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J.D., The Catholic University of America, Columbus School of Law, expected May 2021; B.A., Salve Regina University, 2016. The creation of this Comment would not be possible without expert guidance and support of Professor Lucia A. Silecchia, for whom the author is extremely grateful. She also thanks the Catholic University Law Review staff and editors for their tireless and detailed work. Finally, she thanks her family and friends for their unwavering love and support.

WHOSE HIGHEST AND BEST? INCLUDING ECONOMIC DEVELOPMENT AND INDIVIDUAL LANDOWNERSHIP IN THE HIGHEST AND BEST USE STANDARD

Brigid Sawyer[+]

In a bleak and fitting analysis of American culture, Chief Sitting Bull of the Hunkpapa Lakota tribe stated, "The love of possessions is a disease in [Americans]. . . . They claim this mother of ours, the earth, for their own use, and fence their neighbor away . . . If America had been twice the size it is, there still would not have been enough."[1] While private possession of property is a well-accepted part of American culture, how we use that property is often a hotly contested issue. Takings under eminent domain reveal an inherit conflict in American ideology. What do we value more: land being used for its most economically productive purpose or the individual rights of those first (or currently) using the land?[2] As this Comment illustrates, this conflict is hardly limited to eminent domain and extends to other areas of land use and acquisition. The earth has a finite amount of space to accommodate the estimated 7.74 billion people in existence today.[3] The answer to this question has important implications for the ability of people to use their land as they want and as the greater society needs.

This Comment explores the American history of the two competing goals of land use: economic development and individual land ownership. The similarities between founding-era philosophy on property, Native American land takings, and eminent domain valuation are not readily apparent. Many Native American land cases, and the legislation surrounding Native American

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1. *Sitting Bull*, WIKIQUOTE, https://en.wikiquote.org/wiki/Sitting_Bull (last visited Jan. 30, 2021).

2. It is relevant to note that there are some land uses which do not solely provide an economic use or an individual benefit—for example, roads, school, hospitals, prisons, and railroads provide public benefits. These public benefits often give an economic or an individual benefit as well, such as the creation of paths for commerce or the private ownership of public resources. It is the purpose of this Comment to balance the goals of economic productivity of land with individual land ownership when those goals arise as justification for the choices made regarding land.

3. The estimated world population grows in number every day and has likely grown significantly since the publication of this article. *See U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, https://www.census.gov/popclock/?# (last visited Jan. 30, 2021).

land, are not related to eminent domain.[4] However, the theories and justification surrounding Native America land takings speak to the tension between the desire to use land in the most economically productive manner and the desire to respect the individual landowner's rights, both of which are echoed in founding-era philosophy and eminent domain discussion.

Section I details the founding philosophies that have shaped American understanding of land use. Section II explores the history of Native Americans' land rights and takings. Section III discusses eminent domain, valuation in connection with eminent domain, and the impact of *Kelo v. City of New London*.[5] By analyzing these three seemingly different areas of law together, a more appropriate definition of highest and best use can be created. Section IV points to the connections between these subjects and Section V recommends restructuring the highest and best use standard. Redefining this legal term of art can create a standard that values both economic development and individual property ownership.

I. FOUNDING ERA PHILOSOPHY ON PROPERTY LAW

In order to create a workable standard, the historical perspective on property ownership must be reviewed. The desires for economic development and individual land ownership date back long before the United States was formed. Scholars discuss the tension between these and similar ideas that influenced the Foundering Fathers.[6] However, four philosophers and writers—John Locke, William Blackstone, Adam Smith, and James Madison—had a significant impact on the Founders' political philosophies.[7] These four individuals come from the English common law system, Scottish economics, and American

4. *See infra* Section II.

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

6. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 820–21 (1995) (discussing the differences in the conception of property between liberalism, which promotes individual rights above all else, and republicanism, which believes in limiting individual rights for the sake of the common interest).

7. David Adler, *Legal History, Civic Literacy and a Liberal Arts Education: Building Blocks for Civic Participation*, 56 THE ADVOCATE 42, 43 (2013) (commenting on Locke's influence on the colonies and America in "preserv[ing] republican principles"); Schick v. United States, 195 U.S. 65, 69 (1904) (discussing the fact that Blackstone's ideas were well known by the Founders); James W. Ely Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 34 (2012) (noting that Smith was known by Founders but his work was not discussed at the Constitutional Convention or ratifying debates, making his influence "hard to chart"); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1877 (2009) ("Smith had a substantial impact on the thinking of the Framers of the Constitution . . . ."); Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 270 (1997) ("Mr. Madison was the prime mover in the drafting and adoption of the Constitution. He was the quintessential Founder, known for generations by the title 'Father of the Constitution.'").

philosophy.[8] The first, John Locke, theorized that property ownership came from people mixing the labor they own with the land given to them in common.[9] Locke stated, "God and his reason commanded him to subdue the earth, i.e., improve it for the benefit of life, and therein lay out something upon it that was his own, his labour."[10] Labor, owned by each person individually, improved the raw land and gave people ownership of the land which they improved.[11]

Another English writer, William Blackstone, defined property as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[12] He praised the concept of individualized property in land, stating "[h]ad not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey[.]"[13] A Scottish economist, Adam Smith, theorized that, in the progression toward property acquisition, society passes through four different states: hunters, shepherds, agriculture, and commerce.[14] As society passes through each stage, the property is more susceptible to theft or harm and more laws need to be passed to protect property.[15]

James Madison wrote a short essay on property, which began by defining the term with a quote similar to Blackstone's definition: "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."[16] Madison explained that property extends beyond property of physical things to individual rights.[17] He was also one of the Federalist Papers' authors.[18] In Federalist 10, Madison cited unequal property

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8. William Uzgalis, *John Locke*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018) https://plato.stanford.edu/entries/locke/; *Sir William Blackstone, Relief Portrait*, ARCHITECT OF THE CAPITOL, https://www.aoc.gov/art/relief-portrait-plaques-lawgivers/sir-william-blackstone (last visited Jan. 30, 2021); *About Adam Smith*, ADAM SMITH INSTITUTE, https://www.adamsmith.org/about-adam-smith (last visited Jan. 30, 2021); *James Madison*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/ (last visited Jan. 30, 2021).

9. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 18 (Richard H. Cox, ed. 1982).

10. *Id.* at 21.

11. *Id.*

12. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND APPLICABLE TO REAL PROPERTY 1 (Alexander Leith & James Frederick Smith, eds. 1880), https://archive.org/details/commentariesonl00leitgoog.

13. *Id.* at 7–8.

14. Adam Smith, *Lectures on Jurisprudence*, *in* CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY 120, 120 (Richard A. Epstein ed., 2000).

15. *Id.* at 122.

16. James Madison, *Property*, *in* CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY 185, 185 (Richard A. Epstein ed., 2000) (quoting *The National Gazette* (March 29, 1792)). Madison did not quote Blackstone in his work. *Id.* at 185–87.

17. *Id.* at 185.

18. *Federalist Papers: Primary Documents in American History*, LIBRARY OF CONGRESS, https://guides.loc.gov/federalist-papers (last visited Jan. 30, 2021). The Federalist Papers were a

distribution as a main source of American factions.[19] He stated, "Those who hold and those who are without property have ever formed distinct interests in society."[20] However, he believed the large size of the country would prevent a majority from organizing to take rights from another group of citizens.[21]

The combination of these views shows the philosophical climate prior to and during the creation of the United States, as well as the theories that influenced the American legal system for years to come. Locke was one of the only English writers to influence eminent domain law with his writings[22] and courts cite Locke to ground their analysis of historical views of property rights and protection against the government.[23] Courts also regularly cite to Blackstone's definition and understanding of property.[24] Further, since there was limited discussion of property and the Takings Clause at the Constitutional Convention, and Madison wrote the Takings Clause in the Constitution, his opinions are believed to have been of significant importance to the Founders.[25]

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series of essays published under the pseudonym "Publius" arguing for the ratification of the Constitution. *Id.*

19. THE FEDERALIST NO. 10 (James Madison); Treanor, *supra* note 6, at 842; *see also* Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 260 (1990) (summarizing Madison's characterization of the causes of faction).

