

REVIVING PROTECTION FOR PRIVATE PROPERTY: A PRACTICAL APPROACH TO BLIGHT TAKINGS

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ABSTRACT

This Article argues that current scholarly theories and suggestions, post-*Kelo*, for reviving protection for private property under the Takings

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Clause are unrealistic and unlikely to succeed. After a short Introduction, Part I provides background and presents four recent examples of eminent domain abuse where 'blight' definitions have skirted bans against economic takings. Part II discusses several current theories espoused by prominent scholars and analyzes whether their adoption would have prevented the abuses presented in Part I. This Article concludes that adoption of current theories would not have prevented those kinds of abuses and more attention needs to be given to procedural protection. Procedural protection needs to be provided for all property owners, but most especially for those most vulnerable to eminent domain abuse: poor and minority property owners.

INTRODUCTION

In previous articles, the author suggested that the Takings Clause¹ should be eliminated because (1) it has failed to provide protection from governmental takings or guarantee just compensation; and (2) it is unnecessary because local, state, and federal governments could accumulate land needed for public projects by purchasing property on the free market.² This would mean that governments would still have the power, under common law nuisance doctrine and the police power, to take property when a private owner cannot or will not rectify a designated health or safety violation. While still adhering to that position, the Author recognizes that it is a radical one and neither Congress, the American public, nor other legal scholars are likely to agree.³ Thus a less radical, more practical approach is needed.

Taking a more moderate position, Professor Richard Epstein, in two prominent works, suggests that the Takings Clause should be interpreted in a manner more consistent with common law property doctrine. Professor Ilya Somin similarly argues that state and federal courts should categorically ban economic development takings because the "visible hand of eminent domain often destroys as much wealth as it creates and too easily becomes a grasping hand serving the interests of the politically powerful at the expense of the weak."⁴ This Article will discuss these suggested remedies

1. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

2. Nadia E. Nedzel & Walter Block, *Eminent Domain: A Legal and Economic Critique*, 7 MD. L. J. RACE, RELIGION, GENDER, & CLASS 140 (2007) [hereinafter *Eminent Domain*]; Nadia E. Nedzel & Walter Block, *The Demise of Eminent Domain*, 9 NYSBA GOV'T, LAW & POL'Y J. 70, 71 (2007).

3. See, e.g., David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 162-63 (2007) (showing concern that holdout problem in land assembly may be pervasive, thus partially justifying economic eminent domain takings).

4. Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 184-85 (2007) [hereinafter *Grasping Hand*].

and will present several examples of post-*Kelo* eminent domain abuse, analyzing whether Epstein's four-pronged solution or other current suggestions would remedy those problems. Finally, the Article will propose less sweeping changes.

This Article argues that though current scholarly proposals are effective in theory, they are either unlikely to be adopted by courts, likely to be insufficient, or likely to lead to the same morass of judicial interpretation currently in place. Effective legal change is most likely to be brought by legislatures rather than courts, given the nature and scope of current Supreme Court jurisprudence.⁵ Legislatures can begin by banning all economic takings including blight takings. To be effective, however, such legislation must also (1) require procedural transparency in the negotiation and promulgation of eminent domain takings, (2) require independent evaluation of property, (3) provide a mechanism for independent review of takings calculations, and (4) require takings agents to inform owners how they can obtain an independent review.

I. THE PROBLEM

Current Supreme Court case law, up to and including *Kelo*, misinterprets the Takings Clause in a number of different ways. The consequence of these misinterpretations is that local, state, and federal governments are encouraged not only to take private property for their own economic gain, but are also allowed to take property without justly compensating the owner. After *Kelo* a number of jurisdictions passed legislation designed to limit or stop economic takings,⁶ but this legislation has limited effect, because it does not address procedural and compensatory issues, as shown by examples drawn from New York, Tennessee, California, and Alabama.⁷ Wealthier property owners are able to help themselves through media attention, lawsuits, and lobbying, but poor, less-educated, and minority owners find their efforts to defend themselves thwarted.

A. Takings Clause (Mis)interpretations

The Takings Clause was intended to protect private property from governmental takings in two ways: first, the property must be taken only for

5. See generally GERALD M. ROSENBERG, *THE HOLLOW HOPE* (1991) (arguing that effective social change is brought about by legislation rather than Supreme Court decisions).

6. See Patricia E. Salkin, *Eminent Domain Post Kelo: A State of the States*, 36 ENVTL. L. REP. 10864 (2006); CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, 2007, http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf, [hereinafter CASTLE COALITION, 50 STATE SURVEY].

7. See *infra* notes 25-56 and accompanying text.

a public purpose, and second, the former owner must be given just compensation. After a long history of difficulty interpreting the phrase “public purpose,”⁸ the Supreme Court essentially stated that the term means whatever a legislature says. This interpretation was first highlighted in *Berman*⁹ and then in *Kelo*,¹⁰ where the Supreme Court stated that “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.”¹¹ According to the Supreme Court, the result of this interpretation is that a legislature can take property not just for building public buildings and infrastructure that will be used by the public, but also when the legislature wants to eliminate blight or pursue a “program of economic rejuvenation.”¹² This is so even if the result will ultimately be that the property is being taken from one private party and given to another—a result antithetical to the original understanding of the Takings Clause.¹³ But this is not the only problem with the current Supreme Court interpretation of the Takings Clause. As with the understanding of public use, the Supreme Court’s interpretation of what constitutes just compensation has similarly been problematic: fair market value as defined by courts habitually under-compensates owners.¹⁴

B. Resulting Injustice

In his dissent in *Kelo*, Justice Thomas argued that the Supreme Court’s departure from the natural meaning of the term “public use” is “deeply perverse” and exacerbates the harms perpetrated on powerless groups and individuals, particularly pointing to the historical displacement of African-Americans caused by urban renewal projects.¹⁵ Although large-scale urban

8. See *Eminent Domain*, *supra* note 2.

9. See *Berman v. Parker*, 348 U.S. 26 (1954) (suggesting “public purpose” means whatever a legislature intends it to mean).

10. *Kelo v. City of New London*, 545 U.S. 469, 479-83 (2005).

11. *Id.* at 483. *But see id.* at 506 (Thomas, J., dissenting) (“[T]he Court replaces the Public Use Clause with a “[P]ublic [P]urpose” Clause . . . or perhaps the ‘Diverse and Always Evolving Needs of Society’ Clause . . . , a restriction that is satisfied, the Court instructs, so long as the purpose is ‘legitimate’ and the means ‘not irrational,’ . . .”) (citations omitted) (alterations in original).

12. See *id.* at 469. *But see id.* at 494 (O’Connor, J., dissenting) (indicating that a law that takes property from A and gives it to B is against all reason and justice, and “effectively . . . delete[s] the words ‘for public use’ from the Takings Clause”).

13. See *id.* at 494 (O’Connor, J., dissenting) (A law that takes property from A and gives it to B is against all reason and justice, and “effectively . . . delete[s] the words ‘for public use’ from the Takings Clause”); *id.* at 506 (Thomas, J., dissenting).

14. See *Eminent Domain*, *supra* note 2.

15. *Kelo*, 545 U.S. at 519-23 (Thomas, J., dissenting). See also BERNARD J. FRIEDEN & MARSHALL KAPLAN, *THE POLITICS OF NEGLECT* 24 (1975) (showing that the urban renewal movement of the 1950s and 1960s caused the displacement of “177,000 families and another

renewal projects may not be as common since the failed *Berman* project was repealed in the 1970s,¹⁶ Justice Thomas's comment is apt: state and local governments still have both the means and the incentive to abuse the takings power and are evidently doing so despite post-*Kelo* reactionary legislation designed to prohibit 'economic' takings. Instances of such abuse are described in news stories,¹⁷ blogs,¹⁸ studies conducted by interest groups such as the Institute for Justice's Castle Group,¹⁹ and investigations done by independent organizations such as the Alabama Advisory to the U.S. Civil Rights Commission.²⁰ Post-*Kelo* assertions of abuse come from all over the United States, including (among others) New York City (Queens), Nashville, California, and Alabama. Logically, the property most often targeted for economic eminent domain takings is property in depressed areas because it is the least expensive for a governmental entity to acquire. Consequently, those upon whom state and local governments are most likely to prey are those who are least likely to be able to defend themselves and their property: poor, elderly, uneducated, and minority property owners.

