THE REALLY NEW PROPERTY: A SKEPTICAL APPRAISAL

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I. THE CALL FOR TRANSFORMATIVE ACTIVITY

The simple idea that it needs only a change in some external thing (such as the structure of property rights) to transform the human condition is superstition lurking behind many treatments of the subject.[1]

A. The Beguiling Nature of Transformation

The call for transformation in property law reminds us that there is nothing new under the sun.[2] Moderns have sought secular salvation; first through Marxism,[3] and more recently through progressive or free market economics.[4] Many have sought it through reform of law in general, and property law in particular. This is hardly surprising, because the "idea that law is a governing instrument is central to American jurisprudential thought," and scholars with disparate objectives have described "law" in terms they found congenial.[5]

Like the prophets of biblical days, "modern American lawyer-prophets . . . [have] brought prophetic anger at injustice into the public square in America."[6] Hearkening to the New Deal and Civil Rights revolutions, when "law became a

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1. Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, *in* NOMOS XXII: PROPERTY 3, 8 (J. Roland Pennock & John W. Chapman eds., 1980).

2. *Ecclesiastes* 1:9. *See infra* note 7. An earlier version of this Article was presented at an Association of American Law Schools (AALS) panel on "Law as Transformative Agent: Thinking and Doing Property in New Categories."

3. *See* KARL MARX, CAPITAL (Eden & Cedar Paul trans., J.M. Dent & Sons Ltd. 1978) (1867) (The first volume of Karl Marx's *Das Kapital* was published in 1867. Marx asserted not only that capitalism exploited and alienated labor, but also that it separated subjective moral value and objective economic value.).

4. *See generally* Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 CASE W. RES. L. REV. 569 (2006). The relationship between market activity and human flourishing remains the subject of lively debate. *See, e.g.*, Brian Leiter, *Marxism and the Continuing Irrelevance of Normative Theory*, 54 STAN. L. REV. 1129, 1136 (2002) ("When conservatives argue that the welfare state is doomed because it stifles private enterprise . . . they are adopting Marx's argument that economics is the driving force in human development.") (quoting John Cassidy, *The Return of Karl Marx*, NEW YORKER, Oct. 20, 1997, at 249, 250).

5. Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMP. L. REV. 737, 739 n.6 (2008) (citing, inter alia, the following examples: legal process, law and economics, and critical legal studies).

6. Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 521 (2003).

powerful tool to challenge and reconfigure social institutions,"[7] Association of American Law Schools President Rachel Moran asked: "Is the citizen-lawyer now largely relegated to some lost golden age of reform?"[8]

Our law of property is imperfect, as are our other social and economic institutions. It is thus entirely fitting that we commit ourselves to the search for correctives.[9] The label "citizen-lawyer" implies the application of legal skill to a range of public policy issues that go well beyond the administration of the judicial system. Perceived imperfections in property law historically have been a rich target for reform. "[M]odern Utopians . . . have tended to find private property distasteful and an impediment to perfectionist aspirations."[10] However, the reformist tendency conflicts with other values, because "if politics is only about property, it seems materialistic . . . . Yet a politics of virtue and justice can easily devour property."[11]

In considering social reform, the role of law is in uneasy tension with the role of social science. As Dean Anthony Kronman has noted,

> the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present, and though its power to do so is not limitless, neither is it nonexistent. In philosophy, by contrast, the past has no legitimating power of this sort.[12]

Nor does the past have legitimizing value in engineering or in economics, although, to be sure, practitioners try to learn from past events and from successes and failures in past endeavors.

Abrupt swerves in the law deprive it of legitimacy, especially where courts

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7. Rachel Moran, *Transformative Property*, https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=EventInfo&Reg_evt_key=e95fe6b3-00bd-4570-950c-d1bfa09e510c&RegPath=EventRegFees (last visited May 17, 2010). The theme of the AALS 2010 annual meeting was "transformative law." This thesis carried over to the joint program of the AALS Property and Real Estate Transactions Sections, titled "Law as Transformative Agent: Thinking and Doing Property in New Categories," where an earlier version of this Article was presented. *See* AALS Annual Meeting Program 22 (Jan. 6-10, 2010), *available at* http://www.aals.org/am2010/AMProgram2010.pdf.

8. Moran, *supra* note 7.

9. *See, e.g.*, Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 33-34 (J. Roland Pennock & John W. Chapman eds., 1982), *reprinted in* 39 TULSA L. REV. 663, 689 (2004)) (noting that, in such instances as individuals selling rights over their bodies in exchange for subsistence, "[t]hough it might turn out that there is no way . . . to make things on the whole any better, you would be committed to at least searching for some corrective").

10. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1898 (2007).

11. Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 889-90 (2009).

12. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032-33 (1990).

opine on polarizing issues in which they have no discernable special expertise or authority. As Ninth Circuit Court of Appeals Judge Alex Kozinski put it, "When we act like politicians we can expect to be treated like politicians."[13] Also, there is a fine line between the life of the law being governed by experience,[14] and by expedience.[15] Abrupt change also inflicts harm on those who relied on previously settled law and may confer windfall gains on others.[16] Although some would go so far as to celebrate "property outlaws" who force transformation in law by extralegal means,[17] the lack of stable property institutions has been a substantial bar to development.[18]

The debate over the modification of property law norms for advancing political goals has its genesis in the nature of law itself. For much of our history, the prevailing mode of thought was legal formalism, with its stress on law as autonomous, comprehensive, and structured.[19] "In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal."[20] On the other side of the debate is instrumentalism, the notion that law should advance wealth maximization,[21]

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13. United States v. Burdeau, 180 F.3d 1091, 1094 (9th Cir. 1999) (Kozinski, J., dissenting). While it is well within the common law tradition for courts to speak to other courts about the development of legal rules, it is novel and inappropriate to use the bench as a pulpit from which to deliver sermons to Congress about which laws it should pass, or to instruct the Justice Department on how to prosecute its criminal cases. These are matters entrusted by the Framers to the political branches, and we may not squander the court's moral capital by attempting to influence political processes.

Id. I am indebted to Gideon Kanner for calling Judge Kozinski's opinion to my attention.

14. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., The Belkamp Press of Harvard Univ. Press 1963) (1881) ("The life of the law has not been logic: it has been experience.").

15. *See* Kisbey v. State, 682 P.2d 1093, 1095 (Cal. 1984) ("[T]he life of the law is not logic, but expedience."); *see also* Gideon Kanner, *When Rip Van Winkle Meets 21st Century Jurisprudence*, L.A. DAILY J., June 2, 2009, at 6.

16. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 511 (1986) (analyzing how transitions in law "impose gains and losses on those who, prior to the change, had taken actions with long-term consequences").

17. *See* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010).

18. *See, e.g.*, HERNANDO DE SOTO, *Preface to* THE LAW AND ECONOMICS OF DEVELOPMENT, at xiii, xiii (Edgardo Buscaglia et al. eds., 1997) ("Those nations that have succeeded in developing a market-oriented economy are not coincidentally those that have recognized the need for and secured widespread property rights protected by just laws.").

19. *See, e.g.*, Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988).

20. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988).

21. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL

social solidarity,[22] or some other external goal.

In *The Path of the Law*,[23] Oliver Wendell Holmes, Jr., averred that judges "have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."[24] Professor Hanoch Dagan quotes this language as Holmes' claim that the "formalist fallacy" serves as a "cover-up."[25]

Holmes continued, "if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition."[26] After a brief trek through the Year Books, German forests, and assumptions of dominant classes,[27] he concluded:

> [History] is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[28]

Dean Anthony Kronman retorted:

> Holmes' celebrated dictum that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics," should thus be understood as a call for the rejection of tradition and, to the extent it rests upon traditionalist assumptions, of precedent itself, an unshackling of the law from the authority of the past and its replacement by the timeless authority of reason, or more precisely, by the particular species of reason that is embodied in the calculative judgments of economic science.[29]

"From the viewpoint of an economist, the past has no inherent authority,"[30] Kronman added, "and an appeal to it can never have, for him, a justificatory

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STUD. 103 (1979).

22. *See, e.g.*, ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 21-22 (1984).

23. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

24. *Id.* at 467.

25. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 617 (2007).

26. Holmes, *supra* note 23, at 469.

27. *Id.* at 468-69.

28. *Id.* at 469.

29. Kronman, *supra* note 12, at 1036 (quoting Holmes, *supra* note 23, at 469).

30. *Id.*

power of its own."[31]

The logical end of instrumentalism is the assertion that "[t]he idea of authority is a fabrication," that "[c]laims of moral right to be obeyed owe their historic salience to the self-interest of claimants," and that "human communications become law simply by participating in a self-recognizing system that successfully signals what people are likely to do and to expect."[32] Similarly, it has been argued that the difference between law and politics is only "a dualistic ontological conception."[33]

Early in their careers, my own law school mentors, Myres McDougal and Harold Lasswell, focused on legal education and public service. They noted that training for the public profession of the law has been the purview of law teachers, a "subsidized intellectual elite."[34] Despite lamentations about the need to refashion the curriculum to serve "insistent contemporary needs,"[35] little has been done to incorporate social science into law and to make jurisprudence responsive to "the major problems of a society struggling to achieve democratic values."[36]

Lawyers, when advising policy makers regarding legal constraints, they added, are "in an unassailably strategic position to influence, if not create, policy."[37] McDougal summed up legal realism as standing for the proposition that "law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves."[38]

Karl Llewellyn, a leading proponent of American Legal Realism, reported in 1931 that "[f]irst efforts have been made to capitalize the wealth of our

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31. *Id.*

32. Laurence Claus, *The Empty Idea of Authority*, 2009 U. ILL. L. REV. 1301, 1301.

33. Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT'L & COMP. L. 19, 20 (2009). Dr. Cerar's article further notes:

> Law and politics as social phenomena are two emanations of the same entity (a monistic ontological conception), regarding which their separate existence is only a consequence of a human dualistic or pluralistic perception of the world (a dualistic ontological conception). Furthermore, the difference between law and politics is, from a deeper ontological perspective, in fact only illusory, for reason of which also in the fields of legal and political theory and philosophy there are conclusions regarding the partial or complete overlapping of law and politics, sometimes even the equating of the two that raises a crucial question of how both notions are defined. Regardless of such findings, the distinction (i.e. consciously persisting in a distinction) between law and politics at the current level of human development is necessary and indispensable.

Id.

34. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 203 (1943). McDougal was president of the AALS in 1966.

35. *Id.*

36. *Id.* at 205.

37. *Id.* at 209.

38. Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941).

reported cases to make large-scale quantitative studies of facts and outcome."[39] Three-quarters of a century later, Thomas Miles and Cass Sunstein reported that we "are in the midst of a flowering"[40] of studies attempting "to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets."[41] In such analysis, it is asserted, researchers are abjured from wasting time on determining whether politics has some effect on judicial decisionmaking, because the only pertinent question is not if, but rather how much.[42]

However, Sunstein himself has noted systemic problems in human cognition,[43] and the urge to quantification and construction of models might be merely another symptom of what Professor Daniel Farber referred to as "economics' famous case of 'physics envy.'"[44]

B. A Clash of Visions

For some, engaging in transformative activity for social justice is what Justice Holmes called a "can't help."[45] Nevertheless, there are fundamental problems with the urge to transform property. Change, even transformative change, does not necessarily represent progress. Some transformations are reactionary. Almost 150 years ago, Sir Henry Maine observed that "we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[46] The bedraggled villain of medieval times cast down

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39. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243-44 (1931).

40. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008).

41. *Id.*

42. Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685 (2009).

43. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). *See infra* notes 110-12 and accompanying text.

44. Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 295 (2001).

> Some of us do find the theoretical elegance of physics more congenial than the complexities of molecular biology, and it would be nice if the social sciences turned out to be as elegant as relativity or quantum mechanics. But there is no reason to believe that a successful science of human behavior will look more like physics than like biology.

Id.

45. Letter from Oliver Wendell Holmes, Jr., to Lewis Einstein (June 17, 1908), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 69, 70 (Richard A. Posner ed., 1992) ("[A]s I have said before all I mean by truth is what I can't help thinking. But my can't helps are outside the scope of exhortation. . . .").

46. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Beacon Press 10th ed. 1963) (1861) (emphasis omitted).

his eyes and tugged at his forelock as his lord rode by. Replacing status subordination with formal legal equality surely is a salutary development, notwithstanding the "revolution"[47] that removed residential landlord-tenant law from the realm of private contract and private ordering[48] and reconverted that relationship from contract to status.[49]

Equality before the law does not, of course, equate to equality in other aspects of life.[50] However, the fact that legal equality does not solve many of life's problems does not necessarily mean that a change to a different legal regime would be for the better.

The economist Harold Demsetz suggested some useful postulates here. The first is the "nirvana" fallacy, which refers to the proclivity to view markets in the context of their warts, such as externalities and other market failures, while juxtaposing markets with an idealized view of government regulations, that simply are assumed to be optimal.[51] Demsetz added that "[t]he nirvana approach is much more susceptible than is the comparative institution approach to committing three logical fallacies—*the grass is always greener fallacy*, *the fallacy of the free lunch*, and *the people could be different fallacy*."[52] Under an idealized system, things probably would be better. But it is not implausible that, in many instances, nowhere is the grass green enough. As Carol Rose put it, "in this vale of tears, second-best may be the best that we can do."[53]

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47. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

48. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 575-76 (1982).

49. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979).

50. ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., John Lane Co. 1910) (1894). Witness Anatole France's sardonic comment upon "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." *Id.* at 95.

51. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969). The fallacy first was described in R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) (noting comparisons between "a state of laissez faire and some kind of ideal world").

52. Demsetz, *supra* note 51, at 2 (noting that the propensity of private enterprise to underinvest in basic research does not mean that government will achieve a better allocation).

53. Rose, *supra* note 10, at 1926.

> Economic thinkers have come to realize that [the person who is self-seeking but generous to those who reciprocate] is a great source of wealth-production—much more so than the purely saintly type. Economic success often serves as the rationale for ignoring the unsolvable issues of entitlement and distribution that dog property regimes. But moral thinkers might well consider that this kind of person, the normal subject of property, is also worthy of some respect. This is not because she is perfect, which she is not, and not simply because her characteristics are so productive, which they are, but because she has her own streak of divinity. It is a streak that, although wary, is still

In a memorable political address, Governor Mario Cuomo declared "we must be the family of America."[54] But the correlative of treating millions of people we do not know as if they were our family is that we must treat our intimates no better than we do strangers. There are people who can do this. Mother Theresa comes to mind, but she was a saint. Most people are not. It is human nature, using Adam Smith's illustration, to regard the severance of one's little finger as more important that the ruin of millions.[55]

Our system of property law is based primarily on common law accretion of precedent in narrow cases over a millennium, not on top-down mandates.[56] At its core, transforming our legal system is predicated on transforming our nature. As Thomas Sowell described in *A Conflict of Visions*,[57] it is easy to intuit from a person's views on several selected issues his or her views on many more that seem unrelated. The key is that some individuals have what Sowell termed an unconstrained vision of the perfectibility of human kind, whereas others have a constrained vision of the same. The latter group deems human nature inherently flawed and that the task of organized society is to create a setting conducive to most people getting along reasonably well most of the time. Similar views that conservatism is a temperament, not an ideology, are associated with Michael Oakeshott.[58] This proposition is grounded in a humility that reflects Immanuel

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> trustful, trustworthy, and good-willed—all traits that can be enhanced by institutions that recognize that, in this vale of tears, second-best may be the best that we can do.

Id.

54. Mario Matthew Cuomo, 1984 Democratic National Convention Keynote Address, (July, 16 1984), *available at* http://www.americanrhetoric.com/speeches/mariocuomo1984dnc.htm (declaring that "the failure anywhere to provide what reasonably we might, to avoid pain, is our failure").

55. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 157 (Knud Haakonssen ed., Cambridge University Press 2002) (1761) ("If [a man would] lose his little finger to-morrow, he would not sleep to-night; but, provided he never saw them, he will snore with the most profound security over the ruin of a hundred millions of his brethren.").

