NOTE

RETHINKING "JUST" COMPENSATION: DIGNITY RESTORATION AS A BASIS FOR SUPPLEMENTING EXISTING TAKINGS REMEDIES WITH GOVERNMENT-SUPPORTED COMMUNITY BUILDING INITIATIVES

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INTRODUCTION

> "We have to give a damn. We have to give a damn about people staying in their home. We have to give a damn about poor and working-class folks, and about seniors who want to spend their sunset years in the homes that they know and love. We have to *care*, and our policies will follow our compassion."[1]
>
> – Professor Tanya Washington,
> Georgia State University College of Law

Soon after the Constitution was ratified, the Bill of Rights enshrined certain fundamental protections for individuals. The Fifth Amendment is among those crucial safeguards. Through its Takings Clause, the Fifth Amendment guarantees, "[N]or shall private property be taken for public use, without just compensation."[2]

Even though the Takings Clause may appear straightforward, the extent to which it restricts government action has

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1 Cliff Albright, *Gentrification Is Sweeping Through America. Here Are the People Fighting Back*, GUARDIAN (Nov. 10, 2017, 5:00 AM) (quoting Tanya Washington), https://www.theguardian.com/us-news/2017/nov/10/atlanta-super-gentrification-eminent-domain [http://perma.cc/EJ2C-YKFN].

2 U.S. CONST. amend. V, cl. 4.

been controversial.[3] Especially following the Supreme Court's decision in *Kelo v. City of New London*,[4] lawmakers and scholars alike have hotly debated the scope of the public use requirement.[5] Today, legislatures regularly invoke some version of "public use" when exercising the eminent domain power, seizing private land to build projects ranging from public parks[6] and hospitals[7] to privately owned sports arenas[8] and manufacturing plants.[9]

In stark contrast, the Takings Clause's just compensation requirement has been ignored almost as much as the public use requirement has been scrutinized.[10] Indeed, the Supreme Court has largely abided by a singular notion of just compensation for more than a century: "just compensation is commonly considered the fair market value of the property at the time of the taking."[11] As a result, judges have rarely deviated from the fair market value standard.[12] But while just compensation doctrine has remained stagnant at the judicial level, scholars

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3 *See* Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-*Kelo, 41 WAKE FOREST L. REV. 237, 239–41 (2006).

4 545 U.S. 469 (2005).

5 *See* Lopez, *supra* note 3, at 241, n.23.

6 *See Man Fights to Retain His Property Although City Claims Eminent Domain*, CBS 46 (Aug. 7, 2018), http://www.cbs46.com/story/38826565/man-fights-to-retain-his-property-although-city-claims-eminent-domain [https://perma.cc/32SQ-5YX3].

7 *See* Payne Horning, *Eminent Domain Court Battle Looms over Utica Hospital Project*, WRVO PUB. MEDIA (July 19, 2018), http://www.wrvo.org/post/eminent-domain-court-battle-looms-over-utica-hospital-project [https://perma.cc/5RKQ-6FDT].

8 *See* Charles V. Bagli, *Ruling Lets Atlantic Yards Seize Land*, N.Y. TIMES (Nov. 24, 2009), https://www.nytimes.com/2009/11/25/nyregion/25yards.html [https://perma.cc/YVG5-W4J7].

9 *See* Rikki Mitchell, *Mount Pleasant May Take Remaining Properties in Foxconn Area Through Eminent Domain*, TMJ4 (May 9, 2018, 10:14 PM), https://www.tmj4.com/news/local-news/mount-pleasant-may-take-remaining-properties-in-foxconn-area-through-eminent-domain [https://perma.cc/3RPG-ZM2G].

10 *See* Lopez, *supra* note 3, at 239.

11 Elisabeth Sperow, *The* Kelo *Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 408 (2007) (first citing United States v. Miller, 317 U.S. 369, 374 (1945); then citing Olson v. United States, 292 U.S. 246 (1934)).

12 The Court has occasionally deviated from this standard when addressing injuries caused by the taking of intangible property. *See* Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After* College Savings v. Florida Prepaid, 37 SAN DIEGO L. REV. 637, 670–71 (2000) ("Intangible property, as well as real property, is special for the purposes of the Takings Clause. . . . The right to earn interest on principal is an intangible property interest. The Court has found it to be a special interest worthy of protection under the Takings Clause."). However, the fair market value standard for the taking of real property has remained inflexible. *See infra* subpart I.A.

have long questioned the wisdom of fair market value as a meaningful tool of justice.[13]

This Note joins those criticisms. However, while existing scholarship has merely proposed alternative measures of financial compensation,[14] this Note contends that justice is fully served only when the government embraces nonmonetary means of compensation as a way to supplement existing monetary remedies.[15] Money damages are a logical fix for economic injuries, but money only goes so far. Where displaced individuals are also subjected to dignitary harms, the government only fulfills its obligation to provide just compensation through the process of dignity restoration.

To illustrate the need for a broader understanding of just compensation, this Note turns to America's long history of blight condemnations and urban renewal. Part I provides an overview of relevant Takings Clause jurisprudence and contextualizes our understanding of just compensation in relation to the ever-evolving public use doctrine. It then examines existing criticisms of the fair market value standard, before situating dignity as a value inherent within those criticisms and as a constitutional value already recognized by the courts. Building on that background, Part II applies Professor Bernadette

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13 *See* James W. Ely, Jr., *The Historical Context of Just Compensation*, PRAC. REAL EST. LAW., May 2014, at 9, 14–15 (first citing W. Harold Bigham, *"Fair Market Value," "Just Compensation," and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 67 (1970) ("To the extent that the existing use of the fair market value test prohibits compensation for consequential damages, however, the landowners [sic] compensation is inadequate, and he is in fact paying more than his fair share."); then citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 51–56, 182–186 (1985) ("The central difficulty of the market value formula for explicit compensation, therefore, is that it denies any compensation for real but subjective values."); and then citing United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) (acknowledging that "'just compensation' tends systematically to undercompensate the owners of property taken by eminent domain" and describing the Supreme Court's approval of this shortfall as "a conclusion rather than a reason").

14 *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006) (discussing existing scholarship and noting that "even accurate valuation methods may fail to make owners whole").

15 The Takings Clause applies to the federal government and state governments. *See* Chi., B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 239–41 (1897). Notably, the Takings Clause was the first provision from the Bill of Rights to be incorporated, through the Fourteenth Amendment's Due Process Clause, as applicable to the states. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 604 (2003). To the extent that *Chicago* interprets the Takings Clause beyond the meaning that was intended at the time of ratification, the Supreme Court has long recognized that the meaning of the Takings Clause, including the just compensation requirement, continuously evolves.

Atuahene's "dignity takings" thesis to urban renewal and urban displacement, exposing the dire need to broaden the meaning of just compensation. It then argues that government actors are constitutionally obligated to support neighborhood-based initiatives aimed at restoring dignity to the communities traditionally uprooted by urban redevelopment and proposes several ways that the government can fulfill this obligation.

I
BACKGROUND

A. Eminent Domain, Urban Renewal, and Balancing the Takings Clause

The Fifth Amendment's Takings Clause reads, "[N]or shall private property be taken for public use, without just compensation."[16] Applicable to eminent domain, the government's power to seize private property for public use in exchange for compensation,[17] these few words distilled centuries of common law into two brief requirements: public use and just compensation.[18] Although the Takings Clause's meaning has been debated, its dual requirements are generally understood to work together.[19] As a result, it is necessary to consider how public use has evolved in order to fully understand the present state of just compensation.[20]

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16 U.S. CONST. amend. V, cl. 4.

17 *See* Kohl v. United States, 91 U.S. 367, 373–74 (1875) ("The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."); George Galgano, Note, *Just Compensation for Per Se Environmental Takings*, 16 PACE ENVTL. L. REV. 217, 220 (1998) ("[T]hrough the process of eminent domain, . . . legal title to private property is transferred to the government in exchange for compensation to the property owner." (footnote omitted)).

18 *See* Ely, Jr., *supra* note 13, at 9 (tracing the roots of the Takings Clause to foundational English legal documents such as the Magna Carta).

19 *See, e.g.*, Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 184–85 (2017) ("The just compensation requirement of the [T]akings [C]lause was designed as an intermediate position between two unpalatable extremes: at the one end, the government could take property without any compensation, at which point individual property owners would be subject to the abuses of a dominant majority faction. At the other end, the property could be taken only with the express consent of the property owner, at which point the holdout problem would become insurmountable. . . . [The just] compensation requirement . . . prevents abuse at one end of the takings equation while inducing responsible behavior on the other.").

20 *See* Lopez, *supra* note 3, at 242 ("The Article concludes that a broader assessment of the individual losses associated with eminent domain, even though they are subjective, resuscitates the word 'just' in 'just compensation' and brings the eminent domain balance closer to a point of equipoise."); *id.* at 283 ("[W]hile the scope of the public use definition changed over time, the interpretation of

The Supreme Court made its most recent major statement on public use in 2005's *Kelo v. City of New London*, which followed decades of judicial deference towards eminent domain.[21] Considered by many to be the high-water mark of permissible government takings, *Kelo* significantly broadened the scope of public use, expanding the term to apply to a mere "public purpose."[22] Plaintiff Susette Kelo challenged New London's attempt to seize her home for the purpose of building a commercial district on the razed property.[23] Pharmaceutical giant Pfizer had announced plans to construct a research facility in New London, and the city hoped that the increased traffic Pfizer brought would spur economic growth in the city's new commercial district.[24]

In a 5–4 decision, the Court ruled in favor of New London, holding that economic development is a sufficient public purpose, and thus public use, to satisfy the Takings Clause.[25] The Court's dissenters viewed this conclusion with alarm.[26] As Justice O'Connor pointed out, "[N]early any lawful use of real private property can be said to generate some incidental benefit to the public."[27] Consequently, the majority's interpretation of public use could be understood as "not realistically exclud[ing] *any* takings."[28]

Almost immediately, politicians, scholars, and concerned citizens across the nation responded with outrage to *Kelo*'s vast potential for abuse:

> Political cartoons portrayed the *Kelo* majority as (among other things) a modern-day Ku Klux Klan, as a wrecking-ball knocking down a home with the owner still inside, and as a blood-stained butcher hacking the heart out of the Constitution with a cleaver. The case consistently polled with a disapproval rating of over 80%.[29]

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what constitutes 'just compensation' petrified. The diverging evolutions of the two clauses have had a profound effect on the modern balance between the . . . [values] contemplated by the Takings Clause . . . .").