66,000 single individuals, most of them poor and most of them black"); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003). For a post-*Kelo* analysis, see David Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 199-206 (2007).

16. See *Berman v. Parker*, 348 U.S. 26 (1954). The underlying development project is overturned by the Housing and Community Development Act of 1974, 43 U.S.C. § 5316 (2000). See also 42 U.S.C. §§ 1450-1451 (sections omitted pursuant to §5316); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 311-14 (1992) (criticizing urban renewal and public housing programs as "inherently wasteful ways of rebuilding cities").

17. See, e.g., Richard Lawson, *To Push Development, Cities Use Eminent Domain as a Last Resort*, THE CITY PAPER (May 28, 2008), available at <http://www.nashvillecitypaper.com/news.php?viewStory=60464>.

18. See, e.g., Blue Collar Muse, Blog, <http://conservablogs.com/bluecollarmuse/> (last visited Mar. 3, 2009).

19. See, e.g., DICK M. CARPENTER II, PH.D. & JOHN K. ROSS, *VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE* (Institute for Justice 2007), available at http://castlecoalition.org/index.php?option=com_content&task=view&id=38&Itemid=120; MINDY THOMPSON FULLILOVE, M.D., *EMINENT DOMAIN & AFRICAN AMERICANS: WHAT IS THE PRICE OF THE COMMONS?* (Institute for Justice 2007) available at http://castlecoalition.org/index.php?option=com_content&task=view&id=38&Itemid=120; DANA BERLINER, *PUBLIC POWER PRIVATE GAIN: A FIVE-YEAR STATE BY STATE REPORT EXAMINING THE ABUSES OF EMINENT DOMAIN* (Institute for Justice 2003), available at http://castlecoalition.org/index.php?option=com_content&task=view&id=38&Itemid=120; CASTLE COALITION, 50 STATE REPORT CARD, *supra* note 6.

20. The Alabama Advisory Committee to the United States Commission on Civil Rights met on April 29, 2008, to hear testimony concerning several instances of eminent domain abuse. See details discussed *infra* Subsection II.B.4-6 (on file with author) [hereinafter Transcript].

The question remains whether governments are even capable of renewing an area. Arguably, allowing them to do so encourages rent-seeking by both governmental entities and developers through the use of eminent domain takings. Governmental entities use eminent domain taking to raise their tax base at the expense of existing taxpayers, and developers use it as an inexpensive way to acquire property so as to minimize expenditures and maximize future profits. Such quasi-governmental renewal projects are often unsuccessful and result in undeveloped or even more blighted property, as was the case in the projects in *Berman*,²¹ *Poletown*,²² and *Kelo*.²³ Even where the property taken is ultimately redeveloped, the benefit is one-sided in that the government and developer benefit, but the former property owners are displaced and under-compensated for their property. It is for this reason that urban renewal projects are sometimes termed ‘urban removal’ projects by victimized minority owners. In contrast, where renewal occurs through market processes, both former and new owners benefit. This is a win-win situation typical of the free market where buyers and sellers are free to contract and also free *not* to contract.²⁴ The following four instances

21. The Washington, D.C. redevelopment project that led to *Berman* ultimately failed and the legislation creating it was repealed. Housing and Community Development Act of 1974, 42 U.S.C. § 5316 (2000). See 43 U.S.C. §§ 1450-1451 (sections omitted pursuant to § 5316); see also JACOBS, *supra* note 16, at 311-14 (criticizing urban renewal and public housing programs as “inherently wasteful ways of rebuilding cities”).

22. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (holding the *Poletown* taking constitutional), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). Eminent domain powers were used in an urban renewal project in the *Poletown* area of Detroit where it was anticipated that General Motors would build a factory. When it failed to do so, what had previously been a busy commercial area was left as a strip of abandoned and burned-out properties. See JEAN WYLIE, *POLETOWN: COMMUNITY DESTROYED* (1989); Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhoods Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651 (2005).

23. Three years after the Supreme Court’s decision authorizing the exercise of eminent domain, the property remains undeveloped. RICHARD A. EPSTEIN, *SUPREME NEGLECT* 4 (2008) (“The entire 93-acre site remains vacant of any structures; Susette Kelo’s house, the last structure standing, has been cared away as part of a compromise. Nonetheless, the city has built on schedule its ghostly infrastructure, complete with paved streets, new walkways, and historic-style lamps. The entire area is surrounded by an esplanade that leads to nowhere. No new construction is in sight. . . . It took more than six years to boot Kelo and her neighbors from their homes. It will likely take ten or fifteen years for construction to be completed.”).

24. See, e.g., CURT PRINGLE, *DEVELOPMENT WITHOUT EMINENT DOMAIN; FOUNDATION OF FREEDOM INSPIRES URBAN GROWTH*, 3-9 (2007), available at <http://www.castlecoalition.org/publications/Perspectives>. The City of Anaheim, led by Mayor Curt Pringle, wanted to see a new downtown area developed in an admittedly under-utilized area of the city. Instead of taking the “easy path to redevelopment,” as Mayor Pringle calls eminent domain, city officials were guided by market forces. *Id.* The area, known as the Platinum Triangle, would have been ripe for a blight declaration in almost any other municipality due to its proximity to Angel Stadium, Arrowhead Pond, the Anaheim Convention Center, and Disneyland, but city officials decided early on that eminent domain

of alleged eminent domain civil rights violations will be used to analyze each abuse being complained of and the effectiveness of proposed remedies.

1. *Willets Point, Queens, New York*

Willets Point, also known locally as the Iron Triangle, is a thirteen-block area located near the Flushing and Corona neighborhoods in Queens, New York. The area consists largely of auto repair shops, junkyards, and other industrial and small businesses.²⁵ It lacks both sidewalks and sewers and is consequently prone to flooding in times of severe rain.²⁶ Given the area's prime location close to Shea Stadium and its label as "the very definition of blight," New York City targeted it for major redevelopment, including a convention center, housing, a hotel, and retail space. This redevelopment was to cover sixty square acres and cost three billion dollars. According to PlanNYC.org, as of 2007, the city's Economic Development Corporation has been negotiating to relocate local business owners, threatening them with eminent domain proceedings. As a return salvo, on April 9, 2008, a group of Willets Point business and landowners filed suit against the city.²⁷ The Plaintiffs sought a court order requiring the city to provide basic vital infrastructure—repairs to streets and storm sewers and installation of sanitary sewers, street lights, street signs, and other services that the city has allegedly negligently or intentionally withheld for over forty years.²⁸ The implicit argument was that the city wrongfully withheld infrastructure so that it could claim the area was blighted or in need of redevelopment and assert eminent domain power on that basis.²⁹

Post-*Kelo*, New York state has not enacted any legislation limiting economic takings,³⁰ so private owners are no more protected than they are

would not be an option. City officials "made zoning requirements more flexible" to meet market demands. *Id.* Among other commonsense solutions, the city rezoned the area to allow easier development, took responsibility for clearing environmental impact statements, simplified the permitting process and reduced arcane building requirements. The simplified process made the area more attractive to developers. As a result, the Platinum Triangle has flourished, with 7,000 new homes "and a wide variety of restaurants and retail space" that resulted from billions of dollars of private investments—not government force. *Id.*

25. John Lauinger, *Eminent Domain Bid Seen as Study Slams Willets Point*, NY DAILY NEWS, June 12, 2008; John Majeski, *City Moves on Willets Point Plan Despite Many Objections*, REAL EST. WKLY., June 11, 2008.