56. *See* Hage v. United States, 35 Fed. Cl. 147 (1996).

> The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates.

Id. at 151.

57. THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES (Basic Books 2007) (1987).

58. *See* MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 168, 169-88 (1962).

> To be conservative . . . is to prefer the familiar to the unknown, to prefer the tried to the untried . . . the limited to the unbounded . . . [W]hat makes a conservative disposition in politics intelligible is nothing to do with natural law or a providential order, nothing to do with morals or religion; it is the observation of our current manner of living

Kant's admonition:

> [W]hile man may try as he will, it is hard to see how he can obtain for public justice a supreme authority which would itself be just, whether he seeks this authority in a single person or in a group of many persons selected for this purpose. For each one of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it. Yet the highest authority has to be just *in itself* and yet also a *man*. This is therefore the most difficult of all tasks, and a perfect solution is impossible. Nothing straight can be constructed from such warped wood as that which man is made of.[59]

Isaiah Berlin rephrased Kant's insight as "out of the crooked timber of humanity no straight thing was ever made."[60] He added, "[e]very situation calls for its own specific policy."[61]

Dealing with a societal problem by fashioning a specific policy, or, more ambitiously, by devising a new way of thinking about property, is daunting even for the best-intended person. The complexity of knowledge required, including knowledge particularized to discrete localities and trades, creates a huge information problem.[62] For that reason, it a fatal conceit that a top-down decisionmaker will calculate correct answers.[63] Also, much relevant information is in the form of tacit knowledge in the eye or hand of its possessor, and not readily transmissible to others.[64] Even if policymakers were omniscient, the

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> combined with the belief . . . that governing is a specific and limited activity, namely the provision and custody of general rules of conduct, which are understood, not as plans for imposing substantive activities, but as instruments enabling people to pursue the activities of their own choice with the minimum frustration . . . .

Id. at 169-84.

59. Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in POLITICAL WRITINGS 41, 46 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. Cambridge University Press 1991).

60. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 170 (1969).

61. ISAIAH BERLIN, *Political Ideas in the Twentieth Century*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 60, at 1, 39-40.

62. *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

> The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.

Id. at 519.

63. *See generally* F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 27 (W.W. Bertley III ed., 1988) (asserting that the notion that centralized planning could coordinate satisfying the needs of entire societies demonstrated the intellectual's tendency toward "the fatal conceit that man is able to shape the world around him according to his wishes").

64. *See* MICHAEL POLANYI, *The Logics of Tacit Inference*, *in* KNOWING AND BEING 138, 141-

assumption that private property owners are self-serving, but government officials and employees necessarily act for the public good is an example of the nirvana fallacy. The fact that all are of the same crooked timber leads each to similar temptations.

Public choice economics, which considers legislation and rulemaking from an economic perspective, finds that legislators, executive branch officials, and agency administrators are motivated by the same types of incentives as their counterparts in the private sector. It concludes that the very regulatory agencies and other bureaucratic institutions that were designed to overcome failures in the marketplace are themselves subject to the similar failures.

An essential element of public choice is the economic (or "interest group") theory of law. Under this view, "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."[65] Legislators at the federal, state, and local levels are in a position to supply new laws (or repeal existing ones). Likewise, regulators at all levels of government have the ability to manufacture and revoke rules and regulatory interpretations.

Representatives of numerous interest groups demand favors that officials can supply. "[M]arket forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups."[66] Ironically, the existence of orderly legislative procedures and independent judges promotes such special interest group bargaining, because the existence of the same augur against any easy change in the structure of benefits once interest groups have obtained them.[67]

One might assume that in a democracy large and widely dispersed groups should carry the day. However, due to the large costs associated with organizing and coordinating large groups of people and the small amount at stake for any single member of the group, such organization is utterly impractical. As Mancur

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42 (Marjorie Grene ed., 1969) (explaining that personal knowledge includes a tacit dimension, i.e., it is "an *actual knowledge* that is indeterminate, in the sense that its content *cannot be explicitly stated*").

65. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). *But see* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-53 (1977-78).

66. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

67. *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). "The element of stability or continuity necessary to enable interest-group politics to operate in the legislative arena is supplied, in the first instance, by the procedural rule of the legislature, and in the second instance by the existence of an independent judiciary." *Id.* at 878. For a brief overview of current approaches to interest group theory, see generally Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 CARDOZO L. REV. 1273 (2008).

Olson argued in his classic *The Logic of Collective Action*, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*."[68]

Concentrated interest groups engage in rent seeking,[69] a term which originally referred to appropriating the income that could be derived from a parcel of land, but which now largely is used in connection with efforts to exact the value of government-created monopoly privileges. Often, these privileges themselves become "regulatory property."[70] New York City taxi medallions, for example, are pieces of tin traded for hundreds of thousands of dollars only because cars not bearing them are forbidden to cruise the streets for passengers for hire.[71]

Proponents of markets often speak of "government failure," including the proclivity of regulation to be imposed or threatened for the self-serving purposes of legislators seeking contributions or votes. Classic American examples of rent seeking include *Williamson v. Lee Optical of Oklahoma, Inc.*[72] and *United States v. Carolene Products Co.*,[73] which upheld statutes suppressing alternatives to established businesses. "[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."[74]

Proponents of government action, on the other hand, remind us of "market failures." Market actors have a proclivity to externalize their costs (such as air pollution) by inflicting them on others.[75] Regulatory proponents also assert that

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68. MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965).

69. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967), *reprinted in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 39 (James M. Buchanan et al. eds., 1980). The specific term "rent seeking" was coined by Anne Krueger. *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974), *reprinted in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, *supra*, at 51.

70. Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 124 (2001).

71. *Id.* at 144 n.52.

72. 348 U.S. 483, 491 (1955) (upholding an Oklahoma statute prohibiting opticians from replacing broken lenses without a new eye examination and imposed at the behest of prescribers).

73. 304 U.S. 144 , 153 n.4 (1938) (asserting that civil rights are to be distinguished from property rights, and that the former are preferred rights). The statute upheld in *Carolene Products* forbade the sale of "filled milk," which was skim milk with coconut oil added. *Id.* at 145. The product did not pose a health risk and was desired by its primarily lower-income consumers as a nutritious substitute for whole milk. The tale behind its suppression by the dairy industry is told in Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

74. Powers v. Harris, 379 F.3d 1208, 1220 (10th Cir. 2004).

75. *See, e.g.*, David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 661-62 (1994) (asserting that in the correction of negative externalities destructive to the environment the "conscious rationality of bureaucrats replaces the will of market actors").

market economies "may produce unacceptably high levels of inequality of income and consumption,"[76] and that "[d]iatribes against government forget the many successes of collective action over the last century."[77]

Another fundamental problem with transformative law is that presumably it is intended to enhance social welfare, which supporters might assume is facilitated by government ordering of economic and social activity. However, we cannot aggregate individual preferences devise normative criteria,[78] because without a "clear majority" favoring one policy over others, there is no "rational means of aggregating individual preferences."[79]

C. Burke, Oakeshott, and Ellicksonian Order

Given the problems of government decisionmakers not having complete information and often acting through self-interest previously noted,[80] what should our posture be towards "transformative property?"

We might start by being mindful of the law of unintended consequences, which suggests that we never can modify just one aspect of a complex system. In that light, it is incumbent that those seeking to transform property first analyze present law in its full context and with analytic empathy. "Otherwise, scholars risk unwittingly violating a maxim that applies as much to scholarship as to medicine: First, do no harm."[81]

Other things being equal, long-established property regulations are preferable.[82] Tradition can serve as an anchor stabilizing the legal system and property rights in the face of sometimes-faddish change. As Russell Kirk argued, "[c]ustom, convention, and old prescription are checks upon both man's anarchic impulse and upon the innovator's lust for power."[83] Tradition has a hold on the affections of people that increase the legitimacy of institutions. It might be, for instance, that the constitutional doctrine of originalism, "in emphasizing reference to the historical document and the meaning or intentions of famous Framers, can evoke emotional responses that alternatives to originalism cannot

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76. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 37 (16th ed. 1998).

77. *Id.* at 39.

78. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 2-3 (1989).

79. Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1222 (1994).

80. *See supra* Part I.B.

81. Roger Conner & Patricia Jordan, *Never Being Able to Say You're Sorry: Barriers to Apology by Leaders in Group Conflicts*, 72 LAW & CONTEMP. PROBS. 233, 259-60 (2009).

82. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 64 (2000) ("A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.").

83. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 7-9 (Regnery, 7th ed. 2001) (1953).

directly match."[84]

Edmund Burke, Michael Oakeshott, and others have argued against an overly narrow conception of reason in law and government.[85]

> For Burke and Oakeshott, conceptual relationships have little to do with how customs and traditions function in the real world. Because the powers of human reason are severely limited, all but the most intellectually gifted are incapable of engaging in sustained, rigorous analysis or of thinking through problems without falling into error. The dilemmas of human existence are particularly resistant to rational analysis because social practices and traditions are not derived from first principles, but evolve over time by trial and error. Human action in society and politics operates not primarily through reasoning, but through adherence to prescriptive roles, customs, and habits continuously adjusted to the messy demands of day-to-day living. The test of behavioral rules is thus whether they work well in the real world as guides for human interaction rather than whether they conform precisely to syllogistic demands.[86]

Even Justice Holmes might not have been as set against the use of tradition in law as generally is supposed.[87] Professor Hanoch Dagan recently asserted that Holmes' quarrel with "blind imitation of the past" relates not to serious examination of tradition,[88] but rather to blind adherence to it, as opposed to what Holmes termed "enlightened scepticism."[89]

In discerning fair and viable approaches to property law, an excellent starting place is the scholarship of Robert Ellickson. In a recent celebration of his work,[90] Professor Carol Rose described as a core attribute Ellickson's "skepticism about government of intervention—specifically zoning," and how "this kind of

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84. R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 689 (2008) (discussing also Walter Bagehot's distinction between the "efficient parts" of the English Constitution and the "dignified parts," which Bagehot thought tended to "excite and preserve the reverence of the population." WALTER BAGEHOT, THE ENGLISH CONSTITUTION 7 (Miles Taylor ed., Oxford Univ. Press 2001) (1867)).

85. Wright, *supra* note 84, at 690 n.18 (citing, inter alia, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96-97 (L.G. Mitchell ed., Oxford Univ. Press 1999) (1790); *see also* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS (1962)).

86. Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1069 (2005).

87. Dagan, *supra* note 25, at 653.

88. Holmes, *supra* note 23, at 469 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

89. Dagan, *supra* note 25, at 653 (quoting Holmes, *supra* note 23, at 469).

90. Carol M. Rose, *Of Natural Threads and Legal Hoops: Bob Ellickson's Property Scholarship*, 18 WM. & MARY BILL RTS. J. 199 (2009).

governmental action is administratively costly; that it is ham-handedly overprotective against nuisances; that it is rife with special interest favoritism; and perhaps most important, that it often has a number of damaging third-party effects, particularly in reducing housing opportunities for families of modest means."[91] Along with this was his "preference for legal structures that can promote private ordering."[92]

If top-down regulation, for which Ellickson's non-complimentary term is "legal centralism,"[93] is undesirable, he suggests other, more workable alternatives. These included measures to streamline private land use covenants and a reorganization of nuisance law to permit owners "to find their own solutions to local land-use conflicts."[94] Ellickson's dislike of centralism does not imply that he disliked governing societal institutions. In particular, he noted that a robust system of property was indeed "accurately characterized" as a public good.[95]

More broadly, Professor Rose noted, Ellickson promoted "'normalcy,' or ordinary neighborliness, as a baseline standard of behavior among property owners; he proposed that ordinary activities be left alone, that subnormal activities pay their way via liability rules, and that, if possible, supernormal activities be rewarded."[96] She concluded by describing the regime suggested by Ellickson's work as "a kind of restrained, thin legal order—an unintrusive legal frame that allows people to weave their own quite predictable, but good-natured, patterns of order."[97]

In Ellickson's best-known work, *Order Without Law*,[98] and in his recent book *The Household*,[99] he discussed how natural ordering tends to promote bottom-up

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91. *Id.* at 200-01 (citing Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693-705 (1973)).

92. *Id.* at 201.

93. *Id.* at 199. The rise of centralism continues, in matters large and small. *See, e.g.*, Christina S.N. Lewis, *Rents Signal Rise of D.C., Fall of N.Y.*, WALL ST. J., Jan. 8, 2010, at A1 ("The office market in Washington, D.C., is poised to topple New York as the nation's most expensive, reflecting the declining fortunes of the nation's financial center and the government expansion under way in the U.S. capital.").

94. Rose, *supra* note 90, at 201 (citing Ellickson, *supra* note 91, at 761-79).

95. Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1365 & n.249 (1993) (describing owner-created mechanisms for governing land-use relationships and attributing characterization to James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 338-39 n.44 (1992) and Carol M. Rose, *Property as Storytelling*, 2 YALE J.L. & HUMAN. 37, 51-52 (1990)).

96. Rose, *supra* note 90, at 201.

97. *Id.* at 206.

98. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991) (illustrating that rural neighbors often resolve their disputes cooperatively without reference to formal law); *see also* Ellickson, *supra* note 95 (describing owner-created mechanisms for governing land-use relationships).

99. ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH

institutions for cooperation in land use, both within the community and within the household itself. Thus, Ellicksonian relationships are based upon social norms and ritual behaviors, as opposed to resting on legal obligation.[100] The interaction of the web of such relationships with the individuals who reside within them comprises what sociologist Erving Goffman referred to as the individuals' moral careers.[101]

Although the efficacy of affordable housing is discussed later in this Article,[102] it is useful to note here the harm that inclusionary zoning does to the moral careers of neighborhood residents. A few low- and moderate-income people obtain middle- or upper middle-class housing at low cost, as beneficiaries of inclusionary zoning and similar subsidy schemes. Many others, who are similarly situated in life to those lucky beneficiaries, themselves aspire, and often work hard, to obtain similar housing. Undoubtedly, some find in the selection process the moral caprice of their ostensible betters.

For decisionmakers higher up the socio-economic scale, distinctions among the underclass, the working poor, and the lower rungs of the middle class seem of little import. Likewise, the differences between those possible recipients of largess who have multiple out-of-wedlock children, addictive behaviors, and inability to hold a job, and possible recipients with low incomes but who make valiant attempts to adhere to middle-class norms, may seem to have lost their salience. Given such social institutions, it is difficult for those striving to improve their condition within what we deem substandard neighborhoods to feel that their achievements are respected or to persevere.[103]

(2008).

100. *See e.g.*, Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1183 (noting that, although law exerts coercive force through state-imposed fines and imprisonment, social norms exert ex post controls through mechanisms such as gossip and shunning individuals who act badly, while ritual elicits ex ante acceptance of assigned social roles).

101. ERVING GOFFMAN, *The Moral Career of the Mental Patient*, *in* ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 125, 168 (1961). "Each moral career, and behind this, each self, occurs within the confines of an institutional system, whether a social establishment such as a mental hospital or a complex of personal and professional relationships."

102. *See infra* Part IV.B.

103. *See* Gertrude Himmelfarb, *Comment*, *in* WORK AND WELFARE 77, 82-83 (Amy Gutmann ed., 1998) (suggesting the recent welfare policy attempted, unsuccessfully, to avoid moral distinctions and judgments); *see also* GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 249 (1994).

> Individuals, families, churches, and communities cannot operate in isolation, cannot long maintain values at odds with those legitimated by the state and popularized by the culture. It takes a great effort of will and intellect for the individual to decide for himself that something is immoral and to act on that belief when the law declares it legal and the culture deems it acceptable. . . . Values, even traditional values, require legitimation.

Id. at 247-48.

