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EMINENT DOMAIN, PROPERTY RIGHTS, AND THE SOLUTION OF REPRESENTATION REINFORCEMENT

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ABSTRACT

Courts at both the federal and state level are busy remaking the law of eminent domain. Property rights advocates argue that courts should scrutinize more closely government's ability to take property with plans to transfer it to private developers. But asking courts to second-guess the wisdom of governmental policy decisions cannot be a workable solution. Instead, eminent domain could be tightened by relying on the idea of representation reinforcement, through which courts boost the interests of those groups who are unlikely to have their voices heard in the political realm. Across the nation, local governments are using eminent domain to discourage residency by poor persons. This article proposes that eminent domain be constitutionally impermissible when it is both used to take land destined for private hands and disproportionately hurts the poor or politically disadvantaged.

TABLE OF CONTENTS

INTRODUCTION 2
I. EMINENT DOMAIN LAW, FROM THE FIFTH AMENDMENT TO *HATHCOCK* AND *KELO* 6
II. TODAY'S EMINENT DOMAIN CONTROVERSIES 18
III. GOOD AND BAD SCENARIOS FOR EMINENT DOMAIN 24
IV. QUANDARIES FOR THE RIGHT AND LEFT 30
A. The Right 30
B. The Left 32
V. ASSESSING IDEAS FOR A TOUGHER PUBLIC-USE STANDARD 34
VI. THE SOLUTION OF REPRESENTATION REINFORCEMENT 43
A. Representation Reinforcement and Political Participation 43
B. Representation Reinforcement and Eminent Domain 47
1. A Proposed New Requirement for Eminent Domain 48
2. Other Applications of Representation Reinforcement 52
CONCLUSION 54

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INTRODUCTION

Strange legal bedfellows are clamoring for limits on government's power of eminent domain over private property. On the political right, property rights advocates lament the ease by which governments have been able to take private property for projects that libertarians view with skepticism.[1] They cite cases such as Hawaii's colossal redistribution of land in the 1980s, which the United States Supreme Court upheld despite its resemblance to socialism,[2] and Illinois's selling its power of eminent domain for a small "fee."[3] On the left, advocates for the poor argue that businesses with political and financial clout often are able to sway local governments into taking land (with monetary compensation, of course) from less powerful persons, including racial minorities, and then giving it to more influential groups, under the guise of economic growth.[4] They point to cases in which local authorities "condemned" land from poorer persons in order to serve the desires of corporate titans such as Donald Trump and the General Motors Corporation.[5]

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1. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 83, 161, 177–81 (1985) (criticizing the broad reach of eminent domain at the end of the twentieth century).

2. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–43 (1984). In *Midkiff*, the Supreme Court approved Hawaii's wide-ranging Land Reform Act, through which the state used eminent domain and took many parcels of land owned by large landowners and sold them to families who had been living on the land as renters. *See id.* at 231–32. This program, which resembled socialist land redistribution, was justified in part by Hawaii's unique history, in which a nearly feudal system of landownership by a handful of leading families continued beyond statehood, which occurred in 1960. *See id.* at 232–33. In the 1960s, the government found that more than 90 percent of privately owned land was held by only 72 private individuals. *See id.* at 232. It is questionable whether such a land redistribution plan would have received the approval that it did if it had been undertaken in, say, Texas or New York. *Midkiff* relied on *Berman v. Parker*, 348 U.S. 26 (1954), in which the court rejected a challenge to the District of Columbia's plan to redevelop "slums" and set forth highly deferential standards for reviewing the government's decisions and exercising eminent domain, even in cases in which the taken land is slated to be given to private developers. *Midkiff*, at 239–40.

3. *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., LLC, 768 N.E.2d 1, 10 (Ill. 2002). The Illinois Supreme Court held that the Illinois system, under which local governments in effect held the right to sell their exercise of eminent domain to private developers willing to pay a fee, exceeded the government's powers under the Illinois constitution. *Id.* at 10–11.

4. *See, e.g.*, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 32–36 (2003) (giving a history of the government's using the designation of "blight" to exclude poor persons and African Americans); David H. Harris, Jr., *The Battle for Black Land: Fighting Eminent Domain*, NBA NAT'L BAR ASS'N MAG., Mar.–Apr. 1995, at 12, *available at* 9-APR NBAM 12 (Westlaw).

5. *See* Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In *Banin*, New Jersey's Atlantic City casino development agency sought to take by eminent domain a small retail store, in order to give developer Donald Trump more room for expansion of the Trump Plaza casino complex. *See* 727 A.2d at 110. The New Jersey court departed from earlier precedent and held that the action did not serve the "public interest." *Id.* at 111. A number of other state courts followed with opinions more skeptical of governmental assertions of "public use." *See, e.g.*, City of Springfield v. Dreison Inves., Inc., Nos. 19991318, 991230, 000014, 2000 WL 782971, at *1 (Mass. Super. Ct. Feb. 25, 2000) (overturning use of eminent domain for the purpose of the development of a privately owned minor league baseball stadium); City of Novi v. Robert Adell Children's Funded Trust, 659 N.W.2d 615, 617 (Mich. Ct. App. 2002). *See also* Corey J. Wilk, *The Struggle Over the Public Use*

In 2004 and 2005, the grumbling over eminent domain bubbled over into the courts and into the public discourse. First, *County of Wayne v. Hathcock* overruled the most notoriously deferential state court opinion that allowed government to seize private land and turn it over to private businesses in the name of economic development.[6] Second, four dissenting Justices of the United States Supreme Court, in *Kelo v. City of New London,*[7] called for a significant tightening of the federal constitutional law of property rights against eminent domain,[8] although a slim majority of the Court refused to budge from the precedent of a deferential standard of review.[9] Third, in the wake of *Kelo*, critics from state legislators to comic strip cartoonists have called for new steps to restrict government's ability to condemn private property.[10] This political and judicial

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Clause: Survey of Holdings and Trends, 1986 – 2003, 39 REAL PROP. PROB. & TR. J. 251, 257–61 (2004), for a discussion of developments in state courts.

6. 684 N.W.2d 765, 769–70 (Mich. 2004), *overruling* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). *Poletown* held that the taking of a neighborhood for a new General Motors factory was a permissible exercise of eminent domain because the city asserted that it provided a "public benefit," which in turn satisfied the state constitution's requirement that eminent domain be used for "public use." 304 N.W.2d at 459.

7. 125 S. Ct. 2655 (2005), *aff'g* Kelo v. City of New London, 843 A.2d 500 (Conn. 2004). In *Kelo*, discussed in Part I, landowners challenged the exercise of eminent domain by the City of New London, Connecticut, which planned to use their properties for a development project, which would include land for a new facility of Pfizer Inc. *See id.* at 2658–61. New London hoped that the project would help revitalize its economically depressed downtown. *Id.* at 2658–59. The landowners argued to the Court that the condemnation violated the Fifth Amendment of the U.S. Constitution, which states, "[N]or shall private property be taken for public use, without just compensation." *See id.* at 2658; U.S. CONST. amend. V. The Supreme Court majority, which included Justices Stevens (who wrote the Court's opinion), Kennedy, Souter, Ginsburg, and Breyer, upheld the city's action, applying the traditionally deferential standard to reviewing eminent domain, through which government must compensate the landowner. *See* 125 S. Ct. at 2665. The Court held that eminent domain is constitutional as long as it to serve a "public purpose," even if the condemned land is destined for private hands. *See id.*

8. *See* 125 S. Ct. at 2675 (O'Connor, J., dissenting) (Rehnquist, C.J., Scalia & Thomas, JJ., joining in dissent).

9. *See id.* at 2663–65 (majority opinion).

10. The public reaction to *Kelo* has been remarkably vocal, especially in a year in which most of the public debate centered on foreign affairs. *See, e.g.*, Ken Hearny, *High-court Seizure Decision Sparks Uprising*, BALT. SUN, July 24, 2005, at 4L, *available at* 2005 WLNR 11644508 (noting the nationwide negative political reaction to *Kelo*, including the adoption of a resolution in the U.S. House of Representatives deploring the decision); Shannon O'Boye, *Politicians Trying to Ease Public's Fear of Governments Seizing Property*, S. FLA. SUN-SENTINEL, July 27, 2005, at B1, *available at* 2005 WLNR 11795323 (noting legislative initiatives at both the federal and state levels to restrain local governments); Rosa Brooks, *It's Open Season on Private Property*, L.A. TIMES, July 27, 2005, *at* B13, *available at* 2005 WLNR 11848751 (criticizing *Kelo*). In an interesting example of a seemingly dry property rights issue reaching unexpected locations, at least three nationally syndicated comic strips have weighed in against excessive domain for private development. *See* Jeff Millar & Bill Hinds, *Tank McNamara* (July 26, 2005), *available at* http://cervo.net/comics/?id2=tm&comicdate=7%2F26%2F2005; Bruce Tinsley, *Mallard Fillmore* (July 18, 2005), *available at* http://jewishworldreview.com/strips/mallard/2000/mallard071805.asp; Scott Santis, *Prickly City* (Mar. 8, 2005) (on file with author) (one of a series of anti-eminent-domain strips in a conservative-oriented cartoon). Also amusing was the effort of property rights advocates to have the government of Weare, New Hampshire, use eminent domain to take the home of Justice Souter by eminent domain and turn it into a motel. Hearny, *supra*.

At least some liberal commentators have come to the defense of *Kelo*, albeit somewhat reluctantly. *See, e.g.*, Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30, *available at* 2005 WLNR 9994769 (concluding that a higher scrutiny of "public use" would be troublesome);

clamor may eventually revolutionize the government's authority, as the critics have demanded.[11] It may also hamstring, however, local governments' ability to foster urban redevelopment.[12]

A number of social phenomena have strengthened the chorus against eminent domain, including its often-toothless "public use" requirement.[13] First, the scales have fallen from the nation's eyes over the effectiveness of urban "renewal" projects, some of which have been driven as much by racism and profit-seeking as by a good faith desire to renew urban areas.[14] Moreover, many local governments, especially the cash-poor central cities, are trying ever harder to raise revenue by attracting businesses and wealthy residents – and discouraging the poor – thus making an eminent domain an irresistible tool.[15]

Frustration with eminent domain has led to many proposals for reform. Suggestions in recent years include: (1) requiring more procedural hurdles before a government can take property;[16] (2) limiting eminent domain to cases in which the public, not a private party, retains the own-

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Richard Cohen, *Take Life, but Not My House*, WASH. POST, July 26, 2005, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501334.html (syndicated column) (criticizing conservatives for caring more about government's taking of property than of life).

11. *See, e.g.*, James E. Krier & Christopher Serkin, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock*: Public Ruses*, 2004 MICH. ST. L. REV. 859, 859–60 (2004) (suggesting that the "subject of public use is back on the table, with a good chance of substantial change in the law across the country").

12. *See, e.g.*, Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1865–73 (2005) ("Property owners should not be protected by narrowing the public use requirements so much that eminent domain can never be used for economic development projects because then many of these projects could not be completed, nor any of their benefits to the community realized.")

13. As interpreted by most courts in the twentieth century, the public-use restriction has meant merely that government had to assert that the condemnation served the public interest in some way. *See Haw. Hous. Auth.*, 467 U.S. at 241 (applying U.S. constitutional law) (citing Berman v. Parker, 348 U.S. 26 (1954)); *Poletown Neighborhood Council*, 304 N.W.2d at 480 (Mich. 1981) (applying Michigan constitutional law), *rev'd by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

For a sample of critiques of the toothless public-use standard, *see, e.g.*, Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 934–38 (2003) (arguing that courts should employ in reviewing eminent domain the more skeptical standard used in scrutinizing government "exactions" on private owners); Ralph Nader & Alan Hirsh, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 219–24 (2004) (calling for a tighter standard for eminent domain destined for private ownership, especially when the property owners are politically less powerful).

14. *See* Pritchett, *supra* note 4, at 7–47 (giving the history of the deferential standard and blaming both racism and gullibility of the prospects of "urban renewal").

15. *See, e.g.*, PAUL KANTOR, THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY 2 (1995) (arguing that local governments must incessantly seek to please business to attract dollars and balance their budgets).

16. Professor Garnett has provided a list of "short cuts" to eminent domain that could trigger tougher judicial scrutiny. *See* Garnett, *supra* note 13, at 970–82. Among these is a "quick-take" process designed to facilitate and speed up the condemnation process. *See id.* at 970–74. By imposing more hurdles to eminent domain, as opposed to fewer, legal reform might be able to weed out justifiable exercises from those that are suspect. *See id.* at 982.

ership of the land;[17] (3) allowing private use of condemned land only under limited circumstances, as set forth in the new *Hathcock* decision;[18] and (4) reversing the usual presumption of deference, so that the government has the burden of justifying the public value of its development plan.[19] In the last category, Professor Nicole Stelle Garnett has suggested the skeptical standard that the Supreme Court has imposed in reviewing government "exactions" from land owners in return for granting permits.[20] Such reforms seem to harmonize with the Rehnquist Court's activism in protecting property rights through the United States Constitution's Fifth Amendment.[21]

I contend, however, that a reversal of the presumptions under eminent domain is bound to be unsatisfactory. Demanding more exacting scrutiny of the justifications for eminent domain is likely to lead courts into an inextricable bog of trying to assess and weigh the benefits of public development projects – a fact-finding job that is a legislative, not judicial, function. Even if a court were to able to reach conclusions as to the efficacy of public projects, the most likely successful challengers under a complex balancing test would be wealthy, corporate, and institu-

17. The effort to restrict eminent domain is largely limited to targeting cases in which the government does not plan to use the property for government purposes. *See* Katherine M. McFarland, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 142–43 (2004). This approach is driven, of course, by the fact that the U.S. Constitution and those of many states limit eminent domain to cases of "public use." *See, e.g.*, U.S. CONST. amend. V; MICH. CONST. art. X, § 2. It is worth noting, however, that the arguments of "property rights" against eminent domain have no force when government does take land for governmental purposes, such as for schools, police stations, parks, etc. *See* McFarland, *supra* at 142–43, 146–47. It is difficult, therefore, to assert that private property is "sacrosanct," *Hathcock*, 684 N.W.2d at 769, considering that almost no one suggests that government is restricted from taking private property for a city office building.

18. *Hathcock*, 684 N.W.2d at 781–85, 787. The Michigan Supreme Court wrote that eminent domain destined for private ownership is permissible when (1) private assembly of large tracts of land for "instrumentalities of commerce," such as railroads, would be financially difficult, because of the incentive for landowners to "hold out," (2) the private ownership is still accountable to the public, such as for highly regulated service industries, and (3) the condemnation is based on "public concern" with the land itself, such as is the case with slum clearance. *Id.* at 781–84.

19. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 310–14 (2000) (arguing for a reversal of the presumption in favor of constitutionality when taken land is destined for private ownership); Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3 (2003) (calling for a requirement that government give "substantial evidence" of public benefits when taking property destined for private ownership).

20. *See generally* Garnett, *supra* note 13 (arguing for judicial review of eminent domain destined for private ownership using the standard for "exactions," set forth in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987), where the Court found that an exaction must have a "nexus" to the harm for which it purportedly compensates, and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), where the Court established that the nexus must be "roughly proportional" to the harm).

21. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 626–30 (2001) (holding that a property right against a regulatory taking is not lost simply because the property is sold after the regulation is imposed); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that a land use regulation is a compensable taking of private property if it prohibits "all economically productive or beneficial use of the land"); *Nollan*, 483 U.S. at 837 (finding that an exaction must have a "nexus" to the harm for which it purportedly compensates); *Dolan*, 512 U.S. at 391 (establishing that the nexus must be "roughly proportional" to the harm).

tional property owners – hardly the categories of persons for whom we should expend most of our sympathy over the abuses of eminent domain. After all, eminent domain is perhaps the only major exercise of state power in which poorer persons suffer more than they would in the absence of government.

Instead of having courts scrutinize the *justification* for taking property, I propose that courts focus more straightforwardly on the individual *targets* of eminent domain. In crafting my proposal, I rely on the "representation reinforcement" theory of the late Professor John Hart Ely, who argued that judicial review should concentrate not on particular outcomes but on assuring that all categories of persons receive adequate representation in the political and legislative processes.[22] I propose that eminent domain should be impermissible in those instances in which government takes the homes predominantly of poorer persons, and then transfers the land to private parties. In these cases, we have strong reason to suspect that the targets of eminent domain did not get adequate representation in the legislative and administrative branches of government. A tougher standard for eminent domain and "public use" should focus on trying to ensure that poor persons are not forced to lose their homes simply because they are poor.

I. EMINENT DOMAIN LAW, FROM THE FIFTH AMENDMENT TO *HATHCOCK* AND *KELO*

With one of the more cryptic passages of the United States Constitution, the framers ended the Fifth Amendment with a clause stating, "[N]or shall private property be taken for public use, without just compensation."[23] Nearly all state constitutions hold some sort of similar requirement.[24] What is missing from the Constitution is a statement of authority for "taking" private property. The rather inchoate governmental power of eminent domain, fairly well established in English law by the late eighteenth century, was simply assumed.[25] Moreover, the Fifth Amendment does not squarely state that eminent domain can only be exercised for "public use;" literally, the clause states only that just compensation be given in those instances in which property is taken for public use. Federal courts, however, have assumed that the public use reference is a threshold requirement for the exercise of eminent domain.[26] A number of scholars, including Professor Donald Kochan, have concluded sensibly that the Fifth Amendment's drafters conceived of an eminent

22. *See infra* Part VI. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23. U.S. CONST. amend. V.

