *Id.* at 174 (citing *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007)).

³¹⁸ *Valsamaki*, 916 A.2d at 326-28.

³¹⁹ *Id.* at 329.

³²⁰ *Id.* at 331-32.

³²¹ *Id.* at 345 (“It is important to note that the opportunities to challenge a condemnation are shortened and truncated when quick-take condemnation is used as opposed to regular condemnation.”). “In the case of regular condemnation, once the City establishes at least a minimal level of public use or purpose, judicial review may be thereafter limited to determining that the agency’s decision is not so oppressive, arbitrary, or unreasonable as to suggest bad faith; that, however, is not the case in assessing immediacy in a quick-take condemnation.” *Id.* at 343.

³²² *Id.* at 355.

use/purpose' of its plan" even with its "sparse" evidence.³²³ Granted, the court recommended that the City proffer much more evidence to satisfy its prima facie case,³²⁴ but it is hard to imagine any submission that would fall short of the evidence presented in *Val-samaki* (except perhaps a bald admission that the city had no plans whatsoever for a parcel). Not surprisingly, the opinion does not cite any projects which were ultimately invalidated for lack of a comprehensive plan.³²⁵

The Second Circuit's approach to the pretext question in *Goldstein* highlights the precedential problem with second-guessing a legislature's planning process.³²⁶ In attempting to prove that the city intended to benefit primarily the developer, the plaintiffs sought judicial review of the city's planning process, including budgets, e-mails, and "other pre-decisional documents."³²⁷ The court refused to second-guess the implementation, as opposed to the purpose, of the condemnation, and cited "over a century of precedent" that precluded it from doing so.³²⁸ Additionally, it noted that a court has no business reviewing the probability the project will succeed.³²⁹ Rather than analyzing mounds of documents, *Goldstein* reaffirmed a commitment to historical deference. This seems to be perhaps the inevitable judicial approach to the planning question.

Although the U.S. Supreme Court in *Kelo* found solace in the city's "carefully formulated" "economic development plan," its emphasis does not establish a rule or stan-

³²³ *Id.* at 351, n.26.

³²⁴ *Id.*

³²⁵ One prior case had been remanded to allow the developer an opportunity to present planning evidence, which he ultimately satisfied. *Id.* at 355 (citing *Prince George's County v. Beard*, 291 A.2d 636, 642 (Md. 1972)).

³²⁶ *Goldstein*, 516 F.3d 50, 61-64.

³²⁷ *Id.* at 62.

³²⁸ *Id.* (citing *Kelo* at 483 (over a century of jurisprudence has "wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power"); *Midkiff* at 244 ("it is only the taking's purpose, and not its mechanics that must pass scrutiny under the Public Use Clause"))).

³²⁹ *Id.* at 63-64 (The Atlantic Yards Project "may not be successful in achieving its intended goals. But whether *in fact* the [Project] will accomplish its objectives is not the question: the

dard. Read in light of the Court’s repeated deference to legislative decision-making, it would be extremely difficult for a lower court to cite a lack of planning as justification for enjoining a condemnation. Additionally, recent decisions have shown that a modicum of planning or consideration will satisfy a reviewing court.³³⁰ At the least, minimally-imaginative officials can muster up a particularized statement, substantiated or not, and courts will not be disposed to second-guess its feasibility.³³¹

4. Difficulty in Judicial Evaluation of Project Success

Courts have historically refused to enjoin a taking for the reason that it does not portend to be successful.³³² Similarly, once a legitimate condemnation is underway, courts will not return to the question of a project’s success. If a taking is constitutional at the outset, poor execution by the legislature or executive branch would not later invalidate such an exercise of power. In contrast to takings for economic development, courts more meaningfully review the merits of other types of subsidies, such as TIF. Nevertheless, an analysis of courts’ treatment of the “but for” test in TIF challenges illustrates the inherent problems in assessing the success of such government-sponsored projects.