21 545 U.S. 469 (2005).

22 *See id.* at 483–484, 484 n.13.

23 *See id.* at 473–75.

24 *See id.* at 474–75.

25 *See id.* at 483–84.

26 *See id.* at 498–99 (O'Connor, J., dissenting).

27 *See id.* at 501.

28 *See id.*

29 Eduardo M. Peñalver, *Property and Politics*, NEW RAMBLER, http://newramblerreview.com/book-reviews/law/property-and-politics [https://perma.cc/QJ68-8ZC7] (reviewing ILYA SOMIN, THE GRASPING HAND: *Kelo v. City of New London* and the Limits of Eminent Domain (2015)).

The widespread anger over *Kelo* reached "across the political spectrum in a way that—even a decade later—is remarkable."[30] State governments quickly enacted legislation to restrict *Kelo*'s scope, and, as of 2015, forty-five states had passed "anti-*Kelo* legislation."[31]

Even before anti-*Kelo* legislation, however, *Kelo*'s broad definition of public use did little to change existing law.[32] In many ways, the pre-*Kelo* legal scheme was equally troubling. For decades before *Kelo*, legislatures had wielded eminent domain as a favored tool for urban condemnation and redevelopment.[33] Post-*Kelo* legislation merely restored this already destructive status quo.[34] Undaunted, legislatures have used and continue to use eminent domain to target and displace minority communities, thinly justified by a veneer of "public use."

Indeed, *Kelo* stands as a testament to a century's worth of urban blight-clearance efforts and redevelopment policies stretching back to the City Beautiful movement, which emerged at the turn of the twentieth century.[35] At that time, during the height of the Second Industrial Revolution, cities became increasingly noisy, dirty, and crowded, as factories—and factory workers—multiplied.[36] In response, longtime ur-

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30 *Id.*

31 Most of these acts were passed within the first three years after *Kelo*. *See* Ilya Somin, Opinion, *The Political and Judicial Reaction to* Kelo, WASH. POST (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/ [https://perma.cc/7KPA-WYH4].

32 *See* Peñalver, *supra* note 29 (noting that *Kelo* did not change existing law and paraphrasing Somin's interpretation of *Kelo* as "consistent with longstanding precedent").

33 *See* Andrea J. Boyack, *Side By Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHI.-KENT L. REV. 435, 458 (2017).

34 *See* Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 714 (2008) ("Some commentators argue that many states have adopted reforms where 'blight' exceptions are so broad that the law provides virtually no protection at all against economic development takings."); *id.* at 724.

35 More precisely, City Beautiful coalesced following the 1893 World's Columbian Exhibition in Chicago. *See* Dessa Marie Dal Porto, Note, *La Piccola Italia Invisible: Washington D.C.'s Invisible Little Italy*, 11 GEO. PUB. POL'Y REV. 15, 17 (2006).

36 *See* Sidney F. Ansbacher et al., *Florida's Downtowns Are Free to Grow Local Broccoli . . . and Chickens (Sometimes)*, 11 FLA. A&M U. L. REV. 1, 32–33 (2015) ("[A]t the start of the industrial revolution[,] [o]vercrowding in the cities was a paramount concern since it impacted numerous public health, safety and welfare issues (e.g., spread of disease and fire)." (quoting Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into*

ban elites fled the cities, seeking "suburban space and freedom."[37] These elites became the reformers behind "City Beautiful."[38]

The City Beautiful movement was "premised on the notion that civic revitalization, and ultimately social progress, could be achieved by beautification and sanitation regimes with attention to landscape design, municipal improvement and civic configuration."[39] In particular, the movement "focused largely on planning city parks, landscaping urban waterways, and designing attractive spaces for public buildings."[40] Through these beautification efforts, reformers "hoped to inspire and empower the poor to a level of moral and civic virtue."[41] They aimed to clean up overcrowded, dirty tenements and slums, and to restore a clean and healthy way of life to city residents.[42]

The City Beautiful movement crystallized years of urban beautification efforts that had resulted in landmarks such as New York City's Central Park.[43] Initially patronized by the city's wealthiest residents,[44] Central Park was created as an oasis from rapid urban development and the calamitousness of city life.[45] Towards that end, park construction efforts displaced 1,600 poor and immigrant residents and demolished "one of the city's most stable African-American settlements."[46]

Local Land Use and Environmental Controls, 20 PACE ENVTL. L. REV. 109, 110 (2002)).

37 *See* Dal Porto, *supra* note 35, at 17.

38 *See* Ansbacher et al., *supra* note 36, at 9–10 ("While the [City Beautiful] movement emphasized green spaces, its leaders were patricians who saw food gardens and soup kitchens for the poor as blight to be eradicated.").

39 Lolita Buckner Inniss, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?*, 11 U. PA. J.L. & SOC. CHANGE 75, 85–86 (2007–08).

40 *See* Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 YALE L.J. 116, 128–29 (2005).

41 Dal Porto, *supra* note 35, at 17.

42 *See* Ansbacher et al., *supra* note 36, at 27 (noting that City Beautiful was "the next step" in furthering earlier efforts to abate "moral nuisances" and "sources of serious pollution").

43 Strictly speaking, the creation of Central Park predates the formal emergence of City Beautiful. Nevertheless, the Park is often considered alongside City Beautiful given its galvanizing influence on the movement. *See* Kristen David Adams, *Can Promise Enforcement Save Affordable Housing in the United States?*, 41 SAN DIEGO L. REV. 643, 716–17 (2004).

44 Elizabeth Blackmar & Roy Rosenzweig, *History*, CENTRALPARK.ORG, https://centralpark.org/history-of-central-park/ [https://perma.cc/AR9V-WLLV] ("[I]n the park's first decade more than half of its visitors arrived in carriages, costly vehicles that fewer than five percent of the city's residents could afford to own.").

45 *See* Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 27 (2002).

46 *See* Blackmar & Rosenzweig, *supra* note 44.

As with the subsequent City Beautiful movement, these efforts were justified as a way "to beat back urban blight '[i]n a somewhat romantic effort to recapture the bucolic and putatively more virtuous past of rural America.'"[47]

Rooted in lofty ideals intended to enrich the lives of the elite, City Beautiful did little to improve living conditions for most city-dwellers.[48] Thus, urban planners quickly realized the limited impact of City Beautiful's aesthetics-based approach and began to emphasize the so-called City Practical.[49] Shifting towards pragmatic rather than aesthetic reforms, cities began in earnest to zone polluted industrial sectors away from residential areas.[50] The Supreme Court's decision in 1926's *Village of Euclid v. Ambler Realty Co.*[51] gave further momentum to this effort.[52]

In *Euclid*, the Supreme Court granted localities wide discretion to enact zoning schemes.[53] So long as zoning ordinances had a substantial relationship to public health and safety concerns, per *Euclid*, they were presumptively constitutional.[54] Through this implicit endorsement of centralized urban planning, the *Euclid* Court began the legal reification of policies that the City Beautiful movement had long advocated for.[55] Further, by validating urban planning undertaken for health and safety reasons, *Euclid* laid the groundwork for the mid-twentieth century redevelopment movement that was later euphemistically christened "urban renewal."[56]

These ambitious beautification and aesthetic goals intersected with the world of eminent domain in 1954's *Berman v.*

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47 *See* Ansbacher et al., *supra* note 36, at 5 (quoting Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 602 (2001)).

48 *See* Clowney, *supra* note 40, at 129.

49 *See* Mark Fenster, Note, *"A Remedy on Paper": The Role of Law in the Failure of City Planning in New Haven, 1907-1913*, 107 YALE L.J. 1093, 1104 (1998) ("[B]y 1907 [the City Beautiful movement] . . . was beginning to be expanded into what was known as the 'City Practical' movement.").

50 *See* Inniss, *supra* note 39, at 86 ("[I]n response to concerns about building uniformity, public health, safety and welfare, cities and towns began to develop zoning codes.").

51 272 U.S. 365 (1926).

52 *See* Ansbacher et al., *supra* note 36, at 29 (noting the emergence of Euclidean zoning schemes as a consequence of the City Beautiful movement).

53 *See* Inniss, *supra* note 39, at 87 ("Since *Euclid*, zoning ordinances bear a presumption of validity.").

54 *See id.*

55 *See* Ansbacher et al., *supra* note 36, at 29.

56 *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 12–13 (2003) ("[L]eading urban reformers . . . would later argue that the Court's opinion [in *Euclid*] supported the use of eminent domain for urban renewal.").

Parker.[57] The decision is credited with catalyzing the modern expansion of "public use."[58] For years after *Euclid*, and following the Great Depression, idealistic zoning and urban redevelopment projects had proceeded in earnest.[59] But:

> As African-Americans began moving north following World War I and II, federal and local governments began intentionally creating racial segregation through various public projects such as urban renewal, public improvement, and public housing programs, causing the "picture of the urban ghetto . . . to develop." Local governments adopted racial segregation as a de facto policy. Whites began pouring out of the urban areas and into suburbia in a widespread pattern termed "White flight." Industry began leaving the urban areas in favor of cheap land and tax incentives. Zoning ordinances, designed to facilitate segregation, separated blocks by race, and restrictive covenants allowed for legally backed racial discrimination and segregation.[60]

Although the Supreme Court had declared explicit race-based zoning illegal in 1917,[61] it was against this racially hostile backdrop that the justices adjudicated *Berman*. Only five years earlier, the Housing Act of 1949's Title I had "called for the elimination of slums by using public capital to acquire, demolish, and clear blighted areas. Once cleared, the land was to be transferred to the private sector for development."[62] Partly inspired by the not-too-distant memory of City Beautiful, "[t]he original premise behind the [Act] was that improvements to the physical surroundings of the city would produce urban revitalization."[63] In the post-war years, these initiatives provided cover for authorities to condemn largely minority neigh-

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57 348 U.S. 26 (1954).

58 *See* Joshua Brian Lanphear, *Reconceptualizing "For Public Use" in the Aftermath of* Horne v. Department of Agriculture, 94 U. DET. MERCY L. REV. 1, 15 (2017).

59 *See* ALISON ISENBERG, DOWNTOWN AMERICA: A HISTORY OF THE PLACE AND THE PEOPLE WHO MADE IT 125 (2004) ("From the vantage point of later decades, the depression is usually portrayed as a hiatus, an interruption to the otherwise expansive long-term trends of twentieth-century metropolitan growth.").

