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## The Public-Use Question as a Takings Problem

Nicole Stelle Garnett\*

#### Introduction

In 1998, Gateway International Motorsports Corporation ("Gateway") approached its neighbor, National City Environmental ("National City"), about purchasing a parcel of land for a parking lot. National City refused to discuss the matter. Rather than attempting further negotiations, Gateway filed a "Quick-Take Application Packet," asking the Southwestern Illinois Development Authority ("Development Authority") to condemn the land for Gateway in exchange for a commission. National City countered that such a condemnation was inconsistent with the Takings Clauses of the United States and Illinois Constitutions.<sup>1</sup> The Illinois Supreme Court agreed. The court accepted that the stated justification for the condemnation, i.e., the promotion of economic development, was a "public" one. It reasoned, nevertheless, that the means by which the Development Authority sought to advance that goal—to "advertise that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers"—exceeded the state and federal constitutional limits on the eminent-domain power.<sup>2</sup>

Southwestern Illinois Development Authority v. National City Environmental<sup>3</sup> is not the only recent decision setting aside an exercise of eminent domain as inconsistent with the "public use" limitation on the takings power. In September 2002, in *Daniels v. Area Plan Commission*,<sup>4</sup> the United States Court of Appeals for the Seventh Circuit invalidated a county planning commission's decision to vacate a restrictive covenant in order to make way for a shopping center. The court reasoned that the taking ran afoul of the Fifth Amendment's public-use limitation because the stated justification for the action—again, the promotion of economic development—was "conclusory and largely unsupported."<sup>5</sup> And, in 2001, a federal district court similarly

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<sup>&</sup>lt;sup>1</sup> See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); ILL. CONST. art. I, § 15 ("Private property shall not be taken or damaged for public use without just compensation.").

<sup>&</sup>lt;sup>2</sup> See Southwestern III. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10 (III. 2002). The opinion reversed an earlier decision upholding the condemnation. Southwestern III. Dev. Auth. v. Nat'l City Envtl., No. 87809, 2001 III. LEXIS 478 (III. Apr. 19, 2001), vacated and reh'g granted, 748 N.E.2d 194 (III. 2001).

<sup>&</sup>lt;sup>3</sup> Nat'l City Envtl., 768 N.E.2d 1.

<sup>4</sup> Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002).

<sup>5</sup> Id. at 463-64.

rejected a local government's effort to use eminent domain to accommodate the Costco Wholesale Corporation's expansion demands.<sup>6</sup>

The facts of these cases are unremarkable. Government officials regularly use the power of eminent domain to benefit private entities, and just as regularly justify their actions with assertions about the need to promote "economic development."<sup>7</sup> Rather, the remarkable thing about these cases is that the courts questioned the government's right to do so. In *Hawaii Housing Authority v. Midkiff*,<sup>8</sup> the United States Supreme Court reaffirmed that the Fifth Amendment demands broad deference to a government's decision to exercise the power of eminent domain.<sup>9</sup> *Midkiff* makes clear that "public

7 For example, for the past several years, the city of Pittsburgh has pursued on-again-offagain plans to condemn over one hundred small businesses in an effort to transform an ailing downtown into a vibrant retail center. See Bill Steigerwald, Death by Wrecking Ball: Pittsburgh and the Politics of Eminent Domain, REASON MAG., June 2000, at 30. When proposed, the plan drew screams of protest from the businesses slated for condemnation. Arguing that the "Fifth and Forbes" development was the last best hope for urban renewal, however, the city stuck to its guns-right up to the moment that one of the major "anchor" retailers withdrew from the project. At that point, the plan folded. See, e.g., Tom Barnes, Fifth-Forbes Foes Express Relief in Party Atmosphere, PITT. POST-GAZETTE, Nov. 25, 2000, at A13. In recent months, however, the city has floated the plan again and has refused to rule out the possible use of eminent domain. See, e.g., Tom Barnes, Fifth and Forbes: Fears of Eminent Domain Bring D.C. Law Firm Back, PITT. POST-GAZETTE, March 9, 2002, at C5. Other state and local governments have, in the name of "economic development," condemned homes and businesses to make way for law firms, auto race tracks, industrial plants, stadiums, shopping centers, wholesale stores, and casinos. See, e.g., Laramore v. Ill. Sports Facilities Auth., No. 89 C 1067, 1996 WL 153672 (N.D. Ill. Apr. 1, 1996) (stadium); City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001) (displacement of church); State ex rel. Tomasic v. Unified Gov't, 962 P.2d 543, 553 (Kan. 1998) (auto race track); City of Springfield v. Dreison Invs., Inc., Nos. 19991318, 991230, 000014, 2000 WL 782971 (Mass. Super. Ct. Feb. 25, 2000) (stadium); Detroit/Wayne County Stadium Auth. v. 7631 Lewiston, Inc., 601 N.W.2d 879 (Mich. Ct. App. 1999) (same); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998) (limousine holding lot for Trump casino); City of Chattanooga v. Classic Refinery, Inc., No. 03A01-9712-CV-00552, 1998 WL 881862 (Tenn. Ct. App. Dec. 17, 1998) (same); In re The Westlake Project, 638 P.2d 549 (Wash. 1981) (retail shopping center); David Firestone, Black Families Resist Mississippi Land Push, N.Y. TIMES, Sept. 10, 2001, at A20 (Nissan assembly plant); Rick Thackeray, Proposed Hummer Plant Raises Eminent Domain Questions, INDIANA LAW., Mar. 29, 2000, at 6 (AM General manufacturing facility). For a comprehensive, state-by-state examination of the use of eminent domain to promote "economic development" in this way, see DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), available at www.castlecoalition.org/report/pdf/ED\_report.pdf.

8 Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

9 Id. at 241 (upholding Hawaii Land Reform Act of 1976, which authorized the use of eminent domain to transfer fee simple title from lessor to lessee); see also, e.g., Thomas Merrill, Rent Seeking and the Compensation Principle, 80 Nw. U. L. REV. 1561, 1569 (1986) [hereinafter

<sup>6</sup> See 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), appeal dismissed as moot, 60 Fed. Appx. 123 (9th Cir. 2003). Interestingly, in an unrelated case, another federal district court held that condemning a church at Costco's request violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000). See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). Costco's involvement in both cases may have been more than coincidental. A property-rights group has collected news reports and filings which suggest that Costco regularly demands eminent-domain services from local governments. See Ramesh Ponnuru, This Land Is Costco's Land: Cities Steal Land and Give it to Costco, NAT'L REV. ONLINE, Feb. 18, 2003, at http://www.nationalreview.com/ponnuru/ponnuru021803.asp.

use" challenges are subject to rational-basis review. That is, so long as a taking can be justified by some *conceivable* public purpose, it will be upheld. Yet in each of the cases mentioned above, a court put the government to its proof—requiring a demonstrated connection between the challenged taking and the *particular* purpose used to justify it. In so doing, these courts refused to allow the government to avail itself of the "conceivability" safety valve provided by rational-basis review, a standard that requires approval of any taking that might serve the public interest in some theoretically possible way.<sup>10</sup>

In other words, these cases may have been wrongly decided. A central conclusion of this Article, however, is that they were not wrongheaded. The courts were justifiably frustrated with the *Midkiff* straightjacket and underwent doctrinal contortions to escape it. This Article illustrates that the courts' instincts were sound, and that *Midkiff* needs to be supplemented with precisely the kind of means-ends scrutiny employed in these recent cases. This conclusion proceeds from an analogy to a different kind of "takings" claim. While the public-use limitation on the takings power has been widely regarded as a dead letter, at least since *Midkiff* (notwithstanding the above-mentioned surprises), standards for evaluating so-called "regulatory" takings have evolved substantially.<sup>11</sup> Importantly, after *Nollan v. California Coastal Commission*<sup>12</sup> and *Dolan v. City of Tigard*,<sup>13</sup> the government may not demand that a property owner cede title to property in exchange for regulatory approval unless it establishes that the exaction demanded is "roughly proportional" to the impact of the proposed development.<sup>14</sup>

Although these exactions cases did not overrule *Midkiff*,<sup>15</sup> they may have something important to say about the public-use problem. In both the

13 Dolan, 512 U.S. 374.

Merrill, *Rent Seeking*] (observing that "[t]he Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends"); Cass Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 891 (1987) (noting that "it is said that the public use requirement has been rendered effectively unenforceable, much like the rationality requirement of the due process clause post-*Lochner*").

<sup>&</sup>lt;sup>10</sup> The standard rational-basis review formula, as set forth in *Midkiff*, requires only that the government demonstrate that "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241. The Seventh Circuit explicitly rejected the "conceivability" rule. *See Daniels*, 306 F.3d at 466 (rejecting the Commission's argument that "we should not just consider the actual purposes that were considered, but also any *conceivable* public purpose").