20. THE FEDERALIST NO. 10 (James Madison).

21. Treanor, *supra* note 6, at 842–43.

22. WILLIAM B. STOEBUCK & JOHN W. WEAVER, 17 WASH. PRAC., REAL ESTATE § 9.1 (2d ed. 2020) ("[N]o [other] English writer attempted any systematic explanation of expropriation theory [English eminent domain]; and not a single English decision on eminent domain has been found from the pre-Revolutionary period.").

23. *See* Kirby v. N.C. DOT, 786 S.E.2d 919, 924 (N.C. 2016) (citing Locke and Madison to support the statement, "From the very beginnings of our republic we have jealously guarded against the governmental taking of property."); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 204 (Tex. 2012) (showing that Locke's statement on "preservation of property rights [being] '[t]he great and chief end' of government" was previously approved by the Texas Supreme Court); Cannon v. State *ex rel.* Sec'y of the Dep't of Transp., 807 A.2d 556, 566–67 (Del. 2002) (Holland, J., dissenting) ("Undoubtedly influenced by Locke, the rights of property owners were characterized by the most prominent political theorists in the eighteenth century as the 'bulwark of freedom from arbitrary govemment [sic].'").

24. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1261–62 (11th Cir. 2012) (quoting Blackstone's definition of property to create a historical background of Second Amendment rights); John R. Sand & Gravel Co. v. United States, 60 Fed. Cl. 230, 237 (Fed. Cl. 2004) (citing to Blackstone to both define property and discuss the ability of the government to exact limits on private property); *Kirby*, 786 S.E.2d at 923–24 (citing to Blackstone to support the statement, "The fundamental right to property is as old as our state.").

25. Treanor, *supra* note 6, at 791 ("There are apparently no records of discussion about the meaning of the [Takings] clause in either Congress or, after its proposal, in the states. Madison's statements thus provide unusually significant evidence about what the clause was originally understood to mean[.]"). *See also* Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-*Kelo, 41 WAKE FOREST L. REV. 237, 249 (2006). In addition to the other philosophers mentioned in this Comment, Madison was strongly influenced by the ideas of Hugo de Groot (Grotius), who first paired the words "eminent domain" and articulated the idea that land could be taken by the government if remuneration of funds was given. *Id.* at 245–46, 249–50.

II. NATIVE AMERICAN LAND TAKINGS

A. Tension Between Founding-Era Theories and America's Desire for Native American Land

The idea that property is owned by those who use their skills and occupation to acquire it, alongside the protection that society and government afford,[26] had to be balanced with the actions of European and, later, American settlers.[27] In *Johnson v. M'Intosh*, the Supreme Court was faced with two conflicting lines of title, one tracing back to Native American ownership and the other acquired by the United States from Great Britain through the Revolutionary War.[28] The defendants, who acquired their chain of title through the United States, argued against any property rights of indigenous people, citing Locke and other philosophers as the basis for this line of thought.[29] In his majority opinion, Chief Justice Marshall agreed that the defendants had the true line of title but did not go as far as the defendants urged to deprive Native Americans of all land rights.[30] He stated, "[t]he absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[31] In doing so, Marshall rode a fine line of acknowledging that, by occupying the land, the Native American tribes had a limited right to occupy it and the "discoverers" were the only authority to which the Native Americans could sell their land.[32]

Marshall continued his theory of discovery with right to occupancy title in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.[33] Both cases dealt with Native American sovereignty and deciding whether state laws could be enforced against Native Americans.[34] In *Cherokee Nation*, the Court refused to rule on whether the laws of Georgia could bind the Cherokee Nation but found that the Native American tribe was not a foreign nation within the meaning of the

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26. *See supra* Section I.

27. *See* JEDEDIAH PURDY, THE MEANING OF PROPERTY 68 (2010) ("The Anglo-American account of the legitimacy of imperialism depended essentially on a vision of property that made it, as it was for Blackstone, the linchpin of social order, progress, and sovereignty.").

28. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 571 (1823).

29. Johnson v. M'Intosh, 1823 U.S. LEXIS 293, 32–33 (1823).

30. *Johnson*, 21 U.S. at 592.

31. *Id.*

32. *Id.* at 591. Justice Marshall said this opinion is in line with the following, established principle: "[t]he absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring." *Id.* at 592. Occupancy is described as "full and exclusive possession, use, and enjoyment of the land described . . . ." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.03 (Nell Jessup Newton ed., 2012).

33. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) *superseded by statute as stated in* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 562–63 (1983).

34. *Cherokee Nation*, 30 U.S. at 15; *Worcester*, 31 U.S. at 536.

Constitution.[35] In *Worcester*, the Court found that Georgia state laws which interfered with the relationship between the United States and the Cherokee Nation were "repugnant to the constitution, laws, and treaties of the United States."[36]

Eminent domain is the government's power to take land for public use.[37] Formal exercise of this power is not often a point at issue in Native American land taking cases, since discovery, removal, and allotment[38] provided sufficient justification for such land takings.[39] However, in *Cherokee Nation v. Southern Kansas Railway Co.*, the right to use eminent domain produced a chink in the armor of Marshall's theory of discovery with right to occupancy.[40] In this case, the Cherokee Nation argued that the United States could not use eminent domain to take land to build a railroad because the Nation was a sovereign state and held the right of eminent domain itself.[41] Justice Harlan, writing for the majority, disagreed with the Nation's position and, relying on Marshall's opinion in *Cherokee Nation v. Georgia*, said the Nation was a "dependent political communit[y]," and its separate status from the United States did not make it sovereign.[42] He said that, even though the land was held in fee simple by the Nation (due to treaties between it and the United States government), the land was "held subject to the authority" of the United States.[43]

B. Legislative Response to Takings

Early negotiations between the United States government and the Native American tribes were conducted through treaties and legislation.[44] On May 28, 1830, Congress passed the Indian Removal Act, allowing the President to exchange land in the west "for the whole or any part or portion of the territory claimed and occupied by [a Native American] tribe or nation[.]"[45] Treaties formed the basis of the United States' removal process of Native Americans from their eastern homelands to the west.[46] President Andrew Jackson, both before and after the *Cherokee Nation v. Georgia* and *Worcester* decisions, put

35. *Cherokee Nation*, 30 U.S. at 19–20.

36. *Worcester*, 31 U.S. at 561–62.

37. *Eminent Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See infra* Section III.A.

38. *See infra* Section II.B.

39. *See generally* Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 58–67 (2005) (comparing the current use of eminent domain with the taking of Native American lands through discovery, removal, allotment, and surplus lands given to white settlors).

40. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).

41. *Id.* at 648–49.

42. *Id.* at 653–54.

43. *Id.* at 654, 656–57.

44. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (Nell Jessup Newton ed., 2017).

45. Indian Removal Act, ch. 71, 4 Stat. 411, § 2 (1830).

46. COHEN'S HANDBOOK, *supra* note 44.

pressure on Native Americans to enter into treaties that would give up their eastern land and require, either explicitly or implicitly, that they move westward.[47]

As time went on, white settlors began moving westward, and removal policies were soon replaced with reservations—smaller areas of land for Native American tribes to live on—and allotment—assigning land to individual members of tribes.[48] There was a belief that common ownership of property within Native American tribes was hampering development.[49] Allotment was supposed to help assimilate Native Americans into American society.[50] As Kenneth Bobroff described it, "[b]y instilling individualism in the wild Indian, allotment would bring to him the incentive to work and acquire. With private property would come salvation and civilization."[51] The Indian Allotment Act was passed, which provided that "the President of the United States . . . is authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes . . . to allot the lands in said reservation in severalty to any Indian located thereon[.]"[52] However, this policy did not create Native American farmers; rather, it saddled Native Americans with property tax debt, fractioned heirs, and ultimately left room for white settlors to purchase or adversely possess the land.[53] According to Bobroff, "[b]y 1934, when the Federal government ended allotment, the

47. *Id.* The United States' treaties with the Cherokee Nation and the Creek Nation exemplify the interactions between the government and many Native American tribes during this period. *Id.* The Cherokee Nation signed a treaty which required it to move west, and the journey subsequently became known as the "Trail of Tears." *Id.* The Creek Nation signed a treaty giving it the option to create allotments of the land; but, after white settlors forcefully took it, the military forced the Creek Nation to move west. *Id.*

48. *Id.* Reservations were an important part of the recent Supreme Court case, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The Court found that a Creek Nation reservation created by Congress remains "Indian nation" for the purposes of a statute assigning jurisdiction over crimes where the accused are Native American. *Id.* at 2459–60, 2478, 2482. This finding was based on Congress' creation of the reservation without a subsequent termination of that reservation. *Id.* at 2482. Justice Gorsuch, writing for the majority, stated that, because the reservation was promised to the Creek Nation perpetually, "[i]f Congress wishes to withdraw its promises, it must say so." *Id.* While this ruling is a step toward increased respect for the Creek Nation's land, one ambassador for the Creek Nation stated, "[n]ot one inch of land changed hands today . . . All that happened was clarity was brought to potential prosecutions within Creek Nation." Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html.

