THE GOVERNMENT'S RIGHT TO DESTROY

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I. INTRODUCTION

"Every building begins as a dream. Destroying a building, on the other hand, is a matter for realists rather than dreamers."[1]

Every year, in cities and towns across the country, tens of thousands of property owners attempt to destroy their homes, offices, or other buildings that they own.[2] Whether to clear space for new construction or to rid themselves of unwanted maintenance and expense, property owners often seek to take the proverbial wrecking ball to their property.[3] Yet despite Blackstone's exhortation that a property owner has "sole and despotic

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1. David Samuels, *Bringing Down the House*, HARPER'S MAG., July 1997, 295, no. 1766, at 37.

2. There appear to be no nationwide figures for number of demolition permits issued annually. However, looking at figures for the number of permits issued by various individual cities each year (typically in the thousands), one can make the admittedly unscientific extrapolation that there are many times that issued on a nationwide basis annually. *See, e.g.*, Roxana Baiecanu, *NYC Demolition Permits Slowly Rising, while New Building Permits' Decline May Be Leveling Out*, PROPERTYSHARK.COM (Feb. 26, 2013), http://www.propertyshark.com/Real-Estate-Reports/2013/02/26/nyc-demolition-permits-slowly-rising-new-building-permits-level/ (indicating that there were 1,174 demolition permits issued in New York City in 2012, down from a high of over 2,000 which were issued in 2008); *Daily Demolition Report*, SWAMPLOT, http://swamplot.com/tag/topic-daily-demolition-report/ (last visited Jan. 19, 2015) (reporting the number of daily demolition permits issued in Houston, Texas; the average appears to range from five to ten per weekday); Christopher Reynolds, *Out with the Old: In L.A., There's More 'Erase-atecture' than Preservation*, L.A. TIMES (Dec. 29, 2002), *available at* http://articles.latimes.com/2002/dec/29/entertainment/ca-reynolds29 (citing a study by the L.A. Times finding that 1,211 demolition permits were issued by the city in 2001).

3. Although the songs of Miley Cyrus might lead one to believe otherwise (*see* MILEY CYRUS, *Wrecking Ball*, *on* BANGERZ (RCA Records 2013)), use of the wrecking ball for destruction of property is no longer common; hydraulic excavators and other advanced machinery has largely replaced it. *See* JEFF BYLES, RUBBLE: UNEARTHING THE HISTORY OF DEMOLITION 186 (2005) ("[S]ophisticated machinery has largely consigned the wrecking ball itself to the dustbin, even though crusty contractor types still call the 'skull cracker' the most efficient and profitable way to wreck.").

dominion . . . over the external things of the world,"[4] an owner seeking to demolish a building will face numerous legal obstacles.

A wide range of common law and statutory rules—ranging from arson laws and the doctrine of waste, to historic preservation regulations and zoning ordinances, to private contractual agreements such as deed restrictions—operate to limit an owner's right to destroy her property.[5] These limitations reflect both an assumption that owners will rarely want to destroy something they own, since it presumably has value, as well as a utilitarian judgment that owners should not waste resources valuable to society.[6] The right to destroy is thus a disfavored right compared to the others accorded to owners, such as the rights to use, exclude, transfer, and dispose.[7] As noted by Professor Strahilevitz, Black's Law Dictionary has even dropped the reference to the right to destroy from its definition of "owner."[8]

However, the right to destroy remains largely unconstrained for one particular type of property owner: the government. In cities across the country, governments are exercising their right to destroy as a property

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4. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766).

5. The term "destroy" can be defined in a variety of ways, some of them very broad. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 792 (2005) ("On the broadest reading of a right to destroy, an owner destroys property every time she eats a piece of cake."). For purposes of this article, "destroy" is used in a more narrow sense to refer to the physical destruction of improvements on real property (i.e., buildings and other structures).

6. *See* Edward J. McCaffery, *Must We Have the Right to Waste*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, 76, 79–80 (Stephen R. Munzer ed., 2001) (citing Honoré and other historical legal scholars' dismissal of the significance of the right to destroy for these reasons). As noted in note 5, *supra*, the focus of this article is on the right to destroy as it applies to physical improvements on real property. For a thorough analysis of the right to destroy as it applies to other types of property, see JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT (4th prtg. 2002) (chattels); Strahilevitz, *supra* note 5, at 783 (chattels, land, improvements).

7. The "bundle of rights" theory of property was developed by early twentith century legal realists such as Wesley Hohfeld and Roscoe Pound. *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied*, *in* JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter W. Cook ed., 1923); Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) (discussing the rights to possess, exclude, dispose of, use, enjoy the fruits and profits, and destroy or injure). While the bundle of rights theory has it critics, see, e.g., Tony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002) (arguing that the bundle of rights theory is theory is "inconsistent with the fundamental tenets of an environmental ethic, which emphasize both context-specific interconnectedness and the value of the object itself" and should be replaced by a "web of interests" understanding of property law), it remains prevalent in both property casebooks and as one of the primary theoretical frameworks used by courts analyzing property law issues. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 83 (7th ed. 2010) ("[Property] consists of a number of disparate rights, a 'bundle' of them").

8. Strahilevitz, *supra* note 5, at 783.

owner[9] on a massive scale: 2,500 buildings destroyed in Cleveland; 3,000 in Buffalo; and a goal of over 10,000 demolitions in Detroit.[10] Headlines such as "*Detroit Survival Depends on Speed of Destruction*"[11] and "*Blighted Cities Prefer Razing to Rebuilding*"[12] proclaim the strategy being pursued by governments across the country as the path to economic growth, reduction in crime and blight, and greater sustainability.[13] Through the use of eminent domain, tax lien foreclosure, and land acquisition mechanisms such as land banks and redevelopment agencies, the government in these cities and others is able to destroy property that it owns, with few constraints on its ability to do so once the property has been acquired.

In highlighting the divergence between a private owner's narrow right to destroy physical improvements on real property and the government owner's broad right to do so, this Article has two major goals. First, it delves into the assumption that the right to destroy is universally and equally disfavored for all owners, and demonstrates that for one particular type of owner—the government—the right to destroy remains relatively unconstrained. This recognition is important not only because the government—federal, state, and

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9. In addition to exercising the right to destroy as a property owner, the government can also exercise the power to destroy pursuant to the police power and under the doctrine of necessity. *See* Bowditch v. Boston, 101 U.S. 16, 18 (1879) ("At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner."); Shaffer v. City of Winston, 576 P.2d 823, 825 (Or. Ct. App. 1978) ("The general rule is that a municipality in the exercise of its police power may, without compensating the owner, destroy a building that threatens the public safety where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition."). While important questions are raised by the government's power to destroy in these capacities, the focus of this article is on the government's right to destroy as a property owner in order to fully explore the differences in the scope of that right as between private and government property owners.

10. *See* Adam Allington, *Cities Demolish Homes, but Problems Linger*, MARKETPLACE (July 16, 2012), http://www.marketplace.org/topics/economy/cities-demolish-homes-problems-linger (Detroit); Ken Belson, *Vacant Properties, Scourge of a Beaten-down Buffalo*, N.Y. TIMES (Sept. 13, 2007), http://www.nytimes.com/2007/09/13/nyregion/13vacant.html?pagewanted=all (Buffalo); *Demolition Grant Program Update Shows 6,000 Abandoned Properties Demolished*, OHIO ATT'Y GEN. (Oct. 22, 2013), http://www.ohioattorneygeneral.gov/Media/News-Releases/October-2013/Demolition-Grant-Program-Update-Shows-6-000-Abando.

11. Jeff Green & Prasant Gopal, *Detroit Survival Depends on Speed of Destruction*, BLOOMBERG (May 30, 2013), http://www.bloomberg.com/news/2013-05-30/detroit-survival-depends-on-speed-of-destruction.html.

12. Timothy Williams, *Blighted Cities Prefer Razing to Rebuilding*, N.Y. TIMES (Nov. 12, 2013), http://www.nytimes.com/2013/11/12/us/blighted-cities-prefer-razing-to-rebuilding.html?pagewanted=1.

13. The names of government-sponsored demolition programs also reflect this hope. *See, e.g.*, OHIO ATTORNEY GEN., *"Moving Ohio Forward" Grant Program Demolition Guidelines*, (Aug. 1, 2012), *available at* http://www.ohioattorneygeneral.gov/Files/Individuals-and-Families/Consumers/Foreclosure/Demolition-Guidelines-5-2-12.aspx.

local—owns a significant amount of property,[14] but also because it exposes a paradox: while the right of an individual property owner to destroy its property is narrow, the right of a property owner representing many individuals—the government—is broad. The end result of the act of destruction by either type of owner is the same: the property that is destroyed no longer exists and any value existing in it is permanently lost. Yet whether an owner can exercise the right to destroy its property may depend entirely on whether it is a private actor or a government entity.

The second goal of this Article is to suggest not only that the government has a broader right to destroy than private owners, but also that it *should*. While seemingly paradoxical, the divergent scope of the government's and private owners' right to destroy can be justified on both doctrinal and normative grounds. More than simply the result of numerous, unrelated legal rules, the differing scope of the right to destroy for government and private owners reflects a balancing of interests of both the owner and the community in property. Drawing on relational and social-obligation theories of property law, this Article argues that a right to destroy which is broader for government owners than for private owners is appropriate for three reasons.

First, greater constraints on private owners' right to destroy are appropriate to address the problem of iteration effects. Iteration effects occur when the same action repeated over and over again by numerous individual actors results in an unjust or harmful outcome, despite the fairness of the rules permitting each individual action.[15] To minimize such iteration effects, the initial rules applying to individual actions should be adjusted to account for the negative cumulative effect.[16] Although a particular individual owner's

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14. "Forty percent of all the land in the United States is owned by the government at some level." ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 144 (2007) [hereinafter FREYFOGLE, ON PRIVATE PROPERTY]. While much of government-owned land is protected and unimproved, and therefore not the type of property which is the focus of this article, government entities in urban areas own a significant percentage of developed/developable land as well. *See, e.g.*, DEP'T OF MGMT. SERVS., 2011 STATE FACILITIES INVENTORY ANNUAL REPORT 4 (2011), *available at* http://www.dms.myflorida.com/content/download/81178/467639/version/1/file/2011+SFI+Report_Final.pdf (reporting that in 2011, 30 state government entities reported 17,999 owned, not leased, facilities, totaling approximately 154 million square feet of owned space); *City-Owned Land Inventory*, CITY OF CHI., https://www.cityofchicago.org/city/en/depts/dcd/supp_info/city-owned_land_inventory.html (last visited Jan. 19, 2015) (showing that the City of Chicago owns 15,375 individual properties).

15. *See* McCaffery, *supra* note 6, at 103–04 (applying the Rawlsian justice as fairness philosophy, which posits that society should establish rules that promote fairness, but once the rules are established, individuals should generally be allowed to operate within the rules without further interference, except where the net result of many iterations of voluntary transactions produces an unfair result).

16. *Id.*; *see also* Eric T. Freyfogle, *Private Land Made (Too) Simple*, 33 ENVTL. L. REP. 10,155, 10,157–58 (2003) (highlighting the disconnect between the "real world" and the

exercise of the right to destroy does not always raise significant policy concerns, the repeated exercise of the right to destroy by many individuals acting without consideration of cumulative effects can have significant negative impacts in areas such as sustainability, affordable housing, and historic preservation, thus necessitating adjustments to the scope of the private owner's right to destroy.

Second, fewer restrictions on the government's right to destroy are necessary because of the communal responsibilities of government owners. While private owners typically act to maximize the value of their property, with no duties to other parties except to avoid using their property in a way that causes harm, the government has a duty to make decisions about its property that promote the public health, safety and welfare, i.e., to act in the public interest.[17] While recognizing that the government does not always fulfill these duties (and that even defining public interest is a subject of much debate),[18] the communally-oriented objectives of public ownership suggest that the scope of the government's right to destroy remain relatively broad, since the government may need to exercise the right to destroy to promote the public interest in circumstances with no analogy to private owners.

Finally, while the exercise of the right to destroy by both government and private owners can have negative impacts in policy areas such as

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theoretical assumptions of law and economics scholars, and noting that in the "real world," people "expect ownership norms to reflect prevailing ideas of fairness" and "the rights and responsibilities of private ownership shift with changing circumstances and cultural values, and rightfully so, given that private property retains its philosophic justification only so long as it undergirds the collective well being").

17. Although maximizing the value of government-owned property may be one way to promote the public health, safety and welfare, promoting the public welfare may also require the government to take actions with respect to its property that do not maximize profits, such as locating a park or public library on government-owned land that could otherwise be sold to private developers. *See infra* note 148 and accompanying text.

18. *See infra* notes 146–49 and accompanying text. Public choice literature suggest that local governments' land use decisions are driven not by disinterested leaders seeking to promote the objective common good but rather by one of two conceptions of the public interest: the "homevoter" theory or the "growth machine" theory. *See* Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMP. STUD. 227, 230–34 (2014). The homevoter theory suggests that a local government's land use policies are crafted to mollify homeowners in the jurisdiction, who seek policies that maximize the value of their properties (i.e., low residential property taxes, minimization of development that would compete with and/or lower the value of existing residential properties, and a tendency towards exclusionary zoning). *Id.* The growth machine theory, in contrast, suggests that local government's land use decisions are driven by developers and landowners focused on economic growth and maximizing their profits (rents or sales prices). *Id.* While conventional wisdom has been that the homevoter theory applies primarily in suburban jurisdictions and the growth machine theory applies in urban areas, a recent empirical study of New York City's land use policies suggests that the homevoter theory applies even in that most urban of jurisdictions, suggesting that homevoters may have far more influence on local governments than previously acknowledged. *Id.* at 259–61.

sustainability, affordable housing, and historic preservation, a relatively broad right to destroy for government owners is appropriate because such concerns can be more effectively addressed through limitations on the government's ability to *acquire* property rather than limitations on its right to destroy. While imposing such limits on private owners could be constitutionally problematic and potentially considered impermissible restraints on alienation, limits on the government's ability to acquire property—such as the public use requirement for eminent domain, notice requirements for tax lien foreclosures, and statutory standards in state enabling acts for land banks and redevelopment authorities—indirectly accomplish many of the same goals as constraints on a private owner's right to destroy. By preventing the government from ever becoming an owner, such limitations prevent the government from becoming entitled to an owner's right to destroy.

This Article is the first to recognize that the scope of the right to destroy differs for government owners versus private owners. More broadly, this Article contributes to the scholarship on the under-developed law of property destruction[19] by providing a framework for understanding not only under what circumstances government and private owners can "deprive a resource of its immortality,"[20] but also why the law gives a broader right to destroy to some owners and a narrower right to others. [21]

The remainder of this Article is structured as follows. Part II provides an overview of the central paradox identified by this Article. Section II(A) examines why the right to destroy is generally disfavored and catalogues the numerous common law and statutory rules that operate to limit an owner's right to destroy. Section II(B) then challenges the assumption that the right

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19. Recent scholarship by Lior Strahilevtiz (*see supra* note 5), Joseph Sax (*see supra* note 6), and Edward McCaffrey (*see supra* note 6) has brought much needed attention to this area of the law, but it still remains relatively unexplored in the legal scholarship.

20. Strahilevitz, *supra* note 5, at 795–96.

21. The differing treatment of publicly owned land and privately owned land is reflected in many of the fundamental rules first-year property students learn. For example, one cannot adversely possess government-owned property, 3 AM. JUR. 2D *Adverse Possession* § 257 (2014), and an owner's right to exclude is shaped in part by the public or private ownership of the land. *See* Benefit v. City of Cambridge, 679 N.E.2d 184, 922 (Mass. 1997) (holding local ordinance that banned peaceful begging in a public park violated the First Amendment). Scholars such as Eric Freyfogle have persuasively argued that the distinction between publicly owned land and privately owed land should be abandoned and replaced with "a continuum [of ownership] with some lands more subject to public control and some lands more subject to private control." Eric T. Freyfogle, *Symposium Essay: Goodbye to the Public-Private Divide*, 36 ENVTL. L. 7, 15 (2006). While recognizing merit in this argument, the author believes that under our current conception of property law, with publicly owned land distinct from privately owned land, a broader right to destroy for government owners than for private owners reflects the interests that would be served by such a continuum approach to ownership.

to destroy is universally disfavored, and explores how a government owner of property, unlike a private owner, retains a relatively broad right to destroy. Part III contends that the divergent scope of the government's vs. private owners' right to destroy is both doctrinally coherent and normatively desirable. Specifically, it identifies three justifications for the government's broader right to destroy: iteration effects of private owners' right to destroy, the communal responsibilities of government owners, and limitations on the government's ability to acquire property. Part IV analyzes the policy implications and risks posed by the government's relatively broad right to destroy. In recognition of the fact that any exercise of the right to destroy is permanent and resources are increasingly limited, Part V concludes by considering whether additional procedural checks may be warranted on the government's exercise of its right to destroy.

