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EXCLUSIONARY EMINENT DOMAIN

David A. Dana[*]

I. INTRODUCTION

This Article explores the phenomenon of "exclusionary eminent domain" – the exercise of eminent domain that has the effect of excluding low-income households[1] from an otherwise predominantly or entirely middle-class or wealthy neighborhood or locality, whether or not exclusion itself was the purpose of the condemnation. All condemnations exclude the condemned owner (and his or her tenants, if any) from the condemned property. Exercises of what I am calling "exclusionary eminent domain" are *doubly* exclusive because the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes. In exclusionary eminent domain, low-incomes households are excluded not only from their homes but also from their home neighborhood or locality.

Exclusionary eminent domain, as I am using the term, seems to occur in two distinct contexts. In the suburban context, a structure or structures occupied by low-income households are condemned by a predominantly non-low-income locality in the interest of attracting new development that will house or otherwise be geared to middle-class or wealthy people. The threatened condemnations of mobile home parks in suburban New Jersey towns such as Lodi are examples of this type of exclusionary eminent domain.[2] In the urban gentrification mode of

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[1] Low-income" or "moderate income" are terms that can be viewed in national terms or location-specific terms. In part, the case for restricting exclusionary eminent domain in this Article builds on a federal poverty line conception of poverty, see infra (discussing concentration of poverty as a rationale for an exclusionary eminent domain doctrine and explaining that concentrated poverty is typically assessed with reference to the federal government's poverty standard). However, that case also builds on a loss-of-"subjective value"-from- dislocation rationale that is applicable when the condemned households have low income or wealth relative to their neighbors in the locality even if, in absolute terms, their household income is well above the poverty line. See infra Part IV B i. Eminent domain is exclusionary in the sense I am using that term, and hence potentially might be limited by an exclusionary eminent domain doctrine, if the condemned household has much lower income than the other households in the locality, such that the available housing in the locality is well beyond the reach of the condemned household.

[2] The opponents of the Lodi development proposal described it as an effort "to remove 230 families from their homes in an area "bereft of low- and moderate-income housing." Merry Firschein, *Hands off, trailer court tells Lodi; Planner calls move to raze home "an outrage,"* Bergen Record, Nov. 28, 2002, ay L02. The Lodi officials response was that they simply want to "turn an unprofitable eyesore into a commercial district that would generate substantial property taxes" and "[o]nce redeveloped, the two trailer parks could probably deliver four times [current tax] revenue." *Giada, Cardoletti, Trailer parks' redevelopment endorsed; Residents denounce Lodi panel's vote as a betrayal*, Bergen Record, June 5, 2003, at L01. *See also* Ana M. Alaya, *Some Call It Blight, They Call It Home*, The Star-Ledger, June 23, 2005, available at www.nj.com/news/ledger. The Lodi saga has been going on for years, but for now it appears that local officials have given up their redevelopment plans. *See* Suzanne Travers, *Council ends eminent domain attempt*, Herald News, July 17, 2007, available at www.northjersey.com. One difficult-to-answer

exclusionary eminent domain, a large city with a mix of wealthy and poor areas condemns low-income housing in a gentrifying or largely gentrified area, with the result that the displaced low-income residents must move to poorer areas of the city or out of the city. The use of threats of eminent domain to facilitate the massive Atlantic Yards development in north central Brooklyn – a development that will feature seventeen luxury towers to be constructed by Frank Geahry – illustrates this model of exclusionary eminent domain.[3]

Although condemnations of low-income households have been invoked prominently in the debate over *Kelo*[4] and post-*Kelo* reforms in the law of eminent domain, the question of whether exclusionary eminent domain as a distinct category of eminent domain should be legally limited has not engaged lawmakers, judges, or commentators. Perhaps this is not altogether surprising, given the state of the law at the time of *Kelo* (and still today). There were and are no cases holding that a condemnation is unlawful on the grounds that it is exclusionary of low-

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question is how many cases exist that are comparable to Lodi but that do not gain national coverage because owners and tenants do not mount the concerted opposition that the Lodi owners and tenants did. In many instances, trailer park owners or other owners of low-income housing just sell, and although they may have sold even without a background threat of eminent domain, that threat presumably does, as a matter of basic economic theory, encourage the sales. There is very little empirical scholarship on condemnations generally or on the socioeconomic characteristics of condemnations. *See generally* David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VERMONT L REV 129, 133-34 (2007) (noting the dominance of advocacy and the absence of empirical scholarship). We do not even have a reliable count of the number of threatened or actual condemnations; the Institute of Justice publishes some statistics but their numbers may under or over count the number of threatened condemnation actions. Compare Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, available at ssrn.com/abstract id=976298, at 16 ("The Institute of Justice figures are only approximate and it is likely that they greatly undercount the number").

[3] Atlantic Yards is an area that was already gentrifying before the Atlantic Yards project commenced, but that nonetheless still include a substantial number of low-income households and minority households in 2000. See Pratt Institute Center for Community and Economic Development, SLAM DUNK OR AIRBALL? A PRELIMINARY ANALYSIS OF THE ATLANTIC YARDS PROJECT 1 (2005); Develop Don't Destroy Brooklyn, RESPONSE TO THE ATLANTIC YARDS ARENA AND REDEVLOPMENT PROJET BLIGHT STUDY CONTAINED WITHIN THE GENERAL PROJECT PLAN, SEPTEMBER 26, 2006, at 3. The chief group opposed to Atlantic Yards – Development Don't Destroy Brooklyn – has complained that "many property owners . . . have felt compelled to negotiate . . . in a disadvantageous environment created by . . . the use of eminent domain." Brief for Development Don't Destroy (Brooklyn), Inc et al as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005)(No. 04-108). Tenants have gotten "the hardest hit," losing rent-stabilized apartments with no guarantee of relocation assistance and no real option but to leave their community. Deborah Kolben, *Nets site renters left out in eminent domain payouts*, The Brooklyn Papers, 2/3/2006; see also Deborah Kolben, *Market for sellers, not renters*, Brooklyn Papers, Feb. 3, 2006 (reporting tenants complaints regarding impending dislocation and the absence of assured relocation assistance). *See also* Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L REV 841, 856-57 (2006) ("Not only do cities fail to use their eminent domain power to build more affordable housing units, but they often use their power to raze them . . . . By taking such affordable housing units off the market by their exercise of eminent domain power, cities reduce the available housing stock for low-income residents as such units are usually replaced by new high-end commercial, residential, and mixed-use projects"). The use of eminent domain to help create wealthy urban neighborhoods at the cost of poor households is nothing new. See, e.g., Stephan Salisbury, *Society Hill emerged amid tumultuous times – The genteel neighborhood, a blueprint for gentrification*, Philadelphia Inquirer, March 17, 2004, at G!3 (explaining how eminent domain was used to create the wealthy Society Hill neighborhood of Philadelphia).

[4] *See Kelo v. City of New London*, 545 U.S. 469 (2005).

income households. There is, quite simply, no jurisprudence of exclusionary eminent domain upon which reform efforts can readily build.

This Article assesses the case for a new state constitutional law doctrine limiting exclusionary eminent domain, and argues that, on balance, the advantages of such a doctrine may exceed the disadvantages. The particular form of exclusionary eminent domain doctrine I am positing would incorporate two of the features of the most analogous existing doctrine, the state constitutional law doctrine regarding exclusionary zoning. Those features are, first, judicial evaluation of a locality's actions in terms of the metropolitan regional needs for low-income housing and each locality's fair share obligation with respect to those needs, and, second, the creation of a rebuttable presumption of illegality when the locality takes an action that will bring its stock of affordable housing below or further below its fair share obligation. An exclusionary eminent domain doctrine would not absolutely bar condemnation of low-income housing in a locality or neighborhood that otherwise has less than its fair share of such housing, but rather would result in the application of heightened review to such condemnations. The condemning authority would have to provide a more compelling, more-tailored justification for condemnation than rational basis review would require.[5]

An exclusionary eminent domain doctrine would raise the cost to local officials of condemning low-income housing located in middle-class or wealthy neighborhoods or localities, and thereby would make it more likely that those officials would configure new development so as to leave such housing in place. The doctrine also would provide a strong incentive for a locality that wanted to proceed with the condemnation of low-income housing to create substitute low-income housing in the same neighborhood as the development site, as by doing so they would negate the claim that condemnations would drop the locality or neighborhood below its pre-condemnation fair share of low-income housing. In addition, the doctrine would have the effect of increasing the bargaining power of owners of low-income housing owners who want to sell, so that they would receive larger payments than they would have if there were no exclusionary eminent domain doctrine.[6]

Of course, a central, foundational question is why should the costs of excluding low-income households be raised by means of an exclusionary eminent domain doctrine? What is the theoretical justification for a doctrine that increases the costs to localities of exclusion? Or stated slightly differently: What is wrong with condemnations that pay fair market value and have the result of pushing out low-income households from an otherwise non-low-income locality or neighborhood in a locality? Is there, in other words, a problem to be fixed?

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[5] The sort of heightened review proposed might be comparable to that employed under the Nollan and Dolan nexus/rough proportionality tests for judicial review of land use exactions. See Nicole Garnett, The Public-Use Question as a Takings Problem, 71 GEO WASHINGTON L R 934 (2003) (arguing generally that public use review should be modeled after Nollan/Dolan heightened review). I have argued elsewhere that the effectiveness of Nollan/Dolan review may be limited where developers are repeat players with the local authorities such that developers must maintain their reputation as credible and cooperative negotiators, see David A. Dana, Land Use Regulation in an Age of Heightened Scrutiny, 75 NC L REV 1243, 1294-97 (1997), but condemned and potential condemnees often are not repeat players with the local authorities in which the properties at issue are located.

[6] See infra Part III.

This Article situates the theoretical critique of exclusionary condemnations under current eminent domain doctrine within the discourse of (broadly speaking) law and economics. Exclusionary condemnations under current doctrine systematically undercompensates property owners because they provide no compensation for the condemnees' loss of their ability to remain in their current locality or neighborhood, which is something condemnees presumably value highly. In that sense, current doctrine underprices low-income housing and produces an inefficiently high level of condemnations of low-income households.[7] Current eminent domain doctrine also takes no account of the costs that other localities and neighborhoods bear as a result of exclusion of low-income households: exclusion of low-income households from otherwise middle-class or wealthy areas tends to increase concentrated poverty and associated social harms.[8] In sum, exclusionary eminent domain under current doctrine is a problem because it does not force the internalization of all of real costs of exclusionary condemnations. An exclusionary eminent doctrine would have the benefit of promoting full costs internalization and, while the adoption of the doctrine itself would not be costless, there are reasons to suppose those costs would be modest.

A doctrine limiting exclusionary eminent domain would not impact some of the most heated eminent domain controversies: the economic development condemnations in New London at the heart of the Kelo case would be unaffected by such a doctrine because New London already has a relatively large stock of low-income or affordable housing and the housing that New London sought to condemn was unquestionably not low-income housing. Indeed, one of the distinct advantages of a doctrine limiting exclusionary eminent domain is that it would be a much narrower and hence much less intrusive reform in the law of eminent domain than the reforms that have dominated post-*Kelo* debate. The dissenters in *Kelo* and many advocates of post-*Kelo* reform have criticized instances of the use of eminent domain to exclude low-income households from neighborhoods or localities,[9] but the legal rules they have advocated would not limit the use of eminent domain in cases involving the exclusion of low-income households and might even increase the use of eminent domain to exclude low-income households.[10] A doctrine limiting exclusionary eminent domain would much more modestly constrain local decisionmaking, while much more effectively protect affordable housing where it is most scarce.

An exclusionary eminent domain article could make a difference in both suburban and urban gentrification cases that have garnered wide attention. In the case of Lodi New Jersey, a clearly recognized exclusionary eminent doctrine under New Jersey state constitutional law could have persuaded the town officials not to have pursued the condemnations or to have pursued them in a different fashion. In central Brooklyn, the massive Atlantic Yards private development does include a community benefits agreement that provides that some affordable housing will be constructed in or near the redeveloped area as substitutes for lost affordable

[7] *See infra* Part V B i.
[8] *See infra* Part V B ii.
[9] *See, e.g. Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (criticizing economic development using condemnations as "disproportionately" burdening "poor communities" and "the least politically powerful.").
[10] *See infra* Part II C.

housing. The existence of a clearly recognized exclusionary eminent doctrine under New York state constitutional law might have resulted in a more generous and definite commitment for the creation of new affordable housing, and would allow for a more effective court enforcement mechanism.

The Article is organized as follows. Part I outlines the law of eminent domain and evaluates how the proposed and adopted post-*Kelo* reforms would or would not affect the exclusion of low-income households from non-low-income neighborhoods and localities. Part I also outlines the state law of exclusionary zoning and explains how that the structure of that law could be adapted to create a doctrine of exclusionary eminent domain. Part II argues that exclusionary eminent domain cannot be effectively criticized on de-ontological grounds but can be effectively criticized on failure-of-cost-internalization grounds Part III explores the costs of an exclusionary eminent domain doctrine. A brief conclusion follows.

II. FROM KELO TO POST-KELO REFORM TO EXCLUSIONARY EMINENT DOMAIN

This Part outlines the federal and state law leading up to the United State's Supreme Court's decision in *Kelo v City of New London*, and analyzes post-*Kelo* reforms from the vantage of a concern for limiting exclusion of low-income households via eminent domain. As explained, neither pre-*Kelo* laws nor post-*Kelo* reforms would reduce exclusionary eminent domain. Indeed post-*Kelo* reforms may result in more exclusionary eminent domain.

The body of current doctrine that comes closest to addressing exclusionary eminent domain is the state constitutional law of exclusionary zoning. Exclusionary eminent domain can be conceptualized as *ex post* exclusionary zoning, and exclusionary zoning can be conceptualized as *ex ante* or anticipatory exclusionary eminent domain.[11] Because exclusionary eminent domain and exclusionary zoning address related problems, it makes sense to ask whether the concepts and features of state exclusionary zoning doctrine could be used in constructing a doctrine of exclusionary eminent domain. The Part argues that exclusionary zoning doctrine can serve as a model for an exclusionary eminent domain doctrine.

A. Federal Constitutional Law before Kelo, and the Kelo Decision

The Fifth Amendment to the United States Constitution contains the following language, often labeled the Takings Clause or the Just Compensation Clause: "nor shall private property be

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[11] There are, as far as I can ascertain, no court cases linking exclusionary zoning principles to eminent domain. However, in the Lodi trailer park litigation, the New Jersey Public Advocate did, as an amicus, argue that "[i]f this principle [that localities must regulate in the interest of the general welfare] prohibits municipalities from using zoning to prevent low- and moderate-income families from locating in their communities, a fortiori it forbids the use of eminent domain to expel low- and moderate-income families already living within their communities." Brief of Amicus Curiae Public Advocate of New Jersey, LBK Associates et al v. Borough of Lodi, Superior Court of New Jersey, Appellate Div., A-0018929-05T2, at 39. The connection between Mount Laurel and eminent domain, however, has not been addressed by the courts in the Lodi litigation.

taken for public use, without just compensation."[12] The United States Supreme Court long ago held that the Takings Clause of the Fifth Amendment applies to the states and political subdivisions of the states.[13] Thus, to be constitutional, a state or local government's condemnations must pass muster under both the federal constitution and that of the state in which the property in question is located.