As Howard Husock put it, "Why, after all, should a small minority of families gain amenities and low rent, not because they've worked hard and improved their station but because of a combination of need and luck?"[104] After all, "[p]oor neighborhoods historically were places where many small-time landlords owned modest homes and rented out apartments, often living on the premises. Ownership—or the hope of it—is the surest incentive to improve and maintain one's neighborhood."[105]

D. Who Transforms the Transformers?

The Roman poet Juvenal asked "*quis custodiet ipsos custodes?*"[106] In any society where officials are entrusted with paternal powers, the question of "who will watch the watchers" looms. As noted earlier, it was a central issue for Immanuel Kant.[107] Plato dealt with it through the "noble lie," the inculcation of belief in the ruling class that they were born to rule the city, and would do so as a disinterested public service.[108] In our time, the noble lie takes the form of the Progressive Era belief that disinterested experts could supplant untidy and often-venal politics.[109] During the three decades before United States entry into World War I, which terminated the Progressive era, "reformers eroded the nineteenth-century belief that private litigation was the sole appropriate response to social wrongs."[110] In its place, an array of federal and state regulatory agencies became primarily responsible for social control over much of the economy.[111]

One factor fueling deference to expertise is evidence that people are not rational decisionmakers. Seventh Circuit Court of Appeals Judge Richard Posner asserted that rational choice simply is "choosing the best means to the chooser's ends,"[112] but Professor Daniel Farber argues that Posner's "broad and seemingly innocuous definition turns out to be surprisingly powerful. It implies that people

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104. Howard Husock, *Back to Private Housing*, WALL ST. J., July 31, 1997, at A18.

105. *Id.*

106. Juvénal, *Satire* VI, ll. 347-48.

107. Kant, *supra* note 59, at 46 ("[E]ach one of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it.").

108. PLATO, THE REPUBLIC, *e.g.*, ¶¶ 414b-15c (Richard W. Sterling & William C. Scott trans., W.W. Norton & Co., 1985).

109. *See, e.g.*, David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 179-80 (2009) ("As elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: a faith in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.").

110. Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 61 J. ECON. LITERATURE 401, 401 (2003).

111. *Id.*

112. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

have a coherent set of preferences as a basis for formulating goals, that they maximize their utility given these preferences, and that they make optimal use of available information."[113] Farber adds, "But while people are not always economically rational, their behavior is not random either. Rather, people display well-documented cognitive biases, use heuristics that do not always produce correct results, occasionally lack the willpower to carry out their plans, and sometimes sacrifice their own interests to achieve 'fairness.'"[114]

A popular recent approach to melding recognition of cognitive biases with regard for personal autonomy is "soft paternalism." This movement, popularized by Richard Thaler and Cass Sunstein's *Nudge: Improving Decisions About Health, Wealth, and Happiness*,[115] derives from research in behavioral economics indicating cognitive errors and biases that indicate people will make systematic errors in making decisions pertaining to their own welfare.[116] It then proceeds to "nudge" people to make decisions in their own interests, using devices such as requiring that they choose to opt out of participating in employer-sponsored retirement plans, instead of choosing to opt in.[117]

However, soft paternalism has troubling implications. Who will decide what is good for an individual and what biases ought to be corrected? In short, "who will nudge the nudgers?"[118] Moreover, as Professor Russell Korobkin observed, the very same tools might be applied to individual choices for benefitting not their own welfare, but rather the expected utility of society as a whole.[119] In their critique of the "new paternalism,"[120] Professors Mario Rizzo and Douglas Whitman suggest another source of possible abuse:

> The insights of the slippery-slope literature suggest that new paternalist policies are particularly subject to expansion. We argue that this is true even if policymakers are rational. But perhaps more importantly, we argue that the slippery-slope threat is especially great if policymakers are not fully rational, but instead share the behavioral and cognitive biases attributed to the people their policies are supposed to help. Consequently, accepting new paternalist policies creates a risk of accepting, in the long run, greater restrictions on individual autonomy

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113. Farber, *supra* note 44, at 282.

114. *Id.* at 280 (adding that what is new about these cognitive biases is "their rigorous documentation by social scientists").

115. THALER & SUNSTEIN, *supra* note 43.

116. *See, e.g.*, Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* CHOICES, VALUES, AND FRAMES 288, 295-98 (Daniel Kahneman & Amos Tversky eds., 2000).

117. THALER & SUNSTEIN, *supra* note 43, at 109.

118. Jonathan B. Wiener, *Best Cass Scenario*, 43 TULSA L. REV. 933, 944 (2008).

119. Russell B. Korobkin, *Libertarian Welfarism* (Dec. 8, 2009), *available at* http://ssrn.com/abstract=1361071.

120. Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685 (2009).

than have heretofore been acknowledged.[121]

Whether one believes that transforming law is for the benefit of those affected, society, or the transformers themselves,[122] the nudging model presumes institutional competence. That presumption might be wrong.

Complex organizations might be susceptible to what Professors Geoffrey Miller and Gerald Rosenfeld term "intellectual hazard."[123] In their introduction, Miller and Rosenfeld described two navigation teams planning a NASA Mars mission, and a hospital team preparing a patient for an amputation. The navigation teams inadvertently used different systems of measurement, and the surgeon cut off the wrong leg.

> Each of these disasters resulted from a common, dangerous, but little-recognized phenomenon. The events in question took place within complex organizations—a bureaucratic agency with numerous teams and subcontractors working on the same project, a hospital with its network of physicians, nurses, equipment, and systems for medical and financial record-keeping and control. The mistakes that occurred were elementary—so elementary that if a single person had been carrying out the task, rather than a complex team, they never would have happened. Yet the consequences of those mistakes were devastating[124]

"The problem in both cases," the authors assert, "was the failure of the complex organization to properly acquire, communicate, analyze, and implement information pertinent to risk and crucial to the success of the operation."[125] Although the thesis of their paper is that failures in processing and transmitting risk-related information helped precipitate the breakdown of sophisticated and technologically advanced financial markets, the implications for top-down planning in general are unmistakable.[126]

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121. *Id.* at 688.

122. *See, e.g.*, Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 621-22 (2003) ("According to [public choice] theory, elected officials, being rational actors like everyone else, are primarily motivated by the desire to maximize their individual self-interest. This means that legislators and the chief executive will try to maximize their chances of being re-elected and thereby retain their desirable positions, while administrators will attempt to maximize the budget of their agencies . . . ." (citation omitted)).

123. Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008* (Nov. 4, 2009), *available at* http://ssrn.com/abstract=1499789.

124. *Id.* at 2.

125. *Id.* at 2-3; *see also* Holmes, *supra* note 23, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

126. The results of the conceit that mind-numbingly complex financial instruments could hedge all risks ought to be predictable. *See supra* notes 62-64 and accompanying text.

An additional problem with the noble lie results from increasing separation of law and morality resulting from acceptance of the Realist worldview. This is manifested, for instance, in a vast attenuation of the sense of obligation that corporate leaders once felt towards the communities in which their firms first grew and prospered.[127] As first-year law students learn, the operative view in contract is not keep your word, but rather go back on your word when that would constitute an efficient breach. The logic of "efficient breach" goes beyond the inability of the victim to sue for specific performance and might even extend to permitting the party in breach to sue the victim to recover what otherwise might have been the victim's losses had the transaction been consummated.[128]

Whether a breach is efficient or not, the proclivity of Holmes' "bad man" to look solely at possible punishment as a guide to the legality of his actions[129] tends to displace any concerns as to the morality of his actions, as well. Most ordinary consumers have honored their debts, even where breach would be more expedient. A recent paper by Professor Brent White suggests that homeowners whose mortgage debt substantially exceeds fair market value generally do not walk away, largely because of feelings of shame and guilt about foreclosure.[130]

> [T]hese emotional constraints are actively cultivated by the government and other social control agents in order to encourage homeowners to follow social and moral norms related to the honoring of financial obligations—and to ignore market and legal norms under which strategic default might be both viable and the wisest financial decision. Norms governing homeowner behavior stand in sharp contrast to norms governing lenders, who seek to maximize profits or minimize losses irrespective of concerns of morality or social responsibility. "Such norm asymmetry" systematically disadvantages borrowers in negotiations with lenders and has led distributional inequalities in which individual homeowners shoulder a disproportionate burden from the housing collapse.[131]

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127. *See, e.g.*, ROBERT B. REICH, THE FUTURE OF SUCCESS (2001).

128. *See* Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. Rev. 1679, 1679-82 (2008).

> A party in breach of contract cannot sue the victim of breach to recover what would have been the victim's loss on the contract. The doctrinal rationale is simple: A violator should not benefit from his violation. This rationale does not, however, provide an economic justification for the rule. Indeed, efficient breach theory is founded on the proposition that a *breach of contract need not be met with reproach*. Yet the prospect of recovery by the party in breach—that is, the prospect of negative damages—has received scant attention in the contracts literature.

Id. at 1679 (emphasis added).

129. Holmes, *supra* note 23, at 460-61.

130. Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis* (Feb. 2010), *available at* http://ssrn.com/abstract=1494467.

131. *Id.* (abstract).

Given the problems of personal character and lack of complete information endemic to transforming rules, we should approach "transformation" in property law with trepidation.

II. PRELUDE TO TRANSFORMATION—THE "DISINTEGRATION" OF PROPERTY

The calls for "transformative activity" and creation of "new categories concerning the nature and uses of property"[132] suggest the potential for unbounded change. That would require removal of the undergirding of traditional property, and the reestablishment of property in forms that the transformers find congenial. The process resembles the one employed by what Erving Goffman referred to as "total institutions," such as prisons and military boot camps, which systematically tear down and rebuild the values and modes of thinking of those who enter them.[133]

A. The Theoretical Turn to Fragmented Property

1. Traditional Views of Property as an Integrated Concept.—Laypersons, still living in a pre-Hohfeldian world,[134] think of property as "things."[135] However, lawyers have come to "shun" such talk, and instead speak of "property" abstractly, using metaphors such as "bundles of rights."[136] Traditional understandings of property, however, were richer than mere rights to exclude others.

Despite the modern Manichean distinction between property as thing and bundle of sticks, it is possible to have an integrated theory of property that "maintains that the elements of exclusive acquisition, use, and disposal represent a conceptual unity that together serve to give full meaning to the concept of property."[137]

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132. *See supra* note 7 and accompanying text.

133. Erving Goffman, *On the Characteristics of Total Institutions*, in ASYLUMS, *supra* note 101, at 1-124. Total institutions are "defined as a place of residence and work where a large number of like-situated individuals, cut off from the wide society for an approciable period of time, together lead an enclosed, formally administered round of life." *Id.* at xiv.

134. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (establishing a taxonomy of fundamental jural relations); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 724-34 (1996).

135. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26 (1977) (asserting that "one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. . . . Instead of defining the relationship between a person and 'his' things, property law discusses the relationships that arise *between people* with respect to things.").

136. Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1558 (1982).

137. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV.

The Greek understanding of property stressed the right of use, and Roman theory "emphasiz[ed] the substantive elements of acquisition, use and disposal," thus "leaving exclusion as only a logical corollary" of property.[138] More generally, "[w]hen philosophers, scholars, and jurists throughout history have analyzed and defined the concept of property, they have returned again and again to the substantive possessory rights—the rights of acquisition, use and disposal—and the right to exclude is left as only a corollary of these three core rights."[139]

In Anglo-American tradition and law, William Blackstone famously described property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[140] But this was an opening gambit, a canonical strategy of property talk that unfolded in a much more nuanced understanding that one's rights were limited by nuisance and other common law protections of the rights of others.[141]

William Pitt celebrated the right of even the most humble to bar their doors to the King.[142] Undoubtedly the best known to the American Framers of the English and Scottish Enlightenment thinkers, John Locke, declaimed in his *Second Treatise of Government* on "lives, liberties, and estates, which I call by the general name, '*property.*'"[143] In the Lockean tradition, John Adams declared that "[p]roperty must be secured or liberty cannot exist."[144]

2. Contemporary Scholarship.—In contemporary property scholarship and teaching, property is looked at as a bundle of rights and correlative obligations,[145] and as a series of incidents of ownership.[146] Taken literally, there is nothing

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371, 376 (2003).

138. *Id.* at 391.

139. *Id.* at 392.

140. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-69).

141. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 601, 603-04 (1998).

142. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358 (quoting William Pitt, *Speech on the Excise Bill*, in 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 1307 (1753-65)).

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake-the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Id.

143. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (emphasis added).

144. 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851), *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996).

145. *See* Hohfeld, *supra* note 134, at 28-59.

146. *See* A.M. Honoré, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest

instrumental in this, because traditional property is the aggregate of the sticks in the bundle and incidents of ownership. However, as my colleague Eric Claeys recently observed, many judges and scholars "use the bundle metaphor as conceptual shorthand for an implicit normative claim: that policy analysis may treat property as an instrument for directly promoting immediate policy goals, without disrupting property's foundational functions."[147]

Professor Thomas Grey's well-known monograph *The Disintegration of Property*, asserted that the term "private property" has no uniform meaning in ordinary speech.[148] Professor Francesco Parisi argued that "entropy in property" causes property to spiral through "a one-directional inertia" that fragments property, while "reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal."[149]

However, even apart from normative claims that may be implicit in the "bundle" approach, subtle cognitive effects might arise from breaking down "property" into numerous slices and subjecting each to separate analysis.[150] As Professor Richard Epstein notes, Grey's rejection of the concept of property as things "fosters an unwarranted intellectual skepticism."[151] Grey "rejects a term that has well-nigh universal usage in the English language because of some inevitable tensions in its meaning, but he suggests nothing of consequence to take its place."[152] Epstein adds, "[e]liminate the sense of the term 'private property,' and it becomes easy to knock out the constitutional pillars that support the institution, thereby expanding both the size and discretionary power of government."[153]

Indeed, the thesis of Michael Heller's *The Tragedy of the Anticommons*,[154] and its more general reiteration in *Gridlock*,[155] is that there is too much private property. Although over-fractionalization of property surely is an important concern, over-agglomeration of government regulation is as well. In any event, we might question whether gridlock is a major source of social dislocation, in

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ed., 1961).

147. Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 619 (2009).

148. Thomas C. Grey, *The Disintegration of Property*, *in* NOMAS XXII: PROPERTY 69, 70-71 (J. Roland Pennock & John W. Chapman eds., 1980).

149. Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 595-96 (2002).

150. The effect might be akin to the desensitization that might result from showing a jury numerous repetitions of individual frames of filed or videotaped acts of violence. *See, e.g.*, Deborah L. Mahan, *Forensic Image Processing*, 10 CRIM. JUST. 2, 8 (1995).

151. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 21 (1985).

152. *Id.*

153. *Id.*

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

155. MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

light of the economic distortions produced by government subsidy programs and mandated rigidities in markets, both pointing to the fact that there is too little private property.[156]

Reinforcing his theme, Heller makes much the same point in discussing the problem of property rights that have become dysfunctional through division by their owners.[157] He notes that fragmentation "may operate as a one-way ratchet."[158] "Like Humpty Dumpty, resources prove easier to break up than to put back together."[159]

In *The Tragedy of the Anticommons*, Heller found that rights in Moscow stores were fractionalized and scattered to the extent that a multiplicity of veto rights precluded the stores use.[160] It would be up to the State to break the ensuing gridlock.[161] But, like Voltaire's Holy Roman Empire,[162] the utility of Heller's felicitous phrase is dependent upon the assumption what we are talking about what accurately might be called a commons, that the veto rights he postulates are antithetical to the commons, and, finally, that the playing out of the situation is in fact tragic.

All of this might, or might not, be true. The fact that the surfeit of fractional property rights in Moscow that Heller describes was created during the frenzied dying days of the unlamented Soviet Union and their immediate aftermath gives us no reason to assume that their faults could be attributed to a robust and indigenous system of private property that has grown, and had been honed, through accretion under the common law.[163] As an empire collapses, the control and ownership of vast resources come up for grabs. The process is more reminiscent of Herman Melville's wonderful description of fast and loose fish in *Moby Dick* than it is of considered judgment.[164]

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156. *See* Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There is Too Little, Not Too Much, Private Property* (Nov. 13, 2009), *available at* http://ssrn.com/abstract=1505626 (noting, inter alia, rigidities induced by employment regulation and land use restrictions).

157. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999).

158. *Id.*

159. *Id.* at 1169.

