

University of Michigan Journal of Law Reform

Volume 42

2009

Public Use, Public Choice, and the Urban Growth Machine: Competing Political Economies of Takings Law

Daniel A. Lyons
Munger, Tolles & Olson, LLP

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Daniel A. Lyons, *Public Use, Public Choice, and the Urban Growth Machine: Competing Political Economies of Takings Law*, 42 U. MICH. J. L. REFORM 265 (2009).
Available at: <https://repository.law.umich.edu/mjlr/vol42/iss2/2>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Daniel A. Lyons*

The Kelo decision has unleashed a tidal wave of legislative reforms ostensibly seeking to control eminent domain abuse. But as a policy matter, it is impossible to determine what limits should be placed upon local government without understanding how cities grow and develop, and how local governments make decisions to shape the communities over which they preside. This Article examines takings through two very different models of urban political economy: public choice theory and the quasi-Marxist Urban Growth Machine model. These models approach takings from diametrically opposite perspectives, and offer differing perspectives at the margin regarding proper and improper condemnations. But surprisingly, both models stand united in opposition to economic development takings and both view skeptically the current wave of eminent domain reform. By discussing why each model comes to this conclusion, this Article sheds additional light upon the substantive limits that legislatures should place upon eminent domain authority and procedural reforms that would help assure proper exercises of that power within this circumscribed scope. The Article also recommends greater cooperation between legislatures and judiciaries to develop these broad standards and to assure that condemnation authorities adhere to them in individual cases.

INTRODUCTION

Every few years, a Supreme Court decision captures the public's attention in ways that legal scholars neither anticipate nor understand. *Kelo v. City of New London*¹ was such a case. *Kelo* involved a Connecticut town's plan to spur economic development by seizing several private homes through eminent domain and converting the neighborhood into a commercial center anchored by pharmaceutical giant Pfizer.² The homeowners challenged the city's action as inconsistent with the Takings Clause, which permits condemnations only for "public use."³ By a vote of 5–4 the Court turned away the homeowners' challenge, explaining that "[f]or more than a

* Associate, Munger, Tolles & Olson, LLP. JD *magna cum laude*, Harvard Law School, 2005; AB *magna cum laude*, Harvard College, 2000. Effective July 1, 2009, I will be an Assistant Professor at Boston College Law School. I wish to thank David Barron, Crystal Lyons, Grant Nelson, and Ilya Somin for their helpful comments and suggestions. Any errors, of course, are mine alone.

1. 545 U.S. 469 (2005).

2. *Id.* at 473–74.

3. *Id.* at 475.

century, our public use 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.”⁴

Kelo was initially greeted with a collective yawn by the legal academy, which breezily explained that the holding flowed inexorably from the Court’s earlier takings decisions.⁵ But the public outcry was immediate and intense. “Within days [of the decision] Internet bloggers, television commentators, and neighbors talking over backyard fences decided that *Kelo* was an outrage.”⁶ According to two national surveys conducted in fall 2005, between 81 percent and 95 percent of respondents disagreed or strongly disagreed with the decision.⁷ The House of Representatives denounced the decision by a vote of 365–33.⁸ Even Justice Stevens, *Kelo*’s author, distanced himself from the decision in a later speech, explaining that he thought the city’s decision was “unwise” and that he would not have supported it as a legislator.⁹

This harsh public response has prompted an equally unexpected legislative backlash to reform local condemnation authority. Since the *Kelo* decision, over forty states and the federal government have enacted some type of legislation to limit eminent domain’s reach.¹⁰ From Alabama to Wyoming, legislators have accepted the Supreme Court’s challenge and endeavored to determine, as a policy matter, which local initiatives should be considered permissible public uses within the constitutional framework that *Kelo* affirmed.

But answering this question is impossible without a nuanced understanding of how cities grow and develop, and how local governments make decisions to shape the communities over which they preside. It is somewhat of a constitutional misnomer to con-

4. *Id.* at 483.

5. See, e.g., Thomas W. Merrill, *Six Myths about Kelo*, PROB. & PROP., Jan.-Feb. 2006, at 19, 19–20 (2006).

6. *Id.*

7. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo* 93 MINN. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298 (citing American Farm Bureau Federation Survey, Oct. 29–Nov. 2, 2005, Zogby International, and The Saint Index Poll, Oct.–Nov. 2005, Center for Economic and Civic Opinion at University of Massachusetts/Lowell).

8. H.R. Res. 340, 109th Cong. (2005).

9. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1, cited in Merrill, *supra* note 5, at 19.

10. Somin, *supra* note 7, at 1; see also Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 712 (discussing state and federal reforms in 2005 and 2006). As Somin notes, The Castle Coalition maintains a regularly updated list of such initiatives. Castle Coal., Legislative Center, <http://www.castlecoalition.org/legislation> (last visited Oct. 23, 2008).

ceptualize a unitary "public" whose interests are furthered or damaged by an individual taking. In reality, as with all polities, cities are an amalgam of various constituencies that pursue disparate, and often contradictory, goals regarding land use and community development. To determine how local government *should* deploy the condemnation power to benefit these constituencies, one must first appreciate how local government *presently* exercises this power: which initiatives government frequently supports through eminent domain, and who benefits—and who suffers—from these decisions.

This Article addresses that issue by analyzing takings law through the lenses of two very different models of urban political economy. Public choice, or interest group, theory treats legislation as a good that is bought and sold like any other. Public choice theory criticizes condemnation as a license for politically-connected interests to acquire property through legislative fiat rather than voluntary purchase, which in the process distorts market processes that would otherwise help land flow to its most efficient use. By comparison, the Urban Growth Machine model espoused by John Logan and Harvey Molotch focuses upon the conflict in local politics between those forces interested in economic development and residents whose lives are disrupted by it.¹¹ Rooted in part in Marx's bifurcation of use and exchange value, the Urban Growth Machine model criticizes eminent domain as a powerful tool by which pro-development forces overcome local opposition to capital, decimating communities and disrupting residents' lives in pursuit of rising exchange values through ever-intensifying land uses.

The application of these lenses suggests that the current wave of post-*Kelo* reforms is misguided and unlikely to correct eminent domain abuse. Public choice theory and the Growth Machine model approach the issue from diametrically opposite perspectives, and offer differing perspectives at the margin regarding proper and improper condemnations. But both models stand united in opposition to economic development takings and both view skeptically the likelihood that state legislatures have corrected—or are capable of correcting—this abuse. By discussing why each model comes to this conclusion, this Article sheds additional light upon the *substantive* limits that legislatures should place upon eminent domain authority and *procedural* reforms that would help assure proper exercises of that power within this circumscribed scope of authority. The Article also recommends greater cooperation

11. JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 1-2, 17-29 (1987).

between legislatures and judiciaries to develop these broad standards and to assure that condemnation authorities adhere to them in individual cases.

I. THE CONSTITUTIONAL EXPANSION OF PUBLIC USE

Before delving into the political economies underlying current condemnation practice, it is helpful to summarize briefly the evolution of takings as a constitutional matter. The Fifth Amendment unites under one heading several fundamental rights that the government may not abridge without proper legal procedure, including the Parthian shot “nor shall private property be taken for public use without just compensation.” The effect of this clause as a substantive limit on the sovereign has evolved over time, as courts have struggled to define the government’s proper role in an increasingly industrial society.

A. Intellectual Origins of American Property Rights

Many commentators on both sides of the political spectrum trace the Takings Clause to the Lockean theory of property rights.¹² In his First and Second Treatises of Government, Locke argues that property is a natural and pre-political right originating in the labor theory of value. An individual owns his body, and by mixing his labor with property in the common, he acquires title to that property as an extension of himself.¹³ Because property rights originate in

12. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 19–20 (1985); DAVID ANDREW SCHULTZ, *PRIVATE PROPERTY AND PUBLIC USE IN AMERICAN CONSTITUTIONAL LAW* 2, 5 (1989) (“[I]n colonial America . . . Locke’s [political theory] was perhaps the most influential.”); Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 526–28 (2007) (“Locke’s stature as one of the major intellectual figures in American constitutional history is universally acknowledged. . . . [A]nd some would claim that America is a ‘Lockean nation.’”) (citations omitted); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 9 (2005) (“John Locke, of course, was a large influence on American political thought.”).

13. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 18–21 (Crawford B. Macpherson ed., Hackett Pub. Co. 1980) (1690) (“As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common.”). Locke argues that these natural rights flow from God, who gave the Earth to men in common with the commandment that it be improved through labor. *Id.* at 18–19. Needless to say, such an argument would hold little sway in today’s secular society. But as Richard Epstein explains, Locke’s reliance on God is not fatal to his scheme, for a rule of first possession accomplishes the same result. If each individual owns his own labor and those things to which his labor extends, then things in the

the state of nature, preexisting even the most primitive of societies, they grant their owner singular and absolute control over a thing that no one, including the state, could violate: "The supreme power cannot take from any man any part of his property without his own consent."¹⁴

For Locke, property is closely tied to personal individual liberty, the sphere wherein one has absolute reign.¹⁵ It is to protect this sphere that individuals leave the state of nature and form a government: "the preservation of property [is] the end of government, and that for which men enter into society."¹⁶ Therefore property forms a nearly indefeasible claim against society and government alike:

Men therefore in society having property, they have such a right to the goods, which by the law of the community are their's [sic], that no body hath a right to take their substance or any part of it from them, without their own consent Hence it is a mistake to think that the supreme or legislative power of any common-wealth, can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure.¹⁷

Informed by Locke's equation of property with liberty, the Takings Clause imposes two independent checks on the power of the government to seize private property. The first is that a taking can occur only pursuant to a valid "public use." The "public use" requirement is a substantive limit on government power, an outer

state of nature are owned not in common, but by no one. As a result, the first person to acquire a thing, mixing his labor with the object, acquires individual ownership. *See* EPSTEIN, *supra* note 12, at 11; Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221 (1979).

This rationale also sidesteps the problem of ousting common ownership, a problem Locke struggles mightily to overcome through his "as much and as good" limitations on property acquisition. *See* LOCKE, *supra*, at 21. The rule of first possession accords with the traditional common law view of ownership. *See, e.g.,* *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (famously holding that a hunter acquires no property right through the pursuit of a fox, and thus a rival hunter who kills the fox commits no trespass); EPSTEIN, *supra* note 12, at 11.

14. LOCKE, *supra* note 13, at 73; *see also* SCHULTZ, *supra* note 12, at 7.

15. *See* SCHULTZ, *supra* note 12, at 6 ("Locke's theory of property is political, with the language of property used to defend the political liberty of Englishmen against the Crown. It is this political linkage of property to personal power that was most influential on America.").

16. LOCKE, *supra* note 13, at 73.

17. *Id.*

boundary beyond which the sovereign cannot stray.¹⁸ The second is the requirement that “just compensation” be paid in the event of the taking. This prong works as a process-based check within the scope of enumerated power: representative government can take a parcel for public use only if it is willing to expend treasure to do so.¹⁹ The clause’s two-tiered approach thus gives the government the flexibility to exercise the sovereign’s power of eminent domain, but in a fashion that heeds Locke’s warning that:

[A] man’s property is not at all secure, tho’ there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power

18. Some commentators have challenged the notion that the “public use” prong of the Takings Clause imposes any substantive limit on government power. *See, e.g.,* SCHULTZ, *supra* note 12, at 104 (citing JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (1909)). Textually, the clause reads “nor shall private property be taken for public use, without just compensation.” It does not read “nor shall private property be taken *except* for public use.” Because this word is missing, the text of the Takings Clause does not preclude the government from taking property for private use; it merely requires that where a property is taken for public use, just compensation must be paid. *See* Merrill, *supra* note 5, at 21.

This reading, of course, is somewhat at odds with Supreme Court precedent which declared as early as 1796 that the government lacks the power to “take property from A[] and give[] it to B.” *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); *see infra* text accompanying notes 21–24. Nonetheless, in light of the structure of the Fifth Amendment it is possibly more correct to state that the prohibition on takings for private use flows not from the Takings Clause, but the Due Process Clause. Such an approach finds support in the Court’s regulatory takings jurisprudence:

As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. In other words, it 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.

Lingle v. Chevron U.S.A., 544 U.S. 528, 536–37 (2005) (internal quotation marks and citation omitted). This formulation also finds some support in the seminal physical takings case of *Berman v. Parker*, 348 U.S. 26, 33 (1954), which stated that “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.”

This distinction is not without importance: because economic regulation is subject only to rational basis review, a takings limitation anchored in the Due Process Clause affords private property much less constitutional protection than advocates of eminent domain reform are likely to prefer.

19. Epstein disputes this purpose for the “just compensation” limitation. For him, just compensation is the route by which a taking secures the consent of the governed: a rational person would consent to a transaction that leaves him objectively better off by compensating him for what he has lost. EPSTEIN, *supra* note 12, at 15–16. But as discussed *supra*, this conception is flawed: if just compensation truly left the landowner “objectively better off” then the landowner would have voluntarily consented to the transaction.

to take from any private man, what part he pleases of his property, and use and dispose of it as he thinks good.²⁰

B. Gradual Judicial Expansion of Public Use

The pre-Marshall Court case of *Calder v. Bull*²¹ contained a striking early endorsement of a narrow “public use” principle. In a sweeping opinion rooted in natural law, Justice Chase warned state and federal governments against violating the “fundamental principle[s]” that “are the foundation of the legislative power” and “decide what are the proper objects of it.”²² Among the examples of legislative action forbidden by the “general principles of law and reason” is “a law that takes property from A, and gives it to B,” a transgression that Justice Chase places on par with “punish[ing] a citizen . . . for an act, which, when done, was in violation of no existing law.”²³ “It is against all reason and justice, for a people to entrust a Legislature with such powers,” wrote Justice Chase, “and, therefore, it cannot be presumed that they have done it.”²⁴

Despite this warning (or perhaps because of it), the Supreme Court would not hear a case under the Takings Clause until 1875.²⁵ Eighteenth-century eminent domain law was hashed out in state courts, where debates raged as to meaning of state constitutional “public use” requirements. Colonial and early American exercises of the eminent domain power were limited primarily to the building of roads, schools, and other public buildings, public goods whose title remained for the most part in government’s hands.²⁶ Summarizing the state of the law in 1871, Thomas Cooley wrote that:

[T]he public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds

20. LOCKE, *supra* note 13, at 73–74.

21. 3 U.S. (3 Dall.) 386.

22. *Id.* at 388.

23. *Id.*

24. *Id.*

25. *Kohl v. United States*, 91 U.S. 367 (1875) (upholding federal government’s condemnation of land for a post office).