II. THE SCOPE OF THE RIGHT TO DESTROY

A. Private Owners and the Right to Destroy

This Section begins with a discussion of why the right to destroy is generally disfavored. It then presents an overview of the most significant legal mechanisms that serve to limit the scope of a private owner's right to destroy.

1. Why Destruction Is Disfavored

The right to destroy entitles its holder to the ultimate power over an object: to negate its very existence.[22] Unlike other rights in a property owner's bundle of rights, the right to destroy permanently alters the nature of thing owned:[23]

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22. While land is arguably a perpetual form of property, depending on how broadly the term "destroy" is defined, there may be situations where an owner can "destroy" even land, such as in the case of mining or blasting operations, or situations of environmental degradation. *See* Strahilevitz, *supra* note 5, at 795–96.

23. While the exercise of other rights in the property owner's bundle—such as the right to exclude or transfer—may create changed circumstances, the exercise of those rights does not permanently alter the nature of property in the same fundamental way that the right to destroy does. It may be expensive or time-consuming to undo the exercise of the right to exclude or the right to transfer, but it is almost always possible to take actions so that the pre-existing state of affairs exists once again; once the right to destroy is exercised, however, the action cannot be undone. *See* ANTHONY M. TUNG, PRESERVING THE WORLD'S GREAT CITIES: THE DESTRUCTION AND RENEWAL OF THE HISTORIC METROPOLIS 68 (2001) ("[I]n preservation one principle is absolute: we cannot replace the past once we have destroyed it. We may build facsimiles; but having forfeited the original, we have no way to judge how exact our copies are . . . .").

the property that is destroyed no longer exists and any value existing in the property is permanently lost.[24] While the permanence of destruction is key to its effectiveness,[25] it also makes any exercise of the right to destroy an irreversible one, with irreversible risks. Thus, although some minimum level of the right to destroy is necessary for a functioning society,[26] destruction of property has been generally disfavored under the common law.[27]

Destruction threatens both an economist's guiding principle of efficiency and society's sensibilities about prudent use of resources. An unencumbered, unilateral right to destroy for property owners is inefficient from an economic perspective because destruction is not the optimal use of the resource if it still contains positive value.[28] Furthermore, squandering or wasting something that could be put to good use conflicts with the values held by most societies; the proverb of "waste not, want not" reflects a belief in the prudent use of resources that cuts across cultures and time.[29] Thus, while the right to destroy

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24. The "value" of property exists in a variety of forms. *See infra* notes 170–71 and accompanying text.

25. *See* Kellen Zale, *Urban Resiliency and Destruction*, 50 IDAHO L. REV. 85, 100 (2014) (discussing how destruction can be beneficial for these reasons and others).

26. The right to destroy property is necessary to some degree because it allows for the creation of physical and conceptual space for innovation and progress, the elimination of that which is outdated, underutilized, or unneeded, and the correction of past mistakes. *Id.* Professor Strahilevitz suggests that property destruction should also be allowed because it promotes expressive values. Strahilevitz, *supra* note 5, at 824–35 (discussing the expressive value of various acts of property destruction). Scholars have also argued that from a doctrinal point of view, the right to destroy is necessary to justify the existence of other rights in an owner's bundle. *See* Paul Ohm, *The Fourth Amendment Right to Delete*, 119 HARV. L. REV. 10, 14 (2005) ("Although the right to destroy may seem culturally or economically unsavory, it is protected because without the extreme ability to change, delete, or destroy, virtually nothing will be left of the rights of dominion and control.").

27. *See* McCaffery, *supra* note 6, at 79–80 (noting that most theorists who have addressed the issue of the right to destroy have devoted little attention to it, on the grounds that people, out of self-interest, generally do not destroy what they own, so there is little need to be concerned about the issue).

28. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 10 (2d ed., 3d prtg. 1977) ("'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction *as measured by aggregate consumer willingness to pay* for goods and services—is maximized."). A legal regime that allows owners to unilaterally exercise the right to destroy may not be the most efficient allocation of rights, since others may be willing to pay more for legal rights that prevent destruction.

29. For example, while many religions historically endorsed destruction in the form of animal sacrifice as proof of piety, there is arguably a theological basis for society's distaste for imprudent use of resources. *See* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285, 308 (Peter Laslett ed., 2d ed. 1967) ("Nothing was made by God for Man to spoil or destroy."); Strahilevitz, *supra* note 5, at 793.

Much has been written on modern society being a more wasteful culture than past societies. *See, e.g.*, ALVIN TOFFLER, FUTURE SHOCK 50 (1984) ("In the past, permanence was the ideal . . . and economic logic dictated the policy of permanence . . . . As the general rate of change in society accelerates, however, the economics of permanence are—and must be—replaced by the

is traditionally included in a property owner's bundle of rights,[30] as the most extreme version of the other rights in the bundle,[31] numerous common law doctrines and statutory rules operate to limit the scope of an owner's right to destroy. The next Section discusses these various legal rules, focusing specifically on those which act to limit the scope of an owner's right to destroy improvements on real property.

2. How Destruction is Disfavored

This Section provides an overview of the numerous statutory and common law rules that operate to limit a property owner's right to destroy.[32] Some of these principles operate as an outright prohibition on the owner's ability to destroy property, while others constrain an owner's right to destroy by imposing delays and costs on her exercise of that right.

a. Land Use Regulations

Land use regulations are the most pervasive legal mechanism that act to limit the scope of a private owner's right to destroy. Numerous types of land

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economics of transience . . . . This means that it often becomes cheaper to replace than to repair."); JEFF FERRELL, EMPIRE OF SCROUNGE 28 (2005) ("[T]he culture and economy of consumption . . . promotes not only endless acquisition, but the steady disposal of yesterday's purchases by consumers who, awash in their own impatient insatiability, must make room for tomorrow's next round of consumption."). Yet, even today, society still exhibits an interest in the prudent use of resources in a wide range of contexts. *See, e.g.*, Catherine Saillant, *L.A. Starts 2014 with its New Plastic-Bag Ban*, L.A. TIMES, Dec. 31, 2013, http://articles.latimes.com/2013/dec/31/local/la-me-la-bag-ban-20140101 (noting that Los Angeles now charges a small fee if customers do not have their own reusable bag for groceries); *see also* Jesse Hirsch & Reyhan Harmanci, *Food Waste: The Next Food Revolution*, MOD. FARMER (Sept. 20, 2013), http://modernfarmer.com/2013/09/next-food-revolution-youre-eating/ (highlighting both the moral questions implicated by food waste when millions go hungry as well as the environmental costs and economic inefficiencies, since "in a global commodity market, waste drives food prices up, for everyone.").

30. Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939). For other articulations of the specific sticks included in the bundle of rights see DUKEMINIER & KRIER, *supra* note 7, at 83; A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 113–24 (A. G. Guest ed., 1961); Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 3 (1990).

31. For example, the right to destroy is the extreme form of the right to use and exclude because destroying literally uses up the property and permanently excludes others from it. Strahilevitz, *supra* note 5, at 794.

32. The statutory and common law rules discussed in this section focus on legal principles that constrain the ability of a living private owner to exercise his right to destroy buildings and other improvements on real property. As Lior Strahilevitz has pointed out, the law also imposes constraints on the ability of deceased owners to exercise their right to destroy such property. *See id.* at 796–99 (discussing judicial decisions in which courts refused to effectuate will provisions ordering the destruction of buildings formerly owned by the deceased).

use laws constrain the owner's ability to destroy property. First, the requirement that an owner obtain a demolition permit itself creates a constraint—if usually a relatively minor one—on an owner's right to destroy. In the vast majority of U.S. jurisdictions, a property owner cannot simply demolish a building on her property; formal approval by the relevant governmental authority is required.[33] While the demolition permit application process is relatively straightforward and does not typically present a significant obstacle (unless there are environmental or historic preservation concerns about the property),[34] most demolition permits have an expiration date that acts as a secondary limitation on the owner's right to destroy. Thus, an owner who has been issued a demolition permit must begin (or complete) the demolition within a statutorily established time period (typically 30–180 days), or the permit is considered invalid and the owner must go through the whole application process again.[35]

Beyond the initial constraint imposed on the right to destroy by the demolition permit process, several additional types of land use laws more significantly constrain a property owner's right to destroy. These include anti-mansionization ordinances,[36] demolition delay ordinances,[37] and

33. *See, e.g.*, ST. PAUL, MINN., CODE § 33.03 (2014) ("No person shall construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure without first obtaining a building permit from the building official.").

34. For a discussion of how environmental laws operate to limit the scope of an owner's right to destroy, see *infra* notes 75–93 and accompanying text; for historical preservation laws, *infra* notes 45–61 and accompanying text.

35. *See, e.g.*, *Demolition Permit Policy*, FREMONT CNTY., http://www.fremontco.com/building/demolitionpolicy.shtml (last visited Jan. 19, 2015) ("Demolition permits are valid for one hundred eighty (180) days and are not renewable."); *Demolition Permit Application*, CITY OF WINTER PARK, FLA., http://cityofwinterpark.org/departments/building-and-permitting-services/demolitions/ (last visited Jan. 19, 2015) ("All demolition permits expire thirty (30) days from issuance of the demolition permit, unless as extension is granted.").

36. Anti-mansionization (or mansionization) ordinances typically modify applicable zoning laws to limit the height and/or square footage of single-family homes in an effort to prevent oversized development. *See, e.g.*, *Baseline Mansionization Ordinance and Summary*, CITY OF L.A. (2008), *available at* http://wallstreetproperties.com/virtualoffice_files/Summary-SKMBT_C25009030616290.pdf.

37. *See, e.g.*, *Canton Demolition Delay Bylaw*, CANTON HISTORICAL COMM'N (2003), *available at* http http://www.town.canton.ma.us/DocumentCenter/Home/View/495; *Historic Preservation Commission Frequently Asked Questions (FAQ)*, WHITEFISH BAY, WIS., http://www.wfbvillage.org/index.asp?SEC=3DE9BC9B-8280-4D07-84DF-2FB06113BD95&Type=B_LIST (last visited Jan. 19, 2015); *Review of Demolition Permit Application by the Somerville Historic Preservation Commission*, SOMMERVILLE, MASS. (2003), *available at* http://www.somervillema.gov/sites/default/files/DemoReviewInfo.pdf. Some jurisdictions have gone further and enacted demolition review ordinances that apply to all properties in the jurisdiction, whether or not potentially historic. *See, e.g.*, ALAMO HEIGHTS, TEX., CODE pt. II, ch. 5, art. IX, § 5-131 (2010) ("This article shall apply to all proposed building,

heightened standards for special permit or variance requirements.[38] While the legal mechanism of each of these land use regulations varies, the motivation behind their adoption is often the same: to address the issue of teardowns.[39] The teardown, or mansionization, phenomenon is most often seen in desirable inner-core suburbs where older houses that are typically in structurally sound condition are demolished and replaced with new, significantly larger structures often considered to be "out of character" with the neighborhood.[40] Justifications for enacting land use laws to limit teardowns, and correspondingly limit owners' right to destroy, include the negative impact of teardowns on the availability of affordable housing,[41] the threat to the aesthetic character of neighborhoods (even where not historic),[42] and the failure of teardowns to reflect an environmentally sound and sustainable approach to land use planning.[43] These concerns have been considered within

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demolition, construction, additions or alterations located within the jurisdiction of the City of Alamo Heights . . . except where such demolition is necessary to protect the public health, safety and welfare."); *id.* at § 5-134 ("The goal of the demolition review process is to allow public review and comment regarding the impact that the proposed demolition, and any replacement structures, may have on the surrounding neighborhood and the city.").

38. Variances, also called special permits or special exceptions, allow an owner to use their property in a way not otherwise permitted under the applicable zoning regulations, where "owing to special conditions, a literal enforcement of the provisions of the [zoning] ordinance will result in unnecessary hardship . . . ." DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 188 (6th ed. 2012).

39. Land use laws limiting an owner's right to destroy typically survive takings challenges, as long as the owner is left with reasonable economic uses for the property. *See, e.g.*, Historic Albany Found. v. Coyne, 159 A.D.2d 73, 79 (N.Y. App. Div. 1990) (noting that a property owner's right to destroy is "but one strand in the bundle of property rights" enjoyed by an owner and upholding a local historic preservation ordinance which prevented a private owner from demolishing its property).

40. *See Teardowns and McMansions*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/sustainable-communities/creating/teardowns/#.VJYb0sA0 (last visited Jan. 19, 2015).

41. Teardowns can negatively impact affordable housing both by eliminating a community's stock of "starter homes" for potential future residents and by driving up property values, and thus property tax rates for current residents. *See* Bjorklund v. Zoning Bd. of Appeals, 450 Mass. 357, 363 (2008) (finding a town's refusal to approve construction of a large residential property because it would increase the non-conforming nature of the structure currently on the property within the town's police power because "[t]he expansion of smaller houses into significantly larger ones decreases the availability of would-be 'starter' homes in a community, perhaps excluding families of low to moderate income from neighborhoods").

42. Heather May, *Salt Lake Residents Resist McMansions*, CHI. TRIB. (June 25, 2005), http://articles.chicagotribune.com/2005-06-12/business/0506120408_1_historic-districts-ordinance-four-other-houses (quoting a resident's frustration regarding teardowns in his neighborhood: "[People] come in and try to destroy the exact thing that made them want to live there in the first place.").

43. *See* BYLES, *supra* note 3, at 10 (quoting a demolition company owner's opinion regarding the houses he has demolished: "50 percent of them were totally livable . . . I would love to live in a lot of them myself."); *see also* White v. Armour, No. 381210, 2008 WL 4946478, at

the police power of local governments, and courts have upheld the restrictions imposed by various anti-teardown land use laws on private owners' right to destroy from takings challenges.[44]

b. Historic Preservation Laws[45]

If a building is sufficiently old, culturally or architecturally significant, or located in a neighborhood considered to be historically or culturally significant,[46] historic preservation regulations may operate to limit the owner's right to destroy the property.[47] A wide variety of federal, state, and local laws fall under the umbrella of historic preservation laws.[48] These include the National Historic Preservation Act, which established the National Register of Historic Places as well as the legal framework for states to implement federal historic preservation protections;[49] state historic preservation laws, which may establish state historic registries that may allow

*3 (Mass. Land Ct. Nov. 19, 2008) (finding zoning law which required extra level of review for proposed residential construction over a certain number of square feet justified because "[l]arger homes (those in excess of 6,000 square feet) are deemed to have a greater impact on their surroundings than smaller ones and surely this is so . . . [since they] have more bulk, more bedrooms, more cars, more visitors, and more activity.").

44. *See Bjorklund*, 450 Mass. at 357. While anti-mansionization ordinances do not prevent an owner from destroying their property and replacing it with a new structure that complies with the square footage, design or other requirements of the local ordinance, by limiting the owner's options for what can be rebuilt on the property, the laws may ensure that demolition is no longer an economically attractive option, thereby indirectly limiting the scope of the right to destroy. *Id.*

45. Historic preservation laws are a type of land use regulation, but they are analyzed in a separate category because they raise unique issues and typically operate as a more rigorous limitation on an owner's right to destroy than the non-historic preservation land use laws discussed in the previous section.

46. Properties generally must be 50 years of age or older to receive protection under historic preservation laws. However, buildings less than 50 years old may be listed on the National Register or state or local historic registries. *See* CHRIS GUIA ET AL., A LEGAL PRIMER FOR N.C. HISTORIC PRESERVATION COMMISSIONS, PRESERVATION NORTH CAROLINA (May 2008) [hereinafter LEGAL PRIMER FOR HISTORIC PRESERVATION]. Such properties typically qualify because they are "[l]ocations of historic events, associate[d] with [particular] individuals, exemplary examples of architecture, and links to important events in social history . . . ." *Id.*

47. Extensive scholarship exists in both legal and non-legal forums on the value that historic properties contribute to cities, in terms of historic, architectural and cultural significance, and historic preservation laws exist at all levels of government. *See, e.g.*, Penn Cent. Trans. Co. v. City of N.Y., 438 U.S. 104, 108 (1978). While even the most ardent preservationists do not contend that the old should be saved simply because it is old, "[t]hat the architecture of the past should be saved as part of the city of the future is both a very recent and a very old idea." TUNG, *supra* note 23, at 30.