49. Leeds, *supra* note 39, at 65.

50. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1565 (2001).

51. *Id.* at 1571.

52. Indian Allotment (Dawes) Act, ch. 119, 24 Stat. 388, § 1 (1887).

53. COHEN'S HANDBOOK, *supra* note 44, § 1.04; Bobroff, *supra* note 50, at 1618.

policy had cost Indians almost 90 million acres, two-thirds of the land they owned fifty years earlier."[54]

Allotment ended with the passage of Indian Reorganization Act (IRA).[55] By the 1930s, attitudes changed as to the assimilation of Native Americans into American culture, and a desire emerged to promote economic potential within Native American communities.[56] On June 18, 1934, Congress passed the IRA, which provided "[t]hat hereafter no land of any Indian reservation . . . shall be allotted in severalty to any Indian."[57] The Act went on to state, "[t]he Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened . . . to sale, or any other form of disposal by Presidential proclamation[.]"[58] A main purpose of this law was to promote economic development, which in turn would support Native American self-governance.[59] Pursuant to this Act, some land was taken in trust, meaning "that the federal government holds title to the land in trust for tribes or individual Indians."[60] But the impact was meek, even after the Bureau of Indian Affairs began attempting to acquire land for tribal owners.[61] While the IRA decreased the rate at which Native Americans lost their land, it did not address allotment fractionation, and only a small amount of lands were returned to Native Americans.[62]

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54. Bobroff, *supra* note 50, at 1561.

55. Indian Reorganization (Wheeler-Howard Law) Act, chs. 575–76, 48 Stat. 984 (1934).

56. COHEN'S HANDBOOK, *supra* note 44, § 1.05.

57. Indian Reorganization Act § 1.

58. *Id.* § 3.

59. Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 144 (2006). The IRA allowed tribes to adopt a constitution and bylaws to "organize themselves under the . . . Act." *Indian Reorganization Act, Procedural Guide*, 11 FED. PROC. FORMS § 41:89 (2020).

60. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-543T, INDIAN ISSUES: OBSERVATIONS ON SOME UNIQUE FACTORS THAT MAY AFFECT ECONOMIC ACTIVITY ON TRIBAL LANDS 3 (2011), https://www.gao.gov/assets/130/125965.pdf. Trust status frees the land from state and local taxes as well as zoning ordinances. *Id.* The GAO noted some uncertainty in the land in trust due to issues with the processing of applications by the Bureau of Indian Affairs and a 2009 Supreme Court decision. *Id.* at 4. In that case, the Court ruled that the language in the IRA—"now under federal jurisdiction"—which allowed the Secretary of the Interior to hold land in trust for Native Americans, meant "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." Carcieri v. Salazar, 555 U.S. 379, 395 (2009); *see also* Bethany C. Sullivan & Jennifer L. Turner, *Enough is Enough: Ten Years of* Carcieri v. Salazar, 40 PUB. LAND & RES. L. REV. 37 (2019) (analyzing the challenges and impacts of *Carcieri*).

61. G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix"*, 45 IDAHO L. REV. 575, 589 (2009).

62. Jered T. Davidson, Comment, *This Land is Your Land, This Land is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 586 (2011). The concern at the time was mostly focused on assimilating Native Americans into American culture. Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP. L. REV. 251, 261 (2012). The Department of Interior

III. HIGHEST AND BEST USE

A. Eminent Domain

Beyond Native American land takings cases, eminent domain is another area of law that sees the tension between economic development and respect for individual land ownership. Eminent domain is a right of a governing body, either under the natural law theory or the concept of sovereignty.[63] The natural law theory says that eminent domain power in a constitution merely recognizes that a government has power under the natural law, and individuals subject to this power must be compensated for their land loss.[64] The concept of sovereignty comes from the idea that eminent domain power lies with the sovereign, and positive laws must restrict that power.[65] The Massachusetts Supreme Court aptly stated, "[b]y force of this power, back of all private titles lies the eminent domain as an inherent attribute of organized government."[66] The United States Constitution limits the federal government's eminent domain powers with the following sentence: "[N]or shall private property be taken for public use, without just compensation."[67] Each state in the country also has the power of eminent domain.[68]

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acted on its own discretion to acquire lands in trust prior to 1980 and, even after a more official process was enacted in 1980, "scholars argued that the process was too similar to the pre-1980 unpublished guidelines . . . ." Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 527 (2013). Congress enacted the Indian Land Consolidation Act (ILCA) in 1983 in an attempt to correct some of the problems of Native American land fractionation and to "[consolidate] tribal lands through sale, purchase, or other exchanges." Davidson, *supra* note 62, at 587. The ILCA, however, included a provision which forced land to escheat to the tribe when there was only a small, fractional share of property interest. Leeds, *supra* note 39, at 68. The Supreme Court found this action to be an unconstitutional taking, and Congress unsuccessfully attempted multiple revisions to the ILCA. *Id.* Congress also passed the American Indian Probate Reform Act (AIPRA) to reduce fractionation by changing the rules of intestate succession of heirs which has had some benefits reducing further fractionation but does not correct previous fractionation and sometimes dismisses tribal land choices. Davidson, *supra* note 62, at 591, 594.

63. 1 NICHOLS ON EMINENT DOMAIN § 1.14(1)–(2) (Matthew Bender ed., 2020).

64. Young v. McKenzie, 3 Ga. 31, 43–44 (1847); 1 NICHOLS, *supra* note 63, § 1.14(1).

65. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) ("The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right."). The court in *Boom Co. v. Patterson* highlighted that the right of eminent domain is inherent to sovereignty. *Id.* Societies have historically varied in whether this includes a payment of just compensation. *See* 1 NICHOLS, *supra* note 63, §§ 1.2, 1.14(3).

66. Weeks v. Grace, 80 N.E. 220, 220 (Mass. 1907).

67. U.S. CONST. amend. V.

68. *See, e.g.*, Dalche v. Bd. of Comm'rs, 49 F.2d 374, 381 (E.D. La. 1931).

B. Valuing Land

In order for there to be payment of just compensation, the land taken in an eminent domain proceeding must be valued.[69] Land is valued by two factors: fair market value (or market value) and the land's "highest and best use." The Mississippi Supreme Court described fair market value as, "the amount of money which could be obtained on the open market at a voluntary sale of property; the amount that a purchaser who is willing, but not required to buy, would pay, and the amount that a seller who is willing, but not required to sell, would accept."[70] It is the price of a free market transaction for goods or services: the lowest price the seller will sell at and the highest price the buyer will purchase at.[71] However, fair market value is only one part of valuation because, unlike a typical transaction, an eminent domain case does not involve a willing seller.[72]

The highest and best use standard is also applied in valuation. In the same year that Congress passed the Indian Reorganization Act, the Supreme Court decided *Olson v. United States*, where a landowner wanted the "actual use and special adaptability" of their land included in condemnation valuation.[73] The Court stated,

> The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.[74]

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69. 4 NICHOLS, *supra* note 63, § 13.01(2); *see also Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "just compensation" as "a payment by the government for property it has taken under eminent domain—usu. the property's fair market value, so that the owner is theoretically no worse off after the taking."). This proceeding is also called condemnation. *Condemnation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

70. Tunica Cnty. v. Matthews, 926 So. 2d 209, 216 (Miss. 2006) (quoting Bear Creek Water Ass'n v. Town of Madison, 416 So. 2d 399, 402 (Miss. 1982)); *see also* United States v. Commodities Trading Corp., 339 U.S. 121, 123–25 (1950) (finding that some alternatives, such as ceiling prices, can be used when this fair market value is not an accurate measure of just compensation).