26. SCHULTZ, *supra* note 12, at 98.

of public benefit to spring from the more profitable use to which the latter may devote it.²⁷

As Cooley acknowledges, however, the pressures of the Industrial Revolution slowly tore the public use doctrine away from its public-ownership roots. The first visible beneficiaries were railroads, engines of commerce in both a figurative and literal sense that turned to government to solve holdout problems among existing landowners. In *Bloodgood v. Mohawk & Hudson Railroad*,²⁸ New York upheld a state statute granting railroads the power to take private land to build rail lines, as long as compensation was paid to the owner.²⁹ Although the law violated Justice Chase's maxim that legislatures cannot take property from A and give it to B, the takings were justified because "the conveyance of travelers, or the transportation of merchandise from one part of the State to another [are] public improvements and for the public benefit."³⁰

Grain milling was another quite visible industry that received eminent domain assistance. Operating an eighteenth-century mill generally required substantial water pressure, which owners obtained by damming a nearby water source. These dams, however, frequently flooded neighboring parcels. In a foreshadowing of the later use of eminent domain to overcome local resistance to development, many states passed general mill acts that permitted the flooding to occur (often but not always upon payment of just compensation), on the grounds that the mills thereby constructed were open to use by the public.³¹

The "use by the public" test proved a tempting lure to avoid the law's prohibition on taking property from A to give to B. But as a growing number of enterprises attempted to shoehorn their purposes into the test's confines, a brief backlash appeared in state courts. In Massachusetts, Chief Justice Lemuel Shaw reassessed the mill acts, holding they were not takings cases but a special species

27. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 585-86 (2d ed. 1871).

28. 18 Wend. 9 (N.Y. Sup. Ct. 1837).

29. *Id.* at 15-16

30. *Id.* at 13. (citing *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831)) It is worth noting that this expansion of the takings power was often controversial. For example, the Missouri Constitution, adopted in 1875, provides that railroads cannot acquire fee simple title to a parcel through eminent domain. The railroad could use condemnation to secure an *easement*, but "[t]he fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken." MO. CONST. art. I, § 26.

31. See SCHULTZ, *supra* note 12, at 101-02.

of riparian law to which the public use and just compensation requirements did not apply, and as a result did not constitute precedent for a general expansion of the public use doctrine.³² Other courts grafted a “necessity” requirement to the “use by the public test” as a way of narrowing the availability of the eminent domain power.³³ But confusion over such idiosyncratic issues as who could access the property and which use restrictions owners could place on a facility created a checkerboard of inconsistent public use exceptions toward the end of the nineteenth century. By 1871, Cooley could write with assurance that the takings clause was not a general license to engage in economic planning, but just where the boundary lay between permissible and impermissible takings was unclear.³⁴

Early Supreme Court cases, focusing on whether the Fourteenth Amendment’s Due Process Clause prevented a state from taking from A and giving to B, displayed similarly mixed results. In the 1896 *Missouri Pacific Railway v. Nebraska* opinion,³⁵ the Court considered whether Nebraska could force a private railroad to enter a lease with local grain farmers to construct and operate a grain elevator on the railroad’s land. The farmers initially sought to negotiate with the railroad, but when the latter refused, the state ordered the railroad to comply by invoking its common carrier laws.³⁶ The Supreme Court invalidated the order, holding that “[t]he taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth . . . Amendment.”³⁷

But *Missouri Pacific Railway* was quickly displaced by an ever-expanding view of the state’s condemnation power that swept far past the contours of Cooley’s nineteenth-century treatise. Over the next three decades, the Supreme Court would approve an irrigation system for desert farmers,³⁸ waterways and aerial tramways for

32. *Id.* at 102; David Schultz, *What’s Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. ENVTL. L. & POL’Y 195, 202 (2006).

33. See Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 606–07 (1949).

34. See Donald J. Kochan, *“Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 67 (1998).

35. 164 U.S. 403 (1896).

36. *Id.* at 411–13.

37. *Id.* at 417. Notably, the Court decided the case as a matter of Due Process, not as a Taking. The Court noted that “[t]he order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain.” *Id.* at 416.

38. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896).

mining companies,³⁹ and hydroelectric power⁴⁰ as “public uses,” in the process explicitly rejecting the “use by the public” test that had framed the nineteenth-century condemnation power.⁴¹ The only taking struck down during this period as an invalid public use was one in which the government’s purpose was a naked land grab to sell the excess for profit.⁴² The thread uniting each case was a belief that economic expansion was in the public interest and could be aided by government coercion of those who would stand as barriers to progress.

C. The Present Doctrine

The modern takings doctrine originates in the 1954 *Berman v. Parker* decision.⁴³ At issue was the District of Columbia Redevelopment Act of 1945, which allowed for the condemnation of large tracts of Washington for the purpose of slum clearance.⁴⁴ Plaintiff department store owners, whose property was not a slum but was included in the tract to be taken, challenged the condemnation power largely because of the District’s ability to take more than it needed and to sell or lease the surplus to private companies.⁴⁵ Despite earlier case law suggesting that excess condemnation was not a valid public use,⁴⁶ the Court permitted the taking,⁴⁷ declaring that

39. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Clark v. Nash*, 198 U.S. 361, 368–70 (1905).

40. *Mt. Vernon-Woodbury Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916).

41. As noted above, the Court decided these cases under the Fourteenth Amendment’s Due Process Clause. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 270 (2007). But this technicality is largely a distinction without a difference with respect to the Court’s views on proper and improper public uses. The *Fallbrook* Court explained that while the Fifth Amendment did not apply to states and the Court lacked jurisdiction to consider whether the state court erred in its interpretation of state constitutional law:

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

Fallbrook, 164 U.S. at 158.

42. *Cincinnati v. Vester*, 281 U.S. 439 (1930).

43. 348 U.S. 26 (1954).

44. *Id.* at 28–30 (discussing D.C. CODE ANN. §§ 5-701 to -719 (1951)).

45. *Berman*, 348 U.S. at 29–31.

46. See *Vester*, 281 U.S. at 447.

47. *Berman*, 348 U.S. at 36.

“the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation,” and that “[t]his principle admits of no exception merely because the power of eminent domain is involved.”⁴⁸

Berman represents the eminent domain aspect of an amended constitutional structure that adapted seventeenth-century property law to fit an industrial age. Even at the height of *Lochner*-era judicial scrutiny of state economic regulation,⁴⁹ the *Euclid* Court permitted local governments to engage in extensive land use planning designed to guide and promote economic development while mitigating nuisances.⁵⁰ As Cass Sunstein notes, the demise of *Lochner* and ascension of the New Deal led to even greater judicial deference toward state action designed to benefit private parties, actions which in previous eras would have been condemned as impermissible.⁵¹ Throughout the late nineteenth and twentieth centuries, local government was increasingly seen as a partner in progress, with both the power and the duty to take an active role in economic development to better the lives of its citizenry.

Interested critics may use two distinct models to analyze this worldview, each aimed at a different component of the philosophy underlying the *Berman* regime. Public choice theory challenges the faith *Berman* places in the legislative process to determine which projects are socially beneficial; the Growth Machine model challenges *Berman*'s conclusion that economic development is a suitable public policy end. Each theory is critical of current eminent domain law, but in different and nuanced ways; it is to these critiques that this Article now turns.

48. *Id.* at 32.

49. See *Lochner v. New York*, 198 U.S. 45, 57 (1905) (finding that a “right to free contract” implicit in the due process clause precluded state legislation limiting the number of hours each week that a baker may work).

50. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390–97 (1926); John A. Saurenman, Keystone, Nollan and First English *Three Years Later: How Fare the States?*, 3 EMERGING ISSUES ST. CONST. L. 115, 132 (1990) (finding it “surprising that the *Lochner* Court gave its approval to zoning”).

51. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1724–25 (1984).

II. PUBLIC CHOICE AND PUBLIC USE

If you rob Peter to pay Paul, you've already got half the vote.

—Aegyptophilus⁵²

A. Theoretical Underpinnings

Interest group theory aims to demystify the aura surrounding the legislative process by rejecting the presumption that government endeavors to further the public interest.⁵³ Instead, each political actor is assumed to pursue self-interested ends: politicians trade political access for assistance with re-election, and special interest groups provide that assistance in exchange for legislation that maximizes their own well-being.⁵⁴ Interest group theory posits that “legislation is a good demanded and supplied as much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare.”⁵⁵ Or in the words of Gordon Tullock, “People are People . . . ‘Homo politicus and homo economicus are the same.’”⁵⁶

In many ways, interest group theory is only the modern incarnation of James Madison’s concern with faction. Madison, who would later write the Fifth Amendment’s Takings Clause, explained in *The Federalist No. 10* that factions were an inevitable part of the legislative process: “different classes of legislators [are] but advocates and parties to the causes which they determine,” and “[i]t is in vain to say that enlightened statesmen will be able to adjust those clashing interests and render them all subservient to the public good.”⁵⁷ When left unchecked, Madison wrote, “the public good is disregarded in the conflicts of rival parties, and . . . measures are too often decided, not according to the rules of justice . . . but by the superior force of an interested and overbearing [faction].”⁵⁸

52. Quoted in Kelley L. Ross, Rent Seeking, Public Choice, and the Prisoner’s Dilemma, <http://www.friesian.com/rent.htm> (last visited Oct. 23, 2008).

53. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35 (1991); Gordon Tullock, *The Theory of Public Choice*, in GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* 3, 3–6 (2002).

54. Elhauge, *supra* note 53, at 35.

55. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982), quoted in Kochan, *supra* note 34, at 79.

56. Tullock, *supra* note 53, at 3 (quoting William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 7, 9–10 (Fred S. McChesney & William F. Shughart II eds., 1995)).

57. *THE FEDERALIST* No. 10, at 44–45 (James Madison) (Penguin Classics ed., 1987).

58. *Id.* at 42.

The sine qua non of interest group theory is rent-seeking, the expenditure of resources by special interest groups to secure favorable government treatment. Rent-seeking is successful largely because of the phenomenon of concentrated benefits and dispersed costs. For any given piece of legislation, the benefits are concentrated in a few recipients who have a strong incentive to obtain or preserve their perks. By comparison, the costs are dispersed among the public at large. The individual bill in question costs the individual taxpayer a trivial amount, much less than the costs that would be incurred by fighting the legislation.⁵⁹ Therefore it is irrational for any individual taxpayer to combat rent-seeking through the political process.

In this fashion, public choice theorists describe how special interests "capture" the public lawmaking process for private gain. Because the interest group in question stands to gain a substantial benefit from favorable legislation, it has an incentive to lobby the appropriate public officials to secure that legislation through campaign contributions or other favors up to the point that the costs of lobbying exceed the benefit of the legislation.⁶⁰ The public officials comply because they benefit personally from the resources spent on lobbying, while the costs of the legislation are borne by the public as a whole rather than the policymakers themselves. And the taxpayers remain rationally ignorant of the transaction: in most cases, the cost of the legislation to the individual taxpayer is less than the alternative cost of researching the legislation and fighting it.⁶¹ In this fashion, each party, acting rationally, acquiesces in the creation of rent-seeking legislation without ever having to consider whether the public benefits from the transaction.

One may glean several additional insights from this model of legislative action. For example, the greater the taxpayer's information costs, the more likely he is to remain rationally ignorant of the legislation. Special interests and politicians therefore have incentives to structure legislation in ways that hide the true costs from the public, for example by negotiating in private or by offering a public rationale for the legislation that is difficult to validate.⁶² In addition, repeat players in the rent-seeking game enjoy

59. These costs include, inter alia, the information costs of investigating the costs of an issue and identifying those similarly situated, and the organizational costs of combining those affected into a coalition to fight the rent-seeking legislation. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229 (1986).

60. See Kochan, *supra* note 34, at 80.

61. See Macey, *supra* note 59, at 229.

62. See Kochan, *supra* note 34, at 80-82.

comparative advantages over newcomers: the repeat player's transaction costs of rent-seeking are lower because it has already learned from experience the efficient ways to lobby public officials and it enjoys a reputational advantage in that the public official knows the interest group is capable of delivering on its end of the rent-seeking bargain.⁶³

B. Interest Group Theory and Eminent Domain

At first glance, the "concentrated benefits, dispersed costs" public choice story seems ill-suited to describe eminent domain initiatives. When the government takes from A and gives to B, one's initial notion is that the situation is better described as one of "concentrated benefits, concentrated costs" because A loses his property and B gains it. Exploring the dynamics of takings further, however, two rejoinders help explain why the public choice model applies in this setting.

First, the payment of just compensation largely "decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation."⁶⁴ The compensation requirement essentially "buys off" the affected landowners from the general fisc, at least in part, which spreads much of the cost of the taking among a broad range of rationally ignorant taxpayers.⁶⁵ Whether the entity seeking title then receives the land free or for a small fee from the government, the result is a transfer that mimics the traditional rent-seeking subsidy story.⁶⁶ The benefits of the transaction are concentrated in the entity seeking the condemnation, while the costs are divided between the affected landowner and the general public.

63. See *id.* at 82.

64. *Id.* (citation omitted); see also Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289–91 (1992); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 968–71 (2005).

65. See Recent Cases, *Eminent Domain—Nongovernmental Takings—Michigan Supreme Court Holds that Government Cannot Take Land to Develop a Private Office Park—County of Wayne v. Hathcock*, 648 N.W.2d 765 (Mich. 2004), 118 HARV. L. REV. 1769, 1773 (2005) ("When the government takes private property and pays compensation for it, the entire tax-paying public bears the burden and has an incentive to monitor the use of that power. When property is transferred to a private party, however, the private recipient effectively pays compensation, and the general public has little financial incentive to scrutinize the taking.") (citations omitted); see also Levinson, *supra* note 64 (arguing that paying compensation from the public fisc may deter opposition to the taking by spreading the costs across a diffuse electorate rather than a single, motivated property owner).

66. See Kochan, *supra* note 34, at 83.

Of course, “just compensation” does not always completely offset the costs suffered by the landowner; if it did, landowners would never challenge takings. But the landowner who fights a taking despite the offer of just compensation typically faces substantial disadvantages in the market for political favors. The interest group seeking the condemnation is more likely than the landowner to be a repeat player in this market. While the landowner’s efforts to fight the taking could also be classified as rent-seeking, he is forced to do so and is more likely to be a one-shot participant in the market for political favors.⁶⁷ As a repeat player, the interest group benefits from lower transaction costs and reputational benefits over the landowner as discussed above.⁶⁸ Moreover, the landowner suffers from a collective action problem. Organizing opposition to a condemnation requires significant time and resources, but successful opposition benefits all affected landowners, not just those who invest in the struggle. As a result, affected landowners are tempted to free ride on the efforts of their neighbors, making it less likely that opposition will develop. Together, these advantages tilt the political field sharply in favor of the party seeking the taking.