<sup>&</sup>lt;sup>11</sup> See generally, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazollo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

<sup>12</sup> Nollan, 483 U.S. 825.

<sup>&</sup>lt;sup>14</sup> See id. at 391 ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."); see also id. at 386; Nollan, 483 U.S. at 837.

<sup>&</sup>lt;sup>15</sup> The Court has expressed reservations about applying the *Nollan/Dolan* nexus requirement outside of the exactions context. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999) ("The rule applied in *Dolan* considers whether dedications de-

eminent-domain and exactions contexts, the government seeks to acquire property to advance a *particular* public policy. In both, it offers a property owner something of value (either monetary compensation or regulatory approval) in exchange for his or her property. Yet, the Court's approach to these two forms of land acquisition diverges sharply. In an exactions case, the government must link the means by which property is acquired to the ends for which it will be used; in an eminent-domain case, it need not. Indeed, one prominent federal court of appeals judge has suggested that considerable "tension" exists between the deference required in public-use cases and the heightened scrutiny of exactions.<sup>16</sup> National City Environmental, Daniels, and the 99 Cents Only case provide real-world evidence of this tension. Despite the fact that current law appears to preclude inquiry into whether a compensated taking is calibrated to advance its asserted purpose,<sup>17</sup> each of these courts took pains to distinguish Midkiff so as to require the government to establish a means-ends connection similar to that demanded by Nollan and Dolan.

This Article examines whether this jurisprudential move should be formalized—that is, whether a version of the means-ends review required of exactions should extend to public-use cases. I make no effort to argue that *Nollan* and *Dolan* extend, as a matter of deductive logic, to the taking of property by eminent domain.<sup>18</sup> Rather, I explore first whether the justifications for heightened means-ends scrutiny of exactions are present when the government acquires land by eminent domain, and, second, what such scrutiny might look like in a public-use case.<sup>19</sup>

17 See Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). Of course, an errant court occasionally departs from this total-deference rule, usually on state-law grounds. See Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 103–06 (1986) [hereinafter Merrill, Economics of Public Use] (surveying successful state-court public-use cases).

<sup>18</sup> The exactions cases address when a government must exercise its power of eminent domain, rather than its police power, to acquire property. Obviously, this question does not arise in a public-use case because the government has chosen to acquire land by eminent domain and compensation is unquestionably required. The full impact of *Nollan* and *Dolan* remains the subject of substantial debate. See generally, e.g., TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *Dolan* and *Lucas* (David L. Callies ed., 1996); David A. Dana, Land Use Regulations in an Age of Heightened Scrutiny, 75 N.C. L. REV. 1243 (1997); James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning After* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103 (1996).

<sup>19</sup> In so doing, I take *Nollan* and *Dolan* as given and therefore assume that the theoretical justifications for compensating some regulatory takings serve to explain the rule adopted to trig-

manded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.").

<sup>&</sup>lt;sup>16</sup> See Richardson v. City & County of Honolulu, 124 F.3d 1150, 1167 (9th Cir. 1997) (O'Scannlain, J., concurring in part, dissenting in part), cert. denied sub nom. City & County of Honolulu v. Small Landowners, 525 U.S. 871 (1998); see also Richard A. Epstein, The Harms and Benefits of Nollan and Dolan, 15 N. ILL. U. L. REV. 479, 491–92 (1995) ("Another point that is not settled is whether this new judicial attitude or suspicious look will carry over to other portions of the takings clause that don't involve compensation and police power regulation. So, for example, does the Hawaii Housing Authority v. Midkiff reading of the public-use requirement, which allows any conceivable justification the state can put forward, continue to apply? ... I don't know whether Midkiff can survive Dolan, but I know that it should not.").

The Article proceeds as follows: Part I examines whether the compensation guaranteed when the government acquires land by eminent domain eliminates the need for a legal rule mandating a relatively tight fit between the means by which and the purpose for which land is acquired. In doing so, the Article considers the most common theoretical justifications for compensating some regulatory takings-efficiency and fairness.<sup>20</sup> This analysis reveals at least two separate reasons for relatively close scrutiny of a governmental decision to acquire private property involuntarily, even when property owners are compensated for their loss. First, monetary compensation does not necessarily zero out what Frank Michelman famously termed the "demoralization costs" associated with a taking.<sup>21</sup> Indeed, given the potential inadequacies of the constitutionally mandated fair-market-value "just compensation" award, an owner who loses his property through an exercise of eminent domain sometimes may be worse off than an owner asked to relinquish property rights as an exaction.<sup>22</sup> Second, public-choice theory suggests that the compensation requirement alone will not necessarily deter the government from overacquiring private property. On the contrary, the need for a government to "compete" for development might constrain the use of exactions but not the power of eminent domain. While the former discourages development, the latter can be used to induce developers shopping for a new location.23

Part II discusses how courts might conduct means-ends scrutiny of an exercise of eminent domain. Means-ends scrutiny may seem odd to those accustomed to the ends-oriented nature of the traditional public-use challenge. But, it is not difficult to conceive of a test that does in public-use cases what *Nollan* and *Dolan* did in exactions cases—abandons rational-basis review and require the government to link the means by which it acquires land to the *particular* purpose (rather than a *conceivable* one) for the acquisition.<sup>24</sup> How might such review work? The government acquires land to advance

<sup>21</sup> See Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214 (1967) [hereinafter Michelman, Property, Utility, and Fairness]; see also infra text accompanying notes 69–109.

- 22 See infra text accompanying notes 105-09.
- 23 See infra text accompanying notes 141-70.

ger compensation in those cases. I recognize that many commentators take issue with Nollan and Dolan. See, e.g., RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 184 (1993) (noting that "Nollan has received a rocky reception" in academic literature); see also infra notes 183-84 (citing representative sources on the academic debate surrounding Nollan and Dolan). I make no attempt to justify those decisions here. Rather, I explore whether the legal rule adopted in them is at least as justified in a public-use case as in an exaction case.

<sup>&</sup>lt;sup>20</sup> See, e.g., Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 HARV. L. REV. 997, 998 (1999) ("In a vast and otherwise contentious literature ... there appears to be virtual consensus that the purposes of just compensation are essentially two[:] ... 'utility' and 'fairness'....').

<sup>24</sup> Rational-basis review is, of course, a form of means-ends scrutiny—if a toothless one. The accepted wisdom is that *Nollan* was the first case to abandon this standard of scrutiny in the land use context. See infra note 42 and accompanying text. For a classic criticism of the "conceivability" test, see Gerald Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, Foreword to the Supreme Court 1971 Term, 86 HARV. L. REV. 1, 19–20 (1972).

public purposes in various ways: at times by using the power of eminent domain, at times by purchasing it on the market, and at other times (as *Nollan* and *Dolan* illustrate) through exactions.<sup>25</sup> Furthermore, not all condemnations proceed in the same way; the government sometimes takes procedural shortcuts when acquiring property that amplify the concerns raised by eminent domain generally.<sup>26</sup> Because the government has choices about how to acquire property, a court might require it to demonstrate, as the Supreme Court has with respect to exactions, that a given exercise of eminent domain is "reasonably necessary" to advance or, put differently, "related in nature and extent" to the public purpose used to justify it.<sup>27</sup> The remainder of this Article discusses how this test might play out in public-use cases.

#### I. Eminent Domain as a "Means-Ends" Problem

The Fifth Amendment's Takings Clause (and like provisions of state constitutions) provides that private property shall not be "taken for public use, without just compensation."<sup>28</sup> The extent to which the reference to "public use" creates a judicially enforceable limitation on the power of eminent domain is the subject of a longstanding debate. That debate has traditionally focused upon whether courts should scrutinize the "publicness" of a project enabled by the use of eminent domain, especially when the government condemns land with the intention of transferring it to a private party.<sup>29</sup> The United States Supreme Court's answer to that question has, at least in the past fifty years, been essentially once in a blue moon (maybe).<sup>30</sup> In *Berman v. Parker*<sup>31</sup> and again in *Midkiff*,<sup>32</sup> the Court rejected the argument

26 See infra text accompanying notes 228-305.

27 Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994) (describing federal standard for review of exactions).

28 U.S. CONST. amend. V; see also 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DO-MAIN § 7.01 (3d ed. 2002) (discussing public-use clauses in state constitutions and statutes).