60 Kate Meals, Comment, *Nurturing the Seeds of Food Justice: Unearthing the Impact of Institutionalized Racism on Access to Healthy Food in Urban African-American Communities*, 15 SCHOLAR 97, 118 (2012) (footnotes omitted).

61 *See* Buchanan v. Warley, 245 U.S. 60, 81–82 (1917); Inniss, *supra* note 39, at 88.

62 Ian S. Tattenbaum, Note, *Renewal for the 1990s: An Analysis of New York City Redevelopment Programs in Light of Title I of the Housing Act of 1949*, 6 N.Y.U. ENVTL. L.J. 220, 221 (1997).

63 *Id.*

borhoods, forcing people out of their homes and entrenching segregation.[64]

Perhaps in recognition of these systematic efforts to dispossess, dislocate, and segregate urban minorities, Congress amended the Housing Act in 1954 to, among other things, euphemistically rename Title I as "Urban Renewal."[65] With this change, Congress hoped to signal "that the goal of the 1949 Housing Act had evolved from slum clearance to slum prevention/rehabilitation."[66] But even if Congress had intended to implement genuine change, the Supreme Court's contemporaneous decision in *Berman* did much to erase it.[67] The Housing Act, both before and after *Berman*, remains associated with racially infused urban clearance.[68]

These race-based patterns of urban clearance were evident in *Berman*, which authorized a use of eminent domain that resulted in the demolition of a 97.5% black community.[69] Empowered by decades of city beautification efforts, and seeking to restore the "charm" to the neighborhood in question, the Court affirmed the government's significant discretion to condemn neighborhoods as "blighted" and to tear them down for the purpose of redevelopment.[70] By enshrining the Housing Act's condemnation of "blight" as a valid public use of the eminent domain power, *Berman* accelerated urban redevelopment's already strong record of race-based exclusion. The City Beautiful movement had finally come to fruition, but the fruit was rancid.

Post-*Berman*, "blight" became a potent linguistic tool. By merely *labeling* an urban neighborhood as "blighted," legislatures could quickly target minority neighborhoods for clearance and redevelopment, regardless of the community's actual conditions:

> Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amor-

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64 *See* Meals, *supra* note 60, at 119.

65 Tattenbaum, *supra* note 62, at 226.

66 *Id.*

67 *See id.* (noting that the semantic change to urban renewal "did not present a significant practical departure from urban redevelopment").

68 *See id.*

69 *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1085 (1996).

70 *See* Berman v. Parker, 348 U.S. 26, 32–35 (1954) ("Congress and its authorized agencies have made [blight] determinations that take into account a wide variety of values. It is not for us to reappraise them. . . . Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.").

> phous 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.[71]

Coupled with *Berman*'s permissive stance toward public use, blight enabled local governments to "[use] their powers of eminent domain to condemn and demolish entire communities located in America's inner cities."[72] Government actors increasingly weaponized blight condemnations to displace unwanted minority groups from certain neighborhoods:

> Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city.[73]

Of course, at least some efforts to abate urban decay were motivated by genuine concern for the health of city residents.[74] But "there is also no doubt that many of the neighborhoods that stood in the way of urban renewal were not slums, and that the money spent for new housing largely went for buildings too expensive for those displaced to afford."[75] And of the 1,000,000 individuals estimated to be displaced by urban renewal, more than half of them were black.[76] Deliberately or not, eminent domain undertaken in the name of blight clearance and urban renewal disproportionately targeted black and African American communities.[77]

Accordingly, the postwar urban revitalization period has been described as a time of minority "clearance and contain-

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71 *See* Pritchett, *supra* note 56, at 3.

72 Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 177 (2016) [hereinafter Atuahene, *Sociolegal Concept*].

73 Pritchett, *supra* note 56, at 6.

74 *See* Frug, *supra* note 69, at 1085–86.

75 *Id.*

76 *See id.*

77 *See* Atuahene, *Sociolegal Concept*, *supra* note 72, at 177; *see also* Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 8–9 (2005) ("So scornful are many commentators today of the once-lauded urban renewal projects of the mid and late twentieth century that they are often referred to derisively as 'Negro removal.'" (first quoting David H. Harris, Jr., *The Battle for Black Land: Fighting Eminent Domain*, NBA NAT'L BAR ASS'N MAG., Mar.–Apr. 1995, at 12; then quoting Pritchett, *supra* note 56, at 47)).

ment."[78] Displaced from their homes by eminent domain, but often priced out of their neighborhoods by gentrification and rising prices, minority families were increasingly relocated to public housing.[79] Combined with government subsidies to encourage suburban home ownership, which largely benefited the white middle class, these practices entrenched de facto segregation.[80] Urban minority communities relocated to different urban minority communities, needlessly inflicting upon thousands of families the indignity of having their homes, neighborhoods, and communities seized and destroyed.[81]

By 1974, a host of socioeconomic factors brought the formal Urban Renewal era to an end.[82] But although federal programs called "redevelopment" or "urban renewal" disappeared, *Berman*'s invidious weaponization of "public use" has lingered.[83] New legislation has repeatedly reauthorized blight eradication, slum clearance, and redevelopment, perpetuating the legacy of urban renewal to the present day.

With this history of racial targeting in mind, it should come as no surprise that *Kelo*'s expansion of public use beyond its already vast scope sent shockwaves across the country.[84] Even after the *Kelo* backlash, however, subsequent decisions have done little to quell concerns about abuses of eminent domain.[85] Consider 2015's *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[86] There, the Supreme Court affirmed the validity of legal challenges to urban redevelopment based on a disparate impact on minorities, noting that "[l]ocal policy discretion that operates to maintain housing barriers and perpetuate the status quo of

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78 Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After* Inclusive Communities, 24 GEO. MASON L. REV. 663, 698 (2017).

79 *See id.*

80 *See id.*

81 *See* Frug, *supra* note 69, at 1069 ("As a result [of public housing projects], the blacks evicted by urban renewal moved either to existing housing in the black ghetto or to newly constructed public housing in the same neighborhood; many whites moved to the suburbs.").

82 Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 703 (1994) ("[W]ith Richard Nixon's 'new federalism' in 1974, formal federally sponsored redevelopment ended.").

83 *See id.*

84 *See* Somin, *supra* note 31.

85 *Cf.* Rigel C. Oliveri, *Disparate Impact and Integration: With* TDCHA v. Inclusive Communities *the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267, 286 (2015) ("Ultimately, [subsequent cases like] *Inclusive Communities* left existing precedent intact, preserving a legal theory that was in many ways more important in theory than in practice.").

86 135 S. Ct. 2507 (2015).

racial isolation, even under the auspices of 'community revitalization,' is not legitimate and is subject to challenge."[87] Further, the Court affirmed the importance of "prevent[ing] segregated housing patterns that might otherwise result from covert and illicit stereotyping."[88]

Despite these affirmations, *Inclusive Communities* remains a hollow victory for fair housing and community activists. Although it endorsed progressive litigation strategies, the decision relied on, and underscored, the continued validity of blight clearance and damaging urban redevelopment initiatives. *Inclusive Communities* highlights that even after the backlash to *Kelo*'s radical expansion of public use, the status quo of urban destruction has hardly changed. And post-*Kelo* legislation has often protected only unblighted properties from condemnation, implicitly reaffirming *Berman*'s pernicious use of blight.[89] Today, blight condemnations remain the norm, used to justify the razing and redevelopment of vulnerable communities.

All told, the post-*Kelo* saga demonstrates the importance of meaningful checks on eminent domain. Chief among these is the Takings Clause's just compensation requirement, intended to safeguard individual rights from overreach by siphoning government funds for each taking of property.[90] But as with all checks and balances, the Takings Clause is most effective when its powers and obligations are held in a delicate balance:

> Overemphasizing the republicanism in the [public use requirement] allows a government to gobble up property for public uses pursuant to its eminent domain power, which transgresses the time-honored respect for private property. On the other hand, overemphasizing the liberalism in the [just compensation requirement] risks putting the brakes on government projects that benefit the public, such as public schools, roads, or firehouses.[91]

The Supreme Court's increasingly permissive definitions of public use have disrupted this balance.[92] While the meaning of public use continues to evolve, the Court has refused to do the same for just compensation.

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87 *See* Seicshnaydre, *supra* note 78, at 665.

88 *See Inclusive Cmtys. Project*, 135 S. Ct. at 2522.

89 *See* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1871 (2013).

90 *See* Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

91 Lopez, *supra* note 3, at 253.

92 *See id.* at 290.

The notion of compensation for eminent domain reaches back hundreds of years to English common law.[93] Based on this history, the Fifth Amendment later enshrined the compensation requirement, with the key addition of one word: "just."[94] But American courts had little opportunity to explore the meaning of "just compensation" until the late nineteenth century.[95] The Supreme Court finally addressed "just compensation" in *Monongahela Navigation Co. v. United States*.[96]

Monongahela concerned government use of eminent domain to seize a dam on the Monongahela River. In its opinion, the Court directly addressed the addition of the word "just" to the Takings Clause's compensation requirement.[97] Noting the use of "just" as a form of emphasis, the Court explained that "just compensation" must therefore demand "a full and perfect equivalent for the property taken."[98] In the Court's view, the Constitution's promise of "a full and perfect equivalent" applied only "for the property, and not to the owner."[99]

With this pronouncement, *Monongahela* established that the Takings Clause requires compensation only for seized property—regardless of any nonproperty value or incidental benefits an owner may lose as a consequence of her property being seized.[100] But the Court's rationale remains opaque. The decision offered a seeming contradiction between "a full and perfect equivalent" and compensation solely "for the property." Further, *Monongahela* remains in tension with earlier statements that just compensation requires the "full indemnification and equivalent of the injury thereby sustained"[101] and "with the later statement in *Boston Chamber of Commerce v. City of Boston* that the Constitution 'deals with persons, not with tracts of

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93 *See* Ely, Jr., *supra* note 13, at 9 (quoting the Magna Carta's requirement of compensation for government takings).

94 U.S. CONST. amend. V, cl. 4.

95 Ely, Jr., *supra* note 13, at 11 (noting that "[t]he Supreme Court ruled in *Barron v. Baltimore*, 32 U.S. 243 (1833)[,] that the Bill of Rights, including the Fifth Amendment, applied only to the federal government. [But] [t]he national government rarely utilized eminent domain until the late nineteenth century.").