160. Heller, *supra* note 154, at 633-40.

161. *See* HELLER, *supra* note 155 (broadening and popularizing the anticommons thesis).

162. As Voltaire had observed, the Germans' Holy Roman Empire was "neither holy, nor Roman, nor even an Empire." *See* JOHN G. GAGLIARDO, REICH AND NATION: THE HOLY ROMAN EMPIRE AS IDEA AND REALITY, 1763-1806, at 291 (1980) (citing VOLTAIRE, ESSAI SUR LES MOEURS ET L'ESPRIT DES NATIONS 70 (1769)).

163. *See* Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51, 53 (1977) (noting that, where both parties are have an interest in precedent, parties will tend to re-litigate inefficient rules until they are changed).

164. *See* HERMAN MELVILLE, MOBY DICK 331-34 (1st ed. London) (1851) (generalizing on the distinction between "fast fish," specifically whales that had been harpooned so as to belong to a particular ship, even if subsequently adrift, and "loose fish," whales which were in their natural

In the United States, more providently, property arose from different political traditions and popular aspirations.[165] Americans are heirs to the Glorious Revolution of 1688, which affirmed that the king was subject to the rule of law, as well as the English and Scottish Enlightenments.[166] Settlers had been attracted to the American colonies by promises of land in fee simple (allodial title) on generous terms.[167] Both before and after independence fee simple ownership denoted a rejection of feudalism, where one held property of the King.[168]

B. The Redefinition of Property

With the term property assertedly stripped of determinate meaning, it becomes easy to further reduce its potency through what ostensibly are changes in the mechanism for its protection. The seminal work was Guido Calabresi and Douglas Melamed's *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.[169] By shifting the focus from property to entitlements, which are deemed to be protected by either a "property rule" (injunctive relief) or a "liability rule" (monetary damages), Calabresi and Melamed put property rights in play in a new fashion.[170]

It would seem untenable to have an absolute rule enjoining interference with private property because that would not take into account eminent domain, adverse possession, or the equities of good-faith encroachers.[171] Nevertheless, unless injunctive relief is the norm, the core meanings of property as the rights to use and exclusion of others are vitiated. Some courts have honored the dignity and subjective value inherent in property ownership.[172] Many others have not,

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state or harpooned in a manner not perfecting a claim. The latter were available to be hunted by all. Melville analogized mortgaged land and serfs to "fast fish," and the rights of man and the America before the arrival of Columbus to "loose fish.").

165. For elaboration, see Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 78-82 (2002).

166. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 12-13 (1985) (noting that the entitlement to property and liberty of which the Framers' generation was "so proud" was not really new but was part and parcel of the historic rights of Englishmen).

167. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11 (1992).

168. *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 310-16 (1991).

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

170. *See id.*

171. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 54 (2007) (concluding that, if faced with an unintentional encroachment resulting in only slight harm to the plaintiff and grave hardship to the defendant if removal of the encroachment were required, "most American courts today would probably deny injunctive relief and award only damages").

172. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160-61 (Wis. 1997)

either because of their own notions of social justice,[173] or the court's calculus that public gains from such intrusions outweigh the private costs.[174] However, the logical outcome of permitting private benefits to trump property rights is to grant any private individual who anticipates a surplus after paying fair market value to the owner the right of private condemnation.[175] Thus, all property becomes no more than Melville's "loose fish."[176]

Another device for the redefinition of property is legislative "ipse dixit."[177] The U.S. Supreme Court noted that property interests are not created by the Constitution.[178] Instead, it utilizes "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth amendments."[179] As the U.S. Court of Appeals for the District of Columbia Circuit explained:

> The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement. These mutually reinforcing understandings can arise in myriad ways. For instance, state law may create entitlements through express or implied agreements, and property interests also may be created or reinforced through uniform custom and practice.[180]

> It is an uncontroversial, yet often unarticulated proposition that, in the absence of constitutional, statutory or common law rules, custom and usage may identify and create contract or property rights. Some courts have gone so far as to suggest that rights created by custom may be so robust as to trump positive law or common law.[181]

States may not avoid the need to pay just compensation simply by defining existing property rights out of existence, even as against post-enactment purchasers.[182] The effect of putting "so potent a Hobbesian stick into the

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(upholding punitive damages for intentional trespass resulting only in nominal damages).

173. *See, e.g.*, State v. Shack, 277 A.2d 369, 371-72 (N.J. 1971) (holding unsolicited visits to migrant farm workers by legal aid and medical workers not trespasses on farmer's land).

174. *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 874-75 (N.Y. 1970) (denying injunctive relief where nuisance resulted from activity benefitting the local economy).

175. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009) (advocating private condemnation for private purposes with minimal judicial intervention, so long as the erstwhile condemnor offers just compensation).

176. *See supra* note 164.

177. *See* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 555 (2002).

178. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

179. *Id.* (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)).

180. Nixon v: United States, 978 F.2d 1269, 1275 (D.C. Cir. 1992) (citations omitted).

181. *Id.* at 1276 n.18.

182. Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

Lockean bundle . . . [would be,] in effect, to put an expiration date on the Takings Clause."[183] Despite the Court's admonition, changes in law do have an effect on property.[184] Perhaps even changes in the "regulatory climate" have some effect.[185] The Court heard oral argument on December 2, 2009, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[186] a case raising the issue of whether the state supreme court's "invoc[ation of] nonexistent rules of state substantive law" constituted a "judicial taking."[187]

C. The Call to Property Transformation

The debate about the right amount of property is analogous to the debate about the right amount of tax. Although the so-called "Laffer Curve"[188] correctly notes that taxes might be raised to the point where tax revenues are decreased, economists generally are dubious that our society has approached such a rate.[189] Likewise, the undisputed existence of over-fractionated private property does not suggest that the anticommons phenomenon is pervasive or more pernicious than overregulation.

Although transformative reformers might suggest that government entitlements *replace* private property, it was not so long ago that legal academia's attention was riveted on the concept that government entitlements are transformed in nature by *becoming* private property. In 1964, the *Yale Law*

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183. *Id.* at 627.

184. *See, e.g.*, *id.* at 633 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis."). Justice O'Connor was one of the five-Justice majority. The Court's "investment-backed expectations" test was first enunciated in *Penn Central Transportation, Co. v. City of New York*, 438 U.S. 104, 124 (1978), and most recently has been reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005).

185. *See* Good v United States, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999) ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain [development approval]."). *But see* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1379 n.3 (Fed. Cir.), *aff'd on reh'g* 231 F.3d 1354 (Fed. Cir. 2000) (noting, referring to *Good*, that circuit rules precluded subsequent panel decisions changing established principles unless affirmed en banc).

186. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), *cert. granted sub nom.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 129 S. Ct. 2792 (2009).

187. *See* U.S. Supreme Court Docket for case 08-1151, *available at* http://www.supremecourt.gov/qp/08-01151qp.pdf.

188. *See, e.g.*, James M. Buchanan & Dwight R. Lee, *Politics, Time, and the Laffer Curve*, 90 J. POL. ECON. 816, 817-18 (1982) (describing the Laffer Curve's asserted inverse relation between tax rates and revenue).

189. *See, e.g.*, Jon Gruber & Emmanuel Saez, *The Elasticity of Taxable Income: Evidence and Implications*, 84 J. PUB. ECON. 1 (2002) (reviewing the literature).

Journal published Charles Reich's *The New Property*,[190] one of the most heavily cited law review articles in history.[191] Although Reich was downplayed as "an example of the scholar who produces a single influential article in his lifetime,"[192] his construct still has appeal.[193]

As previously noted, Mario Cuomo's call that the individuals of the United States become "the family of America" nominally enlarges the concept of the family, but would actually result in its dissolution.[194] Similarly, when Charles Reich advocated that the traditional concept of private property be expanded to include "the new property" of government largess, the ensuing "positive liberty" inevitably would encroach upon the "negative liberty" of individual independence that is buttressed by traditional property.[195]

"Dignity" is a term associated with independence and with some measure of equality.[196] Notions of reconciling material well-being and equality are confounded by the existence of "positional goods," which derive their value from inequality.[197] In particular, "Americans tend to view homes as 'positional' goods, and so have strong desires to purchase homes that place them as high as possible within the homeownership hierarchy."[198] In this context, Professor Nestor Davidson suggested "leveling as a normative frame for property doctrine."[199]

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190. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

191. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1548 tbl. 1 (1985) (rating *The New Property* as the fourth most-cited law review article written since 1947); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760, 766 tbl. 1 (1996) (rating *The New Property* as the fourth most-cited law review article of all time).

192. William M. Landes & Richard A. Posner, *Heavily Cited Articles in Law*, 71 CHI.-KENT L. REV. 825, 827 (1996).

193. *See, e.g.*, Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1132-41 (1997) (describing "nonwhiteness as new property").

194. See *supra* note 54 and accompanying text.

195. *See* BERLIN, *supra* note 60, at 122-24 (noting that "negative liberty" from interference by others is a right that might be universally enjoyed, but that "positive liberty" to receive nurture from others necessarily imposes correlative obligations upon them).

196. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 320-21 (1983) (asserting that individuals are entitled to such wherewithal as is necessary for participation as full members of society).

197. *See* Jonathan Haidt et al., *Hive Psychology, Happiness, and Public Policy*, 37 J. LEGAL STUD. S133, S151 (2008) ("Many of the goods that are known to contribute to well-being, such as wealth and high status, are positional goods: relative position matters more than absolute levels, so competitors are trapped in a zero-sum game." (citing ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999)).

198. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 836 n.58 (2009) (citing Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AMER. ECON. REV. 137 (2005)).

199. Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 802 (2009).

> It is important to avoid the simplistic temptation to think that tinkering with the structure of property can significantly change underlying individual and cultural norms. Nonetheless, recognizing the intricate intertwining of doctrine and status signaling suggests that the design of property law may be a way to temper some status races.[200]

Professor Davidson attributes Susette Kelo's "anxiety" to her forced relocation to a place of lower or uncertain status, the "status anxiety" of small-time landlords to a shift in the balance of power resulting from the landlord-tenant "revolution" of the 1960s and '70s, and so on.[201] But re-attributing pain resulting from deprivation of property to deprivation of status makes no more sense than re-characterizing a mugging as an assault merely on dignity.

Many people purchase large homes not to obtain heightened "status," but rather in order to make visits from children and grandchildren more attractive, to leave a family inheritance, or, perhaps, to endow a chair at a university. Landed wealth and family businesses have been the source of much charitable giving. It was the steel magnate and philanthropist Andrew Carnegie who declared: "'The man who dies thus rich dies disgraced.'"[202]

On the other hand, not all who would commandeer private property for ostensible public benefit do so for altruistic reasons. Urban redevelopers, for instance, are known to favor redevelopment, and to contribute to like-minded political candidates.[203] One is reminded of the popular Hank Williams song about televangelists who importune that we send our money to God, but who give us their address.[204]

D. Transforming Property: Who Steers and Who Rows?

With the term "property" purportedly stripped of any intrinsic meaning, those desiring transformation through government action would have a clear field. Furthermore, government could leverage the social impact of its actions through use of private partners. In their influential book *Reinventing Government*,[205] David Osborne and Ted Gaebler urged that private actors be enlisted to "row" as government officials "steered."[206] Similarly, Professor Robert Ahdieh has

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200. *Id.* at 763 (citing Minogue, *supra* note 1). Minogue's advice remains sound.

201. *Id.* at 810-11.

202. ANDREW CARNEGIE, *The Gospel of Wealth, in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 1, 17 (1933).

203. *See infra* Part III.D (discussing pretextuality in urban redevelopment).

204. "Now there are some preachers on T.V. with a suit and a tie and a vest / They want you to send your money to the Lord but They give you their address. . . ." HANK WILLIAMS, JR., THE AMERICAN DREAM, *on* HANK WILLIAMS, JR.'S GREATEST HITS, VOL. 1 (Warner Bros./Curb Records 1983), *available at* http://www.mp3lyrics.org/h/hank-williams-jr/american/.

205. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

206. *Id.* at 30 ("As they unhook themselves from the tax-and-service wagon, [political leaders]

stressed the "coordination functions of the regulatory state."[207]

Although the steer-and-row metaphor is beguiling, it raises troublesome issues of undesirable intrusion and micro-management by government in the activities of private actors assigned to row, and, conversely, in private businesses wresting the helm away from the government.[208]

III. "RIGHT-SIZING" PROPERTY FOR REVITALIZATION AND "SMART GROWTH"

A. The Justification for Government Involvement in Urban Development

The classic reason for government's constraint on the use of private land is protection of public health and safety.[209] In those areas, government regulations substantially, and often unnecessarily, have supplanted common law nuisance.[210] But urban revitalization goes far beyond actions countenanced by traditional police power concerns.

The broad approach to revitalization recently was articulated by Professor John Costonis, who regretted that the Supreme Court's opinion in *Kelo v. City of New London*[211] was so closely associated with economic development and tax revenues.[212]

> [T]he *Kelo* court misconceived the issue before it by framing it as an

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have learned that they can steer more effectively if they let others do more of the rowing. Steering is very difficult if an organization's best energies and brains are devoted to rowing.").

207. Robert B. Ahdieh, *The Visible Hand: The Coordination Functions of the Regulatory State* (Dec. 9, 2009), *available at* http://ssrn.com/abstract=1522127.

> When it comes to preventing financial crises, developing the infrastructure of the internet, and articulating common standards for high-definition television—to name but a few examples—regulation designed to alter individual payoffs proves to be both unduly costly and inadequately effective. In these and other coordination settings, a regulatory paradigm oriented to group and social dynamics, to expectations and information, and to failures of coordination emerges as a kind of "new regulation."

Id. at 1. This view is consistent with the "New Governance" paradigm. *See supra* Part III.E.

208. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MAN. SCI. 3 (1971) (asserting that control of the regulation generally is acquired by the regulated industry and operated primarily for its benefit). For relevant examples, see *infra* Part III.D (discussing pretextuality in urban redevelopment).

209. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (stating that land use regulations "must find their justification in some aspect of the police power, asserted for the public welfare").

210. *See* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583 (2008) (advocating restoration of common law nuisance actions to remediate environmental torts); Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007) (advocating replacement of condemnation of "blighted" parcels by abatement and foreclosure).

211. 545 U.S. 469 (2005).

212. John J. Costonis, *New Orleans, Katrina and* Kelo*: American Cities in the Post–*Kelo *Era*, 83 TUL. L. REV. 395 (2008).

> economic development "higher taxpayer" question. In fact, the problems the project was designed to address . . . engage not only "economic development" but a broad range of conventional urban planning problems that undeniably link the alleviation of these problems to New London's deployment of its eminent domain power.
> . . . Rejuvenation of New London's Fort Trumbull project area was also intended to create a climate of confidence and citizen pride that would stimulate the solution of off-project physical and social planning issues associated with crime, education, housing abandonment, and other planning ills.[213]

Professor Costonis' words seem redolent of *Berman v. Parker*,[214] where Justice William O. Douglas rhapsodized that the public welfare "is broad and inclusive," and that "[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary."[215] It is instructive that *Kelo* was bereft of similar imagery.[216]

Residents of a neighborhood presumably would prefer more civic confidence and beauty, but that only raises the question of why a central government should attempt to revitalize an urban region, or a large city attempt to revitalize a given neighborhood. The answer is not clear.

> By increasing the attractiveness of an area, the central government raises the probability that an individual will want to stay in that area, which in turn increases the degree of investment in social capital. Government support for distressed areas can be seen as a means of subsidizing the positive externalities associated with social capital investment. In principle, it is even possible that government intervention could move the city from the bad equilibrium, where everyone leaves and no one invests, to the good equilibrium, where people stay and invest.
>
> Although there is no doubt that theory can provide an intellectually coherent rationale for supporting declining areas, it is less obvious that the model's conditions for federal government support to be beneficial are met in the real world. After all, providing incentives for geographic stability is a more direct means of promoting social capital investment than propping up declining areas. . . . If human capital investments also create spillovers, and if the returns to human capital are higher outside of declining regions, then propping up those regions will cause a reduction in human capital investment that must be weighed against any gains from social capital investment.[217]

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213. *Id.* at 427 (footnotes omitted).