71. *Law of Supply and Demand*, INVESTOPEDIA (Nov. 29, 2020), https://www.investopedia.com/terms/l/law-of-supply-demand.asp. Valuation is determined as of the date of the taking. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984); AMTRAK v. Certain Temp. Easements Above the R.R. Right of Way in Providence, R.I., 357 F.3d 36, 39 (1st Cir. 2004). *Contra* 1 JAMES C. BONBRIGHT, THE VALUATION OF PROPERTY 61 (1937) (stating that the "fair" in fair market value is sometimes used by courts to consider equity in eminent domain valuation and that the willing buyer and seller model is illusory because the actual market conditions are unknown).

72. D. BENJAMIN BARROS & ANNA P. HEMINGWAY, PROPERTY LAW 833 (2015).

73. Olson v. United States, 292 U.S. 246, 248 (1934).

74. *Id.* at 255.

This was one of the first applications of the highest and best use standard. A similar definition was also used for many years by the Appraisal Institute.[75] The Appraisal Institute is a professional organization of real estate appraisers, and its members specialize in "valuation-related services."[76] However, in the fourteenth edition of the Appraisal Institute's publication, *The Appraisal of Real Estate*, the definition was simplified to "[t]he reasonably probable use of property that results in the highest value."[77] The original elements of "(1) legal permissibility, (2) physical possibility, [and] (3) financial feasibility"[78] are still considered, but the primary concerns are probability of use and the highest value of the land.[79]

If a government wanted to purchase property for public use, and property owners were always willing to sell at fair market value, there would be no need for the government to use eminent domain.[80] Courts have commented on this problem before, and the Seventh Circuit has stated that "[f]ull compensation will

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75. James D. Masterman, *Proving Highest and Best Use*, *in* ALI-ABA COURSE OF STUDY MATERIALS: EMINENT DOMAIN AND LAND VALUATION LITIGATION 89, 91 (2005).

> Highest and best use is the most profitable use the property will bring in light of its zoning, economic, environmental, legal, practical, social and physical characteristics unique to the property. The four criteria that must be met are: (1) legal permissibility, (2) physical possibility, (3) financial feasibility, and (4) maximum profitability, sometimes phrased as maximum productivity.

Id.

76. JOEL R. BRANDES, LAW & THE FAMILY NY FORMS § 97:1 (2d ed., 2020). "The Appraisal Institute is a global membership association of professional real estate appraisers. The majority of Appraisal Institute members are practicing real estate appraisers and property analysts who provide valuation-related services[.]" *Id. See also* ROBERT D. FEDER & P. BARTON DELACY, VALUING SPECIFIC ASSETS DIVORCE § 12.09 (2020); Masterman, *supra* note 75, at 92; *About Us*, APPRAISAL INSTITUTE, https://www.appraisalinstitute.org/about/ (last visited Feb. 7, 2021). Other appraisal organizations and standards exist as well. *See generally* WILLIAM S. YETKE & LARY B. COWART, VALUATION STRATEGIES DIVORCE § 6.61 (5th ed. 2020). Additionally, the federal government and many states depend on the Uniform Standards of Professional Appraisal Practice (USPAP), created by the Appraisal Foundation, for the basis of their real estate appraiser regulations. 7 NICHOLS, *supra* note 63, §§ G4.03(1), (4)(b).

77. Mark D. Savin, *Highest and Best Use and the Challenges of the Market*, *in* ALI CLE COURSE OF STUDY MATERIALS (2015) (quoting APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (2013)). Under the USPAP, "an appraiser must 'develop an opinion of the highest and best use of the real estate' after analyzing the relevant legal, physical and economic factors." Brandee L. Caswell, *Anatomy of an Appraisal: How do Eminent Domain Lawyers Review and Analyze Appraisal Reports?*, *in* ALI CLE COURSE OF STUDY MATERIALS (2020). These factors include: "Legal permissibility[,] Physical possibility[,] Financial feasibility[,] Maximal productivity[,] Reasonable probability issues[,] Need for supporting expertise in HBU analysis[,] Proper application of Project Influence Rule in HBU determination[,] Alternative or multiple highest and best uses[, and] Interim uses[.]" *Id.*

78. Masterman, *supra* note 75, at 91.

79. Savin, *supra* note 77; *see also* Michael Rikon, *The Highest and Best Use Concept in Condemnation*, 82 APR N.Y. STATE BAR J. 44 (2010).

80. BARROS & HEMINGWAY, *supra* note 72, at 833.

often exceed fair market value—many people would not sell their home for its fair market value, if only because of moving expenses."[81]

The Florida Constitution has a requirement of full compensation when the state government uses eminent domain[82] and the Florida Supreme Court has ruled that moving expenses fall within the requirement for full compensation, saying that "[a] person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in the compensation."[83] By contrast, the Arkansas Constitution does not have a requirement of full compensation;[84] however, the state's Supreme Court has ruled that just compensation is defined by full compensation and that full compensation requires interest paid dating back to the time of the government's entry, beyond the fair market value of the property.[85]

C. Kelo v. City of New London

Eminent domain and the economic productivity of land came to a head in *Kelo v. City of New London*.[86] In this case, the landowners contested whether the taking of the property for economic development constituted a valid public use and whether the property could be transferred to private owners "simply because the new owners may make more productive use of the property."[87] Of the landowners, one made "extensive improvements to her house" and another lived in her house since birth—the last sixty years of which were with her husband.[88] The properties, owned by these and other petitioners, were not of poor quality or upkeep; rather, they were condemned due to their location in the same area where the community development project was planned.[89] The Court, citing precedent of allowing economic development as a public use, found that the economic development project was a public use.[90] The Court pushed the ultimate responsibility for deciding public use to the states by saying, "[f]or

81. United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010); *see* 1 BONBRIGHT, *supra* note 71, at 72 ("The very value that I place upon my present dwelling is influenced by the fact that my ownership of it saves me from incurring these so-called 'incidental losses.'").

82. FLA. CONST. art. X, § 6(a).

83. Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 292 (Fla. 1958). At the time of this case, that constitutional provision was located in FLA. CONST. art. XVI § 29. *Id.* at 290.

84. ARK. CONST. art. 2, § 22 (requiring only *just* compensation for property takings by the state of Arkansas).

85. Ark. State Highway Comm'n v. Stupenti, 257 S.W.2d 37, 40 (Ark. 1953).

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

87. *Id.* at 496 (O'Connor, J., dissenting); *see also id.* at 472–73.

88. *Id.* at 475.

89. *Id.* The majority opinion did not discuss the value these qualities added to the property. *See generally id.* at 472–90.

90. *Id.* at 480–83. The Court cited to Berman v. Parker, 348 U.S. 26 (1954); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); and Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), to illustrate economic development as a public use. *Id.* at 480–82.

more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[91] The Court also found that the transfer of land to a private party, even though it benefitted the new private owners, fell within public use because it was within "the government's pursuit of a public purpose."[92] The Court concluded by saying that such results may seem harsh, even after just compensation payment; however, states had the option to impose stricter public use limits on themselves.[93]

D. Impact of Kelo

In the aftermath of *Kelo*, many states heeded the recommendation of the majority and placed restrictions on their own eminent domain powers through legislation, ballot measures, and sometimes judicial decisions.[94] Since 2006, forty-seven states have amended their eminent domain laws.[95] There are many commonalities between these changes, but the most relevant for the purposes of this Comment are the narrowing of the public use definition and the increasing compensation for landowners in eminent domain cases.[96] Kansas's eminent domain statute provides an apt example of such a restriction, because it prohibits the government from transferring land to a private party except in certain enumerated circumstances.[97] The statute allows eminent domain for economic development purposes, but caveats this broad exception with the following statement: "If the legislature authorizes eminent domain for private economic development purposes, the legislature shall consider requiring compensation of at least 200% of fair market value to property owners."[98] At the federal level,

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91. *Id.* at 483. The Court applied the local legislature deference principle to the case at hand by stating, "[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." *Id.*

92. *Id.* at 485.