24. *See, e.g.*, ARIZ. CONST. art. II, § 17; MINN. CONST. art. I, § 13; OHIO CONST. art. I, § 19; S.C. CONST. art. I, § 13.

25. *See* Pritchett, *supra* note 4, at 9–10 (discussing early American conceptions of eminent domain).

26. *See, e.g.*, Haw. Hous. Auth. v Midkiff, 467 U.S. 229, 239–40 (1984).

domain that would allow taking private property for useful public land – roads are the classic example – but not for the personal desires or whims of the king, as was sometimes the practice in England, or his future American counterparts.[27]

Considering the limited governmental activities of the early republic, there was little need to parse the limits of the meaning of "public use." Governments used eminent domain sparingly – land for an army fort here, a post office there, a reservoir down the road.[28] But the nineteenth century rush to the western American frontier, combined with the rise of industrial capitalism, generated a new idea – that governments could use eminent domain to foster economic growth by transferring land to selected persons in the private sector. While states gave businesses such as water mills prime space along river rapids,[29] the federal government granted enormous stretches of land to railroad companies in order to bring railways, and thus western civilization, to the supposedly untamed frontier.[30] With hindsight, of course, we in the twenty-first century view these land shifts with considerable skepticism. From the jaundiced public-choice view of government, nineteenth-century governments were susceptible, through corruption and other means, of being swayed by corporate interests. The most outrageous example of nineteenth century perversion of government was the 1869 sale (later revoked, leading to a United States Supreme Court case) by the Illinois legislature of the entire downtown Chicago waterfront to the Illinois Central Railroad.[31] Today's libertarians argue that government is not needed to foster economic growth; in fact, government will only get in the way.[32] If specific parcels of land are valuable for economic growth, private parties will beat down the doors of their owners in order to develop them. Even if government is not corrupt, there is no reason to think that bureaucrats or legislatures are as good as private accountants in figuring what which land purchases are potentially profitable, and thus economically beneficial for the economy.

The nineteenth century examples established a precedent that there are some circumstances in which the public welfare arguably may be

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27. *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 65–71 (1998).

28. *See* McFarland, *supra* note 17, at 142–43, 146–47. *See also* Pritchett, *supra* note 4, at 7–13, for a history of nineteenth century interpretation of the limits of eminent domain.

29. *See, e.g.*, Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 728–30 (N.J. Ch. 1832).

30. *See, e.g.*, Pritchett, *supra* note 4, at 9–12 (discussing the debates over the use of eminent domain to assist railroads and other nineteenth century businesses).

31. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 439–64 (1892). *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004) (presenting an extensive history of the landmark litigation).

32. *See, e.g.*, EPSTEIN, *supra* note 1, at 177 (criticizing governmental intervention in private transactions). *See generally* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT (1990) (statement of libertarianism).

served by the government's transferring land from one private owner to another. The current use of the land may be undesirable (for example, a local polluter who meets federal and state laws and who can be forced to move only through a government buy-out) or another land use might be more desirable (for example, a ranch owned by an obstinate farmer that sits on top of an especially large uranium mine in an age when nuclear energy is considered essential).

The second half of the twentieth century witnessed a great expansion in the use of eminent domain to shape private development.[33] Such growth dovetailed with the greater vision for government that emerged in the wake of the Great Depression, World War II, and post-war prosperity, when government seemed a solution for social ills. Professor Wendell Pritchett has recently detailed the twentieth century growth of the idea of "urban renewal."[34] At the beginning of the century, the idea of slum "clearance" was touted as a progressive means of helping the urban poor.[35] Using eminent domain to get rid of run-down structures led to the term "condemnation" as a catch-all for government's taking of private property. In today's under-populated central cities of vacant buildings and parking lots, it is hard to imagine that the overcrowding of cramped urban tenements was considered an urgent need a century ago, and that simply condemning these structures was considered by progressives to be a step toward bettering the lives of the urban poor, even if demolition did not necessarily provide them better housing.[36] A more expansive conception of eminent domain, approved by deferential courts, emboldened a variety of interests. Real estate developers, eager to take advantage of the potential profits of development in central cities, aligned themselves with the housing reformers.[37] Big city mayors often completed the chorus, as the prospect of a more affluent citizen base seemed a worthy temptation. Spurred by these forces, state and local authorities used eminent domain not only against "slums" but for areas that were subject to "blight," a botanical term that defined an area that seemed diseased and headed for slum conditions in the near future.[38] Once authorized to take property that fit rather loose definitions of "blight," redevelopment authorities were able to condemn nearly at will. In a classic example of the public-choice criticism of putatively public

33. *See* Pritchett, *supra* note 4, at 7–14.

34. *See generally* Pritchett, *supra* note 4.

35. In the late nineteenth and early twentieth centuries, urban social reformers such as Jane Addams focused public attention on the health and safety problems of urban overcrowding. *See, e.g.*, Harold L. Platt, *Jane Addams and the Ward Boss Revisited: Class, Politics, and Public Health in Chicago, 1890-1930*, 5 ENVTL. HIST. 194 (2000), *available at* http://www.findarticles.com/p/articles/mi_qa3854/is_200004/ai_n8890369#continue.

36. *See id.*

37. *See* Pritchett, *supra* note 4, at 2–6, 26–30.

38. *See id.* at 14–34, 38–39 (discussing the abuse of the term across the twentieth century from its origin as a means of slum clearance to its modern conception as a catch-all of governments that seek to condemn land).

welfare initiatives being a mask for private gain, these authorities seized private property – often lower-income and African American neighborhoods – in cities across the country. Shielded by the banner of housing reform, these seizures were spurred largely by the prospect of profit for private developers who sought subsidized land.[39] So scornful are many commentators today of the once-lauded urban renewal projects of the mid and late twentieth century that they are often referred to derisively as "Negro removal."[40]

By the mid twentieth century, American courts came to accept the governments' arguments for deference.[41] After all, courts early in the century had acquiesced to government regulation of land use through zoning (over the muffled complaints that zoning was a mask for social and class segregation) because of the apparent public welfare benefits of separating land uses.[42] The same arguments convinced courts that local governments, not judges, were in the best position to determine what was truly in the public interest. The landmark United States Supreme Court case was *Berman v. Parker*, which in 1954 upheld the taking of dozens of blocks of residential land in southwest Washington, D.C.[43] (Ironically, the facts that most of the residents were black and that the redevelopment plans would price-out most poor black citizens were not issues in the litigation, despite the fact that the case was argued shortly after the school desegregation case of *Brown v. Board of Education*.[44]) The court rejected the challengers' argument that, because the plan called for privately owned development, it failed the public-use requirement. Justice William O. Douglas, who had a soft spot for utopian ideas of land regulation, wrote that judges must defer to local government's expert findings as to the harms caused by poor housing stock and the benefits to the community of replacing them through condemnation.[45]

If there were any doubt as to the breadth of the government's power, it was dispelled in 1984 by *Hawaii Housing Authority v. Mid-*

39. *See generally* Pritchett, *supra* note 4, at 22–35 (discussing the rise of abuse of eminent domain under the banner of urban "renewal").

40. Harris, Jr., *supra* note 4 at 12; Pritchett, *supra* note 4, at 47.

41. *See, e.g.*, Pritchett, *supra* note 4, at 37, 47 (discussing the rise of deference to eminent domain decisions, culminating in Berman v. Parker, 348 U.S. 26 (1954)).

42. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (rejecting a claim of "right of property" and upholding the constitutionality of land use zoning restrictions under the police power); *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974) (holding a town may regulate the composition of households under land use law); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 310, 312 (Mo. 1970) (upholding laws that restrict land use on aesthetic grounds).

43. 348 U.S. 26, 36 (1954).

44. *See Berman*, 348 U.S. at 36 (1955); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that "separate but equal" schools were inherently unequal) *aff'd*, Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (holding that states are ordered to take "all deliberate speed" to desegregate)

45. *See Berman*, 348 U.S. at 35–36 (holding that courts must defer to the judgment of the political branches on social issues, including the exercise of eminent domain); *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (Douglas, J., writing for the court and approving a zoning law that excluded group houses for college students).

kiff.[46] The Hawaii government adopted legislation that provided for the seizure of large parcels of the island chain from owners who had inherited them during Hawaii's near-feudal colonial history. After appropriate compensation, the land was then sold to less affluent Hawaiians, mostly tenant farmers who had already worked the land.[47] After the Ninth Circuit held that the quasi-socialistic redistribution to private citizens failed to meet the public-use requirement, the Supreme Court reversed.[48] The reach of eminent domain is equivalent to the reach of the police power, Justice Sandra Day O'Connor wrote for the Court, citing the famously amorphous power of state and local authorities to do just about anything they desire if it serves a putative public interest and violates no other right.[49] As long as government provides compensation, therefore, it was almost certain to fulfill its federal constitutional obligation.

Meanwhile, at the state level, the most notable – or notorious – case was Michigan's 1981's *Poletown Neighborhood Council v. City of Detroit.* [50] Faced with a threat by the General Motors Corporation to move production out of the city, Detroit seized an entire neighborhood, Poletown, in order to provide the automaker with the land, and the price, that it wanted.[51] Poletown was not a predominantly black neighborhood (and Detroit had a black mayor by this time), but it was nonetheless no match for the persuasion of Detroit's most prominent employer.[52] Echoing the federal constitutional law, Michigan's highest court held that it must defer to the city's finding of what was good for Detroit.[53] This finding was sufficient to satisfy Michigan's public use requirement until 2004, when it was overruled by *County of Wayne v. Hathcock*.[54] As explained in Part V, *Hathcock* disallowed eminent domain destined for private hands, except when there are "special concerns" with the old land use, such as when the government seeks to remove a "blighted" land use – a potentially large loophole that should continue to trouble property rights advocates.[55]

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46. 467 U.S. 229 (1984).

47. *See Haw. Hous. Auth.*, 467 U.S. at 234. Within the case there is a discussion on Hawaii's "land reform" program of exercising eminent domain to redistribute land. *Id.* at 232–34.

48. *Haw. Hous. Auth.*, 467 U.S. at 245, *rev'g,* Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

49. *Haw. Hous. Auth.*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers").

50. 410 Mich. 616 (1981) (en banc).

51. *See Poletown Neighborhood Council*, 410 Mich. at 636–37 (Fitzgerald, J., dissenting) (recounting the history of the Poletown controversy); *see generally* JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989).

52. *See generally* JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989).

53. *Hathcock*, 410 Mich. at 638-39.

54. 471 Mich. 445, 482–83, *rev'g* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616 (1981).

55. *County of Wayne*, 471 Mich. at 475–76.

In contrast to *Hathcock*, the United States Supreme Court's 2005 decision in *Kelo v. New London*[56] did little to change the federal precedent. Had the Supreme Court tightened the federal constitutional law, it would have restricted eminent domain at all levels of governments, by virtue of the Fifth Amendment's application to the states.[57] As it was, the much-anticipated *Kelo* reinforced the deferential approach of the federal courts and constituted a major disappointment to the property rights movement.[58] Time will tell whether it is only a temporary setback.

The eminent domain in *Kelo* was a good example of how local governments are using the power to try to shape their economies. The City of New London, Connecticut, which was long famous for its submarine yards and naval station, has suffered from the end of the Cold War; as of the late 1990s its unemployment was double that of the state average.[59] Like many "old economy" cities, New London saw salvation in luring new technology companies to its borders.[60] Soon after Pfizer Inc., a pharmaceuticals firm, announced tentative plans in 1998 to locate a research facility in New London, an economic development corporation established by the city submitted a plan for a multifaceted new development complex around the Pfizer site.[61] The ninety-acre development plan, which was approved by the city in 2000, would include a "small urban village" of shops and restaurants, marinas and a "riverwalk," new residences, space for a naval museum, and room for plenty of offices.[62] New London hoped to create 1000 new jobs, increase tax revenues, and "revitalize" the city.[63] Most of the land was purchased by negotiation;

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56. 125 S. Ct. 2655 (2005).

57. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 243–44 (1897) (finding the "takings" clause applies to state governments).

58. *See, e.g.*, Ken Hearny, *High-Court Seizure Decision Sparks Uprising*, BALT. SUN, July 24, 2005, at 4L, *available at* 2005 WLNR 11644508 (noting the nationwide negative political reaction to *Kelo*, including the adoption of a resolution in the U.S. House of Representatives deploring the decision); Shannon O'Boye, *Politicians Trying to Ease Public's Fear of Governments Seizing Property*, S. FLA. SUN-SENTINEL, July 27, 2005, at B1, *available at* 2005 WLNR 11795323 (noting legislative initiatives at both the federal and state levels to restrain local governments); Rosa Brooks, *It's Open Season on Private Property*, L.A. TIMES, July 28, 2005, *available at* 2005 WL 11848751 (criticizing *Kelo*).

Some liberal commentators have come to the defense of *Kelo*, albeit somewhat reluctantly. *See, e.g.*, Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30, *available at* 2005 WLNR 9994769 (concluding that a higher scrutiny of "public use" would be troublesome); Richard Cohen, *Take Life, but Not My House*, WASH. POST, July 26, 2005, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501334.html (syndicated column) (criticizing conservatives for caring more about government's taking of property than of life).

59. *See Kelo*, 125 S. Ct. at 2658 (discussing the downturn in New London's economy); *see generally* JOHN PINA CRAVEN, THE SILENT WAR (2001) (discussing New London and submarine construction in the Cold War).

60. *See Kelo*, 125 S. Ct. at 2659 (referring to the town's hope that Pfizer and other "research and development" businesses would rejuvenate the city).

61. *Kelo*, 125 S. Ct. at 2659. It is interesting that the record did not show that the development plan was a prerequisite or even a "carrot" to Pfizer's building in New London.

62. *Kelo*, 125 S. Ct. at 2659.

63. *Id.* at 2658.

other parcels, including the homes of some of the eventual plaintiffs, were targeted for eminent domain.[64] The properties were not "blighted;" they were condemned because of the needs of the development plan.[65] As with any modern American development, some of the home parcels might be used for automobile parking.[66]

The majority opinion in *Kelo* – written by Justice Stevens and joined by four other relatively liberal justices, Kennedy, Souter, Ginsburg, and Breyer – rejected the plaintiffs' request to narrow the Fifth Amendment's public-use requirement. The majority assessed the precedent at the highest level of generality. In both *Berman* and *Midkiff*, the Court had approved eminent domain projects in which some or all of the land was destined for private ownership; both projects were intended to help the localities' economies.[67] Accordingly, the majority concluded, the public-use restriction does not forbid taking land destined for private hands; rather, the test remains simply whether the eminent domain serves a "public purpose."[68] Because courts must defer to the economic policy judgments of local governments,[69] New London's eminent domain complied with the Fifth Amendment.[70] While the Court emphasized that the New London project did not benefit any particular private party,[71] this observation skirted an important issue, which occurs in many other development cases. Many exercises of eminent domain plainly *do* benefit an identifiable private party, which sometimes promises to build in the city only if it receives discounted land.[72] The *Kelo* majority dodged the point that a benefit to a specific private party may often accompany a purported public benefit. Deciding whether the private or public benefit is the leading motivation, and which benefit is merely "incidental," remains a challenge for any more skeptical review under the Fifth Amendment.

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64. *See id.*

65. *See id.* at 2660.

66. *See id.* at 2659.

67. *See id.* at 2660–61 (discussing *Berman* and *Midkiff*).

68. *Kelo*, 125 S. Ct. at 2661, 2663 (concluding that the "public use" requirement means only that the project must serve a "public purpose").

69. *Id.* at 2668. The Court quickly dismissed the plaintiffs' alternative suggestion that courts should permit eminent domain for economic development only when the court finds a "reasonable certainty" that the purported public benefits would actually occur. *See id.* at 2667. Such a fact-bound inquirywould be a dead-end; courts cannot and should not engage successfully in such second-guessing of economic judgments. *Id.*

70. *See id.* at 2665.

71. *Kelo*, 125 S.Ct at 2661–62 (stating that the Hawaii law in *Midkiff* did not benefit any class of identifiable individuals). But the entire point of the Hawaii plan was to enable tenant farmers to buy the land on which they worked; this specific class of individuals clearly gained, at the expense of those landlords whose property was taken. This transfer may have served the public, but it cannot be denied that it also helped a specifically identifiable persons.

72. *See, e.g.*, County of Wayne, 471 Mich. at 452, 453 (stating new economic development is contingent upon the government's provision of land), *overruling* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616 (describing how the corporation threatened to move the facility to another city unless the government provided land).

The five-justice majority in *Kelo* failed to make even a nod to the leftist critique of eminent domain as tending to hurt lower-income residents. This may have been due in part to the advocacy of the plaintiffs by attorneys for the Institute for Justice, a property rights organization,[73] which appeared to offer only half-heartedly the liberal skepticism.[74] It is not hard to read between the lines of the majority opinion, however, a trepidation over expanding property rights against the government. The Court noted approvingly the "carefully formulated" redevelopment project in New London and the supposed benefits that the project would bring to the city.[75] This focus on due process and community benefits parallels the deferential approach employed by the more liberal justices in cases asserting an unconstitutional "regulatory taking."[76] Indeed, the only hopeful ground for future challenges noted by the majority appears to be an assertion that the government is unfairly giving the land to only one owner[77] or other evidence of "illegitimate purpose" – presumably, for example, the bribery of government officials.[78]

Finally, in an ironic twist, Justice Stevens noted that the theme of "federalism" and the "great respect" owed to state legislative and judicial judgments counseled against having the federal courts strike down local political choices.[79] If the citizens of Connecticut consider the benefits of private ownership more important than the benefits of economic development, they are free to restrict eminent domain through either state constitutional or statutory law. The Court cited both Michigan's *Hathcock*[80] and California's prerequisite of a finding of "blight" before eminent domain may be used[81] as examples of states giving some protections to their landowners. Such protections, however, may not be very effective in preventing eminent domain abuses, as I discuss in Part V.