214. 348 U.S. 26 (1954) (upholding condemnation of an unblighted parcel in the middle of a southwest Washington, D.C. redevelopment area).

215. *Id.* at 33 (citations omitted).

216. *See* 545 U.S. 469.

217. Edward L. Glaeser & Charles Redlick, *Social Capital and Urban Growth*, 32 INT'L REG'L SCI. REV. 264, 265 (2009).

B. Transformation of Property Through Transformation of Parcels

This Article focuses on attempts to transform property through the transmogrification of existing parcels of land so that they will be harmonious with elements of public infrastructure, such as a transportation system, resulting in the "best fit" between capacity and anticipated needs. That might be a useful aspiration.[218] However, right-sizing has come to mean much more.

Professor Heller's primary concern in *Anticommons*[219] was legal property—the fractionalization of ownership rights in a specified parcel of land. In *Gridlock*, however, that concern broadened, to include fee ownership of small parcels as fractionalized interests in the super parcel he envisioned in their place.[220] He subsequently suggested a mechanism for accomplishing this.[221]

The existence of privately owned parcels that physically are too large would seem most unusual, because underutilized parcels are deterred by property taxes, which are based on highest and best use and by adverse possession, which requires at least some monitoring of vacant land.[222] Mostly, however, owners have sought to take the gains that accrue from subdivision and sale when the time is propitious. As a practical matter, the existence of parcels that are too small for modest buildings is discouraged by land use regulations prescribing minimum sizes of building lots.

Over time, of course, parcels that once were economically viable might become too small to accommodate profitable new uses. In that case, owners have an incentive to buy the lands of neighbors or sell to someone who would consolidate small parcels into large ones. In some cases, owners decline to sell small parcels at market prices. They might be characterized as holdouts who thwart the assembly of socially valuable tracts except on terms giving them the lion's share of assembly gains, or, alternatively, as principled owners whose subjective enjoyment of the land exceeds their desire for lucre. When holdout motivation is alleged, for genuine or pretextual reasons, localities and redevelopers might invoke the anticommons principle and urge that the land be condemned, usually for retransfer for private economic revitalization.

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218. *See, e.g.*, Allen D. Biehler, Address at the Pennsylvania Planning Association 2005 Annual Conference 9-13 (2005), *available at* http://www.planningpa.org/presentations/05/puzzle.pdf (noting that "[a] 'best fit' transportation program or project (all modes) that meets transportation needs and considers: community and regional goals, quality of life, economic development initiatives, fiscal constraint, [and] social/environmental issues").

219. Heller, *supra* note 154.

220. HELLER, *supra* note 155.

221. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008) (discussing buy-out schemes for consolidation of parcels).

222. An exception has been the breakup of the feudal incidents of large colonial proprietors at the time of the American Revolution. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 n.5 (1984) (citing statutes and cases).

C. Top-Down Urban Revitalization

The U.S. Supreme Court held that the condemnation of sound residential parcels for retransfer for private urban revitalization did not violate the Fifth Amendment's Public Use Clause in 2005 in *Kelo v. City of New London*.[223] *Kelo* generated an immense amount of negative reaction, and the "backlash probably resulted in more new state legislation than any other Supreme Court decision in history."[224] Without rehearsing the *Kelo* decision, which already has been the subject of vast scholarly commentary,[225] I will note that the case is an important lynchpin of state and local government efforts to create local analogues to national industrial policies.[226]

A pernicious effect of *Kelo*'s imprimatur upon condemnation for retransfer for economic development is the likely *reduction* in the efficiency of urban revitalization. This results from the fact that "projects will have to be made to 'work' in blighted areas that might be poorly suited for them."[227]

Although gigantic top-down projects might have their merits, they do not replace bottom up development. The new "CityCenter Las Vegas" project, with eighteen million square feet of hotels, condominiums, and shopping, is perhaps the largest such complex in the country.[228] But, "[i]t is not 'a community,' as [one of its developers] pretends—where will his condo dwellers go to buy groceries?"[229] "It will never, can never be a 'gathering place' for Las Vegans, since more and more of them live in gated neighborhoods in the suburbs."[230] The Center City project could not have been built without coercion because the land was acquired through a hotly contested condemnation.[231] Despite government

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223. 545 U.S. 469, 482-83 (2005).

224. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2102 (2009).

225. *See, e.g.*, David L. Callies, Kelo v. City of New London*: Of Planning, Federalism, and a Switch in Time*, 28 U. HAW. L. REV. 327 (2006) (discussing the inversion whereby the liberal wing of the Supreme Court favored federalism in *Kelo* and the conservative wing favored application of the federal constitution); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. COLLOQUY 5, 5 (2006) (asserting that the post-*Kelo* reform movement's emphasis on preventing revitalization condemnation, as opposed to blight condemnation, "privileges the stability of middle-class households relative to the stability of poor households, and in so doing, expresses the view that the interests and needs of poor households are relatively unimportant").

226. *See* Steven J. Eagle, Kelo*, Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63 (2009).

227. Lynn E. Blais, *Urban Revitalization in the Post-*Kelo *Era*, 34 FORDHAM URB. L.J. 657, 685 (2007).

228. See David Littlejohn, *If Not a City, Then What?*, WALL ST. J., Dec. 23, 2009, at D5 (describing project).

229. *Id.*

230. *Id.*

231. City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 11 (Nev.

assistance, the project's development has been troubled.[232]

The president of the Partnership for New York City, comprised of powerful business leaders,[233] recently asserted: "Without power to assemble sites to keep pace with demands of a modern economy, our cities would be doomed to decay. Prohibit condemnation of rural farms and greenfields, but allow cities to constantly renew themselves, or they will die."[234] The juxtaposition of the organic notion of cities renewing "themselves" with the top-down requirement of centralized condemnation apparently eluded the author.

1. The Idée Fixe: The Rise of the Creative Class.—One notable example of an enthusiasm that served as an impetus for urban redevelopment is the identification of what Professor Richard Florida grandly referred to as *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life*.[235] Florida described this nascent socioeconomic group as "people who are paid principally to do creative work for a living . . . the scientists, engineers, artists, musicians, designers and knowledge-based professionals."[236] In an article discussing the movement towards "concentrated affluence" in inner-city neighborhoods,[237] Professor Audrey McFarlane stated that "the 'Creative Class' values urban space because they need face-to-face interactions for social fulfillment."[238] She cites members of the "creative class," together with "affluent adults without young children" and former suburbanites

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2003) (adopting expansive views of "blight" and "public use").

232. *See, e.g.*, Alexandra Berzon, *Contract Dispute Could Hamper City Center Finances*, WALL ST. J., May 19, 2010, at B2 ("Contractor claims against City Center . . . could jeopardize the projects's loan contracts and condo sales, the project said in a recent court filing.").

233. Partnership for New York City, http://www.nycp.org/about.html (last visited May 17, 2010).

> The Partnership is a nonprofit membership organization comprised of a select group of two hundred CEOs ("Partners") from New York City's top corporate, investment and entrepreneurial firms. Partners are committed to working closely with government, labor and the nonprofit sector to enhance the economy and maintain New York City's position as the global center of commerce, culture and innovation.

Id.

234. Kathryn Wylde, *Minus Eminent Domain, Cities Die*, WALL ST. J., Nov. 16, 2009, at A22 (letter to the editor).

> Cities need every means at their disposal to attract private investment and encourage development. Without the ability to assemble sites that can be redeveloped, we will have brownfields where green buildings should rise, vacant manufacturing lofts where biotech labs are needed. When used well, eminent domain is a critical tool for keeping our economy growing.

235. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002).

236. *Id.* at xiii.

237. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006).

238. *Id.* at 14 (citing FLORIDA, *supra* note 235, at 182-87).

whose children have grown, as "[a] broad class of people with ample financial resources, expensive tastes, and high demands for convenient, gourmet, and high-end services and products is creating an unprecedented pressure to restructure urban space to suit their needs and desires."[239]

> It is essential that government facilitate redevelopment, and often such development is accomplished through a public/private partnership. The most dramatic use of municipal power comes from the choice to use eminent domain in a particular redevelopment context, such as in a residential neighborhood. . . .
>
> Municipal power is also used to facilitate both private commercial and city-sponsored commercial redevelopment. The city plays a role in the residential context by actively supporting rehabilitation and renovation by middle class families—this is justified by attracting people with the resources to do something positive for the community. . . . [W]hether privately or publicly initiated, government plays an integral role in private development.[240]

Professor Richard Schragger, in a recent article describing "local political pathologies" associated with municipal "giveaways" to attract mobile capital and "exploitation" of existing mobile capital,[241] refers to municipal efforts to attract capital by "offering amenities that will appeal to the so-called 'creative class' or to wealthier incomers."[242]

Although those accounts suggest "the twenty-first century is witnessing a new upper-middle class urban American dream,"[243] that conclusion might be premature. In the most sought-after cities during the housing bubble, "pied-a-terres and speculative buyers increasingly have influenced the trajectory of urban housing markets."[244]

According to Professor Gideon Kanner,

> Perversely, urban redevelopment as practiced has contributed to urban decline by tearing down large numbers of badly needed urban low and moderate cost dwellings. What began as "slum clearance" in short order became a destroyer of urban "blight," a term so elastic as to earmark perfectly usable and badly needed low cost housing for destruction. . . . Redevelopment usually succeeds, if at all, in creating a few urban shopping malls or downtown office buildings that are populated by

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239. *Id.* at 13.

240. *Id.* at 38-39 (footnotes omitted).

241. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 507 (2009) (citing RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS 27-45 (2005)).

242. *Id.* at 507 (footnote omitted).

243. McFarlane, *supra* note 237, at 14.

244. Joel Kotkin, *The Ersatz Urban Renaissance*, WALL ST. J., May 15, 2006, at A14.

> commuting suburbanites who wouldn't be caught dead living in the city. . . . In spite of a recent trickle of empty nesters and yuppies who tend to move into trendy areas of what one commentator has aptly called "hip cool cities," the trend continues—the net migration is still out of, not into cities, and so far redevelopment has not only failed to stem that outgoing population tide but has intensified it.[245]

"Instead of luring the 'hip and cool' with high-end amenities," Joel Kotkin admonished that cities must serve the needs of working- and middle-class families and businesses.[246] "These include such basic needs as public safety, maintenance of parks, improving public schools, cutting taxes, regulatory reform—in other words, all those decidedly unsexy things that contribute to maintaining a job base and the hope for upward mobility."[247]

Furthermore, Kotkin decried the "myth" of "superstar cities,"[248] observing that the triumphs of the recent financial boom "obscure the longer-term developments that continue to reshape metropolitan America. Economic and demographic trends suggest that the future of American urbanism lies not in the elite cities but in younger, more affordable and less self-regarding places."[249]

Recently, many officials of medium-sized cities who paid substantial lecture fees to glean Richard Florida's insights are feeling disabused by what one journalist who has written extensively about housing and development calls "the ruse of the creative class."[250]

2. The Rise of Showcase Projects.—Many scholars hypothesize that a driving force behind the showcase projects is the need for politicians to appear as if their actions are accomplishing something. Herbert Rubin studied the perceptions of development practitioners about showcase projects by surveying planners in cities with populations over 25,000.[251] Although the study was conducted in the late 1980s, population growth and newer quicker medium for public awareness likely only increase these findings, not diminish them. Rubin concluded that "[t]he survey material show that approximately half of the economic development practitioners are concerned that either their work is formalistic or that much of the urban economic development effort is guided by symbolic, rather than substantive, economic development concerns."[252] These

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245. Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 436-37 (2009) (footnotes omitted).

246. Kotkin, *supra* note 244.

247. *Id.*

248. Joel Kotkin, *The Myth of 'Superstar Cities,'* WALL ST. J., Feb. 13, 2007, at A25.

249. *Id.*

250. *See* Alec MacGillis, *The Ruse of the Creative Class*, AMER. PROSPECT, Dec. 21, 2009, at 12.

251. Herbert J. Rubin, *Symbolism and Economic Development Work: Perceptions of Urban Economic Development Practitioners*, 19 AM. REV. PUB. ADMIN. 233, 233-34 (1989).

252. *Id.* at 245.

empirical findings mirror the same results seen on the grander scale of international economic development.[253] Furthermore, federally funded urban redevelopment programs "encouraged big, ambitious projects," because cities seeking funding had to produce "convincing 'workable programs' demonstrating how they would excise blight from redevelopment project areas. Designed as civic symbols of area-wide rejuvenation, redevelopment projects often boasted a level of public amenity superior to what the private sector usually built, except in the very wealthiest areas."[254]

Because showcase projects are driven by symbolism, they should not be expected to be economically viable. "[W]hen government officials want an economic development project more than the private interests chosen to develop it do," one respected business commentator recently noted, "[p]rojects grow bigger and more ambitious than they need to be, thereby requiring more subsidies than they deserve, until virtually all of the economic benefits wind up in the hands of private interests."[255] Showcase projects exemplify the proclivity of governments to give away public resources to lure mobile capital, while correspondingly exploiting owners of fixed capital such as real estate.[256]

D. Government Support for Private Redevelopment

Government support for redevelopment includes the condemnation of multiple small parcels, which it subsequently assembles into large parcels that it transfers to redevelopers at little or no charge. Other forms of support include subsidized financing[257] and infrastructure.[258] The receipt of such opportunities is very valuable, so that developers aggressively seek both that redevelopment projects are created and that they are designated as redeveloper. This process is

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253. William Easterly, *The Cartel of Good Intentions*, 131 FOREIGN POLICY 40, 44-45 (2002), *available at* 2002 WLNR 5330447.

254. George Lefcoe, *After* Kelo, *Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 86 (2008).

255. Steven Pearlstein, *Out of Control: The Sorry Saga of the Convention Center Hotel*, WASH. POST, Feb. 12, 2010, at A20 (noting that the agreement for an adjoining "headquarters" hotel sought by the Washington, D.C., Convention Center Authority would, inter alia, subordinate rents to other expenses, including the hotel operator's management fee).

256. Schragger, *supra* note 241, at 493.

257. *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) ("Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." (footnote omitted)); Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse*, 90 MINN. L REV. 213 (2005).

258. *See, e.g.*, Lefcoe, *supra* note 254, at 86 ("Federally funded urban redevelopment encouraged improvements in civic infrastructure because local governments could count such expenditures to meet their matching share contribution under the federal renewal program.").

known as "secondary rent seeking."[259]

Aside from the direct or indirect provision of taxpayer funds,[260] the process is driven by government expropriation of assembly gains. Large tracts of land in, and adjacent, to downtown areas have a higher market value than the aggregate of smaller parcels comprising them. Pro rata shares of this value are inchoate in the ownership of each of the smaller parcels. If government had imposed unitization instead of condemnation, this value would have inured to the owners instead of the government and its redevelopment transferees.[261] Nevertheless, and despite concerns evinced by U.S. Supreme Court Justices,[262] expropriation of assembly gains has been the almost universal rule.[263]

The process of allocating all the assembly gains to the condemnor and subsequent redevelopers not only induces the secondary rent seeking by redevelopers,[264] but also mobilizes an extended legion of beneficiaries of the current system, such as feasibility consultants, lawyers, bankers, and construction unions to join in its protection. This tends to defeat the more efficient utilization of resources that was the raison d'être of revitalization in the beginning.

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259. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 85-86 (1986) (referring to efforts by prospective redevelopers and other interest groups to promote appropriations of others' property for their subsequent gain); *see also* Gregory S. Alexander, *Eminent Domain and Secondary Rent-Seeking*, 1 N.Y.U. J. L. & LIBERTY 958 (2005).

260. By direct provision, I refer to infrastructure, targeted training for employees, and the like. Indirect subsidies include revenues forgone through the use of industrial revenue bonds and tax increment financing.

261. *See* Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field*, 24 J. LAND RESOURCES & ENVTL. L. 277, 285 (2004) (noting that most oil and gas producing states require unitization, by which producing fields are exploited as if they had unitary ownership, with net proceeds shared by various surface and mineral rights holders on a pro rata basis).

