

2007

Establishing a Leasehold through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo

Carol L. Zeiner

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ESTABLISHING A LEASEHOLD THROUGH EMINENT DOMAIN: A SLIPPERY SLOPE MADE MORE TREACHEROUS BY *KELO*

Carol L. Zeiner⁺

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+ Associate Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida; former College Attorney for Miami-Dade College (MDC). I thank Gary S. Brooks, Esq., former special counsel to MDC, Fleta A. Stamen, Esq., former Assistant College Counsel, later College Attorney, to MDC, and Anthony R. “Andy” Parrish, Jr., Esq., real estate consultant to MDC, with whom I encountered the fact pattern that provided the inspiration for this Article. I thank Professor William A. Kaplin of Catholic University School of Law, for discussing the implications of this topic for public colleges and universities, and for encouraging me to write this Article. I thank Professor Michael A. Olivas, University of Houston School of Law for hosting the 2004 Houston Roundtable for Higher Education Law, which provided a forum for the development of scholarship in the field, and I thank him for his insightful suggestions on an earlier draft of this Article. I thank my colleagues, John Makdisi, Elizabeth Pendo, Lauren Gilbert, and John Kang for their comments and discussion of earlier drafts of this Article. I continue to be grateful to Professor Roberta Rand, former head librarian, University of Miami Rosenstiel School of Marine and Atmospheric Sciences Library for welcoming me to do my writing at that library. I thank Ned Swanner, former Faculty Services Librarian and former head of Public Services, St. Thomas University School of Law, for his research assistance and knowledgeable discussion of this topic, and my research assistants, Jessica Pacheco and Kansas Gooden for their hard work. I am grateful to St. Thomas University School of Law for a summer writing stipend that enabled me to write this Article.

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I. INTRODUCTION

Consider this situation. A public college is in the process of expanding a campus. Students are registered for classes and it is important to those students, the local economy, and the quality of life in the community, that higher education continue to be provided on an ongoing basis. Unfortunately, despite careful planning to anticipate need and timely commencement of the construction project, unforeseen difficulties have arisen. Completion of construction will be delayed by six to eighteen months. The college has been leasing space for classes in a nearby office building, but the lease is expiring. The landlord refuses to extend the lease on any terms. After an exhaustive search, the college can obtain no other space in the area. It is faced with canceling most classes for the remainder of the construction period. Students and the public will be outraged. The college administration very much wants to continue to serve the public's needs.¹

Consider another example. In response to the sudden bankruptcy and closure of the manufacturing plant of a major local employer, a governmental entity needs to lease space in which to provide job retraining and workforce development services to those who have lost their jobs. In order to properly provide services, the governmental entity needs to locate the service center within a specific area of the county that is easily accessible by public transportation and that provides lots of free parking for the large number of clients who will be making lengthy visits to the service center. The governmental entity can find no space within the targeted area that meets all of its needs, except for a large vacant space within a shopping center. The center's owners refuse to rent the space

1. This is an actual problem that I encountered as general counsel for Miami-Dade College (MDC). It is a matter of public record. When the college initiated the procedural steps preliminary to eminent domain, the landlord extended MDC's lease. In the years since then, I have remained fascinated by the theoretical, philosophical, and practical issues that might be involved in such a case, but I have found very little written on this topic.

for this type of use because of the demand on parking, and because the clientele is not that which the shopping center wishes to attract. The government does not want to purchase a facility because it believes that the program is not likely to be needed in this location for longer than three years.²

Why not use eminent domain to create the leaseholds that will provide solutions to these important problems? Perhaps it is time for governmental entities to seriously consider using eminent domain to acquire less than a fee simple interest in real property when the specific need is important, of a limited—rather than an indefinite—duration, and a bargained-for exchange cannot be negotiated. Many state and local governments are in financial difficulty, and the federal government claims to seek more cash-conscious means of providing services in order to reduce the deficit. The public might be better served if cash-strapped governments leased property rather than expending scarce tax dollars to purchase real property in fee simple through use of eminent domain. However, serious problems lie just below the surface of this seemingly good solution.

It is fairly common for part or all of a tenant's interest in real property to be taken when a governmental entity uses eminent domain to acquire fee simple title to the landlord's realty in which the tenant's space is located.³ Commercial leases typically contain provisions applicable to partial or total condemnation.⁴ Treatises address the situation,⁵ and much has been written about strategies for such situations in texts on commercial leasing and eminent domain.⁶

2. Although this fact pattern is hypothetical, government need for leased space to address a particular, urgent need occurs on a fairly frequent basis.

3. See 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 13.08(1) (rev. 3d ed. 2003) (revised by Sandra R. Bullington); 2 POWELL ON REAL PROPERTY § 17A.01(2) (Michael Allan Wolf ed., 2005).

4. 2 POWELL ON REAL PROPERTY, *supra* note 3, § 17A.01(2), at 17A-20; Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 U.C.L.A. L. REV. 1083, 1087-88 (1987); Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee upon Condemnation of Leased Property*, 22 A.L.R.5th 327, 350-63 (1994); see also ARTHUR J. MENOR, FLA. BAR, FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS: LEASES §§ 10.23-.25 (4th ed. 2005).

5. See, e.g., 2 POWELL ON REAL PROPERTY, *supra* note 3, § 17A.01(2)(c), at 17A-20, § 17A.03(1)(a)(iii), at 17A-62; 5 THOMPSON ON REAL PROPERTY § 40.14 (David A. Thomas ed., 2005). 2 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.02 (6)(a) (rev. 3d ed. 2003) (revised by David Schultz). See generally JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN (rev. 3d ed. 2003) (containing an index with almost three full pages of references devoted to the taking of leased property).

6. See generally THEODORE J. NOVAK, BRIAN W. BLAESSER & THOMAS F. GESELBRACHT, CONDEMNATION OF PROPERTY: PRACTICE AND STRATEGIES FOR WIN-

By contrast, there is little literature about the legal issues, policy considerations, or practical ramifications that arise when the government seeks to use eminent domain to create a leasehold interest in real property rather than acquiring a fee simple. The limited writings and case law on the topic summarily state that government can engage in such action as if it were beyond question.⁷ The careful analysis necessary to prove or disprove the conclusion is missing from the literature. Likewise, the controversial consequences of an affirmative answer have not been examined. This Article seeks to fill a part of that void. It examines, in detail, the question of whether or not a governmental entity *can* establish a leasehold through condemnation proceedings under its power of eminent domain. It then moves to the question of whether, or under what circumstances, government *should* use condemnation proceedings to establish a leasehold. The Article examines the severe problems that can arise from such government action. Finally, the Article suggests possible solutions. It suggests limitations that both respect the government's ability to engage in takings, and uphold the checks and balances and individual autonomy that are essential to our social order and system of government.

Part II provides an overview of that portion of takings law that is germane to the Article. Part III analyzes whether a governmental entity can create a term for years through condemnation proceedings based on the exercise of its power of eminent domain. It concludes that, under current law, government can take such action whenever eminent domain is a permissible means of obtaining fee simple title. This includes the power to use eminent domain to create leaseholds to be transferred to private parties in transactions analogous to *Kelo v. City of New London*.⁸

Part IV of this Article summarizes the circumstances, albeit limited, in which government *ought* to use eminent domain proceedings to establish a leasehold. It also introduces some of the concerns that can arise even from appropriate use of the power. Part V exposes serious problems that can arise out of such takings. A number of these harms are specific to takings that create a leasehold. Others can arise in takings in general but are exacerbated because of the unique circumstances that accompany

NING JUST COMPENSATION (1994); Goldberg, Merrill & Unumb, *supra* note 4, at 1084; Zitter, *supra* note 4, at 327.

7. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 183 (2002); ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 124-25 (1999); 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 14.01 (rev. 3d ed. 2003) (revised by Robert A. Slavitt); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 605 (1972).

8. 125 S. Ct. 2655 (2005); see also *infra* notes 22-33 and accompanying text (discussing *Kelo* in further detail).

condemnation proceedings to create a leasehold. Part V also explores whether these concerns are so intractable as to require prohibition of condemnation proceedings to establish leaseholds on the basis of public policy, but concludes that such a drastic remedy is not warranted. Ultimately, adjustments to the calculation of just compensation can ameliorate a number of the concerns, and refinements to the calculation are suggested. There are, however, remaining concerns that are so severe that I propose that eminent domain to create leaseholds through condemnation proceedings be limited as a matter of public policy to eliminate the most egregious harms to the public. Part V suggests limiting the permissible scope of condemnations that create leaseholds to those in which government itself, the public, or a private entity acting as an agent of government is occupying the leasehold. This provides the most effective and efficient solution. It is simpler to administer than other approaches, preserves the ability of government to use condemnation proceedings to establish a leasehold in appropriate circumstances, eliminates the most egregious harms, and protects from government intrusion the sphere of individual autonomy that is essential to the preservation of our social fabric. Part VI summarizes the proposed solutions.

II. BACKGROUND

The Takings Clause of the United States Constitution reads: “Nor shall private property be taken for public use, without just compensation.”⁹ It applies to the states through the Due Process Clause of the Fourteenth Amendment.¹⁰ The constitutions of most states also contain takings clauses.¹¹

Today, two types of takings are recognized: traditional physical takings and regulatory takings.¹² Physical takings are typically accomplished through the exercise of the power of eminent domain, through which the governmental entity acquires land or an interest in land¹³ from a landowner in an action for condemnation.¹⁴ A physical taking can also be the

9. U.S. CONST. amend. V.

10. U.S. CONST. amend. XIV, § 1; *see also* *Chi., Burlington & Quincy R.R. v. City of Chi.*, 166 U.S. 226, 238-39 (1897).

11. *See, e.g.*, FLA. CONST. art. X, § 6; N.J. CONST. art. I, § 20; OHIO CONST. art. I, § 19; TEX. CONST. art. I, § 17.

12. *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22 (2002).

13. This Article discusses takings in the context of real property. However, virtually any type of “property” can be the subject of a taking. *See, e.g.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220 (2003) (interest on lawyers’ trust accounts (IOLTA accounts)); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984) (trade secrets); *City of Oakland v. Oakland Raiders*, 646 P.2d 834, 837 (Cal. 1982) (en banc) (football team).

14. Sometimes the process stops short of judgment in condemnation proceedings and the government negotiates a purchase in lieu of eminent domain. *See* Thomas W. Merrill,

result of a permanent invasion of an owner's property by the government¹⁵ or a third party acting with government authorization.¹⁶ A regulatory taking arises when a governmental entity regulates an owner's use of his or her land so extensively that it is the equivalent of a taking.¹⁷ Both physical and regulatory takings are forced exchanges in which the property owner's interest in land is taken without the owner's consent.

The Takings Clause does not bar the government from taking private property within its jurisdiction. Nor does it empower the government to take private property.¹⁸ Rather, the Takings Clause acts as a limitation on that power.¹⁹ The Clause operates whenever "private property" is "taken" by government.²⁰ Government can do so only when such taking is for "public use," and only if the government pays "just compensation" to the owner of that property.²¹ A body of law and considerable scholarship has arisen around each of these requirements.

The Economics of Public Use, 72 CORNELL L. REV. 61, 77 (1986). A purchase in lieu of condemnation provides certain federal income tax benefits to the condemnee. See I.R.C. § 1033 (2006).

15. See *infra* notes 97-105 and accompanying text; see also MELTZ, MERRIAM & FRANK, *supra* note 7, at 124-25.

16. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

The cause of action, inverse condemnation, arises under traditional physical takings theory when the government appropriates a landowner's property without aid of condemnation proceedings, and the landowner, rather than the government, institutes legal action. See, e.g., *United States v. Clarke*, 445 U.S. 253, 255 (1980). At the time that the Constitution was written and until 1922, physical takings were the only takings recognized by the courts. MELTZ, MERRIAM & FRANK, *supra* note 7, at 119.

17. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Today, inverse condemnation actions are also the means utilized by property owners in situations in which they believe that a regulatory taking has taken place. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306-07 (1987).

18. In addition to takings proceedings initiated by government, sometimes such authorization is given to public utilities. E.g., FLA. STAT. ANN. §§ 361.01-.08, 362.02 (West 1999 & Supp. 2007).

The power to take private property is a characteristic of sovereign power. *Kohl v. United States*, 91 U.S. 367, 371-72 (1875); NOVAK, BLAESSER & GESELBRACHT, *supra* note 6, at 4. In the United States, authorizing legislation is needed before government can lawfully occupy or condemn private land. *Id.* at 5; 1A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03(1) (rev. 3d ed. 2003) (revised by David Schultz); Stoebuck, *supra* note 7, at 566-67.

19. *Kelo v. City of New London*, 125 S. Ct. 2655, 2667 n.19 (2005) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part)); see also DANA & MERRILL, *supra* note 7, at 2.

20. U.S. CONST. amend. V.

21. *Id.*; see also DANA & MERRILL, *supra* note 7, at 1-7 (providing students with an excellent, concise, introductory explanation of these requirements and the recurring issues).

The 2005 case, *Kelo v. City of New London*, reflects the current controversy with respect to the public use element,²² a topic that has implications for this Article. In *Kelo*, the city of New London, Connecticut sought to assemble ninety acres of privately owned real property in a nonblighted neighborhood for economic redevelopment.²³ The assembled parcels would be conveyed to private parties for redevelopment as a research and development facility, marina, housing, and other private uses.²⁴ Redevelopment planners hoped to use the establishment of a \$300,000,000 research facility by the pharmaceutical company Pfizer Inc. on nearby land as a catalyst for economic rejuvenation.²⁵ The New London Development Corporation (NLDC), acting on behalf of the City, filed eminent domain proceedings with respect to land that could not be acquired through negotiated purchases.²⁶ A number of the condemnees contested on grounds that this taking for transfer to a private party for private use did not constitute a public use as required by the Fifth Amendment to the United States Constitution.²⁷ The five-to-four decision of the Supreme Court upholding the taking has generated considerable controversy.²⁸ The majority found that *Berman v. Parker*,²⁹ *Hawaii Housing Authority v. Midkiff*,³⁰ and *Fallbrook Irrigation District v. Bradley*,³¹ provided controlling precedent.³² The majority of Justices found that “public use” under the Fifth Amendment has the broader meaning

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

23. *Id.* at 2660.

24. *Id.* at 2659-60. The city of New London had experienced economic decline for decades. *Id.* at 2658. The situation worsened with the closure of a naval facility in the city, which prompted “state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization.” *Id.* at 2658-59.

25. *Id.* at 2659. The Pfizer project was announced publicly in February 1998, the month following state authorization of a \$15,000,000 bond issue for the Ft. Trumbull area, \$5,350,000 of which was “to support the NLDC’s [the New London Development Corporation—a private nonprofit entity created to help plan economic development] planning activities.” *Id.*

26. *Id.* at 2660.

27. *Id.*

28. See, e.g., Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 493-96 (2006); Brett Talley, Recent Development, *Restraining Eminent Domain Through Just Compensation: Kelo v. City of New London*, 125 S. Ct. 2655 (2005), 29 HARV. J.L. & PUB. POL’Y 759, 759-60 (2006); Charles Lane, *Justices Affirm Property Seizures*, WASH. POST, June 24, 2005, at A1; Associated Press, *Homes May be ‘Taken’ for Private Projects*, MSNBC.COM, June 23, 2005, <http://www.msnbc.msn.com/id/8331097/>; Bill Mears, *Supreme Court Backs Municipal Land Grabs*, CNN.COM, June 24, 2005, <http://www.cnn.com/2005/LAW/06/24/scotus.property/>.

29. 348 U.S. 26 (1954).

30. 467 U.S. 229 (1984).

31. 164 U.S. 112 (1896).

32. *Kelo*, 125 S. Ct. at 2662-63, 2667-68.

of “public purpose,”³³ and that “[t]he City ha[d] carefully formulated an economic development plan that it believe[d] w[ould] provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”³⁴ The majority noted “that there was no evidence of an illegitimate purpose”³⁵ and “the City’s development plan was not adopted to benefit a particular class of identifiable individuals”;³⁶ then, the majority concluded, “[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review . . . the takings . . . satisfy the . . . Fifth Amendment.”³⁷ Impassioned dissents argued that all privately owned property is now at risk of being taken for transfer to another private party “[u]nder the banner of economic development.”³⁸ The impact of this decision upon temporary takings to create leaseholds is discussed in detail in Part V.C.

In recent years, the subject of short-term, or “temporary,” takings has generally arisen in the context of regulatory takings. If a court finds that the governmental regulation in question constitutes a taking, the government has three options.³⁹ The government can choose to rescind the regulation.⁴⁰ It can modify the regulation so that it no longer constitutes a taking but rather comes within the police power of government so that the government does not have to provide compensation to the property owner under the regulation as modified.⁴¹ Finally, the government can choose to keep the regulation in force, without modification, in which event the government has chosen to exercise its power of eminent domain⁴² and must pay just compensation to the property owner.⁴³

33. *Id.* at 2662 (citing *Fallbrook Irrigation Dist.*, 164 U.S. at 158-64).

34. *Id.* at 2665.

35. *Id.* at 2661.

36. *Id.* at 2662 (internal quotation marks omitted).

37. *Id.* at 2665.