96 148 U.S. 312 (1893).

97 *See id.* at 325–26.

98 *Id.* at 326.

99 *Id.*

100 *See id.*; *see also* Ely, Jr., *supra* note 13, at 12 ("[T]he added qualification that compensation was for the property taken and not for losses to the owner has come to be understood as barring compensation for collateral or consequential losses that the government may impose on private owners.").

101 *See* Ely, Jr., *supra* note 13, at 10.

land.'"[102] Subsequent case law has not resolved these inconsistencies.

The Supreme Court compounded this conclusory and rigid understanding in *Olson v. United States*, which attempted to further clarify the meaning of just compensation.[103] Writing of the "full and perfect equivalent" mentioned in *Monongahela*, the Court stated that just compensation is the "equivalent [of] the market value of the property at the time of the taking[,] contemporaneously paid in money."[104] The Court continued, "[j]ust compensation includes all elements of value that inhere in the property, *but it does not exceed market value fairly determined*."[105] Although these statements recognized that a plaintiff should "be made whole," the *Olson* Court ignored the tension surrounding *Monongahela* and inexplicably closed the door to alternative interpretations of "a full and perfect equivalent."[106] In so doing, *Olson* enshrined "fair market value" as the modern just compensation standard.[107]

Since *Olson*, the meaning of the just compensation requirement has largely remained static, whereas the public use requirement has expanded dramatically during the same time frame. These dual requirements were intended to check each other, but the difference in scope that has developed between the two suggests that the Takings Clause's intended balance has not been achieved. Urban renewal and its destructive legacy continue to highlight this constitutional imbalance and the corresponding need to redefine just compensation.

B. Criticisms of the Fair Market Value Standard

With the public use requirement having received its fair share of judicial attention, the Court's restrictive approach to just compensation has prompted scholars to question the continued validity of the fair market value standard. After all, "[r]emoving weight from one side of a balance is only one way to

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102 *Id.* (citation omitted) (quoting 217 U.S. 189, 195 (1910)).
103 292 U.S. 246 (1934).
104 *Id.* at 254–55.
105 *Id.* at 255 (emphasis added).
106 *See id.*
107 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001) (first citing *Olson*, 292 U.S. at 255; then citing 4 NICHOLS ON EMINENT DOMAIN § 12.01 (Julius L. Sackman ed., 3d rev. ed. 2000)). *But see* Sperow, *supra* note 11, at 408 (2007) ("In certain circumstances, however, condemnees may also be entitled to reasonable moving expenses and other bonus payments above the fair market value of their property."). Given criticisms of just compensation doctrine's focus on financial compensation, payment of additional expenses does not change the analysis set forth in this Note. *See infra* subpart I.B.

correct an imbalance. If the Takings Clause balance is to move toward equipoise, one way to do so without disruption to public use doctrine is to alter the interpretation of the just compensation clause."[108]

Some scholars have critiqued fair market value from an economic perspective. According to these critics, fair market value as contemplated in *Olson* is an unfair and inaccurate cap on *Monongahela*'s ideal of a "full and perfect equivalent for the property taken."[109] For example, Professor James W. Ely, Jr. has noted that: "The [fair market value] standard takes no account of consequential damages, such as broken community ties[,] lost profits, relocation expenses, loss of business goodwill, and costs of litigation."[110] In short, the Court's emphasis on a singular measure of compensation overlooks the complex ways in which people function as economic actors.[111] By eliminating many possible avenues for recourse, the fair market value standard increases the risk that land transfers pursuant to eminent domain will result in gross economic disparities.[112] Indeed, even *Monongahela* considered the impact of nonmarket value compensation, when the Court noted the government's right to continue collecting toll profits from the seized dam.[113]

Scholars have also criticized fair market value for entrenching *Monongahela*'s central flaw: its refusal to contemplate injuries to the *owner* of the seized property.[114] As Professor Richard Epstein has explained, "The central difficulty of the market value formula for explicit compensation . . . is that it denies any compensation for real but subjective val-

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108 Lopez, *supra* note 3, at 290.

109 Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

110 Ely, Jr., *supra* note 13, at 14 (citing Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57 (1969)).

111 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (6th ed. 2003) (explaining that "just compensation is not full compensation in the economic sense" because it excludes the possibility of compensation for the loss of "subjective values").

112 *See* Benjamin A. Householder, Note, Kelo *Compensation: The Future of Economic Development Takings*, 82 CHI.-KENT L. REV. 1029, 1033 (2007).

113 *Monongahela*, 148 U.S. at 337 ("[A]fter taking this property, the government will have the right to exact the same tolls the navigation company has been receiving.").

114 Ely, Jr., *supra* note 13, at 14–15 ("[T]he fair market value approach ignores the subjective value that an owner has in his or her property. These might include not only sentimental attachments but also the special suitability of the property for their personal needs. Critics charge that the fair market value standard in effect confiscates such subjective value. Indeed, some scholars maintain that the prevailing fair market test systematically under compensates persons whose property is taken for public use.").

ues."[115] Among these overlooked values, for instance, are the "sentimental or other non-economic value[s] condemnees may place on their homes."[116] In particular, eminent domain exacts a unique toll on displaced homeowners, as government takings forcibly divorce the homeowner from "the connection to her home formed from life's experiences occurring within its confines."[117] And as an amicus brief in favor of New London admitted during the *Kelo* litigation, the most obvious shortfall of the fair market value standard is that it does not appreciate the noneconomic value that owners attach to their properties.[118]

These comments suggest that even if fair market value were replaced with more accurate measures of monetary compensation, monetary payments may be inadequate to compensate for some losses.[119] Therefore, especially in light of the expansive public use doctrine, courts should begin to reconsider the meaning of just compensation. As Professor Alberto B. Lopez notes:

> The use of the word "just," . . . connotes that the compensation should fairly remunerate the individual for the loss suffered at the hands of the government. The damage caused to the person as a result of eminent domain unquestionably includes not only the loss of soil, but also subjective harm. . . . [Today,] [t]he compensation provided to the dispossessed owner is not just in the sense that it is fair or deserved but instead becomes superfluous in that it is just—in the sense that it is only—compensation.[120]

C. Dignity in American Jurisprudence

Fortunately for critics of the fair market value standard, noneconomic injuries are judicially cognizable, and thus, redressable.[121] American courts have long contemplated dignity as a nonenumerated value implicit in the Constitution.[122]

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115 Lopez, *supra* note 3, at 292–93 (quoting EPSTEIN, *supra* note 13 at 83).

116 Sperow, *supra* note 11, at 408.

117 Lopez, *supra* note 3, at 292.

118 *See* Householder, *supra* note 112, at 1055–56.

119 *See* Lopez, *supra* note 3, at 291–92 ("Gain-based compensation and legislative benchmarks for payments are nothing more than assembly-line compensation divorced from the individual assessment required of the liberalism embraced by the just compensation clause."); Sperow, *supra* note 11, at 408.

120 Lopez, *supra* note 3, at 294.

121 *See, e.g.*, FEC v. Akins, 524 U.S. 11, 20–25 (1998) (finding that the respondents' "inability to obtain information" was a redressable injury in fact).

122 Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANA/O-LATINA/O L. REV. 15, 17 (2006) ("In the American context, the idea of dignity survives largely through interpretive efforts of judges who identify dignity as an inherent constitutional

In *Goldberg v. Kelly*, the Supreme Court indicated that "[f]rom its founding the Nation's basic commitment has been to foster the *dignity* and well-being of all persons within its borders."[123] More recently, the Court has repeatedly signaled that arguments centered on protections for individual dignity fit within the existing constitutional framework.[124] Although several dignity-based arguments have been tied to landmark LGBT rights cases,[125] the Court has noted the importance of dignity in other areas, such as in countering racial discrimination.[126] Justice Sotomayor recently explained why dignitary harms matter in the racial discrimination context, writing, "Race matters because of . . . the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'"[127] In the equal protection context and elsewhere, dignity is intertwined with key constitutional values.

The Takings Clause itself leaves ample room to embrace dignity. Consider the writings of James Madison, who drafted

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value. Indeed, modern American courts have come to rely upon dignitary discourse when analyzing Fourth Amendment protections against unlawful searches and seizures, Eighth Amendment protections against cruel and unusual punishments, Fourteenth and Fifteenth Amendment antidiscrimination claims, and Ninth and Fourteenth Amendment issues involving women's reproductive rights.").

123 Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 766 (2005) (emphasis added) (quoting Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970)).

124 Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011) ("In the last 220 years, Supreme Court Justices have invoked [dignity] in more than nine hundred opinions.").

125 *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) ("The fundamental liberties protected by [the Due Process] Clause . . . extend to certain personal choices central to individual dignity . . . ."); United States v. Windsor, 570 U.S. 774, 775 (2013) (striking down the federal Defense of Marriage Act as "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, . . . sought to protect in personhood and dignity"); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (striking down a statute criminalizing homosexual sodomy, given the importance of "intimate conduct" in retaining "dignity as free persons"); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) ("[C]hoices central to personal dignity . . . are central to the liberty protected by the Fourteenth Amendment.").

126 *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017) (recognizing the government's "commitment to the equal dignity of all persons," in ruling that the Sixth Amendment requires the jury "no-impeachment" rule to yield when a juror's statements clearly indicate she relied on racial animus or stereotypes in convicting a criminal defendant); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250, 275 (1964) (affirming Congress's power to prohibit racial discrimination in interstate commerce, given the relevant Civil Rights Act's purpose to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'").

127 *See* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 315 (2014) (Sotomayor, J., dissenting).

the Clause. "In [his essay *Property*], Madison conceived of property as more than a mere physical object, describing it as including several intangibles such as opinions, safety, and free choice."[128] Justice Rehnquist later drew on these intangibles in *Penn Central Transportation Co. v. City of New York*, writing, "[P]roperty as used in the Taking Clause . . . 'is addressed to every sort of interest the citizen may possess.'"[129] Arguably among these are the unique dignitary interests that people retain in their homes.