The Takings Clause has been construed to create two distinct limitations on government. The first limitation is that the government may take private property only for a public use: the government may not take private property for a non-public use, no matter how much compensation is paid. The second limitation is that, when the government does take private property for a public use, it must pay "just compensation."

What it means to "take" private property is clear in the cases of both market purchases and formal condemnations. The government is not regarded as taking private property when it acquires title to private property by means of a non-compelled, market transaction: the government can buy property without constitutional constraint. By contrast, when the government formally invokes its eminent domain power by forcing the transfer of title of the property to itself via a condemnation proceeding, the government unquestionably has taken private property. For purposes of the compelled transfer of title of private property from a private property owner to the government, there is no question that a taking has occurred, but there remains the question whether the taking was for "public use" and whether "just compensation" was paid. For the taking to be constitutionally permissible, both the public use and just compensation requirements must be satisfied. Even if just compensation--indeed, even if more-than-just compensation--is paid, a taking that is not for public use is constitutionally impermissible. A key question, therefore, is: what does "public use" mean?

One plausible understanding of the words "public use" is that the property in question must actually be controlled by, and hence available for actual use by, the general public, as is true, for example, of a public park or highway. But the courts had disavowed the conception of public use as requiring actual public use (assuming they ever avowed it) by the end of the nineteenth century.[14] On the current United States Supreme Court, only Justice Thomas appears to have any sympathy for restricting public use to actual use by the public.[15]

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[12] U.S. Constitution Art. V.

[13] See Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

[14] See Kelo, 545 U.S. at 478-80. The fact is there is almost no direct evidence one way or the other as to the framer's understanding of "public use." See David A. Dana & Thomas W. Merrill, PROPERTY: TAKINGS 8-25 (2002). Nonetheless, it may be that, if asked, "[m]ost Americans" would say that "public use" means "actually going to be used by the public as, for example, a road or a park." John Tierney, *Supreme Home Makeover*, N.Y. Times, Mar. 14, 2006, at A27.

[15] See Kelo, 545 U.S. at 508 (Thomas, J., dissenting) (arguing for a reading of the "public use" requirement as allowing the taking of property only if "the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever").

The move from public use to public purpose begs the question: what kind of purpose is a public purpose such that a government lawfully may exercise its eminent domain power? One possible answer is that a condemnation has the constitutionally requisite public purpose as long as it has the purpose of providing a benefit, incidental or direct, to the public. The shift from purpose to benefit, however, would seem to require a sorting as to which kinds of benefits count and which do not. If all kinds of benefits count, the public use limitation on eminent domain is no limitation at all, since it is hard to imagine a project that cannot be said to generate some sort of benefit for the public. But if only some kinds of benefits count, by what criteria are we to identify those benefits?

One might argue that the overall thrust of the federal case law has been to suggest that any benefit government may legitimately pursue – anything that aids a constitutionally permissible government object – passes the public use test. There are, however, relatively few public use cases, and the current Supreme Court itself appears divided on just compensation and public use issues. Thus, it is still plausible that the federal courts would hold under some circumstances that a condemnation is *not* for the public use even as they recognized that the condemning government could constitutionally pursue the objective advanced by the condemnation through means other than condemnation, such as regulation and taxation.

The federal case law does identify two distinct kinds of public benefits that can justify the use of eminent domain: the removal of "blight" and "economic development." The cases spawned by the massive, federally- funded urban renewal projects of the 1950s and 60s, and in particular *Berman v. Parker*,[16] gave rise to the conventional wisdom that states and localities enjoy very broad discretion in making blight designations and in using eminent domain to curb the blight. Indeed, as in *Berman* itself, a property may be condemned for federal constitutional purposes even when it is indisputably not blighted, as long as it is located in a blighted area designated for renewal.[17] Writing for a unanimous court, Justice Douglas in Berman made clear that the federal constitution places no real constraint on urban renewal and redevelopment undertaken under the blight removal label.

"Blight" is an imprecise term, [18] but there almost certainly is some limit to how far "blight," however amorphous that term may be, can be stretched. [19]After all, the department store at issue

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[16] 348 U.S. 26 (1954).

[17] Id at 30. Further, the Supreme Court's opinion in Midkiff, which addressed Hawaii's effort to end land monopoly, contains language that could be read to mean that there are no constraints at all on what constitutes a permissible public benefit that will justify a condemnation. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is coterminous with the scope of a sovereign's police power.").

[18] State statutory definitions of blight are in large measure very vague, and allow for a wide range of fully occupied residences and economically viable businesses to be designated as part of a blight district. As Colin Gordon has noted, "'blight' is rarely defined with any precision in . . . statutes". See Colin Gordon, Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight, 31 Fordham Urb. L.J. 305, 305-06 (2004) See also id (explaining that one California state legislator complained in 1995 that "defining blight [has] bec[o]me an art form.").

[19] The Norwood, Ohio case serves a case in point. The Norwood condemnations were styled as blight condemnations but the holdouts complained that the designation mistook their tidy ranch house homes for a slum. See Motoko Rich, *The Buyouts versus the Holdouts*, New York Times, June 30, 2005, at F1. One might well

in Berman, although in good repair, was located in a poor area of the District of Columbia that did contain at least some dilapidated buildings.[20] Hence the "need" for governments and courts to recognize the category of "economic development" condemnations--condemnations of non-blighted properties in non-blighted areas done in the interest of fostering economic development within a locality.

Economic development is not a term with any precise definition, but the gist of the term seems to be development that is expected to improve the locality's tax base or job base. Thus, a condemnation done to replace well-tended, middle-class brick bungalows with luxury condominiums and mansions would qualify as an economic development condemnation but not a blight condemnation. And likely for this reason, the state redevelopment agency in the Kelo case did not even try to argue that the neighborhood lived in by Susan Kelo and her middle-class neighbors was blighted and that *Berman* and similar precedents therefore applied.[21]

Prior to the United States Supreme Court's 2005 decision in *Kelo*, it was not entirely clear whether, as a matter of federal constitutional law, economic development was a public benefit sufficient to satisfy the public use requirement and hence render a condemnation constitutional. The majority opinion authored by Justice Stevens extends to political decisions to pursue economic development condemnations the same sweeping deference that the Berman court accorded political decisions to pursue blight removal condemnations half a century earlier. According to the majority opinion, "[p]romoting economic development is a traditional and long accepted function of government," and "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized," such as "the purpose of transforming a blighted area . . . through redevelopment."[22] Moreover, the Court in Kelo made clear that it is not the judiciary's role to "second-guess" public officials' judgments as to the efficacy of their economic development plan or as to what land needs to be acquired in order to effectuate the project. Quoting Berman, the Court affirmed the principle that once the question of public purpose has been decided, the courts are to leave questions of how that purpose is effectuated to the discretion of politicians.[23]

Read together, Berman and Kelo establish that, as a matter of federal constitutional law, both blight removal and economic development condemnations are constitutional. Nonetheless, even within the current Supreme Court, economic development remains a more controversial rationale for condemnations than blight removal: Five justices joined the Kelo majority, but four dissented.

B. State Constitutional Law before Kelo

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speculate that the Ohio Supreme Court agreed with the holdouts, although the Court's ostensible holding was much more general – that the blight statute was unconstitutionally vague. *See Norwood v Horrey*, 853 N.E.2d 1115, 1145 (2006).

[20] *See Berman*, 348 U.S. at 28.

[21] Blight was not relied upon by New London in the state court litigation, see Kelo v. City of New London, 843 A.2d 500, 531-34 (Conn 2004), or of course in the United States Supreme Court.

[22] See Kelo, 545 US at 484.

[23] See Kelo, 545 US at 488-89.

With a few exceptions, the state constitutions contain public use clauses that are very similar to the language in the Fifth Amendment. For example, the Michigan Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." The Connecticut Constitution mandates that "[t]he property of no person shall be taken for public use, without just compensation therefor."[24] To be constitutional, a condemnation must qualify as a public cuse under the federal constitution and under the applicable state constitution.

Even before Kelo, state constitutional law was not uniformly as expansive in its conception of "public use" as federal constitutional law. The great majority (but not all) state courts accepted blight removal as a basis for condemnations, and deferred to sometimes very broad statutory definitions of blight.[25] Fewer state courts have spoken to the issue of the condemnation of non-blighted properties to non-blighted areas for economic development, but most that have done so affirmed such condemnations. However in some states, even before Kelo, the legality of the sort of condemnation at issue in Kelo – a condemnation of non-blighted properties with an anticipated transfer to private ownership – was contestable.

Of the pre-Kelo state constitutional law precedents that recognized economic development condemnations as lawful, the Poletown opinion is far and away the most famous or infamous. In 1981, the Michigan Supreme Court in its Poletown opinion held that the City of Detroit acted constitutionally in condemning a stable, non-blighted neighborhood in order to provide General Motors with a site for a new plant.[26] The Poletown case sparked a tremendous amount of criticism, in no small measure because Poletown was a flourishing ethnic neighborhood that was utterly destroyed and the General Motors plant never delivered the number of promised jobs. Although Poletown itself remains a highly controversial decision, state court opinions across the country have mirrored its reasoning in approving economic-development condemnation. The reasoning of the Michigan Supreme Court in Poletown essentially was the same as that employed more than two decades later by Justice Stevens in Kelo: according to the Michigan Supreme Court, when the legislature determines that a condemnation "meets a public need," such as economic development, the Court's role is "limited." "The determination of what constitutes a public purpose" should not be second-guessed by a court "except in instances where such determination is . . . manifestly arbitrary and incorrect."

Washington state is the state whose courts have most consistently adhered to a narrower conception of public use (under state constitutional law) than the federal courts have (under federal constitutional law). A line of Washington cases affirm that a "beneficial use is not necessarily a public use."[27] In In re Seattle,[28] the Washington Supreme Court invalidated

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[24] See Mich. Const. art. 10, § 2; Conn. Const. art 1, § 11.
[25] See Colin Gordon, Blighting the Way: Urban Renewal, Economic Development & The Elusive Definition of Blight, 31 FORD URB L J 305, 321-322 (2004) ("courts have granted local interests almost carte blanche in their creative search for 'blighted' areas.").
[26] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), overruled by County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004)
[27] Manufactured Housing Communities of Washington v. Washington ,13 P3d at 189 (citing In re Petition of Seattle, 638 P2d 549 (1981) and Hogue v Port of Seattle, 341 P2d 171 (1959)).

condemnations that were part of an urban renewal/blight removal and prevention project and that entailed the transfer of condemned properties to private retailers. Although the Court acknowledged that the condemnations were in the "public interest," the court held that they qualified as for private use, not for public use condemnations. In Manufactured Housing Communities of Washington v. Washington,[29] the Court invalidated a statute that in effect would employ the eminent domain power to transfer ownership of mobile homes from park owners to current tenants. Again, the Court insisted on a narrow conception of public use that would preclude blight and economic development condemnations.

Several states have accepted blight condemnations but rejected non-blight-removal, economic development condemnations. Kentucky has adhered to this position for some time.[30] Most recently, in 2004, two state supreme courts--Illinois and Michigan-- explicitly held that, at least in some instances, economic development is not a public purpose that justifies condemnation as a matter of state constitutional law.[31]

The Michigan case attracted national attention because it entailed the specific disavowal of the Poletown decision. Pointedly rejecting the reasoning, it had employed in Poletown, the Michigan Supreme Court in County of Wayne v. Hathcock held that economic development was a meaningfully different purpose than blight removal for purposes of the state constitutional requirement that takings be for public use.[32] Economic development, the court held, was a constitutionally insufficient purpose for condemnation even when the promised economic benefits of the business and technology park development are very substantial, such as 30,000 jobs and $350 million in tax revenue. The court acknowledged certain cases in which economic development condemnations would pass constitutional muster because of the strong social welfare or public need for a particular development in a particular place, such as where the property was selected for condemnation because of "facts of independent public significance" rather than because of the preferences of private developers participating in the project.[33] In tenor, the court's opinion was very close to that of Justice O'Connor in her Kelo dissent.[34]

C. Post-Kelo Reforms in the States

Kelo ignited a storm of eminent domain reform in the United States. With the notable exception

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[28] 638 P2d 549 (1981)
[29] 13 P3d at 189 (2000)
[30] See Prestonia Area neighborhood Ass'n v. Abramson, 797 SW2d 711 (Ky 1990). Whether state agencies and localities nonetheless continue to try what would seem to be legally-prohibited condemnations is a question. See Dana Berliner, PUBLIC POWER/ PRIVATE GAIN (Inst. Justice 2003), at 81 (stating that Kentucky localities nonetheless were seeking to employ eminent domain for economic development).
[31] In the Illinois case, the state supreme court held that relatively insubstantial, incidental contribution "to positive economic growth in the region" from a project--in this case an expanded parking lot for a racetrack-- did not justify condemnation even though the court acknowledged that in other cases the economic development benefits of a project might be sufficient to justify condemnation. See Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).
[32] See County of Wayne v. Hathcock, 684 NW2d 765, 782 (2004).
[33] Id at 783.
[34] See Kelo, 545 US at 494 (O'Connor, J, dissenting).

of Ohio, [35] the impetus for reform has been either the state legislature or the ballot initiative. Ilya Somin has helpfully questioned how stringent any of the reform statutes are in practice, given large exceptions in the legislative language and unresolved questions regarding enforcement.[36] Taking the reforms at face value as meaningful, however, the reforms fall into three reasonably distinct categories in terms of their stated objectives:

* Substantial limits and/or a ban on both blight removal and economic development condemnations
* Substantial limits and/or a ban on economic development condemnations, and
* A tightening of the requirements for a finding of "blight," by narrowing the requirements for classifying a structure as blighted and/or by reducing or eliminating the capacity of a condemning authority to include non-blighted structures within an area designated as blighted.

Only a few states have opted for the first reform; a number of states have opted for the second reform.[37] Most but not all the states that have adopted the second reform have done so in conjunction with the adoption of some version of the third reform.[38] In all, one or more of the three reforms has been adopted in the great majority of the states. From the vantage of concern regarding the exclusion of low-income households through eminent domain, this pattern of reform is troubling because the second and third reforms actually may promote more exclusion of low-income households through eminent domain.

To see why this is so, it may be helpful to consider first how eminent domain can operate to exclude low-income households. Low-income housing can and often has been condemned for "public uses" that entail actual public use, such as construction of public highways or schools. Low-income housing has also very often been condemned under the rubric of blight removal condemnations, since almost all the criteria for blight used by various jurisdiction correlate with poverty or lack of wealth of the owners or occupants of the structures.[39] Low-income housing also could be condemned under the rubric of economic development condemnations, but there is not much evidence this has been the case, most likely because it is typically easy to fit low-income housing within the confines of the blight category.

A ban on the use of eminent domain except in the case of actual public ownership and use

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[35] See *Norwood v Horrey*, 853 N.E.2d 1115, 1145 (2006).

[36] See Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo (January 2008), available at www.ssrn.com.

[37] And of these few, only Florida is a heavily populated area with established redevelopment agencies and a tradition of using eminent domain to facilitate development and redevelopment. See H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006). .

[38] For discussions of the reforms in various states, see Somin, supra note ; Patricia Salkin, Eminent Domain Legislation: A State of the States, 36 Envtl L Rep 10864, 10865-70 (2006); David A. Dana, The Law and Expressive Meaning of Condemning the Poor after Kelo, 101NW U L REV 365 (2007); David A. Dana, Why the Blight Distinction in Post-Kelo Reform Does Matter, 107 NW U L REV COLLOQUY 30 (2007).