38. *Id.* at 2671 (O’Connor, J., dissenting); *see also id.* at 2677-78 (Thomas, J., dissenting) (stating that the majority’s interpretation of “public use” allows the Court to hold “a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a ‘public use’”).

39. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

40. *Id.*

41. *See id.*

42. *Id.* This assumes, of course, that the other requirements of eminent domain, private property and public use, are present. *See U.S. CONST. amend. V.*

43. *First English*, 482 U.S. at 321. However, if that which is taken does not constitute private property, the Takings Clause is inapplicable and no compensation is owed to the owner under the Takings Clause. *See id.* at 314. If the taking is not for public use, the government cannot proceed with the taking. *Kelo*, 125 S. Ct. at 2661. Prior to the Supreme Court’s decision in *Kelo*, one of the key cases in the development of the public purpose interpretation, *Poletown Neighborhood Council v. City of Detroit*, was overturned

Even if the government decides to rescind its regulation or decides to modify the regulation so that it no longer constitutes a taking, the government must pay just compensation to the property owner for the period during which the regulation constituted a taking.⁴⁴ In such instances, the determination of when such a temporary taking begins and ends becomes critical to the calculation of just compensation.⁴⁵

Court decisions and commentators who have considered temporary regulatory takings tend to cite a series of cases from the World War II era to establish the bona fides of the concept of a temporary regulatory taking and to provide initial guidance for the calculation of just compensation for such takings. For example, the Supreme Court's opinion in *First English Evangelical Lutheran Church v. County of Los Angeles*⁴⁶ relies upon *United States v. General Motors Corp.*⁴⁷ and *Kimball Laundry Co. v. United States*,⁴⁸ the same cases that first considered temporary physical takings—in other words, the establishment of a leasehold through condemnation.⁴⁹

These cases, each over half-a-century old, arose out of fact patterns involving the nation's response to the attack on Pearl Harbor that thrust the United States into World War II.⁵⁰ Because there is little literature on the topic of leaseholds established as a result of condemnation proceedings, and that which exists does not analyze the issue but merely employs distinctly conclusory language,⁵¹ Part III of this Article analyzes whether, under current law, government *can* create a leasehold in an owner's real property through a traditional physical taking utilizing condemnation proceedings.

by the Supreme Court of Michigan on the basis of Michigan's state constitution. See *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); Symposium, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 837 (2004). The Court's decision in *Kelo* expressly states that nothing precludes the states from adopting more stringent limitations pertaining to public use. *Kelo*, 125 S. Ct. at 2668.

44. *First English*, 482 U.S. at 321.

45. David Schultz, *The Price Is Right! Property Valuation for Temporary Takings*, 22 HAMLIN L. REV. 281, 294 (1998); Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953, 960 (1995).

46. 482 U.S. 304 (1987).

47. 323 U.S. 373 (1945).

48. 338 U.S. 1 (1949).

49. See *First English*, 482 U.S. at 318.

50. See *Kimball Laundry*, 338 U.S. at 3; *Gen. Motors*, 323 U.S. at 375.

51. See *supra* note 7 and accompanying text.

III. CURRENT LAW RECOGNIZES ESTABLISHMENT OF A TERM FOR YEARS THROUGH CONDEMNATION PROCEEDINGS IN ALL SITUATIONS IN WHICH EMINENT DOMAIN IS PERMISSIBLE

If one simply asks whether the government can take a leasehold through condemnation proceedings, inevitably there is confusion between the rather commonplace event in which the government eliminates a leasehold by taking the fee simple interest in real property that is subject to the leasehold, and the circumstances that are the subject matter of this Article. The question must be posed with carefully chosen language so as to avoid confusion between instances when the government uses its eminent domain power to take real property that is subject to a lease, thus terminating the lease,⁵² and instances in which the government uses its power of eminent domain to create a term for years in the condemnor. This Article examines the latter.⁵³

The Supreme Court recognized short-term physical takings in *General Motors*.⁵⁴ It was soon followed by *United States v. Petty Motor Co.*,⁵⁵ and *Kimball Laundry*, among others.⁵⁶ As mentioned in the concluding paragraph of Part II, these three cases involved condemnations of the temporary use of real property for military purposes during World War II.⁵⁷

In each of these cases, the Court recognized that a taking had occurred despite the finite duration of the takings. In *General Motors*, it was stated that “the Government’s power to take for a short period, and to

52. See *supra* note 3 and accompanying text.

53. There is analogous confusion with respect to easements—situations in which a government taking eliminates an easement and those in which the taking creates an easement. See 9 PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS ON EMINENT DOMAIN* § 32.01(3), at 32-6 (rev. ed. 2003); see also Stoebuck, *supra* note 7, at 603-04.

54. *Gen. Motors*, 323 U.S. at 380. Although commentators focus on *General Motors* and its progeny when discussing temporary takings, it was not the first instance in which the Supreme Court had before it a case dealing with a temporary physical taking. In *A. W. Duckett & Co. v. United States*, 266 U.S. 149 (1924), the Court gave at least tacit approval to a temporary taking of an interest in a pier for war purposes (World War I). *Id.* at 150-51 (“On the face of those acts it seems to us manifest that the United States, *although not taking the fee*, proceeded *in rem* as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world.” (first emphasis added)). The Court then went on to find that a tenant of the pier was entitled to just compensation. *Id.* at 152.

55. 327 U.S. 372 (1946).

56. *E.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 117 (1951); *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 262 (1950).

57. *Pewee Coal*, 341 U.S. at 115-16 (involving the government’s seizure and operation of a coal mine to prevent a mine workers strike from hampering the United States’ war effort during WWII); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949) (condemnation of plant for use by the Army); *Petty Motor Co.*, 327 U.S. at 374 (condemnation of building for government).

demand possession of the space taken . . . cannot be denied.”⁵⁸ The Court also stated, with respect to the property interest that could be taken in eminent domain:

That interest may comprise the group of rights for which the shorthand term is “a fee simple” or it may be the interest known as an “estate or tenancy for years,” as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.⁵⁹

In explaining its determination of the proper measure of just compensation for the term of years that was taken in that case, the Court said that the government could not, by specifying a finite term for the taking, rather than taking the fee, manipulate and thereby defeat its constitutional obligation to pay just compensation.⁶⁰

Petty Motor Co. arose “out of a petition for condemnation of the temporary use for public purposes of a building in Salt Lake City, Utah.”⁶¹ The government condemned the private property for a term of approximately two and one-half years, with a right on “the part of the [government] to surrender the premises on June 30, 1943,” approximately seven months after the beginning of the temporary term, or alternately, on June 30, 1944, approximately nineteen months after the beginning of the temporary term.⁶² In a footnote, the Court stated, “[n]o one questions the authority of the United States to condemn this temporary interest.”⁶³ The issues to be decided by the Court in the case related to the determination of just compensation for tenants in the buildings whose leaseholds were impacted by the condemnation.⁶⁴ The appropriateness of a temporary physical taking was treated as beyond question, and the exigencies of

58. *Gen. Motors*, 323 U.S. at 380. In this case, General Motors was the lessee of a warehouse under a long-term lease and the government was a subtenant of part of the warehouse. *Id.* at 375. The government filed condemnation proceedings to take a short-term lease of the remaining space from General Motors, the long-term lessee. *Id.* In this instance, the government itself was to use the premises taken. *Id.*

59. *Id.* at 378.

60. *Id.* at 381 (stating that the government cannot “defeat the Fifth Amendment’s mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title”). Based on this language, it appears that the Court was concerned that the government might try to avoid the payment of just compensation under the Takings Clause by engaging in temporary physical takings, rather than takings of fee simple interests in land. *Id.* at 381-82. The Court would not allow the just compensation requirement to be subverted in such a manner. *Id.* The Court’s opinion does not analyze whether or not a short-term taking of an interest less than fee simple should be allowed at all. Rather, it reaches the conclusion stated *supra* notes 54, 57-58 and accompanying text. See *Gen. Motors*, 323 U.S. at 378.

61. *Petty Motor Co.*, 327 U.S. at 374.

62. *Id.*

63. *Id.* at 374 n.2.

64. *Id.* at 373-74.

war played no part in the Court's discussion as it appeared in the opinion, except that the statute that constituted the legislative authority for the taking happened to be the Second War Powers Act.⁶⁵

Kimball Laundry involved the condemnation of a laundry plant—land, building, physical plant facilities, and operation of the laundry plant—for military purposes, for an initial term of just over seven months, which term could be extended from year to year at the election of the Secretary of War.⁶⁶ The laundry plant was to be used “to service, for pay, the laundry and dry cleaning requirements of the soldiers, officers, and all the Army hospitals, training centers, and forts in the Seventh Service Command.”⁶⁷ The Supreme Court was conclusory in its statement that the short term appropriation constituted a taking.⁶⁸ The only issue was the calculation of just compensation, as “it was known from the outset that this taking was to be temporary, and determination of the value of temporary occupancy can be approached only on the supposition [of] free bargaining between petitioner and a hypothetical lessee of that temporary interest.”⁶⁹ Once again, the Court treated the legality of the physical taking of finite duration under the Fifth Amendment as a foregone conclusion. Again, the fact of war was not discussed in the Court's opinion and seemed to play no part in the determination that a taking had occurred, or in the measure of just compensation.⁷⁰

In each of these cases, the government brought the condemnations under section 201 of the Second War Powers Act of March 27, 1942.⁷¹ Since the purpose of each of the takings was to use the properties for war purposes, it is likely that these takings would not have occurred but for the wartime situation and passage of the Second War Powers Act.⁷² However, aside from providing the impetus for the authorizing legislation, and the Supreme Court's recitation that the condemnations arose under that Act, neither the conditions of wartime nor the Act were discussed in the Court's opinions.⁷³ Rather, the Court's decisions were grounded in its

65. See *id.* at 374-75; see also Second War Powers Act, ch. 199, 56 Stat. 176, 177 (1942) (repealed).

66. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949).

67. Brief of Petitioner at 5, *Kimball Laundry*, 338 U.S. 1 (No. 63).

68. See *Kimball Laundry*, 338 U.S. at 6-7.

69. *Id.* at 7.

70. See *id.* at 3-4.

71. Second War Powers Act, ch. 199, 56 Stat. 176, 177 (1942) (repealed); *Kimball Laundry*, 338 U.S. at 3 n.1; *United States v. Petty Motor Co.*, 327 U.S. 372, 374 n.2 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375 (1945).

72. Similarly, in *Pewee Coal*, it is doubtful that the government would have seized operation of the specific coal mines except that the strike “threatened to seriously cripple . . . prosecution of the war” with potentially disastrous consequences. *Pewee Coal Co. v. United States*, 88 F. Supp. 426, 427 (Ct. Cl. 1950), *aff'd*, 341 U.S. 114 (1951).

73. See *supra* note 71 and accompanying text.

interpretation of the Fifth Amendment, and focused on the determination of just compensation thereunder.⁷⁴ Despite the absence of any discussion of the wartime circumstances, modern legal thought would assume that such a critical political and social factor, as well as the Justices' commitment to the war effort, played a role in the outcome of the cases.⁷⁵ Thus, it could be argued that a military attack on the United States, or another exigent circumstance, is a necessary prerequisite for a taking through condemnation proceedings to establish a leasehold.

This contention is overcome, however, because the *General Motors* line of cases not only continues to be cited in situations not involving the exigencies but also guides development of current case law, particularly with respect to regulatory takings.⁷⁶ Over thirty-five years after they were originally decided, *General Motors*, *Petty Motor Co.*, and *Kimball Laundry* were relied upon by the Supreme Court to establish an entitlement to just compensation for temporary takings in the context of regulatory takings in *First English*.⁷⁷ Wartime, as well as other exigent circumstances, were absent from the situation.⁷⁸

Likewise, the Court of Appeals for the Federal Circuit and the Court of Claims have recognized physical temporary takings under the Fifth Amendment where neither wartime nor other exigent circumstances was present.⁷⁹

74. See *Kimball Laundry*, 338 U.S. at 5; *Gen. Motors*, 323 U.S. at 374-75. The use of the Fifth Amendment as the basis of the decision was stated by implication in *Petty Motor Co.* See *Petty Motor Co.*, 327 U.S. at 377.

75. Contrary to modern legal thought, a Langdellian formalist argument could be made, based on the total absence of any discussion of the wartime circumstances in the Court's opinions in any of these cases, that the exigencies of war played no role in the Court's decisions, and accordingly, these cases constitute controlling law, regardless of whether the nation is then at war or facing other exigent circumstances. See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-10 (1983). The opposite interpretation would arise under legal realism, a theory of law prevalent at the time the decisions were rendered. Legal realists would maintain that the nation's involvement in World War II, a central feature of life in the United States at the time that the takings occurred, would have played a role in the Court's decisions and that these cases cannot properly be understood absent consideration of the circumstances. See generally Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 18-21 (1999). The impact of legal realism was so great that today, scholars, practitioners and students alike tend to assume that extant circumstances and judges' viewpoints play a role in the outcome of cases.

76. See *infra* notes 77-79 and accompanying text.

77. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

78. See *id.* at 306-07.

79. *Skip Kirchorfer, Inc. v. United States*, 6 F.3d 1573, 1576-77 (Fed. Cir. 1993); *Hendler v. United States (Hendler III)*, 952 F.2d 1364, 1367 (Fed. Cir. 1991); *Petro v. United States*, 47 Fed. Cl. 136, 151 (2000).

More recently, *General Motors* and *Petty Motor Co.* have been cited by the Supreme Court expressly for the purpose of establishing that “compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.”⁸⁰ *General Motors* was also cited in the Court’s 2005 decision, *Lingle v. Chevron U.S.A. Inc.*⁸¹

Based on the foregoing, it is clear that the *General Motors* line of cases, which established short-term takings of a finite (if not definite) duration as bona fide takings within the scope of the Takings Clause of the Fifth Amendment, is still good law. Moreover, the existence of the exigencies of wartime is not a necessary condition.⁸² Thus, short-term takings are constitutionally valid. The legal reasoning of the *General Motors* line of cases, as well as current cases, is grounded in the Fifth Amendment and does not depend on involvement in war for its viability.⁸³ Nor does it depend upon the existence of other exigencies.

The next issue to be considered is the matter of authorizing legislation. In *First English*, it was noted “that the decision to exercise the power of eminent domain is a legislative function.”⁸⁴ The Fifth Amendment, standing alone, does not authorize governmental takings. Legislative authorization is needed.⁸⁵

The Second War Powers Act, the statute that authorized the condemnations in *General Motors*, *Kimball Laundry*, and *Petty Motor Co.*, happened to be worded to expressly mention takings of temporary use.⁸⁶ The legislation permitted the government to acquire “real property, temporary use thereof, or other interest therein” by condemnation.⁸⁷ This could

80. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (regulatory takings); *see also* *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (involving IOLTA accounts).

81. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (holding, in a unanimous opinion, that whether a statute substantially advanced a legitimate state interest was not a valid method of identifying regulatory takings for which just compensation was required because the test did not address the character or magnitude of the burden proposed). *Peewee Coal* was also cited. *Id.* at 537.

82. *See supra* notes 71-79 and accompanying text.

83. *See supra* notes 74, 78-79 and accompanying text.

84. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

85. *Hendler v. United States (Hendler III)*, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (“Once legislative authority is obtained, authorized members of the government may determine how and when the authority will be exercised.”); 1A SACKMAN, *supra* note 18, § 3.03(1), at 3-46 (“[T]he right to authorize the exercise of eminent domain is legislative. In the absence of direct authority from a legislature, there can be no taking of private property for a public use, except in cases where the owner consents to the taking.”); Stoebuck, *supra* note 7, at 568-69.

86. Second War Powers Act, ch. 199, 56 Stat. 176, 177 (1942) (repealed).

87. *Id.*

give rise to an argument that it is necessary that the legislation authorizing the condemnation make specific, express reference to condemnations of temporary duration, in order for there to be a valid temporary taking.⁸⁸ This potential objection is not particularly persuasive because takings of interests in private property of short-term duration are legislatively authorized if takings of less than the fee fall within a statute's description of the property that can be taken.

While the authority of government to engage in a taking can arise under a variety of statutes,⁸⁹ the Fifth Amendment sets the constitutional parameters. If there is a taking of private property for public use, just compensation must be paid.⁹⁰ As mentioned above, in *General Motors*, the Supreme Court stated with respect to the term "interest":

That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance.

The constitutional provision is addressed to every sort of interest the citizen may possess.⁹¹

It is primarily the right to use one's property that is the interest taken in regulatory takings.⁹² Similarly, it is the right to use one's property for a period of temporary duration that is the interest taken in a temporary physical taking.⁹³ The right to occupy and use one's real property is a key characteristic of an interest in property.⁹⁴ Likewise, the right to exclude is also one of the key rights incident to the ownership of an interest in property.⁹⁵ When government appropriates for itself a term of years during which it can use the landowner's land without his consent, the gov-

88. See, e.g., FLA. STAT. ANN. § 127.01(1)(a) (West Supp. 2007) ("The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.").