93. *Id.* at 489.

94. 1 MICHAEL ALLEN WOLF, NICHOLS ON EMINENT DOMAIN SPECIAL ALERT § SA.01 (2019); 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN SPECIAL ALERT, § SA.02 (2020).

95. WOLF, *supra* note 94; Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J.F. 82, 86–88 (2015).

96. SACHMAN, *supra* note 94.

97. KAN. STAT. ANN. § 26-501b (2006).

98. § 26-501b(f). Other states have similar provisions providing for additional compensation above fair market value. For example, a homestead taking in Missouri is compensated for 125% of the fair market value. MO. ANN. STAT. § 523.039(2) (West 2006). Similarly, in Indiana, the taking of agricultural land entitles the owner to either 125% of the fair market value of the land or an ownership interest in other "agricultural land that is equal in acreage to the parcel" lost through eminent domain. IND. CODE ANN. § 32-24-4.5-8(a)(1)(A) (West 2019). In Michigan, the taking of a principal residence must be given 125% of the fair market value of the property. MICH. COMP. LAWS ANN. § 213.23(5) (West 2007).

Congress attempted to create similar laws with broad prohibitions against takings for non-public uses, and allocated funding to revitalize areas with vacant, run-down, or foreclosed on buildings.[99]

Even in the fifteen years since *Kelo*, little is known of whether eminent domain actions have increased or decreased due to the decision.[100] In a report to Congress in 2006, the Government Accountability Office indicated that it had limited data on the impact of eminent domain due to its use by different state agencies and the fact that "it is difficult to establish measures to quantify the wide range of costs and benefits to individual communities of projects involving eminent domain."[101] One of the landowners' attorneys in *Kelo*, Dana Berliner, wrote an article, *Looking Back Ten Years After Kelo*, where she analyzed *Kelo*'s effect had and state responses on eminent domain actions.[102] She focused on New York, one of the three states that has not enacted significant restrictions on eminent domain, and noted that courts there have allowed eminent domain to be used for "private development around a sports stadium, the expansion of Columbia University, the replacement of a CVS with a Walgreens, and the enhancement of a golf course."[103] She also pointed out the inconsistency in state eminent domain laws since the *Kelo* decision.[104]

State definitions of "blight" (endorsed by the Supreme Court in *Berman v. Parker*[105]) can be expansive, allowing eminent domain in areas considered "blighted" or in need of revitalization.[106] Eminent domain cases based on blight are those "involv[ing] condemnation of land where the articulated public use is the removal of undesirable or unhealthy living conditions."[107] While legal challenges to blight takings have seen recent success due to courts that are more

99. WOLF, *supra* note 94.

100. Meron Werkneh, *Retaking Mecca: Healing Harlem Through Restorative Just Compensation*, 51 COLUM. J.L. & SOC. PROBS. 225, 233 (2017).

101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 3, 5 (2006), https://www.gao.gov/new.items/d0728.pdf. Congress mandated this study. *Id.* at 2. As of the date of this article, no follow-up report has been issued by this office to determine if there is more information in the years since the *Kelo* decision. *See* https://www.gao.gov/index.html (search "eminent domain" and date restrict to 12/1/2006 through 09/07/2020).

102. Berliner, *supra* note 95, at 84.

103. *Id.* at 89. Arkansas and Massachusetts are the other two states which have not changed their eminent domain laws. *Id.*

104. *Id.* at 90.

105. Kelo v. City of New London, 545 U.S. 469, 484 n.13 (2005) (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

106. *See* Werkneh, *supra* note 100, at 238, 241–42; Patricia Hureston Lee, *Shattering "Blight" and the Hidden Narratives that Condemn*, 42 SETON HALL LEGIS. J. 29, 51–52 (2017); Leeds, *supra* note 39, at 55; Kaur v. N.Y. State Urb. Dev. Corp., 933 N.E.2d 721, 733–34 (N.Y. 2010) (finding that development of Columbia University's campus in a blighted area was a public use).

107. Leeds, *supra* note 39, at 55.

critical of broad blight standards,[108] litigation in these cases is often too expensive for those affected to dispute and challenges may be limited by states.[109] Additionally, people of color and people in disadvantaged classes often have a greater likelihood of being impacted by a state's definition of blight.[110]

Wesley W. Horton, an attorney for the city in *Kelo*, also wrote a response to the decision entitled Kelo *is Not* Dred Scott.[111] He cited Supreme Court precedent, arguing that economic development as public use was not a new development in eminent domain jurisprudence.[112] He also pointed out that the courts are still available to landowners as a remedy if the government uses eminent domain improperly.[113] J. Peter Byrne, a Professor at Georgetown University Law Center, argues that bias against minorities in economic development projects was prevalent in the 1950s and 1960s but is no longer as significant of a problem, due to local control over such projects and growth in minority political power.[114]

Immediately post-*Kelo*, alternative solutions to economic development as a public use became a popular topic for scholars, mostly focused on compensation for personal value. John Fee suggested valuing homes based on their "intrinsic value" rather than simply market value.[115] He argued that this position is consistent with the remedies available in tort law, such as emotional harm in wrongful death actions and sentimental damages for loss of personal property.[116] He recommended a graduated, statutory adjustment for "personal detachment" from the home based on length of time in the home.[117]

Other alternatives include Kelianne Chamberlain's suggestion to create a system where landowners impacted by eminent domain would receive a share of the revenue from the project their land was taken for, implemented either

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108. Dana Berliner et al., *Challenging the Right-to-Take: A Whirlwind Tour of Cases and Issues*, *in* ALI CLE COURSE MATERIALS (2015).

109. Lee, *supra* note 106, at 49; Berliner, *supra* note 108. Berliner stated, "The past 10 years of redevelopment litigation indicates that courts now examine [blight definitions] much more carefully and with less deference then [sic] they once did." Berliner, *supra* note 108.

110. Leeds, *supra* note 39, at 56.

111. *See generally* Wesley W. Horton & Brendon P. Levesque, Kelo *is Not* Dred Scott, 48 CONN. L. REV. 1405 (2016).

112. *Id.* at 1414–15.

113. *Id.* at 1425. The authors go on to suggest a more developed version of Justice Kennedy's test, looking more carefully at what constitutes a "public use." *Id.* at 1426–27.

114. J. Peter Byrne, *Eminent Domain and Racial Discrimination: A Bogus Equation*, *in* THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE 51, 51 (2014), https://www.usccr.gov/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf.

115. John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 804 (2006).

116. *Id.* at 805.

117. *Id.* at 818.

through statutes or judicial decisions.[118] Similarly, Dale Orthner argued for a system based on the same premise with a "compensation premium" of fifty percent above market price, justified by the idea that landowners reap some of the rewards that the economic development plan would bring to the community.[119] Professor Alberto Lopez suggested including a subjective harm calculation in the valuation of property under eminent domain.[120] He argued that "the principle that just compensation is limited to the value of the soil lost by an owner ignores the human element inherent in the [eminent domain] clause and overlooks the historical foundations of eminent domain."[121] Under his theory, a subjective standard would allow for more just compensation for landowners affected by eminent domain.[122]

IV. ECONOMIC DEVELOPMENT VERSUS INDIVIDUAL PROPERTY RIGHTS

In tracing the origins of economic development and individual property rights, it is important to begin with historical perspectives on these concepts. Locke, Blackstone, Smith, and Madison all touched on the conflict between these ideas in their own unique ways. They either pointed to the importance of individual property ownership or to the importance of government and society to manage these rights.[123] Locke discussed the increased value of privately owned property, as opposed to that left in common, due to a person's labor on the property.[124] He went on to say that people enter into society, and the sovereign regulates their private property.[125] Connecting these concepts, he argued, "[t]he great and *chief end* therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property*."[126]

Blackstone had a greater focus on the way that the creation of society impacted property ownership. Blackstone stated that "the *right* of possession

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118. Kelianne Chamberlain, Comment, *Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings*, 14 WYO. L. REV. 77, 96, 101–02 (2014).