[39] For discussions of the correlation between "blighted" and "poor", see Amanda W. Goodin, Rejecting the Return to Blight in Post-Kelo Legislation, 82 NYU L REV 177, 200-204 (2007); Bruce Fein, Eminent Domain, Eminent Nonsense, Wash. Times, Oct. 11, 2004, at A16.

(schools, parks, highways) is both an under- and over- inclusive reform from the vantage of concern regarding exclusionary eminent domain. The reform does eliminate the use of blight removal and economic condemnations that exclude low-income housing. Obviously, however, it does nothing to constrain actual-public-use condemnations that will result in the exclusion of low-income housing. Historically, poor areas have been prime targets for public road construction and other large public works projects facilitated by eminent domain.[40]

Perhaps more importantly, this reform is wildly overinclusive from the perspective of limiting the exclusion of low-income households. This reform would constrain the use of eminent domain in a broad range of contexts, and hence dramatically undermine some of the desirable functions of the use of eminent domain by regulators – most notably, overcoming holdout problems in fragmented land markets that otherwise might prevent socially beneficial development, and in particular development in poor localities struggling with the problems of concentrated poverty.[41] And, again, politically, this kind of reform seems to have very limited traction.

Indeed, one notable byproduct of blanket bans on eminent domain is that states and localities could not use eminent domain to construct or retain affordable housing, which at least sometimes they do want to do (however much in other instances they seek to block or eliminate such housing). Redevelopment agency officials emphasize that use of eminent domain allows them to assemble land for affordable housing; "when you have distressed communities," eminent domain is needed "to do [a] worthwhile public purpose and help[] your citizens find places to live in . . . ."[42]

A limit or ban on economic development condemnations does not address condemnations for actual public use, and hence would not reduce the number of exclusionary condemnations pursued for actual public use. But more than that, this kind of reform might increase the number of exclusionary condemnations pursued for local development rather than for actual public use. A limit or ban on economic development condemnations makes land assembly and hence development of sites that contain middle-class housing -- which is typically unblighted under even broad conceptions of blight – more expensive and hence less attractive for local officials and developers because they do not have the assistance of eminent domain or the threat of eminent domain to facilitate land assembly. As a relative matter, land assembly and hence development of sites with low-income housing will thus be more attractive for land assembly and

[40] For an illuminating historical treatment, see Raymond A Mohl, *Stop the Road: Freeway Revolts in American Cities*, J. URBAN HISTORY, Vol. 30, No. 5, 674-706 (2004).

[41] For excellent accounts of the overcoming-holdout rationales for eminent domain, see Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L REV 61, 80 (1986); Thomas J. Miceli & Kathleen Segerson, 9 AMER L & ECON REV 160 (2007).

[42] Todd Wright & Evan S. Benn, Eminent Domain, Miami Herald, April 30, 2006, at BR (quoting Carol Westmoreland, executive director of the Florida Redevelopment Association). See also Terry Sheridan, End-of-Term Eminent Domain Bill Likely to be Fought, Broward Daily Bus. Rev. , May 11, 2006, at 1 (voicing complaints from agency officials and lawyers about proposed restrictions on eminent domain, and noting that one city agency was finalizing the condemnation of a 10-unit apartment building for affordable housing).

development because they still can be condemned or plausibly threatened with condemnation on the basis of blight. The end result of the limit or ban on economic development condemnations thus will be fewer condemnations of middle-class housing and more condemnations of low-income housing, including more condemnations of low-income housing that result in the exclusion of low-income households from an otherwise middle-class or wealthy neighborhood or locality.

Consider, for example, a predominantly middle-class locality that wants to enhance tax revenue by collaborating with a developer who will build in office park in the locality. There are two possible sites where land could be assembled for an office park – one that contains no low-income housing and could not reasonably be characterized as blighted, and one that contains low-income housing, the locality's only low-income housing, and that could reasonably be characterized as blighted. The first site would be more attractive for a developer if the land acquisitions costs were 20 percent higher than those for the second site, but a greater than 20 percent price difference would lead the developer to instead prefer the second site. Imagine that, with eminent domain potentially applicable to both sites, the expected costs of acquiring the first site would be only 15% more than the expected costs of acquiring the second site. Once eminent domain no longer is potentially applicable to the first site, the expected cost of acquiring the first site will be 30% more than that for the second site. Hence, the change in eminent domain law will lead the locality and developer to shift their development focus from the first to the second site. As a result, low-income residents will be displaced, and forced the leave the locality in search of available affordable housing.

The third reform -- tightening the definition of "blight" -- also may make low-income housing more vulnerable to the threat of condemnation. The tightening of the definition of blight may make it impossible or at least more difficult for officials to characterize modest middle-class housing as blighted, so that, relatively speaking, truly low-income housing will become more attractive for condemnation-facilitated development. The number of condemnations of low-income housing presumably will rise, and some of these additional condemnations presumably will involve low-income housing located in otherwise middle-class or wealth neighborhoods or localities. In the previous office park example, a loose definition of blight might have tempted the locality and developer to characterize the housing on the first site as blighted and hence open to condemnation or the threat of condemnation, but the tightening of the definition would remove that temptation and convince the locality and developer that they simply could not threaten condemnation with respect to the first site and that the second site, with low-income-housing, was the better development option.

D. Exclusionary Zoning Doctrine

Eminent domain law, pre- and post-Kelo, does not address the exclusion of low-income households as a distinct problem or concern. Nor, more generally, does federal constitutional law. But one strain of state constitutional law does address the phenomenon of exclusion of low-income households, although by means of zoning rather than the exercise of eminent domain.

As discussed below, three important principles dominate the law of zoning in the United States, especially the judge-made, non-statutory law of zoning. When fully adhered to by state courts, these principles compel the courts not to impose any non-statutory limits on exclusionary zoning. In the minority of states where the courts have developed an exclusionary zoning doctrine as part of their state constitutional jurisprudence, the courts have been compelled to depart from the third of these three principles.

The first principle is that it is the presumptive province of each political jurisdiction – each locality – to develop and implement its own zoning rules and regulations. State legislatures of course can create institutions or rules that trump local decisionmaking but when they do not, local decisionmaking reigns supreme. As a result, in many parts of the country, dozens of localities in the same metropolitan enact their own zoning rules without any coordination mechanism. Despite state efforts to establish more regional coordination in land use matters, t Growth" principle of regional coordination, intense fragmentation of zoning authority remains the (politically- and judicially-accepted) norm. As Mark Fenster notes, the United States is still characterized by "[t]he near autonomy of local governments in the administration of land use in their jurisdictions."[43]

The second principle is that local officials and politicians can regulate a broad range of land use decisions as part of an expansive charge to act in the interest of public healthy, safety, and welfare (with welfare broadly conceived); almost any interest is a legitimate subject of zoning, and generally courts are deferential in reviewing the fit between the zoning as a means to a designated end and the designated end. Consistent with this principle, controlling residential density is deemed relevant to local health, safety, and welfare, and hence local density-based controls are regarded as legitimate government functions. And so too are a range of local restrictions and requirements regarding the design and composition of housing, as distinct from the density of housing.

One implication of acceptance of the second principle is that local zoning adopted by local officials and politicians can have a large impact on the availability, composition and (of particular note for the purposes of this Article) price of housing within each locality. As Nicole Garnett explains, "[m]etropolitan fragmentation undoubtedly permits local governments to dress up exclusionary zoning in a growth management gown." [44] Density and other local controls can de facto limit the development of affordable housing in a number of ways. Density controls that limits or bar multifamily housing tend to exclude low-income households because, on average, single-family homes are more expensive than condominiums or apartments. Within the realm of single-family zoning, large minimum lot size requirements can raise the price of homes beyond what any low-income households can afford. Density limits that require minimum square footage for apartments or that restrict the number of residents in each apartment or that require dedicated parking spaces for each apartment unit or that otherwise make building and housing

[43] Mark Fenster, Regulating Land Use in a Constitutional Shadow: The Institutional Context of Exactions, 58 HASTINGS L J 729,735 n 39 (2007).
[44] Nicole Garnett, Suburbs as Exit, Suburbs as Entrance, 106 MICH L REV 277 (2007).

code compliance very expensive also tend to exclude low-income households, and in particular low-income households with children (and in particular many children).

The third principle of American zoning law is that, in making decisions regarding what zoning rules to adopt or enforce, local officials and politicians need *not* consider – or certainly weigh heavily – the effects of the rules they adopt *outside* the locality. In the language of the public use clauses, the third principle teaches that the only public that counts is the public in the locality. Political dynamics tend to make local officials and politicians concerned only with local welfare, as it is local voters who elect them and local taxpayers who pay their salaries.[45] The third principle approves and reinforces that parochial political dynamic by ensuring local officials and politicians' decision will only be assessed in terms of local welfare, unless the state legislature has intervened to constrain the range of lawful decision-making at the local level. Indeed, Euclid v Ambler,[46] the case that probably defines the law of American zoning more than other – and that has deeply influenced state courts although it is a federal constitutional case – strongly embraces this principle by upholding suburban zoning that quite plainly was meant to operate to protect the quality of life of current suburban residents by excluding lower-income, would-be apartment dwellers from migrating from the city.[47] The Court in Euclid did note that there might be circumstances where extra-local welfare consideration are so weighty that they must be considered,[48] but the case clearly embraces parochialism in zoning.

The courts in some states, however, have departed from this third, "parochialism" principle in the context of exactly the sort of zoning provision at issue in Euclid, that is, zoning provisions that effectively exclude low-income residents from middle-income suburbs. As a rhetorical matter, there is a significant number of states in which the courts have suggested that, as a matter off state constitutional principles, local officials must consider extra-local welfare in considering zoning measures that may have significant exclusionary effects.[49] In practice, however, the courts in only a small number of states have repeatedly used state constitutional law to overturn or set aside zoning provisions on the grounds that they are exclusionary or excessively

[45] For a thoughtful discussion of regional governance as a response to this dynamic, see Richard Briffault, Localism and Regionalism, 48 BUFF L REV 1, 21-22 (2000) (arguing that "[i]n metropolitan areas, democracy requires giving the regional electorate a voice in local decisions that have regional consequences.").
[46] Village of Euclid v Ambler Realty Co., 272 US 365 (1926).
[47] See Richard H. Chused, Euclid's Historical Imagery, 51 CASE W RES L REV 597, 613-614 (2001) (noting that Justice Sutherland "gave us a picture of an "apartment" that "politely" – that is, without the overt use of racial and ethnic slurs – called fort the most negative, stereotypical imagery of New York tenement house districts").
[48] Village of Euclid, 272 US at 390 ("If it be the proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effects is to divert the industrial flow from the course which it would follow, to the injury of the residential public, if left alone . . . . It Is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.").).
[49] For overviews of the state court case law, see Jeffrey M. Lehmann, Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach, 12 – WTR J. Affordable Housing & Community Dev. L. 229 (2003); J.R. Kemper, Exclusionary Zoning, 48 A.L.R. 3d 1210 (2007); Henry A. Span, How the Courts Should Fight Exclusionary Zoning, 32 SETON HALLL REV 1 (2001); Robert C. Ellickson & Vicki L. Been, LAND USE CONTROLS 951 (2005).

exclusionary. In a few states, however, the state courts might have done so had the state legislature not first enacted state exclusionary zoning laws and established administrative boards with oversight over exclusive zoning complaints.[50]

The decisions of the New Jersey, New York and Pennsylvania courts deserve particular note. [51] New Jersey's experience is certainly the best known, in large part because the New Jersey Supreme Court has been exceptionally assertive in holding that all municipalities – developed and built-up ones – have an obligation to both avoid provisions that exclude low-income households and to take affirmative measures to include low-income households.[52] The New York and Pennsylvania courts have followed the same basic conceptual model as the New Jersey courts, but have been more restrained and have focused on the review of the exclusionary effects of particular zoning practices on a case-by-case basis.

There are several common features of the New Jersey, New York, and Pennsylvania approach. One is the use of the concept of a "fair share" within the "metropolitan region." In this approach, the relevant political actor is the municipality – typically a suburb – and the municipality does not have an obligation *not* to exclude low-income households per se, but rather has an obligation not to exclude them when the municipality otherwise lacks its "fair share" of the needed stock of affordable housing for the metropolitan region. In New Jersey, quite controversially, the Supreme Court adopted a specific plan assigning each municipality a fair share allocation within defined metropolitan regions.[53] By contrast, in other states, the court never sought to globally define and assign "fair share" obligations, and instead deployed "fair share" in a reasonably loose fashion on a case-by-case basis, often using expert testimony and focusing on the raw numbers or percentages of low-income housing in the suburb at issue compared to neighboring suburbs and the nearest major city.[54]

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[50] Most notably, without judicial prompting, the Land Conservation and Development Commission in Oregon interpreted its statutory authority as requiring adherence to Mount-Laurel like principles, see Seaman City v. Durham, LCDC No. 77-025 (April 18 1979), and the Massachusetts legislature passed the so-called Anti-Snob Zoning Law in 1969, Mass. Gen. Laws Ann. Ch. 40B, 20-23. For an analysis of the statutory approaches in states such as Oregon and Massachusetts, see Thomas A. Brown, Democratizing the American Dream: The Role of a Regional Legislature in the Production of Affordable Housing, 37 U MICH J L 599 (2004).

[51] See South Burlington County NAACP v. Township of Mount Laurel, 336 A2d 71 (NJ 1975); South Burlington County NAACP v. Township of Mount Laurel, 456 A2d 390 (NJ 1983) ; Surrick v. Zoning Hearing Board of Upper Providence Township, 382 A.2d 105 (Pa. 1977); Reimer v. Bd of Supervisors of Upper Mount Bethel Township, 615 A2d 938 (Pa. Commw. Ct. 1992); BAC, Inc. v. Bd of Supervisors of Millcreek Township, 633 A2d 144 (PA 1993); Berenson v.. Town of New Castle, 341 N.E.2d 236 (NY 1975); Continental Building Co. v. Town of North Salem, 625 NYS2d 700 (NY App Div 1995). There have also been cases invalidating zoning as exclusionary on non-statutory, substantive due process grounds in a number of other states, including Illinois, Michigan, New Hampshire, and Virginia. See Lehmann, supra note 49, at 241-146.

[52] On the Mount Laurel cases and resulting legal regime, see Charles Haar, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); Henry Span, Exclusionary Zoning, 32 Seton Hall L REV 1, 49-59 (2001).

[53] The New Jersey Supreme Court justified its requirement of precise fair share numbers on the pragmatic grounds that numbers would drive concrete action, while admitting precision in assessing fair shares was impossible. See Mount Laurel II, 456 A.2d at 441.