26. Ray Rivera, *Businesses in Potholed, Sewerless Queens District Sue the City*, N.Y. TIMES, Apr. 10, 2008.

27. *Id.*; Jess Wisloski, *Willets Point Property Owners Sue City*, NY DAILY NEWS, Apr. 10, 2008.

28. *Id.*

29. Fernanda Santos, *A Confrontation Over the Future of Willets Point*, N.Y. TIMES, Aug. 14, 2008, at B1.

30. Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 839 (2008).

under the U.S. Constitution and Supreme Court jurisprudence. Even prior to *Kelo*, one group called New York “perhaps the worst state for eminent domain abuse.”³¹

2. Nashville, Tennessee

In contrast with New York, Tennessee passed legislation post-*Kelo* to bar takings that are for “either private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise.”³² However, an exception was made for redevelopment of “blighted” areas,³³ and blight was defined in broad, vague terms.³⁴

Allegedly the Metropolitan Development and Housing Agency of Nashville (MDHA) contracted with the Houston-based developer the Lionstone Group to sell the Nashville Music Row property that Lionstone wanted for redevelopment at cost. At that time, the property was owned by Joy Ford of Country International Records, an independent record label. MDHA then asked Ford to sell. When she refused, MDHA filed an eminent domain action against the property, claiming that it was blighted.³⁵ Thus the assertion is that the city, in a bid to increase its taxable property, agreed to sell property that it did not yet own to an outside developer and only subsequently asserted eminent domain to gain ownership, using blight as a pretext to do so.

3. Bayview-Hunters Point—San Francisco, California

According to the Castle Coalition, the San Francisco Board of Supervisors approved a plan in May 2006 that added 1,400 acres of residential, commercial, and industrial property in the Bayview-Hunters Point neighborhoods to the pre-existing 137-acre Hunters Point redevelopment project. This plan was approved despite vocal opposition from residents including the Coalition for San Francisco Neighborhoods, a civic group comprised of thirty-eight neighborhood associations that had voted unani-

31. BERLINER, *supra* note 19; *see also* CASTLE COALITION, 50 STATE REPORT CARD, *supra* note 6.

32. TENN. CODE ANN. § 29-17-102(b) (2000).

33. *Id. discussed in* Eagle & Perotti, *supra* note 30, at 842.

34. S.B. 3296, 104th General Assemb., Reg. Sess. § 14 (Tenn. 2006) (amending TENN. CODE ANN. § 13-20-201 (2006)). *See also* Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform*, 2006 MICH. ST. L. REV. 709; Robert J. Stikowski, *Form-Based Land Development Regulations Update*, ALI-ABA Course of Study Materials, Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation (Aug. 16-18, 2007) (state-by-state analysis of post-*Kelo* legislation).

35. *See* Blue Collar Muse, *supra* note 18; Lawson, *supra* note 17.

mously to oppose the project.³⁶ After New Orleans, the Bayview is the nation's largest self-contained African-American community.³⁷ Officials say the area is blighted, although it is redeveloping naturally without governmental coercion: the area has the highest percentage of home ownership of any San Francisco neighborhood; property values have risen consistently; private development permits for residential, light industrial, and commercial developments are being issued; and people are buying property in the area and moving in.³⁸

Though the plan limits the exercise of eminent domain power with respect to residential property, it gives the redevelopment agency clear authority to condemn commercial and industrial property in the redevelopment area during the next twelve years. There are at least 150 blocks included in the project. Residents are wary of city planners' promises of revitalization. Although eminent domain is not currently authorized for residential properties, the plan does call for replacing existing housing units. That means residents may eventually be forced to move. If the city planners decide to take residential property, the plan promises that residents may not be moved unless clean and safe alternative housing is found for them first. However, the Redevelopment Agency has previously failed to deliver promised jobs and housing for displaced residents, which is what happened to the Fillmore neighborhood in the 1960s. Once the Redevelopment Agency was finished seizing and redeveloping property, rents were higher and the neighborhood was gone.³⁹ Furthermore, under California law, the procedures involved for challenging a proposed taking are difficult to find, involve short limitation periods, and are difficult to follow.⁴⁰

4. Birmingham, Alabama

In April, 2008, in response to several citizen complaints, the Alabama Advisory Council to the U.S. Civil Rights Commission conducted a hearing to determine whether local government might be abusing eminent domain

36. CASTLE COALITION, CALIFORNIA SCHEMING: WHAT EVERY CALIFORNIAN SHOULD KNOW ABOUT EMINENT DOMAIN ABUSE (2008), available at http://www.castlecoalition.org/index.php?option=com_content&task=view&id=570 [hereinafter CASTLE COALITION, CALIFORNIA SCHEMING]; see also Casey Mills, *Bayview-Hunters Point Turns Out in Force Against Redevelopment*, Beyond Chron., Mar. 8, 2006, <http://www.beyondchron.org/news/index.php?itemid=3017>; Carol Harvey, *Bayview Residents Are Threatened by 'Urban Removal'*, STREET SPIRIT: JUSTICE NEWS & HOMELESS BLUES IN THE BAY AREA, April 2006, available at <http://thestreetspirit.org/May2006/gentrify.htm>.

37. See Harvey, *supra* note 36.

38. CASTLE COALITION, CALIFORNIA SCHEMING, *supra* note 36.

39. See Harvey, *supra* note 36.

40. See CASTLE COALITION CALIFORNIA SCHEMING, *supra* note 36; see also Sandefur, *supra* note 34 (discussing failed reform attempts in California).

powers.⁴¹ In the cases presented at the hearing, the property owners involved were consistently elderly, in poor health, poverty stricken, uneducated, and African-American. One instance involved a taking of residences to expand an airport, another involved taking of a church and residences in the Alabaster, and a third involved the taking of a second church on a different parcel. The complaints included threats made by negotiating agents, lack of procedural transparency, self-dealing and manipulation with regard to determination of fair market value, and unfair dealing with regard to subsequent sales of property.

5. *Alabaster, Alabama*

Alabaster, Alabama is a town seventeen miles south of Birmingham. Alabaster residents Mattie Taylor, Calvester Hawkins, Pastor Elizabeth Swain, and Julia Montgomery, whose property was taken to build a Lowe's store and adjacent strip mall,⁴² testified they were told that if they did not sell to the governmental entity at the price offered, then the property would simply be taken from them without compensation or the possibility of recourse.⁴³ Such threats amounted to an apparently blatant constitutional violation, coupled with illegal coercion.⁴⁴ The residents testified that they sought information from local, state, and federal agencies on how to defend against the takings or negotiate on a stronger basis.⁴⁵ They also sought legal help, but could not find an attorney to help them and were told by numerous agencies that nothing could be done or that the agency had no responsibility.⁴⁶

6. *Birmingham Airport Expansion*

Consistent with the Alabaster residents' testimony concerning their efforts to seek redress or representation, Gerald D. Colvin, an attorney who specializes in representing those faced with eminent domain takings, stated that while Alabama has rules for eminent domain procedures under the Code of Alabama and the Alabama Eminent Domain Code, there is no standard procedure for how the state must negotiate the purchase of property

41. The Author was invited and provided testimony concerning eminent domain law and interpretational problems.

42. Transcript, *supra* note 20, at 38.

43. *Id.*

44. *Id.* at 43 (testimony of Elizabeth Swain). "If you don't do it, we're going to put . . . you know and have eminent domain and we are going to take it and then we are not going to owe you anything." *Id.* at 44.