89. See, e.g., *id.* §§ 127.01-.02 (delegating the power of eminent domain to county governments); *id.* § 1013.25 (West 2004) (granting the power of eminent domain to public universities and community colleges in Florida "[w]henever it becomes necessary for the welfare and convenience of any of its institutions or divisions to acquire private property for the use of such institutions").

90. U.S. CONST. amend. V.

91. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

92. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987).

93. See *supra* notes 54-60 and accompanying text; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting *Gen. Motors*, 323 U.S. at 378)).

94. *Loretto*, 458 U.S. at 435.

95. *Id.*; see also *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159-60 (Wis. 1997); MELTZ, MERRIAM & FRANK, *supra* note 7, at 117 ("[O]ne of the most revered incidents of ownership—the right to exclude others—[is] a right that should be 'tenaciously guarded by the courts.'" (quoting *Cable Holdings of Ga. v. McNeil Real Estate Fund VI*, 953 F.2d 600, 605 (11th Cir. 1992))).

ernment, having destroyed the owner's right to use and occupancy, and the owner's right to exclude the condemner for the duration of the term, has deprived the landowner of an interest in private property for the duration of that term, just as surely as the government has deprived a landowner of an interest in his property when it effectuates a taking of fee simple title.⁹⁶ In both instances, an interest in property has been taken; the only distinction is the duration of the deprivation based on the nature of the interest that was taken. Thus, it is clear that statutory language that merely authorizes takings of private "property," without expressly mentioning periods of temporary duration, is sufficient to include within its meaning takings of that interest in real property known as an estate for years.

Another issue is the proper interpretation of the term "permanent" as it appears in some cases and discussions of physical takings, most notably, *Loretto v. Teleprompter Manhattan CATV Corp.*,⁹⁷ which seems to be a source of the confusion.⁹⁸ In that case, the majority distinguished a permanent occupation of real property by government, which the Court found to invariably constitute a taking, from a temporary invasion of property, "or government action outside the owner's property that causes consequential damages" on the owner's property.⁹⁹ The latter governmental actions may or may not constitute a taking, depending on the outcome of the ad hoc balancing tests that are used in regulatory takings cases.¹⁰⁰ Specifically, the Court in *Loretto* said that "[m]ore recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts use of property,"¹⁰¹ and that the Court's recent cases "imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause."¹⁰²

96. See MELTZ, MERRIAM & FRANK, *supra* note 7, at 124.

97. 458 U.S. 419 (1982). In *Loretto*, the Supreme Court found that a taking had occurred when a cable television company attached cable wires and junction boxes to a rental building owned by Mrs. Loretto despite her objections. See *id.* at 438. The relevant statute prohibited landlords from, among other things, interfering with the installation of cable television facilities upon the landlord's property. See *id.* at 444-45 (Blackmun, J., dissenting).

98. Cf. MELTZ, MERRIAM & FRANK, *supra* note 7, at 125.

99. *Loretto*, 458 U.S. at 427-28.

100. *Id.* at 426-27.

101. *Id.* at 430.

102. *Id.* at 432.

This language¹⁰³ could form the basis for an argument that a physical occupation of a landowner's property for a term of six to eighteen months, as in the first fact pattern presented in the introduction to this Article, or for a term of three years, as described in the second fact pattern presented in the introduction, might not constitute a taking for which compensation must be paid because the occupation of the landowner's real property is not *permanent* within the usual sense of the word. Such an occupation would constitute a taking only if the ad hoc balancing tests that have become common in regulatory takings cases were fulfilled.¹⁰⁴ The dissent in *Loretto* predicted precisely this type of confusion saying that the majority's approach "erects a strained and untenable distinction . . . [that] 'reduces the constitutional issue to a formalistic quibble' over whether property has been 'permanently occupied' or 'temporarily invaded.'"¹⁰⁵

The "permanent occupation" versus "temporary invasion" distinction has been discredited many times.¹⁰⁶ The dispute was ultimately laid to

103. The above quoted language is not the only misleading language in *Loretto*. The Court also stated that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. This language seems to forget that an appropriation of private land that serves no public interest is constitutionally prohibited. Moreover, I suggest that "without regard to the public interests" is errant language that generates problematic decisions such as *Kelo*.

104. *See id.* This could generate the absurd argument that if the leasehold is not "permanent" in the usual sense of the word, and for some reason does not constitute a taking under the ad hoc balancing tests, then it is not a taking for which just compensation is due. It is an affront to basic constitutional principles that real property could be occupied by the government for the duration of a leasehold (i.e., longer than a transitory trespass) to the exclusion of the owner, yet not require just compensation. *See infra* Part V.C. (discussing Justice Thomas' dissent in *Kelo*).

105. *Loretto*, 458 U.S. at 442 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964)).

106. It should be noted that the majority in *Loretto* cited Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), finding that formal expropriation proceedings are different from physical occupation of land and that formal expropriation presumably constitutes a compensable taking. *Loretto*, 458 U.S. at 427 n.5. Thus, it appears that the majority would likely agree with my conclusion that government condemnation proceedings to acquire leasehold interests for government use, such as those likely to be used in the two hypotheticals at the beginning of this Article, would constitute a compensable per se taking.

Subsequent lower court decisions and commentators have been able to ascertain what the *Loretto* Court meant, explaining that use of a landowner's real property by the government, or by those acting with the authority of government, for a finite term of reasonable duration constitutes a taking without resort to the ad hoc analysis found in regulatory takings cases. *See Hendler v. United States (Hendler III)*, 952 F.2d 1364, 1376 (Fed. Cir. 1991); *see also* MELTZ, MERRIAM & FRANK, *supra* note 7, at 125.

In *Hendler III*, the government (the Environmental Protection Agency (EPA) of the federal government and the State of California acting for the federal government), acting with legal authorization but without the landowner's consent, placed numerous groundwa-

rest by the Supreme Court itself in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*¹⁰⁷ and *Brown v. Legal Foundation of Washington*.¹⁰⁸ *Tahoe-Sierra* dealt with the claim of an association of landowners that moratoria on development constituted a regulatory taking of property without compensation.¹⁰⁹ *Brown* did not involve the taking of real property.¹¹⁰ It dealt with a claim that rules of the Washington Supreme Court requiring limited practice officers to place clients' funds in "interest on lawyers' trust accounts" (IOLTA accounts) violated the claimants' First and Fifth Amendment rights.¹¹¹

The court's language in *Tahoe-Sierra*, which was quoted at length in *Brown*, clarified the Court's position as to traditional physical takings of temporary duration, by stating:

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the inter-

ter monitoring wells on the owner's property and engaged in other activities on the owner's land to monitor and combat groundwater pollution from the Superfund hazardous waste site, the Stringfellow Acid Pits, located off-site but nearby. *Hendler III*, 952 F.2d at 1369, 1376, 1379. The landowner responded to the government's action with a claim of inverse condemnation. *Id.* at 1375.

In reviewing the decision of the Court of Claims, the Court of Appeals for the Federal Circuit found that a taking had occurred under traditional physical takings theory. *Id.* at 1383-84. In reaching its decision, the court directly confronted the concept of "permanent physical occupation" found in *Loretto*. *Id.* at 1375-78. The court in *Hendler III* explained:

In this context, "permanent" does not mean forever, or anything like it. A taking can be for a limited term—what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.

Id. at 1376. The *Hendler III* court also relied upon *General Motors*, saying that in *General Motors*, "the government's appropriation of the unexpired term of a warehouse lease was a taking; the fact that it was finite went to the determination of compensation rather than to the question of whether a taking had occurred." *Id.* The *Hendler III* court expressed its belief that the "temporary" versus "permanent" dispute "was not a fight over principle, but a dispute over the illogical use of a word." *Id.* at 1376-77.

The *Hendler* case made its way between the trial court and the U.S. Court of Appeals for the Federal Circuit several times (*Hendler I–Hendler VI*). Ultimately, in *Hendler VI*, the court upheld a decision of the lower court that, despite the taking, the plaintiffs were due no compensation because the special benefits derived by plaintiffs more than offset the value of the easements taken and their severance damages. See *Hendler v. United States (Hendler VI)*, 175 F.3d 1374, 1376-78, 1383 (Fed. Cir. 1999).

Likewise, in, *Skip Kirchdorfer*, the Court of Appeals for the Federal Circuit stated that "[a] 'permanent' physical occupation does not necessarily mean a taking unlimited in duration. A 'permanent' taking can have a limited term." *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (citation omitted).

107. 535 U.S. 302 (2002).

108. 538 U.S. 216 (2003).

109. *Tahoe-Sierra*, 535 U.S. at 306.

110. See *Brown*, 538 U.S. at 228-29.

111. *Id.* at 227-29.

est that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.¹¹²

This language resolves not only the permanent occupancy versus temporary invasion dispute but also confirms that the *General Motors* line of cases¹¹³ still constitutes good law and continues to enjoy the favor of the Supreme Court.¹¹⁴ It also confirms that government's appropriation of a leasehold for its use constitutes a traditional physical taking for which just compensation is required under the Fifth Amendment.¹¹⁵

The foregoing discussion reveals no impediment to the use of condemnation proceedings to create a leasehold in any situation in which eminent domain is allowable. Accordingly, condemnation proceedings could be used in a situation like that in *Kelo* to create a leasehold in a private party if enabling legislation has been enacted and there are legislative findings establishing some public benefit. Thus, government could condemn a leasehold in the New London property owners' land, in either the form of a long-term ground lease or a standard business lease, thus placing the homeowners and the private party tenants in a relationship of landlord and tenant. This outcome, although troubling, is not beyond comprehension; footnotes 4 and 6 in the Supreme Court's opinion note

112. *Tahoe-Sierra*, 535 U.S. at 322 (citations omitted); see also *Brown*, 538 U.S. at 233. Consider the *Tahoe-Sierra* Court's use of the phrase "public purpose" instead of "public use" in connection with the discussion of *Kelo*, *supra* notes 22-38 and accompanying text, as well as the implications for takings that create leaseholds, discussed *infra* Part V.

113. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

114. It is interesting to note the frequency with which the *General Motors* line of cases has been cited in recent years. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *Brown*, 538 U.S. at 233; *Tahoe-Sierra*, 535 U.S. at 322.

115. Thus, there is ample support for the conclusory statements of legal scholars that temporary takings constitute valid takings for which the Fifth Amendment requires compensation, without the necessity of wartime or other exigencies. Professors Dana and Merrill recognize takings that are "less than total in terms of time as well as space." *DANA & MERRILL*, *supra* note 7, at 183. They state their summary conclusion, and then immediately proceed to discuss how the concept has been used in recent case law on regulatory takings. *Id.* at 183-85. Meltz, Merriam, and Frank explain that "[b]oth physical and regulatory takings can be permanent or temporary, partial or complete." *MELTZ, MERRIAM & FRANK*, *supra* note 7, at 124. Professor Stoebuck mentions leaseholds within a list of various types of interests an owner might transfer to a private party and which could therefore constitute "property" in eminent domain. Stoebuck, *supra* note 7, at 605. Likewise, *Nichols on Eminent Domain* extensively discusses the *General Motors* line of cases in its treatment of temporary easements. See 9 *ROHAN & RESKIN*, *supra* note 53, § 32.03. Because that treatise recognizes temporary physical takings of a term for years and uses them as guidance in the well-accepted realm of temporary easements, I would argue that the acceptance of temporary easements as Fifth Amendment takings within American jurisprudence further validates takings of a term for years for more generalized use.

that negotiations for a long-term ground lease between private developers and the government were ongoing.¹¹⁶ The only difference is that the taking of a leasehold would place the homeowners in the role of landlord, and the terms would not be negotiated as in a typical lease but would be imposed and then compensated in the form of just compensation.¹¹⁷

Having concluded not only that the *General Motors* line of cases constitutes precedent of continuing viability¹¹⁸ but also that creation of a leasehold through condemnation proceedings appears to be a fundamentally sound legal concept under takings jurisprudence, it is appropriate to inquire as to the circumstances in which government *ought* to establish a leasehold through condemnation proceedings.

IV. CIRCUMSTANCES IN WHICH GOVERNMENT SHOULD CREATE A LEASEHOLD THROUGH CONDEMNATION PROCEEDINGS

The question of whether and to what extent government *should* engage in condemnation proceedings to create leaseholds is a more complex and intriguing question than whether or not government *can* engage in such takings. Governments frequently acquire fee simple title to land in permanent and partial physical takings.¹¹⁹ They regularly take temporary easements for construction staging areas and similar temporary uses during construction of roadways and other public improvements.¹²⁰ Governments regularly eliminate leaseholds when they take the fee simple interest in the land that is subject to the lease.¹²¹ There are circumstances, albeit limited, in which government should utilize condemnation pro-

116. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660-61 nn.4, 6 (2005).

117. In circumstances in which an assemblage of land is needed for the private lessee, it is also conceivable that government would undertake an assemblage by condemnation proceedings to create a leasehold in each of the needed parcels, then sublease to the private party end user. If the coerced leases impose affirmative duties on the condemnees/lessors, the complications inherent in this situation quickly become unworkable. Can you imagine the burden on multiple, private, involuntary landlords of complying with the demands of their unwanted, powerful, corporate, private lessee?

118. See *supra* notes 113-14 and accompanying text.

119. Sometimes the land taken in fee simple was encumbered by a leasehold, easement, or other encumbrance; in these instances, the government's taking would also take (i.e., eliminate) the leasehold, easement, or other encumbrance. See *supra* notes 3-6 and accompanying text. This is a very common occurrence in takings law. See *supra* note 3 and accompanying text. This Article, by contrast, and the policy discussion in Part V pertain to the use of condemnation to *create* a leasehold with the condemnor, or a private party designated by the condemnor, as the lessee, and the condemnee as the lessor.

120. In the case of a temporary easement, the government is acquiring a less than fee interest having certain characteristics in common with a leasehold. Cf. John D. Echeverria, *Regulating Versus Paying Landowners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 7 (2005).

121. See *supra* notes 3-6 and accompanying text.

ceedings under its power of eminent domain in order to create a leasehold.

One obvious circumstance in which condemnation proceedings are appropriate for creation of a leasehold is when a prospective landlord engages in monopolistic behavior believing that he or she can obtain a grossly excessive rental rate because the prospective government tenant has no satisfactory alternative and is thought to have deep pockets.¹²²

A major argument in favor of establishing a leasehold through condemnation, aside from the fact that it is purely an extension of eminent domain theory in general, is that leasing, rather than purchasing real property, may result in more prudent use of taxpayers' funds, especially in times when governments find themselves short of cash and facing budgetary constraints. There are instances in which government needs immediate, short-term occupancy, especially when facilities are needed to respond to a particular temporary situation or for community outreach programs. Those programs are often of limited duration based on the community's needs. For example, job retraining due to the sudden closure of a major regional employer, such as that described in the introduction to this Article, is no longer necessary once dislocated employees find other work.¹²³ In other instances, the need is of limited duration because the funding or sponsor for the program, often the state or federal government, provides funding or program requirements based on a limited time frame.¹²⁴ Alternatively, there may be temporary needs during the construction or reconstruction of government-owned facilities such as the college example provided at the beginning of the Article. Obviously,

122. I discuss this monopolistic behavior phenomena in connection with public colleges' and universities' efforts to purchase land in fee simple for college expansion and discuss various alternatives, including exercise of eminent domain, in order to deal with land speculation practices in the vicinity of growing public institutions of higher education. In doing so, I focus on the statutory and regulatory environment of Florida. However, the concepts are applicable on a more general basis. See generally Carol L. Zeiner, *Monetary and Regulatory Hobbling: The Acquisition of Real Property by Public Institutions of Higher Education in Florida*, 12 U. MIAMI BUS. L. REV. 103 (2004).

123. Similarly, government may have only a temporary need for facilities to provide short-term (hopefully) disaster relief efforts following natural disasters. In such situations, extended negotiations with a prospective landlord could delay the delivery of services for which there is immediate need. Brief negotiations followed by quick take condemnation if allowed by state law, see, e.g., FLA. STAT. ANN. § 1013.25 (West 2004), used in conjunction with the quick take process, such as that provided in chapter 74 of the Florida Statutes, may prove to be the most expeditious means for government to obtain possession of facilities needed immediately for relief services. See *id.* §§ 74.101-.111 (West 2004 & Supp. 2007).

124. Such a situation could easily arise under a federal grant to a public community college or other public entity pursuant to which the public body will provide certain services at various locations for the duration of the grant. Space is needed to perform the terms of the grant; however, leasing is the most viable alternative because the need for the space will end with the conclusion of the grant.

leasing will involve a smaller outlay of cash¹²⁵ than would a purchase.¹²⁶ Leasing also eliminates the carrying costs¹²⁷ that will be incurred by government in connection with owning real property beyond the time that it is needed, as well as the expense and possible political fallout of disposing of government-owned property once the need ends.¹²⁸ Moreover, and of particular constitutional significance, the taking of a leasehold in appropriate circumstances is more consistent with constitutional concerns than is the taking a fee simple under such circumstances. Government should not take more property than it needs.¹²⁹ Likewise, government should not take a greater interest in property than it needs.¹³⁰ Obviously, however, before seeking to establish a leasehold through condemnation proceedings, the prospective governmental lessee must determine that its needs are of finite duration and government must do a reasonable job of determining how long the leasehold will be required.¹³¹ Although leasehold

125. The courts may require the payment to be made at one time at the initiation of the leasehold. However, there may be circumstances in which periodic payments are appropriate, such as payments for repeated extensions of the term.