As earlier noted, TIF-enabling statutes often require a finding of “blight” and compliance with a “but for” test.³³³ However, many statutory blight requirements are vaguely defined.³³⁴ This lack of specificity allows municipalities broad discretion in select-

[constitutional requirement] is satisfied if . . . the . . . [state] *rationally could have believed* that the [taking] would promote its objective.”) (citing *Midkiff* at 242).

³³⁰ See *Goldstein*, 516 F.3d 50 (2nd Cir. 2008); *Valsamaki*, 916 A.2d 324.

³³¹ Possibly, an extensive planning requirement is only useful for a court seeking justification to approve condemnation, while its absence is not very useful for disapproval. In this sense, it is a shield to cities, but not a sword to landowners.

³³² *Kelo v. City of New London*, 545 U.S. 469, 488 (“A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.”).

³³³ *Tomme*, *supra* note 120, at 220.

³³⁴ See, e.g., *Tomme* FN 61 (citing ARK. CODE ANN. 14-168-301(3)(B) (Supp. 2005); KY. REV. STAT. ANN. 99.340(2) (LexisNexis 2004); OHIO REV. CODE ANN. 303.26(E) (LexisNexis 2003); WYO. STAT. ANN. 15-9-103(a)(iii) (2005)).

ing projects.³³⁵ Furthermore, as exemplified by *Kelo*, unless a statute specifically requires a finding of blight, a finding of local economic distress might supplant the blight requirement, thus permitting the creation of a TIF district solely for the purpose of economic revitalization.³³⁶

Furthermore, and more germane to this section, judicial regulation of TIF arrangements has been minimal because of the inherent subjectivity involved in reviewing projects. The “but for” test simply does not equip courts with effective assessment criteria.³³⁷ To the extent that a particular parcel could have been improved through the efforts of its existing owners or independent private investors, the diversion of the “tax increment” to repay the project-funding bonds effectively constitutes a direct subsidy to the private owners. A but for determination could simply require a finding that, “in the opinion of the municipality: (i) the proposed development or redevelopment would not reasonably be expected to occur solely through private investment within the reasonably foreseeable future.”³³⁸ This easily attainable standard involves speculation with no method of verification, so courts give great deference to the legislature. Accordingly, challenges to the “but for” requirement are rare and the test loses much of its muster.³³⁹ If a government entity utilizes its power to take property in conjunction with a TIF project, satisfaction of the “public use” requirement will almost always accompany satisfaction of the

³³⁵ See *supra* subsection II.C.1

³³⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005).

³³⁷ Again, the but for test asks the difficult question of whether increased real estate values, and consequent higher tax revenues, would have occurred without (but for) the government stimulus. Tomme, *supra* note 120, at 221.

³³⁸ Tomme, *supra* note 120, at 222 (citing MINN. STAT. 469.175 (2004)).

³³⁹ *Johnson & Kriz*, *supra* note 121, at 39. See, e.g., *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 45 (1964) (holding that “a reasonable basis for [a blight] finding” outweighs the “speculative argument” that redevelopment would otherwise take place”).

“but for” test.³⁴⁰ These powerful governmental tools, combined with the inability of courts to measure their abuse, alarm critics.³⁴¹

The difficulty of measuring the “but for” test also highlights another important concern for many TIF opponents. As gauging the success of an investment in a particular parcel is so difficult, how can a government hope to allocate resources to a depressed area more efficiently than the private market?³⁴²

5. The Political Process as a Check on the Legislature

Vague and ineffective judicial standards show that courts may not serve as much of a check on the legislature, so we must analyze the political process to determine if politicians will respect their duty to the public at large.³⁴³ Government officials typically consider much more than constitutionality before acting. For example, Justice Stevens emphasized in informal remarks he issued soon after his opinion in *Kelo* that he regarded transfers for revitalization as bad public policy.³⁴⁴ More recently, he has emphasized from the bench “the distinction between constitutionality and wise policy.”³⁴⁵

In order for the electorate to oust ill-performing officials, it must have some method of assessing the net societal efficiency of municipal projects. For example, will the social, cultural, and economic benefits of the New London project outweigh the demor-

³⁴⁰ Tomme, *supra* note 120, at 222 (“Redevelopment authorities have little trouble articulating a public use when they can assert that private development would not otherwise occur.”).