29 See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMI-NENT DOMAIN 162-81 (1985) [hereinafter EPSTEIN, TAKINGS] (arguing that the Fifth Amendment's Takings Clause was designed to enable the government to condemn land for public use, not to seize land to advance the broadly defined "public interest"); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205-25 (1978) (surveying development of public-use tests); Merrill, *Economics of Public Use, supra* note 17, at 61; Sunstein, *supra* note 9, at 891 (describing historical and current interpretation of Public Use Clause); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 600-14 (1949) (surveying development of public-use doctrine in state and federal courts).

30 See Sunstein, supra note 9, at 891 (noting that the "public use requirement traditionally meant that the property had actually to be used by the public. But gradually the requirement was expanded to refer to any plausible public justification... Thus it is said that the public use requirement has been rendered effectively unenforceable ....").

31 Berman v. Parker, 348 U.S. 26 (1954). In *Berman*, the Court considered a challenge to the District of Columbia Redevelopment Act, which authorized the use of eminent domain to

<sup>25</sup> See, e.g., Saul Levmore, Just Compensation and Just Politics, 22 CONN. L. REV. 285, 286 (1990) [hereinafter Levmore, Just Compensation] ("Governmental projects often include some actions that involve market participation of the familiar private sort, some that involve the power of the state to take private property while compensating for its pre-taking value, and some that draw on powers of the state . . . to burden without compensation."). It is reasonable to assume, in fact, that the government will use the power of eminent domain, only after resorting to the market and failing. See infra text accompanying notes 221–22.

that the "fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries . . . condemn[s] that taking as having only a private purpose."<sup>33</sup> Instead, the Court equated "public use" and "public interest," and, as noted above, held that the government has virtually unfettered discretion to exercise its power of eminent domain to advance any conceivable public purpose.<sup>34</sup> As Justice O'Connor observed for a unanimous Court in *Midkiff*, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less so than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."<sup>35</sup>

In an influential work, Thomas Merrill argues that the refusal to consider the "means" and "ends" of eminent domain separately goes a long way toward explaining courts' traditional "hands off" approach to the public-use question. He posits that courts are reluctant to second-guess a government's assertion that a project enabled by eminent domain advances the public interest because "[t]he answer to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake."<sup>36</sup> As the Court observed in *Midkiff*, "[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."<sup>37</sup> Given this practical and philosophical limitation, Professor Merrill has suggested that judicial review should instead focus on the *means* by which the government chooses to acquire land, rather than the *ends* that the government seeks to advance by acquiring it.<sup>38</sup> In Merrill's view, an analysis of the "means question," which asks "where and how the government should

<sup>32</sup> In *Midkiff*, the Court considered a "public use" challenge to a law which enabled the Hawaii Housing Authority to condemn property occupied by tenants living on single-family residential lots and transfer the title in fee simple to the lessees. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984). After quoting extensively from *Berman*, the Court concluded, "[1]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240. Because it found that the law was supported by a conceivable public purpose—breaking up a land oligopoly—the Court concluded that the law was constitutional. *Id.* at 241–42. And, as in *Berman*, it refused to separately scrutinize the means that Hawaii had chosen to advance this policy. *Id.* at 242–43.

33 Id. at 243-44.

<sup>34</sup> Id. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

- 36 Merrill, Economics of Public Use, supra note 17, at 67.
- 37 Midkiff, 467 U.S. at 244.
- 38 Merrill, Economics of Public Use, supra note 17, at 67-68.

acquire and level much of southwest Washington, D.C. and transfer it to a private developer for redevelopment. The plaintiff, who owned a department store slated for condemnation, challenged the law. *Id.* at 31. The Court rejected his argument that the Fifth Amendment precluded the condemnation of property under these circumstances. *Id.* at 36. Nor did the Court require the government to demonstrate that the use of eminent domain was a necessary or even wise way to advance the goal of redevelopment, reasoning instead that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.* at 33.

<sup>35</sup> Id. at 242-43.

get property, not what it may do with it . . . demands a more narrowly focused and judicially manageable inquiry than the ends approach."<sup>39</sup>

The Court's opinions in *Nollan* and *Dolan* adopted that very approach in the exactions context. *Nollan* and *Dolan* both addressed the problem of regulatory "exactions" imposed in exchange for discretionary approval to develop private property. Prior to these cases, federal judges and legal scholars alike assumed that, as is currently the case with eminent domain, the power to impose exactions was coterminous with the scope of the police power. That is, the government was free to exact concessions from property owners so long as the regulation was plausibly connected to some conceivable governmental interest.<sup>40</sup> After *Nollan* and *Dolan*, the government's police power to regulate private property remains unquestioned. If the government chooses to regulate *via* exactions, however, it must demonstrate a meansends connection between the exaction and the regulatory goal.

In *Nollan*, the Court held that the California Coastal Commission ("Commission") violated the Fifth Amendment's Takings Clause by conditioning the approval of a building permit upon the property owners granting an easement providing pubic access across their property to a public beach.<sup>41</sup> The Court accepted the Commission's assertion that "the public interest will be served by a continuous strip of publicly accessible beach along the coast."<sup>42</sup> The Court nonetheless found that the exaction effected a taking because the Commission failed to establish an "essential nexus" between the condition demanded (an easement granting physical access to the beach) and the policy used to justify it (the need to minimize the negative effects of constructing a new home that would obstruct the public's view of the ocean).<sup>43</sup>

Several years later in *Dolan*, the Court resolved a question left open in *Nollan*, namely, the degree of connection required between the exaction imposed by the regulatory agency and the policy justifying it.<sup>44</sup> At issue in *Do*-

<sup>39</sup> Id. at 67. The fact that both Berman and Midkiff were unanimous opinions provides support for this hypothesis.

<sup>40</sup> See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) ("The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan."); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 842-43 (1987) (Brennan, J., dissenting) ("The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. . . . [T]he Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens."); see also, e.g., Dana, supra note 18, at 1253-54 (noting that prior to Nollan, "bottom-line dynamics of land use litigation" was that "[l]ocal governments won, aggrieved property owners lost"); Molly S. McUsic, Looking Inside Out: Institutional Analysis and the Problem of Takings, 92 Nw. U. L. REV. 591, 602 (1998) (observing that although previous decisions claimed to apply "substantially advances" test, Nollan represented first departure from previous, rational-basis review of property regulations); Frank Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1607 (1988) [hereinafter Michelman, Takings] (noting that "[p]rior to Nollan, a judicial determination of a property regulation's validity . . . to the extent that it involved any means-ends appraisal, involved only scrutiny of the public purposes plausibly ascribed to the regulation").

<sup>41</sup> Nollan, 483 U.S. at 836-37.

<sup>42</sup> Id. at 841.

<sup>43</sup> Id. at 837.

<sup>44</sup> Dolan, 512 U.S. at 377.

*lan* was the city of Tigard's decision to condition the approval of a permit to expand an existing plumbing store on the store owner's dedication of approximately ten percent of her property for a pedestrian/bicycle pathway and storm drainage system.<sup>45</sup> As in *Nollan*, the Court accepted that the ends of the policy purportedly advanced by the dedication were valid.<sup>46</sup> The Court further found the "essential nexus" required by *Nollan* between the legitimate policy and the permit condition.<sup>47</sup> The Court nonetheless held that the exaction violated the Takings Clause because the city had failed to establish that the required dedication was "roughly proportional" to the impact of the proposed development.<sup>48</sup>

#### A. A Question of Compensation?

But what do *Nollan* and *Dolan* have to say about the public-use question?<sup>49</sup> An exercise of the power of eminent domain does not raise the unconstitutional conditions problem at issue in the exactions cases:<sup>50</sup> The government is forcing a property owner to relinquish all rights of ownership in exchange for compensation—not to barter them away for regulatory approval.<sup>51</sup> The very fact that the government unquestionably must pay for the land it takes by eminent domain might sufficiently dispel a concern motivating the heightened scrutiny required in *Nollan* and *Dolan*, namely that the

<sup>50</sup> See Dolan, 512 U.S. at 385 (noting that both cases applied the "well-settled doctrine of 'unconstitutional conditions'"); see also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991) (characterizing the constitutional claim at issue in Nollan).

<sup>51</sup> The unconstitutional conditions doctrine prohibits the government from conditioning the receipt of a public benefit, even a benefit to which the recipient is not entitled, upon the surrender of a constitutional right. *E.g.*, Been, *supra* note 50, at 474; RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 5 (1993) [hereinafter EPSTEIN, BARGAINING] ("Stated in its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."). For other comprehensive treatments of the doctrine, see also, e.g., Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State,* 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989).

<sup>45</sup> Id. at 379-80.

<sup>46</sup> Id. at 396.

<sup>47</sup> Id. at 387.

<sup>48</sup> Id. at 395-96.