126. This assumes a short-term lease rather than a long term ground lease, which is analogous in many ways to an outright purchase of the fee. The long-term ground lease is a technique frequently used by developers of commercial real estate projects. *See infra* notes 175-77 and accompanying text.

127. Here, I am referring to the ongoing financial outlay necessary to maintain and secure owned property regardless of whether it is in use. If the purchase was financed by bonds, there will be a continuing obligation of bond service, *see, e.g.*, *Rankin v. City of Fort Smith*, 990 S.W.2d 535, 536, 538 (Ark. 1999), regardless of whether the property is in use, as well as reduction in bonding capacity. Moreover, if the government were to dispose of the property and the condemnee no longer wanted it, there would be expenses of disposition, not to mention public skepticism of the government's wisdom in having condemned a fee simple in the first place.

128. The property may have been previously taken in fee simple by condemnation from an obviously unwilling seller, perhaps someone who lived on the property for most of her life and who, by the time the government need ends, has resolved the emotional loss and has settled into a new abode and lifestyle, only to be faced anew with emotional upheaval. Moreover, if government sells the land, the time of government employees, and therefore taxpayers' money, will be expended in the advertising and bidding process that is an inherent part of government dispositions of land. If we, as a nation, are truly interested in reducing the size and cost of government, we must take into account, as part of the transaction costs, the employee time that could be devoted to another task.

129. If government has no use for the property it is taking, the element of public use is absent, and the taking should not be allowed. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *see also* FLA. STAT. ANN. § 127.01(2) (West Supp. 2007) (requiring a "showing [of] reasonable necessity for parks, playgrounds, recreational centers, or other recreational purposes").

130. *See Preseault v. United States*, 100 F.3d 1525, 1535 (Fed. Cir. 1996). On the other hand, *General Motors* points out that government should not so carve up the ownership of the property such that it takes only those "chips" that it wants, leaving the landowner with the remaining chips that are worthless. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945).

131. *See, e.g., Gen. Motors*, 323 U.S. at 381.

extensions or rights of termination are possible,¹³² the costs of additional condemnation proceedings to obtain an extension or a right to terminate that was not sought in the original proceedings would not be an efficient use of public funds. Moreover, government must attempt to obtain reasonably suitable premises through a voluntary landlord-tenant relationship.¹³³ It is my position that government should not resort to condemnation proceedings unless no suitable alternate location for which a lease can be negotiated is available and government has exhausted all reasonable possibilities for a timely bargained-for exchange.¹³⁴

As will become evident in the discussion in Part V, I urge that condemnation to create a leasehold is appropriate only if government itself, or a private party acting as an agent of government to perform duties normally performed by government, occupies the premises. Leaseholds should not be established by condemnation for transfer to private parties for private use in *Kelo*-type transfers.

Both of the circumstances described in the introduction to this Article are appropriate instances for the use of condemnation proceedings to create a leasehold. In the first fact pattern, the college is not using an involuntary leasehold imposed by condemnation proceedings as an alternative to prudent planning. The need is an important, time-sensitive duty of government. The public entity will occupy the premises itself. The prerequisite attempts to find an alternate solution and to obtain premises by negotiation have failed. A clear, short-term need is present.

In the second fact pattern, government is responding to a sudden development: the bankruptcy and closure of a major local employer. The situation is unexpected, the need is immediate, short-term, and important; government will occupy the premises to provide a significant government service. There is no suitable alternate location, and negotiations have failed.

132. See *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 375 n.8 (1946).

133. Not only does this make sense from the perspective of fiscally responsible behavior but it is sometimes required by statute. See, e.g., FLA. STAT. ANN. §§ 73.015(1), 1013.25 (West 2004).

134. I come to this conclusion because of the serious problems that can be generated by condemnation proceedings to establish a leasehold, because of the injury such takings occasion on the individual autonomy of the condemnee, and because of the economic cost of condemnation proceedings. See *infra* Part V. Although the number of instances in which a leasehold to be established through condemnation is the best solution for government ought to be comparatively few in number, it is likely that many of those occasions will arise because the premises are needed immediately. This will necessitate government's use of quick take condemnation proceedings in which government will be unable to terminate the proceedings if the measurement of just compensation is too high. See, e.g., FLA. STAT. ANN. § 74.031 (West 2004). Thus, government should treat the cost of condemnation as a disincentive.

Although I contend that each of these situations is appropriate for the use of condemnation proceedings to establish the badly needed government leasehold, each situation nevertheless creates significant problems for the condemnee. Although it might be comparatively simple to calculate the rent, level of services, and common area expenses under the first fact pattern because the college is already a tenant in the building, there likely are reasons, other than mean-spiritedness, that motivated the college's landlord to refuse to extend the college's lease.¹³⁵ Perhaps it was the fact that students congregate and socialize in common areas, generate greater wear and tear on a building due to the sheer number of individuals using the premises, and impose greater demands on elevators, restrooms, parking, cleaning, and security than would the lower number of persons who would occupy the space under a typical office space lease. Moreover, it is well-known that parking is a perennial problem in the college setting. Perhaps the landlord made a strategic business decision to change the character of the building and had attracted new, traditional, office tenants on the strength of the fact that the college's lease was expiring and that the unconventional use of the office building would cease.

In the second situation described in the introduction, the terms of the lease (i.e., the types and level of services to be provided by the condemnee lessor) are unknown. Moreover, the entire business plan of the shopping center, and likely its income, as well as that of other tenants, will be adversely impacted for the next three years, and likely beyond.¹³⁶ While tenant leases typically contain provisions dealing with partial condemnation of the property, the government leasehold may still precipitate the breach of the landlord's covenants such as tenant mix and use of the shopping center. Unlike a partial taking in fee simple, in which the changes are permanent and the various parties impacted can readjust their respective positions and seek permanent solutions, the government leasehold is temporary, greatly complicating the situation among all affected parties.

135. Aside from the fact that the hypothetical expressly states that the landlord "will not extend lease on any terms," it is likely that a prudent governmental entity would offer an increased rent prior to initiating costly and adversarial eminent domain proceedings.

136. I specifically point out that the reduction in income may extend beyond the duration of the leasehold because consumer attitudes and habits are important aspects of the retail business. If customers stop coming to the condemnee's shopping center because parking is unavailable due to the government usage, or because the remaining retail areas in the shopping center have too few customers (because too much of the parking is occupied by government customers) to generate the festive, convivial atmosphere that is typically present at a popular shopping destination, those customers will go elsewhere and develop other shopping habits. Once they have found another preferred destination, it will be difficult to attract them to return to the condemnee's shopping center when the government leasehold expires.

Thus, the government's taking of a leasehold generates problems even in these two straightforward examples of situations in which the appropriateness of creating a leasehold is unambiguous. The next part of this Article shows that the problems can go far beyond those mentioned above. It also recommends solutions.

V. CONDEMNATION PROCEEDINGS THAT ESTABLISH LEASEHOLDS: PROBLEMS AND SOLUTIONS

A. Introduction

Despite the existence of circumstances in which the use of condemnation proceedings to establish a government leasehold is the best solution to an important need,¹³⁷ the use of eminent domain for such purposes is fraught with objections, complications, and serious concerns. The problems are both practical and philosophical. Some are unique to the use of condemnation proceedings to establish leaseholds. Others are identical to those that have been expressed in connection with eminent domain in general; however, they take on heightened importance with respect to takings to create leaseholds because of the special circumstances involved. The magnitude and severity of these concerns lead to the conclusion that, as a matter of public policy, government should engage in such takings *only in certain limited circumstances*. Therefore, the law ought to be altered to narrow the circumstances in which takings to establish leaseholds are permissible and also cost-effective for government. This section explores the objections, concerns, and possible solutions.

B. Practical and Economic Objections

1. Leasing Is More Costly over the Long Term

Among the objections to the use of condemnation to obtain a leasehold is the argument that leasing is more expensive in the long term as compared to purchasing, because leasing involves a landlord who seeks to make a profit from leasing.¹³⁸ While it is true that landlords typically enter into the enterprise of leasing real property in order to make a profit, the question of whether leasing or buying is more prudent turns on the

137. See discussion *supra* Part III (establishing the legality of such action when analyzed solely on legal principles); see also discussion *supra* Part IV (describing the recommended parameters of when government ought to establish a leasehold through eminent domain).

138. This argument arises because market value rental, which generally arises in the context of business enterprise undertaken for profit, is the most common measure of just compensation for a temporary taking. See *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

economics of the particular situation.¹³⁹ Basically, the shorter the duration, the less the amount of taxpayers' money that must be dedicated to the particular transaction. If government has done a good job of determining that its needs are of finite duration and it has done a reasonable job of estimating that duration, including contingencies, leasing can be more cost-conscious, especially if the need is clearly short term.

2. Government Needs Never End; Government Cannot Accurately Determine Its Short-Term Needs

Another argument that may be raised is that once government acquires use of real property, its needs never end,¹⁴⁰ and that by acquiring a leasehold, government is merely delaying the inevitable and will eventually have to purchase the property at a subsequent date when its price has appreciated.¹⁴¹ In response to this argument, first, I am not suggesting that establishing a leasehold through condemnation is appropriate in every instance;¹⁴² nor should governments forego acquisitions of fee simple interests in favor of condemning leaseholds where acquisition of a fee simple is the best solution to a particular government need. The fact that this option is not suitable in many situations should not be determinative of whether it is available for use in a different, more appropriate situation. Even if there are comparatively few occasions in which condemning a leasehold is appropriate, I contend that governments should use this alternative when it is the best solution for specific government needs. Government should include consideration of condemning a leasehold when it examines the various alternatives available in any given situation. Second, I would respond that government *is* capable of calculating the duration of short-term projects. However, the estimates cannot be politically expedient projections or made without careful consideration of all the variables.

139. Typically, government does not pay income taxes; thus, the issue of deductibility of rent payments and similar income tax issues are not among the issues to be considered.

140. This position, possibly a little jaded, reflects a viewpoint that government is an ever-expanding entity incapable of controlling itself. Unfortunately, government behaves in this manner often enough to create an arguable basis for the viewpoint.

141. Another variation of this argument is that government projects tend to take so much longer (and cost so much more) than originally projected (for an example from the realm of government construction projects, consider the infamous Boston tunnel project) that the government will either have to buy the property because its needs were actually permanent, or nearly so, or the government will have to extend the leasehold, possibly incurring the expense of another condemnation proceeding.

142. Quite to the contrary, I refer the reader to the special limitations described in Part V of this Article. See discussion *infra* Part V.C.3.

3. Irresponsible Planning

An especially important concern is that the availability of condemnation proceedings to create leaseholds will promote government slothfulness and irresponsible planning¹⁴³ because government can rely on eminent domain proceedings as a quick fix rather than engaging in careful, timely planning to accomplish a permanent solution to a need for facilities. I do not believe that this is currently a problem. Unfortunately, I believe that it is not currently a problem merely because the idea of using eminent domain to acquire a leasehold is not typically one of the alternatives that comes to the attention of government. Under current law, the technique could become fertile ground for government abuse.¹⁴⁴ As will become evident in Part V of this Article, it is my recommendation that the availability of leaseholds created through condemnation be limited. Although my recommendations will tend to curb abuse, the possibility of slothful government is not my primary reason for the recommended limitations. Unfortunately, even if the recommended limitations are adopted, fiscally wasteful behavior will still be possible, even if it is limited. Nonetheless, this is not an appropriate reason to forbid the creation of leaseholds by eminent domain in appropriate circumstances.¹⁴⁵

143. Evaluation of this possible concern was suggested by higher education scholar Professor Michael Olivas whose extensive understanding of various government processes and helpful comments on an earlier draft of this Article improved the final work product.

144. This is especially true where government has quick take eminent domain statutes available. A quick take eminent domain process enables government to immediately condemn and take possession of property with just compensation to be determined at a later date. See FLA. STAT. ANN. §§ 74.01-111 (West 2004 & Supp. 2007). Thus, slothful governmental officials guilty of poor planning through their failure to formulate an appropriate solution to a long-term need for facilities could escape the initial consequences of a facilities dilemma of their own creation by engaging in brief negotiations with a landlord followed by quick take eminent domain proceedings if those negotiations, possibly heavy-handed, are not successful. Once government has engaged in quick take eminent domain, government *must* pay whatever compensation is set at the ultimate end of the judicial proceedings. See *id.* § 74.031 (West 2004). By comparison, depending on the wording of the jurisdiction's regular eminent domain statutes (sometimes referred to as a "slow take" process when being compared to quick take statutes), government can decline to complete the taking if the compensation is too high. Cf. *id.* §§ 74.01-111 (West 2004 & Supp. 2007). Having foregone that precaution, slothful government officials could be wasteful with taxpayers' money. The longer the leasehold, the greater the expense and possible waste, yet the more likely that these particular wasteful officials could complete their terms of office before the fiscal consequences of their slothfulness become apparent to the public.

145. The limitations I recommend will thwart some instances of abuse because an inept, disingenuous government would not be able to impose a private lessee on the condemnee/lessor; but, unfortunately, inept government is always a possibility. Moreover, elimination of all leaseholds established by condemnation will not prevent poor government planning. Government would merely enter into consensual leases at exorbitant rates or enter into far more costly permanent physical takings. Thus, this is not a good reason to totally eliminate condemnation to create leaseholds. The best solution to government waste is transparent governmental affairs and vigilant voters.

4. *The Exception Might Swallow the Typical; Practical Hardships for Property Owners*

Another concern that is particular to condemnations that create leaseholds is that government might rely on takings creating leaseholds and discontinue takings of fee simple interests, thus swallowing what presently is the typical situation within the exception, to the detriment of property owners. Far from swallowing the more common taking of a fee simple, physical takings that create leaseholds through condemnation proceedings appear so rare that very little is written about them. This, however, does not eliminate the possibility that if establishment of leaseholds through condemnation proceedings becomes popular, unique challenges will be presented. Some of these challenges will be quite serious. For instance, the property owner can have a reversion but possess insufficient funds to acquire replacement property. Another possible complication is that under some circumstances, it might be difficult to ameliorate the loss of occupancy and usage of one's property through the leasing of a temporary replacement site.¹⁴⁶

One could argue that government's taking of a leasehold is, in some respects, less of an invasion of the condemnee's property rights than taking a fee simple because in the leasehold situation, the condemnee retains the reversion and, at the end of the lease term, will regain the possessory interest in the fee.

This, however, can be a two-edged sword. In one respect, the condemnee's rights in property are respected because the condemnee continues to own the fee and will regain full control of the property at the end of the leasehold. The shorter the taking, the more the statement in the preceding paragraph will be true. However, the finite duration of the taking also impacts the condemnee's flexibility in obtaining replacement property for the duration of the taking. If the government leasehold includes rights to extend or terminate its leasehold¹⁴⁷ and the condemnee plans to return to the property when the temporary taking ends, the condemnee may need to negotiate similar terms in its acquisition of an interest in other property, often a leasehold, to serve as the condemnee's home or business for the duration of the taking. While the government can dictate the durational terms of the taking, the condemnee does not

146. A solution to the economic aspect of these problems is discussed *infra* Part V.B.5. Although these problems seem at first glance to be economic, they also foreshadow the philosophical concerns discussed *infra* Part V.C.

147. Looking at government need as a former attorney for a political subdivision, I would generally recommend that the government taking include rights of early termination and rights to extend the duration of the leasehold so that the government can meet unexpected circumstances, like construction delays caused by hurricanes, strikes, late delivery of materials, or unanticipated site conditions, without having to incur the expense of further condemnation proceedings.

have such power and must negotiate such terms with its temporary landlord. The condemnee's landlord can impose additional charges for these terms.¹⁴⁸

5. More Practical/Economic Issues and a Solution: The Measurement of Just Compensation

Some critics might utilize these realities to argue that the creation of a leasehold through condemnation proceedings should not be allowed. The response to such an objection is that some of these difficulties are inherent in eminent domain in general; the temporary right to the use and occupancy of real property is merely another type of interest in property that is subject to the eminent domain power of government as limited by the Takings Clause.¹⁴⁹ As currently formulated, just compensation is not intended to cover every loss that a condemnee may suffer.¹⁵⁰ However, the unique losses attributable to temporary physical takings through condemnation proceedings can be addressed to a large extent via adjustments to the measurement of just compensation for such takings.¹⁵¹ In fact, the Court's precedents for temporary physical takings provide likely solutions for the particular problems previously mentioned in leasehold situations. In *General Motors*, the condemnee was a long-term tenant; the United States was, by virtue of its taking, creating a sublease.¹⁵² The Court found that the value of the government's occupancy, and therefore the just compensation to be paid to the condemnee, was "the market rental value of such [property interest] by the long-term ten-

148. It is more likely than not that such additional charges will be imposed. They may appear as separate costs to the condemnee lessee or factors in the calculation of rent because the temporary landlord's stream of income and its ability to plan for the future will be impacted by the condemnee lessee's early termination or extension of the lease.