C. Limitations of the Interest Group Model

As a positive theory, the interest group model is a powerful tool to analyze the inner workings of the political process, and provides key insights for individuals seeking to explain or navigate the political process. But, as Einer Elhauge argues, the model loses some force when deployed normatively: “conclusions that interest groups have ‘captured’ regulators or exercised ‘disproportionate’ influence depend implicitly on . . . baseline views of what degree of influence is appropriate for that group.”⁶⁹ It serves little purpose to condemn developers for “rent-seeking” when they pursue a taking; as noted above, property owners who lobby to defeat a proposed taking could be thought of as engaging in “rent-seeking” as well.⁷⁰ “The condemnation of the political process

67. See *id.* at 82.

68. See *id.* (“[T]he special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators.”); see also *supra* text accompanying notes 59–61.

69. Elhauge, *supra* note 53, at 48.

70. See Kochan, *supra* note 34, at 79–80 (“Though the theory speaks of legislation, it is legislation broadly understood, thereby including legislative acts, administrative agency actions, and executive actions. Indeed, the theory is also not limited to the affirmative act of

draws [its] persuasiveness," at least in part, "from the underlying normative theory" accompanying the description of interest group dynamics.⁷¹

In his article condemning "naked preferences," Cass Sunstein invokes what can be thought of as a weak interest group theory in support of civic republicanism.⁷² Sunstein argues that the Takings Clause and several other constitutional provisions are aimed at "a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."⁷³ A substantive prohibition on legislation reflecting naked preferences frees legislators from the control of faction and forces them instead to select values through measured, careful deliberation and debate.⁷⁴ In most areas of constitutional law, Sunstein explains, the prohibition on naked preferences requires the government to put forth a reason "other than raw political power to justify an exercise of authority."⁷⁵ This is a minimal requirement that the current *Berman* takings standard likely satisfies.

Most public choice proponents, however, take a much stronger tone. Public choice theory takes as its "normative baseline" a strong faith in the robustness of markets to produce socially efficient outcomes.⁷⁶ For many public choice theorists, the price mechanism is the optimal tool by which society uncovers the optimal use of a parcel. A buyer interested in a parcel will offer a price roughly equivalent to the benefit he expects to derive from the parcel. The owner will sell only if that offer exceeds the benefit he currently derives from his use of the land. In this fashion,

legislation. Interest groups may often bargain to block legislation or to receive regulatory forbearance.") (citations omitted).

71. Elhauge, *supra* note 53, at 49.

72. See Sunstein, *supra* note 51, at 1689.

73. *Id.*

74. *Id.* at 1691, 1698.

75. *Id.* at 1698. As a descriptive matter, Sunstein concedes that "this is a trivial constraint, for almost any decision can be justified by reference to a public value." *Id.* Nonetheless, he explains, the prohibition on naked preferences is an important reminder that constitutional law should focus on the substantive limits of government power, repudiating the pluralist notion that "the judicial role is only to police the processes of representation to ensure that all affected interest-groups may participate." *Id.* at 1692-93; see also KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 627 (14th ed. 2001) (contrasting Sunstein's naked preferences theory with the process-oriented view of equal protection espoused by John Hart Ely).

76. See, e.g., Tullock, *supra* note 53, at 8-16; Kochan, *supra* note 34, at 80 (describing the rent-seeking problem as one where "[s]pecial interests seek to use the government to obtain higher prices for goods or services than would otherwise be obtainable under competitive market conditions.").

land will naturally flow to the user who values it most and can extract the most value from the parcel.

The public choice theorist's critique of eminent domain, therefore, is that it allows parcels to change owners without this market check to assure the transaction is efficient. Provided markets are functioning normally, the use of eminent domain to transfer a parcel from A to B creates a deadweight loss to society by shifting a parcel to a less efficient use. The fact that the owner prefers to retain ownership rather than sell the parcel on the open market implies that the owner derives greater utility from ownership and use than competing potential owners would. This premium, the amount by which the current owner values the parcel greater than other potential buyers, is known as the consumer surplus. Eminent domain sacrifices that consumer surplus in the name of political expediency. This reallocation of property to an owner who values the property less than the previous owner produces a deadweight loss to society in the form of lost consumer surplus, as the parcel is put to a less efficient use.⁷⁷ In the process, resources are spent on promoting or opposing rent-seeking legislation, resources that could otherwise be diverted toward productive ventures.⁷⁸

With this normative baseline thus exposed, one recognizes two primary limitations upon the public choice model when applied to eminent domain law. First and foremost, public choice theory struggles to oppose takings conducted against the backdrop of a "market failure." But just what constitutes a market failure is not certain among public choice theorists. There seems to be clear consensus that government action is permissible to procure "public goods" such as roads whose non-excludability and limited profit potential creates a substantial risk of underproduction if left to market forces alone.⁷⁹ But it is unclear whether, for example, holdouts, nuisances, and other market failures are strong enough to override the normative baseline in favor of market forces and justify government intervention (including, where necessary, takings).⁸⁰ In other words, the range of categories condemned as

77. Cf. Tullock, *supra* note 53, at 43–51.

78. See *id.*

79. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 325–33 (1989).

80. Kochan, for example, admits that with regard to holdouts and similar market failures, "[s]ome exercises of the condemnation power, for example, may in fact be in the best interest of overall utility in society even when they transfer property to private entities." Kochan, *supra* note 34, at 87. Similarly, Daniel Kelly admits that the curing of nuisances through blight condemnations "is unlikely to cause socially undesirable transactions." Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases*

inefficient “rent-seeking” under public choice theory varies depending upon the range of circumstances in which one is willing to recognize market failures and the need for intervention.

Second, public choice focuses primarily upon the current owner’s use of the parcel, without considering other potential stakeholders victimized by a taking. If the owner is not also a resident, the model fails to account for the utility the separate tenant also derives from the parcel: while the tenant’s rent reflects much of the utility the tenant derives from the parcel, the tenant also likely has some retained consumer surplus in the parcel’s pre-condemnation use.⁸¹ Public choice also does not give much consideration to the utility that nonresidents derive from the parcel’s pre-condemnation use. If the tenant is the local grocer, for example, neighborhood customers would also derive utility from the parcel’s current use. These non-owner stakeholders receive little, if any, “just compensation” for their lost consumer surplus and therefore are not “bought off” under the “concentrated benefits, dispersed costs” story spun above.⁸² They may still lack the political advantages of local developers, but the disincentives to organize may not be as significant as interest group theory makes them seem.

Despite these drawbacks, however, the public choice model provides a useful lens through which to examine the merits of particular categories of condemnation actions. The rent-seeking story is strongest when one can identify an actor that clearly benefits from a taking and therefore has an incentive to lobby for it, and when the government fails to put forth a plausible theory of market failure to justify the invocation of the political process to transfer title. In these instances, the use of eminent domain to supplant a functioning market raises significant concerns about

and Private Influence, 92 CORNELL L. REV. 1, 57 (2006). Kelly recommends the use of secret agents to purchase parcels on behalf of the developer as a solution to the holdout problem. *See id.* at 5–7, 18–24. While the secret agent solution works in some instances, this proposal suffers structural problems that preclude its adoption to many putative condemnations. Specifically, it may prove difficult to keep the identity of the actual buyer and its future intentions a secret, particularly if the developer is a high-profile entity. Moreover, the time lag necessary to negotiate individual transactions (staggered so as not to arouse suspicion) may prove prohibitive as well.

81. Admittedly, some states provide for tenants to share in certain condemnation awards. For example, in California commercial tenants may receive compensation if their leases have “bonus value,” meaning that they guarantee the tenant a fixed rent below fair market value. *See, e.g., City of S. San Francisco v. Mayer*, 79 Cal. Rptr. 2d 704, 706 & n.1 (Ct. App. 1998). Residential tenants rarely have bonus value because they are typically in month-to-month leases, although municipal codes may provide for some quantum of tenant relocation expenses upon condemnation. *See, e.g., L.A., CAL., MUN. CODE* § 151.09(G) (2005).

82. *See supra* text accompanying notes 64–67.

the propriety of the action and the assumption that the transaction in fact enhances social utility or otherwise fulfills a public use.

III. THE SWORD OF DAMOCLES: EMINENT DOMAIN AND THE URBAN GROWTH MACHINE

*Cities . . . do not compete to please people; they compete to please capital—and the two activities are fundamentally different.*⁸³

A. The Urban Growth Machine

John Logan and Harvey Molotch's 1987 work *Urban Fortunes* offers a different perspective on local government. It describes local politics not as shaped by a competition among various interest groups for influence, but instead as dominated by the "Growth Machine," a powerful network of local elites dedicated to economic development.⁸⁴ The Growth Machine coalition, which includes a broad array of city elites ranging from local landowners and capitalists to labor leaders, newspaper editors, utilities, universities, museums, and politicians, work to build community support behind controversial development measures and stifle opposition from affected residents.⁸⁵

The Growth Machine thesis rose in opposition to two prominent public choice-influenced theories of local government. In *A Pure Theory of Local Expenditures*, Charles Tiebout envisions towns competing against one another in a market for taxpaying residents.⁸⁶ Each town offers a bundle of goods and services packaged to attract a certain type of resident, and residents in turn choose the bundle that most fits their preferences.⁸⁷ Under Tiebout's model, local government makes policy choices by adapting to the migration of residents away from towns with suboptimal bundles of goods and toward those with more attractive offerings.⁸⁸

83. See LOGAN & MOLOTCH, *supra* note 11, at 42.

84. *Id.* at 17–49. *Urban Fortunes* stems from an earlier Molotch article that outlined the book's central thesis. See Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

85. LOGAN & MOLOTCH, *supra* note 11, at 62–85.

86. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–18 (1956).

87. *Id.*

88. *Id.*

Paul Peterson's *City Limits* builds on Tiebout's competition model but suggests that Tiebout misidentified the audience to which local government plays. Peterson recognizes that in reality, residents are much less mobile than Tiebout assumes. Furthermore, he concedes that a city's fiscal revenue is tied in large part to land use, either directly through property taxes or indirectly through income or labor taxes derived from firms engaged in productive land use.⁸⁹ For these reasons, Peterson explains, local politicians play to industry, not residents: "cities constantly seek to upgrade their economic standing" by increasing their "attractiveness as a locale for economic activity."⁹⁰ An advantageous economic position gives a city a competitive edge over competing locales, because the city becomes a net exporter of goods and an importer of labor and capital, tools that allow the local economy to flourish.⁹¹

From this economic analysis, Peterson concludes that "it is only a modest oversimplification to equate the interests of cities with the interests of their export industries. Whatever helps them prosper redounds to the benefit of the community as a whole—perhaps four and five times over."⁹² Local politicians naturally gravitate toward the interests of local businessmen and entrepreneurs, encouraging policies that make the city more attractive for growth and investment—and because the benefits of growth trickle down through the local economy, most city residents benefit from and support these goals.⁹³

Logan and Molotch agree that growth is the all-consuming goal of local government, but they question the source of this trend and criticize sharply Peterson's unbounded optimism in its effect.⁹⁴ The Growth Machine is rooted in what the authors describe as a natural tension between *exchange value*, the value derived by exchanging a parcel on the open market, and *use value*, the value derived from the use of the parcel. Economic development is thought to in-

89. Tiebout seemed to dance around the growth thesis. Although his essay focused on a city reaching *optimum* size, he admits that "[t]he case of the city that is too large and tries to get rid of residents is more difficult to imagine" and that "[n]o alderman in his right political mind would ever admit that the city is too big." *Id.* at 420.

90. PAUL E. PETERSON, *CITY LIMITS* 22 (1981).

91. *Id.* at 22–23. Peterson's claim is reflected in the quotation often attributed to CEO Charles Wilson, that "what's good for GM is good for America." For background on Mr. Wilson's quotation, see Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 601 n.191 (2007).

92. *Id.* at 23. Peterson distinguishes a city's export industry from goods and services produced for merely local consumption. These, he says, do not have the same multiplier effect: "Residents, in effect, are simply taking in one another's laundry. Unless productivity increases, there is no capacity for expansion." *Id.*

93. *See id.*

94. LOGAN & MOLOTCH, *supra* note 11, at 33–34.

crease the exchange values of land, by dedicating land to a more intensive use. As a result, the Growth Machine, whose proponents benefit from rising exchange values, pursues government policies that will attract capital to the city, intensify land uses, and increase exchange values.⁹⁵ But rising exchange values often hurt existing residents, whose use values are upset by increasing rents and high turnover in land use.⁹⁶ To prevent these residents from derailing its development goals, the Growth Machine erects barriers to opposition: "When residents' claims on behalf of use values threaten to undermine growth, government can turn back the challenge, either by invoking police power or by distracting dissidents with payoffs."⁹⁷

Logan and Molotch derive the distinction between use and exchange values from Karl Marx's formulation, but the authors consciously develop a theory that differs in key ways from a neo-Marxist framework. They explain that "the roll out toward capitalist accumulation" that characterizes typical Marxism "seemed brittle in its determinism" and left little room for "human agency and the kinds of empirical variations that people produce as they strive to make their lives and fortunes out of place."⁹⁸ As a result, the authors declined to shoehorn their sociology of place into a Marxist paradigm of capitalist oppression of the proletariat. Rather than highlight capitalists in general, the Growth Machine model focuses on the actions of a distinct group of "place entrepreneurs" and their allies who gain by intensifying land uses. And rather than pity the working class, the model focuses on the effects of growth upon "those who, of whatever class, ha[ve] land-related purposes of their own"—including existing capitalists within a community whose investments are uprooted by the desire to intensify land use.⁹⁹

At first glance, one might understand Logan and Molotch as invoking little more than a different shade of public choice theory. Their objection might be repackaged in public choice terms, to describe the Growth Machine as a special interest group that pursues rent-seeking legislation aimed at economic development

95. *Id.* at 32–34.

96. *See id.* at 34.

97. *Id.* at 35.

98. *Id.* at viii.

99. *Id.* The model's focus on the interests of specific interest-aligned groups of actors, rather than "capitalists" and "workers" generally, helps it avoid some of the flaws that plague Marxist analysis. For example, Logan and Molotch recognize that pro-growth policies may benefit some capitalists but hurt others—for example, those who derive value from current use or those in other communities who would have benefitted from additional investment but for the local Growth Machine's intervention.

through the political process rather than the market. Existing residents lack the political resources to combat the Growth Machine, leading to inefficient transfers that serve the selfish desires of growth proponents but are a net negative to the city as a whole.

But as one unpacks the Growth Machine hypothesis, it becomes clear that Logan and Molotch are asserting a very different argument. As noted above, the power of public choice theory to condemn rent-seeking lies in its faith in the market to distribute goods efficiently within society. Logan and Molotch forcefully reject this normative baseline, at least as applied to land. "Places have a certain preciousness for their users that is not part of the conventional concept of a commodity."¹⁰⁰ Place is indispensable: all human activity must happen somewhere, meaning that a consumer cannot substitute another product for it. One can, at most, settle for less place or a less desirable place.¹⁰¹ Furthermore, "[p]lace is . . . not a discreet element, like a toy or even food"; the use of a particular place creates and sustains access to other use values, such as access to friends, family, and work.¹⁰² These use values are unique to the user and are not readily transferable, meaning they are not perfectly captured in a parcel's exchange value.