The Supreme Court has long understood the unique status of individual rights in the context of the home.[130] For instance, people retain special interests in speech connected with the home, such as placing a sign in one's front yard.[131] Further,

> The home is a moral nexus between liberty, privacy, and freedom of association. A clear example of the nexus is *Stanley v. Georgia*, . . . [where] the Supreme Court held that a state may not prosecute a person for possessing obscene materials in her home. Although the Court rested its holding on the "philosophy of the [F]irst [A]mendment," it is apparent that the Court was influenced by an appreciation of our society's traditional connection between one's home and one's sense of autonomy and personhood.[132]

The Court later echoed this connection between identity, dignity, and the home in *Lawrence v. Texas*.[133] The case struck down a statute banning homosexual sodomy, in part because of the right of consenting adults to exercise autonomy within the home.[134] As Justice Kennedy explained for the majority, the Constitution protects consensual intimate relationships

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128 Emily A. Johnson, Note, *Reconciling Originalism and the History of the Public Use Clause*, 79 FORDHAM L. REV. 265, 298–99 (2010) (citing James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983)).

129 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 142–43 (1978) (Rehnquist, C.J., dissenting) (citation omitted) (quoting United States v. General Motors Corp., 323 U.S. 373, 377–78 (1945)).

130 *See* Nadler & Diamond, *supra* note 34, at 722 ("As others have previously observed—including Justice Thomas in his *Kelo* dissent—the law recognizes the special, if not sacred, character of the home in areas as disparate as government searches, free speech, and tax policy.").

131 *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law.").

132 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991–92 (1982) (footnotes omitted) (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

133 *See* 539 U.S. 558, 574 (2003) ("[C]hoices central to personal dignity . . . are central to the liberty protected by the Fourteenth Amendment." (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992))).

134 *See id.* at 567, 578.

between adults, "in the confines of their homes . . . [to] retain their dignity as free persons."[135]

Following the lead of *Penn Central* and *Lawrence*, Takings Clause litigation often seems to contemplate the intense personal connection between real property, autonomy, and identity. As Joshua Brian Lanphear has noted about *Kelo*, "[A]n emotional and psychological link existed between Susette Kelo's and [co-plaintiff] Wilhelmina Dery's self-identities and their real property. The fact that . . . [they] brought suit to challenge this determination only bolsters this emotional and psychological link."[136]

The Court has historically recognized that the Takings Clause protects a variety of intangible interests, notwithstanding its reticence towards compensating those interests.[137] For example, the Takings Clause protects the valuable right to control property.[138] Additionally, the Clause protects the right to devise property upon death.[139] The Takings Clause further protects the right to exclude,[140] and the Court has heard Takings Clause cases on the property rights in trade secrets or interest in an escrow fund.[141]

All told, these decisions regard property rights as "evolutionary," growing and adapting as people reconceive their relationships to property in particular historical contexts.[142]

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135 *Id.* at 567.

136 Lanphear, *supra* note 58, at 34.

137 Notably,

> [T]he absence of language addressing subjective harm in [Takings Clause] cases stems from one fact: the law did not recognize mental or emotional distress as a compensable injury without accompanying physical harm until the twentieth century. . . . From a historical perspective, then, the failure to account for subjective mental harm for purposes of just compensation is not the result of careful consideration or experience. Rather, the absence of subjective harm from just compensation jurisprudence is the product of historical inertia.

Lopez, *supra* note 3, at 298–99 (footnotes omitted).

138 *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (noting that even where interest income on lawyers' pooled trust accounts "may have no economically realizable value to its owner, possession, *control*, and disposition are nonetheless valuable rights that inhere in the property" (emphasis added)); JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 7.02[B] (1999 & Supp. 2001-2) (citing *Phillips* and indicating that "the right to control" is "critical" to the Takings Clause's protection of "intangible right[s]").

139 *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

140 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

141 Carol M. Rose, *Racially Restrictive Covenants—Were They Dignity Takings?*, 41 LAW & SOC. INQUIRY 939, 948 (2016); *see also* E. Enters. v. Apfel, 524 U.S. 498 (1988); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

142 *See* Pritchett, *supra* note 56, at 6 ("Several influential scholars, particularly Joseph Sax, Carol Rose, and Laura Underkuffler, have argued that property rights

Indeed, "American courts and legislatures have adjusted property rights for decades without any serious argument that those changes violated the [Takings] Clause."[143] Given the longstanding recognition of intangible interests in the Takings Clause context, attempts to redress eminent domain's dignitary harms may ultimately survive constitutional scrutiny.[144]

II
ANALYSIS

A. Understanding Urban Renewal Through the Dignity Takings Framework

Bernadette Atuahene's concept of "dignity takings" provides a useful framework for thinking about the relationship between eminent domain, just compensation, and dignity. According to Atuahene, a dignity taking occurs "when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization."[145] Although

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should be viewed as 'evolutionary' doctrines. . . . Understanding the evolution of property rights requires an examination of the ways that people conceive of their relationship to property in particular historical contexts.").

143 John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 755 (2017). In other areas of the law, courts have embraced compensation for subjective harms such as the intentional infliction of emotional distress or noneconomic harm caused by medical malpractice. In practice, "[n]either of these areas of the law involves more speculation than that associated with compensating for the subjective harm caused by the loss of a home following eminent domain." Lopez, *supra* note 3, at 298–99.

144 *Cf.* Sprankling, *supra* note 143, at 755 ("[N]ew techniques for modifying property rights that are rooted in existing legal doctrines . . . are more likely to survive constitutional scrutiny than those that are not.").

145 Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817 (2016) [hereinafter Atuahene, *Dignity Takings*]. Atuahene initially expounded the concept of dignity takings in WE WANT WHAT'S OURS, *infra* note 146, but has since revised her definition of the phrase. This Note abides by her revised definition. For more information, see Atuahene, *Dignity Takings*, *supra* note 145, at 800–01. Given that the Supreme Court has used the term "dignity" in ways that are consonant with Atuahene's suggestion that human dignity can be diminished or taken, see, for example, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("preserve human dignity"), *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("retain their dignity as free persons"), and *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) ("destructive of human dignity"), this Note takes no position, in light of subsequent scholarship, as to whether the term "dignity taking" most accurately describes the "dehumanization or infantilization" with which Atuahene is concerned. *See* Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 1000 (2019) (arguing that "[d]ignity is indefeasible"). Regardless of terminology, this Note agrees with Professor Alexander's assertion that "every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the

her scholarship has predominantly focused on South Africa, Atuahene has identified dignity takings as relevant in a variety of other contexts.[146] Most notably, Atuahene has drawn preliminary connections between dignity takings and urban renewal.[147]

Atuahene couples her idea of dignity takings with the process of "dignity restoration," defined as "a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency."[148] If we understand blight condemnation and urban renewal as forms of eminent domain that constitute a dignity taking, then the process of dignity restoration offers a new perspective on reforming the meaning of just compensation.

To constitute a dignity taking, a state must directly or indirectly destroy or confiscate property rights from owners or occupiers.[149] In the case of urban blight clearance, the government's use of eminent domain clearly meets this criterion.[150] By definition, eminent domain requires the government to confiscate individual property rights, taking ownership itself.[151]

Next, dignity takings require that the intentional or unintentional outcome of the property confiscation be dehumaniza-

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foundation of flourishing and the material resources required to nurture those capabilities. In the absence of these capabilities and supporting resources, recognition of the entitlement to flourish is simply an empty gesture." *Id.* at 997; *see infra* subpart II.B.

146 *See* BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 176 (2014). Scholars have taken up the call, discussing dignity takings in contexts ranging from the displacement of the Hopi from their sacred lands to the terrorizing of African Americans after the 1921 Tulsa Race Riot. *See, e.g.*, Atuahene, *Dignity Takings*, *supra* note 145, at 797; Alfred L. Brophy, *When More Than Property is Lost: The Dignitary Losses and Gains in the Tulsa Riot of 1921*, 41 LAW & SOC. INQUIRY 824 (2016); Justin B. Richland, *Dignity as (Self-)Determination: Hopi Sovereignty in the Face of U.S. Dispossessions*, 41 LAW & SOC. INQUIRY 917 (2016).

147 *See* Atuahene, *Sociolegal Concept*, *supra* note 72, at 177–78.

148 Atuahene, *Dignity Takings*, *supra* note 145, at 818. As with her definition of dignity takings, Atuahene initially expounded the concept of dignity restoration in WE WANT WHAT'S OURS, *supra* note 146, but has since revised her definition of the phrase. This Note abides by her revised definition. For more information, see Atuahene, *Dignity Takings*, *supra* note 145, at 802.

149 Atuahene, *Dignity Takings*, *supra* note 145, at 817.

150 To be clear, Atuahene's definition seems to contemplate incidental harms to dignity inflicted by the confiscation of other forms of property. In this example, the government seizes real property, with harms to dignity occurring as the "intentional or unintentional outcome." *See id.*

151 *See* Galgano, *supra* note 17, at 220.

tion or infantilization.[152] The systematic targeting and displacement of urban minority communities readily qualifies.[153] Christopher Bracey has pointed out the damage caused by systematic racial discrimination to individual feelings of self-worth. He explains that "racial repression can be understood as a thoroughgoing attempt to deny basic dignity and equal humanity of others because of their race."[154] Framed another way, denials of individual dignity run counter to core values of freedom and equality.[155] By targeting minority communities for eminent domain, treating them as less-than-equal, the government denies the humanity of those individuals.

Part of the reason that large-scale eminent domain invalidates individual feelings of dignity stems from the important role that land plays in self-identity.[156] Space and place contextualize community interactions, and so the systematic demolition of urban residential neighborhoods can be understood as a severe psychological trauma and intangible harm.[157] To paraphrase the work of psychiatrist Mindy Fullilove,

> [A]ll people dislocated through condemnation may suffer from "root shock," which is "the traumatic stress reaction to the destruction of all or part of one's emotional ecosystem . . . . Such a blow threatens the whole body's ability to function . . . . Shock is the fight for survival after a life-threatening blow to the body's internal balance." [This] condition [is] potentially permanent and personally catastrophic.[158]

People relate to community in deep and extremely personal ways.[159] "The aesthetics and atmosphere of our neighbor-

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152 Atuahene, *Dignity Takings*, *supra* note 145, at 817.

153 *See* Atuahene, *Sociolegal Concept*, *supra* note 72, at 177–78.

154 Bracey, *supra* note 122, at 17.

155 *Id.* at 18.

156 Eduardo Moisès Peñalver, *Is Land Special?: The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 268 (2004).

157 *See* Atuahene, *Sociolegal Concept*, *supra* note 72, at 177–78.

158 Yxta Maya Murray, *Peering*, 22 GEO. J. ON POVERTY L. & POL'Y 249, 296–97 (2015) [hereinafter Murray, *Peering*] (quoting MINDY FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 11 (2009)).