149. See discussion *supra* Part III. In addition, it should be noted that in takings of a fee simple interest, the government typically does not pay losses to the condemnee's business or other consequential damages, unless the enabling legislation so requires (some do, but this is a matter of legislative decision rather than constitutional obligation). See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949); *United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945). In such situations, the condemnee may not be made whole. It has been said that just compensation is the means of spreading the loss among all citizens so that one property owner does not bear a disproportional share of the cost of government. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also Stoebeck, *supra* note 7, at 587; William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

150. See sources cited *supra* note 149.

151. I reiterate that neither the elimination of the condemnation of leaseholds nor changes in the calculation of just compensation will prevent inept government. See *supra* note 145. The changes in the calculation of just compensation that I recommend will serve as a disincentive for too frequent reliance on the condemnation of leaseholds and will help to ameliorate some of the special harms that can accrue to property owners whose real property is subject to condemnation that creates a leasehold.

152. *Gen. Motors*, 323 U.S. at 374-75.

ant to the temporary occupier.”¹⁵³ Accordingly, the reasonable cost of removing the condemnee’s property stored on the premises and preparing the space for occupancy by the subtenant¹⁵⁴ should be considered “not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building.”¹⁵⁵ Although it can be argued that *General Motors* involved a government sublease from a long-term tenant and is therefore distinguishable from situations in which the condemnee is the owner of the fee, I believe the better position is that such elements are valid components in the determination of market value when a leasehold is carved from the fee through eminent domain in order to avoid the problem identified by the Court in *General Motors*. In *General Motors*, the Court recognized that if government could

by the form of its proceeding chop[a condemnee’s fee simple] into bits, of which it takes only what it wants . . . leav[ing] him holding the remainder, which may then be altogether useless to him, refusing to pay more than the “market rental value” for the use of the chips so cut off . . . [it could defeat] the “just compensation” [that] the Fifth Amendment contemplates.¹⁵⁶

While elaboration on the intricacies of just compensation for leaseholds created by condemnation proceedings is beyond the scope of this Article, the general approach can be outlined here. A fee owner who must vacate space that he needs, and is then using, in order to make that space available to a short-term tenant would take the cost of temporary replacement space into consideration when setting the rent for the space to be vacated. Thus, analogous to the reasoning in *General Motors*, the reasonable cost of such arrangements should be considered in determining the fair market price.¹⁵⁷ This will, in most instances, eliminate the problem referred to above in which the condemnee might have a reversion, but insufficient funds to acquire appropriate temporary replacement property. It will likewise address the problem in which the condemnee might have to pay a higher rent to negotiate terms in his replacement lease that will dovetail with those in the government’s taking.¹⁵⁸

Kimball Laundry provides an avenue to address the loss of goodwill that can accompany the condemnee’s loss of a business location for the

153. *Id.* at 382. “[M]arket value” is the usual measure of just compensation under the Fifth Amendment. *See id.* at 379.

154. These costs, the Court said, “would include labor, materials, and transportation,” and “might also include the storage of goods against their sale or the cost of their return to the leased premises.” *Id.* at 383.

155. *Id.*

156. *Id.* at 382.

157. *Id.* at 383.

158. *See supra* note 148 and accompanying text.

duration of the temporary taking. In *Kimball Laundry*, the Court noted that while the loss of business goodwill is not typically compensated when a fee simple interest is taken, it was nonetheless appropriate to compensate the condemnee for the loss of "trade routes," the equivalent of business goodwill in the laundry business, that occurred by virtue of the temporary taking.¹⁵⁹ The Court explained that goodwill is not compensated when a fee simple is taken because the condemnee can establish a new permanent location from which to operate its business.¹⁶⁰ However, in *Kimball Laundry's* situation, goodwill was recoverable, if proven on remand, because of the temporary nature of the taking.¹⁶¹ While it can be argued that the condemnee in *Kimball Laundry* was compensated because the government's taking of its laundry business put the condemnee out of business for the duration of the temporary taking, one can also argue quite convincingly that a temporary taking of a location to which goodwill is associated cannot be remedied in the same way as a permanent taking because the condemnee may not be in a position to establish a new permanent site to which its goodwill can be attached and reestablished because the situation is merely temporary. Moreover, the business owner condemnee will most likely incur business disruption and loss of goodwill associated with its return to its original site at the end of the term of the leasehold. Although it is arguable that the condemnee could establish a new permanent location rather than returning, this is highly unlikely because the compensation for a short-term taking will not be sufficient to permit acquisition of a new permanent site in fee. Thus, these are damages particular to a temporary physical taking that ought to be compensated as an additional element of just compensation under reasoning similar to that in *Kimball Laundry*.¹⁶²

Thus, many practical objections to the creation of a leasehold in government through eminent domain proceedings can be addressed through the measurement of just compensation, and objections such as those described above are not valid reasons to prohibit the establishment of a leasehold in government through condemnation proceedings. Rather, they are arguments that suggest that takings to create leaseholds have special features meriting special solutions that can be derived from

159. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9, 16 (1949).

160. *Id.* at 11-12.

161. *Id.* at 14-16.

162. It should be noted that in a case in which the condemnee relocates and operates from a temporary location, the amount payable for the consequent reduction in the value of goodwill may be less than the amount compensable when the condemnee is put entirely out of business for the duration of the temporary taking as was the situation in *Kimball Laundry*. See *id.* at 3.

changes in the law concerning the measurement of just compensation.¹⁶³ At this juncture, it is important to point out that just compensation, even if modified as I have suggested thus far, will not fully compensate a condemnee for its economic losses.¹⁶⁴ In addition, there will be losses, which although theoretically recoverable, might not be recoverable in specific instances because they are speculative. Moreover, just compensation as presently configured in eminent domain does not reimburse the personal losses that relate to the subjective value to the condemnee of the site taken.

There are further complications inherent in the creation of a long-term leasehold in the government condemnor. For some property owners, there will be no practical difference between a taking of a long-term leasehold and the taking of fee simple title. For example, to an elderly homeowner in her late eighties, a twenty-year lease is the equivalent of a permanent taking of her land.¹⁶⁵ A small business owner can be harmed by the loss of goodwill occasioned by loss of a valuable, well-known location for fifteen years, a duration longer than the short-term mentioned above. Given the significant duration of the taking when compared to the life of a business enterprise, does that business owner abandon the old location entirely and establish the business at a new location and begin to accumulate goodwill based on the new location?¹⁶⁶ Will the "market value" measurement of just compensation payable because of the condemnation be sufficient to pay for the new location while the condemnee continues to carry the location in which the condemnee owns the reversion? Arguably both the elderly homeowner and business owner

163. Further research and work in this area is needed. The calculation of just compensation under these circumstances is likely to produce some intriguing questions. The taking of a leasehold in part of a multi-tenant project can cause considerable "collateral damage." The exact extent to which such collateral damage should be compensated is but one of these intriguing questions. It is not unusual for scholars to recommend revisions to just compensation. See, e.g., Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 14 (2005); Merrill, *supra* note 14, at 64-66; Treanor, *supra* note 149, at 1155-56.

164. Rather, the result will be in keeping with the principle enunciated in *Armstrong* that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Moreover, economic damages, such as damage to goodwill or profits can be difficult to establish.

165. Thus, perhaps it is necessary to consider a further adjustment to just compensation to include demoralization costs in takings to create a leasehold. Such an adjustment would ameliorate the "fiscal illusion" under which condemnors tend to operate. See Talley, *supra* note 28, at 766-67.

166. Perhaps just compensation should be adjusted for loss of goodwill in such circumstances. See *id.* at 766-68.

can sell the fee simple subject to the leasehold,¹⁶⁷ or sell the reversion.¹⁶⁸ In the first instance, the amount to be realized from such a sale depends on the value of the income stream and reversion; in the second, it depends on the value of the reversion alone.¹⁶⁹ Thus, whether just compensation—with or without a sale of the condemnee's remaining interest in the condemned property—is sufficient to enable the homeowner or business owner to obtain suitable replacement premises depends on how just compensation is calculated. While these problems can be addressed to a significant extent through the modifications to just compensation described above, it is important that the modifications be further adjusted in light of the duration of the temporary taking.¹⁷⁰

Yet another problem arises when one considers that takings are likely to occur in economically depressed areas.¹⁷¹ The inadequacy of just com-

167. In this instance, the condemnee would sell the fee and the income stream associated with the taking.

168. This would encompass the value of the reversion without the income stream. Another problem is especially important in the case of the elderly homeowner whose accumulated appreciation in her residence is her primary asset. Our elderly homeowner may have planned to sell her home to pay for long-term care or other needs. The situation, and particularly her ability to obtain full compensation, may be greatly, and adversely, impacted.

169. The latter is the case if the landowner sells only the reversion and keeps the just compensation.

170. Discussion of adjustments to the calculation of just compensation to remedy perceived wrongs in the eminent domain of fee simple interests are not unheard of. See *supra* note 163. Professor Gillette, who is supportive of the outcome in *Kelo*, would address the critics' concerns through modifications to just compensation in takings for economic development. Gillette, *supra* note 163, at 20-21. Brett Talley, a critic of *Kelo*, recommends that we adjust to the outcome of that case by modifying just compensation to "reinvest the Just Compensation Clause with the deterrent effect originally intended, lest legislatures employ eminent domain with increased frequency and economic inefficiency." Talley, *supra* note 28, at 765. If Talley's argument with respect to takings of fee simple interests were to be extended to takings that establish leaseholds, I believe that he would suggest that the demoralization costs, such as those impacting the eighty-year-old homeowner described above, could be monetized "using the same mechanism as is currently utilized to award compensation for emotional harm in tort cases." *Id.* at 768. Talley also suggests that government be required to provide a substitute location. *Id.* Such a remedy might be particularly helpful in a taking that creates a leasehold in government. Such an adjustment alone, however, would not address loss of business goodwill; another adjustment to just compensation would be needed for this loss.

Professor Treanor, in a pre-*Kelo* article, recommended an adjustment in just compensation if the property taken represented substantially all of the condemnee's assets. See Treanor, *supra* note 149, at 1155-56. While this is an interesting suggestion, I believe that a considerable amount of work needs to be done to prevent manipulation by condemnees who are not intended to benefit from such an adjustment.

171. See, e.g., *Berman v. Parker*, 348 U.S. 26, 28-29 (1954). It should be noted, however, that the area to be taken by eminent domain in *Kelo* could not be characterized as blighted. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005). But see Marc B. Mahaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of*

pensation to property owners in economically depressed areas, in which fee simple is taken by eminent domain, is a problem of continuing concern.¹⁷² It is possible that the taking of a leasehold could exacerbate the problem.¹⁷³ These special characteristics of the establishment of a leasehold by eminent domain further justify the limitations on creation of leaseholds through condemnation that I propose in the section of this Article on philosophical concerns.¹⁷⁴

Long-term ground leases are often used by developers and others to obtain use and control of land that is, in many respects, the functional equivalent of ownership.¹⁷⁵ If government were to adopt a course of action in which it no longer takes fee simple interests but takes only long-term ground leases, what is the impact on the condemnee? I believe that under current law, government could take such action. The impact on the condemnee from a financial perspective depends on the measurement of just compensation,¹⁷⁶ and again, I recommend modifications to just compensation as described above so that the condemnee will not be placed in an untenable position. If either a traditional lease or a ground

New London, 7 VT. J. ENVTL. L. 41, 54 (2006), <http://www.vjel.org/articles.php?vols=2005-2006>.

172. See Mihaly, *supra* note 171, at 56-57 (recognizing that urban renewal projects were once nicknamed “Negro Removal” projects); see also *Kelo*, 125 S. Ct. at 2686-87 (Thomas, J., dissenting) (acknowledging that urban renewal was known as “Negro removal”). Professor Mihaly maintains that this is no longer the case for a number of reasons. While I agree that some progress has been made, I suggest that further modification is needed because redevelopment projects still disproportionately benefit the wealthy and politically influential, while those deprived of their property are those lacking wealth and influence, often minorities. An ironic aspect of *Kelo* is that the adversity seems to have reached the middle class; perhaps this, in part, explains the outcry. Professor Treanor attributes some of the success of the property rights movement to its ability to arouse the concern of the middle class by telling the stories of ordinary citizens, many of whom are middle class, who suffer staggering losses due to government regulation. Treanor, *supra* note 149, at 1161-62. The dialectic suggested by these arguments, although fascinating, is beyond the scope of this Article.

173. While an adjustment to just compensation such as requiring government to provide comparable substitute premises would assist with the economic impact, philosophical concerns still exist.

174. See discussion *infra* Part V.C.

175. See, e.g., Cohen, *supra* note 28, at 492-93. However, there would be certain tax advantages such as deductibility of the ground rent.

176. In South Florida, it is not unusual that the heirs or devisees of landowners who leased their beachfront land in the 1930s-1950s under long-term ground leases find the rent to be shockingly inadequate when compared to today’s ground lease rental rates. Interview with Anthony R. Parrish, Jr., Commercial Real Estate Broker, Miami-Dade County, Fla. (Sept. 2006). Even if rent escalation provisions are included in the calculation of just compensation (and under the status quo, there is no assurance that this will be the outcome of the condemnation proceedings or that the capitalization rate will be appropriate in calculating the present value of ground rent) this remains a distinct possibility. See discussion *infra* Part V.C. (discussing philosophical concerns).

lease is such that it approximates a permanent taking of a fee simple, can a court find that there has been a constructive taking of the fee and direct the governmental entity to provide just compensation accordingly?¹⁷⁷

The magnitude and severity of these problems suggest philosophical concerns, as well as practical and economic issues. The discussion that follows shows that policy-level solutions, as well as adjustments to the measurement of just compensation, are needed.

C. Philosophical Concerns

1. Some Philosophical Objections

Thus far, this Article has examined economic concerns, many of which can be addressed to a substantial extent through modifications to the calculation of just compensation. However, there are also philosophical, policy-level concerns that are critical in reaching an adequate solution. These philosophical concerns arise when establishment of leaseholds through condemnation proceedings are examined against the significance of the ownership of property and its fundamental role in Americans' sense of personal dignity and freedom. The involuntary nature of the relationship imposed on landowners by virtue of the taking is the primary cause of the concerns.

My expertise is in real property law and higher education law; I do not pretend expertise in constitutional law. Nevertheless, constitutional concerns are implicated, and some basic consideration of the topic is needed to highlight the philosophical issues. While I leave to experts sophisticated discussion of various views on constitutional theory applicable to eminent domain, I recognize a version of the old adage, "where there is smoke, there might well be fire." Given the level of public outcry with respect to the Court's decision in *Kelo*,¹⁷⁸ there are likely some critical, policy-level concerns that ought to be considered in connection with the creation of leaseholds through condemnation proceedings.

I begin Part V.C.1. with objections that have been expressed as to the current status of the law of eminent domain, in general, and then theorize how they might be extended to the use of condemnation proceedings to create leaseholds.

In *Property as a Human Right*,¹⁷⁹ an article grounded in natural law, Professor Levy emphasizes the importance of individual property rights to liberty and the proper functioning of democracy: "Political democracy

177. See discussion *infra* part V.C.II.

178. See *supra* note 28 and accompanying text.

179. Leonard W. Levy, *Property as a Human Right*, 5 CONST. COMMENT. 169 (1988).

cannot function without job-holding, property-owning, masterless citizens.”¹⁸⁰ Referring to the “founding generation,” he notes:

They regarded property as a basic human right, essential to one’s existence, to one’s independence, to one’s dignity as a person. Without property, real and personal, one could not enjoy life or liberty, and could not be free and independent. . . . Americans cared about property not because they were materialistic but because they cared about political freedom and personal independence. They cherished property rights as prerequisites for the pursuit of happiness, and property opened up a world of intangible values—human dignity, self-regard, self-expression, and personal fulfillment.¹⁸¹

Professor Levy argues that individual property rights are no less important today and that an individual’s rights in property constitute a fundamental human right for which he argues that the rational basis test is inappropriate.¹⁸² He asserts, “[s]trict judicial scrutiny is called for when personal rights of property are at issue.”¹⁸³ He concludes:

180. *Id.* at 175.

181. *Id.*

182. *Id.* at 183. The impetus for Professor Levy’s article was the Supreme Court’s decision in *City of New Orleans v. Dukes*. *Id.* at 169. Nancy Dukes was deprived of her right to pursue her livelihood by virtue of a local economic ordinance that banned all pushcart vendors in the French Quarter, except those operated by their owners for at least eight years. *City of New Orleans v. Dukes*, 427 U.S. 297, 298-99 (1976) (per curiam). The Court deferred to the local legislative determinations and upheld the regulation against the challenge that it violated the Equal Protection Clause, finding that the ordinance was merely an economic regulation. *See id.* at 303. Professor Levy pointed out that “[t]he government regulation need only have some rational basis as a means of achieving some police power end. If an economic right is involved, the Court never questions the reasonableness of the government’s means.” Levy, *supra* note 179, at 170. Professor Levy further argues that “[t]he rational basis test, used only when property rights are concerned and never for other rights, is inadequate.” *Id.* at 171. Professor Levy expands his propositions beyond the right to pursue a livelihood, to the individual ownership of property in general. *Id.* at 175 (stating that “[p]rivate property owned by individuals, not corporations, is the bulwark of a free society”). Professor Levy goes on to discuss eminent domain and what he described as “judicial irresponsibility” that gave way “to judicial abdication,” culminating in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Levy, *supra* note 179, at 179. (Levy’s article predated *Kelo* by years.) Levy criticizes the Court’s description in *PruneYard* of “the public right to regulate the use of property [as being] as fundamental as the right to property itself.” *Id.* at 179-80. With respect to *Midkiff*, Levy decries the Court’s equating public use with public purpose and “equating the police power with the power of eminent domain.” *Id.* at 180-81. He points out that this ultimately led the Court in *Midkiff* to allow the state to “do the very thing that Justice Paterson had said it could not do—take property from one citizen, even at a just compensation, and give it to another at that price.” *Id.* at 180.