48. The constitutional validity of historic preservation laws was established by the Supreme Court's decision in *Penn Central*, which upheld New York City's historic preservation ordinance against a takings challenge. *Penn Central*, 438 U.S. at 104.

49. National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. § 470 (2012).

for more properties to receive protection than under federal law;[50] and local laws such as historic districts and conservation district zoning,[51] overlay zones,[52] and design review.[53]

Historic preservation laws typically do not completely bar a property owner from exercising her right to destroy.[54] However, when a property is

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50. *See, e.g.*, CAL. PUB. RES. CODE § 5020 (West 2012) (authorizing the state historical resources commission and registry of historic places).

51. Historic districts and conservation districts are types of zoning that apply to defined physical areas with historic characteristics within a jurisdiction. *See* DEP'T OF THE INTERIOR, NAT'L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 5 (1990), *available at* http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf (A historic "district possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development."). Properties in historic districts are subject to additional protections before property owners can make changes to them, including demolition. *See, e.g.*, Michigan Local Historical Districts Act, MICH. COMP. LAWS § 399.201–.215 (1970), *available at* http://www.legislature.mi.gov/documents/mcl/pdf/mcl-act-169-of-1970.pdf (authorizing local governments to establish historic districts and historic district commissions, and require that property owners obtain a permit from the commission before making changes to property in those districts). Often a certain percentage of properties must qualify as sufficiently old for the area to be entitled to a historic district designation. *See, e.g.*, *Commercial Historic District*, ARK. HISTORIC PRES. PROGRAM, http://www.arkansaspreservation.com/historic-properties/commercial-district/ (last visited Jan. 19, 2015) ("Downtown areas that have the potential to be designated as commercial historic districts must contain a concentration of buildings of which at least 51 percent are at least 50 years old and have not suffered extensive alterations."). In addition, in some jurisdictions, a certain percentage of owners must agree to the historic district designation. *See Historic District Designation Guide*, PRES. HOUS., http://www.preservationhouston.org/technical-assistance-advice/historic-district-designation-guide/#sthash.qvwy97Oa.dpuf (last visited Jan. 19, 2015) ("At least 67 percent of all property owners within a proposed historic district must sign petitions expressing support for district designation in order for the historic district to be established.").

52. JOSEPH WILLIAM SINGER, PROPERTY 645 (Vicki Been et al. eds., 3d ed. 2010) ("Overlay zoning places a parcel in two different zones."). In the context of historic preservation, historic overlay zoning provides protections similar to those granted by historical district designation. *See, e.g.*, *Historic Preservation Overlay Zones (HPOZs)*, L.A. DEP'T OF CITY PLANNING, OFFICE OF HISTORICAL RES., http://www.preservation.lacity.org/hpoz (last visited Jan. 19, 2015) (describing the 29 HPOZs in Los Angeles as providing heightened review to changes of historic properties located in these zones).

53. Design review and guidelines typically set specific requirements owners of historic properties must comply with to be issued a Certificate of Appropriateness, authorizing changes to the property. *See, e.g.*, *Policy and Design Guidelines*, CHARLOTTE HISTORIC DIST. COMM'N (April 2011), *available at* http://ww.charmeck.org/Planning/HDC/PolicyDesignGuidelines.pdf.

54. *See* LEGAL PRIMER FOR HISTORIC PRESERVATION, *supra* note 46, at 10 ("Contrary to popular belief, the listing of a building on the National Register of Historic Places does NOT protect it from demolition."); *see also* Roger K. Lewis, *The Challenges of Preserving a Historic Neighborhood*, WASH. POST, Sept. 28, 2012, http://www.washingtonpost.com/realestate/the-challenges-of-preserving-a-historic-neighborhood/2012/09/27/4a301f5c-0742-11e2-858a-5311df86ab04_story.html ("Designating a neighborhood as a registered national, state or city historic landmark offers some protection against loss of significant contributing properties . . . . But it's still no absolute guarantee against neglect and demolition of buildings . . . .").

listed on national, state or local historic registries, state or local regulations typically require the owner to notify the State Historic Preservation Office or the analogous local office, and a delay of several months is automatically imposed on any proposed demolition.[55] During this period of time, the local governmental entity or agency with responsibility for enforcement of historic preservation laws works with the owner to determine whether alternatives to demolition can be pursued. Such alternatives may include adaptive reuse of the property, locating a buyer willing to keep the property or rehabilitate it, obtaining tax incentives or other funding to rehabilitate the building, or relocating the structure to an alternative location.[56]

To avoid being challenged as a taking or violation of due process, historic preservation ordinances typically have economic hardship exemptions, which provide that a demolition permit cannot be denied if doing so imposes an undue burden on a property owner.[57] The bar for such exemptions, however, is generally high: a mere claim that destroying the building would produce a higher rate of return for the owner typically will not qualify as an "economic hardship."[58] Rather, the owner must show that they would be denied all reasonable use or benefit from the property if denied a demolition permit.[59] Furthermore, many state and local historic preservation laws include provisions which impose affirmative duties on owners to maintain the property or which make economic hardship exemptions unavailable to owners who negligently or intentionally allow the building to fall into disrepair so that demolition becomes an allowable option (either under an economic hardship exemption or because it qualifies as a public nuisance and must be abated).[60] While ultimately, an owner may be permitted to destroy

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55. LEGAL PRIMER FOR HISTORIC PRESERVATION, *supra* note 46. In some states, these regulations apply not only to properties listed on historic registries, but also to those eligible to be listed. *Id.*

56. *Id.*

57. *See, e.g.*, SCOTTSDALE, ARIZ., HISTORIC PRESERVATION ORDINANCE § 6.125 (1999), *available at* https://www.municode.com/library/az/scottsdale/codes/code_of_ordinances?nodeId=VOLII_APXBBAZOOR_ARTVISUDI_S6.125CEECHA (defining requirements for owners to establish economic hardship for income-producing and non-income producing property, and requiring that an owner who believes he satisfies the criteria to apply for a certificate of economic hardship in order to be granted a demolition permit).

58. *See* LOUISVILLE LANDMARKS COMM'N, ECONOMIC HARDSHIP EXEMPTION AND GUIDELINES FOR DEMOLITION 1 (2003), *available at* http://louisvilleky.gov/sites/default/files/planning_design/landmarks_and_historic_pres/economic_hardship_exrev12-17-02_8-7-03.pdf.

59. *See, e.g.*, Dragomir Cosanici & Nicholas L. Bozen, *Economic Hardship, Feasibility and Related Standards in Historic Preservation Law*, MICH. STATE HISTORIC PRES. OFFICE, *available at* http://www.michigan.gov/documents/hal_mhc_shpo_EconHardship_114100_7.pdf.

60. Known as "demolition by neglect," this situation occurs when an owner of property which historic preservation laws or other regulations prevent him from demolishing behaves in a

even historic or architecturally significant buildings,[61] the existence of historic preservation laws limits the likelihood of such a result occurring by placing significant limits on an owner's right to destroy such properties.

c. Arson

Under English common law, arson was defined as "the malicious burning of the dwelling house *of another*."[62] Thus, one would be liable for arson for burning another person's home, but a property owner in possession was entitled to burn his own house and he would not be guilty of arson.[63] Arson laws in England and the United States evolved, however, to encompass offenses against property, such that the burning of non-dwelling houses as well as the burning of one's own house or other building were brought within the definition of arson;[64] as a result, modern statutes make arson a "complex offense against both person and property."[65] The Model Arson Law,

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strategically neglectful manner to have the property declared a public nuisance. *See* NAT'L TRUST FOR HISTORIC PRES., DEMOLITION BY NEGLECT 1 (2009), *available at* http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/resources/Demolition-By-Neglect.pdf. As a result of this behavior, the owner is able to destroy the building on the grounds it is a public nuisance. *Id.* The affirmative maintenance requirements found in many historic preservation ordinances are intended to prevent owners from employing this strategy. *See, e.g.*, SCOTTSDALE, ARIZ., HISTORIC PRESERVATION ORDINANCE § 6.125(B), *available at* https://www.municode.com/library/az/scottsdale/codes/code_of_ordinances?nodeId=VOLII_APXBBAZOOR_ARTVISUDI_S6.125CEECHA; WESTMINSTER, COLO., CODE, tit. XI, ch. 13, § 11-13-14(D) (2014), *available at* http://www.ci.westminster.co.us/CityGovernment/CityCode/TitleXI/13HistoricPreservation.aspx.

61. *See* Adam Chandler, *The Sad Fate (but Historic Legacy) of the Houston Astrodome*, ATLANTIC (Nov. 8, 2013), http://www.theatlantic.com/entertainment/archive/2013/11/the-sad-fate-but-historic-legacy-of-the-houston-astrodome/281269/ ("Preservation, like most acts of restraint, is not a particularly cherished American ideal. Young countries like to topple things over and build them back better; the history is inherently less valuable.").

62. *See* John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 299 (1986) (emphasis added) (explaining that this result was in part because historically the primary goal of the common law of arson was the protection of people and their right of habitation, not the protection of property, although property was incidentally protected).

63. *Id.* at 311, 324. Even under the traditional common law understanding of arson, however, there was recognition of the negative impact the act had on property, reflecting society's disapproval of wasted resources. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 220 (William S. Hein & Co. 1992) (1769) (explaining that arson was an offense of "great malignity" in part because "by burning the very substance is absolutely destroyed"). Arson differed from other types of destruction, however, because it not only deprived the community of the value of the property that was destroyed, it also posed a substantial risk of unintended injury to people and other property. *See id.* ("[F]ire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him . . . .").

64. *See* Poulos, *supra* note 62, at 330–31.

65. *Id.* at 365–66.

developed in the United States in the mid-twentith century and used by many states as a model for their state arson laws, eliminated the "possession of another" requirement from the definition of arson; thus, under state laws tracking the Model Arson Law, an owner will be guilty of arson even if the property destroyed is her own, which she alone occupies.[66] Although a number of states have not completely eliminated the "of another" requirement, it has generally been modified by various "person endangering circumstances" which result in an owner being permitted to burn her property only under narrow circumstances where it endangers no other persons or property interests and it is not conducted with an intent to defraud.[67] By expanding arson liability to owners who burn their own property—either in all circumstances or when it would endanger other people or property or is done with the intent to defraud—modern arson statutes reflect a societal judgment to limit the owner's right to destroy in light of concerns about both protecting human safety and preserving property.

d. Waste

Waste regulates the actions of a current possessor of property when more than one person—either multiple concurrent owners or future interest holders—has an interest in the particular property.[68] The doctrine of waste requires that the possessor not act in a manner that unreasonably interferes with the expectations of other holders of the property.[69] Waste can be either

66. *Id.* at 389–90 (noting that the Model Arson Code, on which a numerous modern state arson statutes are modeled, "prevents owners of all of the possessory and proprietary interests in these buildings from burning them as well. They too are prevented from burning their property, unless the *mens rea* requirement is interpreted in such a way as to alter this result.").

67. *See, e.g.*, ARK. CODE ANN. § 5-38-301(a)(1) (West 2007) (providing that a person commits arson if he "[s]tarts a fire . . . with the purpose of destroying or otherwise damaging: (A) An occupiable structure . . . that is the property of another person; [or] . . . (C) Any property, whether his or her own property or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person"); IND. CODE ANN. § 35-43-1-1 (West 2014) (stating that "[a] person who, by means of fire, explosive, or destrictive device, knowingly or intentionally damages: . . . a dwelling of another person without the other person's consent [or] . . . [p]roperty of any person under circumstances that endanger human life . . . commits arson, a Level 4 felony" and "[a] person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages property of any person with intent to defraud commits arson, a Level 6 felony").

68. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 4.1, at 146 (3d ed. 2000).

69. DUKEMINIER & KRIER, *supra* note 7, at 218. The doctrine of waste is not applicable (and thus not a check on the right to destroy) where there is no concurrent or future interest holder. *See* McCaffery, *supra* note 6, at 84 (explaining that waste "concerns the temporally inefficient situation of a present owner's neglecting the interests of some future owner . . . . A life estate holder is constrained not to—whereas an absolute holder has an unequivocal right to —commit waste.").

active—such as demolishing a building on the property—or passive—such as allowing a building on the property to fall into such disrepair it collapses or is declared a public nuisance and abated.[70]

To determine whether a possessor's actions constitute waste, modern courts employ a reasonableness standard:[71] the current possessor will be permitted to alter the character of the property only when there are changed conditions from when the property interests were created that justify the alteration and only if the change does not diminish the market value of the property.[72] Waste thus acts as a limit on a present possessor's right to destroy even in circumstances where the demolition arguably increases the value of the property; courts typically require that the demolition not only increase the value of the property, but also be justified based on changed conditions on the property or in the neighborhood.[73] Furthermore, even when both of these

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70. *See*, DUKEMINIER & KRIER, *supra* note 7, at 218 (discussing active, or affirmative, waste and passive, or permissive, waste).

71. The doctrine of waste traditionally protected property holders' non-economic as well as economic interests in the property maintaining its status quo. *See* John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1212 (2007) (noting the "tension in waste doctrine between a purely economic understanding of what constitutes waste—one that measures waste by looking for a diminution in the market value of the property—and an understanding based more on the normative prerogative of the future interest holder to decide what kind of changes can be made to the property"); *see also* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 534 (1996) ("In England, waste tended to perpetuate the land-use status quo; it resolved disputes between competing interest holders by preferring existing uses to new uses.").

72. *See* Lovett, *supra* note 71, at 1214 (suggesting that "a mere increase in market value alone" is unlikely to justify substantial alterations in the property by a current possessor, but if there are changed circumstances in the neighborhood where the property is located, and the alterations in the property actually increase the property's value, then the doctrine of waste will not bar a current possessor's alteration of the property, including his decision to destroy physical improvements on the property). Some courts refer to this as "ameliorative waste." *See* DUKEMINIER & KRIER, *supra* note 7, at 220–21 (defining ameliorative waste as an alteration in the condition of the property made by the current possessor in the property that increases the value of the property, rather than decreasing it).

73. *See* Melms v. Pabst Brewing Co., 79 N.W. 738, 741 (Wis. 1899) ("This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, this is a question of fact and not waste per se."). A possessor who commits waste by destroying the property (either actively or passively) will be liable to other holders of interests in the property to an injunction or damages. As for the measure of damages, "the appropriate measure of damages [for the commission of waste] is generally the diminution in market value of the property or the cost of restoring the property to its former condition, whichever is less." STOEBUCK & WHITMAN, *supra* note 68, § 4.5, at 161.

conditions are satisfied, the current possessor exposes himself to litigation if other interest holders dispute the extent of changed circumstances or effect of the act of destruction on the property value.[74] Thus, in those situations where there are multiple holders of interests in a property, the doctrine of waste serves as a limitation on the present possessor's right to destroy.

e. Environmental Regulations

Federal and state environmental laws operate to limit a property owner's right to destroy by imposing requirements that delay, and in some cases outright prohibit, the destruction of improvements that pose environmental risks. While a wide range of environmental protection laws may act to constrain a private owner's right to destroy in specific circumstances, the environmental laws that most commonly implicate the right to destroy are: (i) the Clean Air Act ("CAA") and emissions standards promulgated under its authority, together with state acts implementing those standards;[75] (ii) the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA");[76] and (iii) state environmental protection laws that apply to private actors, such as the California Environmental Quality Act ("CEQA")[77] and Washington's State Environmental Protection Act ("SEPA").[78]

Authorized under the Clean Air Act, the National Emission Standards for Hazardous Air Pollutants ("NESHAP") are the standards set by the EPA for

74. Some scholars have suggested that the doctrine of waste may be over-protective of active uses of property, and not adequately reflect modern understanding of the environment and the value of undeveloped property. *See, e.g.*, Sprankling, *supra* note 71, at 533–36, 556, 569 ("The modern law of waste remains staunchly hostile to wilderness, reflecting its nineteenth-century reconfiguration toward placing such land in productive use."). A private owner committing waste or exercising the right to destroy may actually be doing the most sustainable thing possible with his or her property. *See* Strahilevitz, *supra* note 5, at 798–99 (discussing the case of a New Hampshire man whose will instructed that his home and barn in a rural area be torn down and the area allowed to return to forest; the court hearing this case in mid-1900s refused to order the destruction of the property as the owner had requested, since non-use or destruction of the human improvements was considered a "waste"). The idea that we might find "wild and desolate lands" valuable and not want to expose an owner of such lands to liability for waste may have been inconceivable in Blackstone's England (or even in nineteenth and early twentith century America), but as scholars such as Sprankling and Strahilevitz have suggested, modern scientific understanding about ecology and the environment may lead to a change in our understanding of waste.