<sup>&</sup>lt;sup>49</sup> The Court has expressed reservations about expanding the *Nollan/Dolan* nexus requirement to related constitutional questions, including other types of "regulatory takings" claims. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999) ("The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.").

government might abuse its bargaining position<sup>52</sup> and impose exactions as part of "an 'out-and-out plan of extortion.'"<sup>53</sup>

On the other hand, if the Court's assertions are to be taken at face value, *Nollan* and *Dolan* are *both* unconstitutional conditions cases *and* regulatory takings cases. Further, the Court's opinions in *Nollan* and *Dolan*, as in all regulatory takings cases, reflect the oft-stated principle that the Fifth Amendment 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."<sup>54</sup> By requiring that an exaction be "related in both nature and extent to the impact of the proposed development,"<sup>55</sup> the Court attempted to ensure that the property owner would bear no more than his or her "fair share" of the burden of regulation. Of course, a necessary corollary to this principle is that the "public as a whole" bears the burdens imposed by regulation by paying for them with tax dollars. As Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon*,<sup>56</sup> "[a] strong public interest or desire to improve the public condition does not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>57</sup>

The fact that compensation is guaranteed when the government acquires land by eminent domain, however, does not totally eliminate the concerns underlying either the unconstitutional conditions cases or the regulatory takings cases. First, most scholars agree that, broadly speaking, the unconstitutional conditions doctrine seeks to minimize the opportunity for government abuses of power.<sup>58</sup> Yet, as the discussion below highlights, the power of eminent domain can also be abused, inflicting harms *at least as great* as those that animate *Nollan* and *Dolan*. Second, and relatedly, the fact that compensation is part-and-parcel to an exercise of eminent domain does not eliminate the risk that a property owner may be forced to bear more than his or her

<sup>&</sup>lt;sup>52</sup> See Sullivan, supra note 51, at 1496–97 (arguing that conditioned benefits skew the distribution of power between government and rightholders).

<sup>&</sup>lt;sup>53</sup> Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

<sup>54</sup> Armstrong v. United States, 364 U.S. 40, 49 (1960). For cases quoting Armstrong, see Dolan, 512 U.S. at 384; Pennell v. City of San Jose, 485 U.S. 1, 9 (1988); Nollan, 483 U.S. at 835-36 n.4; Bowen v. Gilliard, 483 U.S. 587, 608 (1987); First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 318-19 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978); see also Glynn Lunney, Compensation for Takings: How Much Is Just?, 42 CATH. U. L. REV. 721, 747 (1993) [hereinafter Lunney, Compensation for Takings] (noting that Armstrong principle has become part of the "ritual litany" employed in takings cases); Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods, 72 DENV. U. L. REV. 859, 880 n.100 (1995) [hereinafter Merrill, Rights as Public Goods] (observing that the statement in Armstrong "has taken on the quality of a canonical recitation"). On Armstrong principle generally, see William Michael Treanor, The Armstrong Principle, the Narratives of Takings, and Compensation Statutes, 38 WM. & MARY L. REV. 1151 (1997).

<sup>55</sup> Dolan, 512 U.S. at 391.

<sup>&</sup>lt;sup>56</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

<sup>57</sup> Pa. Coal, 260 U.S. at 416; see also Dolan, 512 U.S. at 396 (quoting Pa. Coal, 260 U.S. at 416).

<sup>&</sup>lt;sup>58</sup> See, e.g., EPSTEIN, BARGAINING, supra note 51, at 23 (discretionary authority over benefits "increases the risks of government misbehavior"); Sullivan, supra note 51, at 1492–93 (arguing that unconstitutional conditions doctrine prevents government from "aggrandiz[ing] pubic power").

"fair share" of the burden of advancing the common good.<sup>59</sup> An individual forced to relinquish her property in an eminent-domain proceeding stands in a very different position than the taxpayers who must pay to compensate her for it.<sup>60</sup> The government's decision to condemn property has little direct effect on any individual taxpayer; at most, he or she suffers a slightly higher tax burden as a result. But the displaced property owner is vividly aware of the consequences of the government's action; in the worst-case scenario she loses her home, business, neighbors, and community.<sup>61</sup>

For the reasons identified by Frank Michelman in his groundbreaking article over thirty years ago,<sup>62</sup> this difference in position strongly weighs in favor of extending some form of heightened scrutiny to public-use cases. Michelman influentially<sup>63</sup> identifies two purposes of compensation: "utility"<sup>64</sup> and "fairness."<sup>65</sup> The following discussion focuses on "demoralization costs," a factor which Michelman places into the former category,<sup>66</sup> but which clearly has implications for the latter as well.<sup>67</sup> Michelman observes that one justification for the compensation requirement is the need to avoid these "demoralization costs" suffered by property owners, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion."<sup>68</sup> For a number of reasons, compensation does not always eliminate these demoralization costs in the eminent-domain context.<sup>69</sup>

62 Michelman, Property, Utility, and Fairness, supra note 21.

<sup>63</sup> See WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS 141-42 (1995) [hereinafter FISCHEL, REGULATORY TAKINGS] ("[Michelman's article] has dominated academic discussion of the takings issue for more than a quarter of a century."); Heller & Krier, *supra* note 20, at 998 (noting that Michelman's article "remains, more than thirty years after its publication, the most significant piece of academic commentary on [the] subject" of takings).

64 Michelman, Property, Utility, and Fairness, supra note 21, at 1208.

65 Id. at 1218.

66 Id. at 1172-83; see also Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. Rev. 741, 763 (1999) (characterizing "demoralization" analysis as Michelman's "utilitarian calculus"); FISCHEL, REGULATORY TAKINGS, supra note 63, at 142 (same characterization).

67 See Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENT. 279, 286 (1992) ("Michelman's theory is rooted in a psychology of takings; he seems to see the function of compensation awards to be as much therapeutic as economic.").

<sup>68</sup> Michelman, *Property, Utility and Fairness, supra* note 21, at 214. Later commentators have categorized the "demoralization" equation as an "insurance theory" of takings, reasoning that compensation serves to pool the costs associated with property owners' aversion to the risk of an uncompensated taking. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 624 (1984).

<sup>69</sup> See, e.g., Durham, supra note 61, at 1306 (arguing that "[s]pecific demoralization costs appear to be greater for eminent domain than for other governmental actions").

<sup>59</sup> See infra text accompanying notes 71 and 86 (discussing risk of undercompensation).

<sup>&</sup>lt;sup>60</sup> See infra text accompanying notes 140-70 (discussing public choice implications of this difference in position).

<sup>61</sup> See, e.g., James G. Durham, Efficient Just Compensation as a Limit on Eminent Domain, 69 MINN. L. REV. 1277, 1305–06 (1985) (discussing the unique harms imposed by the forced loss of home or business).

First, the measure of damages awarded in an eminent-domain proceeding—namely, the fair market value of the property<sup>70</sup>—frequently fails to make property owners "whole," especially with respect to subjective losses.<sup>71</sup> Using Michelman's terms, the "settlement cost" associated with an exercise of eminent domain (that is, the amount required to avoid demoralization costs)<sup>72</sup> exceed the fair market value of the condemned property.<sup>73</sup>

The well-recounted tale of the psychological toll taken by America's experiment with "urban renewal" provides a heart-wrenching illustration of the human costs of forced displacements. The urban renewal phenomenon emerged conceptually during the 1930s and 1940s among planning intellectuals convinced that virtually all of the largest American cities, as well as a many smaller urban centers, were in a state of rapid deterioration.<sup>74</sup> City planners and municipal leaders recognized urban problems in fundamentally material, not sociological, terms. As such, they hoped to rectify the problem of urban "blight" primarily through the wholesale destruction of existing neighborhoods and the construction of grandiose new developments.<sup>75</sup>

Beginning in the 1940's, the federal urban renewal program underwrote the widespread exercise of eminent domain by local governments to condemn "blighted" areas and sell the properties to private investors at bargain-

71 See, e.g., EPSTEIN, TAKINGS, supra note 29, at 183 ("The central difficulty of the market value formula for explicit compensation . . . is that it denies any compensation for real but subjective values."); see also, e.g., Robert Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 736–37 (1973) (explaining that market value formulation does not account for subjective loss); Merrill, Economics of Public Use, supra note 17, at 83 (reviewing literature); Michael H. Schill, Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. PA. L. REV. 829, 890 (1989) [hereinafter Schill, Intergovernmental Takings] ("In contrast to an indemnity approach, compensating only transferable values seems to shift attention from what the condemnee has lost, to what the condemnor gains."). For additional discussions of the fair-market-value formula, see, for example, W. Harold Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63 (1970); Durham, supra note 61; Lunney, Compensation for Takings, supra note 54.