[54] The New Jersey and Pennsylvania courts specifically employ the term "fair share," but the New York courts do not. However, it is clear that the New York case law employs a fair share-like concept, albeit one (like that under

Another common feature is heightened review of exclusionary practices but not anything approaching true strict scrutiny; practices that serve strong local interest may be upheld even where they are exclusionary and the municipality has not met its fair share obligation. In New Jersey, a municipality may bypass a share of its fair share obligation by making a cash payment to a nearby poor city.[55] In all the relevant states including New Jersey, the exclusionary zoning doctrine in effect creates a presumption against legality for certain strongly exclusionary practices, but the locality can overcome the presumption with a strong showing of local need.[56]

Pennsylvania law) that is much looser or ad-hoc than the one that the Mount Laurel cases embraced in New Jersey. See Blitz v, Town of New Castle, 94 AD2d 92, 463 NYS2d 832 (1983) ("while the New York courts have consistently rejected 'fair share' doctrine which would impose specific unit goals or quotas of housing on a municipality . . . there are relevant data which may indicate whether [the municipality's] provisions for housing are at all commensurate with some general notion of its expected contribution to the regional housing need'). For a statement of the Pennsylvania conception of fair share, see Surrick, 382 A.2d at 109-110 ("In establishing the 'fair share' standard, , this Court has merely stated the general precept which zoning hearing boards and governing bodies must satisfy by the full utilization of their respective administrative and legislative expertise. We intend our scope of review to be limited to determining whether the zoning formulas fashioned by these entities reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs and development.").

[55] For a defense of the New Jersey Supreme Court's decision to uphold this statutory modification to the Mount Laurel doctrine as prudent in the face of the opposition to fair share allocations and claims of judicial overreaching, see Paula A. Franzese, Mount Laurel III, The New Jersey Supreme Court's Judicious Retreat, 18 SETON HALL L REV 30 (1988).

[56] See South Burlington County NAACP et al v. Township of Mount Laurel, 336 A.2d 713, 728 (1975) (explaining that a municipality's fair share obligation is "presumptive" so that once a prima facie case of exclusion has been made, "the burden . . . shifts to the municipality to establish a valid basis for its action or non-action." and the "specifics" of what meeting that burden will entail "may well vary between municipalities according to peculiar circumstances."); Surrick, 382 A.2d at 112 n 13 ("[w]here . . . the facts show an obvious dearth of land zoned for multifamily dwellings, the proponents of the zoning ordinance must put forth adequate justification for this zoning-created scarcity"); Berman v. Bd. Of Comm'rs of Lower Marion, 608 A.2d 585, 588 (Pa. Commw. Ct, 1992) (acknowledging that the presumption against exclusionary lot-size requirements could be overcome upon an adequate showing of need by the municipality). A third common feature of state exclusionary zoning doctrine is the so-called "builder's remedy." One central problem for an effective exclusionary zoning doctrine is the need, if the doctrine is to have any effect, of plaintiffs with standing are needed.. Low-income people potentially excluded from a municipality may well lack the resources and motivation to sue, although legal services groups can at times act on their behalf. Such plaintiffs also face hurdles establishing standing, as they may be unable to show that they would have been able to move into and//or would have moved into the locality absent the challenged exclusionary zoning. In response to this plaintiff problem, the courts in some states have recognized the right of a builder to sue to set aside exclusionary zoning that would limit the density of its proposed project, and in some states, such as New Jersey, the builder's remedy allows the builder to avoid almost all zoning restrictions, see Mount Laurel II, 456 A2d 452 n 37. It is thus potentially very valuable for builders. See David Kirp et al, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 105 (1995) (noting builders satisfaction with the advantages conferred by the building remedy). In the case of an exclusionary eminent domain doctrine, standing is not an issue: the affected owners and tenants already live in the locality and clearly have an interest in the threatened condemnation. It is true, however, that owners of low-income housing and (even more so) low-income tenants may lack resources to press exclusionary eminent domain claims, particularly where the threatened condemnations involve only a few owners or tenants so neighborhood pooling of resources might be impractical.

E. Translating Exclusionary Zoning Doctrine into Exclusionary Eminent Domain Doctrine

The two common features of state exclusionary zoning doctrine – the use of fair share as a doctrinal boundary device and the flexibility provided for by the use of a rebuttable presumption rather than a total or near total bar on exclusionary decisions – can be usefully translated into the context of a state constitutional doctrine limiting exclusionary eminent domain. The fair use concept in the exclusionary domain context, however, requires some modification if exclusionary eminent domain doctrine is to address intra-locality exclusion within large cities.

The basic notion of what I have called "exclusionary eminent domain" implies some fair share limit on the scope of heightened review. This is so because in cases where a neighborhood or locality has otherwise met its fair share obligation for affordable housing, a condemnation will not necessarily result in exclusion of displaced residents from the neighborhood or the locality, as the neighborhood or locality has other affordable housing. Moreover, as addressed below in Part II, one of the central rationales of an exclusionary eminent domain doctrine is the prevention of greater concentration in poverty. If no fair share boundary is applied to heightened review of exclusionary acts of eminent domain, then heightened review would apply to condemnations that actually promotion the deconcentration of poverty, such as condemnations of low-income housing in overwhelming low-income city such as Camden, New Jersey, as part of an effort to facilitate a development designed to attract middle-class households.[57]

The phenomenon of exclusionary eminent domain, as I have defined it, implicates the question of how to define an urban neighborhood in a way that exclusionary zoning does not. Exclusionary zoning doctrine has simply tracked legal boundary lines, presumably because

[57] There are a number of highly controversial eminent domain plans that involve the proposed condemnations of low-or moderate-income households in predominantly poor neighborhoods n predominantly poor localities. The intent of these condemnations is to bring in more expensive and hence more-tax-revenue-generating development. As often is true in the eminent domain wars, New Jersey appears to be the epicenter of controversy. See Editorial, Affordable housing vital for development, Courier-Post (Cherry Hill, NJ), Aug. 8, 2004, at 6G (denouncing redevelopment plans using eminent domain in the low-income localities of Camden, Lindenwold, Mount Holly, and Ventnor). See also . The City of Camden, in particular, has made repeated attempts to create new development using eminent domain. See . While there may be legitimate problems with these redevelopment plans and certainly there may be significant questions as to the adequacy of the treatment of displaced households, they can be viewed as helpful to poor people in general inasmuch as they promote the de-concentration of poverty in localities struggling with the burdens concentrate poverty imposes on localities. See infra . The exclusionary eminent domain doctrine I am proposing would not operate to block the use of eminent domain to facilitate this sort of development, but blanket bans on the use of eminent domain for anything other than actual public use would impede and perhaps wholly undermine these development efforts.

density zoning is not a major contributor to income-based exclusion within major cities: within a city like New York City, for example, lawful and actual density often is higher in wealthy areas than in poor ones. [58] By contrast, the exclusion from eminent domain in the urban gentrification setting may well be within the city – that is, exclusion from gentrified neighborhoods and displacement to low-income neighborhoods sometimes within the very same city. An exclusionary eminent domain doctrine thus might require courts to identify what is the relevant urban "neighborhood" in a eminent domain case without anything in the way of judicial precedents for guidance as how to do so.

Drawing neighborhood lines would not be an easy task for courts. As anyone who has ever lived in a city like New York City knows, the names, boundary lines, and even existence of neighborhoods can be a subject of intense controversy. In the controversy over what the construction of seventeen luxury high-rise buildings will mean in Brooklyn in terms of the income mix of households, some have argued the development will effectively eliminate lower-income households, while others have argued that the development will have minimal effect on the overall soci0economic profile of the area. [59] They are both in a sense correct because they employ different definitions of the relevant affected area.[60] For courts, testimony as to how residents have interacted over geographic space through civic institutions such as churches as well as boundary lines used by the city for various administrative public services and governance purposes may be instructive, if not necessarily conclusive.

The feature of a reasonably-flexible rebuttable presumption of illegal government actions – rather than genuine strict scrutiny – can be readily translated from the exclusionary zoning context to the eminent domain context. In the exclusionary zoning context, a locality can rebut the presumption by showing strong local need for the challenged zoning practice and the absence of less-exclusionary alternative means of achieving that need. In the eminent domain context, a locality could rebut the presumption by showing a strong local need for the project at issue and the absence of alternative sites or site configurations, or in the terms used in the literature, where there is a thin market for appropriate site. As in the exclusionary zoning context, the rebuttable presumption in effect would allow courts to engage in cost-benefit balancing, weighing the costs

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[58] Notably, one of the criticisms of the Atlantic Yards project is that it would replace a relatively low-density, not-wealthy neighborhood with high-density development geared to wealthy households. See Nicholas Confessore, *Developer Defends Atlantic Yards, Saying Towers Won't Corrupt the Feel of Brooklyn*, N Y Times, May 12, 2006.

[59] For critiques of the claims of the project proponents, see DEVELOP DON'T DESTROY BROOKLYN, RESPONSE TO THE ATLANTIC YARDS ARENA AND REDEVLOPMENT PROJECT BLIGHT STUDY CONTAINED WITHIN THE GENERAL PROJECT PLAN SEPTEMBER 26, 2006 26-31 (2006); Pratt Institute Center for Community and Economic Development, SLAM DUNK OR AIRBALL? A PRELIMINARY ANALYSIS OF THE ATLANTIC YARDS PROJECT 17-24 (2005);

[60] See Instant gentrification at AY?, Atlantic Yards Report, Sept. 17, 2006, available at http://atlanticyardsreport.blogspot.com/2006/09/instant-gentrification (showing how gentrification effects depends on the definition of the relevant area). See also Asian Americans for Equality et al v. Koch, 128 AD2d 99, 514 NYS2d 939, 951 (S Ct NY 1987) (in affirming the dismissal of causes of actions against the City for failing to adequately account for the housing needs of the loss-income Chinese-American community, the court noted that the proposed zoning district at issue in the lawsuit "consists of between 14 and 20 blocks" but "we find the applicable zoning districts may very well be the entire City of New York, not a 14-to-20-block District, or even a borough, within the entire city.");

of exclusion against the benefits associated with the exclusionary practice or action. Indeed, this approach arguably already exists in the law of eminent domain: with respect to economic development condemnations, in the form off the Michigan Supreme Court in *Hathcock*'s test that presumptively prohibits private party-to-private party condemnations while identifying certain conditions, such as public necessity, retention of significant public control, or facts of "independent public significance" that make the condemnation site particularly suitable for the kind of development at issue, which, if established by the locality, can nonetheless render such condemnations lawful.[61]

III. **THE EFFECTS OF AN EXCLUSIONARY EMINENT DOMAIN DOCTRINE**

So far, this Article has sketched what an exclusionary eminent doctrine modeled after exclusionary zoning doctrine would look like. It would seem obvious that such a doctrine would reduce the dislocation of low-income households from non-low-income areas or localities by means of eminent domain because the doctrine will block some condemnations that would have just that displacement effect. That is true, but the question of effects has more components.

As an initial matter, it is important to distinguish four sets of actors who might be effected by the fact that an exclusionary eminent domain doctrine makes it more difficult and hence more expensive for localities to condemn housing currently used for low-income housing in areas or localities that otherwise lack or (absent that housing) would lack a fair share of affordable housing. The first set of actors is local officials and developers with whom they sometimes collaborate in contexts where condemnation is threatened or used. The second set of actors is low-income tenants living in non-low-income localities or neighborhoods. The third set is owners – often absentee and typically not- low-income – of housing occupied by such low-income tenants. The final category is housing owned and occupied by low-income households in non-low-income localities or neighborhoods.

As explained below, the adoption of an exclusionary eminent domain doctrine will have a mix of what I will call compensation effects and non-displacement effects. With regard to low-income housing owned by absentee, non-low-income owners, the doctrine sometimes may result in tenants not to being displaced from the neighborhood or locality who otherwise might have been displaced. It sometimes instead will result in larger transfer payments from the locality or developer to the absentee landlord than otherwise would have been made. With regard to housing owned and occupied by low-income households, the doctrine sometimes may result in the low-income owners not being displaced from their neighborhood or locality who otherwise might have been displaced. Other times, it will result in larger transfer payments from the

[61] For a critique of the Hatchcock test as too flexible and hence inviting of abuse and manipulation, see Ilya Somin, Overruling Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use, Volume 2004 MICH STATE L REV 1005.

The rebuttable presumption approach would not allow localities to proceed with condemnations simply by invoking "blight" but it might be possible for a locality in a given case to overcome the presumption by showing that conditions on the property were truly harmful to residents and neighbors and that condemnation was the only practicable means to protect residents and neighbors.

locality or developer to the low-income homeowner than otherwise would have been made. The mix of compensation and non-displacement effects is, a priori, impossible to predict.

The explanation of the effects of the adoption of an exclusionary eminent domain doctrine builds on assumptions as to what motivates local officials who make condemnations decisions and developers who in some instances in effect collaborate with local officials in making condemnation decisions. It is reasonable to assume both local officials and collaborating developers are influenced by the dollar or monetary costs of proceeding with development projects and in particular by the dollar costs of assembling land for development. Private developers obviously are driven by profit motives. Local officials also have an incentive to conserve budgetary expenditures because that allows them more funds to use for purposes that generate political benefits and/or allows them to avoid budget cuts that would generate political costs. Thus, whether we are considering a public-private development that involves both a locality and a developer in condemnation decisions and in the bargaining that takes place in the shadow of condemnation, or the development of something like a new town hall, which may not meaningfully involve any private developer, we would expect that the choice of a site for development from a menu of alternatives might be affected by the expected dollar costs of the acquisition of the parcels or other property interests needed to make up the site. All else being equal, public-private and solely public development will gravitate to sites that are less expensive to acquire.[62]

A simple example involving a locality's and developer's consideration of a site for a new convention center development may help illustrate the possible effects of the adoption of an exclusionary eminent domain doctrine. Imagine that the locality is home to three large apartment buildings occupied by low-income households, and that those apartments are the only low-income housing in the locality. There is thus no question that without the low-income apartment buildings, and without any new substitute low-income housing, the locality would fall below its fair share obligation. For now, also assume that the public benefits of the convention plan are a matter of some dispute and from a physical feasibility standpoint, there are a number of possible sites for a center in the locality other than the land where the low-income buildings are now located. Thus, we can (and will) assume that if a court were to adopt the exclusionary eminent doctrine, it would hold that the locality could not rebut the presumption that condemnation of the los-income housing is illegal.

In the absence of an exclusionary eminent domain doctrine, the locality could readily condemn the buildings on economic development or (depending on their condition and the blight definition under state law) blight grounds, and the fair market value payable upon condemnation

[62] My model of the behavior of political officials and developers assumes that the law constrains how they will seek to advance their preferences, rather than playing a role in the very shaping of those preferences. But the law also plays an expressive function vis-à-vis what is valued and important and what is not in society, and to the extent that is true, judicial recognition of an exclusionary eminent domain doctrine may sensitize politicians, developers, electorates and judges to the burdens and hardship of exclusion and in that way lead them to avoid or reject exclusionary condemnations. The adoption of an exclusionary eminent domain doctrine may have effects quite apart from its direct application or threatened application by the courts. See generally Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1520 (2000).

would be approximately $5 million. Because the owner of the three buildings knows as much, he would presumably voluntarily sell the buildings to the locality/developer for something more than $5 million, rather than face the certainty of receiving less in a condemnation award as well as incurring the transactions costs of the condemnation process. Assume, therefore, that the owner would be willing to sell for $5.5 million as long as the locality can make a credible threat of condemnation.

Now imagine that an exclusionary eminent domain doctrine is adopted by the state courts, such that the locality likely could not lawfully condemn the apartment buildings unless it constructed substitute low-income housing. As a result, any negotiations over the "voluntary" acquisition of the buildings by the locality or developer would not take place in the shadow of the locality's right to condemn at a purchase price of $5 million but rather in the shadow of the owner's right not to sell at any price. As a result, the locality would presumably now estimate that it would need more than $5.5 million -- let us say $7 million -- to persuade the owner to sell.