³⁴¹ See Tomme *supra* note 120, at 230-37. See also Joyce Y. Man, *Effects of TIF on Economic Development*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, *supra* note 118 at 101 (providing the arguments of TIF proponents and critics).

³⁴² See *supra* Part II.C.1.

³⁴³ See *Goldstein*, 516 F.3d at 57 (“But both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of federal courts.”)

³⁴⁴ John Paul Stevens, Remarks, “Judicial Predilections,” Clark County (Nevada) Bar Association, August 18, 2005 (Copy on file with author.).

³⁴⁵ See *New York State Bd. of Elections v. López Torres*, ___ S.Ct. ___, 2008 WL 140755 U.S., 2008. January 16, 2008 (Stevens, J. concurring) (Adding, “as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: ‘The Constitution does not prohibit legislatures from enacting stupid laws.’”).

alization costs and condemnees loss of subjective value? Obviously, it is impossible for anyone to calculate such a multi-factored determination.³⁴⁶ Thus, citizens will likely vote on what side of the story tugs harder on their heart strings.³⁴⁷ Their decision may be influenced greatly by campaigning, public outcry, and government-generated enthusiasm. Unfortunately, these influences weigh in the favor of the decision-making officials.³⁴⁸

First, officials who bestow largess on redevelopers and other revitalization participants can expect to receive substantial campaign contributions. These contributions may help ensure the election of condemnation-friendly politicians. Second, officials may use public funds to tout the merits of and build excitement around a project, leading citizens to believe it is a favorable course of action.³⁴⁹ Condemnees and other negatively affected citizens may try to raise public outcry against such a project, but their lack of funds and disorganization often make this difficult. These problems are even greater for poor citizens, who may be a more politically desirable target than those with more money and influence.³⁵⁰ To be sure, however, post-*Kelo* legislation³⁵¹ and public sympathy apt to inure to displaced elderly homeowners with poignant personal stories, and the like, will, in some cases, stay officials' hands.

³⁴⁶ A variation of these assessment problems also comes with TIF projects. Robust growth in a TIF district simply could be attributed to a government's decision to designate an already growing area as a TIF district to lock in tax revenues that would otherwise be shared with other municipalities. Dye & Merriman, *supra* note 195. Granted this TIF project would not satisfy the "but for" test, but as discussed above, proving such a claim is very difficult. Slower than average growth might occur in a TIF district because the area was extremely depressed to begin with, so it is at a relative disadvantage. *Id.*

³⁴⁷ See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007).

³⁴⁸ See *supra* subsection II.B.2 for a discussion on public choice.

³⁴⁹ This is also related to "showcase projects." See *supra* text accompanying notes 182-185.

³⁵⁰ Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 495 (1976). The political sway of wealthy landowners may compel government officials to compensate them generously to avoid backlash. Poor landowners do not enjoy this power. See *supra* text accompanying notes 180-181. See also Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1640-41 (2006) citing Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Sting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001 (1993).

While citizens traditionally resort to the courts when the political process fails them, a judicial response embodying less than meaningful scrutinizing of government actions is apt to produce scant redress.