72 FISCHEL, REGULATORY TAKINGS, *supra* note 63, at 146 (discussing application of settlement costs); Michelman, *Property, Utility, and Fairness, supra* note 21, at 1214.

73 See EPSTEIN, TAKINGS, supra note 29, at 183 (market value systematically underestimates the use value to owner). Obviously, additional monetary compensation could zero out these demoralization costs, leading some commentators to propose a bonus value award upon condemnation. See id. at 184; Ellickson, supra note 71, at 736–37; see also infra text accompanying note 86 (discussing compensation and the endowment effect).

74 On urban renewal, see generally, for example, BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 15-37 (1989); CHARLES N. GLAAB, A HISTORY OF URBAN AMERICA (3d ed. 1983); ZANE L. MILLER, THE URBANIZATION OF MODERN AMERICA: A BRIEF HISTORY (1973); JON C. TEAFORD, THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA, 1940–1985, at 44–80 (1990); URBAN RENEWAL, THE RECORD AND THE CONTROVERSY (JAMES Q. WIISON ed., 1966).

75 See, e.g., FRIEDEN & SAGALYN, supra note 74, at 16 (stating that planners believed that the existing cities were obsolete and that "[t]o replace the obsolete city with this new vision would mean tearing down much of what was there"); LEWIS MUMFORD, FROM THE GROUND UP 226–29 (1956) (arguing that clearance was the only solution to cities' problems); TEAFORD, supra note 74, at 105 (characterizing the "eradication of slums" as the "ultimate dream of planners").

<sup>70</sup> See, e.g., United States v. Cors, 337 U.S. 325, 334 (1949) (condemnee entitled only to fair market value); Olson v. United States, 292 U.S. 246, 255 (1934) (same).

basement prices.<sup>76</sup> As a result, "city renewal directors were searching for the 'blight that's right'—places just bad enough to clear but good enough to attract developers."<sup>77</sup> In their quest to eliminate "blight," officials razed homes and displaced hundreds of thousands of families and tens of thousands of businesses. Several hundred thousand more were displaced during the same period to make way for the interstate highway system.<sup>78</sup>

During the height of this period, Jane Jacobs colorfully observed that:

[P]eople who get marked with the planners' hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed, and their proprietors ruined, with hardly a gesture at compensation. Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be heard and seen to be believed. . . .

Could Job have been thinking of Chicago when he wrote:

Here are the men that alter their neighbor's landmark ... shoulder the poor aside, conspire to oppress the friendless. Reap they the field that is none of theirs, strip they the vineyard wrongfully seized from its owner ...

A cry goes up from the city streets, where wounded men lie groaning . . .

If so, he was also thinking of New York, Philadelphia, Boston, Washington, St. Louis, San Francisco and a number of other places. The economic rationale of current city rebuilding is a hoax. The economics of city rebuilding do not rest soundly on reasoned investment of public tax subsidies, as urban renewal theory proclaims, but also on vast, involuntary subsidies wrung out of helpless site victims.<sup>79</sup>

Jacobs's words proved prophetic. Long-term studies of urban renewal projects found that the forced displacements destroyed many close-knit urban communities and "created nothing less than a life crisis" for residents.<sup>80</sup> As Bernard Frieden and Lynne Sagalyn have noted, "planners had a knack for picking low-income neighborhoods where residents had deep attachments to friends, relatives, neighbors, churches, schools, and local businesses."<sup>81</sup> One study of the long-term psychological effects of the residents displaced by the demolition of Boston's West End in the late 1950s found that forty-six

<sup>76</sup> TEAFORD, supra note 74, at 107 (noting that Federal Housing Act of 1949 provided aid to local governments to purchase and clear blighted sites and transfer property to private developers for redevelopment). For an examination of the scope of the exercise of eminent-domain powers during urban renewal, see Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. URB. Law 1, 7-8 (1968) (noting that 94 percent of all federally assisted uses of eminent domain occurred in twenty years prior to publication of the article).

<sup>77</sup> FRIEDEN & SAGALYN, supra note 74, at 23.

<sup>78</sup> See id. at 29, 34 (noting that urban renewal displaced more than 400,000 families and 39,000 businesses while highway construction displaced an additional 330,000 families).

<sup>&</sup>lt;sup>79</sup> Jane Jacobs, The Death and Life of Great American Cities 5 (1961).

<sup>80</sup> FRIEDEN & SAGALYN, supra note 74, at 34.

<sup>81</sup> Id. at 33.

percent of women and thirty-eight percent of men suffered "fairly severe grief."<sup>82</sup> Displaced residents in Southwest Washington, D.C. (the renewal effort at issue in *Berman*) reported similar emotional losses.<sup>83</sup>

Concern about this type of uncompensated subjective loss has lead both Merrill and Margaret Radin to argue in favor of changing the eminent-domain ground rules when the risk of subjective loss is high. Merrill argues that the courts should carefully scrutinize the decision to exercise the power of eminent domain in such cases.<sup>84</sup> Radin has gone farther, arguing that "personal," as opposed to "fungible," property should be entitled to special protection from condemnation.<sup>85</sup> Experimental evidence stemming from the groundbreaking work of cognitive psychologists Daniel Kahneman and Amos Tversky, however, suggests that the subjective valuation problem exists with every exercise of eminent domain because possession alone increases the value attached to all property, and not simply that which Radin would characterize as "fungible."86 The presence of such an "endowment effect" is well documented by experiments demonstrating that individuals consistently demand more to part with an entitlement than they would be willing to pay to acquire it in the first instance.<sup>87</sup> This "offer/ask" disparity<sup>88</sup> has led experimental economists to advocate above-market compensation whenever property is acquired through eminent domain.<sup>89</sup>

- 83 DANIEL THURSZ, WHERE ARE THEY NOW 100-01 (1966).
- 84 See Merrill, Economics of Public Use, supra note 17, at 84.

85 See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 1005–06 (1982) (suggesting that "personhood perspective" of property might lead to an implied limitation on government's eminent-domain power to condemn private homes); see also Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1686–87 (1988) (proposing partial market inalienability for some forms of property).

<sup>86</sup> See, e.g., Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 CHI.-KENT L. REV. 23, 35–38 (1989) (noting that the "Tversky-Kahneman analysis predicts that an ordinary landowner would feel the loss of a psychologically vested right... more keenly than he would the loss of a prospect (a psychologically unvested right) of identical market value"). Daniel Kahneman received the 2002 Nobel Prize in Economics for his work with Tversky (who died in 1996). See All Too Human, ECONOMIST, Oct. 10, 2002, at 74. Kahneman shared the prize with Vernon Smith, who pioneered the field of experimental economics. Id.

87 See, e.g., Elizabeth Hoffman & Matthew L. Spitzer, Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice, 14 J. LEGAL STUD. 259 (1993) (reviewing literature); Jack L. Knetsch & J.A. Sinden, Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value, 99 Q. J. ECON. 507 (1984).

88 See Fischel, Regulatory Takings, supra note 63, at 207.

<sup>89</sup> See JACK L. KNETSCH, PROPERTY RIGHTS AND COMPENSATION: COMPULSORY ACQUISI-TION AND OTHER LOSSES 49–53 (1983); Jack L. Knetsch & Thomas Borcherding, *Expropriation* of Private Property and the Basis for Compensation, 29 U. TORONTO L.J. 237, 246–49 (1979); see also FISCHEL, REGULATORY TAKINGS, *supra* note 63, at 207–08 (reviewing literature).

<sup>&</sup>lt;sup>82</sup> Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 360 (James Q. Wilson ed., 1966). On date of relocations, see FRIEDEN & SAGALYN, *supra* note 74, at 34. *See generally* HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS (1962) (case study of the West End).

Nor is the risk of undercompensation limited to psychological losses. On the contrary, the fair-market-value award may also fail to make displaced property owners whole with respect to relocation expenses, good will associated with a business's physical location, or, importantly, the cost of replacing the condemned property.<sup>90</sup> Finally, the fair-market-value determination is made *before* the condemnation. That is, "a condemnee is entitled to the fair market value of his property in its highest and best use *other than* the use proposed by the condemnor."<sup>91</sup> As a result, the condemnee does not share in any increased value that the condemnation adds to the property,<sup>92</sup> despite the fact that an exercise of eminent domain almost always raises the value of the property.<sup>93</sup>

The very fact that the Constitution allocates one hundred percent of this condemnation surplus to the condemnor, or the private beneficiary of the condemnation as the case may be, may *itself* be demoralizing for a property owner. As Abraham Bell and Gideon Parchomovsky recently observed, "While people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration."<sup>94</sup> This is especially true if the windfall is enjoyed by the politically powerful at the expense of vulnerable outsiders to the political process. Consider, for example, a recent dispute over the construction of a major Nissan assembly facility in rural Mississippi.<sup>95</sup> The state "outbid" several other states competing for the facility with a package of tax-financed incentives totaling more than \$400 million and an offer to use the power of eminent domain to condemn more than two and one-half square miles, if necessary.<sup>96</sup> Two black families

<sup>93</sup> Merrill, *Economics of Public Use, supra* note 17, at 85 (noting that "[e]minent domain almost always generates a surplus" which is awarded solely to the condemnor); EPSTEIN, TAK-INGS, *supra* note 29, at 163–64 (questioning division on fairness grounds).