The effect of the jump in the expected voluntary acquisition price on the locality's and developer's decisions as to how to proceed will depending on the price and availability of alterative sites for the office park, the feasibility and price of developing substitute low-income housing, and the value in absolute dollar terms to the locality of proceeding with the office park project. If there are alternative sites that do not contain low-income housing and that would cost less than $7 million to acquire, the developer now may shift their focus to the alternative site, with the result that the low-income tenants will not be displaced. If it were possible to develop substitute low-income housing at a modest cost of say $1 million, then the locality/developer might do so and thereby nullify the effect of the exclusionary eminent domain doctrine and acquire the low-income apartment buildings at a cost of $5.5 million, for a total project cost of $6.5 million. In that case, the low-income tenants would lose their current homes but would be offered -- or at least would be in a position to apply for -- alternative affordable housing in the same locality. If neither alternative sites nor the construction of substitute low-income housing were feasible, the choice of action by the locality and developer would depend on their valuation of the convention center project. If the locality and developer do not value the office park project highly enough to spend $7 million or more on site acquisition, then the locality and developer will simply abandon the project and the low-income apartment buildings will not be sold and the tenants will not be displaced. But if the locality and developer do value the office park project highly enough to spend $7 million or more on site acquisition, then the locality and developer will pay $7 million for the buildings and the low-income tenants will not displaced. In that case, the only difference between the result under the no-exclusionary-eminent-domain-doctrine scenario and the exclusionary-eminent-domain-doctrine scenario is that the building owner receive a much larger -- $1.5 million larger – payment from the locality and developer.

The example works much the same way if we substitute mobile homes and mobile home tracts owned and occupied by low-income households. The adoption of the exclusionary eminent doctrine would mean that the locality and developer would estimate that the owners of the mobile homes would demand more to sell their homes than they would have if they had been

bargaining in the shadow of a credible condemnation threat. Depending on the costs of the various options given the jump in the expected costs of site acquisition, the locality and developer may respond by giving up on the development project altogether, picking a different development site on which low-income housing is not now located, developing substitute low-income housing so that condemnation then could be credibly threatened, or simply acquiring the mobile homes at the higher-than-originally-expected cost. If the locality and developer choose any of these options other than buying at the higher cost, the mobile home owners would not be displaced from the locality (at least if they were able to and would move to any newly-constructed substitute housing).

This discussion so far has assumed that the locality and developer could reasonably estimate what price the site owners would demand to sell and that, if that were a price that the locality and developer were willing to pay, the price would be offered and the sale would take place. But, of course, sale transactions might fail under either a regime with or without an exclusionary eminent domain doctrine because the locality or developer underestimates the price the sellers genuinely would require to sell or because the buyer and/or seller engage in so much strategic bluffing that the sale negotiations simply unravel. In other words, informational asymmetries and the transactions costs of strategic bargaining would affect land acquisition efforts before and after the adoption of an exclusionary eminent domain doctrine. But there is an important difference between a regime with and without an exclusionary eminent domain doctrine vis-à-vis these sorts of negotiation failures. In a regime without an exclusionary eminent domain doctrine, the developer and locality can and at times will respond to the failure of negotiations with a condemnation that likely will be upheld, with the result that current low-income tenants or owners will be displaced. Precisely because this threat of condemnation exists and in a sense constrains and disciplines the scope of negotiations, we would expect relatively fewer failed negotiations due to information asymmetries and strategic bargaining in jurisdictions that have not adopted an exclusionary eminent domain doctrine than in ones that have. However, as discussed below, there are several forces that would constrain the degree of bluffing in an exclusionary-eminent-domain regime, and hence the frequency of breakdowns in negotiations due to bluffing.[63]

To summarize: the adoption of an exclusionary eminent domain doctrine will mean some combination of less displacement of current low-income tenants and greater monetary payments to low-income owner-occupiers and non-low-income absentee owners in return for their sale of their properties. From a normative perspective then, we must consider these three questions regarding the merits of adopting an exclusionary eminent doctrine: Is it a good thing (judged by some metric of goodness) that fewer low-income tenants and owners are displaced from their (but for them) non-low-income neighborhoods or localities? Is it a good thing that low- non-low-income absentee landlords receive more compensation when they do sell to localities or the locality/develop? And is it a good thing that low-income owners receive more compensation when they do sell to localities or developers? As discussed below, there are sound theoretical answers for answering yes to the first and third questions.

[63] See infra Part IV B i.

IV. JUSTIFYING AN EXCLUSIONARY EMINENT DOMAIN DOCTRINE

An exclusionary eminent domain doctrine, like any constitutional doctrine, should have a persuasive theoretical rationale and probably needs one to convince a court to take the step of embracing such a new doctrine. This Part argues, first, that an exclusionary eminent domain doctrine cannot persuasively be grounded in the deontological discourse of individual rights and human dignity, at least as it exists in the American legal tradition. The Part then argues that an exclusionary eminent domain doctrine can be theoretically justified as a means to compel localitities and developers to internalize the full costs of land use and development decisions that would result in the exclusion of lower income households from non-lower-income neighborhoods or localities.

A. Why Deontological/Individual Rights Discourse Is Unhelpful

One could posit that every low-income person or family should have the right to live in a mixed-income, not overwhelmingly, poor neighborhood or locality as a matter of human dignity or some kind of natural law entitlement or even as a matter of some Rawlsian-like hypothetical social contract under a veil of ignorance. But it is not at all obvious that living in a mixed-income setting is so fundamental or so important that it should even be considered within the rubric of basic rights rooted in human dignity or natural law entitlement (whatever natural law might mean). Nor is at all clear that if people behind an imagined veil of ignorance would put such a right on the top of their list (or their list at all) of the basic entitlements a just society should provide everyone. Perhaps an argument rooted in dignity or natural law or hypothetical social contracting could support a claim of a right to minimally decent housing or schooling or health care. Prominent commentators have argued as much.[64] But minimally decent housing need not be located in any particular neighborhood or locality or be surrounded by any particular mix of households in terms of household income.

Moreover, in our federal and state constitutional jurisprudence, there is not now and has never been a recognized right to even minimally decent housing, health care or schooling for poor people, regardless of whether they live in a poor or a non-poor neighborhood or locality. As the United States Supreme Court affirmed in *San Antonio Independent School District v Rodriguez*, [65]it simply is not conceivable that that such things as housing and education are fundamental rights under the United States constitution.[66] Nor (according to the Supreme Court) is heightened scrutiny of government decisions that adversely impact poor people appropriate because the class of poor people is not "saddled with such disabilities, or subjected to such a

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[64] For a review of the literature and a recent attempt to ground such a right, see Samuel Fleischacker, What Exactly Is A Right to "Welfare"?, Northwestern Faculty Workshop Paper, Sept 20, 2007 (on file with author). For a more historical treatment, William E. Forbath, Constitutional Welfare Rights: A History, Critique and Reconstruction, 69 FORD L REV 1821 (2001).

[65] 411 US 1 (1973).

[66] The Court rejected the proposition that the constitution provides a fundament right for the "ill-fed, ill-clothed, and ill-housed." Id. at 37. Just one year earlier, in Lindsey v. Normet , 405 US 56, 74 (1972), the Court announced that "the Constitution does no provide judicial remedies for every social and economic ill" and "the assurance of adequate housing" is a "legislative, not judicial function[]."

history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[67] For their part, some state courts have held that there is an individual right to minimally decent public education, but these decisions are rooted in specific education clauses in state constitutions,[68] and do not create anything like a right on the part of poor children to receive a meaningfully equal education to that received by non-poor students in non-poor school districts or to attend the same schools as non-poor children.[69]

One cannot plausibly argue that the state exclusionary zoning precedents are predicated on a recognition of an individual right to equal housing or equal access to housing. The Mount Laurel cases do invoke "Equal Protection" in explaining their adoption of an exclusionary zoning doctrine.[70] However, these cases do not do anything more than mention these words: they never explicate how state exclusionary zoning comports with federal or state Equal Protection jurisprudence. The do not, notably, identify, a fundamental right or a suspect class implicated by exclusionary zoning. Moreover, under state exclusionary zoning doctrine, an individual poor person or family has no right to complain about exclusion even if he or they live in a poor neighborhood or locality as long as other neighborhoods or localities have met their fair share obligation; in that sense, state exclusionary zoning doctrine on its faces inconsistent with a grounding with an individual rights rationale.

At most, one could argue that our constitutional jurisprudence supports the view that poor people have a right not to be discriminated against or differentially treated by the government solely out of animus against them as poor people. In Romer v. Evans, the Supreme Court seemed to have recognized a principle of that sort regarding gay people, another class that the Court had declined to treat as a suspect class as such.[71] But this is a trivial right for poor people because government condemnations and other actions that exclude poor people announce as their motivation animus against the poor; they are otherwise plausibly explained and justified.

Finally, our jurisprudence does recognize a fundamental right not to be racially discriminated against by the government, and sometimes government actions that adversely impact poor households disproportionately affect African-American and other minority households. To move a doctrine of exclusionary eminent domain into the discourse of constitutional anti-race-discrimination principles, however, one must characterize the use of

[67] 411 US at 28.

[68] See Aaron Jay Singer, School Choice and States' Duty t Support "Public" Schools, 48 BC L REV 909, 926 (2007) (explaining that "school finance case" rely on "terms of the education clauses").

[69] See Laurie Reynolds, Uniformity of Taxation and the Preservation of Local Control in School Finance, 40 UC DAVIS L REV 1835, 1852-53 (2007) ("Looking back on the waves of litigation in school finance, commentators have observed that successful equity plaintiffs often were unable to obtain the equalization they sought . . . . it is difficult to find a school funding system that is true to the . . . principle of fiscal neutrality that a child's educational opportunities should depend only on the wealth of the state and not the wealth of the school.").

[70] See, e,g, Mount Laurel I, 336 A.2d at 726 ("It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional law requirements of . . . equal protection of the laws."). .

[71] Romer v. Evans, 517 US 620, 624 (1996) (striking down a law "born of animosity toward the class of persons affected").

eminent domain as racially motivated, inasmuch as racially discriminatory intent is a cornerstone of the constitutional doctrine regarding race.[72] But in many cases of exclusion by eminent domain, intentional racial discrimination as such may not be a significant factor, and even if it is, that fact may be impossible to prove.[73]

B. Cost-Internalization As a Theoretical Rationale

This Part explores two cost-internalization rationales for adoption of a doctrine of exclusionary eminent domain. Although the two rationales both refer to costs that government and collaborating developers fail to internalize, costs has a distinct meaning in each setting. With regard to the first rationale, "cost" refers to the cost in personal utility and hence social utility that the owner or resident of a condemned property will bear as a result of condemnation. With regard to the second rationale, "cost" refers not to costs borne by the condemnees themselves but rather other social costs that will result from the condemnation and attendant displacement of households. Under ideal conditions, condemnation decision would take account of both sorts of costs, but currently do not fully, and an exclusionary eminent domain doctrine would promote internalization of both sorts of costs.

i. Getting Asset Values Right By Taking Account of Subjective Value

An exclusionary eminent domain doctrine would correct for the under-valuation – and hence excessive replacement through new development -- of low-income housing properties located in non-low-income neighborhoods or localities. This under-valuation results from the failure of current eminent domain doctrine to take account of the relatively large subjective value the owners (or tenants) attach to such housing. The failure of current eminent domain doctrine to account for subjective value is not unique to the context of such low-income housing, but there are particularly compelling reasons to believe that subjective value is a particularly large component of the full true value – that is, fair market or objective plus subjective -- of this category of assets. And the theoretically possible, alternative means of correcting for this under-valuation likely are or would not be available in practice.

The formula for just compensation upon condemnation -- fair market for the asset at the time of condemnation[74] -- excludes any subjective or idiosyncratic value current owners attach to

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[72] See Washington v. Davis, 426 US 229, 29 (1976) (rejecting "a racially discriminatory impact" as sufficient grounds for a constitutional violation).

[73] In the analogous setting of "environmental justice" complaints regarding the siting of waste facilities in poor, minority neighborhoods, advocates have been unable to show that race, rather than low land costs, motivated government decisions, in part because the dynamics of siting include a range of economic and political motivations. For a good discussion of this difficult issue, see Lynn E. Blais, Environmental Racism Reconsidered, 75 N C LAW REV 75 (1996).

[74] U.S. ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 285 (1943) ("[T]he Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment."); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 80-81 (1913) ("The owner must be compensated for what is taken from him, [and] that is done when he is paid its fair market value...."); see also Kimball Laundry Co. v. United States, 338 U.S.1, 22-23 (1949) (Douglas, J., dissenting).

their properties in addition to fair market value. By definition, this exclusion ensures that properties sometimes will be condemned or sold in the shadow of condemnation when it is inefficient for such a transfer to occur – that is when the acquirer of the asset values it less than the party from whom the asset is acquired. The magnitude of this inefficiency for any category of asset depends on how frequently and to what degree subjective value attaches to the assets within the category. For categories of assets for which subjective value is often absent and when present generally quite insignificant relative to fair market value, using fair market value may create only minor inefficiency, and that inefficiency may well be more than offset by the obvious verifiability benefits of the fair market value approach. But for categories of assets for which subjective value pervasive attaches and is on average quite significant relative to fair market value, the fair market value formula might result in a significant misallocation of development resources and on net reduced social welfare. For example, the payment of fair market value for condemnation of a family cemetery or a site that is traditionally sacred for a Native American tribe is no assurance whatever that the transfer is welfare-enhancing.

Low-income owner-occupied housing in otherwise largely or wholly non-lower-income neighborhoods or localities is a category of assets for which the fair market value formula is very unlikely to capture anything like true, full value. Owners of such housing generally attach significant subjective value to their homes, and hence they are very likely to be under-compensated under current eminent domain doctrine. First, for all people, their homes tend to have more subjective value than their commercial or industrial property, as Radin and other legal theorists have emphasized.[75] Second, in the case of low-income owners in non-low-income neighborhoods or localites, fair market value compensation is unlikely to provide them enough money to remain in their neighborhood or locality, unless the locality provides substitute low-income housing (in which case the doctrinal limits would not apply): the owner of a bungalow with $100,000 market value cannot take that sum and buy a house or a condominium (if there are an) in a town where median house prices exceed $600,000.[76] The low-income owners thus lose the subjective value they attach to remaining in their neighborhood or locality. For many people, whatever their wealth or income, remaining in one's neighborhood or locality is extremely

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[75] See Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 991-92 (1982) (describing a home as "a moral nexus between liberty, privacy, and freedom of association). The literature on the psychology of home reinforces this intuitive view, showing that homes are sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks. As a result, dislocation from a home can have a "strong, negative psychological impact on many people." Benjamin Barros, Home as a Legal Concept, 46 Santa Clara L. Rev. 255, 277 (2006). See also John Fee, Eminent Domain and the Sanctity of the Home, 81 NOTRE DAME L REV 783, 790-95 (2006) (arguing for stricter scrutiny of condemnations of owner-occupied homes).