6. The Dormant Commerce Clause

It is possible that governmental efforts at bolstering in-state wealth through land-use and economic incentives may implicate Constitutional concerns beyond uncompensated takings, in particular, the Interstate Commerce Clause.³⁵² The Supreme Court has declared that the “very purpose of the Commerce Clause was to create an area of free trade among the several States.”³⁵³ Thus, state action that discriminates against out of state commerce is unconstitutional, “unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”³⁵⁴ Subsidies for in-state companies have the same economic effect on free trade as discrimination against out-of-state companies.³⁵⁵ Nevertheless, the Court has stated that “[d]irect subsidization of domestic industry does not ordinarily run afoul of this prohibition.”³⁵⁶ In the seminal case of *West Lynn Creamery, Inc. v. Healy*,³⁵⁷ however, the Court left the question for future discussion by declaring: “We have never squarely confronted the constitutionality of subsidies, and we need not do so now.”³⁵⁸

³⁵¹ See Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 43 REAL PROPERTY, PROBATE AND TRUST J. (forthcoming 2008).

³⁵² U.S. CONST., Art. I § 8. “The Congress shall have Power . . . To regulate Commerce . . . among the several States”

³⁵³ *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *McLean v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

³⁵⁴ *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988).

³⁵⁵ See, e.g., Dan T. Coenen, *supra* note 114 at 986 (noting that “[b]ecause such bounties typically are made available only to in-state operations, they appear on their face to abridge the ‘prohibition against discriminatory treatment of interstate commerce.’” (quoting *Boston Stock Exch.*, 429 U.S. at 329)).

³⁵⁶ *New Energy Co.*, 486 U.S. at 278.

³⁵⁷ 512 U.S. 186 (1994).

³⁵⁸ *Id.* at 199 n.15.

State action to prohibit certain types of businesses usually withstands Commerce Clause scrutiny because of the historical importance of states' land use regulation.³⁵⁹ Currently, the greater constitutional concern is with the states' power to retain or entice capital.³⁶⁰ From the outset, it seems that the competition and rent-seeking behavior present when governments take a leading role in economic development are within the realm of impediments to free trade that the Commerce Clause intended to curb.³⁶¹

In *Kelo*, for example, Michigan and Connecticut were in competition for Pfizer's tax dollars, which resulted in Connecticut taxpayers and New London condemnees footing the bill for Pfizer's relocation.³⁶² It might have been in the national interest for Pfizer to make its business decision based on optimal private market resource allocations rather than on state bribes and promises of future revitalization. However, a national view would also consider the negative impact on free trade that such behavior might engender if practiced on a wide-scale basis.

It is unclear how the Court would incorporate the foregoing concerns into its existing Commerce Clause doctrine.³⁶³ In the recent case of *Daimler-Chrysler Corp. v. Cu-*

³⁵⁹ Justin Shoemaker, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891 (1999) (concluding that Vermont's denial of a Wal-Mart in the quiet town of St. Albans would withstand scrutiny under the dormant Commerce Clause because 1) their hostility toward the store does not discriminate between in-state and out-of-state interests, and 2) even if found discriminatory, the town's interest in protecting the tax base and avoiding the negative effects of a big-box store outweigh any burden on interstate commerce). See also Schragger, *supra* note 23, at 29 ("local land use regulations have elided dormant commerce clause scrutiny despite their often protectionist purpose and effects").

³⁶⁰ See Schragger, *supra* note 23, at *31 ("In fact, the current concern in the literature is not that states and cities will exclude out-of-state capital but that they will be too eager to seek it. One of the most controversial and unsettled aspects of the inter-state common market is the extent to which states and localities can provide economic development incentives to attract or, more pointedly, to keep capital in-state.").

³⁶¹ See Coenen, *supra* note 114.

³⁶² See *supra* Part I.A.

³⁶³ *But see id.* at 969 (proposing that courts may distinguish "between permissible and impermissible subsidies by focusing on ... (1) whether, consistent with conventional property-based notions of fairness, the subsidy merely permits state residents to reap where they have sown; (2) whether invalidation of the subsidy frustrates the state's federalism-based interest in experimenting with responses to distinctive local needs; (3) whether the same political dynamics that unduly encourage adoption and retention of discriminatory tax relief (i.e., reduced visibility, heightened