45. *Id.*

46. *Id.* at 36.

under threat of eminent domain.⁴⁷ Thus, there is no way to complain about misconduct by government negotiators.⁴⁸ Mr. Colvin testified (with regard to the airport expansion case) that the governmental agency paid inadequate compensation because prices were set by a real estate company hired by the agency, and no independent, disinterested determination of value was ever made or required.⁴⁹ Birmingham has few real estate appraisers skilled in evaluating properties for eminent domain purposes. Furthermore, as with *Willets Point*, there were assertions that the governmental agency intentionally manipulated the process in order to decrease property values, thus, reducing the compensation that would be due the remaining homeowners.⁵⁰

7. Church Taking

In addition to complaints of threats, lack of transparent process or recourse, self-dealing price evaluations, and manipulation of process, property owners testified that the agencies involved dealt with them harshly and deceptively. In exchange for his church, which was taken under threat of eminent domain, Reverend Smith was given a certain amount of money and a quitclaim deed for a property on which to rebuild.⁵¹ The property had itself been taken under eminent domain power and previously had several homes on it.⁵² The pastor rebuilt his church on the new property (borrowing a substantial amount of money to do so), only to discover that the city would not reconnect the pre-existing water supply, claiming it was not up to code.⁵³ The city would not replace the supply unless Reverend Smith paid an additional \$80,000.⁵⁴ The city's defense was apparently that the property was sold to the pastor via quitclaim deed, and the Birmingham water department was not liable for any agreements made by the agency that sold the property.⁵⁵ Thus, the Reverend and his parishioners, like the other complainants, were worse off after the taking than before. The complainants generally agreed that what angered them was not that their property was taken for

47. *Id.*

48. *Id.* at 52.

49. *Id.* at 23.

50. *Id.* at 46 (referring to sporadic takings in airport community, thus reducing value of remaining properties so that value would be lower).

51. Transcript, *supra* note 20, at 36.

52. *Id.*

53. *Id.*

54. *Id.*; see also Posting of David Beito to The Beacon Blog, *Eminent Domain Abuse in Birmingham? (The Evergreen Baptist Church)*, <http://www.independent.org/blog/?p=97> (May 23, 2008); Posting to YouTube, Rev. John E. Smith – Victim of Property Rights Abuse in Alabama, <http://www.youtube.com/watch?v=6q5ISY6lg7s> (May 4, 2008).

55. See sources cited *supra* note 54.

redevelopment, but that the procedures used were abusive, and they were not justly compensated for their property.⁵⁶

In sum, the Alabama instances are linked by assertions of blighted conditions for justifying the taking, as well as price manipulation by the governmental agency, lack of transparency, harsh dealing, and unjust compensation.

III. SUGGESTED SOLUTIONS

A number of legal scholars have suggested solutions to eminent domain abuse. The most prominent is Richard Epstein, who has written two books on the subject.⁵⁷ Ilya Somin, David Dana, and Amanda Goodwin have also considered the issue recently.⁵⁸ While most of the suggested solutions include a ban on economic development takings, they do not consider the procedural issues that property owners, like those in Alabama, may be facing.

A. Mere Pretext

Kelo stipulates that public use should be defined as “public purpose” combined with deference to legislative judgments.⁵⁹ Nevertheless, some have argued that the Court did (in dicta) put some limitation on the scope of deference, basing their argument on the following language:⁶⁰

[T]he City [of New London] would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void”). Nor would the City be allowed to take property under the mere *pretext* of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, . . . the City’s development plan was not adopted “to benefit a particular class of identifiable individuals.”⁶¹

56. See generally Transcript, *supra* note 20.

57. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); EPSTEIN, *supra* note 23.

58. See, e.g., Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007) [hereinafter *Bad for Poor?*]; Dana, *supra* note 15, at 381; Goodin, *supra* note 15, at 200 & n.121.

59. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

60. Daniel B. Kelly, Olin Fellow, Yale Law School, Address to the Federalist Society on Post-*Kelo* Eminent Domain Reform (Jan. 4, 2008).

61. *Kelo*, 545 U.S. at 477-78 (citations omitted) (emphasis added).

This approach might benefit Joy Smith and her Independent Music studio in Nashville, because the assertion in that case was that the threatened taking was done to confer a private benefit on a particular private party (the developer).⁶² However, the approach is unlikely to help the other complainants in California, New York, or Alabama. While “pretext” might seem to put some limit on the scope of deference, the burden of proof of establishing that the taking was pretextual in order to bestow a private benefit would be on the owner. Further, under the *Berman/Kelo* decisions’ expansive deference to the legislature, a claim that a taking was pretextual could be rebutted merely by the government showing that the private party promised to remove some blight, promised a renewal, or promised a broader tax base. Furthermore, the Court provided no description of what would constitute a “carefully considered development plan,” or what would constitute a sub-standard development plan.⁶³ Thus, *Kelo* grants legislatures extremely broad power to take for purposes of renewal, and grants courts little, if any, power to review those legislative decisions.

B. Epstein’s Proposed Judicial Standard

Epstein posits that the problems with current interpretations of the Takings Clause have arisen for several reasons: (1) because the clause itself is stated in very general terms;⁶⁴ (2) because modern constitutional law mistakenly seeks to extend a high level of protection solely to the right to exclude, ignoring the common law bundle of rights such as exclusive rights of possession, use, and disposition;⁶⁵ and (3) because courts have a naïve faith in good government⁶⁶ by mistakenly believing that public officials typically

62. It might also have helped Port Chester residents Bart Didden and Dominick Bologna. See Richard A. Epstein & Ilya Somin, *The Didden Decision: A Pretextual Decision*, 29 (18) NAT’L L. J. 27 (Jan. 8, 2007):

In 1999, the village of Port Chester, N.Y., established a ‘redevelopment area’ and gave its designated developer, Gregg Wasser, a virtual blank check to condemn property within it. In 2003, property owners Bart Didden and Dominick Bologna approached Wasser for permission to build a CVS pharmacy on land they own inside the zone. His response: Either pay me \$800,000 or give me a 50% partnership interest in the CVS project. Wasser threatened to have the local government condemn the land if his demands weren’t met. When they refused to oblige, their property was condemned the next day. Didden and Bologna challenged the condemnation in federal court, on the grounds that it was not for a “public use,” as the Fifth Amendment requires. Their view, quite simply, was that out-and-out extortion does not qualify as a public use. Nonetheless, the 2d Circuit, in a brief and unsatisfactory decision, upheld this flexing of political muscle.

Id.

63. *Kelo*, 545 U.S. at 478.

64. See EPSTEIN, *supra* note 23, at 38.

65. *Id.* at xvi.

66. *Id.* at 77.

act in the public interest, whereas private landowners typically do not.⁶⁷ The reality is that, rather than working tirelessly for the public good, parochial local governments use planning to gain unfair competitive advantage over commercial rivals.⁶⁸ They use blight declarations to justify condemning communities such as *Poletown* in order to attract plants that never materialize.⁶⁹ In deferring to such governments, courts systematically under-protect and under-compensate property owners.⁷⁰ Consequently, courts defer far too quickly to the legislative will in presuming that a taking is constitutional if it is “rationally related to a conceivable public purpose,”⁷¹ and that any economic renewal plan is therefore legitimate.