75. Clean Air Act § 109, 42 U.S.C. § 7409 (2006).

76. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (current version at 42 U.S.C. §§ 9601–9675 (2006)). CERCLA is also commonly known as the "Superfund" program.

77. CAL. PUB. RES. CODE §§ 21000–21177 (Deering 2014) (CEQA).

78. WASH. REV. CODE § 43.21C (2014) (SEPA).

hazardous air pollutants from stationary sources.[79] NESHAP applies to most commercial and residential properties (excluding residential properties with four or fewer dwelling units), and requires that before any demolition occurs, the property be inspected for the presence of asbestos-containing materials ("ACMs").[80] If ACMs are found in the property, then further requirements are imposed on the owner to remove the ACMs in compliance with federal and state standards prior to demolition.[81] Enforcement and implementation of NESHAP requirements is delegated to states, which typically require any property owner subject to NESHAP to obtain a permit from the appropriate state or local agency prior to demolition, regardless of whether asbestos is found.[82] When a property owner destroys his property without complying with NESHAP, both civil and criminal penalties may apply.[83]

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79. *National Emission Standards for Hazardous Air Pollutants Compliance Monitoring*, U.S. ENVTL. PROT. AGENCY (Nov. 8, 2012), http://www.epa.gov/compliance/monitoring/programs/caa/neshaps.html.

80. The exemption is based on the fact that residential properties typically have only limited amounts of ACMs (asbestos-containing materials). The exemption applies regardless of whether the property is owned by a private entity or government entity, or whether it is demolished pursuant to the owner's right to destroy or the government's police powers (i.e., because it is a public nuisance). *See* Absestos NESHAP Clarification of Intent, 60 Fed. Reg. 38,275, 38,726 (July 28, 1995), *available at* http://www.gpo.gov/fdsys/pkg/FR-1995-07-28/pdf/95-18620.pdf ("EPA believes that the exemption is based on the type of building being demolished or renovated and the type of demolition or renovation project that is being undertaken, not the entity performing or controlling the demolition or renovation."); *Asbestos NESHAP*, U.S. ENVTL. PROT. AGENCY (Jan. 24, 2014), http://www2.epa.gov/asbestos/asbestos-neshap. However, the exemption for demolition of residential properties of four or fewer dwelling units does not apply if the demolition is part of a commercial project, such as to build a shopping center or other private development that would be subject to NESHAP. Absestos NESHAP Clarification of Intent, 60 Fed. Reg. at 38,725.

81. *See, e.g.*, NEB. DEP'T ENVTL. QUALITY, DEMOLITION, RENOVATION AND THE ASBESTOS REGULATIONS (2011), *available at* http://www.deq.state.ne.us/Publica.nsf/0/b729f0f58a830ae88625699100626779?OpenDocument (setting out the specific requirements owners must satisfy, such as inspections and notifications, before being issued a demolition permit for any building subject to NESHAP).

82. *See, e.g.*, N.C. DEP'T OF HEALTH & HUMAN SERVS., NORTH CAROLINA REQUIREMENTS FOR DEMOLITION/RENOVATION & ASBESTOS-CONTAINING MATERIALS (2009), *available at* http://epi.publichealth.nc.gov/asbestos/pdf/demolition_renovation_requirements.pdf (noting that before demolition of a NESHAP-covered property is permitted, the owner must conduct an asbestos inspection and a Demolition Notification must be submitted to the N.C. Health Hazards Control Unit, even if no asbestos found; if asbestos is found, an Asbestos Removal Permit must be obtained).

83. For example, a property owner of a sawmill in Oregon who demolished several buildings on the property without complying with NESHAP and Oregon state law requirements was sentenced to several months home confinement and three years probation. Bryan Denson, *Federal Judge Punishes Businessman for Sweet Home Demolition That Caused Superfund Cleanup*, OREGONIAN (Oct. 30, 2012, 5:46 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/10/federal_judge_punishes_busines.html.

Under CERCLA, the EPA is authorized to initiate cleanup and enforcement actions in response to actual or threatened releases of hazardous substances.[84] CERCLA establishes broad liability under which past and current "owners and operators"[85] of properties on which there has been a release of specified hazardous substances can be held financially liable for remediation costs.[86] While remediation typically requires the cleaning of groundwater and removal of contaminated soil and infrastructure, in some cases, environmental contamination may be so significant that disturbing it would create a greater risk than removal. Existing structures on the property may act as a "cap," containing hazardous materials and preventing them from spreading.[87] In such situations, CERCLA may operate to completely prohibit an owner from exercising his right to destroy because of the risk of further contamination from demolition activities.[88]

In addition to federal laws such as CAA and CERCLA, which limit the scope of a private owner's right to destroy, several states have state environmental protection legislation modeled on the landmark National Environmental Protection Act ("NEPA") of 1969 that can potentially limit private owners' right to destroy.[89] While most of these state environmental laws apply only to actions by state or local governments, some—such as Washington State's SEPA and California's CEQA—apply to private activities, to the extent that government approval is required to conduct those activities.[90] Under these types of state environmental laws, if a governmental

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84. *CERCLA Overview*, ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/policy/cercla.htm (last visited Jan. 19, 2015).

85. Comprehensive Environmental Response, Compensation, and Liabiliy Act § 101(20)(A), 42 U.S.C. § 9601(20)(A) (Supp. V 1987).

86. *See CERCLA Overview*, *supra* note 84.

87. For example, a property owner of a Michigan brownfield property was not permitted to demolish the building on the property where the building's foundation served as cap on soil contaminants. Amy Biolchini, *Demolition of Willow Run Powertrain Powerplant Could Affect Environmental Remediation*, ANN ARBOR NEWS (Apr. 29, 2013), http://www.annarbor.com/news/demolition-of-willow-run-powertrain-plant-could-affect-environmental-remediation/.

88. *Id.*

89. Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 120 (2003) (citing CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION 309 (2002)). The District of Columbia, Guam and Puerto Rico also have legislation modeled on NEPA. Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 954 (2006). Because there is no federal mandate requiring what such state laws address, they vary greatly in their coverage. *Id.*

90. *See, e.g.*, CAL. PUB. RES. CODE § 21001.1 (Deering 2012) ("The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies."). For a discussion of how state environmental laws such as SEPA and CEQA apply in the land use context, see Kellen Zale, *Changing the Plan: The*

agency has discretion as to whether to issue a demolition permit—such when the building proposed for demolition is a historic property—then the issuance of the permit typically will be subject to the provisions of state environmental laws.[91]

If such a state law applies to a particular demolition proposal, then before a demolition permit can be issued to a private owner, an environmental assessment must be prepared, identifying the potential negative environmental impacts of the proposed action. State environmental laws such as CEQA often broadly define what types of impacts should be considered in any assessment by requiring that the impacts of the proposed action on non-traditionally environmental issues such as aesthetics, housing, and cultural resources be considered if applicable.[92] If significant negative impacts are found, a demolition permit may be denied or conditioned on the owner fulfilling certain mitigation conditions, such as restoration or historical recreation off-site.[93] While the mitigation condition or permit denial will not be upheld if it constitutes a taking, as with historic preservation laws, as long as the application of the state environmental law does not deprive the owner of reasonable economic benefits, it will be considered a valid limit on the owner's right to destroy.

f. Deed Restrictions and Conservation Easements

In addition to governmental restrictions such as land use and environmental laws acting as constraints on a property owner's right to destroy, an owner's ability to destroy his property may also be limited by private agreements such as deed restrictions and conservation easements. Deed restrictions, also known as restrictive covenants or covenants, conditions, and restrictions ("CC&Rs"), are private, contractual agreements

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Challenge of Applying Environmental Law Review to Land Use Initiatives, 40 ECOLOGY L.Q. 833 (2013).

91. If the governmental agency does not have discretion as to whether to issue a demolition permit because its issuance is based on fixed, objective standards involving little or no personal judgment about the desirability of the proposed action, then it would be considered a ministerial action and is typically exempted under state environmental review laws. *See, e.g.*, Friends of Juana Briones House v. City of Palo Alto, 118 Cal. Rptr. 3d 324, 335 (Ct. App. 2010) (finding that issuance of a demolition permit may be considered exempt from CEQA as a ministerial project, unless it is for the demolition of an historic structure). Arguably, the exemption for the issuance of ministerial demolition permits under state environmental review laws fails to recognize the fact that any demolition—whether of an historic property or not—can negatively impact sustainability and could be considered to potentially have a significant negative impact on the environment.

92. CAL. CODE REGS. tit. 14, § 15126.2(a) (2011).

93. *See id.* § 15091; *see also* Laurel Hills Homeowners Assn. v. City Council, 147 Cal. Rptr. 842, 845 (Ct. App. 1978) (noting that although a project can be denied approval if mitigation measures are not adopted, only feasible mitigation is required).

that limit land uses.[94] Deed restrictions run with the land, meaning that they are binding on subsequent owners who purchase the property.[95] Traditionally, only deed restrictions imposing an obligation on a landowner not to do something were upheld; however, today, deed restrictions that impose affirmative obligations, such as paying dues to a neighborhood association or maintaining the property in a certain condition, are routinely upheld.[96]

Deed restrictions placing limits on an owner's right to destroy are commonly used in the purchase and sale of historic or architecturally significant properties,[97] but they can be used for any type of property, not only historic ones. Deed restrictions can limit what can be done with a property to a greater extent than land use laws such as zoning, which must satisfy state and federal constitutional standards; deed restrictions simply must comply with applicable laws and not violate public policy.[98] Thus, while an exception for public health and safety would be implied in a deed restriction prohibiting the demolition of property so as not to violate public policy, an exception for economic hardship would not necessarily be required.[99]

A conservation easement can accomplish many of the same purposes as deed restrictions, but it is legally distinct as a type of negative easement authorized under state laws based on the Uniform Conservation Easement

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94. SINGER, *supra* note 52, at 224–25.

95. *Id.* at 224.

96. *Id.* at 225–26, 253.

97. *See, e.g.*, CITY OF NEWTON, DEP'T OF PLANNING & DEVELOPMENT, PROTECTING NEWTON'S HISTORIC NEIGHBORHOODS 1, *available at* http://www.newtonma.gov/civicax/filebank/documents/46831 (explaining that the City of Newton or non-profit historic preservation organizations associated with the city hold approximately 50 preservation restrictions (deed restrictions) that entitle it to approve any proposed changes to those properties).

98. Thus, deed restrictions preventing owners from selling to protected classes of people have been held unconstitutional (SINGER, *supra* note 52, at 274–77). States have also increasingly prohibited deed restrictions that limit owners from engaging in certain sustainable practices (such as using rain barrels for water collection or hanging clotheslines for solar drying of clothes). *See* LaVonda N. Reed-Huff, *Dirty Dishes, Dirty Laundry and Windy Mills: A Framework for Regulation of Clean Energy Devices*, 40 ENVTL. L. 859, 881–84 (2010) (discussing state laws in Vermont, North Carolina, Florida and other states which prohibit such deed restrictions).

99. *See, e.g.*, *About the Commission*, CHARLOTTE-MECKLENBERG HISTORIC LANDMARKS COMM'N, http://www.cmhpf.org/about.html (last visited Jan. 19, 2015) ("When the Commission buys and resells properties, deed restrictions are placed on the property to prevent destruction of the property forever. The HLC owned the Duke Mansion for ten minutes and placed deed restrictions on the property so that it can never be demolished."). The above comment that a property "can never be demolished" once a deed restriction is placed on it is not accurate, since a deed restriction is never so completely immutable: if changed circumstances or public policy requires, an owner can take actions which are inconsistent with a deed restriction, including a demolition deed restriction. SINGER, *supra* note 52, at 288–91.

Act.[100] Under a conservation easement, an owner enters into an agreement with a governmental entity or non-profit to permanently restrict the use of the property in perpetuity;[101] if an owner attempts to violate the easement agreement terms, the governmental entity or non-profit has standing to sue to enforce it. Conservation easements are typically thought of as preserving open space or natural resources on private land, but preservation or façade easements are types of conservation easements that preserve the buildings on private land.[102] The conditions under which a conservation easement will be terminated are typically limited to exceptional changed circumstances; thus, a preservation or façade easement can operate to limit an owner's (and any future owner's) right to destroy an entire building or some aspects of the building potentially in perpetuity.

g. Public Nuisance

If a building endangers the public safety, health or welfare, it may be considered a public nuisance, and the local government may issue an abatement order requiring the owner to remedy the nuisance conditions, which may require demolishing the building; if the owner fails to do so, the government can destroy the building pursuant to its police powers.[103] If the

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100. KARIN F. MARCHETTI PONTE, LAND TRUST ALLIANCE FACT SHEET: CONSERVATION EASEMENTS V. DEED RESTRICTION (2001), *available at* http://www.landtrustalliance.org/conservation/documents/CE-deed-restriction.pdf.

101. Although conservation easements are said to run "in perpetuity," they may be terminated under certain narrow circumstances, such as if the government condemns the property through eminent domain or if changed circumstances apply such that the owner of the property may be able to argue that restrictions in the façade easement no longer fulfill their original purpose because circumstances or conditions have significantly changed from when the easement was drafted. SINGER, *supra* note 52, at 288–91.

102. *See Preservation Easements*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/ (last visited Jan. 19, 2015) ("Preservation easements are conservation easements that protect properties that have historic, architectural, or archaeological significance . . . [a] 'façade easement' is . . . a type of preservation easement that only protects the exterior elevations . . . of a historic building (and often, only those elevations that are visible from public ways).").

103. If the owner fails to comply with the abatement order, the local government can take necessary actions to abate the nuisance, including demolishing the building itself. When a government abates a public nuisance, it does not own the property and therefore is not destroying it pursuant to its rights a property owner. Rather, the city is destroying property that it does not own to protect the public health, safety or welfare pursuant to its police powers. *See* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 148–49 (1995) ("[T]he common law of nuisance . . . simultaneously defines the limits of individual property rights and outlines the general scope of the police power."). No compensation is due to the owner of the destroyed property if the property qualifies as public nuisance. *See, e.g.*, Shaffer v. City of Winston, 576 P.2d 823, 825 (Or. Ct. App. 1978) ("The general rule is that a municipality in the exercise of its police power may, without compensating the owner, destroy a

property is considered a public nuisance, the owner is not compensated for the loss and may be held liable for the government's costs in demolishing the property. Although in a public nuisance scenario a private owner's building is ultimately destroyed, it is usually not because the property owner chose to voluntarily exercise his right to destroy; rather, it is because the owner failed to act to prevent destruction by a government entity acting pursuant to its police powers.[104] Thus, the public nuisance doctrine acts as a constraint on an owner's ability to passively destroy property: to avoid having one's property demolished and receiving no compensation, an owner must exercise a minimum level of maintenance to keep the property from becoming a public nuisance.

B. Government Owners and the Right to Destroy

While the government as a property owner is constrained by some of the same common law and statutory rules that limit a private owner's right to destroy,[105] the government's right to destroy is significantly broader than that

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building that threatens the public safety where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition.").