119. Dale Orthner, *Perspective on* Kelo v. City of New London*: Toward a More "Just" Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 429, 457–58 (2007). Another compensation definition would give five adjustments over fair market value, depending on specific circumstances of the land. Shaun Hoting, *The* Kelo *Revolution*, 86 U. DET. MERCY L. REV. 65, 122 (2009).

120. Lopez, *supra* note 25, at 299.

121. *Id.* at 294.

122. *Id.* at 292–93.

123. *See supra* Section I.

124. LOCKE, *supra* note 9, at 24. "For the provisions serving to the support of human life, produced by one acre of enclosed and cultivated land, are (to speak much within compass) ten times more, than those which are yielded by an acre of land, of an equal richness, lying waste in common." *Id.*

125. *Id.* at 31. Locke stated, "[f]or in governments the laws regulate the right of property, and the possession of land is determined by positive constitutions." *Id.*

126. *Id.* at 75.

continued for the same time only that the *act* of possession lasted."[127] The combination of this insecure private property and limited land and resources created the need for society to protect private property.[128] Society both provided a way to protect the property and to produce an economic order, which allowed people to use their property and the talents of their labor most productively.[129] Blackstone also believed in the ability of the state to take private property on the payment of a reasonable price.[130]

Adam Smith theorized that people gain a greater sense of property as society passes through stages of development.[131] Smith noted that occupation in these stages creates property, in that a person who spends time and energy acquiring something (in his example, an apple) enjoys title to that thing.[132] While Smith approached property ownership from the perspective of the occupation society was in, as opposed to pure labor and need based acquisition, the similarities between his philosophy and that of Locke and Blackstone are abundantly clear.[133]

In his essay on property, Madison stated that the government's purpose is to secure property, regardless of whether it is a tangible thing or an intangible right.[134] Madison believed that, even while property is at risk in the political process, the government that the Founders created had the instruments to protect it.[135] Madison also argued that a government does not live up to its purpose

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127. BLACKSTONE, *supra* note 12, at 3.

128. *Id.* at 7–8. Blackstone also criticized the acquisition of property of other countries, stating:

> But how far the seizing on countries already peopled, and driving out and massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

Id. at 7.

129. *Id.* at 8, 15.

130. *Eminent Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019) (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 424–25 (4th ed. 1991)).

131. Smith, *supra* note 14, at 126. *See supra* Section I.

132. Smith, *supra* note 14, at 122–23.

133. *See supra* Section I. In her article tracing Smith's influence through the United States judicial system, Robin Paul Malloy commented on the significant increase in judicial citations to Smith's works since the 1970s. Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 LOY. L. REV. 33, 61, 64 (2010). She pointed out that Smith's work was omitted from citations in many contemporary and controversial cases regarding private property rights, including Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), Dolan v. City of Tigard, 512 U.S. 374 (1994), Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), and Kelo v. City of New London, 545 U.S. 469 (2005). Id. at 59–60 n.105–08. She explains this in the context of the fear of reviving Lochner-era minimal regulations on private property. *Id.* at 60. She argued that "avoiding overt references to Smith may have been strategically prudent for those lawyers and jurists hoping to deregulate land use while seeking to promote the idea that self-interested property owners can best coordinate land controls through the convergence of private and public interest in the free marketplace." *Id.*

134. Madison, *supra* note 16, at 186.

135. Treanor, *supra* note 6, at 843.

when it neglects to protect an individual's enjoyment of property or free choice in occupations, the latter of which is both property and the means to acquire property.[136]

Economic productivity has been in competition with individual property rights throughout American history. In comparing historical Native American land takings to contemporary post-*Kelo* land takings, Stacy Leeds pointed out that "[e]minent domain, and similar theories of land allocation, are rarely discussed when land resources are abundant. But when competing interests eye a particular tract of land, a hierarchy of preferred land uses emerges."[137] While both goals are important, they are not always in harmony.

In Native American land cases and laws, the conflict between individual rights and economic productivity of the land is evident, especially in Chief Justice Marshall's opinions.[138] Marshall justified his theory of discovery by stating, in regard to Native Americans, that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness[.]"[139] In his opinion, Marshall did not embrace the ideas of Locke and Smith overtly, since he did not agree that the Native Americans mixing their labor with their land gave them fee simple title to their lands, or that the occupation of hunting creates property rights.[140] However, Marshall also did not explicitly deny Native American's impact on title acquisition; rather than stripping them of all title, he gave a title of occupancy in their lands.[141] He wanted to both respect the property rights of the Native

136. Madison, *supra* note 16, at 186.

137. Leeds, *supra* note 39, at 77.

138. *See supra* Section II.A.

139. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823); *see also* Leeds, *supra* note 39, at 61 ("The Court's action, though not an exercise of eminent domain, nonetheless constitutes a taking of a property interest. By judicial action, the federal government took a property interest away from the original owner by simply declaring that the original owner never held absolute title in the first place.").

140. *Johnson*, 21 U.S. at 592; *see also supra* Section I.

141. *Johnson*, 21 U.S. at 591. Some courts have seen Marshall's discussion of aboriginal title as a complete rejection of the idea that Native American lands were empty and available for European discovery and commercial use. Pueblo of Jemez v. United States, 350 F. Supp. 3d 1052, 1097 (D.N.M. 2018). But some scholars see Marshall's argument as an attempt to reconcile the imperialist structure of America with the contemporary distain for it in politics. PURDY, *supra* note 27, at 71. Purdy stated:

> If today's scholars, lawyers, and legislators did not believe that property regimes should be judged by how well they promote economic efficiency and secure ordered political liberty, we would be at a loss to talk about them at all. Marshall's opinion rests substantially on values we still embrace, albeit in different programmatic versions, and to which we lack compelling alternatives.

Id. at 86.

Americans,[142] who occupied the land first, and justify the actions of the settlers, in part because they used the land in way that Americans viewed as more economically productive.[143]

The way the Court discusses the discovery doctrine in relation to other Native American land cases is of great interest to this Comment. In *Cherokee Nation v. Georgia*, Marshall justified the reason why Native Americans tribes did not constitute foreign states by saying,

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[144]

In this opinion, the interaction of the discovery theory from *Johnson* came into stark contrast with Locke, Smith, and Blackstone's interpretations of property ownership.[145] Marshall's opinion in *Worcester v. Georgia* emphasized the independence of the Native American tribes and the enforceability of the discovery doctrine only against other Europeans.[146] Marshall said,

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.[147]

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142. The manner in which Marshall discusses Native American property rights seems to hold more reverence for making the philosophical understanding of property ownership conform to the competing claims of title in this case than for the rights of Native American people themselves. *See supra* Sections I, II.A. The legal arguments he made were reflective of a desire to avoid losing American settlor's use of land and their individual right to own property. *See Johnson*, 21 U.S. at 592.

143. *See supra* Section II.

144. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Justice Johnson, in his dissent, discussed the limitations of the treaties that the Cherokees entered into with the United States, saying,

> It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the states, or United States, over the territory within their limits.

Id. at 23 (Johnson, J., dissenting).

145. *See supra* Section I.

146. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 545 (1832).

147. *Id.* at 559.