[76] The inability to obtain housing in the same area of the proposed condemnation is a central complaint of low- and moderate-income households facing condemnations. A typical complaint is that of the homeowners in Long Branch, New Jersey who were threatened with eminent domain: "They don't want to move. They say they can't afford to. Whatever the government offers by way of compensation, won't be enough, they say." Carol Gorga Williams, Battling the Bulldozers: Don't force us out for new condos, Asbury Park Press, Dec. 18, 2003,at A1. See also Carol Gorga Williams, Widow says taking her dreams along with her home of 44 years, Asbury Park Press, Jan. 18, 2004, at A9 (describing widow's complaint that she could not remain in her community given her $1100 monthly income). The basic question of displaced households in areas where their incomes are relatively low is "Where do I go?" Matt Porio, "Where do I go? Seaside residents fear losing their homes in redevelopment," Ocean County Observer (Toms River, NJ), May 30, 2004.

valuable because it allows them to maintain an array of economically and emotionally important connections, ties and relationships.[77] In the case of low-income people, remaining in their current non-low-income neighborhood or locality may be especially valuable because they may well not be able to relocate in a neighborhood or locality that has comparable wealth and that therefore offers comparable access to jobs, comparable public services and comparable other amenities. Finally, for low-income homeowners, condemnation may mean that they will loose something else they may well subjectively value highly and that accumulating research suggests is something that greatly contributes to household welfare -- the ability to remain a homeowner, and hence a member of the "ownership" society, rather than a renter.[78]

An exclusionary eminent domain doctrine would mean that , if the low-income owner of a bungalow had a subjective value of $200,000 in addition to the structure's $100,000 fair market value, the locality or developer would be required to pay $300,000 -- or certainly something closer to $300,000 than the fair market value – in order to acquire the property. And if the locality or developer only values acquisition of the site at less than the true owners' valuation of $300.000, the owner would not sell and the site would not be acquired. And that would be an efficient, welfare-maximizing result.

The subjective rationale for adoption of an exclusionary eminent domain doctrine is less straightforward, but still plausible, in the context of absentee landlords and their tenants. Landlords cannot be assumed to place high subjective value on their low-income housing properties located in non-low-income neighborhoods or localities. Low-income tenants who live in otherwise non-low-income neighborhoods or localities presumably do place high subjective value on remaining in the apartments for the reasons discussed above in connection with low-income home-owners – the inherent subjective value of home, the subjective value of local affective and other ties that are lost if one cannot afford to remain in the same neighborhood or locality, and the subjective value of being able to continue to live in a non-low-income neighborhood or locality. However, renters – at least month-to-month renters, no matter how long they have lived in the same apartment – have no meaningful property rights within our legal framework, and typically their valuations of their continuing to live where they live is factored into conventional asset pricing/efficiency analyses only to the extent that their valuations affect the rent they are willing to pay and hence affect the market value of the apartment building in which they live. Since low-income tenants lack the money to pay higher rents even if they

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[77] This is of course true even in poor or distressed neighborhoods. For a thoughtful discussion, see James J. Kelly, Jr, "We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST JOHNS L REV 923, 961 (2006).

[78] As Robert Hockett explains, "it turns out that a substantial body of empirical research supports the long-articulated American intuition that asset-owning vindicated by property rules conduces to the richest forms of actually lived and experienced responsible agency." A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society," 79 S. Cal. L. Rev. 45, 99-104, 143-46 (2005). See also Rachel Godsil & David Simunovich, Just Compensation in an Ownership Society, in Private Property, Community Development and Eminent Domain (Robin Paul Malloy ed., forthcoming 2008).

subjectively value continued tenancy very highly, conventional economic analysis would not regard the failure of officials or developers to compensate them as a source of inefficiency.

If one takes a broader social-welfare-maximization, social-utilitarian approach, however, it is clear that more utility is lost when low-income residents are displaced not just from their apartments but also (because of the unavailability of other affordable housing in the same neighborhood or locality) from their neighborhoods or localities.[79] Thus, while landlords may not subjectively value low-income rental housing they own, protection of the tenants' subjective value may justify giving the absentee landlords more bargaining power by removing the threat of condemnation, with the result that such low-income housing will be more expensive for the locality an developer to acquire and hence less likely to be acquired by the locality and developer.

If one accepts that the current eminent domain formula does not capture the full value of low-income housing in non-low-income neighborhoods or localities, and that that creates a meaningful misallocation of resources problem, there are several theoretically possible solutions one could consider. Notably, the legislatures could alter the compensation formula for this category of assets. However, there is no track record of state legislatures or Congress taking on that task, even in the current wave of post-Kelo reform in eminent domain.[80] Indeed, as already noted, the focus of reform efforts has been the protection of middle-class homeowners, not low-income owners or tenants.

Contrary to the suggestion of some commentators, [81] the Uniform Relocation Assistance Act of 1970 and state statutes enacted in its wake[82] does not provide support for the view that the legislatures have attended to losses in subjective value by low-income owners and tenants. As an initial matter, it is hard to say much about how relocation payments work because there has been almost no empirical review of payment practices in practice. The single available study of federal relocation payments for tenants was published in 1995 and involved interviews with only

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[79] One might suppose that the loss in utility from displacement is something local officials would have to take into account because of the political costs those officials would bear as a result of the deep alienation of the displaced tenants. However, officials might rightly understand that the displaced tenants will leave the political jurisdiction and hence be politically irrelevant to them, and, even if that were not so, low-income people more generally lack the resources needed to make the costs to them effectively known and to command influence in politics.

[80] See Lucas J. Asper, The Fair Market Value Method of Property Valuation in Eminent Domain, 58 S.C.L.Rev. 489, 491 (2007) (noting that no state "has enacted legislation that would take into account . . . subjective value").

[81] See, e.g., Nicole Garnett, The Neglected Political Economy of Eminent Domain, 105 MICH L REV 101, 121-123(2006) ; Marc B. Mihaly, Living in the Past: The Kelo Court and Public-Private Economic Development, 34 ECOL. L. Q. 1, 15 (2007) (suggesting that relocation assistance serves "as a de facto surrogate for addressing intangible costs").

[82] See 42 U.S.C. ss 4601-4655 (2000); 4 Nichols on Eminent Domain s 13.05[7], at 13-54 to -55 (Julius L.Sackman et al. eds., 3d ed. 2004) (discussing relocation assistance for owners and referencing La. Rev. Stat. Ann. s 38:3101 (2005)); id. s 13.19 [1], at 13-182 & nn.21-22 (citing R.I. Gen. Laws ss 37-6.1-3 to 37-6.1- 12 (1997); Wis. Stat. s 32.19 (1998)).

34 residential tenants;[83] there are no available studies whatever for the use of state relocation payments in most states. But there are many reasons to believe that payments do not provide adequate compensation and hence adequate cost-internalization. For one thing, not all condemnations are subject to federal or state relocation laws. For another, owners and tenants apparently have no private right of action under the federal or state relocation statutes. [84]In theory, tenants could bring administrative procedure act suits challenging federal or state agency actions as arbitrary and capricious, but such suits apparently almost never brought, presumably because they would require financing and because they almost certainly would fail. As a practical matter, the enforcement of the federal and state statutes lie with the federal and state governments themselves, so it would not be surprising to observe payments being made where and to the extent it is politically expedient but not made or fully made where it is politically unnecessary to do so.[85]

For their part, the state or federal courts could hold that "just compensation" requires a different formula for low-income housing in non-low-income areas, but doing so would open the courts to the complaint that "just compensation" must then include subjective, non-market-value in all other contexts. Not just in constitutional law, but also in common law property generally, the American courts have adhered to an objective, market value conception of property, at least as a matter of formal doctrine, presumably in part to avoid the factual difficulties of assessing subjective value. Losses in subjective value is something, the Supreme Court has explained, citizens simply should bear as part of their obligations as citizens, rather than encumbering

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[83] See Fed. Highway Admin., U.S. Dept. of Transp., Relocation Retrospective Study 2 (1996). Garnett acknowledges that ""[t[he studies relatively small sample sizes call the generalizability of the data into question."). See Garnett, supra note 5, at n 137.

[84] See Ackerly Communications of Florida v. Henderson, 881 F.2d 990, 991-92 (5th Cir 1989) (holding that Uniform Relocation statute does not create a private right of action but instead allows review for abuses of discretion under the Administrative Procedure Act); Osburn v. Dept of Transportation, 221 Cal.app.3d 1339, 270 Cal.Rptr. 761, 764 (Cal.App. 1990) (holding that abuse of discretion is the standard of review for a state agency determination a landowner was not entitled to a benefit under the federal Uniform Relocation act). Under certain circumstances, an owner may be able to argue for federal or state URA payments in the context of the condemnation suit against the owner's property, but condemnation suits do not provide a forum for tenants.

[85] The federal relocation statute does require that tenants and owners are entitled to a "comparable replacement dwelling, which is defined as a dwelling "in a location generally not less desirable
than the location of the displaced person's dwelling with respect to public
utilities, facilities, services, and the displaced person's place of
employment." 42 U.S.C. s 4601(10). See also 4 Nichols on Eminent Domain, supra note 52, s 13.01[12], at 13-22 to-23. However, in practice, it is up to the federal or state agency to decide for itself whether a comparable dwelling must be secured because relocation payments are insufficient for the owner or tenant to acquire one, and it is also up to the federal or state agency to determine what a comparable dwelling is in the particular case. As far as I have been able to ascertain, there are no instances of federal or state agencies funding the construction or development of new affordable housing in non-low-income neighborhoods or localities n fulfillment of legal obligation sunder federal and/or state relocation statutes.

government actions that benefit the whole with difficult-to-assess claims of subjective value. In Kimball Laundry Co. v. United States, Justice Frankfurter acknowledged that "[t]he value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker." But market value, Justice Frankfurter explained, has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use." Market value may be less than true, full value, but "like loss due to an exercise of the police power," this is "properly treated as part of the burden of common citizenship."[86]

Moreover, the very wording of the state and federal constitutions arguably limit court's ability to fold subjective value into just compensation. As the Supreme Court in Monanghela Navigation explained, the Fifth Amendment promises compensation for property and not compensation to the citizen himself or herself. As the Court explained, "just compensation, it will be noticed, is for the property, and not to the owner" whereas "[e]very other clause in this Fifth Amendment is personal." The Court concluded "[t]his excludes the taking into account, as an element in the compensation" any idiosyncratic or subjective value.[87]

Finally, the very unavoidable arbitrariness of any subjective compensation formula is a major obstacle to any judicially-initiated change in the formula for just compensation. If the courts were to hold that market value is not sufficient for low-income housing, they would have to (presumably) announce some new formula for compensation that was reasonably administratable by local officials and that would almost certainly be something like a multiple of fair market value (e.g. 150 or 200 or 500% of fair market value). But picking such an unavoidably-somewhat-arbitrary numbers seems like a legislative, rather than a judicial, move in our legal tradition: it is very hard to imagine a court holding that for state constitutional purposes, just compensation for certain low-income housing is 150% of fair market value at the time of condemnation.[88]

One immediate objection to the preceding analysis is that it will not result in efficient outcomes because the property owner's subjective value cannot be observed, and hence he may demand more than his real valuation by such strategic bargaining, derail negotiations and defeat what perhaps would otherwise be a socially efficient development project. This is a significant objection but also one that can be overstated.

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[86] See Kimball Laundry Co. v. United States, 338 U.S. 1, 5-7, 11-12, 14-15 (1949).

[87] 338 U.S. 1 (1949).

[88] Indeed, the commentators who have argued for greater compensation for subjective value have focused on legislative solutions. See, e.g., John Fee, Eminent Domain and the Sanctity of the Home, 81 NOTRE DAME L REV 783, 814-15 (2006) ("One reasonable approach to improving the valuation of homes [to take account of subjective value] would be to use a statutory formula to increase compensation as a percentage of market value."); Thomas Merrill, The Economics of Public Use, 72 CORNELL L REV 61, 90-93 (1986) (proposing to "increase costs in those situations where we wish to discourage the use of eminent domain" through the use of a surtax or bonus payment).

Any limits on eminent domain will mean certain welfare-maximizing projects will be undone by strategic bargaining in the marketplace that condemnation or the threat of condemnation would have prevented or overcome. The question is how big is that costs with respect to any particular proposed limits on eminent domain. The flexible, non-absolute features of the exclusionary eminent domain doctrine this article has outlined -- that is, the locality's ability to proceed with condemnation by building substitute housing or by making a showing that the presumption against exclusionary condemnations has been rebutted -- would temper strategic bargaining on the seller's part and hence limit the adverse effects of strategic bargaining. A property owner can bluff as to his true selling price but doing so carries the risk that the local officials and developer will respond by condemning his property and seeking to convince the court that the condemnation given the flexible features of exclusionary eminent domain doctrine. Low-income property owners in particular, precisely because they are low-income, can be presumed to be risk averse and to have limited resources to finance litigations and hence to weigh heavily the risk of such condemnation litigation.

In sum, adoption of eminent domain doctrine could mean that properties will not be acquired when the locality and developer is unwilling to pay the full value of the property to current owners and tenants. An exclusionary eminent domain doctrine is not perfectly tailored to correct for the failure of subjective-cost-internalization but it may be the best plausible doctrinal mechanisms to address that value. Moreover, the doctrine also would promote a different kind of cost internalization, as discussed in the next sub-Part.

ii. Internalizing the Social Costs of Concentrated Poverty

It is reasonable to assume that, local officials and developers working with them, while certainly influenced by dollar costs in making development and other land use decisions,[89] are also concerned with a range of other political costs and benefits that may flow from their decisions.[90] And presumably that is a good thing: at least in a well-functioning democracy, the political costs and benefits of possible government actions should roughly reflect the social welfare costs and benefits, and officials will opt for the course of conduct that maximizes net political benefits and hence maximizes net social welfare. But the assumption that political decisions based on political costs and benefits will maximize net social welfare does not hold

[89] Many purchase prices paid in the shadow of condemnation or as a result of actual condemnation are paid by private developers, and such actors presumably are influenced by the dollar costs of site acquisition. Government actors on their own, too, have incentives to minimize expenditures on site acquisition because any money saved can be used to garner political benefits or avoid political costs in other contexts. Even for state agencies with specific redevelopment missions, saving money has benefits in the form of being able to avoid charges of government waste and being able to undertake and hence report on the completion of more projects.

[90] See Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. Rev. 1624, 1642-44 (2006) (reviewing political economy literature); Daryl Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Courts, 67 UCLA L REV 345 (2000) (arguing that "Government actors respond to political incentives, not financial ones – to votes, not dollars.").

when the political decisions themselves either exclude or expel from the relevant political jurisdiction those who are adversely affected by those decisions. [91]

When local officials make decisions regarding local development that have the effect of excluding low-income people from non-low-income neighborhoods or localities, they are unlikely to internalize the resulting social costs in the form of increased concentrated poverty. That is so because the concentrated poverty likely will be located in another locality – specifically, a low-income one – and even to the extent it is not, some of the main social costs of concentrated poverty are not directly borne by local government but rather by the state and the nation as a whole. One rationale for an exclusionary eminent doctrine is that, by raising the costs of excluding low-income households, the doctrine forces the internalization of at least some of the concentrated poverty costs of local officials' and developers' decision to take actions that result in the exclusion of low-income households. This costs-internalization rationale is closely analogous to the rationale the state courts have invoked in support of an exclusionary zoning doctrine, and it is a rationale that is in addition to, rather than alternative to, the internalization of subjective value rationale.