104. In the case of demolition by neglect, the public nuisance doctrine may act to indirectly expand the scope of a private owner's right to destroy. Demolition by neglect occurs when an owner of property who, by historic preservation laws or other regulations is prevented from demolishing, behaves in a strategically neglectful manner to have the property declared a public nuisance. *See* NAT'L TRUST FOR HISTORIC PRES., *supra* note 60. As a result of this behavior, the owner is able to destroy the building on the grounds that it is a public nuisance. *See id*. Regular building and safety code enforcement actions on the part of the government can lessen the likelihood of an owner being able to successfully employ this strategy, as well as enforcement of the affirmative maintenance requirements found in many historic preservation ordinances. *Id.*

105. Land use, historic preservation, and environmental laws can limit the scope of the government's right to destroy in a manner similar to that of private owners. For example, government owners are subject to CERCLA, *see EPA Brownfields Grants, CERCLA Liability and All Appropriate Inquiries*, ENVTL. PROT. AGENCY (Apr. 2009), http://www.epa.gov/brownfields/aai/aaicerclafs.pdf (stating the state and local governments can be held liable under CERCLA), NEPA, *see* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (holding that NEPA imposes procedural requirements on government property owners, but "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs"), and NHPA (CALLIES ET AL., *supra* note 38, at 760–61) (explaining that under NHPA, federal agencies must conduct a review of any proposed action on sites listed or eligible to be listed in the National Register of Historic Places, including properties owned by the government; as with NEPA, however, no particular substantive result is required as a result of the NHPA review). In addition, many state historic preservation laws apply both to privately owned property and state-owned property (*see, e.g.*, 20 ILL. COMP. STAT. ANN. 3420/1 (West 2014) ("It is the purpose of this Act to establish a program whereby State agencies . . . prepare policies and plans to contribute to the preservation, restoration, and maintenance of State-owned historic resources for the inspiration and benefit of the people . . . .")). On the other hand,

of private owners' because of several legal mechanisms not applicable in the context of private owners.[106]

1. Eminent Domain

Eminent domain is the power of the government to take private property for public use, provided just compensation is paid to the owner.[107] The power of eminent domain is set forth in the Fifth Amendment of the U.S. Constitution, as well as provided for in most state constitutions.[108] Under the Fifth Amendment, public use does not require actual use by the public, but merely that the exercise of eminent domain serve a "public purpose."[109]

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land use, historic preservation and environmental laws that apply to government owners may not act as rigorous a constraint on the government's right to destroy as those that apply to private owners. For example, local historic preservation regulations do not apply to federally-owned property and may not apply to state-owned properties. *E.g.*, LEGAL PRIMER FOR HISTORIC PRESERVATION, *supra* note 46, at 10. In addition, CERCLA liability does not attach to government owners who involuntarily acquire ownership of contaminated properties. *See State and Local Government Activities and Liability Protections*, ENVTL. PROTECTION AGENCY (last updated Mar. 16, 2014), http://www2.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections#involuntary ("'Involuntary acquisition' includes obtaining property through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government entity involuntary [sic] acquires title by virtue of its function as a sovereign."). Likewise, NEPA has been held inapplicable to the federal government when it seeks to destroy property which it owns, where the only impacts are socio-economic (*see* Comm. to Save the Fox Bldg. v. Birmingham Branch of Fed. Reserve Bank of Atl., 497 F. Supp. 504, 511 (N.D. Ala. 1980) (overruled on other grounds) (holding NEPA inapplicable to the federal government's decision to demolish a property it owned: "when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger" NEPA).

106. The government also has the power to destroy property that is a public nuisance pursuant to its police power and under the doctrine of necessity. In the case of public nuisance, the city does not own the property and therefore is not destroying it pursuant to its rights a property owner. Rather, the city is destroying property that it does not own to protect the public health, safety or welfare pursuant to its police powers. *See* Kmiec, *supra* note 103, at 148–49. The doctrine of necessity is a common law doctrine that permits anyone—private individual or government actor—to destroy private property if necessary to save human life or avert significant property destruction; no compensation is required. *See* Bowditch v. Boston, 101 U.S. 16, 18 (1879) ("At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.").

107. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; *see also* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking.").

108. U.S. CONST. amend. V; *Kelo*, 545 U.S. at 489.

109. *Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined that concept [of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments

Eminent domain can be used by the government both to acquire property needed for infrastructure and buildings to be used by the public, such as highways or courthouses, and to acquire property that will then be transferred to other private owners to use in a way that will benefit the public, such as for a stadium or a downtown business development.[110] In the wake of the Supreme Court's 2005 decision in *Kelo*, the use of eminent domain for this latter reason, known as economic redevelopment, has been the subject of much debate in the courts, academic literature, and mainstream media.[111] While the *Kelo* decision confirmed that economic redevelopment still satisfies the requirement of "public use" under the Fifth Amendment, some states have narrowed what types of uses will be considered to fulfill a "public use" under state law.[112] However, even under these narrowed understandings

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in this field."). The scope of the government's eminent domain power is thus linked to the scope of the police power: as long as the end goal of the government's purpose falls within the broad scope of its police power (to act in furtherance of the public health, welfare or safety), then use of eminent domain for that purpose is permissible. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power . . . . This principle admits of no exception merely because the power of eminent domain is involved.").

110. *Kelo*, 545 U.S. at 483–84 (noting that the City of New London's plan for economic redevelopment would create more jobs and increased tax revenue for the city, which thus satisfied the public use requirement under the Fifth Amendment). This latter type of public use is known as economic redevelopment. Definitions of "economic redevelopment" vary, but one authority has succinctly described economic redevelopment as the "improvement of an area that was developed at some time in the past but presently suffers from real or perceived physical deficiencies such as blight or environmental contamination or is developed for uses that have become obsolete or inappropriate as a result of changing social or market conditions." *See* AM. PLANNING ASS'N, POLICY GUIDE ON PUBLIC REDEVELOPMENT (2004), *available at* https://www.planning.org/policy/guides/pdf/publicredevelopment.pdf.

111. *See* Michael Allan Wolf, *Hysteria versus History: Public Use in the Public Eye*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT AND EMINENT DOMAIN 15–24 (Robin Paul Malloy ed., 2008) (discussing the reaction in the media and state legislatures in the aftermath of the *Kelo* decision); *see also Kelo*, 545 U.S. at 489 (foreshadowing the debate that would be raised by its decision: "[T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.").

112. *See* SINGER, *supra* note 52, at 744 ("While many state supreme courts have continued to interpret their state constitutions in a manner consistent with the federal interpretation in *Kelo*, an increasing number of state supreme courts have adopted a different path, interpreting their state constitutional 'public use' requirement more stringently." (footnote omitted)); *see also* Elisabeth Sperow, *The* Kelo *Legacy: Political Accountability, Not Legislation, is the Cure*, 38 MCGEORGE L. REV. 405, 418–21 (2007) (describing the post-*Kelo* state legislation passed in forty-seven states curtailing the use of eminent domain). Even before the *Kelo* decision, some states were narrowing what would serve as a permissible public use under state law for the exercise of eminent domain. *E.g.*, Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 786–87 (Mich. 2004) (overruling precedent and holding that "a generalized economic benefit" is insufficient under the Michigan constitution to justify the use of eminent domain to transfer property to a private entity).

of "public use," state and local governments still retain a fairly expansive ability to acquire property using eminent domain.[113]

Once property is acquired using eminent domain, the acquiring government becomes the owner of the property, with the owner's right to destroy. Thus, the government may demolish any existing structures on the property, either in preparation for reuse for other purposes under city ownership or to make the property more marketable for transfer to a private party.[114] Although a government that acquires ownership of property through eminent domain may still be subject to some of the general limitations on the right to destroy discussed in Section II(A), in many cases, those limitations are less stringent than they would be for a private owner. For example, when the government acquires property through eminent domain, any conservation easements existing on the property can be extinguished, with payment of just compensation.[115] Similarly, a government entity acquiring property by eminent domain may not be subject to local or state historic preservation statutes, unless it voluntarily chooses to comply with such laws.[116]

2. Tax Lien Foreclosure

Tax lien foreclosure is a procedure available to local governments after a property owner has failed to pay property taxes.[117] The precise mechanics of

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113. *See* Sperow, *supra* note 112, at 421–22 (citing a study showing that local governments have exercised the power of eminent domain two-and-a-half times as often in the one year after the *Kelo* decision than they did in a four-year period prior to *Kelo*).

114. Alternately, when acquiring property by eminent domain and then transferring to private owners, the government can limit the scope of the future private owner's right to destroy by including covenants as well as recorded development agreement between the government and private developer.

115. Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements*, 2007 UTAH L. REV. 1039, 1082 ("It is essential that government have the ability to assert its eminent domain power to take conservation easements for compensation. This will allow communities to inject flexibility into past plans imposed on them by private organizations and to address through a public process the new communal challenges that inevitably will develop in the future. Eminent domain has long provided the collective with a necessary tool to remedy errors of the past.")

116. *See* Stewart v. Fed. Reserve Bank of Atl., New Orleans Branch, No. Civ.A. 00–3183, 2000 WL 1681235, at *2 (E.D. La. Nov. 7, 2000) (overruled on other grounds) (holding that while Section 106 of the National Historic Preservation Act requires that a government property owner consider the views of the Advisory Council on Historic Preservation before demolishing a building eligible for inclusion in the National Register, the government owner "still had the ultimate authority to decide that demolition was necessary").

117. *See* PAUL C. BROPHY & JENNIFER S. VEY, BROOKINGS INST., SEIZING CITY ASSETS: TEN STEPS TO URBAN LAND REFORM 10–11 (2002), *available at* http://www.brookings.edu/~/media/research/files/reports/2002/10/metropolitanpolicy%20brophy/brophyveyvacantsteps.pdf. While there is a high correlation between vacant and deteriorated

tax lien foreclosure vary by jurisdiction, but typically the process requires notice to the owner(s) and other lienholders of record of the delinquency and foreclosure, holding of a sale, a statutory right of redemption for the owner for a limited period of time post-foreclosure, and a final decree of title in the successful bidder at the foreclosure sale.[118] If there are no third party bidders at the sale, then the government receives title to the property, extinguishing both the original owner's property interest as well as any prior private liens and interests in the property.[119] Although government ownership is often the immediate result of the tax lien foreclosure process, the ultimate goal of the process is to return the property to tax-paying status (i.e., private ownership) so that it can once again serve as a source of local revenues.[120] When a

properties and tax delinquency, tax lien foreclosure is available regardless of the physical condition of the property. *Id.* at 10 ("The correlation between abandoned properties and those that are chronically tax delinquent is high.").

118. William Weber, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1617, 1620 (2013). While notice requirements and statutory redemption periods are intended to protect property owners' due process rights, critics have contended that they result in the tax lien foreclosure process becoming "lengthy, cumbersome, and filled with doubts," and being a less effective tool for local governments to acquire property than it could be. BROPHY & VEY, *supra* note 117, at 11 (noting that in some states, tax foreclosure can take up to seven years); *see also* FRANK ALEXANDER, LAND BANKS AND LAND BANKING 14–15 (2011), *available at* https://www.downtowndevelopment.com/pdf/LB_Book_2011_F.pdf. "In many jurisdictions, foreclosure laws fail to provide either an efficient or effective enforcement mechanism" because of a lengthy process, constitutional deficiencies in notice procedures, use of nonjudicial proceedings, and difficulty with obtaining a clear title because of multiple owners and heir properties with no clear records. *Id.* at 25–26. A few states have reformed their tax foreclosure process to streamline the process in the case of vacant or abandoned properties. *Id.* at 30.

119. James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 73 (2008) ("The super-priority nature of the property tax lien allows tax foreclosure to clear out not only the ownership interests, but also any existing private lien interests in the subject property."). A large number of properties that go through the tax foreclosure process end up being owned by either the foreclosing government entity or a designated quasi-governmental agency, such as a land bank. *See* Weber, *supra* note 118, at 1626–27 (citing statistics for Hamilton County, Ohio in 2011, indicating that, of the 428 properties offered at auction through the tax lien foreclosure process, only 81 received bids from third parties (and of these, only 73 were actually successfully transferred to third parties; the remaining 339 properties became government-owned)).

120. *See* Kelly, Jr., *supra* note 119, at 65 ("The foreclosure of property tax liens performs an essential economic function by reconnecting underutilized properties to the real estate market."). In the case of properties which have accumulated multiple years of tax delinquencies, where the liens exceed the property's fair market value, returning the properties to a productive use may require that the government forgive outstanding tax liens, or the property will not be able to be transferred on the open market. *See* Alexander, *supra* note 118, at 30 (suggesting that tax lien foreclosure laws be changed "to permit either the minimum bid to be reduced to a lower amount" than the outstanding delinquent taxes and associated interest and penalties, or the property be automatically sold to a public agency such as a land bank, which is then authorized to extinguish any outstanding taxes on property it acquires).

government acquires ownership of property through a tax lien foreclosure sale, it acquires a broad right to destroy any structures existing on that property, because the tax lien foreclosure, if conducted properly, extinguishes all prior interests in the property.[121]

3. Land Banks and Redevelopment Agencies

The scope of a government owner's right to destroy is broader than that of private owner's not only because of the unique mechanisms by which the government can acquire property, such as eminent domain and tax lien foreclosure, but also because of the additional forms of holding ownership available to the government. When a government acquires ownership of property—whether through eminent domain, tax lien foreclosure, voluntary acquisition, or other means[122]—it may acquire ownership as a government entity (i.e., as a city, county or state, or agency thereof), or ownership may be acquired by an associated governmental or quasi-governmental entity. Two of the most prevalent forms of alternative ownership are land banks and redevelopment agencies.

a. Land Banks

Land banks are governmental or quasi-governmental entities that act as the central depository for vacant, abandoned, tax delinquent, or public nuisance properties.[123] By acting as the title holder for all excess government-owned property within a particular jurisdiction, land banks can simplify the process of returning the properties to "productive use," through means such

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121. *See* Kelly, Jr., *supra* note 119, at 72–75.

122. Eminent domain and tax lien foreclosure are the most common mechanisms unique to government owners for the acquisition of property. However, the government also may acquire property by a number of other, less common legal mechanisms that are uniquely available only to government owners, as opposed to private owners. These include civil and criminal forfeiture proceedings against property used in a criminal enterprise or acquired with the assets of illegal activities, *see* J. Donald Cole & Robbie J. Dimon, *Risky Business: Dealing with Forfeiture Titles*, 12 PROB. & PROP. 8, 10 (1998) (discussing the risks in transactions involving government-owned property acquired through forfeiture laws), and escheating to the state when a citizen dies intestate and without heirs, *see* Annotation, *Necessity of judicial proceeding to vest title to real property in state by escheat*, 23 A.L.R. 1237 (1923) (stating the majority rule that title automatically vests in the state upon the death of a citizen intestate and without heirs; no judicial proceeding is required).

123. *See* Darren M. Belajac, *The Pennsylvania Legislature Takes a Significant, Though Insufficient, Step Toward Addressing Blight and Tax Delinquency: House Bill 712, the Land Bank Act*, 49 DUQ. L. REV. 79, 82 (2011) (stating that "[l]and banks can be created by state statute, by intergovernmental agreement, or as part of an existing governmental agency," and discussing the Pennsylvania law authorizing land banks in that state); Alexander, *supra* note 118, at 10.

as rehabilitation, re-sale, demolition, assembly with other parcels, or reuse.[124] There are approximately 150 land banks in operation in the U.S. as of 2012.[125]

Land banks have various powers, depending on specific state enabling statute, but they are typically endowed with the power to acquire, destroy and transfer property.[126] Since land banks are governmental or quasi-governmental agencies, and government-owned property produces no tax revenue, the primary goal of most land banks is to return properties it acquires to productive use, typically via transfer to private ownership, where it can once again contribute to tax revenues.[127] However, until that goal can be accomplished, properties are held in ownership by the land bank, which must make decisions about the property that both maximize the likelihood it can be transferred to private ownership and minimize the costs to the land bank while it remains under its ownership. Destruction of the vacant, abandoned and often deteriorating buildings located on properties acquired by the land bank often is seen to accomplish both of these goals:[128] by exercising its right to destroy, a land bank can transform a property that was a negative liability, costing the government money to maintain and bringing in no revenue, into a positive asset, either by being returned to the property tax rolls through conveyance to a new owner once cleared of the dilapidated or unused structures, or by being used in ways that contribute to the well-being of local residents, such as being converted to a green space, park or community garden.

b. Redevelopment Agencies

Like land banks, redevelopment agencies provide governments with an additional means of holding ownership to property. Redevelopment agencies, or redevelopment authorities, are entities authorized under state law to

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124. Jon Hurdle, *Philadelphia Raises Stakes with Plan to Reverse Blight*, N.Y. TIMES, Sept. 22, 2013, http://www.nytimes.com/2013/09/23/us/philadephia-hopes-a-land-bank-will-combat-urban-blight.html?_r=0: ("In Philadelphia, many individuals are deterred from buying tax-delinquent properties by having to deal with a maze of public agencies or with difficulties in finding the private owners. The land bank would take control of vacant, publicly owned properties from four city agencies, leaving the city in a better position . . . .").

125. Bryan Chambers, *Land Bank Plays Role in Improving City Housing*, HERALD-DISPATCH (Nov. 27, 2013), http://www.herald-dispatch.com/news/x1584262133/Land-Bank-plays-role-in-improving-city-housing.

126. Sorell E. Negro, *You Can Take It to the Bank: The Role of Land Banking in Dealing with Distressed Properties*, 35 ZONING & PLAN. L. REP., Sept. 2012, at 1, 3.