183. Levy, *supra* note 179, at 183. It is important to understanding Professor’s Levy’s thesis to keep in mind that he focuses on the rights of *natural persons* in property. *See id.* at 169. In reaching his conclusion, Levy notes with approval language used by the Court in

No principled reason exists for the Court's refusal to ask whether a statute curtailing personal rights in property is in fact a significant means of achieving a legitimate [governmental] objective, and whether it achieves that objective without unnecessarily burdening private rights. There is no legitimate basis for perfunctory scrutiny in such cases. Property owned by people should be accorded the same constitutional respect that courts give to other civil or human rights so essential to the pursuit of happiness.¹⁸⁴

Thus, based on his conclusion that an individual's ownership of real property is as fundamental a civil and human right in the United States as the right to free speech, the right to travel, and the right to privacy,¹⁸⁵ Professor Levy contends that governmental deprivation of a natural person's real property requires strict scrutiny by the courts.¹⁸⁶

In *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*,¹⁸⁷ Professor Treanor notes that by the time the Constitution was written, non-republican, liberal political philosophy had developed among some key figures, James Madison among

a plurality decision in which the Court found a violation of due process where a woman's savings account was garnished without notice or a chance to be heard, stating that Justice Stewart observed:

"[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account

. . . That rights in property are basic civil rights has long been recognized."

Id. at 184 (alteration in original) (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)).

184. *Id.* at 184. Some of these thoughts are reflected in language of the lower courts in *Kelo*. See *Kelo v. City of New London*, 843 A.2d 500, 528-29 & n.39 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005). Given the date of Professor Levy's work, 1988, this is a long-standing debate that continues and is evident in the five-to-four outcome in *Kelo*.

185. The notion of property as a human right finds support in the international community in a number of human rights agreements, among them the aspirational documents adopted by the United Nations General Assembly in 1948, the Universal Declaration of Human Rights, at Article 17 thereof. See Universal Declaration of Human Rights art. 17, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

186. Levy, *supra* note 179, at 183. The current level of scrutiny is much like the rational basis test used in economic regulations; the test currently used in takings cases is that "the legislature's purpose is legitimate and its means are not irrational." *Kelo*, 125 S. Ct. at 2667 (quoting *Midkiff*, 467 U.S. at 242). In other words, a taking meets the public use standard provided "it is 'rationally related to a conceivable public purpose.'" *Id.* at 2669 (Kennedy, J., concurring) (quoting *Midkiff*, 467 U.S. at 241). Justice Kennedy concedes that the standard of review of public use in Fifth Amendment takings cases "echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses." *Id.*

187. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

them.¹⁸⁸ The development was based in part on growing distrust of legislatures because of their demonstrated misuse of power.¹⁸⁹ Treanor observes that “[n]on-republicans had a more expansive view than republicans of which rights could not be undermined by the state. They sought to create a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference.”¹⁹⁰ While there is little legislative history on the Takings Clause of the Fifth Amendment,¹⁹¹ Professor Treanor asserts that Madison intended the Just Compensation Clause of the Fifth Amendment “to have broad moral implications as a statement of national commitment to the preservation of property rights.”¹⁹² Thus, Professor Treanor, too, arrives at the conclusion that individual property rights were intended as highly significant rights deserving of special protection under the Constitution.¹⁹³

Concern for constitutional principles, the loss of which endangers property rights and democracy, was at the heart of Justice O’Connor’s dissent in *Kelo*.¹⁹⁴ Justice O’Connor reminds us that every word in the Constitution has independent meaning.¹⁹⁵ Justice O’Connor states that “the Fifth Amendment’s language . . . impose[s] two distinct conditions on the exercise of eminent domain: ‘the taking must be for a “public use” and “just compensation” must be paid to the owner.’”¹⁹⁶ Further, Justice

188. *Id.* at 704-05.

189. *See id.* at 704. Treanor contends: “Once the state legislatures came to rule in their own right . . . social divisions that had been masked during the struggle with royal governors were exposed.” *Id.* According to Treanor, “legislatures began to take actions with . . . redistributive consequences,” such as confiscating loyalists’ land and enactments that “aided debtors at the expense of creditors.” *Id.* (concluding that “[l]oss of faith in legislatures was common”). Professor Treanor also notes that “[t]he inclusion of just compensation clauses in the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787 took place against th[e] backdrop of fear of legislatures and heightened concern for individual rights[, and c]oncern about the potential for legislative attacks on property . . . particularly . . . in Massachusetts.” *Id.* at 706.

190. *Id.* at 705 (footnote omitted).

191. DANA & MERRILL, *supra* note 7, at 10-16.

192. Treanor, *supra* note 187, at 708. Professor Treanor additionally states that “Madison did not believe property was a natural right—it depended for its existence on positive law.” *Id.* at 710.

193. *See id.* at 705; *see also* Talley, *supra* note 28, at 765.

194. *Kelo v. City of New London*, 125 S. Ct. 2655, 2672 (O’Connor, J., dissenting). It cannot be concluded, however, that the majority in this five-to-four decision sought to trample or ignore constitutional principles. Debate over the Public Use Clause has been a “hot topic” and the subject of discussion with varying levels of intensity over the years. *See, e.g.*, Merrill, *supra* note 14, at 83; Stoebuck, *supra* note 7, at 553-55.

195. *Kelo*, 125 S. Ct. at 2672 (O’Connor, J., dissenting) (citing *Wright v. United States*, 302 U.S. 583, 588 (1938)).

196. *Id.* at 2672 (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003)). As an example of the debate, Professor Stoebuck points out that grammatically, the language of the Fifth Amendment is not incapable of a broader reading, and that the language

O'Connor articulates that "the just compensation requirement spreads the cost of condemnations . . . [while t]he public use requirement . . . imposes a more basic limitation, circumscribing the very scope of the eminent domain power."¹⁹⁷

After quoting the famous language from *Calder v. Bull*,¹⁹⁸ Justice O'Connor, author of the Court's opinion in *Midkiff*, begins the dissent in *Kelo* with a disquieting pronouncement of the demise of the Public Use Clause and consequent imminent danger to the private property of those who do not possess political power.¹⁹⁹ Justice O'Connor points out that the majority opinion, having effectively eliminated the public use requirement, creates a situation in which those with political influence and power can forcibly deprive others of their private property through the unfair use of the political process.²⁰⁰ Her dissent notes that the majority opinion enables outcomes that are precisely those which the Framers, disenchanted with misuse of raw unchecked power in the colonial legislatures by those with political influence, sought to curtail.²⁰¹ Justice O'Connor states that the limitations on the exercise of eminent domain, namely, the public use and just compensation requirements "serve to protect 'the security of Property,' which Alexander Hamilton described to the Philadelphia Convention as one of the 'great obj[ects] of Gov[ernment].'"²⁰² Justice O'Connor further states, "[t]ogether they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the major-

ultimately adopted as the Fifth Amendment does not seem as strong as the language that Madison originally proposed. Stoebuck, *supra* note 7, at 591, 595.

197. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting).

198. 3 U.S. (3 Dall.) 386, 388 (1798) ("An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." (emphasis omitted)).

199. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting) ("[A]ll private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment.").

200. *Id.* at 2671, 2677.

201. *Id.* at 2677.

202. *Id.* at 2672 (alterations in original) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1934)).

ity's will."²⁰³ Justice O'Connor²⁰⁴ concludes the dissent in which Chief Justice Rehnquist, and Justices Scalia and Thomas joined, stating that "the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."²⁰⁵

In his separate dissent in *Kelo*, Justice Thomas focuses on the original meaning of the Public Use Clause.²⁰⁶ He points out that the majority opinion "has erased the Public Use Clause from our Constitution . . . [by] construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."²⁰⁷ Justice Thomas notes: "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage."²⁰⁸ The only other alter-

203. *Id.*

204. In her dissent, Justice O'Connor distinguishes *Berman v. Parker* and *Midkiff*, and clarifies her earlier statement, as author of the majority opinion in *Midkiff* about public use being equated with the police power. *Id.* at 2674-75.

205. *Id.* at 2677. I contend that "those with fewer resources" means racial and ethnic minorities, the old, the disabled and the poor. *See id.* This says something very negative about our national commitment to diversity and equality of opportunity. However, in *Kelo*, the phrase "those with fewer resources" also happens to refer to individuals within the middle class, given their weaker political influence as compared to the financial power, access to those in positions of governmental power, and means of political influence held by various industries and giant corporations. *Id.* Perhaps this explains, in part, the social outcry over *Kelo*. The middle class is now being treated with the same callous disregard as had previously been reserved for the poor, the elderly, and minorities. *See supra* note 28 and accompanying text.

Earlier in the same paragraph, Justice O'Connor had described who she meant when referring to those with more resources, namely, "those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting). Professor Levy also referred to corporations in his article. *See Levy, supra* note 179, at 175. Interestingly, Robert F. Kennedy, Jr. joins Justice O'Connor in decrying the disproportional political power of large corporations; he argues that politically influential corporations have used their power to weaken both enforcement of existing environmental regulations and the actual language of environmental regulations to enhance corporate profits at the expense of the health of ordinary citizens both today and in future generations. *See generally* Robert F. Kennedy, Jr., *Crimes Against Nature*, 18 ST. THOMAS L. REV. 693 (2006).

206. *Kelo*, 125 S. Ct. at 2677-78 (Thomas, J., dissenting). In addition, Justice Thomas also argues that the majority opinion in *Kelo* is but the most recent in a string of misguided cases that progressively deviated from the Public Use Clause's original meaning. *Id.* at 2678. Justice Thomas asserts that two lines of errant precedent converged in *Berman* and *Midkiff*. *Id.* at 2685.

207. *Id.* at 2678.

208. *Id.* Justice Thomas also quoted from the Court's opinion in *Marbury v. Madison*, where the Court stated: "It cannot be presumed that any clause in the constitution is intended to be without effect." *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)). Justice Thomas thus discredits the interpretation that is the result of the majority's opinion.

native, he explains, is that the Public Use Clause “could distinguish those takings that require compensation from those that do not. . . . This [interpretation] would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation.”²⁰⁹ Ultimately, Justice Thomas concludes that he “would revisit [the Court’s] Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.”²¹⁰ He asserts that “it is ‘imperative that the Court maintain absolute fidelity to’ the Clause’s express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally.”²¹¹

The objections of these and other scholars and jurists apply with even more force to temporary physical takings that create leaseholds through the use of condemnation proceedings. Professor Levy’s analysis would require a strict scrutiny standard of review²¹² for takings against natural persons.²¹³ One could conclude from Professor Treanor’s writings that he would seek to preserve an understanding of the Takings Clause that it constitutes very deliberate language intended to protect individuals’ private property from abusive legislative action through carefully chosen, strict limitations that require both public use and just compensation.²¹⁴ Extending the analyses of Justices Thomas and O’Connor to the establishment of a leasehold through condemnation proceedings, both would

209. *Id.* at 2678-79.

210. *Id.* at 2686. Justice Thomas closes his dissent by concluding that the “public purpose” interpretation is “deeply perverse,” favoring those with disproportionate political influence and power, and victimizing the weak, particularly the poor, the elderly, and non-white and minority communities. *Id.* at 2687.

211. *Id.* at 2678 (quoting *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in judgment)).

212. *See supra* note 183 and accompanying text. Again, it should be noted that the three justices dissenting from the decision of the Supreme Court of Connecticut “would have imposed a ‘heightened’ standard of judicial review for takings” constituting economic development. *Kelo*, 125 S. Ct. at 2661.

213. I can appreciate Professor Levy’s distinction between natural persons and artificial entities. *See supra* note 183. Also, like Justice O’Connor and Robert F. Kennedy, Jr., I lament the political power and influence of large corporate entities that is wielded at the expense of ordinary persons. *See supra* note 205. However, I also note that not all corporations are behemoths with extraordinary political influence. Many individuals choose to hold title to their land in a trust, a limited liability company, or another artificial entity for tax, probate, or liability purposes. Professor Levy’s formulation, which would exclude protection for artificial entities, misses the mark and would fail to protect many of the individuals whom Professor Levy would likely seek to protect. Thus, further refinement of Professor Levy’s formulation is needed.

214. *See supra* notes 187-93 and accompanying text.

eliminate economic development takings that create leaseholds.²¹⁵ Further, they would interpret the Public Use Clause of the Fifth Amendment to allow government to engage in takings that create a leasehold when government itself will actually use the leased property or when the public will have the right to use the leased property.²¹⁶ Based on the reasoning in her dissent, I believe that Justice O'Connor would also allow condemnation proceedings if the leasehold interest is to be transferred to one or more private parties, such as common carriers regulated by government.²¹⁷ The private parties, however, would be required to make the property available to the public for its use on a basis regulated by the government—for example, a railroad company, an electric utility company, or a stadium that provides access to all members of the public upon payment of a fee regulated or monitored by the government.²¹⁸

While the majority opinion in *Kelo* may well be the logical descendent of *Berman v. Parker*²¹⁹ and *Hawaii Housing Authority v. Midkiff*,²²⁰ and therefore, according to some commentators, breaks very little new

215. The use of leaseholds, rather than fee simple ownership, for economic development projects is not as far-fetched as it may seem initially. See *Kelo*, 125 S. Ct. at 2660 n.4 (noting that while the litigation was pending, the New London Development Corporation was negotiating a ninety-nine-year lease with a developer. Professor Mihaly also notes that the government condemnor of a fee simple interest often enters into a long-term ground lease with a private developer in redevelopment projects. See Mihaly, *supra* note 171, at 51. Accordingly, government could easily skip the step in which it takes fee simple title; economic development projects could be effectuated by takings that created long term ground leaseholds in the governmental entity, such as ninety-nine-year leases, leaving the reversion in fee simple in the individual condemnee/property owner. The government could then assign or sublease its interest in the leasehold to the new private party, thus vesting the long-term possessory interest in a private party that enjoys greater political favor, and achieving a result much like that decried by the dissenting Justices in *Kelo*. See *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting); see also *id.* at 2686-87 (Thomas, J., dissenting).

216. See *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting); see also *id.* at 2673 (O'Connor, J., dissenting).

217. *Id.* at 2673 (O'Connor, J., dissenting).

218. *Id.* She would also allow such a taking if the leasehold interest to be transferred to one or more private parties would resolve problems in which the existing use of the property was harmful to the public and such harm would be eliminated by the use of the leasehold by the private party following the taking. *Id.* at 2674. This latter situation is the means by which Justice O'Connor distinguished her opinion in *Midkiff* from the situation in *Kelo*. *Id.* at 2674-75. I do not mention it in the main text of this Article because this particular aspect of Justice O'Connor's reasoning in *Kelo* seems more appropriate to takings of a fee simple that would yield a permanent solution to the extant harm.

219. 348 U.S. 26 (1954); see also *Kelo*, 125 S. Ct. at 2663.

220. 467 U.S. 229 (1984). *Kelo* could also be seen as the logical descendent of *Pole-town Neighborhood Council v. City of Detroit*, had it not been overturned by the Supreme Court of Michigan on the basis of the requirements of the Constitution of the State of Michigan. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

ground,²²¹ it fails to take into account the significance of the ownership of real property in the United States.²²² Rather, it treats real property, owned and cherished by individuals as indicia of their freedom, as being the fungible equivalent of money.²²³ It is but an extension of a disturbing trend in which corporate power and political influence seeks to trump the rights of individual citizens.²²⁴

2. *Application to Takings that Create Leaseholds*

Having thus extended, at least theoretically, these scholars' and jurists' objections to temporary takings that create leaseholds via condemnation proceedings, it is clear that they implicate specific objections that are raised against such leaseholds. These objections involve, ultimately, the appropriate standard of constitutional review, the proper interpretation of the Public Use Clause, the proper application of checks and balances to government power, finding the means to control unfair use of the political process, and the value we place on individual autonomy.

Regardless of whether one agrees with my criticism of the majority opinion in *Kelo*, the significance of property ownership and its fundamen-

221. See Gillette, *supra* note 163, at 13; Mihaly, *supra* note 171, at 42. Regardless of the various viewpoints on the *Kelo* decision, that case serves to highlight the need for immediate change in the narrow realm of the use of eminent domain to create leaseholds.