The bifurcation of exchange and use value is crucial to the Growth Machine hypothesis. Although significant value is attached to a parcel's use, the land market responds only to exchange values. This distinction is the reason conventional economists often conclude that "the urban land market is a curious one."¹⁰³ Land is a fixed commodity, with no room for entrepreneurs to make more product.¹⁰⁴ As a result, price, or exchange value, is not always determined by a "balance between supply and demand [but instead] by competitive bidding on a fixed resource by investors who assume that the future price will be greater than the present one."¹⁰⁵ "This is the essence of speculation," in which investment levels are often set based upon expectations of how others will react in the future rather than an evaluation of a parcel's current use value.¹⁰⁶

In this critique of the land market, one begins to realize that Logan and Molotch are also employing a very different conception of "use value" than public choice theorists. For Tullock and other

100. *Id.* at 17 (emphasis omitted).

101. *See id.* at 18.

102. *Id.*

103. *Id.* at 23 (quoting DAVID E. DOWALL, *THE SUBURBAN SQUEEZE* 111 (1984)).

104. *Id.* at 23.

105. *Id.* at 26.

106. *Id.* at 26-27.

public choice theorists, a parcel's use value is best understood as the utility the current owner derives from his ownership and use of the land. The Growth Machine model contemplates a use value that is at once broader and narrower than this model. Logan and Molotch find use values not necessarily in a parcel's owner, but in its occupant—which may or may not be the same—and others who derive utility from the parcel's current use.¹⁰⁷ The tenant's use value turns on idiosyncratic locational benefits such as proximity to friends, work, and school. In this sense, an individual parcel's use value is inextricably linked to the continuity of its surrounding neighborhood: location "establishes a special collective interest among individuals" that gives residents a common stake in the area's future and creates a use value within a neighborhood that is greater than the sum of that neighborhood's parts.¹⁰⁸

And while Logan and Molotch contemplate a variety of different use values that stem from different users and uses of land, they quickly focus upon one use value in particular as worthy of greater protection: the residential use value.¹⁰⁹ Commercial interests derive their own use values from land, but several reasons suggest that they are less attached to place. Their primary interest is in the profitability of operations; the strength of a capitalist's tie to a certain place depends largely on how well that particular plot of land serves the profitability goal. When conditions change, capital is generally more mobile than residents and can exit the community more easily.¹¹⁰ Moreover, the use value that commercial interests derive is less fragile than those of residents: factories find it easier than residents to adapt to changes such as noise, odor, or ethnic succession.¹¹¹ Overall, the absence of personal attachment to place allows entrepreneurs to react to locational changes more quickly and more completely than residential users.¹¹² "The most vulnerable participants in place markets are those with the fewest alternatives."¹¹³

As a result, one may view the Growth Machine critique as a condemnation of the public choice-influenced competition that Peterson lauded. Growth is more than a goal of some discreet

107. Indeed, the landlord, whose only use value is the rent he can extract from the tenant, is the quintessential "place entrepreneur" whose support is crucial to the perpetuation of the Growth Machine. *See id.* at 30–31.

108. *Id.* at 19.

109. *See id.* at 20, 22–23.

110. *Id.* at 22.

111. *Id.*

112. *Id.* at 22–23.

113. *Id.* at 23.

special interest; it is a sociological phenomenon that unites the most powerful stakeholders in a city who would otherwise be separated by great gulfs on other policy issues.¹¹⁴ "Although they may differ on which particular strategy will best succeed, elites use their growth consensus to eliminate any alternative vision of the purpose of local government or the meaning of community."¹¹⁵

But local growth does not make jobs, Logan and Molotch argue; rather, it merely redistributes them from one city to another.¹¹⁶ As a result, the competition between cities that Peterson lauds, the "battle of the growth machines,"¹¹⁷ more closely approximates a race to the bottom in which residential use values are sacrificed in a bidding war for development projects. Residents can be priced out of the neighborhoods in which they have invested their lives, or see those neighborhoods razed for more intensive uses.¹¹⁸ Small businessmen can be bankrupted by more sophisticated competition.¹¹⁹ And when the market changes, companies can simply move to the next town, shifting the costs of growth to those immobile residents who have already sacrificed so much in use value to meet the needs of the city's Growth Machine.¹²⁰

The ill effects of the Growth Machine reach beyond those whose use values are actually disrupted. The existence of a pro-growth agenda also takes a psychological toll on those whose use values are perpetually threatened with disruption. Logan and Molotch concede that growth can enhance use values, such as when a new employer brings lucrative jobs closer to the neighborhood or when a new supermarket allows residents access to goods at a lower cost.¹²¹ But even when growth is good, "residents ordinarily have little *control* over such changes and this contributes to the general

114. *Id.* at 32 ("[V]irtually all place entrepreneurs and their growth machine associates, regardless of geographical or social location, easily agree on the issue of growth itself."); *see also id.* at 50–51.

115. *Id.* at 51.

116. *Id.* at 89.

117. *Id.* at 35.

118. *See id.* at 17–23.

119. *See id.* at 23.

120. *Id.*; *cf.* Local 1330, *United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264, 1280–82 (6th Cir. 1980) (declining to create a community property right to prevent defendant from closing a steel mill that employed much of the community and declining to force the company to rehabilitate those unemployed by the closing).

121. LOGAN & MOLOTCH, *supra* note 11, at 111 ("Sometimes, of course, these changes can represent a use value gain . . ."); *id.* at 85 ("The costs and benefits of growth depend on local circumstance.").

anxiety resulting from the fact that [the Growth Machine] may well serve to undermine neighborhood.”¹²²

B. Support for Protection of Use Values

Although Logan and Molotch derive their exchange/use value dichotomy from Marx,¹²³ the idea that property should be valued by its use also displays shades of the Lockean theory of property. As discussed earlier,¹²⁴ under a Lockean theory of property it is labor upon a parcel that creates a natural property right in the laborer.¹²⁵ If one correlates “labor” with “use,” then Locke lends moral force to the defender of use values: by using a parcel, Locke explains, one makes the land nothing less than an extension of self.¹²⁶ The correlation between Lockean “labor” and Marxian “use” becomes stronger when one considers Locke’s sufficiency proviso. For Locke, the natural right to property attaches only as long as the user leaves “enough, and as good” property in the common for others, so that one’s use of a particular parcel does not deprive others of the ability to do the same. In other words, a parcel’s use value is defined by and inextricably intertwined with the effect of that use upon the use values of others in the community.¹²⁷ And while use creates a *natural right*, Locke finds that exchange is merely a *social construct*: the reduction of labor to a medium of exchange is no more than a condition of entrance to society, as a way to defeat the prohibition on owning more than one can consume without spoilage.¹²⁸

One also sees shades of the importance of use value in certain Supreme Court opinions discussing property as a personal right.

122. *Id.* at 111. Moreover, even when the Growth Machine brings development that improves the city as a whole, it visits costs upon those residents whose use values were disrupted and does not guarantee that those affected residents benefit in the community’s gain. For example, a low-income resident whose housing unit is demolished for a new factory may be forced to leave the city to find a new home and would not be able to partake in the economic prosperity the factory promises.

123. *See, e.g., id.* at 1 & n.1 (“We derive the distinction between use and exchange values from Marx’s original formulation . . .”).

124. *See supra* text accompanying notes 94–95.

125. LOCKE, *supra* note 13, at 19.

126. *Id.* at 25.

127. *Id.* at 21.

128. *Id.* at 29–30. One should not overstate the parallels between Locke and Marx. Nonetheless, the labor theory of value provides a property right as a reward for intensifying land use, making a parcel productive, a goal that can be understood as aligning with the interests of a Growth Machine. *Id.* at 21–23. Moreover, Locke asserts that “the increase of lands, and the right employing of them, is the great art of government,” implying a positive role for government in intensifying land use. *Id.* at 26 (emphasis added).

Logan and Molotch for the most part dismiss American constitutional law as a framework for capitalist expansion: *Urban Fortunes* specifically criticizes the Takings Clause because the just compensation requirement sustains the "commodity status of land."¹²⁹ Similarly, substantive due process generally protects property only insofar as it guarantees a "reasonable return on investment."¹³⁰ But despite this critique, the Court has at times hinted at the importance of property rights as a way to safeguard use values, and of the need to preserve a sphere of autonomy for the way residents use land. In *Lynch v. Household Finance Corp.*,¹³¹ Justice Stewart wrote that:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.¹³²

In *Department of Agriculture v. Moreno*,¹³³ the Court hinted at a right to choose with whom one could live, by condemning a Food Stamp Act limitation that denied benefits to households of "non-related" individuals and was "specifically aimed at the 'hippies' and 'hippie communes.'"¹³⁴ This liberty interest was made more explicit in *Moore v. City of East Cleveland*,¹³⁵ which invalidated a housing ordinance limiting occupancy of a dwelling unit to nuclear families.¹³⁶

Each of these cases suggests a constitutionally-protected value not just in the possession and exchange of land, but in its use, particularly in residential uses that Logan and Molotch struggle to

129. LOGAN & MOLOTCH, *supra* note 11, at 27.

130. *Id.*; see also *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 121 (1976) ("Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a 'reasonable return' on the [operation] of the Terminal.").

131. 405 U.S. 538 (1972).

132. *Id.* at 552.

133. 413 U.S. 528 (1973).

134. *Id.* at 537.

135. 431 U.S. 494 (1977).

136. *Id.* at 496. Indeed, Justice Stevens' concurrence in the judgment tied this liberty interest directly back to the Takings Clause: "East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation." *Id.* at 521 (Stevens, J., concurring in the judgment).

protect. Margaret Radin argues that *Moore* demonstrates an inextricable link between property and personhood:¹³⁷ “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”¹³⁸ Radin writes that certain spaces like the home are reflections of and integral to one’s personhood; as a result, these areas should receive greater protection from city zoning and eminent domain powers, to create a zone of self-expression through the use of property to shape one’s daily life.¹³⁹

C. *The Growth Machine and Eminent Domain*

To the extent that *Urban Fortunes* criticizes the government’s role in the Growth Machine, it focuses its attention upon the way government shapes the public agenda to address issues important to maintaining an investment-friendly culture (such as controlling crime and advertising the city abroad), programs that co-opt or pacify growth opponents, and zoning as a way to attract investment.¹⁴⁰ Logan and Molotch do not discuss eminent domain in any significant detail, but their concern with defending residential use values from the Growth Machine provides substantial insight into modern takings law.

Although it is an imperfect tool, the exclusive right to alienation is an important stick in the bundle of individual property rights because of its ability to defend at least some use values enveloped within a parcel. When a proposed development threatens to disrupt a neighborhood’s use values, affected landowners can simply refuse to sell their parcels and preserve their neighborhood from greater intensification at the hands of the Growth Machine. This solution is imperfect because, as noted above, use values are in part collective and are therefore susceptible to a collective action problem: if a significant minority of landowners within the neighborhood agrees to sell, they can significantly diminish the community use value in the remaining parcels. But both formal and informal methods exist to alleviate this problem: formally, neighborhood landowners can agree to covenants binding their

137. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1012 n.199 (1982).

138. *Id.* at 957 (emphasis omitted).

139. *Id.* at 1005–06 & n.172.

140. See LOGAN & MOLOTCH, *supra* note 11, at 27.

individual properties in a way that protects existing uses.¹⁴¹ Informally, the social networks fostered within a neighborhood can prove strong enough to deter (or in extreme cases punish) defection. One of the foundational assumptions of *Urban Fortunes* is the idea that "people tend, in their market behavior as everywhere else, toward coalition and organization."¹⁴² The stronger the use values prevalent in a neighborhood, the stronger will be these informal organizations that defend those use values through individual refusals and collective pressure not to sell out.

A broad public use rule undermines the protections afforded by the exclusive right to alienation. The expansion of "public use" to encompass economic development gives the local government a right to alienate any parcel in the city to serve its ends. As a result, the Takings Clause empowers a city Growth Machine to place the entire municipality or any part of it at the disposal of those who would intensify land uses.¹⁴³ As the "battle of the Growth Machines" intensifies and developers pit cities against one another, local government faces ever greater pressure to dangle more parcels out as investment bait.¹⁴⁴ And naturally, the parcels that successfully lure investment are often those that are most attractive, meaning significant use values are destroyed by the taking.

Thus, although Logan and Molotch dedicate substantial space to criticizing municipal zoning power, one could argue that the condemnation power is more dangerous to residential use values. Zoning is a large, clumsy weapon: it can dictate a change in the desired use of large swaths of parcels such as neighborhoods, but there exists a time lag between zoning and eventual development to match a town plan, while the zoning itself could be subject to grandfathered prior uses that frustrate the Growth Machine's overall purpose.¹⁴⁵ By comparison, condemnation is a much more surgical instrument, allowing the government to carve out with la-

141. A prominent but notorious example of this method of preserving use values was the use of racially-restrictive covenants to preserve the ethnic homogeneity of many early twentieth-century neighborhoods. Although judicial enforcement of these covenants was held to be unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), their development provides both a legal model of how use values may be preserved and practical evidence that such an approach is feasible.

142. LOGAN & MOLOTCH, *supra* note 11, at 9.

143. *Cf. id.* at 17-23.

144. *See id.* at 35.

145. *Cf. Town of Belleville v. Parrillo's, Inc.*, 416 A.2d 388, 393 (N.J. 1980) (recognizing the right of a restaurant to operate in a residential zone because of its status as a prior non-conforming use, but abrogating that right when the restaurant attempted to change its character to a discotheque).

ser-like precision the most valuable parts of a neighborhood to offer as bait.

And although the law recognizes only an injury to the victimized landowner (and in some cases the tenant), the taking of a particular parcel can have a ripple effect on use values throughout the community. When the local grocery store is condemned, residents lose a convenient—or even essential—local source of the staples of everyday life. When that grocer is replaced with a factory that pours smoke into the air and emits loud noises at odd hours, the residents bear the cost of “progress” while local place entrepreneurs reap the benefits of additional tax revenue and exchange value increases across the city.