Here, Marshall had to align the natural rights theory of property ownership with the discovery justification for the actions of European settlers.[148]

In *Cherokee Nation v. Southern Kansas Railway Co.*, a case involving both Native American land and eminent domain, Justice Harlan addressed the assertion that the congressional act which gave authority to take Cherokee land to build a railroad might not be a legitimate exercise of eminent domain.[149] Harlan quickly dismissed this objection by pointing to the Commerce Clause and arguing that the United States has the power to regulate commerce among foreign nations, states, and Native American tribes.[150] This is an important constitutional hook for Harlan's argument, since the authorization of eminent domain to the federal government does not discuss relations with Native American tribes.[151] By connecting the Takings Clause with the Commerce Clause, Harlan not only legitimizes land takings from Native Americans through eminent domain, but also creates a connection between an eminent domain taking and federal interest in commerce with Native American tribes.[152] The arguments in this section of his opinion are very similar to contemporary arguments for a broad understanding of public use, contending that, even if the act of eminent domain gives a private benefit, it can be justified by the public benefit.[153] Here, the public and commercial value of a railroad was prioritized over the private ownership of Native American lands, even though the railroad was a private corporation.[154] While there was a public purpose to the use of the

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148. Marshall clearly struggles with this dichotomy in the text of this opinion. At one point, he said,

> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

Id. at 543. A straightforward reading of the discovery theory would align with the former and a decision principled on Locke, Smith, and Blackstone would align with the latter. However, Marshall refused to commit entirely to either principle.

149. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 657 (1890).

150. *Id.*

151. *Compare* U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation."), *with* U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").

152. *Southern Kan. Ry.*, 135 U.S. at 657.

153. *Id.* at 657–58. *See generally* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (using the Commerce Clause of the Constitution to justify eminent domain held both by the United States and in fee simple by the tribe).

154. *Southern Kan. Ry.*, 135 U.S. at 657. Justice Harlan contended that, while "[i]t is true, that the company authorized to construct and maintain [the railroad] is a corporation created by the laws of a State . . . it is none the less a fit instrumentality to accomplish the public objects contemplated by the act of 1884." *Id.*

railroad, the Court ultimately had to make a decision between private ownership and economic development in the context of eminent domain.

Congressional actions during the push for Native American removal and allocation also reflected a desire to encourage Native Americans to use their land in an economically productive way or to allow white settlers to acquire more Native American land.[155] And, when Congress eventually took action to rectify the hardship its policies imposed on Native Americans, one of the justifications was reinvigorating the economies of the Native American tribes to promote their own self-governance.[156]

In valuing land for eminent domain through judicial history and traditional appraisal practices, the economic potential of land is often prioritized.[157] Through fair market value and the highest and best use standard, we use indicators reflecting the current and future economic value of the land.[158] Often citing back to *Olson v. United States*, courts sometimes refer to highest and best use as "the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value."[159] Indeed, many factors are considered in this valuation, such as "market demand, economic development in the area, specific plans of businesses and individuals (including action already taken to develop the property for that purpose), and the use to which the property is devoted at the time of the taking."[160]

In Supreme Court cases, most notably in the *Kelo* decision, economic development as a public purpose has been accepted.[161] Justices O'Connor and Thomas wrote impassioned dissents to *Kelo*.[162] O'Connor argued that leaving the decision of what constitutes public use to state legislatures minimizes the

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155. *See supra* Section II.B. Arguably, Native Americans at this time already used their land in what those in power would have considered an economically productive manner. While the federal government argued that the Native Americans were unproductive because they did not acknowledge individual land property rights, many tribes did in fact have recognition of these rights—either in personal property or in land—mostly for agricultural tribes. Bobroff, *supra* note 50, at 1572–73. This has been referred to as "allotment's myth of common ownership." Leeds, *supra* note 39, at 64, 77.

156. *See supra* Section II.B.

157. *See supra* Section III.B.

158. *See supra* Section III.B.

159. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111, 1118 (Fed. Cir. 2015) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

160. 4 NICHOLS, *supra* note 63, § 13.01(8)(b).

161. *See supra* Section III.C.

162. *See generally* Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting). Of relevant note, Justice O'Connor concluded her dissent with a quote from James Madison's essay on property, regarding the need for the government to secure individual property. *Id.* at 505 (O'Connor, J., dissenting). Justice Thomas similarly began his dissent with a quote from William Blackstone, concerning the preeminence of private property rights over public need. *Id.* (Thomas, J., dissenting).

importance of the constitutional provision for eminent domain.[163] She advocated for a "judicial check on how the public use requirement is interpreted[.]"[164] Moreover, she distinguished the *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* decisions, on which the majority rested much of its argument for economic development as a public use, because those decisions eliminated a harmful use and conferred a public benefit.[165] According to O'Connor, since the landowners' properties were not "the source of any social harm[,]" there was no harmful use for the city to eliminate.[166]

Thomas agreed with O'Connor that a public purpose determination by legislatures minimizes the impact of the Constitution's public use clause, and then went on to argue that the majority's public purpose theory is inconsistent with the text of the Constitution.[167] He then pointed to the impact the case could have on economically strained communities.[168] While acknowledging that compensation is paid to land owners, he contended that "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes."[169] He also highlighted the ease of pushing this burden onto poor communities: "Those communities are not only systemically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[170] In these two short quotes, Thomas pointed to the problem of qualifying economic development as a public purpose, and the inherent inequities in creating a system which predominantly values land based on economic productivity.[171]

Many states and Congress, seeing the potential to use this power unjustly, enacted restrictions to limit this power and increase compensation to land owners.[172] While this response provides some restitution for the people affected by eminent domain, the inconsistency in state policies and problems with "blight" designations for eminent domain threaten individual land ownership in

163. *Id.* at 497 (O'Connor, J., dissenting).

164. *Id.*

165. *Id.* at 480–83 (majority opinion), 500–01 (O'Connor, J., dissenting); *see* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (finding that the use of eminent domain for a private party to private party transfer did not confer a benefit on a private party, rather, it eliminated "evils of concentrated property ownership in Hawaii" which was deemed a public purpose); Berman v. Parker, 348 U.S. 26, 28, 32–34 (1954) (upholding a law allowing D.C. to take land considered "slums" through eminent domain for redevelopment, which could include selling or leasing the land to private parties, because the legislature has broad authority to determine its the public purpose).

166. *Kelo*, 545 U.S. at 500–01 (O'Connor, J., dissenting).

167. *See id.* at 506–511 (Thomas, J., dissenting).

168. *Id.* at 521.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See supra* Sections III.C, III.D.

favor of furthering economic development.[173] In Dana Berliner's article, she stated that uneven regulations of constitutional rights do not adequately protect those rights.[174] Some scholars posed alternative solutions to make just compensation more equitable for land owners.[175] Those theories focused on the landowner's enjoyment of development project profits, compensation based on length of home ownership, or a subjective standard for landowners.[176]

V. A BETTER DEFINITION OF HIGHEST AND BEST USE

Suggestions to change just compensation standards are hardly a new concept. Immediately after the *Kelo* decision, many scholars gave recommendations to create new standards for either the public use or just compensation requirements of eminent domain.[177] However, these suggestions often resulted in solutions that were inconsistent, highly standardized, or highly individualized to the point of being broad and nebulous.[178] This Comment suggests a correction to just compensative valuation that is a more middle-of-the-road approach. It is one that incorporates factors specific to landowners, while remaining broad enough to be adopted by both the states and the federal government.