<sup>94</sup> Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 579 (2001). Michelman uses similar logic to argue that the risks of a taking are different in kind than other risks of loss. *See* Michelman, *Property, Utility, and Fairness, supra* note 21, at 1217 (arguing that takings permit majority government to impose cost that is "self-determining and purposive, as compared to other loss-determining forces which seem to be randomly generated").

<sup>95</sup> See David Firestone, Black Families Resist Mississippi Land Push, N.Y. TIMES, Sept. 10, 2001, at A20.

96 Id.

<sup>&</sup>lt;sup>90</sup> See Merrill, Economics of Public Use, supra note 17, at 83 (noting that lost goodwill, relocation expenses, consequential damages to other property, and attorney fees are not compensable); see also Schill, Intergovernmental Takings, supra note 71, at 890–92 (noting that owners are not indemnified for economic losses attributed to business disruption, lost goodwill, relocation costs, or litigation expenses). These problems have been addressed legislatively in some contexts. See, e.g., Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601–4655 (2000). The urban renewal experience again illustrates these problems: at least one-third of businesses displaced during the era failed, leaving owners devastated. FRIEDEN & SAGALYN, supra note 74, at 35.

<sup>91</sup> Merrill, Economics of Public Use, supra note 17, at 83.

<sup>&</sup>lt;sup>92</sup> See United States v. Miller, 317 U.S. 369, 377 (1943) ("The owners ought not to gain by speculating on probable increase in value due to the Government's activities."); Olson v. United States, 292 U.S. 246, 256 (1934) ("[V]alue to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking.").

spurned the state's offers to purchase their farms, accusing the state of treating white and black land owners differently. One of the landowners explained,

My grandfather bought this land in 1941. There's 15 of our families right around here, and none of them want to live anywhere else. But then the state comes in and pushes us around and tells us they're going to turn our land over to a private company. It's not right.<sup>97</sup>

Owners forced to relinquish their rights under such circumstances understandably may feel that they are just as much the victim of "capricious redistribution"<sup>98</sup> as the "uncompensated losers" that concerned Michelman.<sup>99</sup>

#### B. "Singling Out"

Furthermore, in the regulatory takings context, a number of scholars have argued that the justification for compensation is greatest when, using Saul Levmore's words, "the government singles out a private party, in the sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual. . . . "<sup>100</sup> Levmore suggests that the "singling out" rationale for compensation rests in part on the need to deter government from exploiting politically unorganized and vulnerable persons, an argument which is echoed throughout the takings literature.<sup>101</sup>

<sup>100</sup> Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991) [hereinafter Levmore, *Takings, Torts and Special Interests*]; see also, e.g., Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992) [hereinafter Lunney, *Critical Reexamination*] (greater scrutiny needed when concentrated groups impose costs on individuals); Merrill, *Rights as Public Goods, supra* note 54, at 880 ("fair share" justification for regulatory takings reflecting principle that the Takings Clause prohibits "spot" redistribution).

<sup>101</sup> See Levmore, Takings, Torts, and Special Interests, supra note 100, at 1345; see also Heller & Krier, supra note 20, at 99 (Takings Clause can "constrain governmental inclinations to exploit politically vulnerable groups and individuals"); Levmore, Just Compensation, supra note

<sup>97</sup> Id.

<sup>98</sup> Michelman, Property, Utility, and Fairness, supra note 21, at 1215.

<sup>99</sup> Id. at 1214. Michelman himself complained during the urban renewal period about the "violent unfairness" of forced relocations: "There is no palpable reciprocity; the sufferers rarely double as special gainers, and they must submit to the spectacle of private land developers (or new residents) moving in for what looks like a publicly subsidized benefit." Id. at 1255. See also Durham, supra note 61, at 1307 (noting that "[t]he specific demoralization costs caused by the taking will be amplified when the taking's outcome is not to the owner's liking"). Michelman and others have argued that additional demoralization costs are incurred by similarly situated individuals who observe this scenario, sympathize with the victims, and worry about incurring similar losses in the future. See FISCHEL, REGULATORY TAKINGS, supra note 63, at 154 (noting that Michelman attributes demoralization costs to those that look to future and fear similar losses); Durham, supra note 61, at 1310 (discussing demoralization costs suffered by similarly situated owners). The literature on the "insurance model" of takings explores and questions this assumption. See, e.g., Farber, supra note 67, at 283-87 (reviewing literature); see also, e.g., Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Empirical Analysis, 72 CAL. L. REV. 569, 590-94 (1984); William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law, 17 J. LEGAL STUD. 269 (1988); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509 (1986).

And, as the Mississippi case illustrates, one reason to distrust—and discourage—government actions that "single out" individuals, especially those who are politically vulnerable, is that the act of being singled out is itself demoralizing. Some commentators have used the "singling out" logic to explain *Nollan* and *Dolan*, arguing that the heightened scrutiny resulted from the Court's suspicion of regulators' exercise of discretion *vis-a-vis* individual landowners.<sup>102</sup> But, if this fact justifies heightened scrutiny of land acquisition, it is hardly limited to exactions. On the contrary, *every* exercise of eminent domain, by definition, "singles out" individual property owners.<sup>103</sup>

In fact, some individuals forced to involuntarily part with their property in an eminent-domain proceeding may be *worse off* than those who face an aggressive regulatory authority that has "singled them out" for a development exaction. The very fact that a regulatory authority is empowered to demand an exaction reflects two facts: first, bargaining is a part of the American land use planning process,<sup>104</sup> and second, the landowner is not entitled to the permit that she seeks from the regulator.<sup>105</sup> During negotiations with landowners, the regulatory authorities exercise their discretion to offer the landowner a valuable benefit (the green light to develop land) in exchange for the relinquishment of some property rights. By injecting the unconstitutional conditions doctrine into this area of law, the Court has weighed in on

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<sup>25,</sup> at 306–07 (predicting that targets of takings, compensated and uncompensated, are likely to be underrepresented in political process).

<sup>&</sup>lt;sup>102</sup> See Dana, supra note 18, at 1261 (discussing—and rejecting—argument that Nollan and Dolan stem from suspicion of regulators' exercise of discretion). A number of courts have ruled that Nollan/Dolan apply only when an exaction is demanded by a regulator exercising discretion, not when one is imposed pursuant to generally applicable legislative standards. See, e.g., Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 983 (Or. 2002) (holding rough proportionality analysis inapplicable to monetary impact fees that are legislatively determined and generally applied); San Remo Hotel v. City & County of San Francisco, 41 P.3d 87, 105 (Cal. 2002) (refusing to apply Dolan standard because exaction did not result from exercise of discretion); Santa Monica Beach v. Santa Monica Rent Control Bd., 968 P.2d 993, 1002 (Cal. 1999) (holding that essential nexus test does not apply to rent control ordinance); Home Builders Ass'n v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) (holding that Dolan does not extend to monetary impact fees imposed as part of uniform regulatory scheme); Erlich v. Culver City, 911 P.2d 429, 444 (Cal. 1996) (applying Nollan and Dolan to monetary exactions imposed by exercise of discretion).

<sup>&</sup>lt;sup>103</sup> See, e.g., Durham, supra note 61, at 1307–08 (arguing that eminent domain results in high demoralization costs because it pits one person or a small group of persons against the state). The same cannot be said of exactions, which frequently are imposed as part of a general regulatory scheme. As David Dana points out, the exactions at issue in both Nollan and Dolan did not in fact result from a "singling out" of a property owner. On the contrary, "both Nollan and Dolan involved the straightforward application of general policies or statutes to specific parcels rather than individual regulators' exercise of case-specific discretion." See Dana, supra note 18, at 1261.

<sup>&</sup>lt;sup>104</sup> See, e.g., Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CAL. L. REV. 837, 841 (1983) (noting presence of dealmaking between landowners and developers as subject of criticism in scholarly literature).