Nor should one overlook the larger psychological costs that such a rule creates. As noted above, Logan and Molotch cite with disdain the insecurity that residents suffer from the knowledge that no matter how comfortable they are in their daily rounds, their use values can be disrupted at any time by the Growth Machine’s scheming.¹⁴⁶ *Urban Fortunes* notes that renters suffer the most from this phenomenon because they lack any control over whether the parcel from which they derive use today will be available for the same use tomorrow. A broad public use policy expands this category of helpless tenants to include homeowners as well as renters. For all residential users, the shadow of a taking hangs like the Sword of Damocles over their daily lives, creating a greater sense of insecurity than even Logan and Molotch recognized in their original critique.¹⁴⁷

D. Limitations of the Growth Machine Model

Like public choice theory, the Growth Machine model is a powerful tool to describe the mechanics of the legislative process. But like the public choice model, it has limitations when deployed as a normative device. Specifically, the somewhat artificial divorce of

146. See *supra* text accompanying notes 121–122.

147. One takings victim expressed this point rather cogently in an interview with the newsmagazine *60 Minutes*. Jim Saleet and his wife had owned their Lakewood, Ohio home for 38 years when the city attempted to condemn their property to convey it to a condominium developer. Said Saleet, “I thought I bought this place. But I guess I just leased it, until the city wants it.” *Eminent Domain: Being Abused?* (CBS television broadcast Sept. 26, 2003), available at <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml>. It is, of course, important not to overstate the magnitude of this psychological effect: although any property user is potentially subject to ouster by eminent domain at all times, few are aware of the possibility until they are personally threatened with a taking—a phenomenon that Mr. Saleet’s testimony demonstrates.

exchange and use values and the romanticization of residential use values lead to criticism of many socially efficient transfers of property and can ignore the problems that some residential uses may cause.

While the Growth Machine thesis recognizes that place is indispensable and all human activity must happen somewhere, it seemingly does not offer a device by which one may determine *which* activities should happen in *which* places. More specifically, by disaggregating a parcel's use and exchange values, Logan and Molotch downplay the interaction between the two values in the creation of a good's price. This decision is conscious: in the Growth Machine view, place entrepreneurs seek to manipulate price by holding land for the purpose of increasing exchange values, rather than because they extract any underlying use value from the parcel.¹⁴⁸

One cannot doubt that speculators exist, particularly in the land market. But as Frederich Hayek noted long ago, prices also serve as a conduit by which widely dispersed information about the value of a commodity may be communicated.¹⁴⁹ In other words, price is the exchange value for which the owner is willing to sacrifice his use value in the commodity and also the exchange value that a potential buyer is willing to pay to acquire a use value in the commodity. In this way, price signals the relative importance of different potential buyers' use values, and facilitates the transfer of goods to its most valued (and therefore presumably its most socially beneficial) use.¹⁵⁰ Indeed, Logan and Molotch recognize that many such transfers are socially beneficial and enhance use values of neighboring parcels.¹⁵¹ Yet they eschew this mechanism for sorting among competing uses for scarce land, without offering another model to determine which takings, if any, are socially beneficial.

Relatedly, the theory's romanticization of the residential use value fails to account for the negative externalities of some residential uses. While Logan and Molotch recognize that the relationship between interlocking parcels can enhance use values, they pay little attention to the fact that this relationship can also subtract from use values. The "taverns" and "bookie joints" in poor neighborhoods may enhance residential use values just as the analogous restaurants do in more affluent neighborhoods by providing de-

148. See LOGAN & MOLOTCH, *supra* note 11, at 32–34.

149. See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945).

150. See *id.*

151. See LOGAN & MOLOTCH, *supra* note 11, at 111; *supra* text accompanying note 117.

manded services to local residents.¹⁵² But to the extent that they also spawn criminal activity, their existence may reduce the value a nearby resident derives from use of his parcel. By failing to account for these nuisances and other negative externalities, the Growth Machine theory again offers an imperfect measurement of the normative value of a particular taking.

Therefore, like public choice theory, the Growth Machine hypothesis is a strong descriptive model but has some drawbacks as a comprehensive normative theory. But despite this flaw, it too proves a useful lens through which to examine particular exercises of the condemnation power. When deployed in this capacity, the Growth Machine model highlights two particular points that are often overlooked in the eminent domain debate. First, every effort to improve a community by intensifying land use has victims. Even where the goal is urban renewal—ostensibly to improve the quality of life for the city's poor generally—the particular residents who currently live in the condemned tract suffer tremendous life disruptions that typically are not compensated by current condemnation jurisprudence. Second, communities are greater than the sums of their parts. A city's social value depends in part upon the lattice of interlocking use values between parcels, and this common value rarely enters the calculus of individual development decisions despite the ripple effect that such a decision can have upon the community as a whole.

IV. DEFINING THE PROBLEM: THREE CASE STUDIES

Both public choice theory and the Growth Machine hypothesis express concern with the broad power conveyed to local government by the current takings doctrine. But their differing approaches, one marked by strong faith in markets and the other by protectionist concerns for residents, lead to nuanced differences when each is applied to the facts of a particular case. This section applies these theoretical approaches to three (in)famous modern takings cases, *Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Poletown Neighborhood Council v. Detroit*, to sort out the doctrinal distinctions between them and assess the usefulness of each as a theoretical lens.

152. *Id.* at 113.

A. Blight Elimination and Slum Clearance: Berman v. Parker

As discussed briefly above, *Berman* involved a public use challenge to the District of Columbia Redevelopment Act of 1945.¹⁵³ Section 2 of the Act declared Congress's finding that:

[O]wing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.¹⁵⁴

Furthermore, Congress declared that "these ends cannot be attained 'by the ordinary operations of private enterprise alone without public participation'"; curing the blight required "comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs."¹⁵⁵

To solve this problem, the Act authorized the National Capital Planning Commission to develop a land use plan for the district and to use the condemnation power to engage in targeted redevelopment of specific areas.¹⁵⁶ In accordance with that plan, the Commission carved out a particularly blighted area of southwest Washington for condemnation, a largely residential area in which 64.3 percent of the dwellings were "beyond repair" and an additional 18.4 percent required "major repairs" to be inhabitable.¹⁵⁷ Under authority of the Act, the Commission initiated condemnation proceedings within this area.

The Commission's action was challenged by the owner of a department store within the area to be condemned.¹⁵⁸ The plaintiff seemed to concede the validity of a taking for the purpose of slum clearance, and challenged only the extension of the commission's

153. *Berman v. Parker*, 348 U.S. 26, 28 (1954); see also D.C. CODE §§ 5-701 to -709 (1951).

154. *Berman*, 348 U.S. at 28 (quoting D.C. CODE § 5-701).

155. *Id.* at 29 (quoting D.C. CODE § 5-701).

156. See *id.* at 29-30.

157. *Id.* at 30.

158. *Id.* at 31.

power to include his store, which was not a "slum."¹⁵⁹ In a unanimous opinion, the Supreme Court refused to engage in such hair-splitting, adopting instead a rule granting substantial deference to the legislature's determination of a "public use" and holding that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."¹⁶⁰ Because regulation of public safety fell within the traditional police power of the states, the legislature had enunciated a sufficient public purpose so as to satisfy the Fifth Amendment's public use requirement.¹⁶¹

1. The Public Choice View

For purposes of this Article, the doctrinally interesting portion of *Berman* is not the plaintiff's claim of excess condemnation, but whether eminent domain should be used for purposes of slum clearance and blight elimination. As noted above, the strength of public choice theory's normative claims as applied to eminent domain turn upon one's view of the strength of markets.¹⁶² One could argue that this problem is better entrusted to the market than government on one of two theories. First, one might assume that with sufficient time the market will devise a solution to the blight problem, and preemptive government action retards the process. Second, one might assume that slum housing is in fact the most efficient use for the area proposed for condemnation: the poor must live somewhere, and human ecology has forced them from more valuable parcels elsewhere to the southwestern quadrant of our nation's capital.¹⁶³ But both of these arguments are speculative and somewhat circular, in that they cite the result of market transactions as evidence of the infallibility of those transactions, without explaining why the market's result is superior to the planning commission's alternative vision.

More likely, public choice theory would have difficulty condemning slum clearance as inefficient rent-seeking because of the strong case that such action is necessary to correct a market failure.

159. *Id.* ("To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community.").

160. *Id.* at 32.

161. *Id.* at 32-33.

162. See *supra* text accompanying notes 72-74.

163. See LOGAN & MOLOTCH, *supra* note 11, at 4-8 (summarizing the tenets of the human ecology school).

In its statement of purpose, Congress specifically declared that these properties represented a threat to the public and that the market was incapable of providing an adequate private remedy.¹⁶⁴ The concern is rooted in nuisance: Slums are breeding grounds for disease and crime, which have ill effects on neighboring parcels. Private tort law provides an inadequate remedy because the property owners are often judgment-proof. Furthermore, like use values, the nuisances generated by each parcel feed on one another. A prospective buyer cannot simply purchase a lot and hope to restore it, because the causes of nuisance transcend individual parcels; the lot would be burdened by nuisances from neighboring properties that the buyer would be powerless to correct.

Because nuisances are externalities whose costs are inadequately internalized through the private tort system, the state may use its police power to minimize or prevent nuisance-causing behavior. As *Berman* suggests, the condemnation of blighted areas is nothing more than the exercise of that police power through the means of eminent domain. Because the Act corrects a market failure, and because the purpose of the legislation is not so much to secure an extra-market transfer of property as much as it is to protect markets from the deleterious effects of nuisances, public choice theorists would have trouble criticizing *Berman* as socially inefficient (however much they may condemn the broad legislative deference that has been the effect of *Berman* in practice).

Indeed, many who oppose broad eminent domain powers on the ground that they allow private entities to capture the regulatory process nonetheless concede the state's power to engage in blight-curing takings. In his famous *Poletown* dissent, Justice Ryan conceded that condemnations could occur where the land was selected "according to facts of independent public significance," citing slum clearance as one example.¹⁶⁵ The *Hathcock* court, in overturning *Poletown*, confirmed that "condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern."¹⁶⁶ And in the analogous regulatory takings context, Justice Scalia noted that a regulation depriving an owner of all economically viable use of a parcel does not effect a taking if the regulation inheres in "the re-

164. See *Berman v. Parker*, 348 U.S. 26, 28–29 (1951).

165. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478, 480 (Mich. 1981) (Ryan, J., dissenting) (emphasis omitted).

166. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 782–83 (Mich. 2004) (citation omitted).

strictions that background principles of the State's law of property and nuisance already place upon land ownership."¹⁶⁷

Those who have approached takings from a public choice perspective have struggled with the issue of blight. Ilya Somin, for example, has criticized the broad reach of the modern takings doctrine from an interest group perspective but concedes that "there may still be an economic rationale for using condemnation as a means of alleviating blight."¹⁶⁸ Somin's concerns about blight are largely prophylactic: he correctly notes that many legislatures have defined "blight" so broadly that the term has in practice become synonymous with economic development takings,¹⁶⁹ and that even condemnation of truly "blighted" neighborhoods generally benefited "politically powerful development interests" rather than the poor residents actually suffering from the blight¹⁷⁰—a critique that displays shades of Logan and Molotch's hypothesis. Ultimately, Somin concludes that "where condemnation may be justifiable in theory, it should still be viewed with great suspicion in practice" and that municipalities should consider other tools to cure blight before resorting to the condemnation power.¹⁷¹ Similarly, Daniel Kelly has found that applying economic theories to blight "seems to cut in two different directions."¹⁷² He ultimately concludes that "eminent domain is unlikely to cause socially undesirable transactions in the context of actual blight" but that private transactions may be preferable because of the possibility that a city may expand the definition of "blight" to encompass economic development takings.¹⁷³

2. The Growth Machine View

In contrast to public choice theory's equivocation and uneasy acceptance of blight-related takings, the Growth Machine hypothesis would condemn *Berman* in no uncertain terms. To Logan and Molotch, the District of Columbia Redevelopment Act is a typical

167. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); *see also id.* (no taking if law "do[es] no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.") (citation omitted).

168. Somin, *supra* note 41, at 270.

169. *See id.* at 265–66.

170. *See id.* at 269–70.

171. *Id.* at 270–71.

172. Kelly, *supra* note 80, at 57.

173. *Id.* at 57–58.

and deplorable Growth Machine act: it uproots and dismantles a neighborhood of politically-powerless residential users, destroying the use value they derive from their community and scattering them to other locations, on the grounds that their residential use detracts capital from investing in the city.

Urban Fortunes highlights the dilemma that urban poor face generally: "The crux of poor people's urban problem is that their routines—indeed their very being—are often damaging to exchange values."¹⁷⁴ Poor people pay less rent than wealthier residents, and their lack of disposable income makes them a disfavored consumer class to attract commercial activity.¹⁷⁵ As a result, local officials often take an active role in stamping out poor neighborhoods generally, "even though the pawnshops, taverns, bookie joints, and so forth are as important to those without money as the analogous boutiques, restaurants, and corporate office complexes are to the rich."¹⁷⁶ Logan and Molotch condemn in strong terms urban revival efforts that serve as "schemes to break . . . this chain of complementary relationships within poor areas" whether it be by "clos[ing] the tavern [and] arrest[ing] the prostitutes" or by "destroy[ing] a group of physical structures that serve a use for the useless."¹⁷⁷

Urban renewal of the sort reflected in *Berman* takes as its starting point the notion that there is no value inherent in poor communities that would justify preserving them. In fact, poor people living in multi-family apartments with few resources and few transportation options derive *greater* value from their location than do their wealthier counterparts, who live in single-family homes and commute to work or the market. The "daily round" of poor residents is smaller, taking them only to establishments in the neighborhood rather than places throughout the city. And their lack of material resources leads them to lean on informal neighborhood networks for more of their daily needs, such as a ride to a more distant location or an emergency babysitter for the kids. Urban renewal and slum clearance casts these use values aside because they are not reflected in the exchange values of individual parcels within a neighborhood.

The *Berman* rule, which allows physical deprivation of property upon the payment of an exchange value that fails to encompass these use values (and indeed, usually delivering even *that* value to

174. LOGAN & MOLOTCH, *supra* note 11, at 112.

175. *Id.*

176. *Id.* at 113.

177. *Id.*

slumlords rather than residents), makes the threat of disruption a permanent and ongoing penalty in the lives of the poor. "Whether it comes to imagining a family, a job search, or starting a small business, confronting the reality of residential instability must have at least some detrimental effect on the way people think about their lives together and make plans."¹⁷⁸ The reality is that all poor people must live *somewhere*; slum clearance does not eliminate the poor, but scatters them. A legal rule allowing the poor to face periodic ejection and perpetual fear of uprooting only destabilizes the close-knit communities of those who rely most on such networks to meet the demands of everyday life.