159 *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1913 n.236 (1994) ("Anyone who doubts the importance of a geographical cultural base need only look to the immigrant and racially identified communities who reconstruct a racio-national space within their (new) home country and who look toward their ancestral homeland long after any tangible connections have disintegrated. Consider the emotional bond of Miami Cubans to a Cuba that is unlikely to accept them within this

hoods and communities . . . affect the ways we think and interact with each other, how our children play, how we choose to travel, and even crime rates."[160] By condemning and displacing these communities, urban renewal's eminent domain practices have expressed a blatant disregard for the unique and sensitive nature of each person's humanity.

Consider New Orleans' Tremé neighborhood, a historically black and African American community.[161] During the heyday of urban renewal, "much of the neighborhood was destroyed with Federal Urban Renewal funds . . . . The destruction leveled eight blocks of historic Creole cottages and music halls, as well as other community structures, and tore out the streets where the music flowed."[162] Nevertheless, city government ignored the destructive impact of urban redevelopment on the community, and in the 1980s sought again to raze parts of the Tremé, this time to build a Tivoli Gardens amusement park.[163]

Although Tivoli Gardens never materialized, urban "revitalization" ultimately won out, demolishing half the neighborhood and evicting its residents from their homes.[164] Today, the site hosts Louis Armstrong Park, which separates the Tremé from the adjacent tourist hub of the French Quarter.[165] The construction of the Park pushed a vibrant center of black life in New Orleans even further out of the public eye, reinforcing systems of oppression that ensure "the everyday places, homes, and histories of poor and working people are less likely to make headlines when they are under threat."[166]

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century and that is undoubtedly far less familiar to many of them than is Southern Florida.").

160 Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 699 (2010) (footnotes omitted).

161 *See* J. Mark Souther, *The Disneyfication of New Orleans: The French Quarter as Facade in a Divided City*, 94 J. AM. HIST. 804 (2007).

162 Frances Frank Marcus, *New Orleans Disputes Future of Park on Site of Treme, Where Jazz Dug In*, N.Y. TIMES (Mar. 23, 1983), http://www.nytimes.com/1983/03/23/us/new-orleans-disputes-future-of-park-on-site-of-treme-where-jazz-dug-in.html [https://perma.cc/W3PJ-L6P3].

163 *See* MICHAEL E. CRUTCHER, JR., TREMÉ: RACE AND PLACE IN A NEW ORLEANS NEIGHBORHOOD 75–81 (2010).

164 *See* Dan Baum, *The Lost Year: Behind the Failure to Rebuild*, NEW YORKER (Aug. 21, 2006), https://www.newyorker.com/magazine/2006/08/21/the-lost-year/ [https://perma.cc/K2UE-TV8R].

165 *See* Souther, *supra* note 161.

166 MANDI ISAACS JACKSON, MODEL CITY BLUES: URBAN SPACE AND ORGANIZED RESISTANCE IN NEW HAVEN 5 (2008). As for the acclaimed HBO series *Treme*, any incidental benefits of the series to the community likely do little to compensate for past harms, especially when viewed in light of the financial benefits that HBO reaps. *Cf.* Householder, *supra* note 112, at 1045–46 ("[W]here a private corporation will profit from a condemnation—justified by collateral benefits to the local economy—

Alternatively, consider New Haven, Connecticut, which at the height of urban renewal received more per capita federal funding for demolition and construction projects than any other city in the United States.[167] In 1957, riding on the coattails of *Berman*, the city extended the Route 34 highway through the "blighted" Oak Street neighborhood, formerly a thriving community of lower-income African American, Italian, and Jewish residents.[168] Although many of the neighborhood's white residents were able to relocate to nearby suburbs, Oak Street's African American residents "found themselves—at rates far higher than whites—in public housing, such as the large and increasingly 'troublesome' Elm Haven project in the Dixwell neighborhood."[169] Unfortunately, the Dixwell project itself was later redeveloped, in a manner "more disruptive than the much-publicized and celebrated Oak Street project. More than 1,100 households and close to 200 businesses were forcibly relocated, and nearly 30 percent of the housing units in the area were completely demolished."[170] And for those who had the initial fortune of relocating to the Hill neighborhood rather than Dixwell, luck soon ran out when the Hill, too, was demolished—forcing Oak Street's inhabitants to experience urban renewal "for the second, third, or even fourth time."[171]

Today, "[t]he neighborhood once called Oak Street is now a collection of extinct street names. In its place are a broad and somewhat useless highway connector and a few very large, architecturally prominent, and visually underwhelming parking garages."[172] In New Haven as in New Orleans, urban renewal deliberately dispossessed and displaced lower-income, minority urban residents from America's downtowns.

Far from being a historical relic, policies perpetuating the legacy of urban renewal are still being implemented.[173] For

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the condemnee is suffering an 'unfair and disproportionate burden.'" (quoting United States v. Commodities Trading Corp., 339 U.S. 121, 129 (1950)).

167 *Exhibition Celebrates New Haven Before and After It Became a Model City*, YALENEWS (June 3, 2004), https://news.yale.edu/2004/06/03/exhibition-celebrates-new-haven-and-after-it-became-model-city [https://perma.cc/PE7P-44JU].

168 Rob Gurwitt, *Death of a Neighborhood*, MOTHER JONES (Sept./Oct. 2000), http://www.motherjones.com/politics/2000/09/death-neighborhood/ [https://perma.cc/A2NS-QUQQ].

169 JACKSON, *supra* note 166, at 19.

170 *Id.*

171 *See id.* at 22.

172 *Id.* at 18.

173 *See* Meron Werkneh, *Retaking Mecca: Healing Harlem Through Restorative Just Compensation*, 51 COLUM. J.L. & SOC. PROBS. 225, 226 (2017) ("In the name of 'economic revitalization,' cities exercise their eminent domain authority on a large

instance, *Berman* remains important in cities like Detroit, which has formed a Blight Removal Task Force with the goal of removing all "blighted" properties from the city.[174] Although such efforts may seem like a laudable attempt to revitalize decaying urban areas, the Task Force's plans are functionally indistinguishable from the destructive practices of urban renewal, taking little account of the community's actual vitality, concerns, or needs.[175] Moreover, Detroit's residents continue to live with the scars of failed projects from the heyday of urban renewal.[176] The forced displacement and entrenched segregation these residents have experienced contributed to a steep decline in quality of life: "Things are so bad in Detroit that social service workers began using a new term to describe the level of want of its citizens: 'deep poverty.'"[177] Blight condemnations symbolically treat these neighborhoods as incapable of

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scale . . . often displacing a more vulnerable community in the process. This process—known as gentrification—is currently occurring in Harlem, where frequent land condemnations are claiming the homes of many residents." (footnote omitted)); *see also* Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 109 (2017) ("Even now, after the heyday of urban renewal, city rejuvenation efforts paid for with federal monies often disenfranchise and uproot the urban poor, while shifting monies to corporate interests.").

174 DETROIT BLIGHT REMOVAL TASK FORCE, http://www.timetoendblight.com/ [https://perma.cc/F6TF-NLAY].

175 *See* Yxta Maya Murray, *Detroit Looks Toward a Massive, Unconstitutional Blight Condemnation: The Optics of Eminent Domain in Motor City*, 23 GEO. J. POVERTY L. & POL'Y 395, 397 (2016) [hereinafter Murray, *Detroit*] (stating, when referring to statements made by one of the Task Force's leaders, "[B]light clearances historically exploit low-income communities and people of color, yet these same officials also pretend that this danger does not exist" (footnote omitted)); *see also* Seicshnaydre, *supra* note 78, at 685 n.168 ("After decades of enduring urban renewal and revitalization efforts, inner-city residents of color have come to believe that if the neighborhood they live in is being improved by money from outside the community, then the intention is to improve it for someone other than them." (quoting James J. Kelley, Jr., *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEMPHIS L. REV. 1009, 1035 (2016))).

176 *See* Murray, *Detroit*, *supra* note 175, at 436 ("[R]acist uses of eminent domain in the 1940s and 1950s helped created current poverty in a city that is nearly 82% African American." (footnote omitted)); *id.* at 436 n.392 ("City officials . . . destroyed much extant housing to build highways, hospitals, housing projects, and a civic center complex, further limiting the housing options of blacks." (quoting THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 36 (1996))).

177 Murray, *Peering*, *supra* note 158, at 305 (citing Debra Watson, *"Deep Poverty" Growing in Detroit, Nationally as Benefits Are Cut*, VOICE OF DETROIT (March 31, 2010), http://voiceofdetroit.net/2011/07/15/deep-poverty-growing-in-detroit-nationally-as-benefits-are-cut/ [https://perma.cc/MZ55-XJU2] ("Even the term 'poor' is no longer adequate to describe the desperate conditions in Detroit.").

independent recovery while also doing little to fix the root causes of urban decline.[178]

Even where urban redevelopment has unintentionally singled out minorities, discrimination has remained an undercurrent of American eminent domain. For instance, in *Town of Huntington v. Huntington Branch, NAACP*, the Supreme Court recognized the town's restriction of multifamily homes to a predominantly minority neighborhood as having a discriminatory and segregationist impact on the area's minority residents.[179] These exclusionary practices, and others, further stigmatized minority communities and inherently raise dignitary issues.[180] "[T]o take away someone's property against his or her will, particularly without generally applicable reasons or compensation, is to signal that this person is not someone whose wishes and projects really matter. It is to treat the owner as an 'other' who does not deserve respect."[181]

These are but a few of the countless examples of urban renewal's systematic dehumanization and infantilization of minority communities. By targeting and displacing minorities, government exercises of eminent domain have undermined these individuals' freedom and dignity.[182] The harmful legacies of *Berman*, *Kelo*, and other cases embody a series of value judgments that use "blight" as a pretext for putting minorities and the disadvantaged "in their 'proper place.' In the Fifth Amendment takings context, this means they are at risk for condemnation."[183] Such condemnation acts as a "perilous erasure and dehumanization of the very vulnerable."[184] And as the Supreme Court has recognized for decades since *Brown v. Board of Education*, "a person who is physically excluded from a place often feels stigmatized and degraded."[185]

At bottom, there is ample evidence that blight condemnations, slum clearance, and urban renewal policies have evinced a persistent government disregard for the degradation that

178 *See* Quinones, *supra* note 82, at 692.