<sup>&</sup>lt;sup>105</sup> See, e.g., EPSTEIN, BARGAINING, supra note 51, at 5 (describing the "paradox" of unconstitutional conditions).

the property owner's side to minimize opportunities for governmental abuse of power.<sup>106</sup>

Still, even a target of governmental extortion has a choice. Indeed, if a property owner did not value the permit sought more than the exaction demanded, the government would stand to gain nothing by seeking to impose the condition.<sup>107</sup> The targets of eminent-domain proceedings have no such choice, but rather are forced to relinquish their rights to advance what they are told is the common good. Given the inadequacies of monetary compensation discussed above, owners who exchange property rights for a development permit may gain more than those compensated for property taken by eminent domain: not only is the permission to develop a valuable benefit, it may in fact be more valuable than the exaction demanded for it. Douglas Kendall and James Ryan have argued that, to avoid complying with Nollan and Dolan, municipalities should use their power of eminent domain to condemn the land demanded for an exaction and offer the property owner the choice of monetary compensation or compensation in the form of the desired discretionary land use approval. Kendall and Ryan suggest that most property owners will prefer the development permit because its value exceeds the fair market value of the land demanded as an exaction.<sup>108</sup>

#### C. The Limits of Compensation and the Politics of Economic Development

Additionally, the compensation requirement (and presumably the scrutiny used to trigger it) is said to deter the government from overconsuming private property.<sup>109</sup> Other scholars have argued that the compensation re-

<sup>108</sup> See Douglas T. Kendall & James E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 VA. L. REV. 1801, 1803 (1995). Evidence supporting this hypothesis can be found in the annals of American constitutional history. In 1982, the Supreme Court held that a New York law requiring a landlord to permit the installation of cable facilities on his property constituted a per se compensable taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). On remand, the New York Court of Appeals upheld the state's finding that only \$1.00 in compensation was due to the landlord. See Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983); see also Ep-STEIN, BARGAINING, supra note 51, at 183 (noting that the Nollan rule "is not without its dangers," including the possibility that the government will purchase the easement for less than its value to the property owners, and/or will deny the permit, leaving the property owners worse off than if they simply accepted the demand).

109 See EPSTEIN, BARGAINING, supra note 51, at 84–85 (discussing the deterrent function of compensation); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."); William A. Fischel & Perry Shapiro, Takings,

<sup>106</sup> Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (discussing worries about "extortion" in regulatory process).

<sup>&</sup>lt;sup>107</sup> See EPSTEIN, BARGAINING, supra note 51, at 182 (probable that the loss that regulator can inflict by denying development approval exceeds value of exaction). Epstein notes that this prediction is more than "idle speculation": forty-three out of forty-four landowners accepted the conditions at issue in Nollan. Only the Nollans challenged them. *Id.; see also* Michelman, *Takings, supra* note 40, at 1611 (observing that the Nollans were made better off by the offer of the conditional grant of the permit because the California Coastal Commission could have simply denied their application outright); Nollan, 483 U.S. at 856 n.9 (Brennan, J., dissenting) (making similar point).

quirement serves the function that Heller and Krier label "specific deterrence," whereby "the obligation to pay compensation can constrain governmental inclinations to exploit politically vulnerable groups and individuals."<sup>110</sup> The Court's expression of concern in *Dolan* that the government might use exactions as a "short cut" to acquire land suggests that a desire to deter government overreach may have influenced the decision to subject exactions to heightened scrutiny.<sup>111</sup>

Yet the historical record suggests that the compensation required when the government acquires land by eminent domain does not always serve either of the deterrent functions mentioned above.<sup>112</sup> That is, the government sometimes exercises its power of eminent domain in a way that is both inefficient and detrimental to the interests of politically unconnected, vulnerable individuals and groups. The most vivid (but by no means the only) evidence comes, again, from the condemnations enabling urban renewal and the construction of the interstate highway system, both of which were characterized by a massive exercise of the power of eminent domain that resulted in both overconsumption of private land and exploitation of vulnerable populations.<sup>113</sup> For example, the highway and urban renewal programs were known to detractors as "Negro Removal"<sup>114</sup>—an appellation that apparently was de-

<sup>110</sup> Heller & Krier, *supra* note 20, at 999; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 96–97 (1980) (compensation principle provides illustration of legal protection of minorities); Levmore, *Just Compensation, supra* note 25, at 309 ("A central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities.").

<sup>111</sup> See Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

<sup>112</sup> Some commentators have attributed this fact to the fair-market-value measure of compensation, and have therefore suggested that full indemnification award would serve an additional deterrent function. See Durham, supra note 61, at 1300–01. Richard Epstein has proposed that the condemnation award should total 150% of the property's fair market value, in part to deter government overreach due to secondary rent seeking. EPSTEIN, TAKINGS, supra note 29. Some empirical evidence suggests that increasing the level of compensation will deter overuse of the eminent-domain power. See Joseph J. Cordes & Burton A. Weisbrod, Government Behavior in Response to Compensation Requirements, 11 J. PUB. ECON. 47–58 (1979) (finding that additional compensation required by Uniform Relocation Assistance Act reduced highway construction outlays); see also FISCHEL, REGULATORY TAKINGS, supra note 63, at 96–97 (discussing studies supporting compensation/condemnation connection).

<sup>113</sup> FRIEDEN & SAGALYN, *supra* note 74, at 29 ("Whatever the motivation, the poor and the minorities were the leading victims of the highway and urban renewal programs."). A classic example (from the same era) of inefficient exercise of eminent-domain powers—resulting in massive and unnecessary forced displacements—is the construction of New York's Cross Bronx Expressway. "Uber-planner" Robert Moses insisted on a route that destroyed the tight-knit East Tremont community, even though a shorter route was available. As a result, the project cost \$10 million more and displaced over 1500 more families than necessary. *See, e.g.*, Durham, *supra* note 61, at 1298–99 (recounting story).

<sup>114</sup> During the same period, Frieden and Sagalyn recount that "officials from several cities told highway lobbyist Alf Johnson that the urban interstates would give them a good opportunity

Insurance and Michelman: Comments on Economic Interpretations of "Just Compensation" Law, 17 J. LEGAL STUD. 269, 269–70 (1988) (arguing that compensation serves function of "disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes"); Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 349 (2000) ("This 'efficiency' rational for compensating takings . . . remains widely accepted by economically minded commentators as the most important justification for just compensation.").

served in some cases. Miles Lord, who oversaw interstate highway takings while serving as the Minnesota Attorney General, later recalled:

We went through the black section between Minneapolis and St. Paul... about four blocks wide and we took out the home of every black man in that city. And woman and child.... Nice little neat black neighborhood, you know, with their churches and all and we gave them about 6,000 a house and turned them loose onto society.<sup>115</sup>

And, as for the efficiency of these takings, the wisdom of the massive land grab that enabled the construction of our interstate highway system remains the subject of substantial debate.<sup>116</sup> The same cannot be said, however, of urban renewal. Despite the enthusiasm of "slum clearance" proponents, whose viewpoint the Supreme Court accepted with vigor in *Berman v. Parker*,<sup>117</sup> urban renewal generally is considered an abysmal failure. As Michael Schill has observed, "[t]he numbers of jobs created and the amount of private sector investment generated by the program were below hopes and expectations of its proponents [and] the human toll caused by displacement and the destabilization of nearby residential communities casts doubt upon the efficacy of subsidized site assembly."<sup>118</sup>

Sadly, in many places, urban renewal likely made things worse.<sup>119</sup> After bulldozers destroyed intact communities and scattered residents to the winds, many residents found themselves *worse off* than they were while living in a

115 Id. at 29.

116 See, e.g., William Buzbee, Urban Sprawl, Federalism, and the Problem of Institutional Complexity, 68 FORDHAM L. REV. 58, 64-74 (1999) (noting that highway system contributes to suburban sprawl and discussing the benefits and costs of that phenomenon); Robert H. Freilich & Bruce G. Peshoff, The Social Costs and Benefits of Sprawl, 29 URB. LAW. 183, 184 (1997) (connecting highway construction and sprawl and claiming sprawl has "engendered . . . major crises for America's major metropolitan regions"). See generally U.S. GEN. ACCOUNTING OF-FICE, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR (1999) (discussing various factors contributing to the suburban sprawl phenomenon).

117 Berman v. Parker, 348 U.S. 26, 32-33 (1954).

118 Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 808–09 (1991) [hereinafter Schill, *Deconcentrating*]; see also FRIEDEN & SAGALYN, supra note 74, at 34 (discussing psychological studies finding that forty percent of residents displaced by urban renewal had "severe, long-term grief reactions").