B. Estate Breakups: Hawaii Housing Authority v. Midkiff

*Hawaii Housing Authority v. Midkiff*¹⁷⁹ involved a statute that sought to dismantle the rather curious structure of the Hawaii land market, a legacy of the state's not-too-distant history as a feudal kingdom. Before the statute had passed, 96 percent of the land in the state was held either by the government or by a handful of wealthy families who, for tax reasons, preferred to lease their lands to residents rather than sell it outright.¹⁸⁰ The Hawaii state legislature faulted this oligopolistic market structure for "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."¹⁸¹

As a result, the state passed a statute permitting tenants to apply to the Hawaii Housing Authority to condemn the land upon which they lived and transfer title from the landowner to the tenant. When a critical mass of tenants filed such applications, the HHA would purchase the lots from the landowner at a price determined either by negotiation between landlord and tenant or set by condemnation trial, and would then sell the land to the tenant-applicant who would acquire "full 'right, title, and interest in the land.'"¹⁸²

178. *Id.* at 114.

179. 467 U.S. 229 (1984).

180. *Id.* at 232-33; *Midkiff v. Tom*, 702 F.2d 788, 790 (9th Cir. 1983).

181. *Midkiff*, 467 U.S. at 232 (outlining legislative findings and objectives of Land Reform Act of 1967, HAW. REV. STAT. ch. 516 (1977)).

182. *Id.* at 234 (quoting HAW. REV. STAT. § 516-25 (1977 & Supp. 1983)).

1. The Public Choice View

It is possible to paint *Midkiff* in a light that would at least give public choice theorists some pause. In a sense, the statute can be considered a response to the failure of a land market to develop in the state of Hawaii. The market functions best when prices are determined by robust and repeated exchanges between many buyers and many sellers. The efficiency gains of a free market hinge upon the pricing mechanism to convey information about the value of different potential users' plans for a property. The effectiveness of that pricing mechanism is retarded when an oligopoly of buyers or sellers can distort property values and prevent parcels from settling naturally upon their highest and best use.

But lurking behind *Midkiff* is a strong notion that, unlike the nuisance-curing scheme underlying *Berman*, this statute more closely resembles (in the words of the Ninth Circuit) "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."¹⁸³ The transfer of the parcel from landowner to tenant "will result in no change in use of the property. The property itself is currently used for residential purposes. After condemnation it will be used for residential purposes."¹⁸⁴ The record reflects that the landlords regularly entered into leases with tenants,¹⁸⁵ which suggests that tenant turnover adequately reflected the demands of the residential housing market.

The scheme therefore is much closer to condemnable rent-seeking legislation that merely transfers title—and the commensurate rights of property ownership—from landlord to tenant without a recognizable gain to society.¹⁸⁶ If the tenant wants title to the parcel upon which he lives, and the benefit of projected price increases over time, public choice theorists would recommend the tenant negotiate a fair price with the landlord that reflects the values each expects to receive from possession of the property right in the parcel.

183. *Midkiff*, 702 F.2d at 798.

184. *See id.* at 796.

185. *Midkiff*, 467 U.S. at 233 ("Indeed, the landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands.").

186. *See* Kochan, *supra* note 34, at 74.

2. The Growth Machine View

By contrast, one expects that Logan and Molotch would champion a law making it easier for renters to acquire greater security in their current use values. More so than residential homeowners, renters have little control over the alienation and transformation of the places from which they derive use value. The Hawaii statute addressed this problem by granting the residents greater security over their parcels: the Ninth Circuit acknowledged plaintiffs' argument that a resident would "treat the property differently because he knows he can stay there as long as he chooses."¹⁸⁷ The shift in title removes the power of the landlord to eject the resident when he suspects he can extract a greater exchange value from capital. And as a result it alleviates the insecurity discussed above under which renters live their daily lives.

But this approval is not without a slight reservation: if the statute's purpose is to be credited, then the devolution of control to hundreds or thousands of individual residents increases the chance that some of them will sell out to interests seeking to intensify land uses. Giving residents title to land means they now make decisions about the parcel by balancing exchange and use values; it takes only a handful of homeowners to sacrifice the latter for the former before the character and stability of a neighborhood are irreparably harmed.¹⁸⁸ Logan and Molotch recognize this possibility, but note that its effects in practice are mild; "ordinarily, the exchange interests of [home]owners are not sufficiently significant to divide them from other residents."¹⁸⁹

C. Economic Development: Poletown Neighborhood Council v. Detroit

In many ways, the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. Detroit*¹⁹⁰ was a precursor to *Kelo*, and its facts are an integral component of many first-year property courses. Shortly after announcing that it would close two outdated

187. *Midkiff*, 702 F.2d at 796–97.

188. *See, e.g.*, LOGAN & MOLOTCH, *supra* note 11, at 115–16 (discussing the process of gentrification).

189. *Id.* at 20.

190. 304 N.W.2d 455 (Mich. 1981). "This is an extraordinary case. The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations." *Id.* at 464 (Ryan, J., dissenting).

Detroit factories and put 15,000 residents out of work,¹⁹¹ General Motors offered to build a new plant in the city, but only if the government could rapidly deliver the automaker 500 acres of "green field" within the city upon which to build.¹⁹² Detroit, facing an 18 percent unemployment rate,¹⁹³ had its "economic back to the wall" and had no choice but to comply.¹⁹⁴

Relying on a "quick take" law that, "[a]s written . . . made it nearly impossible for property owners to challenge the taking of their land,"¹⁹⁵ the city undertook "the most massive and rapid relocation of citizens for a private development project in U.S. history."¹⁹⁶ Detroit seized and demolished 1400 homes, 144 businesses, and 16 churches in Poletown, a close-knit neighborhood of politically-marginalized first- and second-generation Americans.¹⁹⁷ The affected property owners challenged the city's action as a taking for private rather than public use, in contravention of the Michigan state constitution.¹⁹⁸ But their pleas fell on deaf ears: the Michigan Supreme Court refused to question the city's determination that "programs to alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce are essential public purposes."¹⁹⁹ "[W]hen a legislature speaks," the Court wrote, "the public interest has been declared in terms 'well-nigh conclusive.'"²⁰⁰

1. The Public Choice View

Of the three cases analyzed in this Article, *Poletown* most closely resembles the core case that public choice theory condemns, rent-seeking by a concentrated special interest who gives a politician something of value in exchange for a parcel that it otherwise would have to buy on the open market. Unlike in *Berman* and arguably in *Midkiff*, there is little room for an argument that a market failure

191. See *id.* at 460 (Fitzgerald, J., dissenting); JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 32 (1989).

192. *Poletown*, 304 N.W.2d at 470 (Fitzgerald, J., dissenting).

193. *Id.* at 465 (Ryan, J., dissenting).

194. *Id.* at 467 (Ryan, J., dissenting).

195. WYLIE, *supra* note 191, at 55.

196. *Id.* at 52 (citation omitted).

197. *Id.*; *Poletown*, 304 N.W.2d at 470 (Ryan, J., dissenting). Poletown's ethnic flavor was strong enough that Pope John Paul II visited the neighborhood during a North American visit. See Gary S. Vasilash, *GM Detroit-Hamtramck: Slow Start but Gaining Speed*, AUTO. DESIGN & PROD., Nov. 2001, <http://www.autofieldguide.com/articles/110103.html>.

198. *Poletown*, 304 N.W.2d at 457.

199. *Id.* at 458.

200. *Id.* at 458-59 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

somehow requires government intervention in the transaction between General Motors and the residents of Poletown. At most, the city's condemnation power mitigates the transaction costs of negotiating individually with each individual Poletown landowner. But it does not eliminate those costs completely, for the city still must make offers, process paperwork to transfer title, and litigate in the event that individual owners challenge either the condemnation or the amount offered as "just compensation." Moreover, condemnation shifts many of these transaction costs from the future owner to the taxpayers. Condemnation also eliminates the possibility of a socially inefficient holdout, but as both public choice theorists and *Urban Fortunes* attest, at least some private market remedies also exist to prevent holdouts from deterring a project.²⁰¹ The notion that a vibrant community like Poletown constituted a "market failure" is less plausible here than in either of the other two cases.

In addition, it is easier here to identify a beneficiary openly seeking the "concentrated benefits" of special-interest legislation. Justice Ryan's dissent takes great pains to show, consistent with the rent-seeking hypothesis, "the control being exercised over the condemnation project by General Motors."²⁰² The automaker's initial offer to build within the city came with specific requirements as to the size and shape of the required parcel, as well as proximity to specified rail lines and highway routes, on a very abbreviated timetable. Once the Poletown site had been selected, GM sent the city eight pages of "site-specific criteria" ranging from demolition schedules to required onramp construction. Although it became a live political issue whether GM or Detroit had selected the Poletown site (and therefore whether GM should be allowed to acquire for \$8M a parcel that cost Detroit \$200M to condemn), this question was poorly-framed. By narrowing the rules of the game, GM had de facto decided for the city where the appropriate site would be.²⁰³

As Ilya Somin has discussed in greater detail, economic development takings such as *Poletown* are problematic because political safeguards are less likely to check governmental excesses.²⁰⁴ First,

201. See Kelly, *supra* note 80, at 5–7, 18–24 (discussing secret buying agents as a private market solution to the holdout problem); Kochan, *supra* note 34, at 88 (analogizing the tender offer in corporate law to the holdout problem); see also LOGAN & MOLOTCH, *supra* note 11, at 117 (describing a casino company's purchase of a neighborhood in Atlantic City by offering each landowner a fair price but conditioning sale upon the acceptance of these terms by every landowner within a specified time frame).

202. *Poletown*, 304 N.W.2d at 468 n.6 (Ryan, J., dissenting).

203. *Id.* at 467–68 (Ryan, J., dissenting); WYLIE, *supra* note 191, at 51.

204. See generally Somin, *supra* note 41.

the costs and benefits of the taking are difficult for the typical voter to gauge: unlike a bridge or a school, the benefit of “economic development” is “a generalized contribution to the local economy that the average citizen often will not notice, much less be able to measure.”²⁰⁵ While Detroit residents could plainly see the construction of the new Detroit-Hamtramck plant, they could not easily determine how much that plant was contributing to the local economy—or calculate whether that contribution was greater than the cost of buying off and evicting Poletown’s residents. Second, even if these benefits could be calculated, there is a time horizon problem associated with its assessment: although the condemnation of Poletown happened in 1981, the factory was not completed until 1985 and any economic benefit to the community was realized only years afterward, by which time those officials responsible for the condemnation may no longer have been in office.²⁰⁶ Because the average voter is rationally ignorant of the costs and benefits of economic development takings, and even perfect information would likely be realized too late to punish overreaching politicians, public choice theorists are unlikely to trust the political process to separate beneficial economic development through condemnation from naked rent-seeking.

In the end, macro-market dynamics demanded that General Motors build a factory somewhere in the United States. Absent Detroit’s (and other potential suitors’) ability to circumvent the market to deliver the automaker a significant plot of land for next to nothing, GM would have built where it was most efficient to do so. Eminent domain, coupled with other lures to attract capital to the city, distorted the market and allowed General Motors to use its political leverage to gouge Detroit for millions that many suggest have not and never will reap dividends.²⁰⁷ It is hardly surprising, as a result, that most public choice theorists cite *Poletown* as Exhibit A regarding the rent-seeking behavior induced by a broad definition of public use.²⁰⁸

205. *Id.* at 201–02.

206. *Id.* at 202–03.

207. *See, e.g.,* WYLIE, *supra* note 191.

208. *See, e.g.,* Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651 (2005) (celebrating the Michigan Supreme Court’s decision to overturn *Poletown* as “a major victory for property owners not only in that state, but, indirectly, throughout the United States”); Kochan, *supra* note 34, at 69–74.

2. The Growth Machine View

The Poletown experience is also a strong endorsement of both the descriptive story *Urban Fortunes* tells about the manipulation of place to serve exchange values, and of the normative claims it makes regarding the harms that the Growth Machine inflicts on local residents. The company successfully played growth machines one against another to secure significant kickbacks as a lure for investment. Detroit's local elites, divided on most other social issues, united over the goal of attracting investment to boost the city's sagging exchange values. And the residents of Poletown faced a significant disruption in their daily lives as a result of the city's support for growth as an all-consuming goal.

As Peterson predicts and Logan and Molotch lament, GM extracted significant concessions from Detroit by threatening to build elsewhere if its meticulous requirements were not met. In addition to receiving the land for a song, General Motors received significant tax abatements for a decade or more following the plant's completion. When challenged to justify these subsidies, GM repeatedly responded with the threat that it "was a business, not a charity; if its plans couldn't be accommodated, it would have to go somewhere else."²⁰⁹ Across town, Chrysler chief Lee Iacocca was unsurprised by GM's tactics, which he discussed as fairly typical in the auto industry:

Ford, when I was there, General Motors, Chrysler, all over the world, we would pit Ohio versus Michigan. We'd pit Canada versus the U.S. We'd get outright grants and subsidies in Spain, in Mexico, in Brazil—all kinds of grants. With my former employer (Ford), one of the last things I did was, on the threat of losing 2,000 jobs in Windsor, I got a \$73 million grant outright to convert an engine plant . . . I have played [cities against one another] so long I'm tired of it.²¹⁰

But despite the general sentiment that General Motors was exploiting its position of advantage to extract these concessions, there was a broad base of public support for the condemnation throughout Detroit.²¹¹ Businessmen and labor leaders, predisposed to oppose one another, united to sing the praises of the condemnation

209. WYLIE, *supra* note 191, at 53.

210. *Id.* at 36 (quoting Detroiters for a Rational Economy, *Chrysler, the People, and the City* (1980)).

211. See *Poletown*, 304 N.W.2d 455, 471 (Mich. 1981) (Ryan, J., dissenting) (describing "a community-wide chorus of support for the project").

plan, and were joined by local radio personalities, television stations, and newspapers.²¹² As *Urban Fortunes* explains, each of these local elites stood to gain from the General Motors facility: new factories would employ local subcontractors, and provide jobs to boost the membership rolls of the local United Auto Workers chapter. These jobs in turn provide greater disposable income for formerly unemployed residents, which they spend in local business establishments that increase the exchange values of those parcels. As Detroit raises its profile as "open for business," the population slowly grows, increasing demand for other services such as hospitals, law offices, and newspapers. The Growth Machine therefore stood strongly united in support of the GM plan. The only significant opposition other than from Poletown's residents came from consumer activist and professional GM-heckler Ralph Nader, who entered late in the game with the goal of limiting corporate influence but whose assistance was at most a mixed blessing in a town dominated by automobile interests.²¹³

The destruction of use values through the eradication of Poletown is well-documented and widely acknowledged.²¹⁴ Use values were strong within the neighborhood: similar socioeconomic backgrounds and the neighborhood's century-long history as an ethnic enclave housing Detroit's Polish community gave the locality a shared sense of identity.²¹⁵ The strength of Poletown residents' attachment to place is reflected in the ferociousness with which residents defended their homes, and in the rapid organization and tenacity of the Poletown Neighborhood Council. Despite a paucity of resources, few local allies, and virtually no prior experience, Poletown's informal networks quickly wove themselves into a collective entity that held sit-ins, punished defectors within the neighborhood (such as the local Catholic church that accepted the city's condemnation offer to avoid social unrest and bloodshed), and fought a legal battle all the way to the Michigan Supreme Court.²¹⁶

Given this framework, it is not a surprise that the condemnation and sale of Poletown to General Motors was almost a foregone

212. *Id.*; see WYLIE, *supra* note 191, at 84–109. Wylie describes in great detail the way local media moved in lock-step with GM and punished maverick reporters who did not toe the growth line. *See id.* at 92–102. Logan and Molotch would be completely unsurprised by this assessment; both in theory and throughout history, local media has proven a cornerstone essential to the success of a Growth Machine. LOGAN & MOLOTCH, *supra* note 11, at 70–73.