262. Transcript of Oral Argument, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* 2005 WL 529436. Justice Kennedy asked the petitioners' lawyer:

> Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development?

Id. at *15. He later observed to defendants' counsel: "It does seem ironic that 100 percent of the premium for the new development goes to the, goes to the developer and to the taxpayers and not to the property owner." *Id.* at *30. Justice Breyer asked the respondents' lawyer: "is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house?" *Id.* at *32-33.

263. In the only case that the author has located on point, *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1989), the court upheld a scheme of density requirements and limited growth on only a few parcels that awarded all residents in the affected area an aliquot share of development rights that could be traded and combined to enable development of parcels to which the rights were assigned.

264. *See* Merrill, *supra* note 260 and accompanying text.

Three recent New York cases seem to epitomize the unsatisfactory state of current redevelopment jurisprudence. Despite Justice Stevens' assurance in *Kelo* that courts would rectify eminent domain abuse,[265] and Justice Kennedy's assurance in his concurrence that courts would apply heightened scrutiny to situations lending themselves to pretextual condemnation,[266] these cases remind us that the process of preventing abuse is tenuous at best.

In *Goldstein v. New York State Urban Redevelopment Corp.*,[267] the New York Court of Appeals considered the constitutionality of the condemnation of lands in downtown Brooklyn for inclusion in "Atlantic Yards," a twenty-two-acre mixed-use development proposed by developer Bruce Ratner.[268] The U.S. Court of Appeals for the Second Circuit had previously rejected, citing *Kelo*, a federal claim asserting no public use.[269] The New York court, after describing the massive project,[270] conceded that the condition of the condemned parcels was not dire.[271] It added:

> Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.[272]

The dissenting opinion of Judge Smith, referring disparagingly to an earlier era of transformative property, noted that "blight removal or slum clearance, which were much in vogue among the urban planners of several decades ago, have waned in popularity," thus "vindicating" a 1962 dissenting judge's observation that "[t]he public theorists are not always correct."[273] Judge Smith

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265. *Kelo*, 545 U.S. at 487 (noting that courts could deal with abuses "if and when they arise").

266. *Id.* at 493 (Kennedy, J., concurring) (asserting that "a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted").

267. 921 N.E.2d 164 (N.Y. 2009).

268. *Id.* at 165-66.

269. Goldstein v. Pataki, 516 F.3d 50, 59-60 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008).

270. 921 N.E.2d at 166. The court described the project as including, in an initial phase, the construction of an arena to house the National Basketball Association's Nets franchise, currently the New Jersey Nets, and transportation modernization projects. *Id.* In a second phase, sixteen high-rise towers would be constructed to serve both commercial and residential purposes. *Id.* Between 5325 and 6430 dwelling units would be included, and more than a third would affordable either for low and/or middle-income families. *Id.* There also would be approximately eight acres of publicly accessible landscaped open space. *Id.*

271. *Id.* at 171.

272. *Id.* at 172 (citations omitted).

273. *Id.* at 189 (Smith, J., dissenting) (quoting Cannata v. City of New York, 182 N.E.2d 395, 399 (N.Y. 1962) (Van Voorhis, J., dissenting)).

also observed that the southern part of the large tract, where the plaintiffs lived, appeared to be a "normal and pleasant residential community,"[274] that "blight" was alleged only late in the game, and that "[i]n light of the special status accorded to blight in the New York law of eminent domain, the inference that it was a pretext, not the true motive for this development, seems compelling."[275]

In juxtaposition to *Goldstein*, a subsequent New York intermediate appellate court ruled that a revitalization project in Manhattan actually was for private benefit and was compelling. In *Kaur v. New York State Urban Development Corp.*,[276] the court concluded that an urban redevelopment project for which extensive condemnation was employed was for the benefit of Columbia University, a private institution, and did not meet the requirements for "public use" under the United States and New York constitutions. Furthermore, the project was not a "civil project" as required by New York redevelopment law.[277]

However, massive redevelopment projects inevitably provide at least some public benefit. Thus, *The New York Times* editorially denounced the appellate decision in *Kaur*.[278] Perhaps not coincidently, land for the *Times*' new headquarters building was acquired through similar condemnation and in partnership with Bruce Ratner, the Atlantic Yards developer.[279]

Finally, in *Didden v. Village of Port Chester*,[280] a private redeveloper that had been clothed with the village's power of condemnation, exercised that power in apparent retaliation for the condemnee's refusal to take the redeveloper into a business partnership.[281] The court held that, even if the plaintiff's action had not been time-barred, it could not prevail on the merits because *Kelo* had

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274. *Id.* at 190.

275. *Id.* at 189.

276. 892 N.Y.S.2d 8, 25(App. Div. 2009) (holding appropriation for expansion of Columbia University campus an unconstitutional taking, and the Urban Development Corporation Act unconstitutionally vague and violative of due process).

277. *Id.* at 15-16, 23 (citing U.S. CONST. amend. V; N.Y. CONST. art. I § 7, UNCONSOL. LAWS § 6253(6)(d) (UDCA 3(6)(d))).

278. Editorial, *Eminent Domain in New York*, N.Y. TIMES, Dec. 14, 2009, at A30.

279. *See* Matt Welch, *Why The New York Times Loves Eminent Domain*, REASON, Oct. 2005, *available at* http://reason.com/archives/2005/10/01/why-the-new-york-times-s-emine. The article noted that

> 55 businesses—including a trade school, a student housing unit, a Donna Karan outlet, and several mom-and-pop stores [were evicted through condemnation], under the legal cover of erasing "blight," in order to clear ground for a 52-story skyscraper. The *Times* and Ratner, who never bothered making an offer to the property owners, bought the Port Authority's adjacent property at a steep discount ($85 million) from a state agency that seized the 11 buildings on it; should legal settlements with the original tenants exceed that amount, taxpayers will have to make up the difference.

Id.

280. 173 F. App'x 931 (2d Cir. 2006).

281. *Id.* at 932-33.

precluded second-guessing which land should be condemned.[282] *Didden* is especially troubling, because although assembly gains could be exacted only from actual condemnees, premiums that owners place on their property above market value could be exacted from many owners in the redevelopment district as the price for avoiding condemnation.

As I have elaborated upon elsewhere, it is bootless to try to determine if the public benefit of a revitalization transfer is "primary" or "incidental,"[283] even though that standard is reiterated in *Kelo*.[284] So long as officials act for public motives and attempt in good faith to maximize benefits for the polity, whether the corresponding private gain is more or less than the pubic gain seems irrelevant for takings analysis. The "primary" vs. "incidental" benefit distinction is either a heuristic to discourage bribery or an analysis of proportionality that ought to be addressed by courts directly in terms of substantive due process rather than within the rubric of the "public use" aspect of the Takings Clause.[285]

The difficulty in establishing the size and distribution of gains and losses from revitalization leads to a broader insight about the hubris in efforts to transform the nature of property. Individuals value property in land because property interests are associated with natural resources and amenities. Increasingly, the most important amenity is propinquity to others with whom one might forge valuable business or social connections.

The theory of local expenditures, developed by Charles Tiebout, suggests that individual homeowners will gravitate towards those municipalities that provide them with optimal combinations of amenities and taxes.[286] Although the Tieboutian model stressed the relationship between individuals and polities, "in an agglomerative model, people and businesses move to get the benefit of being near neighbors who provide them with social, consumption and employment options or informational spillovers."[287]

The Tieboutian model suggests that the possibility of exit serves to constrain municipal overreaching, so that stringent state controls on local taxing power are unnecessary.[288] On the other hand, the fact that holders of mobile capital[289] may have a tenable "exit" alternative to "voice"[290] may ameliorate, but by no means

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282. *Id.* at 933. (quoting Kelo v. City of New London, 545 U.S. 469, 488-89 (2005)).

283. Eagle, *supra* note 226, at 103-07.

284. Kelo v. City of New London, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring).

285. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542-43 (2005) (repudiating due process as an element of takings analysis, but affirming it as "an inquiry . . . logically prior to and distinct from the question whether a regulation effects a taking"). *See generally* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899.

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

287. David Schleicher, *The City as a Law and Economic Subject*, U. ILL. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1471555.

288. *See generally* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241 (2009).

289. *See* Schragger, *supra* note 241.

290. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

cure, the problem of government expropriation of quasi-rents, the returns that flow from sunk costs. For instance, although highly paid professionals might live in outlying areas, they might nevertheless feel compelled to work in the expensive heart of leading cities so as to be with people like themselves. Once they have invested time and money in establishing their agglomerative networks, individual members are susceptible to being locked into paying high local taxes to pay for services that benefit others. Those whose presence add value to networks desire to internalize the positive externalities that otherwise would be generated by their membership. This provides the relative attractiveness of joining exclusive clubs that are owned by the members rather than by external proprietors,[291] as well as explaining the economic advantage of the shopping center, which permits highly successful merchants to capitalize on the increased traffic they bring to their neighbors in the form of paying lower rents.[292]

E. Gauging the Success of Revitalization

Revitalization efforts tend to be wasteful. For instance, "the proliferation of tax incentives has not produced the intended effect of expanding economic activity and employment in the competitor states."[293] Given that much of the cost is borne by taxpayers and by those who would receive municipal services were the tax revenues to provide them not diverted to debt service on tax increment financing bonds, there is little incentive to ensure that redevelopment is cost-effective.

In *Kelo* itself, the genesis of the condemnation of residential parcels was the expectation of synergy between planned hotel, commercial, and recreational uses in the revitalized area and the recently constructed, and adjoining, Pfizer Inc. world pharmaceutical research center.[294] Despite all of the comprehensive studies that were heavily relied upon by the state and federal supreme courts,[295] the revitalization project never got off the ground. Furthermore, Pfizer announced in November 2009 that it would leave New London.[296] The decision to leave "stirred up resentment and bitterness among some local residents. They see Pfizer as a corporate carpetbagger that took public money, in the form of big tax breaks, and now wants to run."[297]

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291. *See generally* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965).

292. B. Peter Pashigian & Eric D. Gould, *Internalizing Externalities: The Pricing of Space in Shopping Malls*, 41 J.L. & ECON. 115, 118-19 (1998); *see also* Eagle, *supra* note 226 (discussing additional examples).

293. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 397 (1996).

294. Kelo v. City of New London, 545 U.S. 469, 473-75 (2005).

295. *Id.* at 483-84.

296. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

297. *Id.*

Another apparently unsuccessful large-scale redevelopment project raises additional legal issues. In *Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency*,[298] tenants at the Carousel mall challenged a plan under which it would be integrated with an adjoining retail complex into a shopping center/tourist destination known as DestiNY USA, which was "purported to be one of the largest economic development projects in the history of the State of New York."[299] The plaintiffs focused on attempts to condemn narrow slivers of their intangible rights, such as easements of way, instead of their entire leasehold interests.[300] The court rejected these arguments on the grounds that state eminent domain law permitted the condemnation of fractional property rights selected by the condemnor.[301] The city's position was a marked departure from the usual practice of localities of sheltering under the Supreme Court's "parcel as a whole" rule as the proper baseline for takings analysis.[302]

Kaufmann also illustrates that Professor Margaret Jane Radin's notion of "conceptual severance"[303] does not measure departures from a reliable baseline, because government entities chose broad or narrow definitions of relevant property rights, to suit their needs in litigation.[304] Thus, what I term "conceptual agglomeration," and not "parcel as a whole," is at the other end of the continuum.[305]

Furthermore, some *Kaufmann* plaintiffs claimed that their store leases, which they acquired as a result of previous condemnations for urban revitalization, thus were demonstrably in the public interest such that the subsequent condemnation actions against them could not have been for a public use.[306] The court ruled against them on the ground that "'land devoted to a public use may be

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298. 750 N.Y.S.2d 212 (N.Y. App. Div. 2002).

299. *Id.* at 215.

300. *Id.*

301. *Id.* at 218.

302. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326-27 (reiterating that "*Penn Central* . . . [made] it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as whole'" (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978)).

303. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (describing regulatory takings plaintiffs who attempt to define a very small quantum of property affected by a government regulation, so as to maximize the resulting percentage of diminution in value).

304. Perhaps the most extravagant such claim was the New York Court of Appeals' assertion that the relevant parcel in *Penn Central* was all of the land that the railroad owned along Park Avenue in Manhattan, in addition to Grand Central Terminal at the foot of its holdings. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The Supreme Court later characterized the New York court's relevant parcel analysis in *Penn Central* as "extreme—and, we think, unsupportable—view of the relevant calculus." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

305. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7 (4th ed. 2009).

306. *Kaufmann*, 750 N.Y.S.2d at 221.

condemned for another public use only if the new use would not materially interfere with the initial use' and here the initial public purpose for the property would be furthered."[307] This statement might be read as dicta suggesting that, if the new use obliterated the existing public use in order to achieve a different public benefit deemed more important, the second condemnation would be impermissible.

Although the court in *Kaufmann* rejected the explicit argument that land condemned a first time for retransfer to private interests is immune from retransfer a second time, its cautious response points to the fact that revitalization redevelopers might achieve a preferred legal status, quite beyond subsidized financing, the transfer of assembly value, and the donation of infrastructure. In this respect, the plaintiffs are asking for a transformation in property rights that has been proposed in other contexts in the form of regulatory dualism. Under this construct, apparently similar property interests could be subject to different legal regimes in order to provide ex ante assurances to investors in preferred industries or activities.[308]

Apparently the DestiNY USA project has not been successful,[309] and, eight years after the New York appellate decision, a current review of DestiNY USA's own web site shows no activity beyond planning.[310]

Most recently, *The New York Times* reported that sports stadia have fallen out of favor as showcase revitalization projects: "[T]he stadiums were sold as a key to redevelopment and as the only way to retain sports franchises. But the deals that were used to persuade taxpayers to finance their construction have in many cases backfired, the result of overly optimistic revenue assumptions and the recession."[311] After noting the back-loaded costs and sweeteners included to induce approval, the article noted that "[i]n many cases, the architects of the

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307. *Id.* at 221 (alterations omitted) (quoting *In re* Village of Middleburgh, 502 N.Y.S.2d 109, 109-10 (App. Div. 1986).

308. *See* Ronald J. Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU* (Mar. 1, 2010), *available at* http://ssrn.com/abstract=1541226. In regulatory dualism, one of the two systems of regulation—the established regime—is relatively lax and is maintained to accommodate established firms. The second system—the reformist regime—is more rigorous, and is available to existing or new firms that desire to make themselves more credible with the class of patrons whose interests the regulation is designed to protect. *Id.* at 6.

309. *See* Rick Moriaty, *Bank Says Destiny USA a "Failure"; Developer Says It's Not*, POST STANDARD (Syracuse, New York), June 16, 2009, *available at* http://www.syracuse.com/news/index.ssf/2009/06/bank_says_destiny_usa_a_failur.html. The article stated that Leslie Fagan, a Citigroup attorney, at a recent hearing "called Destiny USA a 'failure' with no tenants and urged a judge not to order the bank to lend the project more money." *Id.* Fagan also told a state supreme court judge that "[d]espite spending millions of dollars on marketing, the project has no tenants—and no hope of getting them if there is no money to build out store space." *Id.*

310. *See* Destiny USA, http://www.destinyusa.com/index.php (last visited May 20, 2010).