222. Professor Mihaly admits that "Americans of most political persuasions found the majority decision [in *Kelo*] wrong-headed and oppressive." Mihaly, *supra* note 171, at 41. He characterizes, however, the "fear that government will act as an agent of private rather than public power" as a political position derived through assiduous (and perhaps insidious) effort by those on the organized political right. *Id.* at 41, 56. Professor Mihaly maintains that the outcome in *Kelo* was correct. However, he also asserts that both the majority and the dissenters, as well as the general public, have little understanding of or appreciation for modern land-use redevelopment efforts in urban settings. *Id.* at 42-43. While the public may lack comprehensive understanding of current land-use redevelopment practices, this does not mean that their fear that government officials can succumb to the political influence of the powerful is misplaced. Many examples exist; for instance, many individuals would attribute homeowner's insurance woes, health insurance coverage, and prescription coverage difficulties to the power and political influence of the insurance industry. Both Professor Mihaly and I note that the merits of current land-use practices in urban redevelopment practices are beyond the scope of our respective articles. *Id.* at 56.

223. A fundamental policy-level question arises: is it not important that social reform through land use planning not be achieved in a way that facilitates misuse of political influence?

224. See Kennedy, *supra* note 205; cf. Jaime Davids, Note, *Eldred v. Ashcroft: A Critical Analysis of the Supreme Court Decision*, 13 DEPAUL-LCA J. ART & ENT. L. 173, 175 (2003); Richard A. Epstein, *Congress's Copyright Giveaway*, WALL ST. J., Dec. 21, 1998, at A19; Laurie J. Richter, *Reproductive Freedom: Striking a Fair Balance Between Copyright and Other Intellectual Property Protections in Cartoon Characters* (Spring 2006) (unpublished manuscript, on file with *Catholic University Law Review*); Chris Sprigman, *The Mouse that Ate the Public Domain: Disney, The Copyright Extension Act, and Eldred v. Ashcroft*, FINDLAW, Mar. 5, 2002, http://www.news.findlaw.com/commentary/20020305_sprigman.html.

tal role in Americans' sense of personal dignity and freedom is highlighted when one considers that establishment of a leasehold through condemnation forces the condemnee into a continuing business relationship against his or her will. Condemnation of a fee simple is by definition an involuntary transfer. It may be upsetting and disagreeable during the proceedings; the measurement of just compensation may leave the condemnee with less or more than he or she believes is full compensation; however, it has an end. The establishment of a leasehold in the condemnee's property, by contrast, is an ongoing involuntary business relationship for the duration of the leasehold. It is therefore a continuing government intrusion and irritant, and would seem to many people to be a direct affront to one's sense of liberty. From an emotional, if not technically a constitutional, standpoint, it resonates of concerns for freedom of contract and freedom of association.²²⁵ The continuing affront has an oppressive nature to it that is likely to erode the condemnee's sense of personal dignity.

The impact of government's establishment of a leasehold through eminent domain seems particularly intrusive when the taking is of a part of a multi-tenant facility such as the office building or shopping center mentioned in the two examples at the beginning of this Article.²²⁶ Although partial temporary takings are common when government takes a part of a landowner's land for a temporary easement during construction of road improvements, an actual physical taking and operation of a part of the landowner's business premises in a shopping center or in an office building seems more surprising. Opponents to creation of government leaseholds would point out that this government action directly interferes with the condemnee's business objectives and relationships on an ongoing basis. For example, government's usage may make it impossible for the shopping center to have a tenant mix that the landlord desires or has promised to other tenants. If the government users do not frequent the other businesses in a retail shopping center, the use of parking by governmental invitees excludes shoppers and diminishes the gross revenue of the shopping center. As a consequence, the non-governmental tenants' gross revenue is reduced, and the landlord's percentage rent is diminished.²²⁷ This, in turn, adversely impacts the ultimate value of the shopping center on the real estate market.²²⁸

225. The real concern is more accurately one of individual autonomy, yet the emotional reaction is so strong that the American mind turns to its Constitution for relief.

226. Such takings amount to a partial temporary physical taking.

227. Are these non-compensable consequential losses to property owners whose property is not taken? See *Campbell v. United States*, 266 U.S. 368, 371-72 (1924).

228. In a permanent partial taking, just compensation includes the market value of the property taken plus the diminution of value to the remainder caused by the taking. 4 SACKMAN, *supra* note 3, § 12.01; Alan T. Ackerman & Noah Eliezer Yanich, *Just Com-*

Now consider the impact of the Court's interpretation of the Public Use Clause in *Kelo*.²²⁹ Under this interpretation of public use, government could engage in a *Kelo*-like taking that establishes a leasehold in a large portion of a multi-tenant commercial property, such as the most desirable space in a shopping center. Having taken the leasehold from private citizen *A*, whether *A* is the fee owner or another tenant, government could transfer the term for years to another private party, *B*, that has greater political power and influence than *A*. While forcing a landowner to do business with government through creation of a leasehold that is used and occupied by government may seem intrusive, it is unquestionable that the government has a right to take property for its own use by eminent domain. By contrast, the *Kelo*-like transfer seems especially violative of the citizen's rights both to personal autonomy and to do business or refrain from doing business with anyone he pleases, provided that the refusal is not in violation of law. In *Kelo*, as unfortunate as the impact on the citizens may have been, the taking had an end when the property owners lost their land.²³⁰ In the example provided here, the condemnee is forced into an involuntary ongoing relationship with a private party with whom it would not otherwise contract.²³¹ Moreover, when the taking is of only a part of an integrated project, the ongoing business relationship can be quite complicated and therefore confrontational on a continuing basis. In this type of project, it is likely that the landlord will be responsible for providing a number of services such as water, HVAC,

pensation and the Framers' Intent: A Constitutional Approach to Road Construction Damages in Partial Taking Cases, 77 U. DET. MERCY L. REV. 241, 241-42 (2000). One can quickly see that a myriad of considerations arise, such as loss of percentage rent and breach of covenants in leases with other tenants. This can be ameliorated to a significant extent through modifications to just compensation. However, it is also necessary to consider whether property owners and their tenants might attempt to manipulate the calculation of just compensation through their choice of language in the lease. Since the people primarily impacted by such manipulation would be the taxpayers, this is further reason for a narrowing of the circumstances in which creation of a leasehold through condemnation proceedings should be allowed. Such narrowing is discussed below in this section.

229. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2664-66 (2005).

230. *Id.* at 2668.

231. It is not unheard of that the law can force someone into a business relationship against his will. Consider, for example, the provisions of the Fair Housing Act and Civil Rights Act. Note that here, however, the involuntary business relationship that is forced upon the unwilling condemnee lacks the public policy bases that is fundamental to legislative enactments, such as the Fair Housing Act and Civil Rights Act, designed to eliminate the visages of racial and other types of invidious discrimination or other social evils. See, e.g., Katherine G. Stearns, Comment, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200, 1205-08 (1994). Here, it may simply be a matter of the wealthy and politically powerful and influential using the machinery of government to take from a citizen having lesser political influence property with which the citizen would not part on a voluntary basis in ordinary negotiations.

elevator service, parking, common area maintenance, and security. The greater the need for interaction with the lessee, the more intrusive the continuing involuntary association.²³²

It is easy to imagine all kinds of *Kelo*-like condemnations involving transfers of leasehold to a private party of the government's choosing that would appear to be an affront to liberty and a misuse of government power: (1) the creation of a government leasehold in a research facility owned by private party *A*, followed by an assignment of the leasehold to private party *B*, a powerful business with questionable business ethics that had previously engaged in industrial espionage against party *A*; or (2) the creation of a leasehold in a building owned and occupied by party *A*, a church that opposes abortion, followed by a transfer of the leasehold to private party *B* for use as an abortion clinic by *B*, a politically powerful private entity.²³³

3. A Solution

The examples above highlight the crux of the problem. The condemnees in these examples would be doing nothing illegal or even remotely wrong if they refused to lease to these parties outside the involuntary situation forced on them by the *Kelo*-like condemnation of a leasehold. These outcomes violate the cultural convention, described by Professor Treanor, that "[a] democratic government should not treat its citizens in a way that is generally thought to be unfair."²³⁴ Professor Treanor

232. The intrusion is not limited to only the lessor. Other tenants in the project will be impacted as well. Moreover, the use by *B* may cause the breach of other tenants' leases with their landlord, such as covenants regarding tenant mix and parking. Again, I point out that the legally permissible underlying motivation for the taking in a *Kelo*-type transaction can be nothing more than economic gain (supposedly economic gain or benefit to the community in general), based on "studies" commissioned by an unduly influenced government, but coincidentally having sizable "incidental" economic gain to politically powerful *B*. See *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting). This involuntary relationship has nothing to do with eliminating discrimination or protecting other fundamental rights.

233. Here, the public use requirement, as interpreted in *Kelo*, would be met if the governmental entity determined that family planning services, including abortion, would be helpful in reducing the number of poor people being born in that particular economically distressed area of the city. While such a stated purpose might technically meet the rational basis test that presently prevails based on *Kelo*, the public use is more likely to be stated less controversially, such as making family planning services available in that area of the city (without mentioning the desire to reduce the birth rate among poor people). See *id.* at 2665-66 (majority opinion). I bring this up to note that the underlying, but often unstated, public purpose of urban renewal projects may be to force out the poor so that the community becomes more "desirable" to those who are economically well-off and politically powerful.

234. Treanor, *supra* note 149, at 1156. I admit to discomfort if one were to argue for uncritical acceptance of cultural conventions to shape the law. Uncritical adherence to cultural conventions could result in majority oppression of minorities. For example, one could argue that segregation was once a cultural convention in the United States.

further asserts that violation of cultural conventions is a prime motivator of the property rights movement.²³⁵ Professor Stoebeck contends: “A private person has the inherent privilege of doing anything he has the natural capacity for, limited by regulations imposed for the protection of others.”²³⁶ By trampling this inherent privilege, the *Kelo*-like taking to create a leasehold in a private party violates the cultural convention described by Professor Treanor and damages the social contract between the people and a democratic government.²³⁷

The magnitude and severity of the problems presented by condemnations to create leaseholds are so serious as to demand a solution beyond adjustments to just compensation.²³⁸ Limitations are needed as a matter of public policy. A total prohibition on takings that create a leasehold does not make sense. As described in Part III, particularly in *United States v. General Motors Corp.* and more recent cases, a term of years is clearly an interest in property that can be the subject of a taking.²³⁹ Thus, it should be capable of being created through condemnation proceedings in appropriate circumstances. To conclude otherwise would create anomalous legal results—the law would recognize temporary regulatory takings but not temporary takings through condemnation proceedings. There could be takings of temporary easements as is commonly done for road construction projects, but there could not be a temporary taking in the nature of a leasehold. Such results would simply defy logic and would not be in keeping with constitutional principles or the large body of law governing eminent domain.²⁴⁰

Nevertheless, certain aspects of the leaseholds created through condemnation are very troubling. The most troubling aspect of this form of holding, and the one that distinguishes it from most other types of takings, is the coerced continuing relationship between the government/holder of the leasehold and the condemnee that is forced upon the condemnee for the duration of the taking. In most takings, the dealings between the condemnor and the condemnee end when the fee simple is vested in the condemnor and just compensation is paid to the con-

235. See *id.* at 1155-56.

236. Stoebeck, *supra* note 7, at 588.

237. See Treanor, *supra* note 149, at 1152-54.

238. See, e.g., Gillette, *supra* note 163, at 20-21 (recommending adjustments to just compensation for *Kelo*-type takings of fee simple interests).

239. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341-42 (2002); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993); *Hendler v. United States (Hendler III)*, 952 F.2d 1364, 1376 (Fed. Cir. 1991); *Petro v. United States*, 47 Fed. Cl. 136, 138 (2000).

240. Moreover, it could leave government without an important and legitimate means of responding to an immediate need in times of emergency.

demnee.²⁴¹ There is no coerced ongoing relationship. Even in a permanent partial taking, there is no ongoing relationship between condemnor and condemnee. In a partial taking, just compensation is measured differently than in a total permanent taking to compensate the condemnee for damage to his remaining property that is occasioned by the partial taking.²⁴² The only commonly occurring taking in which there is some ongoing relationship between condemnee and condemnor is the taking of an easement. However, in the vast majority of those instances, the easement will vest in government itself, an agent of government such as the general contractor performing road work for government, or in a private entity in the nature of a common carrier such as a utility company that provides public services to the general public and is regulated or monitored by government.²⁴³ What distinguishes the taking of a leasehold from a taking of an easement is that in most instances, the condemnee is not required to provide continuing services to the easement holder; the condemnee is merely required to refrain from interfering with the easement.²⁴⁴ When a leasehold is taken in condemnee's property, the level of services and the extent of continuing interaction between condemnee and the holder of the leasehold could be extensive, depending on the type of premises that are taken.²⁴⁵ If the premises taken are part of an integrated facility such as an office building or shopping center, the condemnee might be obligated to provide an array of services that are only typical in a consensual relationship.²⁴⁶ Each of these services would be required to be provided at a qualitative level that could be the source of dispute. Moreover, the condemnee may have to enforce compliance of the holder of the leasehold with the rules and regulations governing the tenants of

241. See *supra* note 230 and accompanying text.

242. See 4 SACKMAN, *supra* note 3, § 12.01; Ackerman & Yanich, *supra* note 228, at 241-42.

243. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

244. The condemnee may be required to allow occasional entry on the servient estate for maintenance of the easement. This is similar to the temporary partial taking in *Hendler III*, in which the government entered to do monitoring and maintain the wells, but the condemnee did not have significant ongoing interaction with the government, nor was the condemnee required to provide services to the government. See *Hendler III*, 952 F.2d at 1377.

245. If the leasehold consists of all of the condemnee's premises (for example, a lot with a free-standing building in the nature of a triple-net lease), the condemnee might have to provide few services.

246. The condemnee might well be required to provide HVAC; hot and cold running water; roof and other structural repairs; traffic control in the parking lot; grounds maintenance; common area décor, maintenance, cleaning, and repair; plumbing and electrical repairs; elevator service; security services, and other services. See note 232 and accompanying text.

the office building or shopping center.²⁴⁷ This is very different than the typical burden of an easement upon the servient property.

What limitations are appropriate? For example, one could adapt Professor Levy's proposal to require strict scrutiny review when a leasehold is created in the property of a natural person.²⁴⁸ This strict scrutiny test could be expressed in a variety of ways.²⁴⁹ Professor Levy focuses on the constitutional rights of individuals, and therefore would not require strict scrutiny if the condemnee is not a natural person.²⁵⁰ Therefore, his test would not seem to apply to a dwelling titled in a trust by an elderly person, or to "mom" and "pop," if they hold their land and small neighborhood grocery business in the name of an entity. Due to the frequency with which individuals title their real property in artificial entities,²⁵¹ even if the land is essentially for their personal use, I assert that tests differentiating between property that is titled in natural persons or artificial entities are not the best means of setting appropriate limitations on such takings.²⁵² Likewise, I believe that tests calling for differing levels of scrutiny based on whether the taking is for government use or transfer to a private

247. What is the penalty when the holder of the leasehold, whether government or a private party in a *Kelo*-like transaction, refuses to abide by the rules and regulations of the building? The condemnee landlord may not have available the remedy of termination of the lessee's leasehold as is the case in typical leases. Likely, the condemnee landlord will be subjected to the cost and inconvenience of taking legal action to seek injunctive relief as to continuing or repetitive noncompliance and damages for past harm.

248. See Levy, *supra* note 179, at 183-84. Professor Levy addresses his test to regulations curtailing individuals' rights in property in the exercise of police power under both the Commerce and Takings Clauses. He enunciates his test as follows: whether the regulation "is in fact a significant means of achieving a legitimate police power objective, and whether it achieves that objective without unnecessarily burdening private rights." *Id.* at 184; see also *supra* notes 182-86 and accompanying text.

249. One possibility is to determine whether the public is the only, or merely the primary, beneficiary of the benefit. On the basis of *Kelo*, a private party should not be the primary beneficiary. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005). In addition, under this test, the court would need to determine whether the benefit to be derived is significant to the public welfare, whether the public benefits are likely to accrue, and whether the taking achieves those public benefits without unnecessarily burdening private rights. Under such a test, the court could find that the taking to create a leasehold is or is not permissible. Or, the court could find, on a proper prayer for relief, that the government is required to take a fee simple if it goes forward with the taking. See *infra* text accompanying notes 275-77. The strict scrutiny test enunciated here is only one possibility. Because I favor a different means of imposing limitations on the creation of leaseholds through condemnation proceedings, I have not focused extensively on this test.

250. See Levy, *supra* note 179, at 183-84; see also *supra* note 183.

251. Individuals may choose to hold their property in an artificial entity for a number of reasons, such as estate planning or limitation of liability.