213. *See* WYLIE, *supra* note 191, at 110–14.

214. *See generally id.*

215. *See supra* note 197 and accompanying text.

216. *See* WYLIE, *supra* note 191, at 59–83.

conclusion the moment it was announced. The real surprise is that the Poletown Neighborhood Council managed to mount as much resistance as it did. Of course, it was ultimately a pyrrhic victory for those residents: even as the case was being litigated, more and more landowners accepted the city's terms for their land, lured by the carrot of compensation and fearful of the stick of condemnation.²¹⁷ With each defector, use values within the neighborhood began to unravel, undermining the cause for which the PNC was fighting. The *Poletown* decision and the subsequent forcible eviction of the neighborhood's remaining holdouts was only the final straw, the last vestige of community snuffed out by Detroit's desperate bid to alleviate falling exchange values across the city—an economic crisis to which General Motors had contributed, and from which it would now collect.²¹⁸

V. FINDING COMMON GROUND FOR MEANINGFUL REFORM

In some situations, public choice theory and the Growth Machine model offer widely disparate prescriptions for the use of the eminent domain power—each proffers recommendations that the other finds somewhat uncomfortable. Public choice theorists at least grudgingly support some authority to condemn truly blighted properties to solve nuisances generated by judgment-proof defendants;²¹⁹ Growth Machine proponents abhor the very notion that certain land uses are less important because they adversely affect neighboring exchange values, or that poor tenants should receive any less protection from the ill effects of condemnation than their wealthier counterparts.²²⁰ Similarly, Growth Machine proponents support *Midkiff*-type takings that transfer ownership rights and control from landlords to tenants;²²¹ public choice theorists find it hard to justify a taking as a “public use” where the use in question does not change after the taking.²²²

These disagreements are driven largely by the differing, and contradictory, approaches each theory takes toward the land market. Public choice theorists believe price tracks land use and place great faith in the market to distribute land uses efficiently, while Growth Machine proponents suggest land prices are driven by

217. *See id.* at 82–83.

218. *See id.*

219. *See supra* text accompanying notes 162–173.

220. *See supra* text accompanying notes 174–178.

221. *See supra* text accompanying notes 187–189.

222. *See supra* text accompanying notes 183–186.

speculation and are largely unaffected by a parcel's current use or the use demands of the community's residents.²²³ In reality, land prices likely represent some mixture of the potential uses for a parcel and speculation-driven assessments of local land scarcity. One's decision to analyze a particular taking through one lens or the other depends in part upon the extent to which the parcel's price correlates to its present and prospective use values.

From the perspective of shaping overall condemnation policy, however, these doctrinal differences are less interesting than the surprising amount of common ground the two models share. Despite approaching the issue from diametrically opposite perspectives, both theories find *Kelo* a wildly unsatisfying decision as a matter of policy.²²⁴ Economic development takings such as *Kelo* and *Poletown* are likely to do more harm than good, by displacing existing residents without adequate compensation in pursuit of growth that quite possibly may never materialize—or does so at the detriment of another community equally situated.

Similarly, and perhaps also surprisingly, both models find the post-*Kelo* legislative response to be underwhelming. Most states have failed to adopt measures that would correct the excesses of economic development takings or provide sufficient protection to residents displaced by condemnation. Achieving lasting change requires more substantive reforms than most states have adopted thus far, including more robust procedural requirements to assure that initiatives are truly for a “public use.” Both models also suggest greater cooperation between the legislative and judicial branches to develop and enforce these new limitations.

A. Assessing the Post-Kelo Backlash

As noted in the introduction, over forty states and the federal government have enacted some type of legislation to limit eminent domain's reach.²²⁵ In some cases, these reforms have taken meaningful steps to curb economic development takings similar to those presented in *Kelo*. South Dakota, for example, now categorically prohibits government agencies from taking private property “for transfer to any private person, nongovernmental entity, or other public-private business entity” and further requires the agency to offer the original owner a right of repurchase (at the lesser of fair

223. See *supra* text accompanying notes 64–68, 140–147.

224. See *supra* text accompanying notes 201–218.

225. See Somin, *supra* note 7, at 1; see generally Sandefur, *supra* note 10.

market value or the condemnation price) if the agency seeks to sell the parcel within seven years of condemnation.²²⁶ Similarly, New Mexico has revised its Metropolitan Redevelopment Code to explicitly exclude eminent domain from the powers a municipality may use to promote economic development and precludes the use of condemnation to cure blight.²²⁷

Unfortunately, however, the language of many post-*Kelo* statutes may prove largely ineffective in practice at controlling the very takings that gave rise to the backlash. In most cases, this ineffectiveness is due to the preservation (or creation) of broad exceptions for "blighted" areas and other devices that preserve the power to conduct economic development takings under a different name.²²⁸ Several states that enacted post-*Kelo* reforms explicitly define blight to include conditions that "impair or arrest sound growth" or constitute an "economic or social liability,"²²⁹ terms that are synonymous with an economic development rationale. In many other states, the statutory definition of blight is not so explicitly tied to growth but could be read broadly enough to include economic development takings. For example, Illinois defines blighted areas as areas "detrimental" to "public safety, health, or welfare" because of a combination of five factors from a list that could describe buildings in any community, such as obsolescence, inadequate utilities, "excessive" land coverage, lack of adequate ventilation, or lack of community planning.²³⁰ These terms are sufficiently malleable to permit the condemnation of many parcels whose current uses are not "blighted" in a traditional sense. And

226. S.D. CODIFIED LAWS § 11-7-22.1 to -22.2 (2007).

227. See H.B. 393, 48th Leg. (N.M. 2007) ("A municipality shall have all the powers, other than the power of eminent domain" to carry out Redevelopment Code.).

228. See Somin, *supra* note 7, at 17.

229. ALASKA STAT. § 18.55.950 (2004) (containing both "impairs or arrests the sound growth" and "economic or social liability"); COLO. REV. STAT. § 31-25-103(2) (2006) (containing both "impairs or arrests sound growth" and "economic or social liability"); MO. REV. STAT. § 100.310(2) (1994) (containing "economic or social liability"); MONT. CODE ANN. § 7-15-4206(2) (2007) (containing both "impairs or arrests the sound growth" and "economic or social liability"); NEB. REV. STAT. § 18-2103(11) (1997) (containing both "impairs or arrests sound growth" and "economic or social liability"); N.C. GEN. STAT. § 160A-503 (2007) (containing "impairs the sound growth"); TEX. LOCAL GOV. CODE § 374.002 (1987) (containing both "impair the sound growth" and "economic and social liability"); VT. STAT. ANN. tit. 24, § 3201 (2007) (containing "impair or arrest growth"); W. VA. CODE § 16-18-3(c) (2007) (containing "impairs or arrests the sound growth"). Each of these states exempts "blight" from its prohibition on economic development takings. The Missouri Supreme Court also incorporated "menace injurious to the public health, safety, morals and welfare of the residents" into their definition of blight. *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431, 433 (Mo. 2007) (quoting Tax Increment Financing Comm'n of Kan. City v. J.E. Dunn Constr. Co, 781 S.W.2d 70, 78 (Mo. 1989)).

230. See 65 ILL. COMP. STAT. § 5/11-74.4-3 (1993 & Supp. 2005).

while Pennsylvania now prohibits “the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise,”²³¹ this prohibition exempts Philadelphia and Pittsburgh, the two most prominent places in the state where economic development takings would occur.²³²

1. Political Ineffectiveness from a Public Choice Perspective

Although this ineffectiveness may seem peculiar given the level of public disdain for *Kelo*, public choice theorists are unsurprised that substantive reform has proven difficult to accomplish. Developers have strong incentive to preserve the perk of securing and assembling parcels at below-market rates. Individual landowners subject to takings suffer substantial disadvantages in the market for political favors.²³³ And although economic development condemnations are common, the odds that any individual landowner will fall victim to such a taking is trivial, meaning that individual homeowners have little incentive to invest heavily in rent-seeking behavior to combat the developers’ lobby.²³⁴ As a result, Timothy Sandefur concludes that:

Public choice theory predicts that the *Kelo* decision will cause politicians to holler out for reform as loudly as necessary to appease outraged constituents, and perhaps pass ineffectual measures designed to allay their outrage, but not to accomplish any substantial reform. Once the hue and cry has died down, the eminent domain industry can return to its old habits.²³⁵

Ilya Somin cites voters’ rational ignorance as another potential explanation for this ineffectiveness. Somin suggests that most voters are “rationally ignorant” of the details of public policy generally because they have “little incentive to acquire any substantive knowledge about the details of government actions.”²³⁶ If a voter’s primary goal in seeking information about an issue is to ensure that his vote helps secure his preferred outcome, there is little real

231. 26 PA. CONS. STAT. ANN. § 204 (2007).

232. *Id.* § 203(b); see DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 3, 179–82 (2003) (chronicling recent economic development condemnation actions in Philadelphia and Pittsburgh).

233. See *supra* text accompanying notes 62–64.

234. See Sandefur, *supra* note 10, at 770–71.

235. *Id.* at 772.

236. Somin, *supra* note 7, at 4.

incentive for the voter to seek this information because the odds that his single vote will decide the issue is “infinitesimally small.”²³⁷ Prior to the *Kelo* decision, voters were more rationally ignorant of the possibility that economic development takings occurred. Although *Kelo* raised public awareness of the issue, voters still lack the incentive to closely follow the details of legislative reforms enacted in the wake of the decision.²³⁸ As Somin explains, the rational ignorance hypothesis helps explain how economic development takings flourished prior to *Kelo* despite widespread public opposition to the practice.²³⁹ It also helps explain why the backlash is seemingly ineffective: because the average voter lacks the time or inclination to examine the details of various legislative proposals, “it would not be difficult for state legislators to seek to satisfy voter demands by supporting ‘position-taking’ legislation that purported to curb eminent domain, while in reality having little effect. In this way, they can simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development condemnations.”²⁴⁰

Though they tell different stories, Sandefur and Somin largely present the two sides of the public choice calculus.²⁴¹ Sandefur stresses the incentives developers have to preserve their concentrated benefits, while Somin focuses upon the disincentive voters have to educate themselves regarding the burden of dispersed costs. Both agree that, regardless of which factor is the bigger driver in this equation, the political process is unlikely alone to correct the economic development takings problem and restore the law to the normative result they would prefer.

2. Political Ineffectiveness from a Growth Machine Perspective

The Urban Growth Machine model also notes the difficulty of reforming policies to control the Growth Machine. Logan and Molotch explain that the Growth Machine is willing to placate the use value interests of residents, but only insofar as doing so does not infringe upon its growth goal. “When residents’ claims on behalf of use values threaten to undermine growth, the government

237. *Id.*

238. *See id.* at 4.

239. *See id.* at 51–52.

240. *Id.* at 52.

241. *See id.* at 54–55 (“Political ignorance is the handmaiden of interest group power in the political process. Absent widespread ignorance, interest groups at odds with the majority of the general public would find it more difficult to block eminent domain reform.”).

can turn back the challenge, either by invoking police power or by distracting dissidents with payoffs.”²⁴²

Post-*Kelo* reforms largely fit this model. States responded to residential outcries by adopting symbolic reforms, but were careful to exempt from these reforms limits upon the Growth Machine’s power to maximize exchange values through condemnation. This tendency is perhaps most explicit in the states discussed above whose reforms explicitly include or retain the power to remedy threats to “sound growth” and conditions of “economic or social liability.”²⁴³ Such terms unambiguously communicate to residents that the Growth Machine has no intention of placing substantive limits upon its pursuit of a pro-growth agenda.

Moreover, even those states that successfully limit economic development condemnations continue to permit takings to cure blight. These reforms preserve the Growth Machine’s authority to adjust the urban landscape in instances of “deterioration of site improvements,” “juvenile delinquency and crime,” “obsolescence,” or “tax or special assessment delinquency exceeding the fair value of the land,” or similar definitions. This vocabulary perpetuates the Growth Machine’s commoditization of land and further structures land use law in ways that preserve and promote exchange values rather than use values. The general abdication of authority to engage in economic development takings—in stark contrast with the seemingly unquestioned preservation of power to eliminate blight—serves only to isolate the urban poor from wealthier and more politically powerful residents. Thus as Logan and Molotch predict, the Growth Machine has, at most, distracted its most troublesome residents with payoffs while preserving as much power as possible to continue to promote a pro-growth agenda. In the process, this isolation and preservation of blight-curing authority highlights the normative thrust of *Urban Fortunes*, that poor urban residents are particularly vulnerable to the Growth Machine: “[t]he crux of poor people’s urban problem is that their routines—indeed their very being—are often damaging to exchange values.”²⁴⁴

242. LOGAN & MOLOTCH, *supra* note 11, at 35.

243. See *supra* text accompanying note 229.

244. LOGAN & MOLOTCH, *supra* note 11, at 112.

B. Toward Meaningful Limits on the Condemnation Power

Although some states have succeeded in enacting meaningful eminent domain reform, both public choice theorists and Growth Machine proponents would argue that more must be done to address the negative effects of eminent domain abuse. As discussed in the beginning of this section, the two models have very different prescriptions regarding when a municipality may legitimately use condemnation in pursuit of a putative public use. But for different reasons, the two models agree on a core class of takings that should be prohibited as a matter of policy, and could also agree to a series of procedural measures designed to expose the true benefits and costs of condemnations undertaken within the scope of permissible takings. This minimum level of substantive and procedural reforms are measures upon which both left and right can agree, and would go far to correct the most egregious cases of eminent domain abuse.

1. Substantive Limits

First, state legislatures should take definitive steps to prohibit takings conducted solely for purposes of promoting economic development. For public choice theorists, the market system of voluntary transactions will presumptively assure that the public is “using” a particular parcel in a manner that maximizes social utility, by allowing it to flow to the prospective owner who derives the greatest value from its use. For Logan and Molotch, this exclusion is an important first step toward shattering the notion that the common good demands maximization of exchange values, and refocusing “public use” toward the values that the public derives from the “use” of a parcel.