127. Alexander, *supra* note 118, at 50.

128. *Id.* at 59 (noting that destroying a vacant property owned by the city for use as a public park will not produce any tax revenues, but "could play a central role in both the creation of a sustainable neighborhood community and long-term stabilization of surrounding properties and their tax-generating status").

acquire, assemble and dispose of property in a specific urban area where disinvestment by the private market has occurred.[129] The particular powers of redevelopment agencies vary by state, but many are authorized to acquire property through eminent domain, as well as voluntary acquisition.[130] Redevelopment agencies are generally tasked with the goal of re-stimulating investment in blighted areas where private investment has been unable or unwilling to go; by using public resources to create economic activity, the expectation is that private investment—in the forms of new businesses, jobs and residents—will also be stimulated, and the public investment in redevelopment will eventually pay for itself.[131] Redevelopment agencies are often specifically tasked with stimulating investment in blighted areas; destroying property is often percieved as implicitly or explicitly necessary to achieve this goal.[132]

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129. *See, e.g.*, MASS. GEN. LAWS ch. 121B, § 3 (2015) (authorizing local governments to establish redevelopment authorities to redevelop blighted or substandard areas in a way that achieves stated socio-economic goals); *see also* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 471 (2010) ("With the 1949 United States Housing Act, Congress, for the most part, left it up to each state to devise its own policies regarding the designation of redevelopment areas . . . .").

130. *See, e.g.*, MASS. GEN. LAWS ch. 121B § 11 (2015) (providing that Massachusetts redevelopment agencies are authorized to use eminent domain to acquire property); *see also* Cal. Redevelopment Ass'n v. Matosantos, 53 Cal.4th 231, 246 (2011) ("While redevelopment agencies have used their powers in a wide variety of ways, in one common type of project the redevelopment agency buys and assembles parcels of land, builds or enhances the site's infrastructure, and transfers the land to private parties on favorable terms for residential and/or commercial development.").

131. *See* AM. PLANNING ASS'N, POLICY GUIDE ON PUBLIC REDEVELOPMENT (2004), *available at* http://www.planning.org/policy/guides/adopted/redevelopment.htm ("Given traditionally distinguishable skill sets, and the mixed experience of success and failure of governments acting as redevelopers, it has become increasingly popular for governments to act in concert with private developers to effectively take advantage of the best that both have to offer. These consortiums, most commonly referred to as public/private partnerships, have become an important vehicle by which redevelopment is implemented."). However, redevelopment agencies have been criticized for providing too many benefits at too low a cost to private developers and relying too heavily on an "if-you-build-it,-they-will-come" mentality. *See* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 259 (1989) (discussing the tendency of cities to engage in "if-you-build-it,-they-will-come" redevelopment projects); *see also* MIKE DAVIS, DEAD CITIES 144 (2002) ("Downtown redevelopment is an essentially infinite game, played not toward any conclusion or closure, but toward its own endless protraction.").

132. *See, e.g.*, *Westmoreland County Demolition Program Application*, WESTMORELAND CNTY., http://www.co.westmoreland.pa.us/DocumentCenter/View/1221 (last visited Jan. 19, 2015) ("The primary objective of Westmoreland County's demolition program, administered by RAWC [Redevelopment Authority of Westmoreland County] is to reenergize County neighborhoods through blight elimination while enhancing the health, safety and general welfare of the community."); *see also About Us*, READING REDEVELOPMENT AUTH., http://readingredevelopmentauthority.org/about/ (last visited Jan. 19, 2015) ("Established in 1950, the Reading Redevelopment Authority has evolved over the past six decades. Originally

III. THE NORMATIVE BASIS FOR THE DIVERGENT SCOPE OF THE RIGHT TO DESTROY

The divergent scope of the right to destroy presents a paradox: an individual private owner has a relatively narrow right to destroy, while an owner representing many individuals—the government—has a relatively broad right to destroy. This Part suggests that the paradox can be understood by recognizing that the difference between the two categories is not simply quantitative, but also qualitative. Rather than the mere result of the cumulative effect of numerous, unrelated legal rules, the divergent scope of the right to destroy is in fact both doctrinally coherent and normatively desirable. This Part draws on relational and social-obligation theories of property law to explore the differences between government and private property owners of property,[133] and offers three justifications for why the

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more of a demolition program, the agency's focus has shifted from preservation to rehabilitation to development.").

133. The relational theory (or more accurately, theories, since there are a range of discrete theories that fall within this rubric) of property law views property rights in the context of the interdependent social relationships; it has been advanced by scholars such as Carol Rose, Edward Penalever, and Laura Underkuffler. *See* Gregory Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) ("The common conception of property as protection of individual control over valued resources is both intuitively and legally powerful . . . . However, internal tensions within this conception and the inevitable impacts of one person's property rights on others make it inadequate as the sole basis for resolving property conflicts or for designing property institutions. For those tasks, we must look to the underlying human values that property serves and the social relationships it shapes and reflects."); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) ("[A]s a practical matter, property rights have always overlapped social claims with individual ones, just as they have always mixed stability with change over time."); Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 129 (1990) ("I argue that property, in the historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective. This tension—now seen as something external to the concept of property—was in fact internal to it."). The social-obligation theory of property law is kindred to relational theories, in that it also suggests property laws should reflect our interdependence and should be adjusted to reflect the rights and responsibilities owners have with respect to their property. *See* Gregory Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753–58 (2009). Both relational and social-obligation theories recognize that "property does not have a static definition but rather reflects relationships between people, and between government and individuals, that have changed over time." Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003). The environmental movement and scientific advances recognizing the interconnectedness of the individually owned parcels have also led legal scholars to endorse a relational or communal understanding of property law. *See, e.g.*, FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 14, at 20 (acknowledging that property is an individual right, but "only derivatively": individuals possess property rights "only to the extent that society benefits by recognizing those rights . . . . If draining a wetland appears harmful to the community, then why should society authorize it?").

government should have a broader right to destroy than private owners:[134] iteration effects caused by private owners' actions; the communal responsibility of government owners; and limitations on government's ability to acquire property.

A. Iteration Effects

The principle that one cannot use one's property in a way that causes harm is a cornerstone of property law.[135] While we typically think of harm as occurring as a result of a discrete action by an identifiable owner or owners, in the case of iteration effects, the harm occurs when the same action repeated over and over again by numerous individual actors results in an unjust or harmful outcome, despite the fairness of the rules permitting each individual action.[136] Iteration effects can thus be understood as a type of externality; if enough individuals engage in the particular action, the cumulative negative impacts are imposed on society and not fully borne by the individual actors engaging in the activity. To minimize such iteration effects, the initial rules applying to individual actions should be adjusted to account for the negative cumulative effect.[137]

Examples of iteration effects, and the legal responses to them, are plentiful in land use and environmental law. For example, sprawl has been described as "a large-scale phenomenon, but it happens one household at a time. That is, sprawl is the aggregate result of many separate individual householders each deciding to live in the suburbs rather than inner cities."[138] The cumulative effect of the numerous individual actions in the case of sprawl

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134. While the focus of this paper is the government's right to destroy and why it is appropriately broader than that of private owner, as Professor Strahilevitz has noted in his qualified defense of the right to destroy, there may be arguments that private owners' right to destroy is too narrow. *See* Strahilevitz, *supra* note 5, at 852–53 (suggesting that certain expressive values of owners would be served by a broader right to destroy). While a full exploration of whether and how a private owner's right to destroy could be expanded is beyond the scope of this Article, the author believes that if the owner-as-steward model is taken seriously with respect to both public and private owners, there may be strong arguments that a private owner's right to destroy, while remaining generally narrower than that of government owners, should be selectively expanded where doing so would advance public policy goals such as sustainability.

135. The do-no-harm principle justifies numerous property law doctrines and regulatory schemes, ranging from nuisance to environmental regulations to zoning laws. Where scholars differ, however, is on what should be considered "harm"; as Eric Freyfogle has noted, "[a] land use isn't harmful in the abstract." FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 14, at 112.

136. *See* McCaffery, *supra* note 6, at 82.

137. *Id.*; *see also* Freyfogle, *supra* note 16, at 10,157–58.

138. Zoë Prebble, *Anti-Sprawl Initiatives: How Complete is the Convergence of Environmental, Desegregationist, and Fair Housing Interests?*, 30 BUFF. PUB. INT. L.J. 197, 202 (2011–12).

produces a myriad of negative effects, such as increased infrastructure cost, ecosystem degradation and fragmentation, and socio-economic inequality.[139] The degrading of the environment through activities such as hillside construction or paving of impermeable surfaces is another example of activities which produce iteration effects: although one house on a hillside or one paved parking lot in a neighborhood may have de minimis effect on erosion or storm water runoff, the accumulation of many hillside houses or paved parking lots can cause significant negative environmental impacts, such as increased flooding and water pollution.[140]

In the context of private owners and the right to destroy, although a particular individual owner's exercise of the right to destroy does not always raise significant policy concerns, the repeated exercise of the right to destroy by many individuals acting without consideration of cumulative effects can have significant negative impacts. For example, in historic districts, the demolition of one older building may not itself significantly diminish the historic character of the area; however, the incremental loss of many older buildings can result in the area no longer receiving historic designation protection, thereby disincentivizing other owners in the area from preserving their properties, since tax credits and other benefits of historic district designation will be lost.[141] Furthermore, the iteration effects of private owners' exercise of the right to destroy are often multiplied by what has been termed "contagion effects": when others in a similar position to the owner who has exercised the right to destroy respond to that action by taking the same action. For example, when teardowns begin to impact a particular neighborhood there is often a contagion effect, as owners who had not planned to sell their property do so, both because the character of the neighborhood has changed and because of the increased property values.[142] As a result, not only does sustainability suffer, as buildings are destroyed

139. REID EWING ET AL., SMART GROWTH AMERICA, MEASURING SPRAWL AND ITS IMPACT (2002), *available at* http://www.smartgrowthamerica.org/documents/MeasuringSprawl.PDF.

140. Freyfogle, *supra* note 16, at 10,167–68.

141. *See* Hous. & Cmty. Dev., *Owners of Historic Properties*, CITY OF TUCSON, http://www.tucsonaz.gov/hcd/owners-historic-properties (last visited Jan. 11, 2015) ("At least 51% of the properties within a district's boundaries must contribute to the historic district—meaning, the properties must somehow contribute to the history, architecture, and overall character of the historic district. Contributing properties are eligible for tax breaks . . . . A NRHP [National Register of Historic Places] Historic District may lose its designation if its number of contributing historic properties falls below 51%.").

142. *See* Elizabeth Sappenfield, *Dealing with Development Pressure: Preservation Strategies for Desirable Neighborhoods*, PRES. N.C. (Fall 2008) ("While one house may not seem like a big deal, the first teardown usually starts a domino effect, proving its feasibility and breaking the ice for others.").

before the end of their usable life cycle,[143] but the community suffers economically, through the loss of more affordable smaller "starter homes," and the increased property taxes that result from higher property values.[144]

B. Communal Responsibilities

The motivations and responsibilities of private owners and government owners are fundamentally different.[145] Private owners typically act to maximize the value of their property,[146] with no duties to other parties except to avoid using their property in a way that causes harm.[147] A government owner, in contrast, has a duty to act in the public interest when making

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143. Buildings are often said to have a life cycle. *See* Daphna Lewinsohn-Zamir, *The "Conservation Game": The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 737–41 (1997) ("Buildings are exhaustible and non-renewable. They have a limited 'life.' This life may be lengthy, but its duration is finite."). Destroying a building before its life cycle comes to a close fails to recognize the fact that the "[t]he greenest building is the one already built." Carl Elefante, *The Greenest Building is . . . One that is Already Built*, 21 FORUM J. 26, 32 (2007), *available at* http://www.ipedconference.com/referencematerials/Article_The_Greenest_Building_Is_One_That_Is_Already_Built_by_Carl_Elefante_AIA_LEED_AP_Forum_Journal_Summer_2007.pdf.

144. *See Teardowns*, AM. PLANNING ASS'N, PAS QUICKNOTES NO. 9, at 1 (2007), *available at* http://www.planning.org/pas/quicknotes/pdf/QN9.pdf (discussing the social, economic and physical impacts of teardowns).

145. The different roles of government and private actors are often highlighted by those concerned about privatization of government. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privitzation*, 116 HARV. L. REV. 1285, 1295 (2003) (discussing arguments by commentators opposing privatization of "inherently governmental" services such as adjucation, policing and education on the grounds that these are "functions that go to the heart of . . . the state's inherent responsibilities in a liberal democratic society.").

146. The value that private owners seek to maximize is typically monetary. However, private owners may also seek to maximize non-monetary values, such as artistic expression. Thus, in the context of architectural innovation, an argument might be made that the positives of private owners exercising their right to destroy outweighs the negatives if it is understood as a type of creative destruction. *See* ROBERT D. KAPLAN, AN EMPIRE WILDERNESS: TRAVELS INTO AMERICA'S FUTURE 350 (1998) (too narrow a right to destroy, "too tightly held, might stultify us, turning us rigid and fragile and likely to crack apart someday, like Rome"); Arianna Stassinopoulos Huffington, *Picasso: Creator and Destroyer*, 261 ATLANTIC MONTHLY 37, 38 (June 1988), *available at* http://www.theatlantic.com/past/unbound/flashbks/picasso/destroy.htm ("The urge to destroy is also a creative urge."); *see also* BYLES, *supra* note 3, at 159 ("If you live long enough, you'll see all your buildings destroyed. After all, it's only the idea that counts.") (quoting architect Louis Sullivan). Other commentators, however, have noted that destruction does not necessarily lead to architectural innovation. *See* DAVIS, *supra* note 131, at 91 (noting that "postmodern philosophers (who don't have to live there) delight in the [Las Vegas] Strip's 'virtuality' or 'hyperreality,'" but pointing out that "most of Clark County is stamped from a monotonously real and familiar mold").

147. This duty is reflected most obviously in the common law principle of nuisance, but also underlies a wide range of zoning, environmental and other regulations that regulate what actions private owners can take with respect to their property.

decisions about its property and to promote the public health, safety and welfare.[148] While defining "public interest" and determining whether government actions further it may be a matter of debate, government property owners must justify their decisions with reference to the collective welfare.[149]

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148. *See* Eric T. Freyfogle, *Goodbye to the Public-Private Divide*, 36 ENVTL. L. 7, 20 (2006) ("Private ownership can protect privacy, provide incentives for economic enterprise, and add ballast to civil states. Public ownership, on the other side, is better able to consider the long-term and can assess land uses in broader spatial contexts. Government can resist market pressures to misuse land, and it can manage lands to provide an array of public goods that make little economic sense for individual owners."). The duty of government property owners to act in a way that promotes public welfare reflects an undercurrent in property law in which the owner is viewed as a steward. While the owner as steward model of property law has received less attention historically than the owner as master model, it has a long tradition in legal and non-legal literature. *E.g.*, FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 14, at 141 ("Perhaps we should embrace a notion that landowners are stewards, with clear rights to use but only limited rights to degrade and consume."); SAX, *supra* note 6, at 59 ("The owner-as-steward remains the law's awkward little secret."); Roberta Rosenthal Kwall, *The Author as Steward "for Limited Times"*, 88 B.U. L. REV. 685, 703–04 (2008) (book review) (discussing the owner as steward model in the context of intellectual property law and noting that the concept has roots in theological sources, as well as philosophers like Locke); *see also* James Bernard Murphy, *Equality in Exchange*, 47 AM. J. JURIS. 85, 113 (2002) ("Both Aristotle and Thomas Aquinas understand property ownership as a kind of trust: civil law permits private ownership on the condition that it serve the common good of the community. Each property owner is a kind of trustee who has a duty of justice to ensure that his property meets the needs of his fellow citizens.").

The stewardship duties of the government as a property owner are particularly evident in the operation of the public trust doctrine, which provides that the waters of the state are a public resource owned by all citizens and are held by the government in trust for all to use. *See* MICHAEL C. BLUMM & MARY C. WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW: CHAPTER 1, at 4 (2013) ("The [public trust doctrine] requires governmental trustees to manage the resources that are in the corpus of the trust as a long-term steward for the benefit of both present and future generations."). Originally applied to only the navigable waters of the state and only traditional uses of those waters by the public, such as fishing, the public trust doctrine has been expanded in many states to both cover other types of resources—such as dry streambeds, marine life, and historic battlefields—as well as confer protection on a variety of uses by the public, not just the traditional fishing or navigational activities. *See id.* at 1, 7.