*no*³⁶⁴ it declined such an opportunity to do so. *Cuno* involved a taxpayers' challenge to a proposed state tax incentive package that would keep Chrysler's Jeep plant in Toledo, Ohio rather than move to Michigan. The plaintiffs thought this package improvident in that it "diminishes the total funds available for lawful uses and imposes disproportionate burdens on them."³⁶⁵ The Sixth Circuit considered the constitutionality of the various incentives and upheld a property tax exemption, while invalidating a credit for the state franchise tax.³⁶⁶ The state granted the credit to offset the franchise tax when a business made capital investments within the state. The Sixth Circuit said this gave businesses that invested in-state, rather than out-of-state; an impermissible advantage, and thus violated the Interstate Commerce Clause.³⁶⁷ Although this holding was vacated by the Supreme Court for lack of standing,³⁶⁸ it signals that federal courts may be amenable to invalidating business subsidies under the Commerce Clause.³⁶⁹

The Supreme Court dismissed the *Cuno* suit for the taxpayers' lack of standing.³⁷⁰ Interestingly, Michigan taxpayers previously had been plaintiffs in the suit, arguing that the Ohio incentives robbed their state of the Jeep plant. The Court considered these ar-

risks of entrenchment, lowered administrative costs, and the like) mark the challenged subsidy scheme; and (4) whether the subsidy is part of a program that resembles in form a protective tariff or kindred types of unconstitutional discriminatory taxation").

³⁶⁴ 547 U.S. 332 (2006).

³⁶⁵ *Id.* at 343 (internal quotations omitted). It may be that Toledo would enjoy an economic resurrection, but this is more likely to result from entrepreneurial innovations that might give new life to the city's declining glass industry than from government revitalization. See Jim Carlton, *Toledo Finds the Energy to Reinvent Itself*, WALL. ST. J., December 18, 2007 B1 (describing nascent coat glass with thin layers of chemicals to create ecofriendly "solar cells").

³⁶⁶ *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738 (2004).

³⁶⁷ *Id.* at 745-46.

³⁶⁸ *Cuno*, 547 U.S. at 354.

³⁶⁹ See Schragger, *supra* note 23, at 32 ("Though limited to the ITC, the Sixth Circuit's decision seemed to call into question numerous tax incentives that states and localities had presumed to be constitutional, but which some commentators had argued were vulnerable if the Court took its own doctrine seriously.").

³⁷⁰ *Cuno*, 547 U.S. at 344 (internal citations omitted) (holding that their injury was not "'concrete and particularized', but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'").

guments abandoned though, because they had not been alleged as basis for standing.³⁷¹ Certainly, the Michigan residents' injury was speculative, but possibly not under the same rubric as the Ohio taxpayers' injury.

At present, the Court has not indicated how one might achieve standing in a constitutional challenge to aggressive business incentives. As *Cuno* illustrated, injuries resulting from such government spending are speculative and tenuous. Furthermore, courts are hesitant to second-guess the prudence of a legislature's spending policy.

E. Promising Solutions: A Focus on Fairness

In addition to the losses of dignitary interests and subjective value that accompany condemnation for retransfer, there also exists a large discrepancy between the gains achieved through revitalization-based condemnation and the typically inadequate compensation provided to the condemnees. At the *Kelo* oral argument, Justice Souter opined that "a lot of" the Justices were bothered by the fact that condemnees were not only deprived of any post-condemnation gain, but were rarely made whole.³⁷² Similarly, Justice Breyer expressed concern that homeowners would be worse off so that redevelopers could profit.³⁷³

The following proposals suggest ways to accomplish two primary goals. First, that a continuing interest in the land to be redeveloped should provide condemnees with compensation beyond the pre-redevelopment fair market value of their property. This allows them to capture some of their subjective value in their land, as well as its inchoate assembly value.³⁷⁴ Second, forcing a redeveloper to share the gains of a project reduces rewards gained by secondary rent-seeking, thus minimizing the deleterious effects of

³⁷¹ *Cuno*, 547 U.S. at 337, n.2.