252. In addition to the reasons described below, the Fifth Amendment refers to "private property" and does not distinguish between property owned by a natural person versus an artificial entity. U.S. CONST. amend. V. However, Professor Levy also explains that in the era of the Framers, property tended to be owned by individuals. See Levy, *supra* note 179, at 175.

party for a private use—with some public benefit so that the (low) standards enunciated in *Kelo* would be fulfilled—are not the best means of setting appropriate limitations. In the first instance, the test would be changed if the entity holding title were to convey title to an individual. Obviously, such action would have a variety of tax and other implications. It does not make sense to condition the standards applicable to a taking under the Takings Clause of the Constitution on whether or not the owner of property is willing to be subjected to various income tax, estate planning, ad valorem tax, and general liability consequences. Likewise, a test calling for differing levels of scrutiny based on whether the taking is for government use or for transfer to a private party is unworkable. A governmental entity that could be pressured into engaging in a taking creating a leasehold based on undue political influence and favoritism likely would not find it overly burdensome to take the leasehold, purportedly for government use, and then transfer it to the private party after the passage of a certain amount of time.

Another alternative is to require strict or heightened scrutiny whenever real property is to be condemned for creation of a leasehold regardless of whether government or a private party is to be the lessee.²⁵³ In the interest of efficient judicial administration, “public use” appears to be a better touchstone for this limited type of taking, instead of developing a specific type of heightened scrutiny test.

Another possible limitation is to allow takings that create leaseholds only if exigent circumstances exist. Courts would have to determine what constitutes exigent circumstances, but I believe that this could be accomplished.²⁵⁴ Nevertheless, I would use the idea of exigency, or more properly stated, special circumstances, in a different way to address the situation.

It is my position that where the holder of the leasehold created by condemnation is neither the government itself nor an entity that directly provides public services, the continuing forced relationship between the condemnee and the lessee becomes completely untenable. This is the taking of a leasehold that I describe as being “*Kelo*-like”: a transfer to a private party, possibly a political favorite, for private use that will supposedly provide some benefit to the public based on speculative legislative find-

253. While reexamination of the appropriate level of scrutiny may be fertile ground for further examination, it may be more productive if any such inquiry did not focus on one small aspect of eminent domain. At this point in time, and in order to put controls in place before creation of leaseholds through condemnation proceedings become widespread, I prefer the approach described below that would not allow leaseholds created through condemnation proceedings to be used by private parties unless the private party was providing public services from the location.

254. Even though I encourage further study on the possible limitation of exigent circumstances, at present, I find the approach that is described in the remainder of this Article to be more workable.

ings. I suggest that the coerced continuing relationship that exists in the leasehold situation distinguishes it from the facts in the majority's decision in *Kelo* and necessitates limitations on such transfers; they ought not occur in condemnation proceedings to create a leasehold.²⁵⁵

The continuing involuntary relationship between condemnee and the holder of the leasehold that is created because of the condemnation is a sufficiently special circumstance to warrant special limitations on the basis of public policy. The limitation that I recommend is a narrowing of the public uses for which a leasehold could be created in private property. Thus, not all of the public uses as interpreted under the broad *Kelo* public purpose test would be sufficient to create a leasehold. Because of the special circumstances of the involuntary continuing relationship involved in the leasehold situation, only those uses that are truly public—namely, those in which the government itself, the public in general,²⁵⁶ or an entity that will be providing services from the leasehold premises as an agent of government—would be sufficient to allow the creation of a leasehold through condemnation proceedings. I am well aware that the complexity of the involuntary relationship could vary greatly. There could be situations in which the condemnor takes all of the condemnee's premises for the duration of the leasehold and few, if any, services would be required. On the other hand, in the case of a partial taking of an integrated project, such as space within an office building or shopping center, as described in the two examples in the introduction to this Article, the ongoing relationship, the services to be required, and the burdens upon the condemnee could be quite complex. Rather than placing courts in a position of second-guessing, possibly prospectively, what services might be needed and what extent of services would constitute an impermissible invasion of the condemnee's rights when a private party is to be the holder of the leasehold, I recommend, in the interest of predictability, that the public use simply be narrowed as I have described above for takings that create a leasehold. Such a limitation would not be difficult to administer.²⁵⁷ This

255. Regardless of one's constitutional viewpoint, the obvious problem involved in a *Kelo*-like condemnation to create a leasehold is the same.

256. Instances in which the public in general would use the leasehold would be very rare. I can think only of a park or a free public library as fitting the definition when applied to leaseholds. However, based on limitations on long-term leaseholds and ground leases that are recommended elsewhere in this Article, these circumstances would be rare. *See supra* Part IV.

257. *See supra* notes 194-24 and accompanying text. It should be noted that my proposed limitations to the Public Use Clause are not exactly like those stated by either Justice O'Connor or Justice Thomas. My approach does not include takings for transfer to private parties to address situations in which the prior use was harmful to the public, such as that described by Justice O'Connor. *See Kelo*, 125 S. Ct. at 2674-75 (O'Connor, J., dissenting). In that instance, the government should take the fee, not a leasehold. Justice Thomas would limit the meaning of public use to situations in which the government actu-

solution would relieve the court from second-guessing the wisdom of the legislature's findings of public purpose and public benefit, a concern that is expressed in Public Use Clause opinions.²⁵⁸ It would also relieve condemnees from involuntary continuing relationships with private entities engaged in private use.²⁵⁹ The only coerced continuing relationship would then be one between the condemnee and government or an entity acting as an agent of government for the purpose of providing public services. I would argue that when government, or an entity providing services in the nature of government services, is the occupant of the leasehold, the condemnee has consented to such interference with the condemnee's private rights as part of the price of government.²⁶⁰ Moreover, a continuing involuntary relationship with government already exists in eminent domain; it is a situation that frequently occurs when government takes a temporary easement in a condemnee's property.²⁶¹ Moreover, such a relationship with government was present in the *General Motors* line of

ally uses the property or the public is given the "legal right to use the property." *Id.* at 2682 (Thomas, J., dissenting). I add private entities that provide public services, because the services being provided are those that the government itself could provide. The private provider is acting as an agent of government. Essentially, I would treat the private actor providing the government services as government, based on generalized agency principles.

258. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Interestingly, the solution I suggest yields a result that is similar, although not identical, to the results that could be obtained from a heightened scrutiny test, but with much greater ease of judicial administration and predictability for government and property owners.

259. Based on agency principles, I would consider a private entity providing government services to be the equivalent of government for this purpose.

260. See Stoebuck, *supra* note 7, at 568. Stating the situation even more pragmatically, a leasehold seems less intrusive if government or an entity providing governmental services is the lessee because everyone expects to have a continuing relationship with government under a variety of governmental powers—taxation, traffic control, zoning, and the like—whether one approves or not.

261. I point out that under the Court's decision in *Kelo*, it would be permissible for government to create an easement for a private party for its private use across the land of, and against the will of, the condemnee, based on some legislative finding of attenuated public benefit. See *Kelo*, 125 S. Ct. at 2663. For example, an easement for vehicular access across the yard of a private homeowner could be condemned and transferred to Costco to relocate Costco's driveway, thus reducing traffic congestion at an intersection where Costco's present entrance is located on its own land. I do not believe that enabling private entities to purchase property that is ill-suited to its private purposes and then correcting the situation through the exercise of eminent domain is what the Framers or the cultural consensus had in mind.

cases,²⁶² which are still regarded with favor by the Court.²⁶³ In these instances, the modifications to the calculation of just compensation that are described above are sufficient.

The states are free to eliminate *Kelo*-like takings to create leaseholds under the reservation of rights that was reaffirmed in *Kelo*.²⁶⁴ The federal courts could establish this limitation on public policy grounds; to do otherwise would force these condemnees to bear a greatly disproportional burden—that of continuing intrusion—in violation of the principle enunciated in *Armstrong v. United States*.²⁶⁵ Interestingly, other commentators have already laid the groundwork for such a result through their work on other aspects of eminent domain. Professor Treanor asserts that cultural conventions and their influence on what constitutes undue burden under the *Armstrong* principle have a place in shaping the law of eminent domain.²⁶⁶ In his 1972 work, *A General Theory of Eminent Domain*, Professor Stoebuck asks as rhetorical question: “What further evil lies in the specific taking that compensation will not cure?”²⁶⁷ The *Kelo*-like taking to create a leasehold is such an evil and must be eliminated on public policy grounds.

Having addressed the *Kelo*-like taking to create a leasehold, a few additional details still need to be resolved. What if a government itself uses the leasehold, and then, after the passage of time, assigns or subleases its interest in the leasehold to a private party for private purposes? I would recommend that such action would automatically terminate the leasehold without a reduction in just compensation. This would prevent a governmental entity from being coerced into creating a *Kelo*-like leasehold by subterfuge.

The next issue is what happens if government’s use of the leasehold that is created in part of condemnee’s property is not reasonably com-

262. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 374 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375 (1945). It should be noted that these leaseholds involved the entirety of the condemnee’s premises for the duration of the taking. A partial temporary taking was involved in *Hendler III*. See *Hendler v. United States (Hendler III)*, 952 F.2d 1364, 1369 (Fed. Cir. 1991). Under the particular facts in *Hendler III*, just compensation was ultimately denied because the property owner suffered no compensable damage. *Hendler v. United States (Hendler IV)*, 175 F.3d 1374, 1383, 1384 (Fed. Cir. 1999).

263. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

264. *Kelo*, 125 S. Ct. at 2668.

265. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also Treanor, *supra* note 149, at 1153-54.

266. See Treanor, *supra* note 149, at 1154-56 (arguing for a differential measurement of just compensation in certain instances guided by cultural consensus). *But see supra* note 234 (expressing my reservations concerning uncritical adoption of cultural conventions as legal standards).

267. Stoebuck, *supra* note 7, at 596.

patible with the use of the remainder of the property by the condemnee or the condemnee's tenants? This is a problem that is common in eminent domain. I suggest, however, that like problems described earlier in this Article,²⁶⁸ this can be addressed to a significant extent in the measurement of compensation for a temporary partial taking.²⁶⁹

It is also necessary to consider whether the extent of changes to the leasehold premises to modify it for the use of government or government's agent is a factor requiring some special limitations due to the unique nature of a taking that creates a leasehold. Which party is responsible for making the modifications to the premises, and for the cost thereof? Who is responsible for returning the premises to their original condition? In most instances, I again suggest that this can be handled to some extent through just compensation.²⁷⁰

Perhaps there will be situations in which the modifications are so extensive that the premises cannot be returned to their original condition. This problem should be addressed in the same manner as a condemnation of a leasehold that calls for the destruction and rebuilding of the improvements on the premises because it is similar to the taking of a leasehold in the nature of a long-term ground lease, or a taking that is of such a long duration that it is objectively a taking of the fee because the "chips"²⁷¹ of ownership left in the condemnee are such that justice would be better served if government were required to take the fee simple. Perhaps in these situations consideration should be given to a process in which the court would allow the condemnee to make a request that the fee simple interest, rather than a leasehold, be taken. I make this recommendation by way of a suggestion for additional study rather than arguing that it be adopted. It is a suggestion that cuts both ways. On the one hand, it seems only fair because the condemnee would be requesting the court to exercise its equitable powers to ameliorate an untenable

268. See discussion *supra* Part V.B.5.

269. Just compensation for a partial taking includes diminution of value to the condemnee's remaining land. See *supra* note 228 and accompanying text. The reversion clearly ought to be considered part of the remaining land. Where there is an issue of whether adjacent property (for instance, the rest of the shopping center in which the leasehold is located) is part of the parcel taken or a separate unitary tract, I would favor an interpretation that presumes a unitary tract. However, a number of interesting issues, both fact-specific and general arise in this context, and further research on the particulars of the calculation is encouraged. In any event, it should be noted that just compensation is not a remedy that truly makes a condemnee whole. See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945).

270. For instance, *General Motors* involved the removal of the condemnee's goods and the destruction of some of the condemnee's fixtures to ready the premises for government's use. *Gen. Motors*, 323 U.S. at 383-84. In that instance, the issue was handled in the calculation of just compensation. *Id.*

271. See *id.* at 382 (using the same term).

situation and provide justice.²⁷² The argument on behalf of this alternative would be that it does not give the condemnee the right to insist that there be a taking of the fee simple or no taking at all.²⁷³ Before making such a request, the condemnee could consider the practical impact of the taking of a leasehold, leaving it with a few chips of property, versus the compensation that might be obtainable if a fee simple were to be taken. If my proposed modifications to just compensation for condemnations that create leaseholds are adopted, just compensation in temporary physical takings will include numerous elements that would not be compensable in a taking of the fee.²⁷⁴ Likewise, if the taking was of only a portion of the condemnee's property, it should be noted that just compensation in partial takings includes elements not considered in the measurement of just compensation in a permanent total taking in fee simple.²⁷⁵ In general, these differences in the measurement of just compensation allow for elements in the calculation that are additional to those elements available for a total taking in fee simple. Thus, if the situation were analyzed from the perspective of law and economics, assuming that both the condemnee and government would behave as rational actors, allowing this remedy would make practical economic sense for both the government and the condemnee. It would also be consistent with my point in Part III that government should only engage in condemnation proceedings to establish a leasehold in situations in which it would be the most cost-effective solution. Thus, before making the initial decision to condemn a leasehold, the government would have compared the just compensation for a taking of the fee simple with the taking of a leasehold. Once the leasehold extends beyond a moderate duration, it is logical that the cost of the leasehold would be greater than the cost of the fee simple, and government would decide to take the fee simple. As a result, this remedy for the condemnee would come into play only if the condemnee was willing to accept the lower just compensation and finality of a taking in fee simple in order to avoid the ongoing relationship with government for the duration of the taking. This logic has flaws, however.

272. The condemnee would also be asking the court to interpret its situation as a disproportional burden under *Armstrong*. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

273. Thus, this alternative would seem to be in keeping with the principle that the amount of property to be taken is generally to be decided by the government.

274. See discussion *supra* Part V.B.5 (describing the proposed adjustments to just compensation). Even if my recommendations are not adopted, the *General Motors* line of cases, particularly *General Motors* and *Kimball Laundry*, set forth elements in the measurement of just compensation that are not included in just compensation for the taking of a fee simple. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949); *Gen. Motors*, 323 U.S. at 382-84.

275. See generally 4 SACKMAN, *supra* note 3, § 12.01; 4A SACKMAN, *supra* note 7, § 14.01.

If the condemnee was acting solely on the motivation of maximizing economic gain, it would choose to request this remedy only when the government had been *correct* in its original decision to establish a leasehold through the taking. The condemnee would be trying to force a taking of greater magnitude, a fee simple, than that requested by the government; this would violate the principle that the government selects how much land and what interest in land is to be taken by eminent domain. A condemnee could request this remedy as a strategic maneuver to try to increase the compensation the condemnee would receive, or in the alternative, to make the condemnation so expensive that the government would choose not to take the land.²⁷⁶ Thus, if this suggestion is adopted, courts should order the taking of a fee simple, rather than a leasehold, only in the most extraordinary circumstances. Perhaps the remedy should be limited to those in which the condemnee would receive lesser compensation from the taking in fee simple, thus restricting it to situations in which the condemnee values finality over money.²⁷⁷

VI. CONCLUSION

It is my recommendation that government should engage in condemnation proceedings to create a leasehold, rather than a taking in fee simple, in circumstances in which taking a leasehold is the best solution to government need. This would arise when government has an important short-term need to occupy space for a duration that can be estimated with reasonable certainty,²⁷⁸ and government has been unable to obtain occupancy through negotiations. However, unlike most other takings, the creation of a leasehold through condemnation proceedings creates an involuntary ongoing relationship between the condemnee and the holder of the leasehold. Unlike all other takings, this relationship can become quite complex, involving the continuous provision of services by the condemnee. These special characteristics call for limitations on the circumstances in which the creation of a leasehold should be allowed. Takings

276. Statutes that provide for slow take condemnations, as differentiated from quick take proceedings, allow government to abandon the proceedings without taking the property if the judgment awarded by the court is too high. Compare FLA. STAT. ANN. §§ 73.101, .111 (West 2004) (quick take proceedings), with *id.* §§ 74.021, .031, .061 (regular proceedings).

277. This would properly serve the interests of government because this result would occur only in circumstances in which government should have proceeded to take the property in fee simple in the first place. Obviously, the procedural mechanics of this final suggestion would need to be worked out.

278. Note that it is possible for government to request the right for extensions and the right of early termination. I believe that government should include such requests in the condemnation proceedings, even though they may increase the just compensation payable to the condemnee, unless the government can determine with certainty the date on which its need will end. See *supra* note 147.

that create a leasehold through condemnation proceedings should be limited to those takings in which government itself, the public in general, or an entity providing public services as an agent of government, will use the leasehold premises. Such takings would be fiscally conscientious means for cash-strapped governments to meet public needs and would be in keeping with the concepts that government should not take more property than it needs, and should not take a greater interest in property than it needs.

In order to properly compensate the condemnee for a taking that creates a leasehold, modifications to the measurement of just compensation are needed. These modifications would compensate, among other things, for loss or diminution of goodwill, if proven, for the duration of the temporary taking, and damage to the value of the condemnee's interest in the property not taken. In calculating the market value of the premises taken, the cost to acquire temporary replacement facilities for a duration specifically coordinated with the terms of the taking would be taken into consideration.

Although situations might not be frequent in which the taking of a leasehold would be the best solution to government need, governmental entities should not ignore the possibility in their deliberations. Rather, in the interest of sound fiscal management and respect for the principles of eminent domain, government ought to consider the establishment of a leasehold through condemnation proceedings as one of its options, and should engage in such takings in appropriate circumstances.