149. While governments are tasked with acting in the public interest, defining the "public interest" is a complicated matter. For example, local government land use decisions are often said to be motivated by either "homevoters," i.e., middle-class (often white) residential property owners, or the "growth machine," i.e., real estate development interests, rather than by true, objective interests of the public as a whole. FRIEDEN & SAGALYN, *supra* note 131; DAVIS, *supra* note 131; Been et al., *supra* note 18, at 232–33. Extensive scholarship also exists discussing how regulatory agencies are susceptible to capture by the private interests which they are supposed to regulate. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–85 (2006); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 34 n.95 (2010); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1390 (2013). Furthermore, even governments acting to promote a more inclusive public interest can miscalculate the "public interest." *See, e.g.*, FRIEDEN & SAGALYN, *supra* note 131, at 29 ("Whatever the motivation, the poor and the minorities were the leading victims of the highway and renewal programs."); JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE

To promote the public welfare, government owners need the ability to exercise the right to destroy in circumstances with no analogy to private owners. For example, in "legacy cities"[150] such as Buffalo, Detroit and Baltimore, there is a significant imbalance between the inventory of housing stock and commercial and industrial properties (large) and the demand for such properties (low).[151] The governments in these cities have often acquired ownership of a significant number of these vacant properties, either involuntarily, through tax lien foreclosure,[152] or through voluntary acquisition, such as from donations to land banks.[153] To prevent such properties from becoming public nuisances, as well as to ensure their marketability to potential future private owners, a government owner must expend funds on the building's upkeep and maintenance, as well as the provision of police and fire services.[154] As a result, government resources are

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POLITICAL ECONOMY OF PLACE 168–69 (1987) (describing the legacy of the National Housing Act of 1949 and subsequent urban renewal of the 1950s–60s as both a policy failure and "fiscal loser:" "There seems to be little disagreement about the devastating effects of urban renewal on the poor and minorities. Although improving the housing of the poor was ostensibly the program's key goal, . . . [i]n reality, urban renewal destroyed more housing . . . than it created." (citations omitted)).

150. ALAN MALLACH & LAVEA BRACHMAN, LINCOLN INST. OF LAND POLICY, REGENERATING AMERICA'S LEGACY CITIES 2 (2013), *available at* https://www.lincolninst.edu/pubs/dl/2215_1582_Regenerating_Americas_Legacy_Cities.pdf. The term "shrinking cities" is also commonly used to describe older, industrial, typically East Coast or Mid-West cities that have experienced significant population decline and economic contraction since peaking in the mid-twentith century. *See Shrinking Cities or Dying Cities*, MIDWESTERNER (Dec. 1, 2009), http://globalmidwest.typepad.com/global-midwest/2009/12/are-these-cities-shrinking-or-just-dying-.html.

151. MALLACH & BRACHMAN, *supra* note 150, at 4–5.

152. *See, e.g.*, William Weber, Comment and Casenote, *Tax Foreclosure: A Drag on Community Vitality or A Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1620 (2013) (citing statistics for Hamilton County, Ohio in 2011, indicating that of the 428 properties offered at auction through the tax lien foreclosure process, only 81 received bids from third parties and of these, only 73 were actually successfully transferred to third parties; the remaining 339 properties became government-owned).

153. *Land Bank*, SHELBY COUNTY, TENN., http://shelbycountytn.gov/index.aspx?nid=407 (last visited Jan. 19, 2015) (noting that the Shelby County, Tennessee Land Bank owns over 4500 properties, the majority of which were acquired through tax delinquency, with the rest having been originally acquired voluntarily for public purposes but which are now surplus).

154. While such upkeep may be relatively basic, such as boarding windows and yard maintenance, it is nonetheless costly. *See* Williams, *supra* note 12 (noting that it costs Cleveland $27,000 per house annually to maintain abandoned residential properties). Furthermore, because vacant properties are often at heightened risk for criminal activities, ranging from gang use to arson, police and fire services are often disproportionately expended with respect to these properties. *See* Dan Immergluck, Yun Sang Lee & Patrick Terranova, Local Vacant Property Registration Ordinances in the U.S.: An Analysis of Growth, Regional Trends, and Some Key Characteristics 6 (Aug. 12, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130775 (noting that vacant or blighted properties typically create negative social impacts on nearby residents, such as increases in crime

diverted away from other needs, such as providing adequate municipal services to residents, investing in development to attract new tax sources, or fulfilling fiscal obligations, such as long-term debt service and pensions. Faced with limited resources and ever-shrinking budgets, governments can often best fulfill their obligation to serve the public by exercising their right to destroy in these circumstances.[155] If government owners do not have the ability to destroy property that may be draining government resources—and which may have come into government ownership involuntarily, because no one else wanted it, as with tax lien foreclosure—it is not simply the government as owner that suffers the costs, but the community at large.[156]

The need for a broad right to destroy for government owners to promote the public welfare can also be seen in the context of the government's planning role. When the government has acquired property for which there is

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and vagrancy); *see also* FUNDERS NETWORK FOR SMART GROWTH & LIVABLE COMMUNITIES, VACANT PROPERTIES AND SMART GROWTH: CREATING OPPORTUNITY FROM ABANDONMENT 5 (2004), *available at* http://www.fundersnetwork.org/files/learn/LCW_4_Vacant_Properties.pdf (citing U.S. Fire Administration statistics that over 12,000 fires in vacant buildings are reported in the U.S. annually, with a total annual cost of $73 million in property damage).

155. *See* Edward L. Glaeser, *Bulldozing America's Shrinking Cities*, N.Y. TIMES ECONOMIX BLOG (June 16, 2009), http://economix.blogs.nytimes.com/2009/06/16/bulldozing-americas-shrinking-cities/ ("The hallmark of declining places is an abundance of infrastructure relative to people. It is therefore particularly foolish to try to save declining places by building *new* infrastructure or homes."); *see also* Stephen Gandel, *Bulldoze: The New Way to Foreclose*, TIME (Aug. 1, 2011), http://business.time.com/2011/08/01/bulldoze-the-new-way-to-foreclose/ (Although "the idea that we are at the point where banks would be better off knocking down houses than reselling them shows there is still something very wrong with the housing market," destruction offers a low-cost solution to the potential long-term impact the glut of bank-owned foreclosed properties could have on the housing market.).

156. *See* Williams, *supra* note 12 ("Cleveland, whose population has shrunk by about 80,000 during the past decade to 395,000, has spent $50 million over the past six years to raze houses, which cost $10,000 each to destroy, compared with $27,000 annually to maintain."); *see also* Ben Austen, *The Death and Life of Chicago*, N.Y. TIMES, May 29, 2013, http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html?pagewanted=all ("[T]he numbers on these blocks simply don't add up, and no amount of good intentions is going to change that any time soon. Since 2009, the city has funneled $168 million from the federal Neighborhood Stabilization Program into the purchase of 862 vacant foreclosures, fixing up 804 of them, at an average cost of $110,000. It sank $350,000 into the repairs of one home, but even at the asking price of $105,000, no buyers could be found. So far only 91 of the units have sold.").

Furthermore, even where the government-owned property is not draining public resources, demolition may offer an opportunity for alternate uses and increased revenue to the public coffers. *See* Williams, *supra* note 12 (quoting the president and chief executive of the Federal Reserve Bank of Cleveland: "It is not the house itself that has value, it is the land the house stands on . . . . This led us to the counterintuitive concept that the best policy to stabilize neighborhoods may not always be rehabilitation. It may be demolition."). On the factors that contribute to the value of particular parcel, see FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 14, at 94 (citing the activities of the surrounding community, along with the land's natural features and the efforts of the owner to improve the land, as relevant factors).

no private demand, whether a vacant big-box store in an outer suburb or several abandoned inner city rowhouses, the government needs the ability to use that property in furtherance of public policy goals. For example, if a government wants to discourage sprawl, it may decide that demolition of an abandoned surburban big-box store, rather than reuse in its current form, better enables it to focus on investing in intact and compact neighborhoods elsewhere in the jurisdiction.[157] Similarly, past planning decisions may be recognized as mistaken or no longer relevant—such as when freeways blocking waterfront access downtown impede the area's economic vitality or when the inventory of properties vastly outsizes the demand for such properties. In such cases, the government, as the entity responsible for land use planning and organization on a city-wide, as well as parcel-specific level, needs the ability to correct for past mistakes and account for changed circumstances.[158]

In addition to its duty to promote the public welfare that distinguishes government owners from private owners, government owners are accountable for their actions in a way that private owners are not: the politicians making the decisions about government-owned property can be voted out of office. While community members may be able to indirectly influence private owners' decisions about the exercise of their right to destroy—such as through testifying at public zoning board or historic commission hearings, or by lobbying their state or local legislature to secure passage of historic preservation or environmental protection regulations, or doing so directly through an initiative or referendum—there is nothing analogous to elections as a check on government owners' actions. While recognizing that elections may not be as effective in practice as in theory as a means of holding government actors accountable for their actions,[159] the

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157. *See* Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 510–11 (2012) ("Placing a library or a community center where a Wal-Mart used to be will only continue to require people to get in their cars in order to participate in civic life . . . . [T]hese spaces can be repurposed into new town centers, traditional main streets, or public open space. In order for such sweeping change to occur, though, it will first be necessary to demolish the existing structures and modify the existing zoning ordinances . . . .").

158. *See, e.g.*, Monica Davey, *An Odd Challenge for Planners: How to Shrink a City*, N.Y. TIMES, Apr. 6, 2011, at A14, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D04E4DF1439F935A35757C0A9679D8B63 ("Actually carrying out [urban consolidation], particularly in a city as vast as Detroit, is like solving a complicated set of interwoven puzzles, as [city planners have] discovered over many long days and some nights poring over thousands of pages of maps and statistics . . . . How to reconfigure roads, bus lines, police districts? How to encourage people—there is no power of eminent domain to force them—to move out of the worst neighborhoods and into better ones?").

159. Scholars such as David Schleicher have argued that local governments in particular lack the kind of competitive democratic process that is seen on the state and federal level. *See* David

potential political repercussions of ill-advised exercises of the right to destroy serves as an additional check on government officials who do not recognize both the rights and responsibilities a government owner has.

C. Limits on Acquisition

The legal limitations imposed on private owners' right to destroy discussed in Section II(A) are intended to address substantive negative impacts of acts of destruction by private owners, such as the loss of historic properties, threats to public health or safety, and environmental degradation. In the case of government owners, many of these same goals can be addressed through limitations on the government's ability to *acquire* property rather than limitations on its right to destroy. While imposing such limits on private owners could be considered invalid restraints on alienation as well as constitutionally problematic, limits on the government's ability to acquire property—such as the public use requirement for eminent domain, notice requirements for tax lien foreclosures and statutory standards in state enabling acts for land banks and redevelopment authorities—indirectly accomplish many of the same goals as constraints on a private owner's right to destroy.

Limits on the government's ability to acquire property, rather than its right to destroy property, allows the government to retain the flexibility to eliminate outdated, under-utilized, and vacant buildings, create the necessary physical space for redevelopment and innovation, and redirect economic resources to best meet the needs of residents, as long as the government has complied with the necessary procedural or substantive requirements for acquisition of property. Whether the government acquires property voluntarily, through sale or donation, or involuntarily, through eminent domain or tax lien foreclosure, limits on acquisition are evident. With regard to voluntary acquisition, specific statutory standards in state enabling laws for land banks and redevelopment agencies often specify what types of properties those entities are authorized to acquire and what means they are

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Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 426 (2007) (arguing that "local elections are very inefficient means of translating voter preferences into government policy. That is, local government does not meet the most basic definitions of democracy—it does not provide voters with the ability to replace incumbents with opponents with different views and to have their views represented in local policies."); *see also* Freyfogle, *supra* note 21, at 20 (noting that government property owners "can and do fall short of the ideal:" "government agencies . . . are buffeted by political winds and have trouble saying no to powerful groups").

permitted to use to acquire them.[160] In the context of tax lien foreclosure, notice and hearing procedural requirements serve as limits on the ability of the government to acquire property.[161] With respect to eminent domain, the public use requirement is the primary substantive limitation on the government's ability to acquire property.[162] Whether the government may become a property owner through eminent domain turns on whether the proposed use for the property is a "public use," the meaning of which was addressed most recently by the Supreme Court in *Kelo v. City of New London*.[163] In *Kelo*, the Supreme Court held that "public use" retains a broad meaning, encompassing any use that serves a public purpose, including those that involve the transfer to a private entity.[164] Numerous states, however, more narrowly define the "public use" requirement under state law, furthering limiting the government's ability to acquire property in those states.[165] For example, some states prohibit the use of eminent domain if the

160. *See, e.g.*, 68 PA. CONS. STAT. ANN. § 2109(f)(1) (West 2014) (prohibiting land banks from acquiring properties outside of the jurisdiction which created them, unless operating pursuant to an intergovernmental agreement); *id.* § 2108 (denying land banks the power of eminent domain).

161. *See* Alexander, *supra* note 118, at 29 (discussing pros and cons of notice and hearing requirements in state tax lien foreclosure laws).

162. In addition to satisfying the public use requirement, the government must also pay "just compensation" to the party from which it is acquiring the property. U.S. CONST. amend. V; *see also* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269–70 (1988) ("The compensation requirement thus serves the dual purpose of offering a substantial measure of protection to private entitlements, while disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes."). The measure of compensation is the market value of the property. DUKEMINIER & KREIR, *supra* note 7, at 1077. The just compensation requirement, however, provides less of a check on a government's use of eminent domain than the public use requirement because the cost of acquiring the property is either ultimately borne by taxpayers or because it is funded by outside grants, such as federal funding sources. *See, e.g.*, Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 246–47 (2007).

163. 545 U.S. 469 (2005).

164. *Id.* at 480–81 ("Without exception, our cases have defined [the public purpose] concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."). The scope of the government's eminent domain power is thus linked to the scope of the police power: as long as the end goal of the government's purpose falls within the broad scope of its police power (to act in furtherance of the public health, welfare or safety), then use of eminent domain for that purpose is permissible. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. . . . This principle admits of no exception merely because the power of eminent domain is involved.").

165. *See* Sperow, *supra* note 112, at 418–22 (discussing the state legislative responses to *Kelo* as falling into five general categories: "1) prohibiting the use of eminent domain for economic development; 2) narrowly defining public use; 3) limiting eminent domain to blighted properties; 4) increasing the procedural requirements involved in exercising eminent domain; and 5) creating committees or taskforces to study the issue").

only justification is anticipated tax revenue or job growth, or permit it only for properties that fall within narrow statutorily-prescribed standards for blight.[166] If a government owner fails to satisfy the applicable public use standard—or if it refuses to pay just compensation—it will be prevented from acquiring ownership through eminent domain and thus never be entitled to the property owner's right to destroy.

IV. BALANCING THE GOVERNMENT'S BROAD RIGHT TO DESTROY WITH RISKS OF DESTRUCTION

A broad right to destroy provides government owners with a vital tool to address a wide range of problems: vacant and underperforming properties can be eliminated, the necessary physical space for redevelopment and innovation can be created, and economic resources can be redirected to best meet the needs of residents. However, while the previous Part demonstrated that the government's right to destroy is appropriately broader than that of private owners, there are nonetheless risks posed by its exercise of that right. This Part explores these risks and potential responses to them.

A. Risks of the Government's Broad Right to Destroy

Because destruction is a permanent, cheap and simple solution to many of the issues faced by government owners,[167] there is a risk it may become a default first choice for government property owners who are not checked by the same types of constraints on the right to destroy that private owners have.[168] Although a government owner may be legally entitled to exercise its broad right to destroy, doing so can have negative impacts in a number of policy areas, including sustainability, neighborhood stability, preservation of historic areas, and the availability of affordable housing.

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166. *Id.* The author agrees with other commentators that some of the state law responses to *Kelo* may be problematic because they draw broad strokes in denying local and state governments the flexibility needed to deal with fact-specific situations where eminent domain may, in fact, be appropriate. However, by narrowing the definition of public use—and thereby limiting the government's ability to acquire property—while not disturbing the government's broad right to destroy, these laws illustrate the role limits on acquisition can play in justifying the divergence between private and public right to destroy.

167. These terms are used in a relative sense: while demolition can cost millions and involves complicated planning, it is almost always less expensive and less complex than alternative land use choices. *See* Zale, *supra* note 25, at 86 n.7.

168. *See* Williams, *supra* note 12 ("[D]espite the well-publicized embrace by young professionals of once-struggling city centers in New York, Seattle and Los Angeles, for many cities urban planning has often become a form of creative destruction.").