In contrast to current constitutional law, Epstein posits that traditional common law of property is much more efficient in that it wrings as much benefit out of all resources as possible by protecting the private owner’s entire bundle of rights.⁷² Thus, traditional common law demands effective, transparent systems of recordation and transfer.⁷³ A strong defense of private property and limited government does not rest on the parochial ambition to help the privileged few at the expense of society’s most vulnerable members. Instead, it asks how legislation affects all individuals,⁷⁴ and whether government is abusing or allowing the abuse of individuals—wealthy or poor. Under the traditional police power, a government can limit the use of private property, prevent nuisance, or take property without paying compensation, but only when needed to protect the health, safety, general welfare, and morals of the community.⁷⁵ These limitations can only be exercised to the extent necessary, and only after giving the owner notice and an opportunity to rectify the problem.⁷⁶

Epstein proposes a four-part test to determine whether a taking is constitutional:

- (1) Was private property taken, either by occupation or by restrictions on use or disposition? If so, (2) was that taking justified under the police power to protect against wrongs that the property owner committed against others? If not, (3) was

67. *Id.* at 50.

68. *Id.* at 76.

69. *Id.* at 82, 86.

70. *Id.* at 50, 90.

71. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

72. EPSTEIN, *supra* note 23, at xvi.

73. *Id.* See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHED IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (demonstrating, through empirical study, that economic weaknesses in developing countries are often related to lack of effective, transparent systems of recordation and transfer of property and business ownership).

74. EPSTEIN, *supra* note 23, at 9.

75. *Id.* at 42.

76. See, e.g., *Herrit v. Code Mgmt. Appeal Bd. of Butler*, 704 A.2d 186 (Pa. Commw. 1997) (discussed in Eagle & Perotti, *supra* note 30, at 846).

that taking for a public use? If not, then the consent of the owner is needed. If so, (4) was just compensation paid by the state to the owner for the full losses incurred by the taking?⁷⁷

The first prong involves determining whether there was a taking and is designed to limit or eliminate the current dichotomy between physical takings and regulatory takings.⁷⁸ However, as the subject of this Article is limited to actual physical takings, and regulatory takings are not at issue in the four instances described above, the question then becomes whether the other three prongs of Epstein's test would eliminate abusive economic or "blight" takings.

Under the second prong, a taking under the police power of, for example, a crack house would be justified and no compensation would be needed if the government could demonstrate that the owner had been notified and given an opportunity to rectify the problem but failed to do so. In such an instance, the taking would be justified to protect the safety of neighbors. Under the third prong, Epstein intends to return primarily to the original definition of public use: use by the public or the government.⁷⁹ Courts could require proof that the political branch conducted a cost-benefit analysis, but courts would not have the power to initiate, finance, or oversee any public project:⁸⁰ "the taking [would be allowed] only when the loss in subjective value is small and the locational necessities are great."⁸¹ This third prong, however, is easily misinterpreted and therefore weak. In application, it would likely be subject to the same abuses that led the Supreme Court in *Berman* to abandon its interpretational responsibility in the first place.⁸² Historically courts, including the Supreme Court, have been unable to determine with any consistency what constitutes use by the public.⁸³

The last prong of Epstein's test could help significantly in rectifying the most serious complaint concerning eminent domain abuse—undercompensation—by abandoning the "fair market value" test and by incorporating use value, the costs attendant on forced dislocation, goodwill, licensing costs, and other consequential damages.⁸⁴ Thus, an owner whose property was taken would be due full compensation.

While Epstein's approach would in one respect resolve the California and New York issues by precluding economic takings, the primary short-

77. EPSTEIN, *supra* note 23, at 163-64; *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

78. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

79. EPSTEIN, *supra* note 23, at 78, 80.

80. *Id.*

81. *Id.* at 85.

82. Berman v. Parker, 348 U.S. 26, 32-33 (1954) (discussing split).

83. *See supra* Section II.A.

84. EPSTEIN, *supra* note 23, at 90-92.

coming of Epstein's approach is that it presumes parties have recourse to courts. In reality, the mechanisms by which parochial eminent domain is exercised often allow for little or no judicial review, as in California,⁸⁵ or provide no set procedures for the negotiating process and no requirement of an independent evaluation, as in Alabama.⁸⁶ Procedural requirements under administrative law vary widely, and determining what process is due in an administrative proceeding is notoriously difficult.⁸⁷ Epstein's proposal does not address this problem. Furthermore, implementation of the four prongs of his test requires monumental, rather than incremental, changes in the law and is therefore unlikely to be adopted.

C. Blight

In addition to suggesting using the *Kelo* "pretext" exception and completely revamping the interpretation of the Takings Clause, some scholars have suggested eliminating the blight exception and economic takings to eliminate the abuse of eminent domain.⁸⁸ In *Berman*, a unanimous Supreme Court held that urban renewal was an acceptable "public use" justification for taking private property from one owner and transferring it to another. *Berman's* well-maintained department store, located on the impoverished east side of Washington, D.C., could be torn down as part of a comprehensive slum clearance plan.⁸⁹ Nothing in the opinion tethered public use to blight, as opposed to urban renewal and economic development.⁹⁰ Nevertheless, after *Berman*, blight remains a politically acceptable justification for an economic taking partly for historical reasons and partly because the term brings to mind the crack-house example discussed earlier, as opposed to the examples of Susette Kelo's lovingly cared-for home or *Berman's* well-maintained department store. It simply seems intuitively justifiable for a government to take the crack house, but not a well cared-for home or a viable department store. Spanning the distance between the two extremes is a long history of the development of urban renewal and blight eradication as an acceptable governmental function.

85. See discussion *supra* Subsection II.B.3.

86. Alabama does not have a similar statute, see *supra* text accompanying note 47.

87. See CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2.20 (2006); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW §§ 2.1.1, 2.1.3, 9.2 (West 1993) (discussing when due process is applicable in adjudicative proceedings, its variable content and timing).

88. See, e.g., Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007) (advocating the use of nuisance law and eliminating blight exceptions in eminent domain actions); Goodin, *supra* note 15 (arguing that allowing an economic taking only in the presence of a finding of blight is itself problematic).

89. *Berman v. Parker*, 348 U.S. 26, 30-31 (1954).

90. EPSTEIN, *supra* note 23, at 81.

The urban renewal movement began in the 1920s, during a time when American cities witnessed a boom in the construction of skyscrapers and factories.⁹¹ While the expansion of the suburbs drew the rich, the middle class, and the second generation immigrants out of the city, the slums remained, seemingly impervious to change.⁹² Under the influence of the Progressive Movement, real estate interests, housing reformers, and big-city politicians all hoped to reap benefits from renewing slum areas and formed coalitions to promote redevelopment.⁹³ These coalitions fostered a political climate amenable to the radical reconstruction of urban areas and gradually developed a new terminology of city decline, focusing on the terms *slum* and *blight*.⁹⁴ Advocates worked to convince urban residents that, unless the government intervened, these problems would continue to plague cities.⁹⁵

A *slum* was defined as an area with run-down buildings, dirty streets, and a high crime rate.⁹⁶ Slums were almost exclusively inhabited by poor people.⁹⁷ They were identified as an excess of buildings that were either dilapidated, obsolete, overcrowded, poorly arranged or designed; lacking ventilation, light or sanitary facilities; or a combination of the above.⁹⁸ These conditions were detrimental to the safety, health, morals and comfort of the inhabitants.⁹⁹ In contrast, a *blighted* area (originally a term applied only to plant diseases), referred to an area somewhat better than a slum. *Blight* referred to allegedly natural patterns of detrimental urban changes arising around a city's central business district in formerly residential areas that became mixed with industry and commerce.¹⁰⁰ Formerly attractive housing was divided into ever smaller units for the poor, and eventually these areas were "invaded" by ethnic and racial minorities.¹⁰¹ Planners argued that blight was caused by lack of planning: "[u]nguided urban growth' and an 'indiscriminate mixture of homes, factories, warehouses, junk yards, and stores that has resulted in depressed property values.'" ¹⁰² The thinking was that zoning would improve areas because it could be used to prevent these mixtures—a conclusion that (like eminent domain) has been questioned.¹⁰³

91. Pritchett, *supra* note 15, at 13-14.

92. *Id.* at 13.