³⁷² Oral Arguments in *Kelo. v. City of New London*, 545 U.S. 469 (2005), Feb. 22, 2005, Justice Souter, at 49:13-16 (question by Justice Souter), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf.

³⁷³ *Id.* (question by Justice Breyer, at 50:9-13 (noting that homeowners would "want to be really not made a lot worse off, at least not made a lot worse off just so some other people can get a lot more money. Now what, what is the right -- is there no constitutional protection?").

³⁷⁴ *See supra* Parts II.B.1 and II.B.4

such a process.³⁷⁵ Similarly, if expected rents were simply distributed to condemnees at the outset of a project, rather than on an ongoing basis, officials would be less likely to exaggerate the expected monetary benefits.³⁷⁶

1. Solving the Scale Problem Through Fractional Development Rights

As noted earlier,³⁷⁷ a substantial impetus for private-to-private transfers is the assumption that sub-optimal parcel size hinders economic development. Thus, government condemns many small parcels, assembles them into one super-parcel, and transfers this to a redeveloper. However, it does not necessarily follow that assembly of small parcels should result in the deprivation of their former holders' ownership interests. An alternative approach is to transform separate interests in the small parcels into undivided interests in the super-parcel. An example of how this device could work involves Marin County, California, where officials sought limited development in the Nicasio Valley. This was accomplished through a "Transfer of Development Rights" ordinance in 1981.³⁷⁸ It provided owners of all parcels with transferable development rights (TDRs) that could be accumulated for use on the few parcels on which actual development would take place. Thus, the valley was treated as "one complete land forum, one large property to be sensitively planned."³⁷⁹ The TDRs could be sold to a landowner to allow development beyond the density restriction of one residence per sixty acres.³⁸⁰ The Nicasio Valley TDR amendment gave all landowners the possibility to reap a monetary benefit from future rezonings and density alterations that intruded on "the open spacious feeling of

³⁷⁵ See *supra* Part II.B.5.

³⁷⁶ See Clayton P. Gillette, *Kelo And The Local Political Process*, 34 HOFSTRA L. REV. 13, 21-22 (2005).

³⁷⁷ See *supra* Part II.C.3.

³⁷⁸ *Barancik v. County of Marin*, 872 F.2d 834, 835 (9th Cir. 1988) (upholding Marin County's TDR scheme and subsequent denial of a rezoning application by a landowner with insufficient TDRs).

³⁷⁹ *Barancik*, 872 F.2d at 835.

³⁸⁰ *Id.*

Western Marin.”³⁸¹ Through recognition of fractional development rights, value inchoate in the interests of existing landowners would be recognized, as opposed to the value being converted into regulatory property that would be transferred by government to others.³⁸²

2. Facilitating Owner Participation in Post-Condensation Redevelopment

Using an approach similar to that in Nicasio Valley, condemnees could be awarded a stake in projects that seek to use, and maximize the value of, their land. California has enacted a statute that requires redevelopment agencies to allow condemnees an opportunity to participate in the redevelopment of their parcels.³⁸³ Unfortunately, enforcing rights under the statute has proved difficult, since these owners are expected to submit detailed redevelopment plans within very short time frames.³⁸⁴ An effective approach to involving condemnees in redevelopment project would likely require provision of more definitive rights and administrative feasibility.

3. Localizing Neighborhood Redevelopment Control

Another approach involves the transfer of planning and redevelopment authority to neighborhood supermajorities. Professor Robert H. Nelson, whose earlier work emphasized that zoning was better conceptualized as a neighborhood property right than as a municipal regulation,³⁸⁵ wrote that supermajorities in neighborhoods should have a statu-

³⁸¹ *Id.*

³⁸² *See supra* Part I.E.

³⁸³ CAL. HEALTH & SAFETY CODE § 33339 (West 2007) (requiring that redevelopment agency plans provide for owner participation but not rely on that participation, adopt and publish owner participation rules, give preference to business owners to reenter that same redevelopment area, possess alternative plans in the case that the owners do not participate, and act in good faith to allow owner participation).