Exercise of the government's broad right to destroy can negatively impact sustainability because any value existing in a building is permanently lost when the property is destroyed.[169] The value of the property consists of the physical structure, such as the wood and bricks and glass of which the building is constructed,[170] the embedded energy savings that the building offers over the energy of new construction, as well as the property's ability to contribute to the needs of the city through avenues other than destruction, such as reuse, renovation or adaptation. On a larger scale, loss of value can be seen in the numerous examples of cities destroying buildings and neighborhoods that just a few decades later (or even sooner) it then tries to recreate.[171] While a government owner cannot be expected to predict the future, the expenditure of resources and energy rebuilding what it had earlier destroyed is a reminder that simply because destruction is an available option to government owners, it is not necessarily the best option.

The stability of neighborhoods can also be threatened by the government's exercise of its right to destroy. Even in the simplest of scenarios, where no rebuilding is intended after destruction and where the city plans to transfer ownership—such as in side lot and community garden programs run by many land banks[172]—the anticipated economic benefit to the city depends in large part on another private owner or neighborhood group being able to maintain the property. If the new owners do not maintain it, "[t]he subsequent vacant lot leaves dead space in neighborhoods, attracting crime and detracting from

169. The permanent nature of destruction distinguishes it from other sticks in a property owner's bundles of rights. Exercising the right to destroy permanently alters the very nature of property: the property that is destroyed no longer exists. *See* Zale, *supra* note 25, at 100.

170. A few cities have begun to recoup the first type of value—the physical structure—from destroyed property by engaging in deconstruction programs when they decide to demolish property. *Id.*

171. *Id.* at 86–87 (discussing Pittsburgh's demolition of a low-income, but economically stable, neighborhood in Pittsburgh and its replacement with an arena and parking lots during the urban renewal heyday in the 1960s; 50 years later, in 2011, the city demolished the arena and began redeveloping the area with residential uses, retail and office space, along with a new sports stadium, essentially attempting to re-create the type of neighborhood it destroyed half a century earlier). *See also* Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES, Aug. 3, 2011, http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all (quoting Terry Schwartz, director of Kent State University's Cleveland Urban Design Collaborative on the predicted population growth of the U.S. population by 120 million in the next 40 years: "'What happens is one of two things,' she said. 'Either we reclaim the older industrial cities and repopulate. Or we're going to be building new cities, probably not too far from here.'").

172. After a vacant or dilapidated or tax-delinquent property is torn down, a land bank may offer the cleared lot to a neighboring owner at a nominal cost. The land then becomes part of the neighboring parcel and taxes can once again be collected (now, on the enhanced value of the neighboring owner's new, larger parcel of land). *See Demolition and Vacant Lot Reuse*, CUYAHOGA LAND BANK, cuyahogalandbank.org/demolition.php (last visited Jan. 19, 2015).

the cohesiveness of a residential or commercial environment," and requiring the city to continue to incur maintenance costs, albeit likely lower ones than when a structure was on the property.[173] The same scenario can play out on a larger scale when planned redevelopment projects do not materialize, leaving "nothing to show for . . . highly publicized [redevelopment] effort except fields of rubble."[174]

Exercising the right to destroy is often appealing to government owners because it literally makes the problem disappear, leaving a blank slate on which to start over.[175] However, the problem faced by governments exercising the right to destroy is often far more complex than a simple physical structure. Unlike the brick and mortar of demolished buildings, underlying issues such as unemployment, crime, poverty, and lack of

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173. David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1141, 1160 (1999) (noting that demolishing abandoned or vacant properties and leaving a vacant lot may actually exacerbate the quality of life problems (litter, aesthetics, etc.) and potential for criminal activity, because it may take many years for any rebuilding to take place on the property, and if the cleared lot is left untended, problems above may remain even though there are no buildings on the property anymore). *See also* Tim Logan, *Mysterious Firm Bought More than 240 City Properties, Then Did Nothing*, ST. LOUIS POST-DISPATCH (Aug. 25, 2013), http://www.stltoday.com/business/local/mysterious-firm-bought-more-than-city-properties-then-did-nothing/article_32df225a-306d-5584-84ab-0c8313226614.html (describing the purchase of over 200 already dilapidated properties in St. Louis in 2008 and 2009 by a mystery buyer, who has allowed the properties to continue to dilapidate and failed to pay property taxes on them).

174. *See* FRIEDEN & SAGALYN, *supra* note 131, at 43 (describing redevelopment projects in Detroit, Michigan and Newark, New Jersey in the 1950s, where properties were destroyed, but the cities struggled for years to find private market parties interested in redeveloping the land with productive use); *see also* Tony Favro, *US Cities Use Demolition As Planning Tool but Results Are Often Problematic*, CITY MAYORS (May 7, 2006), http://www.citymayors.com/development/demolition_usa.html (noting that the city of Baltimore owns 14,000 vacant lots where buildings were demolished, many of which were originally intended for redevelopment, but nothing has materialized in their place). The author recognizes that in some cases, this outcome may be part of the inevitable, if painful, process of urban change. *See* Tortorello, *supra* note 171 ("'[T]he truth is, Phoenix and Atlanta have their own expiration date. Every city does.'"); *see also* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1445 (2012) (discussing the dissolution of municipal forms of government: "Like abandoned buildings, the dissolution of a city marks urban change—it describes something that has come before and no longer remains—but dissolution does not stop history or end a community. A local government is dead, but all is not ruins and tumbleweeds. Life carries on, with memories mixing into the landscape of a living present.").

175. *See* Brady Dennis, *Banks Turn to Demolition of Foreclosed Properties to Ease Housing-Market Pressures*, WASH. POST (Oct. 12, 2011), http://www.washingtonpost.com/business/economy/banks-turn-to-demolition-of-foreclosed-properties-to-ease-housing-market-pressures/2011/10/06/gIQAWigIgL_story.html ("The bulldozers are merely 'burying the dead.'").

affordable housing cannot be eliminated by a demolition crew.[176] As the "slum clearance" efforts of 1950s and 60s urban renewal demonstrated, eliminating a physical manifestation of urban decay will rarely, on its own, bring better days.[177] Unless something positive is added to the community, the simplicity of destruction may be its greatest weakness: while "[r]emoval of a negative harm is itself a positive achievement, . . . not all positive achievements are equal."[178]

Finally, the government's exercise of its broad right to destroy can raise difficult questions with respect to the provision of affordable housing. A "displacement dilemma" may result if cities are successful in the "goal of creating new uses that generate new tax revenues," since those uses are also likely to displace low-income residents.[179] Thus, a city's exercise of the right

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176. *See* BROOKINGS INST., VACANT LAND IN CITIES: AN URBAN RESOURCE 2 (2000), *available at* http://content.knowledgeplex.org/kp2/kp/facts_and_figures/facts_and_figures/relfiles/bi_pagano_vacant_land.pdf ("attention to regulating and managing vacant land has often resulted in short-term fixes rather than long-term solutions.").

177. *See* Lavine, *supra* note 129, at 469 ("While federal housing and slum clearance policies may have been crafted with the intent of ameliorating the lives of low income families, by the mid 1960s a growing number of people from both sides of the political spectrum had come to the conclusion that urban renewal was a social failure."). Furthermore, the destruction of buildings may merely shift the underlying problems elsewhere in the jurisdiction or to other nearby jurisdictions. *See* Green & Gopal, *supra* note 11 ("[A] study of Buffalo, where 2,814 buildings were knocked down in a five-year span from September 2007 through August 2012, [showed] crime simply shifted away from areas that were cleaned up to less stable areas nearby . . . .").

178. Alexander, *supra* note 118, at 59.

179. *Id.* at 63 (discussing the unintended consequences of land banks which are successful in revitalizing neighborhoods: "When higher-value properties generate market rates and greater tax revenues, providing affordable housing becomes less economically feasible."); *see also* Linda Baker, *Growing Pains/Malling America*: *The Fast-Moving Fight to Stop Urban Sprawl*, ENVTL. MAG. (Apr. 30, 2000), http://www.emagazine.com/includes/print-article/magazine-archive/7768/ ("What makes the issue [of smart growth] so complex, however, is that the urban renaissance sweeping many of the nation's cities has simultaneously displaced large numbers of minority and low-income families. Focusing development on the inner city instead of the suburbs doesn't automatically translate into more affordable housing."). One commentator expressed the "displacement dilemma" in particular stark terms: "The crux of poor people's urban problem is that their routines—indeed their very being—are often damaging to exchange values." LOGAN & MOLOTCH, *supra* note 149, at 112. Because low-income residents pay less rent and have less buying power, they are disfavored tenants and customers. Because the land uses associated with low-income residents (pawnshops, taverns, storefront churches, etc.) are not the kind of establishments that attract high income residents/businesses/customers, they are often the first on the list to be replaced by redevelopment. *Id.* at 113. The displacement dilemma also reflects a catch-22 that cities find themselves in: because of a disappearing tax base, a city can't afford to invest in deteriorating neighborhoods unless it can use the power of eminent domain to acquire and destroy properties in those neighborhoods and replace them with tax-producing higher value uses. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Mt. Holly, 658 F.3d 375, 379–81 (3d Cir. 2011).

to destroy may result in the city's most vulnerable residents—low-income and minority groups—"being sacrificed so that the city can be reborn."[180]

B. Procedural Checks on the Government's Right to Destroy

As the foregoing discussion indicates, the broad scope of the government's right to destroy poses risks. However, a careful balance must be struck in addressing these risks, since imposing additional constraints on the government's right to destroy can undermine the normative reasons, discussed in Part III, that government owners are justified in having a broad right to destroy in the first place. To ensure that the potential negative impacts of the government's exercise of the right to destroy are identified and addressed, while at the same time avoiding unnecessarily constraining a government owner's ability to exercise that right, this section proposes a procedural check in the form of a demolition review process.[181]

While not requiring that government owners engage in any particular substantive actions, under this proposal, the government would follow an

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180. Austen, *supra* note 156 ("[H]omes were being allowed to turn into wrecks with the fact that the city had a shortage of 120,000 units of affordable housing and some 100,000 people sleeping in shelters or on the street each year. Chicago didn't have just a housing crisis, he offered, it had a moral crisis"); *see also* Allington, *supra* note 10 (expressing concern that large-scale demolition efforts like that of Detroit's current administration may just be urban renewal in new clothing—"a chance for cities to clear the land of the urban poor and open up cheap land for developers."). The foreclosure crisis has further compounded the displacement dilemma by creating a glut of vacant bank-owned properties at the same time as there is a need for affordable housing. *See* Jessica Mulholland, *Ohio County Demolishes Homes to Remove Blight*, GOVERNING (Nov. 2011), http://www.governing.com/topics/health-human-services/housing/cuyahoga-county-ohio-demolishes-homes-to-remove-blight.html (quoting an officer of the Cuyahoga County Land Bank as saying that "up until this housing crisis, you always worked hard to save any house that you could—particularly affordable housing. That's just not the case anymore."); John B. Saul, *MSN Money: Should we tear down foreclosures?*, CHI. COAL. FOR THE HOMELESS (Nov. 15, 2011), http://www.chicagohomeless.org/msn-money-should-we-tear-down-foreclosures/ ("Why houses are being torn down when homelessness is going up is a question that comes up often" in homelessness community advocacy groups). Ironically, displacement of vulnerable residents can result from both destruction *and* preservation. *See* David B. Fein, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 79 (1985) ("Especially in the form of historic districting, however, historic preservation can have undesirable consequences that outweigh its positive contributions. Historic districting may displace and exclude minorities and the poor from urban neighborhoods.").

181. As noted in Section II(B), *supra*, this article is focused on exercises of the government's right to destroy as a property owner, and proposed demolition review process would only apply in such instances; it would not apply to exercises of the right to destroy pursuant to the police power or under the doctrine of necessity. In such circumstances, a pre-demolition review is likely to be inappropriate because of concerns about imminent threats to public safety or welfare. In contrast, when the government is exercising the right to destroy as a property owner, it rarely is facing such emergency considerations.

explicit procedure focusing on how the proposed exercise of the right to destroy impacts heuristics, such as sustainability, efficiency, and proportionality.[182] Such a procedural mechanism is particularly valuable in light of the fact that government owners often make decisions about whether to exercise the right to destroy on an ad-hoc basis,[183] without any explicit consideration of the impact of destruction on policy concerns such as sustainability, affordable housing, or long-term neighborhood stability.

While not advocating any particular one-size-fits-all process, this Article suggests that certain existing legal mechanisms provide useful models for how such a demolition review process could be structured. For example, numerous jurisdictions have enacted demolition delay ordinances that apply to private owners of historic properties; while not prohibiting destruction, these laws require an additional layer of review and consideration of alternatives to demolition before private owners can exercise the right to destroy.[184] A modified version could be made applicable to government owners: the government would retain the right to destroy property, but for buildings that fall within certain targeted categories (whether it be age, condition, specific location, or condition of surrounding neighborhood), a heightened review would apply before the government could destroy the property. Furthermore, like NEPA and many state environmental laws, such a review process would not need to impose any particular substantive outcome;[185] thus, a government owner could proceed with demolition even if the review indicated it would have negative impacts with respect to one or more of the heuristics. However, by requiring the government to go through a process designed to identify the impacts of destruction, the process makes

182. *See, e.g.*, Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 196 (1992) ("The doctrines are to serve not as sources for determinate answers, but heuristically, as sources for themes that may assist in demystifying and limiting the appropriate claim.")

183. The decision-making process government owners employ in deciding to destroy property is also often opaque and lacks clear standards about how the exercise of the right to destroy will impact various policy concerns. *See, e.g.*, *Demolition and Vacate Lot Reuse*, *supra* note 172 (explaining that the land bank "identifies properties for demolition based on physical condition, local input and other criteria," but providing not further explanation of what distinguishes a property that should be destroyed versus on that should not be); Mulholland, *supra* note 180 (describing as "quick and dirty" the review that Cuyahoga Land Bank conducts before demolishing properties donated by federal agencies such as Fannie Mae or HUD). The lack of explicit standards results in part because a government property owner's exercise of the right to destroy occurs in a variety of legal contexts, where the focus is often on the validity of the acquisition of the property and less on the decisions the government subsequently makes as owner of the property. *See* Zale, *supra* note 25, at 106 n.109–11 and accompanying text.

184. *See supra* note 37 and accompanying text.

185. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.").

it more likely that the substantive outcomes reached will be less likely to have negative impacts.[186]

In order to not overburden government agencies, the demolition review process should be relatively streamlined: a relatively short time frame—thirty to ninety days—would ensure that the government's right to destroy is not unnecessarily delayed, but would provide enough time to engage in a more than superficial investigation of the impacts of destruction and give interested parties an opportunity to explore alternatives to destruction. Furthermore, parcel-by-parcel review would not necessarily be required: in situations where entire blocks are being contemplated for demolition, as in cities like Detroit,[187] the demolition review procedure could aggregate the individual properties being slated for destruction in one grouping. In such cases, a categorical heuristic could be added to the procedure itself to evaluate the impact of multi-parcel destruction on resiliency.

V. CONCLUSION

The "right to destroy" is not a fixed, immutable concept. By recognizing that the scope of the right varies depending on the public or private identity of the owner, and the particular legal constraints and enabling mechanisms that apply to that type of owner, this Article lays a foundation for thinking about whether the scope of the right to destroy in each case accomplishes the numerous, and sometimes conflicting, goals society seeks to achieve through property law.

When the interest of both the community and the owner in any particular piece of property is recognized, it becomes clear why government owners have a broader right to destroy than private owners. The community's interest in the real property of private owners—its interests in ensuring sustainable uses of property, preservation of historic resources, and the prevention of threats to the public health or safety—is most effectively addressed by limiting private owners' right to destroy, through legal mechanisms such as land use and historic preservation laws, the doctrine of waste and enforcement of deed restrictions and conservation easements. The community's interest in the real property of government owners, on the other hand, is qualitatively different than its interest in private property. Because

186. *See* Zale, *supra* note 25, at 115.

187. *See* Kirk Pinho, *Blight Authority Targets Additional 21-Block Area of Brightmoor*, CRAIN'S DETROIT BUS. (Jan. 20, 2014), http://www.crainsdetroit.com/article/20140120/news/140129996/blight-authority-targets-additional-21-block-area-of-brightmoor (discussing plans to demolish 67 buildings in a 14-block area in Detroit, along with 50 buildings in a separate 21-block area of Detroit).

government property should be used to benefit the public as a whole, not just the government entity as an owner, the community's interest in this type of property requires legal rules that recognize the democratic responsibility government owners have and the unique position they are in with respect to destruction as a means of promoting the public interest. Yet while the government's right to destroy is appropriately broader than that of private owners, it nonetheless poses risks of overuse; thus, additional procedural limitations on it may be appropriate to ensure that the unintended consequences of its exercise are identified and addressed.