The highest and best use standard needs to be broadened to include factors that consider not only the highest and best economic use of the property, but the highest and best use that is personal to the individual.[179] This specified assessment does not have to be as broad as Professor Lopez suggested in his article.[180] Courts and legislatures often shy away from enacting standards of individual harm to compensation calculations, because it is harder to quantify, and they tend to favor uniform standards which give a percentage increase in compensation to homeowners or farmers.[181] In his treatise on property value, James C. Bonbright acknowledges courts' dislike of using sentimental value to the property owner in valuation, but contrasts this by pointing to courts that have offered owners compensation for destroyed property based on its "intrinsic value"—a value that seems to approximate the cost of recreating the property.[182]

Some may argue that the specific economic conditions of a property are more easily quantifiable than the personal harm caused by the loss of the property; however, state and federal precedent show that expenses—such as moving expenses and interest on the land—can be incorporated into a compensation

173. *See supra* Section III.D.
174. Berliner, *supra* note 95, at 90.
175. *See supra* Section III.D.
176. *See supra* Section III.D.
177. *See supra* Sections III.C, III.D.
178. *See supra* Sections III.C, III.D, IV.
179. *See supra* Sections III.B, III.D for a discussion of the highest and best use definition.
180. *See* Lopez, *supra* note 25, at 299.
181. *See supra* Section III.D; IV.
182. 1 BONBRIGHT, *supra* note 71, at 90–91.

calculation.[183] These examples show the inclusion of more than fair market value or highest and best use calculations in valuation. Additionally, land appraisers consider the individual economic circumstances of the land to value the property.[184] They look at "market demand, economic development in the area, specific plans of businesses and individuals (including action already taken to develop the property for that purpose), and the use to which the property is devoted at the time of the taking[,]" to consider what the economic value of the property is.[185] Indeed, Michael Rikon, in his essay *The Highest and Best Use Concept in Condemnation*, contended that "[h]ighest and best use is not a static concept, but one that fluctuates pursuant to changes in market value, land use regulations and available engineering techniques."[186]

The highest and best use definition can be re-written as a two-part definition: (1) "The reasonably probable use of property that results in the highest economic value[,]" and (2) the personal value to the property owner.[187] In the same way that the economic standard of highest and best use has additional factors to consider in valuation of property,[188] courts can incorporate similar factors to the personal value standard. These could include: (1) length of time at the property, (2) non-economic relocation costs (such as distance from friends and relatives), (3) significant life events which occurred on the property, and (4) unique or irreplaceable modifications to the property (such as a family member who built a deck for the family to use on the property). Length of time at the property can be valued similarly to the way the Uniform Probate Code (UPC) determines the marital property of the decedent's estate for the spouse's elective share—the amount a spouse can take from the estate in lieu of their share from the will—which is a graduated percentage of the estate.[189] It could be a percentage of the property value, a fixed amount for each additional year at the property, or a combination of both. Further, life events and modifications to the property could be valued based on their likelihood of recreation (e.g., a wedding or a porch created by a deceased relative cannot be recreated) and the cumulative effect of regular events at a specific location. Each of these events can be assigned a specific monetary value, which would be added to the final value. These standards could form a basis for the unique conditions of the property to be valued against, since they are unlikely to be a one-to-one match with the property in question. In addition to the economic standards, these standards could help form a more complete definition of highest and best use.

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183. *See supra* Section III.B.

184. 4 NICHOLS, *supra* note 63, § 13.01(8)(b); *see supra* Section III.B.

185. 4 NICHOLS, *supra* note 63, § 13.01(8)(b); *see supra* Section III.B.

186. Rikon, *supra* note 79, at 47.

187. Savin, *supra* note 77; *see also* 4 NICHOLS, *supra* note 63, § 13.01(8)(b).

188. Masterman, *supra* note 75, at 91 (listing the criteria of "(1) legal permissibility, (2) physical possibility, [and] (3) financial feasibility").

189. SUSAN N. GARY ET AL., CONTEMPORARY TRUSTS AND ESTATES 624 (3d ed. 2017).

In order to prove the value to the property owner, a landowner impact statement should be used in the analysis of the highest and best use. This statement could be modeled after a combination of victim impact statements (VIS) and environmental impact statements (EIS). In criminal cases, VIS can be used to give the sentencing judge or jury context of the harm the victim suffered as a result of the defendant's action.[190] In the context of a capital offense case, the Supreme Court commented on the use of victim impact statements by saying, "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[191] Just as both the defendant and the victim should be considered in sentencing for criminal cases, so too should both the economic and personal value of land be considered in making a highest and best use determination. An impact statement gives landowners a way to express the personal value of their land, which can be considered alongside the economic analysis. However, there is a threat that the landowner will exaggerate the personal value of their property to unfairly make additional money from the government's just compensation payment. To counteract this, the EIS model should also be used.

Under 42 U.S.C. § 4332(2)(c), a government agency must create an EIS when their action "significantly affect[s] the quality of the human environment[.]"[192] While there are many purposes of an EIS, the Congressional goal is for the agency to consider the environmental ramifications of their actions—or a private party's—while the proposal is still being formulated.[193] Federal court standards for evaluating the adequacy of an EIS differ, but most look for whether it is sufficiently detailed and researched, proposes alternatives, and gives the public

190. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

191. *Payne*, 501 U.S. at 825 (quoting Booth v. Maryland, 482 U.S. 469, 517 (1991) (White, J., dissenting) *overruled by Payne*, 501 U.S. at 830). Mitchell Frank criticized victim impact evidence, such as photographs or edited movies showing the victim's life, and the Supreme Court's lack of boundaries on it because it has a prejudicial effect on juries. Mitchell J. Frank, *From Simple Statements to Heartbreaking Photographs and Videos: An Interdisciplinary Examination of Victim Impact Evidence in Criminal Cases*, 45 STETSON L. REV. 203, 206, 239–40, 252–53 (2016). Similarly, Amy Phillips points to the jury's likelihood of taking the "worth" of the victim into account in sentencing in capital cases. Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105–06 (1997).

192. National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(c) (2012).

193. Kleppe v. Sierra Club, 427 U.S. 390, 409–10 (1976). Scholars have pointed out the lack of power the National Environmental Policy Act (NEPA) has in reversing decisions that harm the environment, and have identified the threat of agencies not considering the full range of alternatives to the project. James Allen, Note, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RES. & ENV'T. L. 287, 315–16 (2005); Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA in the Ninth Circuit*, 2 WASH. J. ENV'T. L. & POL'Y 193, 195 (2012).

information about the environmental impact of the project.[194] Within the context of the highest and best use standard, the governmental body that proposes the condemnation could work with the landowner to create the landowner impact statement. This creates a distilled explanation of the landowner's personal value.

The landowner impact statement should have elements that are similar to both a VIS and an EIS. It should contain a description of the personal value of the land to the landowner, provided by that person, and the information should be verified by the landowner with documents on relatives in the description, birth and death certificates, building permits, and other pieces of evidence which corroborate their story. While proof of an exact story might not be obtainable, people and their locations or events can be identified to substantiate the personal value description. The governmental body will have the ability to review the description and evidence, as well as the ability to only include in the final landowner impact statement the parts of the description that can be substantiated. In implementing landowner impact statements, the legal profession will need to rely on appraisal associations for guidance as to the kind of evidence that could help substantiate a landowner's personal value claim.

As "highest and best use" is a term of art used by courts and appraisers, both would need to adopt the modified definition. A lack of simultaneous agreement from both groups could create problems and lead to compensation appraisals and court rulings that are not in line with the new definition. For this reason, even though highest and best use is not defined in statutes relating to condemnation, Congress should enact a statute modifying the definition. This will allow courts and appraisers to change their standards as a response to Congress. Further, it will follow many of the similar changes states have made to their condemnation laws, could encourage the holdout states to modify their eminent domain laws, and could even become a standard for states to look to when revisiting changes to their eminent domain laws.

Implementing this standard will have significant impact on the practice of appraisers. Congress will need to work with appraisal associations to ensure this new standard will be uniform and avoid complicated transaction costs. Congress should inquire into the time added to appraisals and cases, costs of procuring documentation, and education for lawyers and appraisers on the new standard. This standard is balanced in that it compensates landowners for personal loss, while requiring them to prove that the loss; however, it will still require large changes in the existing system which necessitates cooperation and insight from all involved.

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194. *See* Mississippi River Basin All. v. Westphal, 230 F.3d 170, 174 (5th Cir. 2000) (listing ESI criteria within the Fifth Circuit); Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 922 (D. Or. 1977) ("An EIS is adequate only if it serves substantially the two basic purposes for which it was designated."); Brooks v. Volpe, 350 F. Supp. 269, 279–80 (W.D. Wash. 1972) (detailing ESI requirements).

VI. CONCLUSION

The revised definition of highest and best allows for the competing values of economic potential and individual rights to the property to be analyzed together without placing one superior to the other. Superiority of economic use was one driving motivation behind taking Native American land and allowing economic development to become a public use under eminent domain. With the new definition of highest and best use, we can allow economic development to be a factor in eminent domain valuation without allowing it to be the only factor. When highest and best use provides a concrete and accurate representation of both conflicting interests, we remain true to founding philosophies of property rights, and allow the valuation system to consider both of these goals more comprehensively.