Second, if the polity determines that blight constitutes a permissible public use, the legislature should define blight using specific terms that focus narrowly upon the nuisance that the condemned tract’s current land use imposes upon its neighboring parcels rather than broad appeals to public welfare or, worse, sound growth and economic liability. These specific, well-defined terms address public choice theorists’ unease with post-*Kelo* blight condemnations by limiting the ability of local elites to shoehorn self-serving projects into a broad statutory mandate. And although Growth Machine proponents would find this limitation incomplete, it is at least a first step toward protecting many urban

residents from the threat of appropriation by limiting the reach of the Growth Machine's redevelopment apparatus.

2. Procedural Reforms

In addition, state legislatures should impose a series of procedural reforms designed to provide greater insight into the benefits and costs of even putatively legitimate takings, and to assure that displaced victims are adequately compensated for the harm done to them. First, states could demand as a condition of a taking that the municipality or redevelopment authority complete a Community Impact Report, similar to the environmental impact reports that accompany many federal development projects. This report would describe the proposed public use and assess the likely positive and negative impacts that the project will have on community residents.

From a public choice perspective, this report would alleviate the rational voter problem by lowering the information cost of learning a project's expected costs and benefits. By requiring specific quantifiable estimates of gains and losses, the report makes it harder for development interests to hide the impact of a taking behind vague public rationales that are difficult to validate. Admittedly, even this lowered information cost is still likely to be far greater than the cost of ignorance for the average taxpayer, meaning that the average voter is likely to remain rationally ignorant of individual condemnations. But this lower information cost makes it easier for predisposed owner-victims to contest a taking. The report also provides a useful benchmark against which one may later assess the success or failure of an individual condemnation, as a feedback mechanism to inform the wisdom of similar proposals in the future. And assuming that report is funded by the party that would benefit from the taking, the reporting requirement increases the transaction cost of a condemnation, which discourages takings at the margin whose projected benefits are less certain and therefore less likely to cover the additional cost.

Community Impact Reports would also find favor with Growth Machine proponents. Logan and Molotch praise the environmental movement as being among the most successful defenders of use values against the Growth Machine.²⁴⁵ The environmental impact report is a significant weapon in that movement's arsenal: it forces development interests to acknowledge and account for the

245. *Id.* at 215.

use values destroyed by their activities, and offers defenders of use values a procedural device by which they can challenge and stall development projects.²⁴⁶ Similarly, a Community Impact Report would draw greater public attention to the use values that the Growth Machine seeks to sacrifice in pursuit of exchange values. And by challenging a condemnation authority's compliance with the report's requirements, defenders of use values can delay individual projects in an effort to avoid development or to extract use-value-preserving concessions from developers, such as limits on future development or affordable-housing set-asides.

Legislators should also consider expanding the compensation mechanism to provide greater compensation to a broader class of individuals. The reigning constitutional principle equates "just compensation" with paying "fair market value" to the landowner. While this rule makes it easier to determine a compensatory figure, there is little reason as a matter of policy to equate the injustice of a taking with the market's assessment of the second-best alternative for the parcel. After all, awarding market value assures that nearly every condemnation creates some deadweight loss to society: even assuming the process correctly determines the "fair market value,"²⁴⁷ that value does not equal or exceed the use value that the owner derives from the parcel, or else the owner would have voluntarily sold at that price. For this reason, public choice theory suggests that "just compensation" should be paid at some multiple of the assessed "fair market value," to make up for this foregone consumer surplus and force the condemnation authority to recognize the actual cost of the taking to the affected party.²⁴⁸ The figure should also include the measure of economic losses that a taking forces upon the landowner, such as relocation expenses or lost goodwill.²⁴⁹

246. See, e.g., *Or. Natural Res. Council v. Goodman*, 505 F.3d 884 (9th Cir. 2007) (enjoining expansion of ski resort in Mt. Ashland National Forest because of Forest Service's deficient environmental impact report).

247. This is a very big assumption. See generally DAVID L. CALLIES & SHELLEY ROSS SAXER, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *EMINENT DOMAIN USE AND ABUSE: Kelo IN CONTEXT* 137–65 (2006) (Dwight H. Merriam & Mary Massaron Ross, eds.)

248. Commendably, the Kansas legislature has seemingly endorsed this principle: though the state's post-*Kelo* reform bill preserves economic development takings if specifically approved by the legislature, it also allows the legislature to consider greater levels of compensation. KAN. STAT. ANN. § 26-501b(f) (West 2007) ("[L]egislature shall consider requiring compensation of at least 200% of fair market value to property owners."). By its text, the provision does not require such a multiple to be paid, but it does require consideration of whether a multiple should be paid, which is a step in the right direction.

249. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106 (2006). As Garnett notes, these economic losses have a significant

Logan and Molotch would also endorse an expansion of the category of recipients to whom compensation is owed, including non-owner tenants. Although they are not formally deprived of title, it is tenants whose use values are most significantly impacted by a taking. Some states have adopted some limited forms of tenant compensation-sharing: in California, for example, commercial tenants in long-term leases at below-market rent can recover the "bonus value" included in the terminated lease.²⁵⁰ This option is unavailable to many residential tenants, however, since residential leases are typically month-to-month arrangements with no locked-in bonus value. Logan and Molotch would recommend expanding the scope of these tenant-protecting mechanisms to compensate all tenants, through a mechanism tied to the destroyed use value rather than the parcel's exchange value.

3. Judicial Review

Finally, both public choice theory and the Growth Machine model imply the need for a greater judicial role in the eminent domain process. Although *Kelo* endorses judicial minimalism in the takings context, even it recognizes that the takings power is not boundless: the Court explained that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party" nor could it "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."²⁵¹ Unfortunately, both public choice theory and the Growth Machine model suggest that municipal authorities are susceptible to precisely this forbidden model of condemnation. And the ineffectiveness of post-*Kelo*

impact on small business owners, who find it difficult or impossible to reopen after relocation. *Id.* To cite one anecdote, Robert Blue, owner of the 70-year-old Bernard Luggage Company at the famed intersection of Hollywood and Vine, waged a prominent media war against the city of Los Angeles, arguing that much of his business was derived from his unique location and that relocation to a less prominent street corner would shutter the business. Blue ultimately negotiated a settlement that preserves the company's position in the luxury hotel complex that the redevelopment authority plans to build on the site. See Rick Orlov, *Hollywood Landmark to be Part of Major Development*, L.A. DAILY NEWS, Sept. 28, 2006, at B1.

250. See, e.g., *City of S. San Francisco v. Mayer*, 79 Cal. Rptr. 2d 704, 707 (Ct. App. 1998). Note that under California law "the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant," *id.*, which poses a potential problem where landlords are in a superior negotiating position vis-à-vis their tenants and therefore conceivably can secure a greater recovery than they are entitled to at their tenants' expense.

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

legislative reform²⁵² implies that a similar problem handicaps the state legislature's ability to patrol local government by itself. Whether the fault lies with the residential voter's relative disinterest (as public choice theory suggests) or his relative powerlessness (as Logan and Molotch claim), the inability to achieve consistent, meaningful reform through legislation suggests that that courts should reconsider the post-*Berman* abdication of judicial review.

Heightened judicial review of individual takings alleviates some of public choice theorists' concerns because judges are less vulnerable to capture by special interests. Unlike politicians who can trade access for political favors, judges operate within ethics guidelines that limit their interaction with the public and for the most part are not dependent upon political contributions to sustain their positions. Logan and Molotch would also welcome greater judicial involvement in takings decisions. Judges generally do not benefit directly from the increase in exchange values due to intensifying land use, and unlike politicians, their reputations are not enhanced by the achievement of community growth goals. As a result, judges are less likely to participate in the Growth Machine coalition and therefore can dispassionately weigh the competing exchange and use values involved in a given condemnation.

Courts have expressed frustration with the difficulty of enforcing limits on takings from the bench. But there is no reason to believe that "public use" and "just compensation" are less justiciable than "unreasonable search" or a host of other individual rights that the Court has enforced through elaborately constructed doctrines.²⁵³ The public would not long tolerate a Fourth Amendment jurisprudence built upon deference to the executive as the branch most familiar with the needs of law enforcement and therefore best situated to determine whether a given search was in fact "reasonable." The public response to *Kelo* suggests that it is uncomfortable with this level of abdication over takings as well.

It is important to recognize, however, that pitting the legislature against the judiciary in the struggle to define appropriate public uses—an exercise that occupies many law review pages in the wake of *Kelo*—creates somewhat of a false dichotomy. In reality, substantive judicial review fosters a symbiotic relationship between the branches, each of which plays a crucial role in fine-tuning takings law. Legislatures have broad authority to identify and remedy public

252. See generally Somin, *supra* note 7.

253. Cf. Note, *The Lesson of Lopez: The Political Dynamics of Federalism's Political Safeguards*, 119 HARV. L. REV. 609, 629–30 (2005) (arguing that political safeguards are inadequate to protect federalism principles and cheering greater judicial enforcement of constitutional federalism principles).

problems within their jurisdiction, and the condemnation power exists as one valuable tool with which to do so. Judicial review serves as a feedback mechanism for the legislature's use of that power in individual cases, particularly those lying at the periphery of permissible public uses. Adverse judicial decisions serve as shots across the legislature's bow, defining the outer limits of the legislature's authority and reminding the political branches of the need to regulate only within their constitutionally-prescribed powers.

Recent reform efforts in Michigan and Ohio demonstrate the effectiveness of this symbiotic relationship. As *Kelo* was winding its way toward the Supreme Court in mid-2004, the Michigan Supreme Court repealed its *Poletown* decision in *County of Wayne v. Hathcock*, holding that the state constitution's "public use" limitation did not extend to economic development takings.²⁵⁴ Following *Hathcock*, Michigan's legislature amended the state constitution to prohibit "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues" and to assess blight on a parcel-by-parcel basis under a clear-and-convincing-evidence standard.²⁵⁵ The legislature has also adopted statutory measures that modify the statutory definition of "public use" to conform to *Hathcock*, to provide increases in compensation to condemned residential tenants, and to allow low-income individuals to recover attorneys' fees following an unsuccessful condemnation challenge.²⁵⁶

Ohio presents another example of judicially-spurred legislative reform. Like many other states, Ohio adopted a post-*Kelo* reform package in 2005 that proved largely ineffective. The statute purported to enact a temporary moratorium on economic development takings until December 31, 2006, but only if economic development was the "primary purpose."²⁵⁷ The statute also preserved the familiar exception for blight, defined as, inter alia, conditions that threaten "sound growth" or constitute an "economic or social liability."

254. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 779–80 (Mich. 2004); see also MICH. CONST. art. 10, § 2 (2004) ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. . . . Compensation shall be determined in proceedings in a court of record.").

255. MICH. CONST. art. 10, § 2.

256. See CASTLE COALITION, 50 STATE REPORT CARD, at 26 (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (summarizing Michigan reforms).

257. See Am. Sub. S.B. 167, § 1, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (exempting "blight" condemnations from temporary moratorium on economic development takings); Ohio Rev. Code § 303.26(E) (2007) (defining blight to include "deterioration" of structures or where the site "substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare.").

Shortly thereafter, the Ohio Supreme Court in *Norwood v. Horney* invalidated economic development takings as forbidden by the state constitution because such a taking is not a "public use."²⁵⁸ The Court explained that "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the [Ohio Constitution's] public-use requirement."²⁵⁹ In response, the legislature recently adopted more sweeping condemnation reforms that explicitly barred economic development takings and narrowed the blight exception.²⁶⁰ The legislature explicitly cited *Norwood* as the rationale for its reform and expressed its intention to conform condemnation practices statewide to the court's constitutional rule.²⁶¹

These examples demonstrate how substantive judicial review at the constitutional level can spur policy reform by fostering a healthy dialogue between a legislature focused on what it should do and a judiciary focused on what the legislature may do. This symbiosis only grows stronger when the dialogue moves from the constitutional to the statutory sphere, where the state legislature has defined the scope of municipal condemnation in more explicit terms and the judiciary's role is to apply those standards to individual cases. Here, free of the uneasy responsibility of breathing life into vague constitutional phrases, the judiciary is free instead

258. *Norwood v. Horney*, 853 N.E.2d 1115, 1146 (Ohio 2006).

259. *Id.* at 1123.

260. See OHIO REV. CODE ANN. §§ 1.08, 303.26(E) (West 2008). Specifically, the revised definition contains two lists of criteria by which a parcel might be considered "blighted." See *id.* § 1.08(B). The first list encompasses what one may consider traditional "blight" factors, such as being "unfit for human habitation or use" because it is "unsanitary, unsafe, or vermin infested," or "pos[ing] a direct threat to public health or safety . . . by reason of environmentally hazardous conditions, solid waste pollution, or contamination." *Id.* § 1.08(B)(1). The second list contains more generic conditions such as "dilapidation and deterioration," "age and obsolescence," or "faulty lot layout in relation to size, adequacy, accessibility, or usefulness." *Id.* § 1.08(B)(2). A plot may be designated as blighted if it satisfies two or more criteria from this list, which "collectively considered, adversely affect surrounding or community property values or entail land use relationships that cannot reasonably be corrected through codes or other land use regulations." *Id.* This second category remains somewhat problematic, as its criteria remain broad and are still seemingly tied to the goal of economic development. But this definition is further tempered by the condition that "[w]hen determining whether a property is a blighted parcel or whether an area is a blighted area or slum for the purposes of this section, no person shall consider whether there is a comparatively better use for any premises, property, structure, area, or portion of an area, or whether the property could generate more tax revenues if put to another use." *Id.* § 1.08(C). While not ideal, this amended definition provides greater protection to homeowners and residents than the pre-*Norwood* definition, and this additional protection is explicitly due to the guidance the Ohio Supreme Court delivered in that opinion.

261. Am. Sub. S.B. 7, § 4, 127th Gen. Assem., Reg. Sess. (Ohio 2007).

to measure municipal actions against the legislature's policy yardsticks and provide clear guidance to condemnation authorities regarding the permissible scope of their power. In the process, substantive judicial review helps ferret out the cases where a putative public use serves as a fig leaf for the private ends of development elites or the Growth Machine.

Public choice theory and the Urban Growth Machine model approach the political landscape from diametrically opposite perspectives: one places tremendous faith in the market and the other vehemently denies the importance of exchange. Yet despite their differences, both schools stand united in their denouncement of condemnations undertaken for purposes of economic development and are dubious that the post-*Kelo* wave of legislative reforms has achieved—or will achieve—lasting protection against eminent domain abuse. Therefore despite their differences, commentators on both sides of this political spectrum can support substantive reforms designed to curb economic development takings, and more robust procedures that communicate to the public the true costs and benefits of a proposed condemnation. Both models also demand that courts shoulder at least some of this reform burden through an iterative process that ferrets out the political branches' inevitable failures. The judiciary's responsibility to "say what the law is"²⁶² must prevent it from continuing to duck its duties in the interests of convenience or political expediency.

262. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).