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73. *Kelo*, 125 S. Ct. at 2658.

74. *See generally* Transcript of Record, Kelo v. New London, 125 S.Ct 2655 (2005), 2005 WL 529436.

75. *See Kelo*, 125 S. Ct. at 2665.

76. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1040–41 (1992) (Blackmun, J., dissenting) (relying on the similar factors in arguing for upholding a government's prohibition of coastal land construction); Penn Central Transp. Co. v. New York, 438 U.S. 104, 138 (1978) (upholding a city's historic landmark law that restricted the use of property, in large part because of the due process afforded in the landmark designation process and the benefits provided to the public).

77. *Kelo*, 125 S. Ct. at 2666–67. In response to the argument that "without a bright-line rule [against eminent domain for economic development] nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and they pay more taxes," the Court wrote that such an action, which would be unlikely in an "integrated development plan," was "not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if an when they arise." *Id.*

78. *See Kelo*, 125 S. Ct. at 2661.

79. *See id.* at 2664 (*citing* Hairston v. Danville & W. R.R., 208 U.S. 598, 606–07 (1908)) (differences among states my lead to differing approaches to land use and land use law).

80. *See id.* at 2668 n.22 (citing County of Wayne v. Hathcock, 684 N.W.2d 765 (2004)).

81. *See id.* at 2668 n.23 (citing Cal. Health & Safety Code Ann. §§ 33030–33037 (West 1997)).

The *Kelo* dissent – penned by Justice O'Connor and joined by the property rights-oriented Chief Justice Rehnquist and Justices Scalia and Thomas – assessed the eminent domain precedent at a much lower level of generality. The dissenters were faced with the particular difficulty of the twenty-year-old precedent in *Midkiff*, written by Justice O'Connor, which stated that the power of eminent domain was coterminous with the expansive "police power" of local governments.[82] Disassociating herself from this "errant language,"[83] Justice O'Connor in *Kelo* followed the approach of the Michigan court in *Hathcock* by seeking to limit eminent domain to those specific situations in which the high court had previously upheld the government's conduct.[84] There are three such categories, Justice O'Connor wrote.[85] The first is when the public retains ownership of the taken land; the second is when the land is transferred to a common carrier, such as a private railroad or utility; the third, most amorphously, is when eminent domain stops some "affirmative harm" inflicted on society.[86] Harms such as the "blight" in *Berman* and the "oligarchy" in *Midkiff* are examples.[87] The property rights justices' adoption of this final category is especially ironic, considering that the four dissenting justices concluded, in a significant 1992 regulatory takings case, *Lucas v. South Carolina Coastal Council*,[88] that it made no sense to describe certain land uses as "harmful," as opposed to the government's merely gaining a benefit by requiring some other land use.[89] Expediency once more ruled the day.

One fact that bothered the property rights justices is that unfettered use of eminent domain may create a "specter of condemnation [that] hangs over all property."[90] This may be true; but this specter has always existed, in the form of condemnation for public ownership. Justice O'Connor both alluded to the possibility of undue private influence – "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-

82. *See Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is coterminous with the scope of a sovereign's police powers.").

83. *See Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting). The rationale for the "errant language" reference was that the statement about "public use" being coterminous with the police power was "unnecessary to the specific holdings of those decisions" – in other words, that it was dictum. Two decades of law students would have to be re-educated.

84. *See id.* at 2673 (O'Connor, J., dissenting).

85. *See id.*

86. *See id.* at 2673–74 (O'Connor, J., dissenting).

87. *See id.*

88. 505 U.S. 1003 (1992). The Court in *Lucas* held that a regulation that deprives a landowner of all economically beneficial use of the land and that prevents the landowner from using the land in a non-nuisance-creating manner triggers the payment of Fifth Amendment compensation for the "total taking." *See id.* at 1027–31.

89. *See id.* at 1025 ("A given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors."). Justice Scalia wrote the *Lucas* opinion and was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas.

90. *See Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

Carlton, any home with a shopping mall, or any farm with a factory"[91] – and rather perfunctorily cited the leftist criticism that "the beneficiaries are likely to those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[92] But one cannot help but think that what bothered the dissenters even more was the quasi-economic fear that widespread eminent domain will squelch private initiative – constitutional rights against unlawful takings "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power," O'Connor wrote[93] – and, perhaps most of all, that eminent domain offends the principle of close-to-inviolate private property rights. Justice O'Connor concluded by citing James Madison's statement that "[T]hat alone is a *just* government, which *impartially* secures to very man, whatever is his *own.*"[94] In sum, however, *Kelo* appears to have added little to the law or understanding of eminent domain and how perceived abuses might be curbed.

Legal commentators of a variety of stripes have attacked the toothless public-use standard. Richard Epstein, a libertarian, has lamented that business plans and productive economic activity may be disrupted by the specter of eminent domain hanging over the heads of private property.[95] Lee Anne Fennell, approaching the topic from the viewpoints of economic efficiency and distribution, wrote that eminent domain often fails to provide for truly "just" compensation, especially for values such as autonomy.[96] Nicole Stelle Garnett has argued that targets suffer uncompensated psychological tolls, including "demoralization costs," of being uprooted from their property.[97] Focusing on the fact that poor neighborhoods are often the target of condemnation, Wendell Pritchett has chastised the courts for their misguided "faith in the political system's ability to operate in a non-discriminatory manner."[98] Outside the

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91. *Id.* at 2676.

92. *Id.* at 2677.

93. *Id.* at 2672.

94. *Id.* at 2677 (*citing* James Madison, *Property,* NAT'L GAZETTE (Mar. 29, 1792), *reprinted in* 14 PAPERS OF JAMES MADISON 266 (R. Rutland et al., eds., 1983)).

95. *See* EPSTEIN, *supra* note 1, at 177 (criticizing governmental meddling in private transactions).

96. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 959 (2004). Professor Fennell argued that "the public use clause is meant to screen out takings for which monetary compensation is not just." *Id.* at 1002. Among her proposals to rein in eminent domain destined for private ownership is a system whereby those homeowners could give advance consent, with a tax break, to eminent domain. *See id.* at 995–96. An earlier and influential economic analysis of eminent domain and public use was Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

97. *See* Garnett, *supra* note 13, at 944, *citing* James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1305–06 (1985) (discussing the economic costs of dislocation); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1215–16 (1967) (arguing that just compensation does not account for the "demoralization" caused to targets).

98. *See* Pritchett, *supra* note 4, at 46.

legal academy, activist David H. Harris, Jr. has pointed to eminent domain as a chief culprit in the loss of property by African Americans.[99] Historian James W. Ely, Jr. has relied on eighteenth century critics of government in calling for the courts to rein in the "despotic power" of modern eminent domain.[100]

In the face of sharp criticism from so many angles, why has eminent domain been so resistant to change for so long? The chief reason is that eminent domain was carried along in the wide stream of judicial deference to economic regulation in the twentieth century. In nearly every realm, courts have deferred to the policy judgments of governments and their delegate agencies.[101] Indeed, the entire umbrella of what became known as administrative law has incorporated deference, with limited exceptions for claims involving special enumerated rights for certain individuals, such as free speech and race discrimination.[102] While courts in the early twentieth century were often skeptical of permitting the nascent progressive movement to regulate private conduct – the so-called *Lochner* era[103] – land use was one of the first areas in which the courts stopped their second-guessing and let local authorities use a free hand in regulating private conduct. In the landmark 1926 zoning case, *Village of Euclid v. Ambler Realty Corp.*,[104] the Supreme Court, using what would later be called "rational basis" review, deferred to the town's findings that zoning served the public welfare.[105] With a few hiccups, courts at both the federal and state level have followed *Euclid* and refused to second-guess the substantive wisdom of land use regulations, as long as the government proffers some public welfare rationale. The Court has even

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99. *See generally* Harris, *supra* note 4.

100. James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, PROB. & PROP., Nov.-Dec. 2003, at 31, 32.

101. *See, e.g.*, Ewing v. California, 538 U.S. 11, 36 (2003) (courts should defer to policy judgments); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 138 (1985); Karcher v. Daggett, 462 U.S. 725, 740 (1983).

102. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984) (federal courts must defer to the legal interpretations of agencies, in large part because the agencies are part of the political branches of government, which are more responsive to the public); U. S. Trust Co. v. New Jersey, 431 U.S. 1, 22–23 (1977) ("As is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."); State v. Barquet, 262 So. 2d 431, 437–38 (Fla. 1972) (courts should defer to the legislature on social and moral issues).

103. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding the law limiting the hours that a baker could work violated a "right to contract"); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697, 1718 (1984) (criticizing the "*Lochner* era" as the assertion by judges of one political choice – libertarianism – over other choices of government).

104. 272 U.S. 365 (1926).

105. *See id.* at 387–97. How can we reconcile the deference provided in *Euclid* and the continued strictness of the Supreme Court in reviewing other aspects of activist government until the late 1930s? Perhaps the answer is that zoning laws tended to provide benefits to the majority of affluent citizens, whose homes were legally protected by zoning from the prospects of annoying businesses or industry moving in down the street. *See id.* at 388, 394 (referring to apartments as "parasites" and suggesting a "pig" doesn't belong in a "parlor"). By contrast, regulations regulating business conduct outside of land use, such as the employment regulations at issue in *Lochner*, tended to help less affluent Americans at the expense of the capitalist class. *See Lochner*, 198 U.S. 45 (1905).

given its imprimatur to laws that favor a particular character or lifestyle for the locality – at least if the lifestyle is the single-family household.[106] Only when government has violated *procedural* standards, such as regulating land on the aesthetic whims of government officials, have courts been more scrutinizing.[107]

Land use regulation is impermissible, of course, when it violates a specific constitutional right, despite claims of a public purpose. Government cannot use land law to infringe the right of free speech (it cannot prohibit homeowners from putting political signs on their houses[108]) or the right against racial discrimination (government could not explicitly segregate races through zoning, even in the separate-but-equal era[109]). Should courts hold that eminent domain's public-use requirement constitutes another right that overrides deference? There are a number of problems with taking such a step. First, although "public use" might be interpreted to prohibit taking property when it is destined for private hands, the Fifth Amendment does not make clear, either through its text or its history, that this is the appropriate interpretation. Moreover, most constitutional rights are enforced from the viewpoint of the *citizen* challenging the government – we ask, for example, whether the person's right of free speech has been restrained. With eminent domain, by contrast, most of the proposals for a tighter standard tend to focus on the nature of the *government's* plans for the property, not on its effects on the private citizen. From a challenger's point of view, there is little difference in effect between eminent domain for a county fire station, which is clearly constitutional, and a similar taking destined for a private office and shopping development. Finally, as explained below, most theories accept as constitutional at least *some* uses of the power to condemn and then transfer to private hands. It remains a challenge for law to develop a coherent theory for limiting abuses of eminent domain.

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106. Perhaps the height of this deference was Vill. Belle Terre v. City of Boraas, 416 U.S. 1 (1974), in which the U.S. Supreme Court upheld a town's ordinance that was designed to keep college students from renting group houses. A landlord and a group of students argued that such a restriction violated various constitutional rights, including the right of association. In upholding the ordinance, however, the U.S. Supreme Court held, in effect (Justice Douglas writing for the Court), that if a town wanted to reserve its land for traditional families only, a court cannot interfere with this substantive choice. Justice Douglas stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

107. *See, e.g.*, Anderson v. City of Issaquah, 851 P.2d 744 (1993) (city may not reject a land use because of subjective aesthetic "feelings" of a government official).

108. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 45–48 (1994) (enforcing a First Amendment right).

109. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 304, 310 (1880) (holding unconstitutional a state law requiring all-white juries and holding that the 14th Amendment's equal protection guarantee prescribed only race discrimination).

II. TODAY'S EMINENT DOMAIN CONTROVERSIES

Eminent domain has been the target of a growing chorus of critics in recent years. This criticism has been driven, in large part, by factual developments. First, competition among governments has pushed them to more actively manage their economies and to look for new ways to attract businesses, jobs, and tax revenue. Moreover, local governments, understanding that courts have deferred to nearly any exercise of eminent domain, have decided to flex their power in new, and sometimes disturbing, directions. These changes have forced a reevaluation of the legal doctrine.

Political science commentators in recent decades have burst the bubble of the civic republican model, which viewed government as a body of sober representatives who deliberate and regulate private conduct solely in order to serve the common public interest.[110] A more skeptical perspective, the "public choice" school, argues that there is no such thing as the "public interest," only initiatives that help one private interest or the other.[111] Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others – be it business interests who are helped by regulation of their competitors or outdoor enthusiasts aided by laws restricting private development in parklands.[112] From another perspective, political scientist Paul Kantor has argued persuasively that many local governments are no longer in charge of their destinies.[113] Stung by movement of wealth and jobs to favored suburbs, many American cities have become desperate to retain and attract businesses and tax bases. As localities vie for business, governments become victims of a ruthless "market" in which the demand – the number of competing localities – greatly exceeds the supply of attractive and job-creating companies.[114] To lower the cost of doing business in their communities, cities are encouraged to take steps such as

110. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1514 (1992) (stating that under the "civic republican model," "government's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.")

111. *See, e.g.*, William F. Shughar II & Laura Razzolini, *Introduction: Public Choice in the New Millennium*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE xxii (William F. Shughart II & Laura Razzolini eds., 2001) (public choice rejects the notion of a "public interest"); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 18 (1962) (discussing the role of economic incentives in human behavior).

112. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (discussing the philosophical stance of public choice and its application to many realms of American law).

113. *See generally* KANTOR, *supra* note 15, at 172–73 (arguing that with the loss of wealth and power, cities have become dependent on attracting industry and business).

114. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that competing state governments act as a "market" in which citizens may choose where to live).

giving tax breaks, curbing regulations, and lowering the cost of land through creative use of eminent domain.[115]

In recent years, governments have moved beyond using their powers merely to attract business. Localities also understand that attracting wealthy *residents* is financially beneficial for the local budgets.[116] Not only do wealthier citizens usually pay more in property taxes, they also typically demand fewer government services – they tend to have fewer children who need public schools, they tend to get involved with crime less often, and they tend to need fewer government health services and emergency assistance.[117] As a result, today's local governments are encouraged not only to use eminent domain to shape the climate for business, but also to try to shape the composition of their citizenry. Encouraging wealthier citizens is, of course, nothing new for local governments. Since the early days of zoning, localities have used their land use power for "exclusionary zoning," which discourages the poor, through techniques such as restricting apartment construction and requiring that new houses must sit on large, and thus expensive, lots.[118] Eminent domain raises the stakes by giving government the disturbing ability to *jettison* existing poorer citizens from the community. Accordingly, governments have pushed to the limits their power to condemn through "blight" designations, as well as other exercises of eminent domain.[119]

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115. In many areas of law, commentators have observed that governments compete for business, and are dissuaded from regulating business, in order to improve their budgets and local economies. *See, e.g.*, William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 91–94 (1996).

116. Counsel for New London, Conn., the town whose eminent domain is challenged in the *Kelo* case, was quoted as saying, "We need to get housing at the upper end, for people like the Pfizer employees. They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city – the young urban professionals who will invest in New London, put their kids in school, and think of this as a place to stay for 20 or 30 years." Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at A25, *available at* 2005 WLNR 1273623.

117. *See, e.g.*, Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL'Y & L. 471, 502–03 (1998) (discussing why poor persons are likely to impose greater demands on local governments).

118. *See Vill. of Euclid*, 272 U.S. 365, 394 (1926) (an early and telling example of the aversion to apartment zoning); South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 174 (1975) (the ground-breaking decision, under New Jersey law, requiring that localities diverge from their usual aversion to apartment zoning and provide a "fair share" of low-cost housing); *see also* James E. McGuire, *The Judiciary's Role in Implementing the Mount Laurel Doctrine: Deference or Activism?*, 23 SETON HALL. L. REV. 1276 (1993) (discussing the legislative response); Susan Ellenberg, *Judicial Acquiescence to Large Lot Zoning: Is It Time to Rethink the Trend?*, 16 COLUM. J. ENVTL. L. 183 (1991) (discussing the practice of large-lot zoning, which often is touted as a way of slowing "growth," but in fact merely spreads it out along a more sprawling are and raises housing prices).

119. *See, e.g.*, Pritchett, *supra* note 4, at 13–26 (discussing the abuse of the "blight" designation, especially as a means of pushing away undesirable residents).

The notion of competition among local governments to attract citizens is also nothing new. In the 1950s, economist Charles Tiebout suggested that the extraordinary number of small local governments in the United States, even in each metropolitan area, serves the purpose of providing a "market" for governments.[120] A citizen who desires low taxes can pick a low-tax, low-service town, while another citizen who prefers more services – such as an extensive public library or mental-health counseling – can choose another community. This market for governments, however, poses a dilemma for compassionate local governments that seek to provide financial or other assistance for poorer persons, including the fostering of low-cost housing.[121] Assistance for the less affluent encourages them to migrate to the town; at the same time, the tax burden pushes away more affluent persons. Local governments can thus be trapped in a variant of the economic tale of the prisoner's dilemma: Although many governments may desire to provide social services, they are discouraged from doing so because of competition with their neighbors.[122] The only way out of this dilemma is for governments to try to close off the market through more centralized government decision-making, such as through metropolitan-wide governments.[123] Absent this solution, governments have an incentive to try to jettison poorer people from their community. While such an idea might strike one as shocking or callous, it is actually a logical extension of Tiebout's recognition of local government lawmaking as a market. Spurred by competition from neighbors, or at least the threat of competition, local governments are encouraged to maximize their tax bases and to minimize the number of poor residents in their community by any available method, including eminent domain.[124]

There is ample evidence that localities across the nation are using eminent domain to discourage poor residents and to encourage the affluent, either through attractive (and high-priced) housing stock or retail facilities that both pay high taxes and attract an affluent clientele. This

120. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Tiebout argued that allowing local government to craft their own laws is efficient, because it permits in effect a market of governments, in which citizens, in theory, are able to pick and choose the type of government and mix of services (or lack thereof, with the concomitant benefit of lower taxes) they desire. *See id.* at 416–24.