311. Ken Belson, *As Revenue Plunges, Stadium Boom Deepens Municipal Woes*, N.Y. TIMES, Dec. 25, 2009, at B8.

deals are long gone by the time the bill comes due."[312]

F. "New Regionalism" and "New Governance"

Real property in the United States generally is subject to plenary regulation by the States, delegation to local governments that might be substantial, particularly with respect to land use, and oversight by the federal government respecting some matters of national interest, such as interstate commerce and the protection of certain individual rights. Some theorists seeking the more efficient and comprehensive provision of services or the elimination of pernicious effects of localism have are dissatisfied with this model. (Of course, many residents revel in localism, and oppose subsidizing comprehensives services for others.) Two suggestions directed towards circumventing the rigidity of formal governance structures are discussed here.[313]

Professor Sheryll Cashin argued that the fragmentation of metropolitan areas into numerous polities created a "dynamic of oppression," whereby majorities in affluent suburbs "marginalized groups" that lived outside their boundaries and generally exercised a "tyranny of the favored quarter."[314] These are the "high-growth, developing suburbs that typically represent about a quarter of the entire regional population but that also tend to capture the largest share of the region's public infrastructure investments and job growth."[315] In describing the challenges to new regionalism, the author writes that:

> The fiscal and social access disparities that flow from fragmented metropolitan governance are at the core of the regionalist challenge. Metropolitan movements of earlier decades sought to stem this growing inequity by creating metropolitan-wide governments. But this effort met with dramatic failure primarily because it was completely antithetical to the desire of suburban voters for local autonomy. The "New Regionalist" agenda accepts the political futility of seeking consolidated regional government. Instead, it attempts to bridge metropolitan social and fiscal inequities with regional *governance* structures, or fora for robust regional cooperation, that do not completely supplant local

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312. *Id.*

313. For similar formulations, see Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 591 (2009) (discussing "diagonal regulation," defined as regulation that "cuts across both vertical (multiple levels of government) and horizontal (branches of government or other entities functioning at the same level) divisions of governance.") and Hari M. Osofsky, *The Future of Environmental Law and Complexities of Scale: Federalism Experiments with the Climate Change Under the Clean Air Act*, WASH. U. J.L. & POL'Y (forthcoming 2010), *available at* http://ssrn.com/abstract=1529668 (stressing need for diagonal regulation to ensure clean air).

314. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987 (2000).

315. *Id.*

governments.[316]

Professor Laurie Reynolds, after reviewing devices that are used for regional cooperation, concluded that wealthier suburbs would have the upper hand in bargaining, and that, "because the New Regionalism's primary goal is to correct the socio-economic disparities in metropolitan regions, the voluntary intergovernmental cooperation approach to regionalism is likely to leave untouched the root sources of the very disparity it seeks to remedy."[317]

Localism has been defended on the disparate grounds that it encourages democratic participation in local government,[318] and that it is an efficient way to provide services.[319] The efficiency argument largely builds upon Tiebout's *A Pure Theory of Local Expenditures*,[320] which stated that homogeneous suburbs would compete for residents by offering various packages of local public goods and associated taxation.[321]

Professor Aaron Saiger attacked "Tiboutian localism," in *Local Government Without Tiebout*,[322] where he asserted that residents sort themselves into one polity or another based not only on tastes, but also on wealth.[323] By controlling entry into their communities, Saiger argued, existing residents will "ratchet" up the wealth levels of new residents, thus sorting people by wealth and also by race.[324] He proposed structural reform that "preserves localism but undermines Tiebout."[325] Analogizing to electoral reform to enhance equity, he suggests that, just as electoral boundaries are fluid from one redistricting to the next, so should local government borders be geographically fluid.[326]

As developed by Orly Lobel[327] and Bradley Karkkainen,[328] "New Governance"[329] is an attempt to reorient away from the "command-style

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316. *Id.* at 2027 (citing JOHN J. HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS 342-65 (1993) (describing the "movement for metropolitan-wide government from 1950s to 1970s and analyzing its marked lack of success") (citation omitted)).

317. Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 155-56 (2003).

318. *See, e.g.*, Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 29 (1998).

319. *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 194 (2001).

320. Tiebout, *supra* note 286.

321. *Id.* at 418.

322. Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93 (2009).

323. *Id.* at 104-05.

324. *Id.* at 107-08.

325. *Id.* at 120.

326. *Id.* at 124-25.

327. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

328. Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

329. *See id.* at 471 n.2 (noting that Karkkainen borrowed the term "new governance" and

regulatory model" culminating in the New Deal and Great Society.[330]

> In contrast, the New Governance model (at least according to its proponents) breaks with fixity, state-centrism, hierarchy, excessive reliance on bureaucratic expertise, and intrusive prescription. It aspires instead to be more open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic. On some variants, it also aspires to be adaptive, claiming both the capacity and the necessity to continuously generate new learning and to adjust in response to new information and changing conditions, systematically employing information feedback loops, benchmarking, rolling standards of best practice, and principles of continuous improvement.[331]

Professor Lobel asserted that some scholars are breaking away from "the false dilemma between centralized regulation and deregulatory devolution," and claimed "a growing consensus in legal scholarship that innovative approaches to law, lawmaking, and lawyering are possible and necessary."[332] Lobel focused on the autopoietic theory of Gunther Teubner,[333] who "argues that the complexity of modern life and society requires a new, next-stage approach to regulation, that of reflexive law, in which law facilitates the internal discourse and coordination of other systems."[334]

Professor Karkkainen disclaims any singular foundation for New Governance scholarship, referring to it instead as "a loosely related family of alternative approaches to governance, each advanced as a corrective to the perceived pathologies of conventional forms of regulation."[335]

IV. THE NEW HOME OWNERSHIP

A. Homeownership as a Property Right

The reawakened notion that one finds rights in status and not in contract has found new expression in the assertion that status itself is a property right. Just as Charles Reich would have turned so-called regulatory property into conventional property,[336] the dignitary interest that inures in homeownership is asserted to augur in favor of public subsidies and other support for democratizing that status.[337] In this sense, the notion that everyone has a claim to the dignitary status

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citing to scholarship employing it).

330. *Id.* at 473-74.

331. *Id.* at 474.

332. Lobel, *supra* note 327, at 343.

333. *See* Gunther Teubner, *Introduction* to AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1, 1 (Gunther Teubner ed., 1987).

334. Lobel, *supra* note 327, at 362.

335. Karkkainen, *supra* note 328, at 496.

336. *See supra* notes 67-69 and accompanying text.

337. *See* Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views*

of homeowner resembles the universal entitlement to be called by an honorific in judicial proceedings.[338]

However, just as individuals are not necessarily benefitted by the bestowal of honorific titles,[339] attaining the status of homeownership often has proven disastrous to those without sufficient equity and income to ride out hard times and the exigencies that befall homeowners.[340] Although highly valued, homeownership in America "does not always deliver the benefits it promises, particularly for lower income homeowners."[341]

The independence that individuals derive from property ownership makes it a traditional desideratum for conservatives.[342] Those with a more progressive orientation value that homeownership carries with it a financial stake in the community's success, resulting in homeowners' greater civic participation.[343] Although homeownership thus generally is seen as desirable,[344] the financial instability that results from aggressive attempts to encourage homeownership, especially for those with low- and moderate-incomes, raises the issue of whether

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of the Castle, 74 FORDHAM L. REV. 2971, 2973 (2006) (contrasting with the notion of the castle as a bulwark against third parties the view that it is "about the inherent dignity of homeownership . . . [and] the subjective importance and status that our society attaches to homeownership").

338. *See* Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing the contempt conviction of an African-American woman who refused to answer the prosecutor's questions at a trial when addressed as "Mary" instead of "Miss Hamilton," while white witnesses were addressed by honorific titles and surnames).

339. *See, e.g.*, Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662 (1986). The author notes the advice in the classic interrogation manual that "the interrogator should use the suspect's last name, preceded by Mr., Mrs., or Miss, particularly if the suspect has a low economic status." *Id.* at 668 (citing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 38-39 (3d ed. 1986)). The interrogation manual reasons that "[b]y thus flattering the person and providing him a sense of dignity from such unaccustomed courtesy, 'the interrogator will enhance the effectiveness of whatever he says or does thereafter.'" *Id.* (quoting INBAU ET AL., *supra*, at 39).

340. *See* discussion *infra* Part IV.D.

341. Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 576 (2009).

342. Southern Agrarians especially stressed individual property ownership as necessary to a culture of family self-reliance. *See, e.g.*, M.E. BRADFORD, REMEMBERING WHO WE ARE: OBSERVATIONS OF A SOUTHERN CONSERVATIVE 86-87 (1985).

343. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 12 (2001) (noting that "[e]ven after controlling for other economic and demographic differences between homeowners and renters, [studies have] found that homeowners were more conscientious citizens and were more effective in providing community amenities").

344. *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1098-99 (2009) (asserting that "the sanctity bestowed by American property law on one category of private property, residential real estate, is not warranted based on the psychological and sociological evidence").

expanding ownership is a worthwhile goal. The present crisis in residential real estate makes this point more evident.[345]

Even apart from personal and national financial considerations, the drive to transform neighborhoods often has redounded to the detriment of existing residents and close-knit communities. The demolition of the Southwest Washington, D.C. neighborhood that was the subject of the leading public use case *Berman v. Parker*[346] is illustrative. According to a local historian:

> Successive streams of migrants—increasingly poor working-class blacks, immigrants and native-born whites—would find community as they made the adjustment to urban life and attempted to gain a foothold. . . . Where residents found community, civic and charity leaders saw deterioration. . . . For the people who lived there, Southwest was a vital neighborhood community supported by a stable core of long-term residents, convenient shopping and established religious institutions.[347]

The Great Society-era observation that "urban renewal" means "Negro removal" was a perception still keenly felt at the time of *Kelo v. City of New London*.[348] More generally, neighborhoods that upper-middle class reformers might see as rundown are not therefore in need of replacement. Some recognize neighborhoods labeled as "slums" as socially valuable:

> [N]eighborhoods branded as slums may well have been better in important ways than their subsidized successors. Indeed, there are grounds to see [the late nineteenth and early twentieth centuries] as a time when the private sector produced not only a relatively large amount of "affordable" housing, but did so in forms that encouraged a social cohesion painfully lacking in government-built substitutes.[349]

The same author also asserts:

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345. *See infra* Part IV.D.

346. 348 U.S. 26, 34-36 (1954) (upholding condemnation of sound buildings for renewal of blighted urban neighborhoods).

347. Linda Wheeler, *Broken Ground, Broken Hearts; In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A1 (quoting Carol Kolker).

348. 545 U.S. 469, 522 (2005) (Thomas, J., dissenting). "Urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'" *Id.* (quoting 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)). The NAACP filed an amicus brief supporting Mrs. Kelo. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108). For a fuller account of opposition to condemnation for urban revitalization by African-American leaders in the context of *Kelo*, see Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237, 268-70 (2009).

349. Howard Husock, *Lessons from Housing's Not-So-Bad Old Days*, WALL ST. J., Sept. 23, 1991, at A14.

> Logic tells us that such housing serves important social purposes, including crime control. Vigilant owners concerned about the upkeep of their property are loath to rent to criminals and vandals—or those who don't watch their young children closely. Those who seek housing are thus sent a message that they must conform to social standards. At the same time, owner-occupied housing offers a means for those of low-income to climb on to the ladder of housing opportunity, using the income from rental units as a means of saving for a move up toward a higher-income, single-family neighborhood.
>
> Public housing stood this social structure on its head. Public management meant that no one with a financial stake in maintenance lived on the premises. Public ownership made it difficult to turn away, or to evict, tenants engaging in criminal activity. Equally important, subsidized rental projects provided no means for the poor to own—and ultimately to trade up. Thus was the social structure of striving, saving and being careful about to whom to rent undermined.[350]

B. The Visionary Approach to Publicly-Assisted Housing

In writing about the "entropy" of property, Professor Parisi noted that "[t]he initial seemingly attractive choice turns out to be suboptimal in the end."[351] In our quest to provide better housing for low- and moderate-income individuals and families, some social measures seemed to have worked well, and others not.

The agitation by the Progressive reformer Jacob Riis for reform of the squalid, poorly ventilated, and tuberculosis-ridden "old law" tenements was a success.[352] Regulation eliminating unhealthy and physically dangerous housing seems squarely in line with government's police power. As Professor Wendell Pritchett observed, because the early twentieth century reforms worked so well, an obsession with "blight" was used extensively during the second half of the past century as a scare tactic justifying urban revitalization. Specifically, he noted:

> To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.[353]

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350. Howard Husock, *The Folly of Public Housing*, WALL ST. J., Sept. 28, 1993, at A18.

351. Parisi, *supra* note 149, at 613. It might be that the mandatory agglomeration of land rights to prevent "entropy" that Professor Parisi advocates itself might turn out to be one of those "suboptimal" choices.

352. *See* JACOB J. RIIS, HOW THE OTHER HALF LIVES (Hill and Wang 1957) (1890).

353. Pritchett, *supra* note 348, at 3.

I have argued elsewhere that nuisance abatement, not condemnation, is the logical and more effective response to dangerous and unhealthy conditions.[354]

In addition to advocating and designing public and public-assisted housing to alleviate physical blight, advocates of reform designed public housing to alleviate psychological blight. Noted architects such as Le Corbusier believed that grand redevelopment would be uplifting; in effect, such "emphasis on monumentality encouraged the wholesale razing of older and poorer urban areas and implementation of large urban renewal projects."[355] Unfortunately, the effects of these large scale urban renewal projects were anything but uplifting:

> The buildings were unadorned, eleven-story concrete slabs with skip-stop elevators, long communal hallways, outside galleries, and large tracts of open green space. The design underscored the isolation of the project from the surrounding community by separating the new superblock from the existing street grid and creating large public common areas and open spaces that belonged to no one, thereby fostering a no man's land for criminal activity. The deterioration of the project began soon after its completion and was greatly accelerated by vandalism and violent crime committed by the gangs that quickly took control of the common areas and public spaces.[356]

Perhaps the most poignant reminder of the failure of massive and poorly-designed public housing projects was the demolition of the Pruitt-Igoe project in St. Louis.[357] Professor Reza Dibadj noted that its "pathetic destruction has become the symbol of a transition away from the ahistorical modern meta-narrative that the project has come to symbolize."[358] "The idea that 'clean lines, purity and simplicity of form would play a social and morally improving role in [our] society,'"[359] she added, "became viewed as . . . 'the modern machine for living, as Le Corbusier had called it with the technological euphoria so typical of the 1920s, had become unlivable, the modernist experiment, so it seemed, obsolete.'"[360]

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354. Eagle, *supra* note 210, at 619-20.

355. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 777-78 (1993).

356. Harry J. Wexler, *HOPE IV: Market Means/Public Ends—The Goals, Strategies, and Midterm Lessons of HUD's Urban Revitalization Demonstration Program*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195, 206 (2001).

357. *See* EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 68-87 (1979) (discussing Pruitt-Igoe and the St. Louis Housing Authority).

358. Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. L. REV. 377, 393 (2007).

359. *Id.* (quoting TIM WOODS, BEGINNING POSTMODERNISM 93 (1999)).

360. *Id.* (quoting ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE 186 (1986)).

C. Affordable Housing

The definition of "affordable housing" necessarily is subjective, but the U.S. Department of Housing and Urban Development deems it to be housing that the household can obtain at a cost no higher than thirty percent of a family's annual income.[361] Initiatives to promote affordable housing seek to alter the market for housing, and historically have focused heavily on subsidization and government spending.[362] However, as federal spending programs have declined over time,[363] local levels of government have sought to fill some of the void through increased focus on regulation.[364] Ironically, however, many government policies, such as the imposition of urban growth boundaries, have the effect of making housing less affordable through making the construction of new housing more difficult.[365]

Although federal support for housing is often tied to broader economic interests,[366] concerns about the provision of affordable housing certainly helped to shield private entities from the stricter scrutiny, which may have in fact mitigated the damage caused by the 2007 sub-prime mortgage crisis.

D. The Current Housing Crisis

According to the well-known housing economist Karl Case, at the end of 2009 the United States faced an "economic disaster of major proportions," which was the "direct and indirect result of extreme volatility in the value of residential property that had served as collateral for the nation's huge stock of home mortgages."[367] This was a result of an "expansionary monetary policy . . . [that] reduced the cost of buying a home by almost a third."[368] Also, "[f]or most

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361. HUD, Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing/ (last visited May 20, 2010).

362. KENT W. COLTON, HOUSING IN THE TWENTY-FIRST CENTURY: ACHIEVING COMMON GROUND 212-44 (2003); Esther Yang, *Affordable Housing in the US: A Brief History and Summation of 20th-21st Century Practices and Policies*, *available at* http://www.uark.edu/ua/kdhsmith/Affordable%20Housing%20in%20the%20US-%20history&summation.pdf.