93. *Id.*

94. *Id.* at 15-16.

95. *Id.* at 16.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 17.

102. *Id.* (citation omitted).

103. See, e.g., Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279 (1990); MICHAEL GOLDBERG & PETER J. HARWOOD, ZONING: ITS COSTS

In the 1950s and 1960s, because of Federal legislation passed in 1949 making substantial federal funding available for large-scale urban renewal projects,¹⁰⁴ cities across the country engaged in massive urban renewal projects relying heavily on the use of eminent domain.¹⁰⁵ Major sections of many cities were demolished and rebuilt.¹⁰⁶ Across the country, the urban renewal movement displaced approximately 177,000 families and another 66,000 individuals, most of them poor and black.¹⁰⁷ Some projects had the effect of forcing low-income residents entirely out of their cities because of the 48,000 new housing units constructed during the same period, less than half (20,000) of those constituted low-cost housing.¹⁰⁸

Although renewal advocates devoted a great deal of study to blighted areas, they never developed a systematic process through which to determine whether an area was blighted.¹⁰⁹ Because the term was so poorly defined, it became a useful rhetorical device.¹¹⁰ Each state defines blight by statute, generally requiring a finding of at least one among a list of factors that constitute blight.¹¹¹ These laundry lists can include things such as structural deterioration, overcrowding, inadequate parking, high crime rates, property tax delinquency, and even uneconomic use of land.¹¹² Older stat-

AND RELEVANCE FOR THE 1980S 14-15 (Walter Block ed., 1980); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 4 (1972); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970).

104. Housing Act of 1949, 42 U.S.C. §§ 1441-60 (2000). See also Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 313 (2004).

105. See Pritchett, *supra* note 15, at 31-37 (discussing trends in urban redevelopment leading to passage of the Housing Act of 1949); *id.* at 37-47 (discussing post-Housing Act redevelopment trends leading to *Berman*).

106. Goodin, *supra* note 15, at 200 & n.121 (citing ROBERT CARO, *THE POWER BROKER* (1975) and discussing Robert Moses's aggressive development agenda which reshaped much of New York City).

107. Frieden & Kaplan, *supra* note 15, at 24, *cited and quoted in* Goodin, *supra* note 15, at 200 & n.122; A. Mushkatel & K. Nakhleh, *Eminent Domain: Land-Use Planning and the Powerless in the United States and Israel*, 26(2) *SOC. PROBS.* 147-159 (1978).

108. CARPENTER & ROSS, *supra* note 19, at 5 (citing Mushkatel & Nakhleh, *supra* note 107).

109. Pritchett, *supra* note 15, at 18.

110. *Id.*

111. Goodin, *supra* note 15, at 197.

112. *Id.* See, for example, Ala. Code section 24-2-2(c) (2006), classifying "blighted property" as property that contains *any* of these factors:

(1) The presence of structures, buildings, or improvements, which, because of dilapidation, deterioration, or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision for ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy.

utes are likely to have longer, broader lists that require a finding of only one factor, making them so broad as to be essentially meaningless. Almost any property under these statutes could be classified as “blighted.”¹¹³ Such definitions lend themselves to abuse, especially where state and local tax increment financing allows public money to be used in urban renewal projects. This provides further incentives to local governments to abuse economic takings.¹¹⁴

In one instance, the city council in St. Louis, Missouri allegedly hired multiple appraisers in an effort to have a World-War II era working-class subdivision declared “blighted” so that it could be redeveloped as a shopping mall, thus increasing the city’s tax base.¹¹⁵ The only problems found were some bedrooms in basements, front porches that had settled, and some windows too small to allow escape in an emergency.¹¹⁶ Similarly, local officials in the St. Louis suburb of Des Peres declared a thriving shopping mall “blighted” in 1997 because it “was too small and had too few anchor stores,” (specifically, it lacked a Nordstrom).¹¹⁷ The entire affluent town of

(2) The existence of high density of population and overcrowding or the existence of structures which are fire hazards or are otherwise dangerous to the safety of persons or property or any combination of the factors.

(3) The presence of a substantial number of properties having defective or unusual conditions of title which make the free transfer or alienation of the properties unlikely or impossible.

(4) The presence of structures from which the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.

(5) The presence of excessive vacant land on which structures were previously located which, by reason of neglect or lack of maintenance, has become overgrown with noxious weeds, is a place for accumulation of trash and debris, or a haven for mosquitoes, rodents, or other vermin where the owner refuses to remedy the problem after notice by the appropriate governing body.

(6) The presence of property which, because of physical condition, use, or occupancy, constitutes a public nuisance or attractive nuisance where the owner refuses to remedy the problem after notice by the appropriate governing body.

(7) The presence of property with code violations affecting health or safety that has not been substantially rehabilitated within the time periods required by the applicable codes.

(8) The presence of property that has tax delinquencies exceeding the value of the property.

(9) The presence of property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

Id.

113. Goodin, *supra* note 15, at 197-98.

114. Gordon, *supra* note 104, at 305-306.

115. Peter WS. Salsich, Jr., *Privatization and Democratization—Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 757 (2006).

116. *Id.*

117. See *JG St. Louis W. Ltd. Liab. Co. v. Des Peres*, 41 S.W.3d 513, 516-17 (Mo. Ct. App. 2001), *discussed in* Gordon, *supra* note 104, at 307.

Coronado, California was declared blighted in 1985 so that the city could use the resulting TIF zone property tax revenues to pay for school improvements.¹¹⁸ A modest two-bedroom home in Coronado can easily cost over \$1,000,000.

D. Post-*Kelo* Reforms and Blight Definitions

Unfortunately, this nonsensical, self-dealing use of blight statutes and tax incentives has not changed significantly post-*Kelo*. *Kelo* explicitly affirmed that states are free to provide owners with a higher level of protection from eminent domain takings than does the Supreme Court's interpretation of the U.S. Constitution's Takings Clause, and a few states have taken advantage of that opening to provide a higher level of protection for property owners post-*Kelo*.¹¹⁹ In the furor after *Kelo*, a majority of states immediately reformed their eminent domain laws, ostensibly limiting or precluding the use of eminent domain for development, but most of them provide little additional protection. A few states, such as Florida, flatly prohibit the use of eminent domain for development, regardless of whether the property is blighted or not.¹²⁰ Some states, such as Georgia and Indiana, ostensibly allow takings to remedy blighted areas, but under very narrow restrictions that essentially amount to prohibition.¹²¹ Still other states essentially prohibit the use of eminent domain but permit an area to be taken if some proportion of the parcels falls under a narrow definition of blight, as is the case in Iowa (75%) and Minnesota (50%). Under these kinds of statutes, land assembly for redevelopment is still permitted, but under limited conditions.

Most states that passed legislative reforms focused primarily on tightening their definition of public use to exclude development projects or projects aimed at increasing tax revenue while leaving an exception for blighted areas. These states were still under the impression that renewal projects for 'blighted' areas are an effective way of improving cities.¹²² One scholar posits that by creating narrower standards for blight designations, the states that enacted these standards were trying to protect middle-class households from using blight designations to end-run a ban in economic development condemnations.¹²³ Thus, under tightened blight rules, local authorities would continue to target poor areas (those most likely to be

118. George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 999 (2001), discussed in Gordon, *supra* note 104, at 306.

119. See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

120. Goodin, *supra* note 15, at 195.

121. *Id.* at 196.

122. *Id.* at 194-95.