121. *See, e.g.*, Boudreaux, *supra* note 117, at 503–04 (arguing that poor persons are less likely to be able to shop for governments efficiently, and that governments compete to discourage poor residents).

122. *See id.* at 504, *citing* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 506–07 (10th ed. 1976) (discussing the mechanics of the "prisoner's dilemma").

123. *See generally* Boudreaux, *supra* note 117, at 504–06.

124. *See, e.g.*, Peterson, *supra* note 116, at A25 (discussing city of New London's desire to attract upper-income residents through eminent domain); Bill Varian & Kris Hundley, *Hillsborough Set to Woo Scripps Deal*, ST. PETERSBURG TIMES, Dec. 2, 2004, at 1B, *available at* 2004 WL 12973563 (discussing state government's agreement to pay for some salaries of professional employees as part of a package to lure a new campus for the California-based Scripps Research Institute to Florida).

phenomenon cannot be revealed fully by reviewing legal decisions.[125] Many exercises of eminent domain never end up in reported court opinions. After all, one of the perceived problems of eminent domain is that it is often used against the poor and politically unsophisticated, who are often unable to mount a legal challenge. A better barometer is found through news reports of how governments across the nation have been using, or abusing, eminent domain. Here is a sampling from the years 2004 and 2005:

> • In Newark, New Jersey, the city is planning an upscale redevelopment plan in the Mulberry Street area. Two-thousand condominiums would make up the heart of the planned complex. The city is in the midst of condemning thirteen acres as "blighted," including a mix of small homes and businesses. The city business administrator was quoted as justifying the plan by saying, "In the end, this thing is going to be here for 70 to 80 years as a tax ratable to the city."[126]
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> • South of Newark, in Long Branch, New Jersey, on the Atlantic coast, the town has used eminent domain to condemn the residences of about 300 people, many of them black, for redevelopment projects. The president of the local chapter of the NAACP has complained that "to use eminent domain to move people out just to move in other people with money – that's just not right."[127] Ironically, New Jersey was an avatar of state constitutional law to encourage affordable housing; each locality must actively provide for its "fair share" of low-cost housing.[128]
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> • In Ardmore, Pennsylvania, the township has designated as "blighted" much of the downtown business area, including an upscale coffee shop and a sophisticated men's clothing store. The business area would be remodeled into an "urban village" focused around a commuter rail stop, which the town hopes will be able to win back shoppers who have left for neighboring towns and their shopping malls. Explaining the township's rationale, Bruce Katz, one of the nation's leading commentators on urban policy, said, "[c]ities actually have very few tools at their fingertips to maintain their competitive edge. I think eminent domain is a critical tool for these places."[129] Nearby Philadelphia's Society Hill, in which poor residents were jettisoned for a redevelopment project that started in the

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125. *See* Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 REAL PROP. PROB. & TR. J. 251, 257–61 (2004) (discussing eminent domain and public use decisions over the past 20 years).

126. Jeffery C. Mays, *Newark Residents in Limbo – $550 Million Redevelopment Stymies Homeowners*, THE STAR-LEDGER, Aug. 15, 2004, at 31, *available at* 2004 WLNR 18071799.

127. *See* Joseph Picard, *Community Urged to Build Housing*, ASBURY PARK FREE PRESS, Feb. 16, 2004, at A1, *available at* 2004 WLNR 16589647.

128. *See* S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 724 (N.J. Sup. Ct. 1975).

129. Matthew P. Blanchard, *Ardmore Tailors the Concept of Blight*, PHILA. INQUIRER, July 31, 2004, at A01, *available at* 2004 WLNR 3691422.

1950s, is cited as an early exemplar of eminent domain to foster government-engineered gentrification.[130]

• Across the Delaware River in Camden, New Jersey, the old suburb of Philadelphia plans to demolish hundreds of old houses in various locations to make way for shopping complexes and condominium and townhouse developments. Remarkably, for a city whose population has fallen dramatically over the past fifty years, the government claims that one reason for the use of eminent domain is to decrease "density" in the area. Opponents of the condemnation assert that the poor people in the community, most of whom are African American or Latino, don't have the clout that the developers have. [131]

• In New York City, Mayor Michael Bloomberg has proposed a "visionary plan" to keep businesses from moving to the suburbs by creating a giant new business center in Brooklyn, across from lower Manhattan. The mayor's plan would create 5.4 million square feet of office space and thousands of apartments, but would also involve eminent domain to displace 131 families and nearly 100 businesses.[132] Meanwhile, in Manhattan, the city used eminent domain to evict apartment owners near Times Square who refused to sell, standing in the way of a new office building for the *New York Times*. A blight designation was upheld by the New York courts.[133]

• Across the country in Martinez, California, northeast of San Francisco, the city is considering the use of eminent domain to remove low-cost housing for redevelopment – a controversial approach that the city has rejected before. Although California law makes it comparatively difficult to use eminent domain for redevelopment – among other things the condemnation of housing must be accompanied by subsidies for low-cost housing construction – the practice has a long history in the state and is becoming more popular.[134]

• In San Diego, California, a new baseball stadium for the Padres stands as the anchor of a boom in downtown development, which has come at the cost of the removal of a number of low-income citizens and small businesses, many of them Latino, through eminent domain.[135]

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130. *See* Stephan Salisbury, *Society Hill Emerged Amid Tumultuous Times,* PHILA. INQUIRER, Mar. 17, 2004, at G13, *available at* 2004 WLNR 3701679.

131. *See* Erik Schwartz, *Progress or discrimination?*, COURIER-POST, Aug. 5, 2004, at 1B, *available at* 2004 WLNR 16060884.

132. Hugh Son, *Downtown Upswing: City Council Approves Sweeping Redo*, N.Y. DAILY NEWS, July 18, 2004, at 47.

133. *See* Gideon Kanner, *Not Always So Fit to Print*, NAT'L L. J., Oct. 30, 2002 at A21; Gideon Kanner, *Feeding 'Times'*, NAT'L L. J., Jan. 7, 2002 at A29.

134. Liz Tascio, *Redevelopment's Mixed Blessings Cities Use Agencies as Tools to Improve, Profit*, CONTRA COSTA TIMES, July 18, 2004, at A01, *available at* 2004 WLNR 3323021.

135. *See* Daniel B. Wood, *San Diego Reinvents Itself – and Gentrifies*, CHRISTIAN SCI. MONITOR, Feb. 26, 2004, at 2, *available at* 2004 WLNR 1642415.

• In North Miami, Florida, the city is using eminent domain to help give a "face lift" to the working-class town, which holds a large Haitian population. A city attorney was quoted as saying that the project, which will involve the demolition of low-cost apartments and the construction of "upscale" condos, was "social engineering" that will greatly improve the city's tax base. "If this works," the attorney said, "everyone associated with it will be able to take pride in a once-in-a-lifetime accomplishment."[136]

• Nearby, in Riviera Beach, Florida, the town is planning an enormous redevelopment project that would remove more than 2,000 houses, many of them low-cost and owned by African Americans, to allow private development of high-rise condos, large houses, and shops. The mayor defends the plan by pointing to the plan's tax benefits, which may pay for better roads and new schools. "We will eliminate poverty in Riviera Beach," he said.[137]

• In Alabaster, Alabama, the town declared as "blighted" a handful of houses that refused to sell to a developer that planned a 100-acre shopping center just off Interstate 65. The eminent domain plan received nationwide attention after it was reported that Wal-Mart, the whipping boy of suburban development, was reported to be an anchor of the shopping center.[138]

• In Lakewood, Ohio, outside Cleveland, the suburb started eminent domain proceedings against dozens of houses, apartments, and small businesses, in order to facilitate the construction of new condominiums and a high-end shopping mall. Defending the action, the mayor said, "This is about Lakewood's future. Lakewood cannot survive without a strengthened tax base. Is it right to consider this a public good? Absolutely?"[139]

• In Ohio's capital, Columbus, a film called "Flag Wars" documented the painful transformation of the city's Near East Side, recently occupied mostly by low-income African Americans, to "Olde Towne," an area attractive to young urbanites, including many single-sex couples, some of whom want the low-income residents to leave. While the town has not yet used eminent domain, the filmmakers documented instances in which the city government facilitated the transformation by steps such as bringing a prosecution against a vocal low-income resident for an unlawful "sign" concerning his African heritage outside his house.[140]

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136. *See* David Ovalle, *City is Banking its Future on Massive Redevelopment,* MIAMI HERALD, at 1B, *available at* 2004 WLNR 6296749.

137. *See* Dennis Cauchon, *Pushing the Limits of 'Public Use'*, USA TODAY, Apr. 1, 2004, at 03A, *available at* 2004 WLNR 6257751.

138. *See* Patti Bond, *Eminent Domain Issue in Alabaster,* ATLANTA J. CONST., Oct. 21, 2003, at 1A.

139. *60 Minutes: Eminent Domain: Being Abused?* (CBS television broadcast July 4, 2004).

140. *See* Ty Burr, *Documentary on Gentrification Loses Sight of the Big Picture,* BOSTON GLOBE, Apr. 23, 2004, at C6, *available at* 2004 WLNR 3587487.

- In Washington, D.C., the city has declared "blighted" a sixteen-acre area of the poor southeast part of the city, which includes small businesses run by immigrants, in order to make way for a new shopping center, and plans to use eminent domain to build a new baseball stadium.[141]

- Finally, across the country in Las Vegas, Nevada, the government declared "blighted" and condemned a number of old commercial businesses in the once-cozy downtown to pave the way for a new parking garage to serve the casinos of downtown Fremont Street, which, ironically, is trying to compete with the larger casinos of the Las Vegas Boulevard strip in America's fastest-growing city.[142]

III. GOOD AND BAD SCENARIOS FOR EMINENT DOMAIN

In this part, I explore some of the dilemmas that face proposals to tighten eminent domain's public-use requirement. These dilemmas form obstacles to reform for both property rights conservatives and advocates for racial minorities and the poor. In order to flesh out these problems, I conjure up a handful of stylized hypothetical scenarios, most of which resemble some of the real examples of eminent domain that are filling the pages of today's newspapers. These scenarios present arguably "bad" uses of eminent domain and arguably "good" uses of eminent domain to foster economic development.

1. Playing Ball. Faced with a tough re-election campaign, a big-city mayor lunches with the owner of an out-of-town baseball team that has been losing money in its current home town. The owner asks that the city provide the team with a parcel of land for the construction of a new ballpark. The mayor mentions land that is currently occupied by a few blocks of small houses, occupied mostly by low-income families. "The people should pose no problem," the major says. "We'll being willing to play ball, especially if you help me out in the re-election campaign." Nods are exchanged. The city condemns the neighborhood as "blighted," and the owner's businesses make contributions to the mayor's re-election campaign.[143]

2. Offshore Threat. The chief executive officer of a large manufacturing company is faced with declining sales in the face of stiff competition from foreign competitors. The CEO leaks to the press that

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141. *See* Tom Knott, *Eminent Domain Threatens American Dream,* WASH. TIMES (D.C.), May 20, 2004, at B02, *available at* 2004 WLNR 771498.

142. *See* Vin Suprynowicz, *"The Taking . . . is Unconstitutional and Void,"* LAS VEGAS REV. J., Sept. 14, 2003, at 2E.

143. Although cases of proven bribery are rare, the most infamous case of government yielding to powerful and connected private interests in land matters was the sale of much of the Chicago waterfront to the Illinois Central railroad in 1869. For a history of the politics of the sale, the possible corruption, and subsequent litigation under the public trust doctrine, *see* Kearny & Merrill, *supra* note 31, at 924–30. For the story of a city's failed attempt to redevelop through construction of a baseball stadium, *see What Went Wrong?,* ST. PETERSBURG TIMES, Mar. 9, 2005 (special section), http://www.sptimes.com/2005/webspecials05/devilrays10/index.shtml.

she will consider moving production "offshore" unless the company can expand at its current location and incorporate a new hi-tech manufacturing process. The state government fears the loss of jobs associated with the plant. The CEO then announces a deadline of three months for the state to sell, for a nominal price, a 100-acre piece of property needed for the factory expansion. The 100 acres include an aging strip mall and a few old apartment buildings. Urged on by labor union leaders, the state government uses eminent domain to take the 100 acres. The land is transferred to the manufacturer at a well-attended media event, behind a banner "Saving Jobs, Building Our Communities."[144]

3. Halting "Decay." An older suburb just east of a big city includes in its housing stock a large number of small "starter" houses and garden apartments built when the area attracted an influx of workers during World War II. While nearly all of the early residents were young white families, in recent years most white families have preferred the suburbs to the west, which contain newer, larger houses with two-car garages. In their place, the older suburb has experienced an influx of immigrants, most of whom are Latino or African. As a result of the demographic shift, the large chain stores leave and are replaced by small thrift stores and carry-outs. Long–time residents in the old suburb campaign against the "decay" and eventually join forces with a national shopping mall developer, which unveils a plan to level the old shopping street and replace it with a gleaming new upscale mall – if the county government agrees to take the land by eminent domain.[145]

Each of the three scenarios above might be considered "bad" exercises of eminent domain. In each, undue influence, economic pressure, or racial and class bias has motivated the exercise of eminent domain. Each might also raise potent objections under a tougher public-use requirement. Now consider some other, perhaps "better" uses of eminent domain:

4. The City Park. A growing city finds that a drawback in its original layout is the lack of a downtown park. When an old hotel in the city center is damaged by fire, the local government decides to exercise eminent domain and condemn the building. The city transforms the block into a central city square. To help pay for its maintenance, the city enters into long-term leases in the park with a popular coffee

144. The most famous example of a powerful employer's using its economic clout to influence local government's eminent domain was General Motors' successful effort to get Detroit to condemn Poletown in the late 1970s. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004). Ralph Nader and Alan Hirsch have characterized the struggle between General Motors and the Poletown residents "like a football game between Penn State and a junior college." Nader & Hirsch, *supra* note 13, at 226–27.

145. Consider the example of Silver Spring, Md., the town where the author grew up, and whose downtown was transformed in the early 2000s as part of a "revitalization" of the old suburb. *See* Paul Boudreaux, *The New Silver Spring Isn't Golden to Me*, WASH. POST, Oct. 5, 2003, at B08.

bar chain, a gourmet sandwich shop, and a privately run underground parking garage.[146]

5. Building Avenues. Another rapidly growing city is troubled by the fact that its downtown streets were laid out in the nineteenth century, before automobiles, and are too narrow and crooked for today's heavy commuter traffic flows from suburban residential areas. Because of the congestion, many leading city businesses are moving to distant suburbs – a phenomenon that brings with it all the environmental, land use, social, and excessive fuel use problems of "sprawl." In an effort to curb the sprawl and encourage businesses to stay downtown, the city and adjacent county join in a plan to take by eminent domain dozens of private lots along four routes into downtown. The plan is to tear down most of the old structures along these routes, lay out wider avenues to the downtown (with room for a light-rail system) and then re-sell the remaining land along the new arteries, giving priority to those owners whose property would be taken. New construction along the routes would be undertaken with the assistance of a set of leading urban architects.[147]

6. Widget Town. A group of economists conclude that a particular region's resilient economy has long been bolstered by its reputation as a center for the widget industry. Without this special reputation, the economists conclude, the region's economy would be likely to decline, as many other old industrial areas have done. When the XYZ Widget Corporation, the region's largest, is offered lucrative tax breaks by other cities, XYZ announces that it will take one of the offers unless it gets financial incentives from its home state. The state legislature decides to condemn by eminent domain some valuable riverside land adjacent to the airport, which had been set aside for a planned park, and instead to build the park on the other side of the river. The state then sells the condemned land at a discount to XYZ, in return for a commitment to build a new widget plant and not to move from the region for another thirty years.[148]

7. Revitalization Complex. Another industrial city has not been so lucky. Like many others, it has witnessed a drain of its middle-class families to the suburbs, while high crime discourages others from moving in. As the city's tax base dwindled, its schools and services suffered. Although many city blocks lay vacant, no one has wanted

146. Pioneer Courthouse Square, the central square in Portland, Ore., which serves as the focal point for the nation's most famously new-urbanist downtown, was opened by the city only in 1984, after being a hotel and parking lot for most of its history. *See, e.g., Pioneer Courthouse Square History*, http://www.pioneercourthousesquare.org/history.htm (last visited Sept. 22, 2005).

147. The modern conception of Paris, France, as being a city of wide boulevards, broad vistas, and elegant architecture dates largely from the mid 19th century, when Napoleon III's prefect of the city, Baron Haussmann, condemned huge swaths of the city for his grandiose boulevards. *See generally* DAVID P. JORDAN, TRANSFORMING PARIS : THE LIFE AND LABORS OF BARON HAUSSMANN (1995).