³⁸⁴ *See, e.g.,* In re Bunker Hill Urban Renewal Project 1B of Cmty. Redevelopment Agency of Los Angeles, 389 P.2d 538 (Cal. 1964).

³⁸⁵ *See* ROBERT NELSON, ZONING AND PROPERTY RIGHTS 22-51 (1977); Robert Nelson, *A Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979); Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in RESIDENTIAL COMMUNITY ASSOCIATIONS, PRI-

tory right to regulate, assemble within one ownership, and even sell all neighborhood lands.³⁸⁶ Most recently, Professors Amnon Lehavi and Amir Licht have argued that landowners threatened by eminent domain for private economic revitalization should be offered the alternatives of constitutional “just compensation,” i.e., the fair market value of their parcels without regard to the proposed development, or shares in the “Special-Purpose Development Corporation” (SPDC) that the locality has designated to exercise its eminent domain powers with respect to a particular project.³⁸⁷

4. Making Blight Redevelopment Open and Transparent by Replacing Condemnation with Abatement and Foreclosure

Since condemnation for redevelopment often is triggered by the asserted presence of blight, it is useful to enunciate an alternative to blight condemnation. As I have outlined in greater detail elsewhere,³⁸⁸ rather than a municipality sweeping in and instantly expropriating property that is actually or ostensibly blighted, the process of alleviation of blight should be open to the market. First, the city could demand that an owner abate the blight. If the owner refuses, the city would be entitled to do itself and impose a betterment assessment on the enriched landowner. Then, the city could foreclose on any property with a delinquent betterment assessment pursuant to typical proceedings for any other unpaid tax or assessment. Foreclosure would allow any interested party to bid on the improved parcel.

Such an open blight remediation process would eliminate much of the politics surrounding blight-inspired condemnation. Knowing that any private party could also reap an economic benefit from a recovered parcel would eliminate governmental favoritism and opportunities to reap a windfall in appreciated property value. The relative attractiveness of “blight” as a justification for industrial policy would suffer, compelling cities to

VATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 45-51 (U.S. Advisory Comm’n on Intergovernmental Relations ed., 1989).

³⁸⁶ Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999)

³⁸⁷ Amnon Lehavi and Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1734-35 (2007).

be more honest about the true purpose of a condemnation and less likely to cite a vague notion of blight. Accordingly, condemnations for economic redevelopment would less often wear a blight façade and courts could develop a more comprehensive body of law on the matter.

Additionally, eliminating the windfalls available through post-condemnation transfer might force cities to abandon grandiose rehabilitation projects in favor of modest parcel-by-parcel improvement. Such bottom-up revitalization is reminiscent of the small-scale economic development celebrated by Jane Jacobs in her studies of urban growth.³⁸⁹

III. Conclusion

Governments' role in land use has continually grown over the last eighty years, but only recently has the focus shifted from minimizing negative externalities to maximizing positive externalities. This trend has instilled in public officials a sense of responsibility to entice large manufacturers, or big-box stores, who offer employment potential and appealing tax revenues. The cost of the hefty incentives sometimes used to lure these large corporations might be drawn from citizens' pockets with promises of economic success. This process of usurping market forces by snatching the reins of economic growth opens the door for corruption, favoritism, rent-seeking, displaced homeowners, and project failures. Ironically, condemnations carried out in the name of efficiency open the door for a host of alternative, potentially deeper inefficiencies. When municipalities engage neighboring towns in competition for business, the free trade nation envisioned by our founders is arguably compromised. Inherent problems in the political process, combined with judicial approaches inadequate at filtering out impermissible private-to-private wealth transfers, provide little control over overly ambitious public officials. Accordingly, the rule of law suffers along with the economic benefits that stem from a reliable legal framework.

³⁸⁸ See Eagle, *supra* note 242.

³⁸⁹ See JACOBS, *supra* note 223.