An initial question is how does exclusionary eminent domain fosters concentrated poverty. When low-income people are displaced from non-low income areas, they typically can only afford to re-locate in low-income areas, areas that already have significant poverty. Their relocation thus reinforces and strengthen geographic segregation by income. As the low-income residents of Lodi's trailer park report, loss of their homes would mean that they would have to leave the whole area surrounding Lodi because housing costs there were simply too high for them to afford. They would need to move to a poorer area, indeed perhaps to a poorer part of the country altogether.[92]

Areas of concentrated poverty are typically defined in the sociological literature as census tract areas where 40 percent of the residents or more live in households at or below the federal poverty line. Some studies also include areas where the concentration is 30 percent.[93] Outside of the more academic literature, "concentrated poverty" is sometimes used more loosely to refer

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[91] See Henry A. Span, How the Courts Should Fight Exclusionary Zoning, 32 Seton Hall L Rev 1 (2001) 1, 23 ("Local politics cannot be trusted to adequately weigh the costs and benefits involved because the costs are almost completely externalized, while the benefits are almost always completely internalized. State and national politics cannot be trusted because those harmed by exclusionary zoning are diffuse, unorganized, and lacking I resources, while those benefited by it have greater resources and are represented by local governments under their control.").

[92] The mobile home residents facing eviction in Lodi, New Jersey have expressed the concern that they would need to leave New jersey and perhaps the Northeast altogether to find another suitable, available mobile home park in a community they would want to live. See Notes of Interviews of Lodi mobile home residents, collected by Gabriel Winter, Class of 2009 Northwestern University School of law (on file with author).

[93] For an overview of concentrated poverty under either definition across the United States, see G. Thomas Kingsley & Kathyrn Pettit, Concentrated Poverty: A Change in Course, Urban Institute, No. 2 (May 2003), at www.urban.org/nnip. According to that report, as of 1990, nine percent of the population lives in census tracts with poverty rates of 30% or more and, as of 2000, eight percent lived in census tracts with poverty rates of 30% or more). For a thoughtful critique of the limitations of the 30 or 40% measure as a means of identifying areas that have the problems typically associated with the concentrated poverty label, see Jennifer Wolch & Nathan J. Sessoms, The Changing Face of Concentrated Poverty, USC Poverty Working Paper 2005-1004.

to areas with large numbers of low-income people but not necessarily any particular percentage of low-income people.

That exclusionary eminent domain contributes to concentrated poverty is only problematic because concentrated poverty is problematic. Concentrated poverty is problematic because it correlates with high rates of teenage and unmarried pregnancy, crime, gang violence, drug use, educational failure, unemployment and underemployment, and mental health problems.[94] Poor households that are located in areas of concentrated poverty suffer from these problems to a greater extent or degree as equally poor households located in areas of concentrated poverty. Moreover, the wellbeing of poor households that have re-located away from areas of concentrated poverty has been documented to improve.[95] Thus, as federal and state public housing agencies and policymakers and many academic commentators now agree, concentrated poverty per se – as opposed to just poverty -- is a source of significant social costs.[96]

Concentrated poverty may contribute to social problems – produce social costs -- in several distinct ways. First, concentrated poverty impacts the funding available for and need for local public services. Areas of concentrated poverty generate very low property revenues, and in much of the United States, property taxes are the primary sources of funding for pubic services such as schools and police in each locality. At the same time, the population in areas of concentrated poverty have high per-household need for public services; such areas need more intensive policing, more comprehensive social services, and more school programs. Concentrate poverty at the locality level thus marries reduced funding for public services with increased for public services, with the result that localities with large areas of concentrated poverty almost cannot avoid having insufficient public services to address the needs of poor households.[97]

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[94] See, e.g., Michael H. Schill, Assessing The Role of Community Development Corporations in Inner City Economic Development, 22 NYU REV L & SOC CHANGE 753, 757 (1996-1997); Edward G. Goetz, DECONCENTRATING THE POOR (2003) 25-31.

[95] See Goetz, supra note 94, at 216-226;Mark Shroeder, Moving to Opportunity: An Experiment in Social and Geographic Mobility, Cityscape: A Journal of Policy Development and Research, Vol 5, No 2, p 57, 66 (2001); Alan Berube & Bruce Katz, Katrina's Window: Concentrated Poverty Across America, The Brookings Institution: Special Analysis in Metropolitan Policy 5-7 (Oct. 2005); Larry Buron, An Improved Living Environment? Neighborhood Outcomes for HOPE VI Relocatees, Urban Institute, Metropolitan Housing and Communities Center, Brief No. 3, Sept 2004; John Goehring, The Impacts of New neighborhoods on Poor Families: Evaluating the Policy Implications of the Moving to Opportunity Demonstration, FRBNY Economic Policy Review, June 2003, at 113.

[96] See Goetz, supra note 94, at 63; Alastair Smith, Mixed-Income Housing Development: Promise and Reality, Joint Center for Housing Studies of Harvard University (Oct. 2002); Harry J. Wexler, HOPE VI, Market Means/Public Ends, 10 SPG-J Affordable Housing & Community Development L 195, 204-05 (2001).

[97] See, e.g., Sheryll D. Cashin, Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New regionalism, 88 GEO LJ 1985, 2012 (2000) (discussing the problems of poorer communities in contrast to "[t]he exclusive, high tax base suburbs [that] are able to keep taxes low, because of low service demands and because taxes are spread across a broad, rich tax base."). While money may not be the only determinant of the quality of public services such as public education and the relationships between financing levels and educational achievement are a matter of continuing study and debate, the best evidence is that more money helps. See, e.g., Rob Greenwald et al, The Effect of School Resources on Student Achievement, Review of Educational Research 361 (1996); Ronald F. Ferguson, Paying for Public Education: New Evidence on How and Why Money Matters, 28 HARV J on LEGIS 465 (1991).

Second, concentrated poverty encourages a "spatial mismatch" between poor people and jobs they could fill and advance in, with the result that concentrated poverty contributes to long-term, even multi-generational unemployment and underemployment. According to the scholar whose writing on concentrated poverty has gained the most prominence, Julius Wilson, joblessness is the defining problem of areas of concentrated poverty.[98] Concentrated poverty fosters joblessness because the poor social conditions it creates encourages employers to move their businesses away from areas of concentrated poverty or not to locate in them in the first place.[99] As a result, the jobs that could employ low-income teens and adults are literally too far away for them to take, or even if commuting is possible, it means a high burden in money, time, and emotional well-being.

Concentrated poverty is also thought to contribute to social harms by means of psycho-social "neighborhood effects" that arise from the geographic and social isolation of poor people living solely or almost solely among other poor people. In areas of concentrated areas of poverty, young people may lack role many models for educational and economic mobility and may be overwhelmed by the dominance of anti-social role models.[100] High levels of crime and family instability in poor neighborhoods also may lead to low levels of social trust and weak social networks, both of which contribute to more crime and family instability and impede economic mobility. The social isolation associated with concentrated poverty causes behavioral patterns and mental attitudes that make immersion in the mainstream economy difficult.[101]

State exclusionary zoning precedents such as Mount Laurel seem to build on a recognition of the social costs of concentrated poverty, even though they do not use that term. In these cases, the rationale for judicial intervention is essentially that exclusionary zoning forces low-income people to concentrate in certain urban areas, with all the negative results that such concentration creates. As the Mount Laurel court explained, "[l]and use regulation is encompassed within the state's police power"; "[i]t is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare."; "[i]t is beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."; and, therefore, "[i]t has to follow that, broadly speaking, the presumptive obligation arises for each . . . municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for . . .low and moderate cost housing . . . "[102] The state courts have openly acknowledged that the property tax system, which

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[98] See William Julius Wilson, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); see also William Julius Wilson, THE TRULY DISADVANTAGED (1987).
[99] See Wilson, WHEN WORK DISAPPEARS, at 3-24.
[100] See Wilson, WHEN WORK DISAPPEARS, at 51-86; Alexandra M. Curley, Theories of Urban Poverty and Implications for Public Housing Policy, J. SOCIOLOGY & SOCIAL WELFARE, Vol 32, No 2 (June 2005); Goetz, supra note at 26-28.
[101] See Curley, supra note 100; L.M Tiggs, Social Isolation of the Urban Poor: Race, Class, and Neighborhood Effects on Social Resources, The Sociological Quarterly 39,1, 53-77 (1998).
[102] See South Burlington County NAACP et al v. Township of Mount Laurel et al, 336 A.2d at 727-28. The tension between a locality's desire to advance a parochial interest in minimizing tax burdens and maximizing its tax base

ties local services funding to the local tax base, makes the closing of a locality's doors to poor and moderate income households in tension with the overall public welfare.[103]

If one accepts that what I have called exclusionary eminent domain contributes to concentrated poverty and that concentrated poverty causes socials costs that conventional eminent domain doctrine does not makes localities and developers take into account, then one might accept that a doctrine limiting exclusionary eminent domain may be, in a cost-internalization sense, efficient. At the same time it cannot be denied such a doctrine could, in practice, raise the price of exclusionary condemnations too much and overcorrect for social costs resulting from increased concentrated poverty. As already noted in the discussion of subjective value internalization, however, the possibility that a doctrine of exclusionary eminent domain will raise the effective cost of excluding low-income household beyond the full social cost of exclusion is mitigated by the fact that the doctrine allows the locality and developer to avoid the doctrinal limits by constructing substitute affordable housing or by overcoming the presumption against exclusionary eminent domain based on a showing of compelling local need.

The concentrated poverty rationale for an eminent exclusionary doctrine is open to another, more tailored objection in the large-city, urban gentrification context. In the suburban context, when an otherwise middle-class town condemns low-income housing, the understanding presumably is that the condemned household residents will leave the community and any increase in concentrated poverty as a result of their exclusion will be borne by some other locality with available low-income housing. But when a large city with a number of poor areas condemns low-income housing in a gentrifying neighborhoods in which other affordable housing no longer is available, the condemned household residents may simply move to poor, non-gentrifying parts of the same city. As a result, concentration of poverty in those parts of the city may increase and so too may the social problems associated with concentrated poverty. If city leaders are presumed to be aware of that dynamic and presumed to care about costs borne by *all* part of the city, it is reasonable to assume that they believe that even with increased-concentrated-poverty costs, development to be facilitated by condemnation or the threat of condemnation is *on net* beneficial for the city.

Moreover, one of the benefits of condemnation in fast-gentrifying or almost-fully-gentrified areas that city officials tout is that the development will help poor people in the city

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and general welfare concerns is a theme of the case law outside New Jersey as well. See, e.g., Green V. Lima Township, 40 Mich. App. 655, 199 N.W.2d 243 (Crt App. Mich 1972) ("th term 'general welfare' . . . is not a mere catchword to permit the translation of narrow desired into ordinances which discriminate against or operate to exclude certain residential uses deemed beneficial.'') (citations omitted); National Land & Investment Co. v. east Township Board of Adjustment, 215 A2d 597, 612 (PA 1965) ("the general welfare Is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary").

[103] As the Court in Mount Laurel I, 336 A2d 713, 736 (1975), explained, "The motivations for exclusionary zoning practices are deeply embedded in the nature of suburban development. . . . as long as these [schools and other] costs are primarily financed through local property taxes, will continue to impel suburban communities to use the zoning laws to encourage commercial development and discourage settlement of less affluent families. . . . .. Insofar as this fiscal situation prevails, suburban communities will find the temptation of exclusionary zoning alluring."

even if they do not or cannot remain in the gentrifying or gentrified areas. New development, it is often argued, brings in tax revenue that the city needs to meet the needs in poor areas of the city and for services mostly used by poor residents.[104] In addition, new development may bring jobs and job training opportunities that are closer to where poor urban people live than the jobs that are being created in fast-growing outer-ring suburbs. And if joblessness is indeed at the heart of the concentrate poverty problem, bringing jobs to the city can be seen as mitigating concentrated poverty even if as the displacement of low-income households from non-low-income neighborhoods may worsens it.[105]

There are, however, plausible retorts to this objection regarding gentrifying urban areas. City officials may not fully internalize the costs of concentrated poverty as a result of displacement because they know some of the displaced may leave the city and move to other cities or poor areas in lower-income suburbs. Moreover, low-income residents may lack the social and economic and hence political capital to make the cost to them and to the city fully understood and included in the calculus regarding land use and condemnation decisions. The social costs from increased concentrated poverty are likely to be less immediate and vivid and hence salient than the tax revenue benefits generated by new development. Finally, while the tax revenue and jobs benefits for poor residents are invoked in the context of controversial condemnation-facilitated development in gentrifying urban areas. there is considerable debate as to whether those benefits ever materialize once the development is completed. New development may generate new tax revenue and jobs but that does not means the revenue will be spent in poor neighborhoods or the jobs filled by residents of poor neighborhoods.[106]

Overall, given the legitimate questions about the concentrated poverty rationale for an exclusionary eminent domain doctrine as applied to the urban gentrification context, it may make sense for the courts to apply a weaker presumption against the legality of condemnations in that context than in the suburban context. It also may make sense for the courts, when and if they do hold the presumption is overcome by the promise of benefits from new development for the

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[104] On that basis, some community leaders and the local ACORN support the Atlantic Yards development. See Jarett Murphy, The Battle of Brooklyn, VILLAGE VOICE, July 26, 2005, at 18 (quoting leaders); Ariella Cohen, Race War on Yards, BROOKLYN PAPERS, Mar. 4, 2006, at 1.

[105] For discussions of how that gentrification without the creation of new affordable housing may both help the urban poor by bringing new resources and harms the urban poor via displacement, see e.g., J. Peter Byrne, Two Cheers for Gentrification, 46 HOW. L. J. 405, 406 (2003); Isis Fernandez, Let's Stop Cheering, and Let's Get Practical: Reaching a Balanced Gentrification Agenda, 12 GEO. J. ON POVERTY & POL'Y 409, 417 (2005). As scholars have noted, gentrification causes displacement not just through new development but also by means of increased rents for the existing housing stock. See James Geoffrey Durham & Dean E. Sheldon III, Mitigating the Effects of Private Revitalization On Housing for the Poor, 70 MARQ. L. REV. 1, 13 (1986). Measuring the effects of gentrification – and even defining what gentrification is, exactly – has been a major challenge for social scientists who must struggle with the difficulty of tracking movements of household members in and out of the neighborhoods or areas being examined. See generally Jacob L. Vigdor, Does Gentrification Harm the Poor, 2002 BROOKINGS-WHARTON PAPERS ON URB. AFF. 133, 150-51, available at http://muse.jhu.edu/journals/urb/toc/urb2002.1.html.

[106] See, e.g., Timothy J. Artik, Who Benefits from Local Job Growth: Migrants or the Original Residents, 27 REGIONAL STUDIES 297, 303 (1993) (estimating that three-quarters of new jobs generated by economic development are filled by newcomers).

city's poor residents, to require the city and developer make binding, credible, legally enforceable commitments as to the delivery of those benefits. In that way, the exclusionary eminent domain doctrine may operate to give "teeth" to community benefits agreements that are sometimes negotiated in the context of controversial urban developments but that have to date sometimes not been followed.[107]

iii. Rationales Compared and Summary

The two rationales for an exclusionary eminent domain doctrine are not mutually exclusive but they do have some notable differences in their implications. The subjective rationale is most problematic vis-à-vis condemnations of the properties of absentee landlords with low-income tenants in either urban, big-city or suburban areas; the concentrated poverty rationale is most problematic with respect to condemnations of properties occupied by low-income tenants in urban, big-city areas.