148. Another way of looking at the Poletown matter is to see the city of Detroit wisely using eminent domain to retain the most distinctive and salient aspect of its economy – as the nation's automotive center.

to risk new housing construction. Finally, a housing developer proposes to build a large mixed-use complex of stores and condominiums, along with a couple hundred low-cost apartments. To be successful, the developer states, the complex has to be big enough to provide a sense of security, and has to be close enough to the downtown to attract single professionals. To fit the complex in, the developer plans to buy a number of vacant lots, but also needs the city to condemn two blocks of occupied properties. The blocks currently are home to a handful of old row houses, some of whose owners refuse to sell. Persuaded by the prospect of finally finding a private housing developer that will venture into the city, and by the prospect that success might attract more developments, the city declares the block "blighted," condemns it, and sells it for a nominal fee to the private developer.[149]

8. *Playing Ball, Revised.* When the original ballpark plan in scenario 1 falls apart because of a lack of sufficient parking and access to highways, the newly elected mayor picks a section of downtown near the interchange of two major freeways and close to existing downtown parking lots that are usually empty in the evenings. An independent engineering study concludes that the new location is the best in the city for a new ballpark. Most of the property is occupied by warehouses, many of which are abandoned or derelict. When the engineering study is released, however, three warehouse owners demand a price far higher than the fairly generous government offers. The city then exercises eminent domain to take the warehouse properties for fair market value to enable completion of the ballpark project.[150]

Scenarios 4-8 set forth examples that might be considered more justifiable exercises of eminent domain. One might consider some or all (or perhaps none) of scenarios 4-8 to be both worthwhile and fair. One could argue that in each of these cases the government has "used" the property to serve the public interest. In scenario 8, in particular, eminent domain might be justified because private property owners are encouraged to "hold out" when their property is fairly unique in fulfilling a public housing need. Yet in all of these examples a *private* party has also benefited unusually from the taking. In all of the examples except one, private owners would take the title to the land. And even in scenario 4, where the government has retained ownership of the "city park," the

149. In *Kelo v.City of New London*, the town condemned land in order to encourage wealthier residents, not poorer ones, of course. *See* Peterson, *supra* note 116, at A25. In some jurisdictions, however, any new development project must include a share of low-cost housing, in order to alleviate the affordable housing crunch. *See* Brian W. Ohm & Robert J. Sitkowski, *Integrating New Urbanism and Affordable Housing Tools*, 36 URB. LAW. 857, 858 (2004).

150. Washington, D.C., plans to build a new ballpark, in part through eminent domain, for the new privately owned Washington Nationals baseball team. *See* Dana Hedgpeth, *Supreme Court Case Could Affect Baseball Stadium*, WASH. POST, Feb. 23, 2005, at E01. Although the plan is to keep the property in public ownership, the primary use of and profits from the property would be for the private owners. *See id.*

government has transferred some of the land to private hands through long-term leaseholds.

If a critic of excessive eminent domain accepts the idea that non-governmental use of condemned property may *sometimes* be justified, then the critic must develop a test to separate permissible uses of eminent domain from impermissible ones. The most straightforward and restrictive test would be to limit eminent domain only to those cases in which the government retained the fee simple. Such a rule would be a very strict interpretation of the public-use standard. It would allow governments to take land for roads, schools, and fire stations, but not to engage in any development projects in which the land is sold to private interests. Even this seemingly blanket rule might, of course, cause difficulties. What if a governmental authority tried to evade the rule by keeping the fee simple but then entering into a ninety nine-year lease with a private business? If the rule prohibited the leasing of taken land, would this prohibit the government from renting out a corner of a passport office building to a private photo shop, or from leasing out space to a sandwich shop in the county office center? Would the government be prohibited from selling the property *forever*, even when it decided that the fire station or post office should be moved elsewhere?

If law allows eminent domain in at least *some* cases in which the government transfers the property to private owners, but not others, complications arise in developing a more nuanced rule. Cases of proven outright bribery probably should not be permitted; the prohibition might be extended to cases of improper governmental behavior or bias, as in the first "playing ball" example, scenario 1, above. But such bias is likely to be difficult to prove. An even thornier problem arises in sorting through development projects that are touted as serving the public interest. Compare the examples of "halting decay," scenario 3, with "widget town," scenario 6. In the former example, the government's argument that eminent domain serves the public welfare is tainted with racism, or at least classism. What some affluent residents may view as the "decay" of a town may appear to other, less affluent persons as merely an evolution in the town's character in a more diverse America. Accepting that racial motivation is impermissible, how is a court supposed to make such a factual finding with exercises of eminent domain? It is true that judges and juries often make difficult decisions about whether race forms a partial or hidden motivation, in employment and other cases.[151] But the well-known difficulties of such inquiries would be magnified in situations involving animus not against particular individuals, but against an community. Moreover, in such cases it is not clear whether "disparate

151. *See, e.g.*, Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1215 (1996) (discussing the complexities of discerning racial motivation in legislative decisions); Personnel Admin. v. Feeney, 442 U.S. 256, 273–74 (1979) (setting forth a standard for claims of racial motivation under the Fourteenth Amendment).

impact" would be sufficient – that is, could a plaintiff make out a prima facie case simply by showing that the eminent domain disproportionately hurt members of racial minorities?[152] And how would the law handle a town's "justification" that it undertook the redevelopment action for purely financial reasons – that it needed more upscale development in order to attract tax revenue in order to pay for schools, police, and social services?[153]

In cases not involving race, the job for the courts becomes even tougher. When a government argues that it needs eminent domain to foster economic development, some may applaud the step. Others may scoff, especially when one or more private businesses end up owning much or all of the land. Critics may assert that it is *private* gain, not public welfare, that has spurred the project.[154] How is a court supposed to resolve such a dispute? One stumbling block is ascertaining whether the locality is being honest about its true motivations. Should a court try to figure out, as in scenario 7, the "revitalization complex" example, whether the government's assertions of a public benefit are valid, or a ruse for private enrichment? Perhaps an even tougher task would be to revaluate the government's judgment that a project would be financially beneficial for the locality. In scenario 6, "building avenues," would the supposed public benefits of building new routes and constructing new buildings be worth the condemnation of dozens of properties? The answer seems murky. Because of the obvious pitfalls in having courts second-guess the judgments of elected officials or their delegated agencies, courts in the twentieth century essentially washed their hands of such types of decisions.[155] Exercises of the local police power generally are given only cursory review,[156] while the Fourteenth Amendment's "rational basis" test employs a similar standard of deference.[157] Indeed,

152. The doctrine that a practice may violate anti-discrimination laws, without proof of discriminatory intent, if it exhibits "disparate impact" on suspect classes, was established in the employment discrimination case of Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971). Disparate impact was made an explicit requirement with the Civil Rights Act of 1991, Pub. L. 102–166, §§106, 107, 105 Stat. 1074, 1074–1076 (codified at 42 U.S.C. §§ 2000e-2(k) (2004)).

153. A defendant may successfully defend a claim of disparate impact by showing that the challenged policy or practice is justified as a nondiscriminatory "business necessity." *See Griggs*, 401 U.S. at 430–32.

154. In *Kelo v. New London*, argued before the Supreme Court on Feb. 22, 2005, the plaintiffs argued the government should not be permitted to take property by eminent domain for the *purpose* merely of fostering private economic development. *See* Brief for Petitioners at 12, Kelo v. New London, No. 04-108 (U.S. Dec. 3, 2004).

155. *See, e.g.*, Ewing v. California, 538 U.S. 11, 36 (2003) (courts should defer to policy judgments); Chemical Mfrs. Ass'n v. Natural Res. Defense Council, Inc., 470 U.S. 116, 138 (1985); Karcher v. Daggett, 462 U.S. 725, 740 (1983); *see also* Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (refusing to second-guess legislative motivations).

156. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984) (courts will not review the underlying merits of the police power decision); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (deferring to town's decision to impose zoning restrictions).

157. Unless the claimant is in a suspect class, a governmental discrimination does not violate the equal protection guarantee as long as there is a "rational basis" for the discrimination, tied to a legitimate governmental end. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442,

even when a regulation is fairly obviously spurred by a desire to foster one business at the expense of another, courts have deferred, as long as the government sets forth an argument of public benefit.[158] If law is to impose a *tougher* standard for eminent domain, therefore, it must go beyond the traditional law of deference and answer the hard questions.

IV. QUANDARIES FOR THE RIGHT AND LEFT

Constructing a tighter law of eminent domain is bound to conflict with some established legal assumptions. It is also bound to clash with some of the principled stances of both property rights conservatives and advocates for the poor. Critics from both the right and left may find that development of a new eminent domain standard will entangle them in some thorny legal quandaries that will complicate any reform.

A. The Right

Property rights libertarians such as Richard Epstein were among the first to deplore the supposed excesses of the late twentieth century law of eminent domain.[159] The first quandary facing a property rights-oriented approach to reform, however, is the matter of *compensation*. After all, private property owners are always entitled to "just compensation" when their property is taken by eminent domain.[160] Most of the legal battles over the property clause of the Fifth Amendment in recent decades have concerned whether government regulation, causing a diminution in the value of the land, constitutes a "taking" for which the owner is then entitled to compensation.[161] The goal of vigorous property rights advocates in the courts, including Chief Justice William H. Rehnquist and Justice Antonin Scalia, has been a wider obligation of governments to compensate property owners. When faced with challenges to land regulations that social conservatives view with skepticism – such as ecologically-

448 (1985) (zoning case); Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955); Reid v. Rolling Fork Pub. Util. Dist., 979 F.2d 1084, 1087 (5th Cir. 1992) (land use case).

158. In *Williamson*, it appeared that the legislature had protected professional optometrists and ophthalmologists at the expense of opticians by making it illegal for the latter to fit old glasses into new frames. *See* 120 F. Supp. 128, 134, 137 (D. Okla. 1954), *rev'd*, 348 U.S. 483 (1955). The Supreme Court, however, held that it is not the role of the courts to second-guess such policy choices. 348 U.S. at 487–88. If there is any evidence that a classification serves some legitimate end it will be upheld, even in the face of considerable evidence that the classification was adopted at least in part as protectionism for one group over another. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469–70 (1981), *rev'g*, 289 N.W.2d 79 (Minn. 1979).

159. *See generally* EPSTEIN, *supra* note 1.

160. *E.g.*, U.S. CONST. amend. V (entitlement of "just compensation" when government takes property for public use).

161. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (state must compensate a landowner when a regulation eliminates all economically beneficial use of the land); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (a government cannot obtain an easement to serve some legitimate governmental purpose, without payment of compensation); *id.* at 842 ("[I]f [the government] wants an easement across the Nollans' property, it must pay for it"); Penn. Central Transp. Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) (arguing it is unfair for government to regulate land use so that a few regulated landowners bear all of the financial burden of providing a benefit to the community).

driven limits on coastal construction[162] or laws barring the modification of old buildings[163] – the front line of attack been to demand compensation, not to attempt the highly difficult task of second-guessing the public-welfare decision on its merits. As Chief Justice Rehnquist wrote in a famous dissent, a property rights concern is that government should not force individual landowners to sacrifice the value of their land for the public good; instead, the government should compensate these landowners.[164]

In eminent domain cases, however, government has already *conceded* that it must pay just compensation (even if the fair market value of the property, which is the usual standard for assessing compensation, does not always fully compensate a landowner for the psychological or sentimental losses sometimes generated with eminent domain).[165] It is true, of course, that the public-use requirement is a separate constitutional requirement from the no-taking-without-compensation command. Nonetheless, it would require a change in property rights philosophy to support a tighter public-use test. Instead of focusing on the plain facts of the *monetary* loss accompanying regulation, property rights advocates will have to focus instead on the vaguer *psychological* and *social* losses associated with eminent domain.[166]

Indeed, a move away from compensation as the appropriate remedy under the Fifth Amendment raises an even broader quandary for free-market critics – a quandary of the fungibility of property. One of the bases of free-market economics is the idea that the true "worth" of an asset is best expressed through its monetary value in the market.[167] Distortions in the market are therefore considered to be "inefficient," in that they decrease the overall wealth of society.[168] For a marketable asset such as land, its value is best expressed by its fair market value. For goods of equal value, rational consumers are presumed to be "indiffer-

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162. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992) (holding that the government must compensate the landowner for the "total taking" regulation, if regulation did not fit within traditional nuisance regulation).

163. Penn. Central Transp. Co. v. City of New York, 438 U.S. 104, 138–39 (1978) (Rehnquist, J., dissenting) (arguing that government should have to compensate the landowner for the decreased value of property as a result of historic preservation law).

164. *Id.* at 141 (Rehnquist, J., dissenting).

165. *See, e.g.*, Garnett, *supra* note 13, at 945 (discussing the psychological costs of losing one's property by eminent domain); Fennell, *supra* note 96, at (describing the costs of a loss of "autonomy").

166. This is not to say that property rights conservatives fail to contend that property owners suffer financial loss through eminent domain. Epstein, for example, bases his objections largely on the cloud over profitable investment and development caused by the potential of eminent domain. *See* EPSTEIN, *supra* note 1, at 177-81.

167. *See Lucas*, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof[?]" (quoting 1 E. COKE, INSTITUTES § 1, at (1st Am. ed. 1812))); *see also* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD (1999) (discussing the economic efficiency model of human behavior).

168. *See, e.g.*, Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451-53 (1987) (touting the efficiency of the market and criticizing governmental meddling).

ent" among them.[169] To compensate property owners with the fair market value of their land – a requirement of eminent domain – is thus to make them whole. Assuming the relative fungibility of an asset such as land, an owner whose property is taken by eminent domain should be able to replace it relatively easily with the compensation award, according to free-market economics.

This is not to say that the psychological and social losses associated are not real costs, of course, to those whose property is taken by eminent domain.[170] Nonetheless, these costs might justify only a modification of the *amount* of compensation in order to make the owner whole, just as awards for psychic injuries supposedly make tort plaintiffs whole. There is no principle of "immorality" for violating "rights" in free-market economics. Epstein, accordingly has focused not on the psychic harms caused by eminent domain but by the more subtle and indirect financial injuries supposedly imposed on business plans by the uncertain specter of eminent domain.[171] It remains a challenge for private-rights jurists to transform these ideas into workable standards for a tighter law of eminent domain.

B. The Left

Critics on the left face an ever greater array of quandaries. Both a demand for a stronger right to retain private property (albeit in the name of less-affluent property owners) and a call for a greater skepticism of the government's exercise of its police power run counter to the major thrusts of modern left-of-center property thought.

First, a limit on government's ability to exercise eminent domain would almost necessarily implicate an expansion of a "right" to private property, however defined. Yet modern left-of-center conceptions of property almost uniformly *de-emphasize* the private, proprietarial nature of property. As put by Professor Eric T. Freyfogle in his recent book, *The Land We Share*, for example, "[p]rivate land in the law is an abstract human construct" and "private property . . . is a social institution in which public and private are necessarily joined."[172] Citing Benjamin Franklin's thinking that property is merely a creature of the legal system and Thomas Jefferson's idea that government should "break up large

169. *See, e.g.*, 2 Paul A. Samuelson, *Commentary on Welfare Economics*, *in* THE COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 1041 (Joseph E. Stiglitz ed., 1966) (discussing the concept of consumer "indifference").

170. *See* Garnett, *supra* note 13, at 944, (citing James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 Minn. L. Rev. 1277, 1305-06 (1985) (discussing the economic costs of dislocation)).

171. *See* EPSTEIN, *supra* note 1, at 177-81.

172. ERIC T. FREYFOGLE, THE LAND WE SHARE 2, 7 (2003).

landholdings," Freyfogle argued that ownership of property requires, as a predominant feature, an obligation to the *public interest.*[173]

Indeed, left-of-center property theory emphasizes the authority of government to thoroughly insinuate the public interest in private property. It rejects the notion that private property is a "bundle" of private rights, removal of one of which triggers compensation.[174] Liberal commentators objected to the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council* that government cannot regulate to deprive an owner of all economically beneficial use for the property.[175] And they reject the skepticism of government expressed in the Supreme Court's stringent standard of review of "exactions" from landowners seeking permits.[176] Liberal property theory calls instead for a sweeping *deference* to governmental decisions to regulate private property.[177] Environmentalists argue that pervasive regulations of air, water, and soil use are justified by the historically under-appreciated interconnections among these natural resources.[178] Liberal economic policy has emphasized the positive role that government can play in restricting, shaping, and directing economic activity in certain positive directions.[179] A broad power of eminent domain to foster urban redevelopment would seem, therefore, to harmonize with this faith in government to mold economic activity for the public benefit.[180]

A more skeptical standard for eminent domain would seem to align leftist thought with the public-choice school of politics, usually associated with the political right. The public-choice theorists scoff at the progressive notions of government's acting in the "public interest."[181]

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173. *Id.* at 5.

174. *See, e.g.*, Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 831 (1987) (likening the ownership of property to a "bundle of rights").

175. *See, e.g.*, Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 334-68 (2004); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993).

176. *See Nollan*, 483 U.S. at 837 (describing land use exactions as having an essential nexus to the supposed harm for which they compensate); *see also* Dolan v. City of Tigard, 512 U.S. 374, 398 (1994) (stating that the exaction must be roughly proportional to the supposed harm).

177. *See, e.g.*, *Lucas*, 505 U.S. at 1039 (Blackmun J., dissenting) (calling for deference to governments land use policy judgments).

178. Perhaps the most famous aphorism of environmentalists is John Muir's "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe." JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 110 (1908); *see also Lucas*, 505 U.S. at 1035 (1992) (Kennedy, J., concurring) (discussing the fragility and interconnection of ecosystems).

179. *See, e.g.*, Minor Myers III, *A Redistributive Role for Local Government*, 36 URB. LAW. 753, 776 (2004) (discussing the role of Democratic politics, beginning with the New Deal, in giving government a larger role n the nation's economy).