179 *See* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1074–75 (1989) (citing Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988)).

180 *See* Rose, *supra* note 141, at 945.

181 *Id.*

182 *See* Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 2016–17 (2015).

183 Murray, *Peering*, *supra* note 158, at 249.

184 *Id.* at 293.

185 *See* Schindler, *supra* note 182, at 2016–17.

these policies impose on individuals.[186] Holistic respect for dignity "requires that one view others as possessing not only inherent dignity at the personal level—that is, equal humanity—but also a presumptive social worth that makes possible sincere inclusion and acceptance into one's own community."[187] By failing to recognize the humanity inherent in the displaced and by refusing to consider individual and community needs, government eminent domain policies have dehumanized and infantilized urban minorities.[188] Blight has continued to serve as a pretext for displacing entire communities of color.[189] And these problems remain relevant because, as Timothy Zick writes, "[T]here is no more fundamental liberty than the freedom to choose one's own place. The loss of that freedom can result in severe forms of not only personal, but constitutional, displacement."[190]

B. Government Support for Community-Based Dignity Restoration

By eroding individual feelings of self-worth and dignity, urban displacement goes far beyond the confiscation of real property. Accordingly, remedies intended to restore self-worth and dignity must go beyond fair market value.[191] The government must adopt creative solutions to fulfill its obligation to restore dignity through just compensation.[192] Certainly, displaced individuals should continue to receive tangible, monetary compensation for the fair market value of their tangible,

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186 *See* Atuahene, *Sociolegal Concept*, *supra* note 72, at 177–78.

187 Bracey, *supra* note 122, at 20.

188 *See* Atuahene, *Dignity Takings*, *supra* note 145, at 801.

189 *See* Janet Thompson Jackson, *What is Property? Property is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN'S L. REV. 63, 112–13 (2010); *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1255 (1967) ("[U]rban redevelopment programs, while plausible enough to override any 'public purpose' objection, nevertheless depend on a still controversial conception. Easily identified, relatively small numbers of people are being handed a distinctly disproportionate and frequently excruciating share of the cost of whatever social gain is involved.").

190 Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 517 (2009) (footnote omitted).

191 *See, e.g.*, Nadler & Diamond, *supra* note 34, at 715 (conducting two experiments seeking to explain the *Kelo* backlash and finding that "under some circumstances, some people indicated that no amount of money was sufficient to compensate for the loss of their property").

192 *See* Atuahene, *Dignity Takings*, *supra* note 145, at 801; Lopez, *supra* note 3, at 294–95.

seized property.[193] And, grassroots initiatives may equally empower affected residents absent government support.[194] However, the Takings Clause is not satisfied unless the government takes affirmative steps to restore the dignity of the communities that it has historically targeted and displaced.[195]

Government concern for community well-being is not a new idea, but rather lies at the heart of the Takings Clause. In drafting the Clause, James Madison drew on the work of legal scholars who had argued for decades that "the paramount duty of the state was . . . the regulation and adjustment of economic power so that the quality of life for all members of society would be maximized."[196] Indeed, the Supreme Court has long recognized that individual dignity is inherently tied to the community:

> In the First Amendment context, the Supreme Court often protects a wide degree of speech; however, the Court has upheld the constitutionality of defamation and libel suits in part because they protect the reputational dignity of individuals. Here dignity pertains not to the self-expression of the speaker, but rather to recognition of the subject's "reputation and standing in the community."[197]

By improving the overall quality of life in the community, as Justice Brennan noted in *Goldberg*, social programs and benefits can help restore dignity.[198] Government support for such programs can "bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[199]

Increased government support for community-based initiatives such as business development zones, entrepreneurship

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193 *See* Bethany Y. Li, *Now is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1235–41 (2016) (discussing monetary compensation for both renters and owners of seized property while recognizing that non-monetary compensation may also be necessary).

194 *See* Werkneh, *supra* note 173, at 256–67 (proposing Community Benefits Agreements between private developers and the community as a form of dignity restoration).

195 *See* Atuahene, *Dignity Takings*, *supra* note 145, at 801.

196 *See* Lee Ivy, Note, *The 1986 Term "Takings" Clause Cases: A Unified Approach to Regulatory Takings?*, 13 OKLA. CITY U. L. REV. 325, 327 (1988) (referencing the writings of Grotius, Pufendorf, Bynkershoek, Burlamaqui, and Vattel, and noting that Grotius, who is known as the "father of the compensation clause," firmly advocated for regulation as a means to improve the quality of life).

197 Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. & PUB. POL'Y 171, 177–78 (2012) (footnote omitted) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

198 *See* Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970).

199 Gilman, *supra* note 123, at 766 (quoting *Goldberg*, 397 U.S. at 265).

and leadership programs, music and art education, community gardens, and various other endeavors that foster community building and a high quality of life is essential to "produce and sustain meaningful changes in the material lives of racially subordinated individuals."[200] Over and above payments for the fair market value of seized property, government compensation through a clear, long-term commitment to high-quality urban life can signal that residents hold personal promise and social value, beginning a dialogue that reestablishes trust, respect, and dignity.[201] These programs "fill pressing needs in the community and are critical to the survival of the communities and to many members of these communities,"[202] particularly as government budget cuts have caused many such programs to vanish.[203]

To start, consider the benefits of urban empowerment zones. These initiatives, already implemented in a number of disadvantaged communities,[204] "[e]ncourag[e] business creation and job growth by providing direct financial support, technical assistance, and other aid" to urban entrepreneurs.[205] By working within the existing community—rather than replacing or destroying it—empowerment zones "foster the creation and growth of businesses and startup companies [that] create jobs at disproportionately high rates," and are a key aspect of true community revitalization.[206] Government support for such initiatives through increased funding or dialogue with lawmakers signals that urban entrepreneurs are worthy of investment and growth. This message opposes condemnations made on the basis of neighborhood "blight" and begins to repair the dignitary harms inflicted by such practices.

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200 Bracey, *supra* note 122, at 18.

201 *See* Valerie P. Hans, *Dignity Takings, Dignity Restoration: A Tort Law Perspective*, 92 CHI.-KENT L. REV. 715, 721–22 (2017) ("[C]ompensation from a wrongdoer who directly provides compensation to an injured person should be more satisfying to the person who has been injured. . . . [However,] financial compensation from third parties may also restore equity and the dignity of victims—although the route to dignity restoration may be more indirect." (footnotes omitted)).

202 *See* LaDona Knigge, *Intersections Between Public and Private: Community Gardens, Community Service and Geographies of Care in the US City of Buffalo, NY*, 64 GEOGRAPHICA HELVETICA 45, 49 (2009).

203 *Id.* at 49.

204 *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 428 (2001).

205 *See* Matthew J. Rossman, *Evaluating Trickle Down Charity: A Solution for Determining When Economic Development Aimed at Revitalizing America's Cities and Regions Is Really Charitable*, 79 BROOK. L. REV. 1455, 1455–56 (2014).

206 *Id.*

The Community Economic Development (CED) movement is another successful example of creative investment in the long-term quality of life in urban communities. Similar to empowerment zones, CED has emerged as a grassroots initiative emphasizing job training programs, small business support, and building and managing affordable housing.[207] In contrast to empowerment zones, however, CED activists relate the movement's genesis to urban displacement and eminent domain.[208] During the height of urban renewal, "disinvestment in inner-city neighborhoods contributed to . . . increased urban poverty, inadequate housing, reduction in employment opportunities and loss of locally owned businesses."[209] CED efforts seek to reverse these collateral effects.

The dire need for CED and other forms of economic development in urban areas underscores the severity of the harms that urban renewal policies have created. Government support for urban job growth and entrepreneurism uplifts depressed urban economies caused by decades of malicious government condemnation and begins to treat these communities with equal dignity. Although financial benefits may result, government support for community-based growth is about more than just money. These initiatives signal that the government cares.

Turning away from the economic realm, consider the value of community gardens in combatting the public health problem of food deserts. Neighborhoods located more than a mile from a supermarket have been deemed "food deserts" for their lack of accessible, healthy, and affordable food options.[210] As of 2012, approximately 23.5 million Americans, or 8.5% of the national population, lived in low-income neighborhoods designated as such.[211] African Americans are almost four times more likely to live in food deserts than whites.[212]

Many food deserts are legacies of urban renewal.[213] Although Americans have become increasingly aware of urban

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207 *See id.*

208 Federal funding tied to urban renewal projects historically focused on encouraging the growth of white suburban communities at the expense of urban minorities. *See* Roberto Hernandez & Kimberly Rios, *Chicago Prize Hoops: Guiding At-Risk Youth to Build Stronger Communities*, 7 DEPAUL J. SOC. JUST. 271, 274 (2014).

209 *Id.* at 273–74.

210 Caitlin Loftus, *An Apple a Day—If You Can Find One—Keeps the Doctor Away: How Food Deserts Hurt America's Health and How Effective Land Use Regulation Can Eliminate Them*, 35 ZONING & PLAN. L. REP. 1, 1 (2012).