123. Dana, *supra* note 15, at 381.

blighted) while working-class and middle-class areas would be much more difficult to condemn.¹²⁴ One author concedes that eminent domain proceedings disproportionately affect the poor, but notes that nothing at this point indicates that the post-*Kelo* reform has exacerbated the problem.¹²⁵

Unfortunately, the scholarly literature fails to acknowledge straightforwardly that communities desiring to redevelop areas are, for very logical reasons, always likely to target poorer areas because they are the areas that most need redevelopment, and they are the least expensive to acquire under eminent domain powers. There is no public policy that the exercise of eminent domain should equally target the rich, the middle-class, and the poor. Developing a rule of proportionality or equal protection would be nonsensical in this situation.

The Alabama situation exemplifies that the objections to the eminent domain takings were based on unfair process and lack of just compensation, not objections to the takings themselves. The deprived owners, who were primarily poor, minority, uneducated, ill, or elderly, were upset because they were treated disrespectfully and left worse-off after the taking. Thus, the problem continues to be finding a way to affect changes that will provide protection to the powerless and ensure that, when the state exercises its eminent domain power, the owner is fairly compensated for his property regardless of his sophistication and ability to navigate a convoluted legal system. In a society that provides staunch protection for accused criminals because it is “better that ten guilty persons escape, than that one innocent suffer,”¹²⁶ it is hypocritical to allow the state to cheat the poorest, most vulnerable citizens out of their property.

E. Police Power and Nuisance

Eminent domain and common law nuisance doctrine provide governments with different (and somewhat overlapping) powers concerning the remediation of blight. Under common law nuisance doctrine, the government may use police power to abate blight and other evils that landowners do not abate on their own.¹²⁷ As William Blackstone stated, “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”¹²⁸ Thus, a government can limit the use of private property, prevent nuisance, or take property without paying compensation, but only to the extent necessary to protect the health,

124. *Id.* at 377.

125. Somin, *Bad for Poor?*, *supra* note 58.

126. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 352 (1871) (“Blackstone’s Ratio”).

127. Eagle & Perotti, *supra* note 30, at 845.

128. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

safety, general welfare, and morals of the community,¹²⁹ and only after giving the owner notice and an opportunity to rectify the problem.¹³⁰ Despite the fact that nuisance doctrine allows the government to take property without compensation, owners have some protection under the police power that is lacking under eminent domain. Generally, the property owner must be given notice and an opportunity to repair the identified problem.¹³¹ Furthermore, many state courts have limited the government's power to demolish unsafe buildings to cases of actual need.¹³² Thus, nuisance is a physical condition of the land, and government efforts to abate do not imply that the landowner loses title. Instead, the property owner does not own the right to engage in the use constituting the nuisance, but does maintain private property rights.¹³³ Epstein's second prong under the proposed Eminent Domain test, which asks whether the taking was justified under the police power to protect against wrongs that the property owner committed against others, would incorporate traditional nuisance law into eminent domain doctrine, especially where "blight" issues are concerned.

Eliminating economic takings under eminent domain law and using only traditional police power for blight, as posited by Epstein, would eliminate wholesale takings of neighborhoods. This would preclude situations such as Poletown, the San Francisco eminent domain threat, and the Iron Triangle situation. However, it might still provide incentive for well-connected redevelopers to team with local officials to acquire smaller, individual parcels of private land without the requirement of having to compensate the owner. Hence, in addition to banning economic takings, local and state governments could be required to give the owner of a "blighted" property an opportunity to repair the problem before police power is exercised.¹³⁴ Professor Eagle suggests that in addition to requiring that the owner be given an opportunity to abate the blighting conditions, the locality could perform the needed repairs and charge the costs to the owner as a betterment assessment, should the owner be unwilling or unable to do so.¹³⁵ Should the owner still not pay, then the assessment lien could be foreclosed upon and the parcel subsequently sold at a tax sale to the highest bidder.¹³⁶ Professor Eagle foresees several advantages to this bolstered form of nuisance doctrine: (1) the police power approach is more consistent with eradicating

129. See EPSTEIN, *supra* note 23, at 42.

130. See, e.g., *Herrit v. Code Mgmt. Appeal Bd. of Butler*, 704 A.2d 186, 189 (Pa. Commw. Ct. 1997); Eagle & Perotti, *supra* note 30, at 846.

131. Eagle & Perotti, *supra* note 30, at 846.

132. *Id.*

133. *Id.*

134. *Id.*

135. Stephen J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW 833, 838 (2007).

136. Eagle & Perotti, *supra* note 30, at 847.

harms than the takings power; (2) the approach will help prevent the abuses and rent-seeking that result from collusion between well-connected redevelopers and local officials (thus preventing the Nashville and New York problems); and (3) the abatement-and-foreclosure procedure, by allowing acquisition of the parcel by any astute bidder at the foreclosure sale, makes the proceedings transparent and incorporates the advantages of the free market in developing an efficient solution to a blight problem.¹³⁷

F. Just Compensation

What individuals really want, even more than the right to keep their property, is fair proceedings and just compensation. Consistent with Supreme Court language, a property owner expects that if the government takes his property, the Takings Clause will require that he be justly compensated so that he is left no worse off after the taking than he was before.¹³⁸ Under eminent domain practice, the expropriating agency must first attempt to purchase the property through voluntary negotiation; nevertheless, the property owner is likely to be aware that an eminent domain action is threatened if he or she refuses to sell on the government's terms. Therefore, such "voluntary negotiation" is, in fact, coercive in nature.¹³⁹ This is apparent in the New York, Tennessee, and Alabama examples discussed previously.

Once the property is subjected to an eminent domain action, the owner is theoretically due the full economic value of the property. But courts have found it difficult to develop working rules to determine that value out of fear that some owners will hold out and unjustifiably drive up the market price.¹⁴⁰ The widely accepted standard is termed "fair market value."¹⁴¹ Unfortunately, landowners have been systematically under-compensated for the loss of their property in eminent domain actions. Business owners cannot recover lost profits, goodwill, removal costs, litigation costs, appraisal

137. *See id.*

138. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); United States v. Miler, 317 U.S. 369, 373 (1943); Olson v. United States, 292 U.S. 246, 255 (1934); Campbell v. United States, 266 U.S. 368, 371 (1924) (all holding that just compensation requires that the owner be put in substantially the same position pecuniarily as if he would have been if his property had not been taken).

139. *Eminent Domain*, *supra* note 2, at 151.

140. *See* 564.54 Acres of Land, 441 U.S. at 511; United States v. Cors, 337 U.S. 325, 332 (1949); United States v. Fuller, 409 U.S. 488, 492 (1973); United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 289 (1943) (Jackson, J., dissenting); *Miller*, 317 U.S. at 375.

141. *Miller*, 317 U.S. at 374; 564.54 Acres of Land, 441 U.S. at 511 (quoted in both sources).

fees, or demoralization costs.¹⁴² Homeowners cannot recover subjective value, litigation costs, appraisal fees, moving costs (above a certain statute-stipulated amount), or any other indirect costs and fees.¹⁴³ Thus, because even in the best of circumstances an owner cannot recover these kinds of costs, by definition he is not left in as good a financial position after the taking as he was before it. The market value method undervalues the property taken and is a poorly-defined fiction. It is confusing, circular, and based on unsound economic theory.¹⁴⁴ Furthermore, as indicated in the Alabama case of the church that lacked access to water, the lack of mutual responsibility between agencies of the same government leaves owners vulnerable to being preyed-upon twice—first by the taking agency and next by agencies responsible for providing infrastructure.