180. *See, e.g.*, Brief for Law Professors Robert H. Freilich, et al. as Amici Curiae Supporting Respondents, Kelo v. New London, 125 S. Ct. 2655 (2005) No. 04-108, 2005 WL 176672 (arguing for deference).

181. *See, e.g.*, William F. Shughart II & Laura Razzolini, *Introduction: Public choice in the New Millennium*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE, at xxii (William F. Shughart II & Laura Razzolini eds., 2001) (asserting that public choice rejects the notion of a "public interest");

Such a concept is an illusion, they contend; most governmental decisions merely serve one private interest group over another.[182] Regulations that purport to protect the environment for example, such as the restrictions on coastal construction in *Lucas*, are not manifestations of the public interest but merely a temporary political victory of those who enjoy recreation on undeveloped beaches over those who would seek to profit from beachfront houses.[183] To develop a skeptical law of eminent domain would be to reverse the traditional leftist trust of government to regulate social matters and to ally itself, however marginally, with the public-choice school and the skeptics of the whole notion of the "public welfare."

In sum, a tougher public-use standard would create an extraordinary tension with left-of-center property theory. It would seem difficult for a coherent conception of property law to both (1) follow a *deferential* standard toward the regulation of private property, with no requirement of compensation, and at the same time (2) impose a *demanding* standard of inquiry into government's exercise of eminent domain, which comes with compensation.

V. ASSESSING IDEAS FOR A TOUGHER PUBLIC-USE STANDARD

Most existing proposals for a tighter law of eminent domain fit into three categories.[184] First, eminent domain could be allowed only when the government retains the fee simple ownership of the taken property. I call this the *governmental title* approach. Second, the power to condemn could be permissible only when there are special and specified attributes of the property that justify eminent domain. Such a test, adopted by the Michigan Supreme Court in 2004 in *Hathcock*,[185] may be called the *special circumstances* approach. Third, courts could construct a more exacting scrutiny of the public-welfare justifications for taking property destined for private ownership. This is the *closer scrutiny* approach.

The governmental title approach holds the benefit of simplicity. Drawing on the Fifth Amendment's language of "public use," courts could hold that governments cannot condemn land and then transfer it to private parties. Eminent domain for roads, police stations, and fire stations would still be permissible, but condemnation for economic devel-

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BUCHANAN & TULLOCK, *supra* note 111, at 18 (discussing the role of economic incentives in human behavior).

182. *See generally* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999).

183. *See generally* DAVID LUCAS, LUCAS VS. THE GREEN MACHINE (1995) (describing the developer's point of view of how he battled what he saw as the overly powerful forces of environmentalism).

184. This list is not exclusive. For another of the growing number of articles criticizing the 20th century deferential law of eminent domain, *see* Nancy Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3, Part V. (2003).

185. *See* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

opment would not be. Professor Epstein, for one, appears to favor this tighter interpretation of the public-use requirement.[186] The governmental title approach would also allow for the continuation of some of the supposedly core purposes of eminent domain under liberal ideas of good governance – public places such as parks, schools, and community centers.

But there are some serious drawbacks to the governmental title approach. Such a restriction would eliminate some putatively "good" uses of the governmental power. Eminent domain in Part III scenarios 5 ("building avenues"), 6 ("widget town") 7 ("revitalization complex") and 8 ("playing ball, revisited") each would be unlawful. One might view such a restriction as the necessary cost of reining in the potential for governmental abuse. Nonetheless, it would be an odd system of law that allowed government to regulate private property so as to prohibit its most profitable uses and to reduce its value by 80% or so and not owe compensation, as is permitted under current law,[187] yet *prohibit* government from using eminent domain, with full compensation, for the purpose of fostering a seemingly worthy cause, such as the low-income housing revitalization complex in scenario 7. Moreover, if fee simple ownership were the criterion, crafty governments could circumvent the restriction. Governments could take property by eminent domain and enter into long-term leases with private tenants, thus retaining ownership while providing the land for private "use." The public-use standard could, of course, be modified further to require that the land be subject to some sort of governmental control or other restriction. Such compromises lead naturally to the second approach for restricting eminent domain.

A *special circumstances* approach was followed the Michigan Supreme Court in 2004's *County of Wayne v. Hatchock*.[188] It was also proposed by the dissenting United States Supreme Court justices in 2005's *Kelo v. City of New London*.[189]

By overruling the infamous *Poletown* decision, Michigan took the lead in developing a tighter state law doctrine of eminent domain. The *Hathcock* case resembled *Poletown* in many respects: the county (which encompasses Detroit and numerous suburbs) wanted to condemn a num-

186. *See* EPSTEIN, *supra* note 1, at 170-73 (criticizing the unlimited reach of eminent domain).

187. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 408-09 (1915) (holding that a regulation preventing owner from continuing to use the property as a brick kiln and deprived the owner of the bulk of the value of the property was not unconstitutional); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (finding 75% reduction is acceptable); Pace Res., Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1031 (3d Cir. 1987) (finding 89% reduction is not a taking).

188. 684 N.W.2d at 775.

189. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting). Justice O'Connor, joined by other property rights conservatives, sought to allow eminent domain only when the condemned land (1) would be owned by the public, (2) is transferred to a private common carrier, such as a railroad or utility, or (3) has been taken by government because of some "affirmative harm" caused by the private land use. *See id.* at 2673-75.

ber of privately owned parcels near Detroit's Metropolitan Airport[190] for the purpose of a 1,300-acre business and technology park.[191] The county hoped that the "Pinnacle Project," which would include a conference center, hotel, recreational facilities, and space for business, would create thousands of jobs and add hundreds of millions of dollars of tax revenue for the county.[192] Much of the land would be transferred to private ownership. Wayne County secured hundreds of acres for the project through voluntary sales, but nineteen owners refused to sell, triggering a county condemnation proceeding.[193]

Although not doubting the "public benefit" of the project, the Michigan Supreme Court nonetheless held that the plan failed to meet a state's constitutional public-use requirement for eminent domain. Although it called private property "sacrosanct,"[194] the court did not impose a governmental title requirement.[195] Rather, returning to pre-*Poletown* precedent, the court concluded that eminent domain destined for private ownership is sometimes permissible.[196] Three special circumstances justify condemnation of land destined for private hands. First, condemned land may be transferred if a private project would face intolerable burdens of "assembly" without eminent domain; transportation corridors such as railroads and canals, which must follow fairly direct paths, supposedly fit within this category.[197] Second, private parties may receive condemned land if it remains "accountable" to the public through pervasive regulation, such as electric and water power utilities.[198] Third, if the specific piece of land subject to condemnation is of "special concern," then the government may seize and transfer it to private parties.[199] In Michigan's *In re Slum Clearance* case of 1951,[200] the government's desire to remove specific slums justified eminent domain, even though the land was then sold to private parties. Because the Pinnacle Project in *Hathcock* failed to meet any of these three special exceptions, the Michigan Supreme Court held that it could not justify a constitutional exercise of eminent domain.[201]

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190. *See Hatchock*, 684 N.W.2d at 770.

191. In today's business jargon, the word "technology" no longer means the use of science to create useful things, but refers specifically to computer-related and microelectronic-related businesses.

192. *See Hatchock*, 684 N.W.2d at 770.

193. *Id.*

194. *Id.* at 769. Did the court really mean this? Is private property truly "sacrosanct," meaning that it cannot be touched? Of course not. No one doubts that the county could have taken the plaintiffs' property for a police station, without any restriction other than to pay just compensation.

195. *See id.* at 765.

196. *See id.* at 781.

197. *Id.*

198. *Id.* at 782.

199. *Id.* at 782-83.

200. 50 N.W.2d 340, 343 (Mich. 1951).

201. *Hathcock*, 689 N.W. 2d at 783-85.

As do many courts when they make significant changes in the law, the Michigan Supreme Court took pains to play down the shift. Characterizing *Poletown* as a radical departure from earlier precedent, the court modestly stated that it was merely returning to its earlier, more restrictive approach to eminent domain.[202] Moreover, as often occurs when a court ventures into new territory, the Michigan court failed to explain why its citation of three special circumstances – and only these three – were the only permissible uses of eminent domain of land destined for private ownership. In particular, it seems difficult to distinguish why the *removal* of an undesirable land use, as in the *Slum Clearance* case, justifies eminent domain while the *placement* of a desirable land use, as in *Hathcock*, does not. The court's explanation that the act of removing a slum is a public "use," while the Pinnacle Project would not be, seems unconvincing.[203] Both plans appear to create a putative public *benefit*, but without permanent ownership by the public. Moreover, by allowing eminent domain to be based on a stated undesirability of the current land use, the reasoning in *Hathcock* would do nothing to affect the "blight" determinations that form a very common basis for perceived abuse of eminent domain.[204] By declaring property "blighted," a government can avoid entirely *Hathcock*'s tightening of the reach of eminent domain. Nonetheless, despite the details it leaves unresolved, *Hathcock* may prove to be a rallying point for property rights critics, by virtue of its conclusion that "alleviating unemployment and revitalizing the economic base of the community" is not a justification for eminent domain.[205]

The *Hathcock* court's job was made easier by its decision not to follow the third general approach to tightening eminent domain – the *closer scrutiny* approach.[206] By relying on old precedent that allowed eminent domain only for specific purposes, the court did not have to wade into the thorny ground of trying to second-guess the governmental assertions of the public benefit to be realized by the planned redevelopment. "There is ample evidence in the record that the Pinnacle Project would benefit the public," the court wrote.[207] "The development is projected to bring jobs to the struggling local economy, add to tax revenues and

202. *Id.* at 784-85.

203. Just as eminent domain is of course not the only way to spur economic development, eminent domain is not the only way to eliminate or ameliorate an undesirable land use. Voluntary purchases, even with a premium, zoning changes, and orders under the law of nuisance are among other ways for government to change land use.

204. *See generally* Pritchett, *supra* note 4, at 3 (outlining the history of abuse of the "blight" designation).

205. *Hathcock*, 684 N.W.2d at 787.

206. The U.S. Supreme Court in *Kelo* also rejected such an approach. *See Kelo*, 125 S. Ct. at 2667-69 (rejecting the plaintiffs' alternative argument that the courts should assess whether a development project is "reasonably certain" to provide significant public benefits). The dissenters also did not suggest a closer scrutiny approach; they proposed instead that the federal constitutional law follow the special circumstances approach. *See id.* at 2673-75 (O'Connor, J., dissenting) (setting forth the circumstances under which eminent domain would be constitutional).

207. *Hathcock*, 684 N.W.2d at 778.

thereby increase the resources available for public services, and attract investors and businesses to the area, thereby reinvigorating the local economy."[208] The judges did not attempt to evaluate whether the private businesses that might profit from the Pinnacle Project pulled strings within the Wayne County government. Nor did they attempt to scrutinize the magnitude of the supposed economic benefits of the plan or try to balance this benefit with the psychological and social harm imposed on the nineteen owners whose property was to be condemned. One can easily understand why the court might have been reluctant to take on such Herculean tasks. Nonetheless, many legal commentators have suggested tighter judicial scrutiny as the preferred solution to the abuse of eminent domain.

The *greater scrutiny* approach holds the promise of separating the "bad" uses of eminent domain from the "good." Nonetheless, it faces extraordinary hurdles. Professor Nicole Stelle Garnett has argued that courts could subject eminent domain to the demanding scrutiny that the Rehnquist Court called for in cases of "exactions" – when government demands property concessions in return for granting a land use permit.[209] Under this test, the governmental exaction must have both a reasonable nexus to and "rough proportionality" to the perceived harm that would result from the permitted activity.[210] While this type of scrutiny seems at first blush to be a promising avenue for a tighter eminent domain standard, I suggest that, in practice, it is likely to be a dead end.

Exactions have been, in recent years, among the hottest battlegrounds for the property rights movement. Using the Fifth Amendment's right against uncompensated taking of private property,[211] property rights proponents have argued that governments unconstitutionally condition the granting of land use permits. Justice Antonin Scalia, who has been the leading advocate on the Supreme Court, has characterized some such demands as "out-and-out . . . extortion."[212] In *Nollan v. California Coastal Commission*, the Supreme Court held unconstitutional a state agency's demand that beachfront-property-owners grant the public an easement to the beach in return for a permit to rebuild their house.[213] Writing for the Court, Justice Scalia was dubious of the government's assertion of the supposed police-power reasons for the easement exaction – the commission had contended that the rebuilt house would interfere with "visual access" to the beach and impose a "psychological bar-

208. *Id.*

209. *See* Garnett, *supra* note 13, at 936-37.

210. *See* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 836-37 (1987) (requiring an "essential nexus"); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring "rough proportionality").

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

212. *Nollan*, 483 U.S. at 837.

213. *Id.* at 827-32.

rier."[214] Finding such assertions to be inadequate, the Court held that there must be an "essential nexus" between the exaction and the property owner's request.[215] Justice Scalia did not hide his suspicion that the California agency had simply used the building permit request as an excuse to squeeze the easement out of the landowner.[216] When a government exacts, he wrote, "there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."[217] It may be good public policy to improve public access to the beach, he concluded, and the government may use "its power of eminent domain for this 'public purpose,' . . . but if it wants an easement across the Nollans' property, it must pay for it."[218]

Judicial scrutiny of exactions tightened with *Dolan v. City of Tigard*,[219] which involved a demanding Oregon agency. In that case, a plumbing and electrical supply store owner needed a permit to double the size of her store and lay asphalt for a parking lot.[220] In return for granting the permit, the city demanded that she comply with the city's "open space" requirement (imposed in part to decrease the amount of stormwater that entered the storm sewers) and required that she dedicate a strip of property along a floodplain for a stretch of a regional pedestrian/bicycle pathway.[221] The city argued the pathway requirement was closely related to the planned land use because a bigger store would generate increased traffic.[222] The Court held, however, that the exaction must be "roughly proportional" to the plan's projected impact.[223] In other words, the government's demands cannot be too large. An elephant gun cannot be shot at a gnat. In *Dolan*, the city failed the test because it made no "individualized determination" of the relative size of the projected impact; the government must make some effort to quantify its demand and relate it to the perceived impact of the land use plan.[224]

Parallels plainly exist between the abuses of exactions and the abuses of eminent domain. Both governmental powers are susceptible to governments using pretexts to justifying its actions. But the chief concern with exactions – that government may be trying to avoid compensation – obviously does not exist with eminent domain. Compare *Nollan* and *Dolan* with *Hathcock*. In *Nollan*, the government failed to provide

214. *Id.* at 838-39. Justice Brennan argued that courts should defer if the government's judgment "*could rationally have decided*" that the exaction served an important objective. *Id.* at 843 (Brennan, J., dissenting).
215. *Id.* at 837.
216. *Id.*
217. *Id.* at 841.
218. *Id.* at 841-42.
219. 512 U.S. 374 (1994).
220. *Dolan*, 512 U.S. at 379.
221. *Id.* at 379-80.
222. *Id.* at 389.
223. *Id.* at 391.
224. *See id.* at 391-93.

persuasive evidence that the easement exaction was closely related to the expected impact of the Nollans' larger house; the government was presumed to be trying to get something for nothing.[225] There is no parallel in *Hathcock*. There, the county *was* offering something to the landowners: just compensation for their property.[226] True, money might not fully compensate a landowner for the psychic and social losses generated by losing property; however, this is a potential complication with *any* exercise of eminent domain, even in uncontroversial takings of land for governmental title uses.[227] Moreover, any parallel between exactions and eminent domain breaks down when we analyze what government may be "hiding" by pretext. With exactions, the typical abuse is that government desires to create a public benefit – such as the beach easement in *Nollan* or the bike path in *Dolan* – and uses the pretext of land use regulation to have a landowner, not taxpayer funds, bear the burden of paying for it.[228] By contrast, with eminent domain, the assertions of pretext typically are *not* that the authority is hiding its reasons for targeting the particular landowner.[229] Rather, allegations of pretext typically concern the government's *motivation* for using eminent domain, such as the concern that Detroit unwisely succumbed to pressure from General Motors in taking the Poletown neighborhood. [230] By contrast, the Supreme Court in both *Nollan* and *Dolan* stressed that the exactions inquiry was *not* to scrutinize the value of the asserted public benefit, such as the beach easement or bike path, but rather to scrutinize the imposition of the burden on the private landowner.[231]

A tighter law of eminent domain could, of course, turn on a stricter scrutiny of the government's motivations. Scrutiny of underlying reasons is notoriously difficult, but not impossible. The laws against race and sex discrimination charge courts with determining whether, say, the motivation for firing an employee was poor job performance or unlawful racial animus.[232] The extraordinarily hard task of parsing motivation from ostentation is justified in large part because of the importance of excising such discrimination from society. Property rights advocates, of course, might argue that the right to land should be given equal respect. Even so, it is understandable why no court has taken on the onerous task

225. *Nollan*, 483 U.S. at 841-42.

226. *Hathcock*, 684 N.W.2d at 771.

227. *See, e.g.*, Garnett, *supra* note 13, at 945 (discussing the psychological costs of losing one's property by eminent domain); Fennell, *supra* note 96, at 966-67 (costs of loss of "autonomy").

228. *See Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 391-93.

229. An exception is the category of claims that government has targeted a particular group because of its race. *See, e.g.*, Pritchett, *supra* note 4, at 47 (assertions of "Negro removal").

230. *See generally Hathcock*, 684 N.W.2d 765 (overruling *Poletown*).

231. *See Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 391-93.