In sum, an exclusionary eminent doctrine probably cannot be grounded in deontological principles of individual rights, but may be grounded in social welfare considerations. Social welfare is perhaps always in the eye of the beholder, but there are reasons to believe that the social welfare calculus being made about exclusionary condemnations does not take adequate account of the losses in subjective value to owners and tenants from those condemnations and the increased social costs from concentrated poverty from those condemnations. An exclusionary eminent domain doctrine would be a reasonably flexible mechanism that is available to the courts to promote internalization of these now-uninternalized costs and thereby would promote more welfare-enhancing land use decisions.

V. THE COST OF ADOPTING AN EXCLUSIONARY EMINENT DOMAIN DOCTRINE

Even if one accepts that an exclusionary eminent domain doctrine would serve a useful costs-internalization function, that does not mean it would be on net beneficial. Adoption of legal doctrines have costs too, and those costs may outweigh the benefits. However, quantification of the costs or the benefits – as is true in so many contexts – is not obviously feasible, and even if it were, presumably cold not be attempted before some states do in fact adopt and implement the doctrine.

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[107] For example, with respect to the Atlantic Yards Community Development Agreement and complaints regarding non-compliance, see Nicholas Confessore, Fewer Jobs and More Condo, Ratner's Opponents Complain, N.Y. TIMES, Nov. 6, 2005, at 41; Ariella Cohen, Freddie Quibbles over Ratner, BROOKLYN PAPERS, Nov. 5, 2005, at 14; Ariella Cohen, 'Affordable' Units May go to Crown Heights, BROOKLYN PAPERS, Oct. 29, 2005, at 13; ATLANTIC YARDS REPORT, CBA ACCOUNTABILITY, WHERE ARE THE REPORTS TO THE COMMUNITY, Aug. 31, 2006, available at http://atlanticyardsreport.blogspot.com/2006/08/cba-accountability-where-are-the-reports.html. See also Christopher Montgomery, Ratner Targets New York, PLAIN DEALER (CLEVELAND), Nov. 30, 2005, at A1 (questioning the enforceability of the Atlantic Yards CBA). For a background on CBAs generally, see Julian Gross et al, COMMUNITY BENEFITS AGREEMENTS, GOOD JOBS FIRST *2005), available at http: www.lane.org/research/docs/CBA__Handbook__2005.pdf.

There are some costs of adopting an exclusionary eminent domain doctrine that might be particular or peculiar to that doctrine, and would not be implicated by other already-adopted or proposed changes in the law of eminent domain. This Part considers three such costs, which I call "judicial legitimacy costs," "legal coherence costs," and "strategic avoidance costs." None of these costs is necessarily so substantial as to counsel against adoption of an exclusionary eminent domain doctrine.

A. Judicial Legitimacy Costs

Adoption of an exclusionary eminent domain doctrine could erode the legitimacy of state courts to some extent by moving the courts into an arguably values-laden, "social issue" domain that segments of the population may regard as properly legislative and not a legitimate domain for the courts. Adoption of the doctrine also could involve the courts in certain decision-making processes for which they lack any particular technical expertise, and in that sense open them to criticism. The extent of these costs, however, may not be great, if only because an exclusionary eminent domain doctrine is unlikely to command widespread public attention.

The exact line between proper exercise of the judicial role and overreaching is much contested in the realm of "social" issues, as recent controversy over same-sex marriage decisions by certain state courts highlights.[108] The New Jersey Supreme Court received intense criticism for its embrace of an exclusionary zoning doctrine. As James Atlas recounts: "Some New Jersey politicians imitated Alabama Gov. George Wallace's defiant stand against school integration in the 1960s. For example, Monroe Township Mayor Peter P. Garibaldi, who was also a state senator, said he would go to jail before he would comply with a court order to rezone for low and moderate-income housing. Then-Governor Tom Kean called the court's decision "communistic." Politicians complained that their constituents worked hard to get their suburban homes and now the government was going to destroy their communities and property values."[109] It is certainly possible that some of the state courts have declined to engage the issue of exclusionary zoning did so because they feared criticism and delegitimization.

So-called activist courts have been criticized not only on "democracy" grounds but also on technical competence grounds. The Mount Laurel Court was chastised for undertaking, in effect, a task well beyond its technical competence or institutional resources – that of being a continuous regional land use planner for an entire state. The New York Courts – courts that

[108] For an interesting discussion of how state courts can limit backlash for "activism" through using remedial delay and interacting with the legislature, see Tonja Jacobi, How Massachusetts Got Gay Marriage: The Intersection of Public Opinion, Legislative Action, and Judicial Power, 15 J Contemporary Law and Legal Problems 219 (2006).
[109] John Atlas, Courting Racial Justice, www.nhi.ord/online/issues/93/review.html. See also Lehmann, supra note [ ], at 256 (" explaining that "The New Jersey's Mt. Laurel opinions provoked massive political resistance that threatened the institutional autonomy of the judicial branch . . . .the author of Mount Laurel II, Chief Justice Wilentz, was nearly denied reappointment as a result of dissatisfaction with the Mount Laurel doctrine").

embraced exclusionary zoning doctrine – acknowledged that "it is quite anomalous that a court should be required to perform the tasks of a regional planner."[110]

An exclusionary eminent domain doctrine would not engender the same intense political reaction as exclusionary zoning doctrine. For one thing, zoning is pervasive and pervasive in particular in its possible exclusionary effects: under the New Jersey Mount Laurel approach, all local land use planning and decisionmaking in theory could have been brought into the realm of heightened constitutional review. By contrast to zoning regulations and decisions, the number of condemnation is relatively few[111] and only some of these would be implicated by an exclusionary eminent domain doctrine. Virtually every locality has some zoning, and hence can be affected by a vigorous exclusionary zoning doctrine. But many localities make sparse use of eminent domain, and, given that (unlike zoning) eminent domain is something localities generally undertake at all only with reluctance, localities might simply not attempt condemnations of low-income housing. Thus, there might not be many actual exclusionary eminent domain cases to garner public attention and focus complaints about judicial overreaching.

Moreover, the state courts could respond to claims of overreaching and technical incompetence in the exclusionary eminent domain context by in effect inviting the state legislature to step in with a statute and administrative processes that would address judicial concerns but move significant decisionmaking and implementation to the legislative and executive branch. In New Jersey, the state legislature did create a regulatory regime in response to the court decisions, and the courts upheld that regime (although they did not withdraw from the role of policing exclusionary zoning altogether).[112] In the somewhat analogous context of

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[110] Berenson, 341 ne2D at 243; see also id (" To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning."). The Pennsylvania and New Jersey courts have made similar statements. See National Land Investment Company v. Eastown Township Board of Adjustment, 215 A2d at 607 (1965) ("This Court has become increasingly aware that it is neither a super board of adjustment nor a planning commission of last resort.")

[111] One estimate that is sometimes referenced is the Institute of Justice's estimate of 10,000 threatened or actual condemnations over 5 years, or on average 2000 condemnations per year. See Institute for Justice, Floodgates Open, June 29, 2005 (explaining that "In its first-ever nationwide study *Public Power, Private Gain*, the Institute for Justice documented more than 10,000 instances of threatened or actual condemnation for private development nationwide from 1998 through 2002")., available at http://www.ij.org/private_property/connecticut/6_29_05pr.html. A substantial portion of these condemnations were merely threatened, so the annual figure of actual condemnations would be less than 2000 (assuming the 2000 figure is correct and not inflated). Many of these 2000 annual condemnations presumably would not be controversial enough to prompt litigation, and even among those that are controversial, presumably only a very modest fraction could plausibly be claimed to raise a potential exclusionary eminent domain claim.

[112] In the second Mount Laurel decision, the New Jersey Supreme Court in effect invited legislative action. See South Burlington Co. Township NAACP v. Mount Laurel , 456 A.2d at 417 ("while we have always preferred legislative to judicial action in this field, we shall continue – until the Legislature acts – to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine"). In the third Mount Laurel decision, the Court upheld the New Jersey statute that incorporated but also modified to make more politically palatable to wealthier communities the principles annunciated in the first and second Mount Laurel decisions. See Public Advocate of the State of New Jersey et al v. Boonton Township et al, 510 A2d 621, 633 (1986) (upholding the validity of the New Jersey Fair Housing Act, L 1985, c 222, and explaining that the statute represented "an unprecedented willingness

local education financing, the state courts have held that sole reliance on property tax financing for schools is unconstitutional, but at the same time have called upon the state legislatures to devise a state funding mechanism to address the problem of inadequately financed school districts, which the state legislatures have done.[113] There is no reason that the state courts could not use a similar approach to contain any legitimacy costs from their embrace of an exclusionary eminent domain doctrine.

B. Legal Coherency Costs

Coherency in legal doctrine promotes not just legitimacy but also predictability, and doctrinal developments that undermine that coherence thus carry a cost. The adoption of new state constitutional law doctrine can entail legal coherency costs if the doctrine is not well-grounded in existing precedents and principles and also if there is no way to logically justify and police the boundaries of the doctrine and the reasoning upon which the doctrine builds.

So defined, legal coherency costs have been a problem for state exclusionary zoning doctrine. There are no specific provisions in the state constitutions on which the courts could build an exclusionary zoning doctrine. As noted, the courts cited the Equal Protection Clause, but no federal Equal Protection precedents are helpful in justifying heightened review of exclusionary zoning and the state courts have not expressly established sought to justify the a protected class of low or moderate-income households. The state courts most often have cited or alluded to "substantive due process" as the grounds for heightened review,[114] but substantive due process in the modern era generally entails only very loose, rational basis review for "economic" regulation rather than individual rights/liberties regulation, and zoning and land use regulation has generally been conceived of as economic regulation. Not surprisingly, therefore, the courts did not undertake any meaningful discussion of how it is that substantive due process precedents or principles justify heightened review of exclusionary zoning.

Moreover, the exclusionary zoning cases raised an important boundary, and spillover question that may help explain why some state courts have avoided entering the arena of policing exclusionary zoning: namely, if substantive due process, whatever that vague term means, justifies heightened review of exclusionary zoning, why does it not also justify heightened review of other zoning practices that affect social welfare in the state and not just the locality at issue? Why does it not justify heightened review generally of local regulation, or even all

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by the Governor and the Legislature to face the Mount Laurel issue after the unprecedented decisions by this Court.").

[113] See Michael Heise, Preliminary Thoughts on the Virtues of Passive Dialogue, 34 AKRON L REV 73, 89-106 (2000) (describing the range of state court approaches in promoting legislative action) .

[114] See Surrick, 382 A.2d at 108 ("this Court has employed a substantive due process analysis in reviewing zoning schemes and have concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare")/ The New York's Berenson test Is not explicitly grounded in substantive due process but explicitly invokes the substantive due process concept of judicial review of the adequacy of the legislation as a means of meeting legitimate general public welfare needs, interpreted by the courts to include regional needs. See Blitz v. Town of New Castle, 463 NYS2d 832, 835 (S Ct App Div 2d 1983) (discussing formulations of the Berenson test).

regulation? "Substantive due process" is a concept that has no obvious subject matter boundaries, and therefore any innovative substantive due process holding has the potential to be stretched – or at least have advocates try to have it stretched – to different factual contexts.[115]

Legal coherency costs would be less of a problem with respect to the adoption of an exclusionary eminent domain doctrine. Exclusionary eminent domain doctrine can be understood as a logical next step to exclusionary eminent zoning doctrine, and in that sense has doctrinal or precedential grounding (which the exclusionary zoning doctrine lacked when it was articulated by state courts beginning in the 1970s). In adopting an exclusionary eminent domain doctrine, state courts also could build on state public use precedents that have read "public use" in state constitutional public use clauses as something narrower or more constrained than anything that might be classified as beneficial to the public or pertaining to a matter of a legitimate government concern.[116] Precedent aside, a key point is that there is a specific constitutional provision -- that is, the public use clause found in one form or another in every state constitution – that can set a clear boundary for the application or invocation of an exclusionary eminent domain doctrine. Because an exclusionary eminent domain doctrine would be tied to what it means to be a public use for purposes of condemnation, the doctrine would not readily give rise to questions about the availability of heightened review in other contexts.

C. Strategic Avoidance Costs

A final kind of cost associated with the judicial adoption of an exclusionary eminent domain doctrine is what I will call strategic avoidance costs. To the extent that a doctrine of exclusionary eminent domain makes it more difficult for a locality to exclude low-income households when they "stand in the way" of wanted new development, it makes the decision by a locality to "accept" or be receptive to the construction of affordable housing less attractive. An exclusionary eminent domain doctrine, in effect, increases the cost to localities of welcoming housing that will or may be occupied by low-income households. To the extent that is so, the adoption of the eminent domain doctrine may promote exclusionary zoning and other behavior on the part of localities that may contribute to concentrated poverty.

The amount of *ex ante* strategic avoidance on the part of local officials, however, is likely to be modest for a number of reasons. First, *ex ante*, local officials will know that whatever the applicable eminent domain doctrine, once structures are built, they are very likely to remain in

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[115] Cf: Collins v. Harker Heights, 503 US 115, 125 (1992) (explaining that th Supreme Court "has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area is scarce and open-ended.").

[116] See City of Norwood v. Horney, 853 NE2d 1115, 1137-38 (Ohio 2006) (citations omitted) ("defining the parameters of the power of eminent domain is a judicial function . . . and we remain free to define the proper limits of the doctrine . . . . There can be no doubts that our ole-though limited – is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure the state takes no more than necessary to promote the public use . . . "); County of Wayne, 684 NW2d at 785 (overruling Poletown as an aberration and affirming that "[o]ur eminent domain jurisprudence since Michigan's entry into the Union amply supports [the] assertion [that] "[q]uestions of public purpose aside, whether the proposed condemnation [is] consistent with the Constitution's "public use" requirement [is] a constitutional question squarely within the Court's authority.").

the locality for an extended time period and if they are removed or demolished, that may well happen without the eminent domain power being strongly implicated. Second, local officials are likely to have a reasonably short time horizon; they mostly do not serve in office for decades (although there are certainly exceptions) and even if they expect that is a possibility, they can be presumed to focus on current circumstances and the next election. Politicians, famously, have a high discount rate with regard to the less-than-near-term future.[117] Finally, local officials would presumably know that state constitutional law, not to mention statutory law, changes over time, so legal restrictions now may not be in place in the future or may be unimportant in light of other changes in law. What we can say, however, is that the amount of strategic avoidance, whatever that amount is, likely will be less in states that have some meaningful limits on exclusionary practices than in the state that do not have those kind of limits.

VI. CONCLUSION

This Article has proposed and explicated the case for a legal reform that has not been pursued in the wake of Kelo. Using features of exclusionary zoning doctrine that is recognized as part of state constitutional law in some states, a new exclusionary eminent domain article would result in heightened review of proposed condemnations that exclude low-income households from non-low-income neighborhoods or localities. Such review can be justified both as a means to avoid particularly great instances of uncompensated subjective loss, and as a means to prevent increased concentration of poverty. An exclusionary zoning doctrine would be cabined by the public use clause in state constitutions and thus would advance social welfare – broadly, rather than parochially, understood – without destabilizing state constitutional law. It is a doctrine whose time has come.

[117] See Daniel C. Esty, Revitalizing Environmental Federalism, 95 MICH L REV 570, 599 n87 (1999); Daniel A. Farber & Paul A. Hemmersboug, The Shadow of the Future: Discount Rates, Later Generations, and the Environment, 46 VAND L REV 267, 299 n 112 (1993).