Some state legislation has attempted to remedy the pitfalls of “fair market value” by requiring enhanced compensation. For example, Indiana specifies that the price to be paid for agricultural land taken through eminent domain must be either 125% of the fair market value of the land or an exchange for a lot of equal acreage plus business losses. Residential land must be compensated at 150% of the fair market value and payment of relocation costs.¹⁴⁵ Michigan similarly requires that condemning authorities pay a homeowner no less than 125% of the fair market value.¹⁴⁶

G. Administrative Procedure

Once a state or local government has authorized the exercise of eminent domain, the actual taking is done by an administrative agency or the agent of an administrative agency. The procedures by which eminent domain takings are governed must be in accord with the due process rules set forth in the Fifth and Fourteenth Amendments of the Constitution: “no person shall be deprived of life, liberty, or property, without due process of law.” However, the underlying administrative law presumption is that federal (and state) agencies have a great deal of freedom with regard to decision-making, because each agency has its own governmental purpose and must be allowed to develop its own rules and procedures, as long as they are within the scope of the powers delegated to them by the appropriate legislative body.¹⁴⁷ Agencies may have both rule-making and decision-making

142. Nathan Burdsal, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 82-83 nn.14-19 (2005).

143. *Id.* at 87-88; *see also* United States v. Bodcaw Co., 440 U.S. 202, 204 (1979).

144. *Eminent Domain*, *supra* note 2, at 151-153 and sources cited therein.

145. *See* IND. CODE ANN. § 32-24-4.5-8(1) (LexisNexis 2006) (taking of agricultural land); IND. CODE ANN. § 32-24-4.5-8(2) (LexisNexis 2006) (taking of residential land).

146. MICH. CONST. art X, § 2.

147. *See* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AS A LEGAL DISCIPLINE, 1 ADMIN. L. & PRAC. § 1.2 (2d ed. 1997); AMAN & MAYTON, *supra* note 87, at 1.

(“adjudicative”) duties.¹⁴⁸ An eminent domain taking or condemnation is adjudicative in nature, rather than rule-making. Adjudicative procedures can be either formal or informal.

Formal adjudication procedures require: (1) timely and adequate notice, (2) opportunity to participate in the decision-making, (3) effective opportunity to defend by confronting any adverse witnesses and rebutting other information, (4) representation by counsel, (5) a record of the proceedings and some form of reasons for the decision, and (6) an impartial decision-maker.¹⁴⁹ Generally there is a right to review a decision made with a formal procedure. A formal procedure can be reviewed either by a separate reviewing body (as with the Board of Immigration Appeals), by a court, or by both.¹⁵⁰ Informal agency actions are more common and are the “life-blood of the administrative process.”¹⁵¹ Such informal processes include, for example, requests for exceptions, waivers, and exemptions to existing agency rules.¹⁵² Under Supreme Court interpretations, a court reviewing agency decisions for constitutionality, whether formal or informal, must determine two things: first, whether there was a deprivation of a protected interest (life, liberty, or property); and second, whether the procedures provided were adequate. In other words, if there is a deprivation the issue then becomes what amount of process is due.¹⁵³

The most recent Supreme Court case addressing due process requirements in eminent domain actions is *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*¹⁵⁴ The plurality stated, “when the government initiates [eminent domain] condemnation proceedings, it concedes the landowner’s right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue.”¹⁵⁵ Furthermore:

When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution. If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government’s actions are neither unconstitutional nor unlawful. . . . Even when the government takes property without initiating condemnation proceedings, there is no constitutional violation unless or until the state fails to provide an adequate post deprivation remedy for the property loss.¹⁵⁶

148. KOCH, *supra* note 147, at § 2.11.

149. *Id.* at § 2.13.

150. *See, e.g.*, Bd. of Immigration Appeals, www.usdoj.gov/eoir/biainfo.htm (last visited Mar. 3, 2009).

151. AMAN & MAYTON, *supra* note 87, at § 9.1.

152. *Id.* at § 9.4.

153. *Id.* at § 7.2.

154. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

155. *Id.* at 712.

156. *Id.* at 714-15 (citations and quotations omitted).

Thus, if the taking is constitutional as per eminent domain requirements, no particular formal procedure is required. Similarly, where a condemnation has resulted from an exercise of police power, the Court has a long line of cases finding that a state's use of its police power to enjoin a property owner from activities akin to public nuisances complies with the requirements of both the Due Process Clause and the Takings Clause.¹⁵⁷

All of the problems enumerated in the Alabama example stemmed from confusing or inadequate procedure. Individual state and local agencies are authorized to process their own eminent domain actions, blight-related or otherwise, and have no accountability for how the action is promulgated. Agents promulgating the takings had no supervision, and the property-owners or their lawyers had no recourse or ability to secure an independent evaluation of the property. As constitutional requirements for due process with regard to takings is minimal, states are free to provide greater protection to homeowners. In deciding what requirements to incorporate with regard to condemnation procedures, lawmakers may want to restrict condemnations to specific, listed agencies. Lawmakers should also designate a separate, independent agency to determine the value of the property and require that an owner be notified that his or her property is being considered for a taking prior to any decision being made. Finally, lawmakers should provide an independent review process through which a homeowner can appeal any such decision.

CONCLUSION

Regardless of political affiliation, most advocates of change propose judicial solutions to the problem of economic eminent domain takings by suggesting standards that a court might impose upon judicial review of a taking. The problem with this approach is that it presumes that most takings are actually litigated. This is an unrealistic expectation, because the types of abuses that are occurring are unlikely to lead to litigation. Either the complainants cannot find lawyers, the lawyers who accept the cases cannot find their way through the morass of state and local agency procedures to a court, or the court (under Supreme Court jurisprudence) extends extreme deference to the government involved. As indicated by post-*Kelo* state legislation and the increasing proliferation of YouTube postings, blogs, and grass-roots organizations, the more sensible approach is through legislation.

The Antifederalists and current scholars were absolutely correct in their assessment that governments do not necessarily act in the public interest, that their powers should be strictly limited, and that their actions should be carefully checked. Governments should be completely barred from any

157. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022 (1992).

power of eminent domain. Nevertheless, this is unlikely to happen. Furthermore, current post-*Kelo* legislation generally protects middle-class and upper-class property, but allows lower-class property to be taken through broadly-defined blight exceptions. As indicated by Madison in the Tenth Federalist, as well as Hayek in *The Road to Serfdom*, governments should not be promoting the interest of any particular faction.¹⁵⁸ Except in times of war, a government should be a civil association, not an enterprise association,¹⁵⁹ and it should promulgate rules that give all parties a fair forum in which to further their interests. The government should not set rules that favor any one faction over another and, thus, should not favor rich over poor, or poor over rich. While acknowledging that the encouragement of economic development is an acceptable goal for government, the appropriate and effective way to do that is through working with market forces and individuals and possibly by giving tax incentives where development is desired. The government must set clear, simple procedural standards for agencies that require fairness, transparency, and simple licensing and regulatory demands. Taking private property and giving it (at sub-par cost) to another private party is certainly not the way to accomplish this.

Because of *Kelo* and the wide-spread furor it caused, recent scholarly focus has been on economic takings. Post-*Kelo* legislation has narrowed local government's authority to take private property from one person and transfer it to another, but it has done nothing to protect those who are most vulnerable and whose property is still likely to be taken as "blighted." Completely banning such takings and relying solely on nuisance doctrine might be ideal, but it would require political agreement on the premise that governments are not likely to be behaving in good faith with regard to renewal programs. Such agreements are unlikely in today's political environment where a large portion of society presumes that "[p]romoting economic development is a traditional and long-accepted function of government."¹⁶⁰ The implicit corollary is that taking private property to accomplish this goal has been acceptable since the New Deal.

A simpler, more effective solution is needed—one that is less likely to spark debate about the proper role of government in society. In parity with private property law, legislatures must require simple, standardized procedures for takings so that only one state agency has the power to negotiate them. Legislatures must also require independent appraisals and set out clear, unbiased mechanisms for review.

158. See generally THE FEDERALIST NO. 10 (James Madison); F.A. HAYEK, THE ROAD TO SERFDOM (50th Anniversary Ed. 1994).

159. See MICHAEL OAKESHOTT, ON HUMAN CONDUCT 109 (1975).

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