211 *Id.*

212 Meals, *supra* note 60, at 105–06.

213 *See id.* at 116–21.

agriculture and the need for proper nutrition, the existence of "food oppression" as a result of structural racism remains relatively obscured.[214] But the relationship between food deserts and racial discrimination is unsurprising: "Institutionalized racism operates on multiple structural levels simultaneously; thus, an urban community of color that lacks healthy food will likely also face housing inequalities, health disparities, substandard education, and overrepresentation in the criminal justice system, as well as a lack of structural power to alter these injustices."[215]

Remedying food deserts and other food oppression issues are but a few of the many important steps the state can take to roll back the systemic obstacles that minority communities face. Moving forward, "comprehensive change must include a combination of community-based solutions and elimination of racism from the structural levels of our food system."[216]

The government can start to rectify the impacts of institutionalized racism on the food sustainability of urban communities in several ways. For instance, policymakers can work to eliminate practices that have historically "provid[ed] public assistance that is insufficient to cover the cost of fresh food," or zoning and incentive policies "that favor corporations over community-based businesses and urban farming."[217] They can also eliminate government subsidies that facilitate the saturation of urban communities and schools with fast food.[218] By taking these steps, the state humanizes residents of historically disadvantaged communities, laying necessary groundwork for dignity restoration.[219]

Community music and arts initiatives play a particularly important role in rebuilding the vitality of traditionally disadvantaged urban neighborhoods.[220] The arts have long been a way for marginalized communities to express their discontent

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214 *Id.* at 106.
215 *Id.* at 101–02.
216 *Id.* at 136.
217 *Id.* at 110.
218 *Id.*
219 *Id.* (referring to illusory distinctions between public and private spheres of action and suggesting that structural racism "severely limits the ability to exercise choice" (quoting Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2222 (2007)).
220 *See* Alan Kay, *Art and Community Development: The Role the Arts Have in Regenerating Communities*, 35 COMMUNITY DEV. J. 414, 423 (2000).

with institutional oppression while reinforcing feelings of dignity and self-worth.[221] For example:

> It is within [the] historical context [of urban renewal] that hip hop developed from urban Black and Latino youth, who were essentially abandoned and rendered invisible by both White and Black politicians alike and the dominant public discourse. Isolated and ignored, in what was categorized by most as a dying city, these youth decided to celebrate, and to live, despite the deteriorating conditions around them, through the beat—the first element and manifestation of hip hop culture.[222]

Even today, community music programs are springing up in neighborhoods touched by eminent domain, such as the Heritage School of Music in New Orleans. Situated in the Tremé, the Heritage School of Music reinforces the role of music and culture in the lives of local youth, and provides important employment opportunities for local musicians.[223] These music schools and similar efforts help encourage interpersonal growth and thriving urban communities.[224] By partially funding these programs and providing venues to showcase and uplift performers, the state can use music and the arts as another tool to restore dignity to disadvantaged populations.[225]

More broadly, the restorative effect of the arts has long been understood, and "[t]here is evidence to show that art, as a medium, can enable individuals and groups to become more employable, more involved, more confident and more active in contributing to the development of their local communities."[226] By rallying isolated communities around a particular purpose, the arts "can help with establishing or refashioning civic iden-

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221 *See id.* at 416 ("[P]articipation in the arts can improve self-confidence and self-identity and . . . can greatly add to social development within communities. This is particularly evident in cases where those most marginalized and disadvantaged [are] encouraged to participate." (citing FRANÇOIS MATARASSO, USE OR ORNAMENT? THE SOCIAL IMPACT OF PARTICIPATION IN THE ARTS (1997))).

222 Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 256–57 (2007) (footnotes omitted).

223 *See Heritage School of Music Program History*, NEW ORLEANS JAZZ & HERITAGE FESTIVAL & FOUND., INC., https://www.jazzandheritage.org/what-we-do/heritage-school-of-music-program-history [https://perma.cc/5H6R-A8YD].

224 *See* Kay, *supra* note 220, at 416 ("[C]ommunity arts projects can impact positively on . . . community regeneration." (citing FRANÇOIS MATARASSO, VITAL SIGNS: MAPPING COMMUNITY ARTS IN BELFAST (1998)).

225 *See id.* at 414–15 ("In run-down, economically and socially depressed areas community development workers often have to look at a range of tools that will enable local people to engage together, develop social and economic skills and assume the power to fashion their own future.").

226 *Id.* at 415.

tity . . . and give voice not only to feelings of loss and despair, but also to quicken hope and instill pride in a shared heritage."[227] Consider the impact of the arts on feelings of self-worth. Studies have long shown that: "children who have taken three years of music instruction have higher self-esteem than their counterparts."[228] What is more, studies have found that "the arts stimulate learning in core subjects while encouraging creativity, benefiting overall learning."[229] In the broader community, as in schools, the arts provide an outlet to facilitate the process of dignity restoration.

Recognizing the dignitary value of the arts is particularly important given that government support for arts and humanities programs has continually decreased.[230] Despite research showing "that students who take electives such as foreign language or music[ ] perform better on core subjects,"[231] many schools have cut such programs in order to allocate more funding towards preparation for standardized testing.[232] Although success on standardized tests is important, declining support for the arts "deprives children of a balanced education, as studies repeatedly show the positive relationship between the arts and academic success."[233]

Indeed, "[t]he arts have the power to address cultural and communal needs in ways and to a depth that few other approaches can claim."[234] Especially for children who have been overlooked by traditional forms of education, exposure to the arts is a route to success that makes a difference "not just in [individual] cultural literacy, but in their self-esteem, their academic achievement, their sense of our global heritage and their readiness for the workforce."[235] Given these rehabilitative benefits, viewing the arts as a government obligation rooted in the just compensation requirement, rather than as a superfluous burden, has the potential to change this destructive para-

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227 Max Stephenson Jr., *Developing Community Leadership Through the Arts in Southside Virginia: Social Networks, Civic Identity and Civic Change*, 42 COMMUNITY DEV. J. 79, 83 (2007).

228 Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After* Brown, 44 WASHBURN L.J. 127, 149 (2004).

229 *Id.*

230 *See* Hernandez & Rios, *supra* note 208, at 272.

231 Vincent, *supra* note 228, at 148.

232 *See id.* at 143.

233 *Id.* at 142.

234 Stephenson Jr., *supra* note 227, at 83.

235 Vincent, *supra* note 229, at 148–49 (quoting Wynton Marsalis, Artistic Director, Jazz at the Lincoln Center, Address at National Press Club Luncheon With Wynton Marsalis (Sept. 22, 2003)).

digm.[236] The government can use community-based arts programs hand-in-hand with wider community development initiatives to successfully empower individuals uprooted by eminent domain.[237]

As these examples illustrate, organic forms of community growth and healing have already "capture[d] the degree to which communit[y] [support] can foster dignity, self-worth, and even autonomy."[238] But amplifying these initiatives through government support can greatly speed up these positive outcomes. After decades of stale just compensation jurisprudence, courts should not hesitate to creatively approach historical and structural injustices.

For example, courts can support long-term, dignity-restoring initiatives by ordering the creation of constructive trusts intended to benefit the community.[239] These trusts could easily be structured to require continuous financial support for certain community initiatives. Thus, on top of a damage award for the fair market value of seized property, a court might order that additional damages be paid into a constructive trust and that the interest that accrues on that trust be paid yearly to a particular community institution.[240] Or a court might order the creation of a grant-making, charitable trust, with the initial damages serving as seed money for annual grants required to be made to community nonprofits or small businesses.[241] Remedial schemes can be creative, and by beginning to reimagine

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236 This Note takes no position on whether budget cuts to arts and humanities programs are themselves Takings.

237 *See* Kay, *supra* note 220, at 422–23.

238 Gilman, *supra* note 123, at 758–59.

239 *Cf.* Kimberly Breedon & A. Christopher Bryant, *Restoring Trust with Trusts: Constructive and Blind Trusts As Remedies for Presidential Violations of the Constitution's Emoluments Clauses*, 11 ALB. GOV'T L. REV. 284, 299–300 (2018) ("Cases in areas of law outside the Emoluments Clause context bear out the notion that the constructive trust is an appropriate remedy for corruption by public officials, regardless of whether the public till suffers any actual loss."); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 631 & nn.28–29 (1995) (discussing constructive trusts as an equitable remedy analogous to express trusts).

240 Analogous schemes already exist. Consider Community Development Entities (CDEs), "financial intermediaries through which private capital flows from an investor to a qualified business located in a low-income community." *See* U.S. DEP'T TREASURY CMTY. DEV. FIN. INSTS. FUND, NEW MKTS. TAX CREDIT PROGRAM, FACT SHEET 1 (2018), https://www.cdfifund.gov/Documents/NMTC%20Fact%20Sheet_Jan2018.pdf [https://perma.cc/LA8T-UJWW]. Unlike the trusts this Note proposes, CDEs secure initial capital for later reinvestment by offering tax credits to investors. *See id.* at 1–2.

241 *See* EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS 173–74 (1974) (indicating that a charitable trust may arise by constructive trust).

just compensation as more than fair market value, the Supreme Court can set the tone from the top down.[242]

To be clear, dignity restoration does not necessarily require the state to establish a certain minimum level of welfare for all citizens.[243] However, true respect for dignity demands "that all citizens possess certain *capabilities*, such as the capability to live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length."[244] These capabilities comprise the minimum, material preconditions of human dignity, and the state's obligation to ensure those preconditions arises from the fundamental constitutional duty to provide just compensation for takings that have stripped communities of that dignity.[245]

Ultimately, a mere shift in tone may go a long way. If we reframe *Berman*'s right to eliminate blight as "a right of individuals to beautiful cities (or communities)," we open the door for new understandings of just compensation to take hold.[246] In this manner, comprehensive community growth strategies can further fundamental constitutional goals by expanding opportunities for those living in segregated, disadvantaged neighborhoods, and by counteracting disinvestment and blight as barriers to more integrated living patterns.[247] Whether through judicial, legislative, or executive action, government investments in the quality of urban life will help to balance the Takings Clause and restore the dignity taken from thousands of Americans by decades of discriminatory eminent domain practices.

CONCLUSION

Longstanding calls for the Supreme Court to revisit the Takings Clause's just compensation requirement are especially relevant in light of urban renewal's destructive history. However, the just compensation requirement should be viewed as a floor, not as a ceiling. Even in the absence of formal action by courts, legislatures and local governments can act to fulfill the

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242 The Supreme Court has repeatedly indicated that determining the meaning of just compensation, as a matter of law, is a judicial function. *See* Ely, Jr., *supra* note 13, at 16.

243 *See* Bracey, *supra* note 122, at 26.

244 *Id.* (emphasis added).

245 *See id.* at 26–27.

246 *See* Barron M. Flood, Note, *"Every Sort of Interest":* Penn Central *and the Right to Community-Making Places*, 19 U. PA. J. CONST. L. 767, 784 (2017).

247 Seicshnaydre, *supra* note 78, at 668.

government's constitutional obligation of "full and perfect" compensation.[248]

By taking preemptive action to support community-based initiatives, financially as well as politically, the same legislatures that seized and destroyed urban neighborhoods can begin to set things right. Court-ordered investments in the long-term well-being of urban communities can further recognize and remedy the dignitary harms inflicted by eminent domain. These state-backed actions are crucial steps towards ensuring the equal dignity to which all are entitled.

Undoubtedly, policies may "follow our compassion."[249] But equally, some policies may be constitutionally required. Just compensation is one such obligation. Far from frivolous, just compensation is integral to our constitutional order. Courts, legislatures, and other government actors need to follow where the Constitution has already led, and begin to reconsider the meaning of the just compensation requirement. Thinking of justice as more than just money is a good start.

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248 *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

249 *See* Albright, *supra* note 1.