232. *See, e.g.*, Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1214-15 (1996) (discussing the complexities of discerning racial motivation in legislative decisions); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (setting forth a standard for claims of racial motivation under the Fourteenth Amendment).

of trying to scrutinize the true motivations of government in exercising eminent domain.

Moreover, the second step of the exactions test – *Dolan*'s requirement of "rough proportionality" – does not fit the problem of abusive eminent domain.[233] Under *Dolan*, the government must make at least a rough assessment of the magnitude of the perceived harm with the property owner's requested land use and then compare this with the exaction demanded in return. With eminent domain, law might begin by calculating the public benefit of the project for which the property is being condemned. The government could be required to estimate how many jobs might be created and how much money would be added to the local economy each year. Such a requirement might be an effective way to ferret out the worst abuses of eminent domain, such as a condemnations incurred by bribery. But with most large-scale eminent domain projects, however, the government already makes such calculations. For the Pinnacle Project at issue in *Hathcock*, for example, the county said that it expected more than 30,000 jobs and millions of dollars to be added to the economy.[234] One might ask whether such figures were seen through rose-colored glasses, but tighter judicial scrutiny would generate the usual problems of tasking the courts with second-guessing the economic conclusions of elected executives, legislatures, or their delegated agencies.[235] The usual solution in administrative law is merely to require that the government show that it has done a decent job of compiling the relevant data and explaining it; the final decision of whether to go forward with a project is left to the political branches.[236] Law might be able to develop a doctrine that says, "If a court concludes that a development project will provide little or no economic or public benefit, it should set aside the condemnation," but this would be a tall order for any judge.

An even more fundamental dilemma in applying *Dolan's* "rough proportionality" comparison is to figure out what to compare the perceived benefits with. One obvious choice would be the amount of the compensation. If the government has to pay $2 million dollars in compensation to take land for a project that is expected to add a discounted value of only $1 million for the local economy, this would seem to be an unwise use of governmental power. But such an anomaly would not seem to be a source of complaint for the landowners (who would get the

233. *See Dolan*, 512 U.S. at 391.

234. *Hathcock*, 684 N.W.2d at 770-71.

235. *See, e.g.*, *Hathcock*, 684 N.W.2d at 772 (noting that in the context of eminent domain the court is limited to reviewing a public agency's determination that a condemnation serves a public necessity only for "fraud, error of law, or abuse of discretion.").

236. *See, e.g.*, Haw. Pub. Hous. Auth. v Midkiff, 467 U.S. 229, 239-40 (1984) (deferring to the government's findings as to the benefits of a project fostered by eminent domain); *see also* Ewing v. California, 538 U.S. 11, 36 (2003) (courts should defer to policy judgments); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 138 (1985); Karcher v. Daggett, 462 U.S. 725, 740 (1983).

$2 million) as much as for the taxpayers; thus it would form a poor basis for a personal property right. In essence, such a test would merely determine whether the government is paying too much for the land. In fact, landowners would be faced with the contradictory task of arguing, in effect, that the government is paying them relatively *too much* for the land. (If the just compensation could be re-evaluated to $500,000, for example, the project would then seem worthwhile for the community, even though the landowners would end up worse off.)

Moreover, balancing value with cost would be a difficult and controversial task in eminent domain. Libertarians argue, with some force, that government-sponsored projects often shift economic activity from one set of businesses, which are not aided by the government, to another set, which in effect are subsidized by the new development plan.[237] The high-technology businesses that would be helped by Wayne County's Pinnacle Project might simply take money and jobs away from other companies that did not have the luck, or perhaps the political savvy, to secure government assistance. At best, the skeptical critique goes, government-subsidized development simply moves jobs from one area to another, and governments are caught in a dilemma of trying to outsubsidize their neighbors to attract business.[238] A quintessential example is professional sports, in which governments quite openly pay, through building multi-million-dollar stadiums and other financial incentives, to lure teams away from other cities.[239] Like any instance of paying to get a reward, much or all of the financial benefits are lost with the payment.[240] Governments should refrain, the critique concludes, from interfering with the free market.[241]

Political skeptics also point out that eager local governments often have an incentive to inflate the expected financial benefits of development projects.[242] Politicians realize that voters are attracted to those who claim that they can give something for nothing – that by wise use of eminent domain and other projects, they can claim to boost the area's economy. Those more sober candidates who emphasize the limits of gov-

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237. *See, e.g.*, Epstein, *supra* note 168, at 1451-53 (touting the efficiency of the market and criticizing governmental meddling).

238. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956) (arguing that competing local governments act as a "market" in which citizens may choose where to live); *see also* KANTOR, *supra* note 15, at 2 (discussing the incentive of cities to try to pay to attract business).

239. *See, e.g.*, Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173 (2002) (discussing the variety of public financing).

240. *See* Peter Sepulveda, Comment, *The Use of the Eminent Domain Power in the Relocation of Sports Stadiums to Urban Areas: Is the Public Purpose Requirement Satisfied?* 11 SETON HALL J. SPORT L. 137, 148-50 (2002).

241. *See, e.g.*, National Platform of the Libertarian Party, Adopted May 2004, http://lp.org/issues/platform_all.shtml (setting out Libertarian party's position re free market).

242. *See, e.g.*, ROGER AND ME (Warner Bros. Inc. 1989) (filmmaker Michael Moore's first movie, detailing, among other things, the ill-fated effort of his hometown, Flint, Mich., to succeed with a theme park called "Autoworld").

ernmental power are simply not as appealing. It is unlikely, however, that courts can do a better job of policing this political phenomenon than they can of assessing the true economic value of a development plan. In sum, the approach to reforming eminent domain of requiring courts to give greater scrutiny to governments' economic policy decisions is likely to be a dead end.

VI. THE SOLUTION OF REPRESENTATION REINFORCEMENT

A rule of eminent domain that requires courts to scrutinize economic claims is, moreover, likely to be most beneficial to those parties that hold the financial resources necessary to marshal expert witnesses and complicated data inherent in such challenges.[243] This result would be especially unwelcome, considering the perceived abuse of ordinary citizens in losing their land to well-connected businesses through eminent domain.[244] If economic justification were the touchstone, then businesses and other institutions would be in a better position to win complex cases than would individual homeowners.

A more compelling argument for a tighter law of eminent domain, I suggest, is to preserve the *personal integrity* of the citizen's home and to avoid the psychic and social damages associated with the loss of a home, despite monetary compensation.[245] Accordingly, I propose, the law should focus not on the *reasons* for the government's decision to use its power, but rather on the claims of those private citizens who serve as the unwanted targets of eminent domain. To craft such a rule I suggest reliance on the "representation reinforcement" theory of judicial review.

A. Representation Reinforcement and Political Participation

Under the theory of the late professor John Hart Ely, the interpretation of individual constitutional rights should not depend upon a delineation of certain "fundamental" substantive rights.[246] Rather, rights are better interpreted as circumstances in which law does not trust the elected legislature to protect the interests of those who lack political clout.[247] Review should focus, Ely wrote, "only on questions of participation, and not with the substantive merits of the political choice under attack."[248]

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243. *See, e.g.*, Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 615 n.83 (2005) (discussing the advantages of the "repeat player" in any adversarial setting).

244. *See, e.g.*, Nader & Hirsch, *supra* note 13, at 219-22.

245. *See, e.g.*, Garnett, *supra* note 13, at 946 (discussing the psychological costs of losing one's property by eminent domain); Fennell, *supra* note 96, at 957 (discussing costs of loss of "autonomy").

246. *See generally* ELY, *supra* note 22.

247. *See id.*

248. *Id.* at 181. Ely's focus on process, as opposed to substantive rights, generated considerable criticism from various corners, from which substance is seen as still crucially important. *See,*

The representation reinforcement approach avoids the crippling faults of both of the traditional camps of constitutional interpretation. The first method, which Ely called "clause-bound interpretivism," and which others might call "textualism" or "original intent," calls for unearthing the supposed intention of the eighteenth and nineteenth century drafters of the Constitution.[249] But many constitutional rights, including "freedom of speech,"[250] "due process,"[251] and "equal protection,"[252] were written with broad, amorphous phrases that seem to cry out for evolving interpretations in different ages and under varying circumstances.[253] With all of these rights, Ely argued, both the history and textual phrasing seem to point to a concern over the *procedure* of social, political, and judicial actions.[254] With free speech, for example, the concern is that all persons are able to participate in the public debate, not that any particular utterances need special protection.[255] The right to due process mandates deliberate and meticulous consideration in a wide variety of legal and judicial proceedings, in order to ensure that certain persons are not treated in a cursory or haphazard manner.[256] And with equal protection, the fear once again is that certain persons – especially African Americans – would fail to receive an equal say in the development of laws and civic opportunities.[257]

The traditional alternative to clause-bound interpretivism, on the other hand, frees judges to create their own conceptions of what values are "fundamental." Giving such power to judges, however, is inherently undemocratic. As Ely pointed out, this judicial power allows courts to override the decisions of the public's elected officials (or their bureaucratic delegates) and impose their own social, political, and moral judgments upon society.[258] At some level, almost everyone agrees that judges should be constrained; one might agree with the outcomes of *Roe*

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e.g., TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 44-50 (1999); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1092-93 (1981); Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. Rev. 547, 578 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064-65 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980). I do not seek to add to the debate over Ely's general theory, but rather to employ it in one context – eminent domain.

249. *See* ELY, *supra* note 22, at 11.

250. *See* U.S. CONST. amend. I (proclaiming right to "freedom of speech").

251. *See* U.S. CONST. amends. V, XIV (controlling how both the national and state governments may deprive a person of life, life, or property).

252. *See* U.S. CONST. amend. XIV (describing the "equal protection" guarantee, which at its genesis concerned the rights of African Americans). *See* Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

253. *See* ELY, *supra* note 22, at 11-13.

254. *See id.* at 13.

255. *See id.*

256. *See id.* at 14-22.

257. *See id.* at 32-41.

258. *See id.* at 43-48.

v. Wade[259] or *Lucas v. South Carolina Coastal Council*[260] or both, but few believe that courts should return to the days of *Lochner v. New York*.[261] None of the proposed touchstones for "doing the right thing" – natural law, neutral principles, tradition, or consensus – is able to rein in judges from simply acting as super-legislatures, using their own values to decide what is best for society.[262]

The solution to the dilemma, Ely concluded, is to view constitutional rights as "policing the process of representation."[263] Building from the famous footnote four of the Supreme Court's decision in *United States v. Carolene Products*,[264] this approach presumes that most decisions of the political branches are reasonable ones – thus the doctrine of judicial deference, which spans across all fields of law.[265] Only when laws do special harm to those minority groups who are likely to hold less clout in the political and lawmaking process should courts intervene.[266] What the eighteenth-century framers, such as James Madison, were most concerned about, and what modern judicial review should focus on, Ely argued, is *participation*.[267] Courts should not try to focus on "whether this or that substantive value is unusually important or fundamental," he wrote, "but rather on whether the opportunity to participate either in the political processes . . . or in the accommodation those processes have reached, has been unduly constricted."[268] As shown by the groundbreaking decisions of the Supreme Court under Chief Justice Earl Warren, Ely argued that judges are uniquely qualified, by virtue of their distance from day-to-day politics and long tenure, to think about whether the minority has been hurt by a "malfunction" in the political process.[269] The goal of judicial review, Ely therefore concluded, should be "unblocking stoppages in the democratic process . . . [w]e cannot trust the ins [in the political process] to decide who stays out."[270] Courts should "protect those who can't protect themselves politically," he concluded.[271] "The whole

259. Roe v. Wade 410 U.S. 113 (1973) (describing constitutional right to abort one's fetus).

260. Lucas v. S.C. Coastal Council 505 U.S. 1003, 1030 (1992) (holding that a land use regulation is a compensable taking of private property if it prohibits "all economically productive or beneficial use of the land").

261. Lochner v. New York, 198 U.S. 45, 53 (1905) (stating government could not regulate working hours because it violates an unenumerated right to contract).

262. *See* ELY, *supra* note 22, at 48-72.

263. *Id.* at 73.

264. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (noting that courts should protect "discrete and insular minorities").

265. *See* ELY, *supra* note 22, at 78. For leading cases on deference, *see, e.g.*, Ewing v. California, 538 U.S. 11, 36 (2003) (confirming courts should defer to policy judgments); Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 138 (1985); Karcher v. Daggett, 462 U.S. 725, 740 (1983).

266. *See* Ely, *supra* note 22, at 79

267. *See id.* at 78-82.

268. ELY, *supra* note 22, at 77 (discussing the history of judicial review).

269. *See id.* (discussing the Warren court).

270. *Id.* at 117.

271. *See id.* at 152.

point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[272]

Writing in the early 1980s, not far from the end of the civil rights era, Ely naturally considered the quintessential poorly-represented minority group to be African Americans, and he focused on laws based on prejudice against, or stereotype of, African Americans.[273] Nonetheless, Ely recognized that courts should be protective of other groups, such as aliens, who cannot vote.[274] An even larger minority group is "the poor," though Ely felt that the problems of the poor most often stemmed from the government's failure to provide them with needed services – not from affirmative steps to disadvantage them.[275] Using the example of the death penalty, however, he argued that a punishment that "people like us" need not worry about – meaning the majority of middle-class citizens who hold some clout in the political process – is the quintessential kind of legal decision in which "some nonpolitical check on excessive severity is needed."[276]

Despite the recognition that Ely's approach has received in academia, it has suffered from a shortcoming of many scholarly ideas – a failure to be explicitly recognized by the practitioners of law. While a number of courts have cited Ely's thoughts on various aspects of constitutional law and interpretation, and while some courts have agreed with the idea that laws concerning racial minorities deserve special scrutiny, few courts have cited or relied on Ely's specific prescription – the approach of representation reinforcement.[277] Ely's theory has been useful as an explanation for why protection of racial minorities has been such an important feature of American law,[278] but it has not done much to develop a practical philosophy of judicial review for *other* categories of claims. In the twenty-first century, fewer laws stereotype racial minorities. Accordingly, it remains a challenge to apply Ely's theory to strengthen the claims of other categories of persons who deserve to have their representation reinforced.

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272. *Id.* at 151.
273. *See id.* at 155-57.
274. *See id.* at 161-62.
275. *See id.* at 161-62.
276. *See id.* at 173.
277. While a handful of federal or state courts have cited Ely's theory, they usually do so to help support claims of well-recognized minority groups, such as racial minorities, immigrants, or prisoners. *See, e.g.*, Kane v. Winn, 319 F. Supp. 2d 162, 203 n.65 (D. Mass. 2004) (evaluating prisoner rights case); State *ex rel.* Cooper v. Caperton, 470 S.E.2d 162, 171 (W. Va. 1996) (discussing minority rights).
278. *See, e.g.*, League of United Latin American Citizens v. Clements, 999 F.2d 831, 858 (5th Cir. 1993) (citing Ely for race discrimination claim).

B. Representation Reinforcement and Eminent Domain

The dilemma of eminent domain, I suggest, is an excellent match for representation reinforcement. Poorer citizens – owners of modest homes, apartment dwellers, and small businesspersons – are quintessential "outs" in local government decision-making.[279] When government considers whether to use eminent domain, we can easily understand why local officials have "no apparent interest in attending" to the needs and wishes of the poor.[280] The incentives noted by Tiebout's model lead governments to discourage the participation of poorer citizens in favor of more affluent persons.[281] For governments that are concerned with improving their tax bases, it simply is not economical to pay attention to the needs or desires of the poor.[282] Indeed, the usual ace-in-the-hole for poor persons – their ability to vote in elections with the same clout as the rich – may conceivably be lost with eminent domain, which enables governments to, quite literally, *expel* poor people from a locality and its voting booths.[283] If law is to grant property owners some sort of right not to have their land taken through eminent domain, it makes sense to begin with the category of persons who are the most likely and sympathetic targets of abusive eminent domain.

Most academic critics, to date, have proposed greater scrutiny by focusing on the *end use* of the land after the condemnation.[284] Taking their cue from the "public use" requirement, critics seek to tighten eminent domain by asking courts to provide greater scrutiny in cases in which the land is destined for private hands.[285] Condemnation for a public highway would be nearly always acceptable, no matter how dubious the highway project is.[286] Meanwhile condemnation for a redevelopment project, such as for an urban shopping complex, would be inherently

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279. *See* ELY, *supra* note 22, at 20 (professing law should protect the "outs" from the tyranny of the "ins").

280. *Id.* at 151. (arguing that identifying and protecting such groups should be the primary responsibility of courts in asserting rights).

281. *See* Tiebout, *supra* note 120, at 418. (arguing that state governments may compete to attract residents). Professor Gerald Frug has proposed that, in order to increase the clout of citizens over their metropolitan area, they be permitted to vote in jurisdictions in which they do not reside. Professor Frug suggests just such a solution. *See* Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 324-30 (1993).

282. *See, e.g.*, Tiebout, *supra* note 120.

283. *See, e.g.*, Harris, Jr., *supra* note 4, at 12 (complaining of governmental efforts to discourage or remove African American residents).

284. *See, e.g.*, Garnett, *supra* note 13 at 934-36.

285. *See, e.g., id.* at 936-37 (contending that the standard should employ the law of land use "exactions," which requires an assessment of the need for the governmental regulation); Jones, *supra* note 19, at 302 (arguing for flipping the presumption against the government in private end use cases).

286. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411-13 (1971) (setting aside a plan to build an interstate highway through Overton Park in Memphis,Tenn.); N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 9 (1986) (suggesting that the construction of an expressway through an African American neighborhood would constitute a violation of the residents' Title VII rights)

more suspect.[287] But, as I have endeavored to explain, a focus on the end use may turn out to be an unsatisfactory solution for property owners. From the perspective of the landowner, losing one's land for a suspect highway is not any less unpleasant than losing one's land for a suspect shopping center. The fact that the highway is *public* property is unlikely to assuage the feelings of the landowner whose property is taken. A requirement that the end use be governmental is unlikely to match those cases in which losses by landowners arouse the greatest sympathy.[288] It is *unfairness* to those who appear to have "lost" in the political process that should be the focus of a tighter law of eminent domain.[289]

Moreover, a strict governmental title requirement is unlikely to mesh well with the examples of eminent domain driven by undue private influence.[290] A highway, after all, may be just as susceptible as a shopping complex to being spurred by abuse. Highway construction companies and those who own land near the exits, for example, may be just as adept as shopping mall developers in twisting government to suit their desires.[291] Viewing the question from the other side, some private end-uses, such as a low-cost housing development and shopping centers in depressed inner city areas, may serve the public interest better than some purely public end-uses, such as a highway built to serve yet another sprawling upscale housing development or super-mall built on former forest land. If a goal is to stop economically dubious projects, greater scrutiny only of eminent domain destined for private ownership would not stop the potential for abuse.

1. A Proposed New Requirement for Eminent Domain

I propose, by contrast, that a tighter law of eminent domain focus not on the end use, but on the *landowners* whose property is taken or, for lack of a better term, the "targets" of eminent domain. In particular, I propose that law focus on those categories of cases in which we perceive that it is most *unfair* for the owners or residents to lose their property, especially those cases in which we suspect that residents have failed to have their voices heard in the political process. Because eminent domain comes with monetary compensation, the chief harm to the landowner comes from the psychological and social injury, and the loss of personal

287. Brief of Petitioners at 9-11, Kelo v. New London, 125 S. Ct. 2665 (2005) (arguing against permitting eminent domain for the governmental purpose of economic development) (No. 04-108).

288. *See* Garnett, *supra* note 13, at 944-49 (discussing the psychological and economic losses suffered by ousted landowners).

289. *See infra* Part VI.B.1.

290. *See, e.g.*, Nader & Hirsch, *supra* note 13, at 218-24 (emphasizing the disparity in political power between small landowners and large corporations in eminent domain cases for private redevelopment).

291. *See, e.g.*, Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1192 (2004) (discussing the power of the highway lobby, written by one of the founders of the "environmental justice" movement to provide racial equity in land use decisions).

autonomy, associated with condemnation.[292] Being evicted from one's home, by no fault of one's own, is likely to alienate one further from one's government and community.[293] This is especially true when the locality is admittedly trying to replace certain housing stock – and perhaps even categories of people – with others. The burdens of having to leave the condemned residence and find another home is a cost that the just compensation requirement may not address fully – and when a town is trying to improve its tax base by eliminating low-cost (and low-taxed) housing and encouraging high-cost (and high-taxed) housing, it is a truism that a poor household may find it difficult to obtain comparable housing in the "upscaled" community.[294] Having to move far from one's home poses an array of problems, of course, including the potential difficulties of a longer commute to work, the need for children to move schools, and the loss of connections to the community, such as places of worship, neighborhood friends, and social groups.[295] For businesses taken by eminent domain, there also may be consequential losses not monetarily compensated for by eminent domain, such as the loss of "goodwill" built up in the neighborhood.[296] Nonetheless, considering the significance of damages to the personal integrity associated with the loss of a family's home, I propose that a stricter law of eminent domain focus on condemnations of *personal residences*. In sum, the law should tighten eminent domain to reinforce the representation of persons whose integrity is damaged by the loss of a residence – whether it be a house, apartment, or mobile home.

Which facts should lead a reviewing court to invoke representation reinforcement? First, I propose that the traditional legal standards applied to suspect racial minorities be extended to eminent domain. The doctrine of disparate impact[297] began in employment discrimination law and has since been extended to other realms of discrimination law.[298] Unjustified disparate impact is unlawful because it roots out cases of hidden conscious discrimination, and it forces changes to policies that may provide similar benefits to the actor with fewer adverse effects on

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292. *See* Garnett, *supra* note 13, at 944-47 (discussing the psychological costs of condemnation on small landowners); Fennell, *supra* note 96 (costs of loss of "autonomy").

293. *See* Garnett, *supra* note 13, at 945-47.

294. *See* Peterson, *supra* note 116, at A25 (explaining that one reason for the New London condemnation is to encourage wealthier residents).

295. *See* articles cited *supra* note 292.

296. *See, e.g.*, Alan T. Ackerman, *Just Compensation for the Condemnation of Going Concern Value*, 64 MICH. BAR J. 1314, 1317 n.56 (1985) (discussing the "usual rule" that goodwill is not compensable).

297. This doctrine requires that actions which have an adverse impact on racial minorities be supported by bona fide justifications. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 425-26, 436 (1971).

298. *See Griggs*, 401 U.S. at 425-26, 436 (establishing "disparate impact" in employment discrimination cases); Tennessee v. Lane, 541 U.S. 509, 509-12 (2004) (applying "disparate impact" analysis to discrimination against handicapped persons).

the suspect groups.[299] Although the Supreme Court in *Washington v. Davis*[300] held that the federal constitution's equal protection command prohibits intentional discrimination, not disparate impact, there is no textual reason why it should be permitted under statutory law but disallowed under the Fourteenth Amendment.[301] In any event, if law were to apply to representation reinforcement to eminent domain, cases of disparate impact on suspect classes, most prominently racial minorities, are a logical place to start.[302]

Moreover, although federal equal protection law has not included poor people within the suspect class, the poor are the *quintessential* category of persons deserving of representation reinforcement.[303] Poor people merit protection for at least two compelling reasons. First, the poor are likely to be disadvantaged in lobbying local governments and influencing eminent domain decisions.[304] Public choice theory reminds us that policy decisions are often the result of one interest group prevailing over others.[305] Second, under the Tiebout model of local governments, the poor are the most likely targets of eminent domain, as a result of government efforts to maximize tax revenue and minimize expenditures.[306]

An obstacle to representation reinforcement for the poor is, of course, that it lacks an explicit textual basis in the United States Constitution's Fifth Amendment[307] or in most state constitutions. How could representation reinforcement be melded into eminent domain's "public use" restriction? Ely's theory considers that when a group fails to receive adequate representation in the halls of government, courts should

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299. *See, e.g.*, George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (setting forth justifications for finding discrimination through disparate impact analysis).

300. Washington v. Davis, 426 U.S. 229, 238-48 (1976).

301. *Compare* U.S. CONST. amend. V (requiring equal protection under the laws) *with* Fair Housing Act, 42 U.S.C. § 3604 (2004) (proscribing discrimination "because of race" in renting or selling real estate) *and* Civil Rights Act of 1964, 42 U.S.C. § 2000d (2004) (prohibiting discrimination "on the ground of race" for recipients of federal financial assistance).

302. Applying eminent domain law to protect racial minorities would harmonize with the "environmental justice" movement, which seeks to protect racial minorities from receiving a disproportionate share of the risks of environmental harms. Like eminent domain today, environmental law did not consider the distributional effects of laws until the environmental justice movement began in the 1980s. *See generally* EDWARD LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA (2003) (tracing the history of the environmental justice movement); ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990) (providing one of the original discussions of the environmental justice movement); Tara R. Kebodeaux & Danielle M. Brock, *Environmental Justice: A Choice Between Social Justice and Economic Development?*, 28 S. U. L REV. 123 (2001) (discussing some of the contentious siting battles in Louisiana).

303. *See supra* Part VI.A.

304. *See, e.g.*, Nader & Hirsch, *supra* note 13, at 219-24.

305. Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 ADMIN. L. REV. 377, 392 (1997) (suggesting that under public choice theory, business groups may tend to prevail in political struggles).

306. *See generally* Tiebout, *supra* note 114.

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

step in and ensure that *all* the "public" receives consideration.[308] Putting this theory into action, eminent domain and its public-use requirement could be interpreted as follows: Eminent domain would be impermissible if it *both* results in a private end-use *and* disproportionately harms poor persons. Just as the disparate impact standard serves to pinpoint otherwise-hard-to-detect forms of discrimination in employment, injecting the public-use standard with a dose of representation reinforcement would give some force to the judicial inquiry of whether an exercise of eminent domain really does serve the public.[309] Such a rule would be more straightforward and easier to apply than having to balance the purported benefits of a particular development project, as others have proposed.[310] Government would be permitted to take land destined for private hands, but only if the land does not include the residences of poor citizens. Taking commercial land or taking more upscale residences would be permissible. Finally, government could take the residences of poor persons, but it could do so only when the public retains ownership.

How would such a standard affect government-fostered redevelopment projects? I suspect that they would be hindered but not crippled.[311] Localities would still be encouraged to provide tax breaks and other incentives to attract new businesses;[312] more often, however, private developers would have to buy or lease the land on the private market, without help from eminent domain.[313] Governments would still be able to condemn private property for important redevelopment projects, but they would be required to do so in a manner that did not disproportionately harm the poorer citizens of the community. Some of the most egregious impositions of eminent domain on the least powerful members of the community might be avoided without unduly hampering government efforts to foster economic development. The "fit" between impermissible uses of eminent domain and the perceived abuses of governmental

308. *See* ELY, *supra* note 22, at 135-59.

309. When government takes the residences of poor persons and racial minorities, we have a reason to fear that the eminent domain was motivated, at least in part, by undue influence from those private parties who would benefit from the development, even if there is no proof of such undue influence. Because of the inherent difficulty of proving such motivation in litigation, a legal rule can avoid the likelihood of undue influence by requiring that government acts avoid the questionable action. To avoid "false negatives" of hidden undue influence, we accept some "false positives" by banning such government action altogether.

310. *See, e.g.*, Garnett, *supra* note 13 (proposing greater scrutiny in public-use cases through a parallel to the exactions test); Jones, *supra* note 19, at 286-87, 305-14 (proposing a flipping of the public-use presumption that currently favors the government).

311. *See* Brief of Law Professors Robert Freilich et al. as Amici Curiae in Support of Respondents at 16-17, Kelo v. New London, 125 S. Ct. 2655 (2005) (No. 04-108) (arguing that local governments would be crippled if prevented from using eminent domain for any and all redevelopment plans).

312. *See, e.g.*, KANTOR, *supra* note 15 (explaining that cities compete to attract businesses).

313. *See* ANDREW ALPERN & SEYMOUR DURST, HOLDOUTS! (1984) (discussing the phenomenon of landowners "holding out" against big development projects in New York City); DANIEL OKRENT, GREAT FORTUNE 95-98 (2003) (discussing those who held out permanently against the development of Rockefeller Center in midtown Manhattan, which was built anyway and became arguably the most successful urban development project in American history).

power would not be perfect, but would come as close possible under practical law.

2. Other Applications of Representation Reinforcement

Another way in which the law could incorporate representation reinforcement would be to place more explicit lawmaking hurdles in the way of eminent domain. Under the laws of most jurisdictions, local development agencies are created by government but often act very independently of legislative control.[314] These agencies hold the power to wield eminent domain, typically with only a subsequent rubber-stamp approval process from a legislative body.[315] The isolation of these agencies makes them unusually susceptible to coercion and influence, especially by wealthy developers and influential citizens.[316] Development agencies often act in ways that would make legislators, who are directly responsive to the people at the ballot box, hesitate. This is especially true in regard to using eminent domain to condemn homes.

A potential solution to the problem of development agencies is to require that eminent domain be approved as regular legislation, not through short-cut approvals by city councils, county commissioners, and state legislatures.[317] Given more public exposure than is usually provided in cursory administrative condemnations, legislative eminent domain would be subject to more open hearings and greater public scrutiny. This is not to say that local legislators are not capable of being unduly influenced or even bribed, but the hurdles that nearly all governments impose on the adoption of new legislation provide some protection against abuse and increase the chances that unwarranted exercises of eminent domain may be exposed and stopped.[318] Moreover, requiring regular legislation also fits well with representation reinforcement. Delegating decisions to administrative agencies makes the most sense when the choice involves technical or scientific expertise.[319] Such expertise may be needed in figuring out what sort of development project, if any, a locality may need, assessing its potential benefits, and deciding to where to locate it. Less susceptible to agency expertise, however, are the difficult questions whether the social and psychological costs of con-

314. *See* Garnett, *supra* note 13, at 974-75.

315. Eminent domain is often approved by local governmental legislative bodies through an abbreviated process. *See, e.g.*, Garnett, *supra* note 13, at 970-72.

316. *See, e.g.*, Nader & Hirsch, *supra* note 13, at 221-26 (discussing the role of political power in eminent domain).

317. *See* Garnett, *supra* note 13, at 970-75 (discussing various "quick-take" procedures).

318. *See, e.g.*, Nader & Hirsch, *supra* note 13, at 231-32 (discussing the role of political power in eminent domain).

319. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 865 (1984) (deferring to an agency interpretation where that interpretation is reasonable); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (deferring to the "'expert knowledge of the agency'") (quoting Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)).

demnation are justified. Such balancing should necessitate a vote by the elected officials, through the public and open forum of regular legislation.

Another way to incorporate representation reinforcement would be to expand the government's constituency. As I have explained, one of the chief impetuses to abusive eminent domain is competition among localities to attract high-taxpayers and discourage low-taxpaying citizens.[320] A way to dampen this unsavory competition is to require that decisionmaking be made by a higher level of government.[321] In a metropolitan area, an inter-governmental umbrella authority could replace each locality in making eminent domain decisions. An even bolder approach would be to demand that *state* authorities approve all uses of the power to condemn. With the decision made at a higher level of government, the desire of town A to compete with town B would be harder to translate into action.[322] If a regional authority were to make the choice, the desires of the representatives of town A would be countered, presumably, by opposition from the representatives of town B and the possible indifference of those from towns C and D. Although most Americans in the twenty-first century are accustomed to thinking that all forms of competition are good, metropolitan and state-level decisionmaking would create a useful "cartel" of government that would dampen Tiebout's model of competition among localities.[323] With competition among close-by localities suppressed, the higher-level government would act in the best interests of the wider geographic area – be it a metropolitan area or a state – not just the best interests of one town. True, a bigger government may still desire to attract upscale business centers and wealthy citizens. Nonetheless, a higher-level authority is more likely to recognize that using eminent domain to foster site-specific development may simply move wealth around, from one locality to another. A higher-level government is more likely to be skeptical of the long-term economic advantages of local plans to develop through eminent domain.

The advantages of higher level decisionmaking to the poor are, of course, not limited to condemnation. For benefits such as public education, welfare payments, and health care, local governments are more likely to hesitate, knowing that generous services will attract those who rely most heavily on government assistance, while the taxes needed for such benefits will drive away the wealthy and mobile. Moving such decisions to a higher level of government is likely to yield better results for

320. *See* Part I, *supra*.

321. *See, e.g.*, Boudreaux, *supra* note 117, at 503-06 (arguing that governments compete to discourage poor residents).

322. *See id.*

323. *See generally* Tiebout, *supra* note 114 (arguing that competing state governments act as a "market" in which citizens may choose where to live).

the poorer citizens of a community.[324] This effect is nothing new. What is new, however, is characterizing the avoidance of eminent domain as a benefit of good government decisionmaking.

CONCLUSION

Eminent domain is close to unique among the workings of modern government. From progressive taxation rates to subsidized public transportation to government-assisted health care, today's public welfare functions usually help redistribute wealth in favor of the less affluent. Eminent domain is an exception. It is a public welfare function that is likely to result in disproportionate harm to poorer citizens of the community. This effect should disturb advocates for the less powerful, as well as advocates for private property rights.

A property rights approach to reforming eminent domain is to limit the power to those cases in which the government keeps title to the property – for roads, schools, and fire stations – and not for any development under private ownership. Such a rule would fit well with the text of the constitutional "public use" requirement. But such a rule would also hamstring the government's ability to foster useful urban development projects. I suspect that most citizens see as worthwhile *some* category of eminent domain in which property ends up in private hands – if not for a new sports stadium to revive a depressed area of town, then perhaps to assist a developer who is stymied by property "holdouts" in an effort to bring stores and quality low-cost housing to a poor urban neighborhood that has little of each. A governmental title rule would limit eminent domain's potential for abuse, but at a cost, and that cost would be borne disproportionately by poorer central cities. Other commentators have suggested that courts should set aside eminent domain when it appears, on balance, that the project wouldn't truly benefit the public. Such a test, however, even if feasible for the courts, would play into the hands of corporate developers and other wealthy landowners, who would be more able to marshal the lawyers, experts, and financial data necessary to win such a claim.

I propose that the rule of law focus on the identity of the targets of eminent domain. It is the perceived unfairness toward these citizens, after all, that gives rise to the call for a tighter law of eminent domain. Because governments pay fair market value in compensation to landowners, law need not worry much about repeat-player developers or most commercial landowners. Instead, the law should have sympathy for homeowners and renters who are uprooted from their houses and apartments. It should pay special scrutiny to cases in which most of the resi-

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324. *See, e.g.*, Boudreaux, *supra* note 117, at 503-06 (arguing that poor persons are less likely to be able to shop for governments efficiently, and that governments compete to discourage poor residents).

dential victims are poor or are racial minorities. In these cases, the courts would act to reinforce the representation of these citizens, who are less likely to have their interests considered and their voices heard by local government. The current United Supreme Court is, of course, unlikely to explicitly adopt such a rule anytime soon. Nonetheless, eminent domain could be crafted to prohibit governments from using eminent domain to harm those persons who have faced the greatest obstacles in achieving the American dream. Such a system would allow eminent domain to play a role in helping, not hindering, the cause of social justice.