363. *See* DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS: NEW RESOURCES REQUIRED TO MEET GROWING NEEDS 2-3 (2009), *available at* http://www.cbpp.org/files/2-24-09hous.pdf (noting that spending on federal low-income housing programs has fallen substantially).

364. RACHELLE ALTERMAN, EVALUATING LINKAGE, AND BEYOND: THE NEW METHOD FOR SUPPLY OF AFFORDABLE HOUSING AND ITS IMPACTS 1 (1989).

365. *See* William A. Fischel, *Comment on Anthony Downs's "Have Housing Prices Risen Faster in Portland Than Elsewhere?,"* 13 HOUSING POL'Y DEBATE 43, 44 (2002) (concluding that urban growth boundaries have raised the cost of housing in Portland, Oregon).

366. Michael S. Carliner, *Development of Federal Homeownership "Policy,"* 9 HOUSING POL'Y DEBATE 299, 304-05 (1998) (noting that many federal programs related to housing finance were originally started as to support the lending and building industries).

367. Karl E. Case, *Housing, Land, and the Economic Crisis*, LAND LINES, Jan. 2010, at 8. Case, together with Robert Shiller, invented the S&P/Case-Shiller repeat sales home price indexes.

368. *Id.* at 10.

households, the largest and most heavily debt financed purchase they will ever make is to buy a home, so housing demand in particular is rate sensitive and responded strongly to the monetary stimulus. With plentiful and cheap liquidity . . . a steady increase in house prices was the result."[369]

> One additional factor clearly played a role in all of this: the federal government's strong efforts to promote home ownership for rich and poor alike. In 1977 Congress passed the Community Reinvestment Act (CRA) and the Home Mortgage Disclosure Act (HMDA), designed to increase bank lending to low-income and minority households. Even today, banks have a CRA exam every year to determine whether they are meeting the credit needs of their entire CRA area, which in almost all cases includes low-income neighborhoods that in previous years might have been rejected ("redlined") for loans or insurance.
>
> These programs reflect a belief that the nation has an interest in promoting home ownership as the American Dream, which is thought by many to lead to meritorious behavior. A homeowner is considered likely to be a better citizen, and more involved in local affairs. Home ownership was also thought to be a way of building wealth for low-income households, part of the social safety net.[370]

The growth in size and complexity of the mortgage market largely results from the activities of two huge government-sponsored entities (GSEs), Fannie Mae and Freddie Mac. Together, they own or guarantee over $5.2 trillion in mortgages, which constitutes over forty percent of residential mortgages in the United States.[371] These GSEs purchased great numbers of mortgages from issuers, bundled them into blocks with uniform characteristics, and sold securities collateralized by these blocks in the international finance market in many tranches, each having different calculated characteristics of return and risk. However, these risk calculations were based on borrower behavior in times of normal real estate markets and a stable economy. Fannie and Freddie are "creatures of regulatory privilege," are likely to require a taxpayer bailout "measured in the hundreds of billions of dollars," and have used their "hybrid public/private structure to obtain and protect economic rents at the expense of homeowners as well as [their] competitors."[372] Their saga should not give comfort to those who think that government might bring about the transformation

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369. Kenneth E. Scott, *The Financial Crisis: Causes and Lessons—Ending Government Bailouts as We Know Them Part I—The Crisis* 3, *available at* http://ssrn.com/abstract=1521610.

370. Case, *supra* note 367, at 12 (citing Karl E. Case & Maryna Marynchenko, *Home Appreciation in Low and Moderate Income Markets*, *in* LOW INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 239 (Nicolas P. Retsinas & Eric S. Belsky eds., 2002)).

371. *See* David J. Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, ALA. L. REV. (forthcoming 2010) (manuscript at 2), *available at* http://ssrn.com/abstract=1357337.

372. *Id.* (manuscript at 4).

of property easily using the steer and row approach.[373]

These problems were exacerbated by the implicit assumption that homeownership was an entitlement. For example:

> In 2004, as regulators warned that subprime lenders were saddling borrowers with mortgages they could not afford, the U.S. Department of Housing and Urban Development helped fuel more of that risky lending.
>
> Eager to put more low-income and minority families into their own homes, the agency required that two government-chartered mortgage finance firms purchase far more "affordable" loans made to these borrowers. HUD stuck with an outdated policy that allowed Freddie Mac and Fannie Mae to count billions of dollars they invested in subprime loans as a public good that would foster affordable housing.[374]

In a recent report to Congress, Neil M. Barofsky, Special Inspector General for the Troubled Asset Relief Program, warned of the pernicious consequences that might attend federal continuing efforts to support housing markets:

> - To the extent that the crisis was fueled by a "bubble" in the housing market, the Federal Government's concerted efforts to support home prices . . . risk re-inflating that bubble in light of the Government's effective takeover of the housing market through purchases and guarantees, either direct or implicit, of nearly all of the residential mortgage market.
>
> Stated another way, even if TARP saved our financial system from driving off a cliff back in 2008, absent meaningful reform, we are still driving on the same winding mountain road, but this time in a faster car.[375]

Other related factors included the actions of non-occupant speculators, who purchased houses and condominiums for quick resale at a profit and who defaulted on their mortgages "in droves" when prices stopped rising,[376] and the increased default rate on adjustable mortgages when interest rates increased.[377]

Problems resulting from an unjustified run-up in the housing supply are apt

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373. *See supra* Part II.D.

374. Carol D. Leonnig, *How HUD Mortgage Policy Fed the Crisis; Subprime Loans Labeled "Affordable,"* WASH. POST, June 10, 2008, at A1.

375. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM QUARTERLY REPORT TO CONGRESS 6 (Jan. 30, 2010).

376. George Lefcoe, *Should We Ban or Welcome "Spec" Home Buyers?*, 36 J. LEGIS. 1, 2 (2010). There were a sufficiently large number of such buyers so "that if only a minority of speculators defaulted . . . it could have explained all or most of the entire increase in foreclosures started." Id. (quoting Stan J. Liebowitz, *Anatomy of a Trainwreck: Causes of the Mortgage Meltdown*, *in* HOUSING AMERICA: BUILDING OUT OF A CRISIS 287, 316 (Randall G. Holcombe & Benjamin W. Powell eds., 2009)).

377. *See* Stan J. Liebowitz, *ARMs, Not Subprimes, Caused the Mortgage Crisis*, 6 THE ECONOMISTS' VOICE: Iss. 12, Art. 4, *available at* http://www.bepress.com/ev/vol6/iss12/art4).

to be long lasting. Because housing is the quintessential durable good, its quantity in a given community adjusts only very slowly to reductions in demand resulting from poor economic conditions. "Durability also implies that a negative shock to a city's productivity will continue to cause population declines over many subsequent decades."[378] Accelerating instability on the downside, "a durable housing model predicts that increases in population will be associated with small increases in prices, but decreases in population will be associated with large decreases in prices."[379]

Problems in the commercial real estate market are similar.

> As was happening in the residential market, a confluence of low interest rates, high liquidity in the credit markets, a drop in underwriting standards, and rapidly rising "bubble" values produced a boom in "bubble-induced" construction and real estate sales based on a combination of unrealistic projections and relaxed underwriting standards.[380]

In another example of misplaced confidence in the transformative powers of experts, the "mortgage meltdown" might be a "normal accident," in that the mortgage market was prone to systemic failure.[381] Specifically, two authors provide:

> Our analysis suggests that the mortgage industry's complex and tightly coupled technology made it vulnerable to failure and that the greed and fraudulent behavior of mortgage industry participants, however reprehensible, played a minor role in the meltdown. The dominant discourse on the mortgage meltdown also attributes the meltdown to insufficient regulatory control. Our normal accident analysis also suggests that insufficient regulatory oversight contributed to the debacle. But our analysis implies that simply increasing the amount of regulation over the mortgage industry is unlikely to reduce its susceptibility to failure in the future. Indeed, if additional regulation increases the system's complexity and coupling, it could increase the system's susceptibility to failure.[382]

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378. Edward L. Glaeser & Joseph Gyourko, *Urban Decline and Durable Housing*, 113 J. POL. ECON. 345, 347 (2005).

379. *Id.*

380. CONG. OVERSIGHT PANEL, FEBRUARY OVERSIGHT REPORT: COMMERCIAL REAL ESTATE LOSSES AND THE RISK TO FINANCIAL STABILITY 20 (2010) (citing FDIC, FINANCIAL INSTITUTION LETTERS: MANAGING COMMERCIAL REAL ESTATE CONCENTRATIONS IN A CHALLENGING ENVIRONMENT (Mar. 17, 2008), www.fdic.gov/news/news/financial/2008/fil08022.html).

381. Donald Palmer & Michael W. Maher, *The Mortgage Meltdown as Normal Accidental Wrongdoing*, STRATEGIC ORGANIZATION (forthcoming), *available at* http://ssrn.com/abstract=1313406.

382. *Id.* (manuscript at 2).

E. Shifting Fee Ownership from Landlord to Tenant

One way in which the rights of tenants transformed into traditional ownership rights was by appropriating the rights of owners on the tenants' behalf. The classic example is rent control, which was traditionally associated primarily with wartime dislocation.[383] Although the U.S. Supreme Court originally upheld rent control precisely, and only, on that basis,[384] after the New Deal rent control was upheld as routine economic regulation.[385] Although landlords under rent control are entitled to a reasonable rate of return in order to avoid municipal takings liability, that principle has been applied to deny them a "fair market" return on their original investments, not discounted in value by rent control, since permitting rents to reflect full value would be "no rent control at all."[386]

Under traditional property notions, rent control, which provides for tenure for sitting tenants, expropriates the landowner's reversion in possession and part of the value inuring in use rights over the premises. Under notions of transformative property, rent control provides a windfall to some tenants, although almost all economists believe that "[a] ceiling on rents reduces the quantity and quality of housing" overall.[387]

Another device is statutory tenure for tenants apart from rent control, so that tenants could not be evicted except for narrowly defined cause at the expiration of their leases. Such a statute was upheld by the New Jersey Supreme Court in *Chase Manhattan Bank v. Josephson*.[388] One result is that a tenant placed in possession before foreclosure has rights paramount to the mortgagee,[389] with the predictable result that lenders could require extra security before lending to home purchases and a typical home buyer will not have access to additional security.

In *Hawaii Housing Authority v. Midkiff*,[390] the U.S. Supreme Court upheld a literal shifting of the fee. Upon the petition of long-term ground lessees, Hawaii condemned the underlying fee interests and resold them to the individual tenants.

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383. *See* John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 67-76 (1950).

384. Chastleton Corp. v. Sinclair, 264 U.S. 543, 548-49 (1924) (invalidating rent control after the emergency ceased); Block v. Hirsh, 256 U.S. 135, 157-58 (1921) (upholding District of Columbia rent control during World War I as an emergency measure).

385. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 516-21 (1944).

386. Cotati Alliance for Better Hous. v. City of Cotati, 195 Cal. Rptr. 825, 830 (Ct. App. 1983).

387. Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 988, 991 (1984) (fewer than 2% of U.S. economists in a random survey disagreed).

388. 638 A.2d 1301, 1314 (N.J. 1994).

389. *But see* Security Pac. Nat. Bank v. Masterson, 662 A.2d 588, 591 (N.J. Super. Ct. Ch. Div. 1994) (excepting new sham leases intended to frustrate foreclosure).

390. 467 U.S. 229, 241 (1984).

V. PROPERTY RIGHTS AND SUSTAINABILITY

Does sustainability require a new theory of property rights? In his article bearing that title,[391] Professor Carl Circo concludes that "the traditional property framework" may "be easily reconciled" with sustainability as resource conservation, "may be sufficiently malleable . . . to accept a generational justice basis for sustainability," but seems unreceptive to "a sustainability agenda based on social justice."[392]

Private property seems an ideal device to ensure conservation, because the present value of resources and amenities encompasses their use at all times in the future, as well as the present. By assigning the residual value of an asset (net of claims against it) to a particular individual, the institution of property correspondingly assigns that person to care for it. As Aristotle put it, something that is owned by everyone is the responsibility of no one.[393] However, some scholars, such as Professor Joseph Sax,[394] more recently Professor J.B. Ruhl,[395] have called for property transformation for environmental protection.[396]

Although owners have no incentive to dissipate their own property, they do have an incentive to impose their costs on others. Common law nuisance protects both neighbors and the institution of property itself by requiring that owners bear the costs of their actions that impose unreasonable burdens on others.[397] In cases where the resulting harm is so diffused as to make recovery in tort impracticable, offsetting ("Pigovian") taxes can eliminate the incentive to engage in activities that create social harm. A carbon tax on greenhouse gas

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391. Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 U. KAN. L. REV. 91, 91 (2009).

392. *Id.* at 159.

393. ARISTOTLE, POLITICS 1261b ("For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill.").

394. *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993). This is cited at least once by an author who defined "transformative property" to mean Sax's "property in the transformative economy," or property based on the idea of transforming something in nature (in a Lockean sense). *See* WILLIAM H. RODGERS, JR., ENVTL. L. § 4.13 (2d ed. 1994) (observing that Sax demonstrated "an outdated notion of transformative property instead of the modern view of usufructuary or ecological property").

395. *See* J. B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, ENVTL. L. (forthcoming 2010), *available at* http://ssrn.com/abstract=1517374.

396. *See* Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 118 (1991) (stating that Reich's *The New Property* concludes that the government's designating something to be property is itself transformative). For discussion, see *supra* notes 190-93 and accompanying text.

397. *See* Eagle, *supra* note 210, at 583-84.

emissions is one example.[398] Another is a congestion fee imposed on using a highway.[399]

The problem of equitable availability of resources across generations is more difficult. Possible answers range from using the same conventional rate that would govern ordinary investments,[400] to dubiousness about discounting,[401] to permitting no discounting of future use at all, on the theory that generations in the distant future have the same right to resources that we do.[402] We act from our own understanding of our own needs, but we act for our progeny on the same basis. We have no magic guide to the resources and desires of those who will come long after us. After all, what would be our reaction if our forbearers in the late nineteenth century had truncated their family lives and learning because they doused their lanterns right after dinner, so that we would have enough whale oil to enjoy our meal?[403]

Our understanding of the meaning of social justice, and how it might be advanced, is tenuous as it pertains to our own generation. Extrapolations into the future might be more reliably described as projections of our own desires rather than the wisdom to discern the needs of those who will come long after us.

It might be that a transformation of property would give us the wisdom to deal with those issues well. But without additional wisdom, it is difficult to devise salutary property concepts. Perhaps a transforming structure will raise us to greater heights, but, as a product of its fallible makers, it will be built from crooked timber.

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398. *See* Daniel H. Cole, *The* Stern Review *and Its Critics: Implications for the Theory and Practice of Benefit-Cost Analysis*, 48 NAT. RESOURCES J. 53, 62 (2008) (discussing the recommendation of a Pigovian carbon tax by an advisory panel appointed by the British government, and citing NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW xvii-xviii (2007), *available at* http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.).

399. *See* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000).

400. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 399 (6th ed. 2003) (noting commercial rate as a possibility).

401. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1168 ("Proffering a discount rate for valuing costs and benefits that will be realized or avoided only centuries in the future and under completely uncertain societal conditions is heroic, foolish, or a mixture of both.").

402. *See, e.g.*, Edwin R. McCullough, *Through the Eye of a Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVTL. L. & LITIG. 389, 436-37 (1995) ("[I]f access to nature is a right, then cost-benefit analysis breaks down. In other words, there is no amount of money which can compensate for irreversible and irreparable damage to nature.") (citation omitted)).

403. *See* Thomas Schelling, *Intergenerational Discounting*, *in* DISCOUNTING AND INTERGENERATIONAL EQUITY 99, 100-01 (Paul R. Portney & John P. Weyant eds., 1999) (averring that discounting helps the currently poorer present generation, as opposed to relatively richer, future generations).