119 Critiques of the largely discredited urban renewal experiment abound. Jane Jacobs's classic, The DEATH AND LIFE OF GREAT AMERICAN CITIES (1961), is an early example of this genre which has inspired subsequent generations of planners, including early proponents of "enterprise zones," *see* STUART M. BUTLER, ENTERPRISE ZONES: GREENLINING THE INNER CITIES (1981), and, more recently, the self-styled "new urbanists." On new urbanism, see generally ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000); JERRY FRUG, BUILDING COMMUNITIES WITHOUT BUILDING WALLS 149–54 (1999); VINCENT KATZ & PETER SCULLY, THE NEW URBANISM: TOWARDS AN ARCHITECTURE OF COMMUNITY (1994); *see also* http://www.cnu.org (website of Congress for the New Urbanism). Another early critique of urban renewal is MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949–1962 (1964). For a more recent critique, see, for example, FRIEDEN & SAGALYN, *supra* note 74, at 15–60.

to get rid of the local '[n-town].'... Whatever the motivation, the poor and minorities were the leading victims of the highway and renewal programs." FRIEDEN & SAGALYN, *supra* note 74, at 28–29.

"blighted" neighborhood. Not only did they lose intact, and fairly stable, communities,<sup>120</sup> but many had difficulty even locating a new place to live. This was especially true of black families, for whom the postdisplacement situation was "close to desperate."<sup>121</sup> Continued migration from the rural South led to overcrowding in the remaining black neighborhoods, and systematic housing discrimination made white areas off-limits even for those who could afford them.<sup>122</sup> Most of those displaced during the period eventually found replacement housing, but many ended up paying more for living arrangements that were not appreciably better than those they left behind.<sup>123</sup>

Adding insult to injury, redevelopment efforts tended to proceed at an excruciatingly slow pace. On average, it took three years for the local government even to sell the condemned land to a private developer.<sup>124</sup> In its report to Congress and President Johnson, the United States National Commission on Urban Problems deplored the "unconscionable amount of time consumed" by the urban renewal process.<sup>125</sup> Writing in 1959, Lyman Brownfield, general counsel for the United States Housing and Home Finance Agency, complained that cities had disposed of only thirty percent of the land acquired through urban renewal programs.<sup>126</sup> Local officials only made matters worse by creating "land banks," i.e., by condemning and stockpiling land until needed.<sup>127</sup> Even more depressingly, "many cities saw nothing at all rise from the ground."128 As of 1965, the Kosciusko Project in St. Louis, Southwest Temple Project in Philadelphia, and Camden Industrial Park in Baltimore had been vacant since 1956, and the Ellicott District Project in Buffalo and Lake Meadows Project in Chicago had been vacant since 1952.<sup>129</sup> Rubble-strewn wastelands in St. Louis and Detroit earned such less-than-affectionate nicknames as "Hiroshima flats" and "ragweed acres."<sup>130</sup> Although much of the land condemned for urban renewal purposes was eventually de-

<sup>126</sup> Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 Law & CONTEMP. PROBS. 732, 740 (1960).

<sup>&</sup>lt;sup>120</sup> Frieden and Sagalyn note that "renewal planners had a knack for picking low-income neighborhoods where residents had deep attachments to friends, neighbors, churches, schools, and local businesses. For immigrants and other city dwellers who needed the security of a supportive neighborhood . . . eviction on short notice created nothing less than a life crisis." FRIEDEN & SAGALYN, *supra* note 74, at 33–34.

<sup>121</sup> Id. at 29.

<sup>122</sup> Id. at 30.

<sup>&</sup>lt;sup>123</sup> The typical residents displaced by urban renewal paid twenty percent more rent after being relocated; subsequent studies found from one-fourth to one-half of displaced families living in substandard housing despite a substantial rent increase. *Id.* at 33. Studies of the problems faced by displaced households are summarized in Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971).

<sup>&</sup>lt;sup>124</sup> David B. Carlson, *The Unrealized Profits in Urban Renewal*, ARCHITECTURAL FORUM, July 1962, at 101.

<sup>&</sup>lt;sup>125</sup> Nat'l Comm'n on Urban Problems, Building the American City, H.R. Doc. No. 91-34 (1969).

<sup>127</sup> Id.

<sup>128</sup> FRIEDEN & SAGALYN, supra note 74, at 43.

<sup>129</sup> Urban Renewal Wastelands: Cities' Development Is Suffering as Bulldozed Acres Lie Idle and Untaxed, NATION'S BUS., Apr. 1965, at 86–87.

<sup>130</sup> Roger Montgomery, *Improving the Design Process in Urban Renewal, in* Urban Renewal: THE RECORD AND THE CONTROVERSY 454, 459–66 (James Q. Wilson ed., 1966).

veloped, the problems that continue to stem from vacant, never-renewed land are myriad: not only does a city lose tax revenue from the land lying vacant (which depresses the value of the adjacent property), but neighboring residents must cope with concomitant ills such as crime, vandalism, fire hazards, and worry about unsafe and unsanitary conditions.<sup>131</sup>

Modern-day economic development efforts enabled through the use of eminent domain pale in comparison to the grand ambitions of the urban renewal enthusiasts.<sup>132</sup> In addition, conventional wisdom is that local governments have gotten "better" at redevelopment. The jury is still out, however, on whether redevelopment actually benefits the public.<sup>133</sup> Those touting urban "success stories" must contend with dismal failures like New Haven, Connecticut's Ninth Square Project.<sup>134</sup> Even floating a redevelopment proposal may cause blight as existing residents and businesses rationally anticipate future displacement by deferring maintenance and/or relocating before a mass exodus depresses property values.<sup>135</sup> (This problem is pervasive enough that courts have developed the doctrine of "condemnation blight" to deal with it.<sup>136</sup>) Ultimately, the government may end up holding a large amount of land that has been rendered uninhabitable, and therefore "unrenewable," precisely because the government threatened to take the land to renew it.<sup>137</sup> And, because many relocated businesses fail, renewal efforts can have the perverse effect of permanently removing businesses from downtown.<sup>138</sup> This prospect is particularly troubling as a matter of "fairness" and "justice": after all, the businesses "renewed" out of business may be longterm stakeholders that stuck it out through economically difficult times.<sup>139</sup>

134 See generally John P. Elwood, Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven, 12 YALE L. & POL'Y REV. 138, 150-53 (1994) (describing the history of failed redevelopment efforts).

135 Id. at 177-78; see also, e.g., City of Buffalo v. George Irish Paper Co., 299 N.Y.S.2d 8, 14 (App. Div. 1969) (holding that "cloud of condemnation" resulting from a redevelopment proposal effected a *de facto* taking of property; plaintiff's tenants refused to renew leases after learning of the plans).

<sup>136</sup> See 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12B.17[6] (revised 3d. ed. 2002) (defining condemnation blight as the "debilitating effect upon value of a threatened, imminent or potential condemnation"). Condemnation blight is sometimes found to be a compensable *de facto* taking, in which case the court will move the date of the acquisition forward to reflect the loss in value caused by the threat of eminent domain. See *id.*; S. William Moore & Lorena Hart Ludovici, *Making a Case for Pre-Condemnation Blight*, SD40 ALI-ABA 93, 99 (1999). But cf., Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) (rejecting claim that property-value losses attributable to abandoned condemnation effort constituted "taking" for purposes of the Fifth Amendment).

137 Elwood, supra note 134, at 178.

138 See, e.g., id. at 180.

<sup>131</sup> See John Accordino & Gary T. Johnson, Addressing the Vacant and Abandoned Property Problem, 22 J. URB. AFF. 301, 303 (2000).

<sup>132</sup> See FRIEDEN & SAGALYN, supra note 74, at 133 (noting that later renewal projects were smaller in scale).

<sup>133</sup> Cf. Kirk Johnson, A Plan Without a Master; Rebuilding by Committee? Robert Moses Would Cringe, N.Y. TIMES, Apr. 14, 2002, at 35 (discussing negatives of the "democratization" of urban planning in context of "Ground Zero" redevelopment). See generally FRIEDEN & SAGALYN, supra note 74, 171–239 (extensive discussion of the debate over the "downtown mall" phenomenon).

<sup>139</sup> See, e.g., Peter W. Salsich, Jr., Displacement and Urban Reinvestment: A Mount Laurel

Public-choice theory offers one explanation why compensation will not necessarily deter inefficient (and unjust) government land grabs. As Daryl Levinson recently observed, "[b]ecause government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."<sup>140</sup> As a result, the very fact that the government can spread the burden of compensation among large numbers of taxpayers, and thus expend little political capital, suggests that compensation alone may underdeter the government from exercising the power of eminent domain.<sup>141</sup>

This is especially true if a government with its "economic back to the wall"<sup>142</sup> turns to eminent domain to attract economic development. It is no secret that many major cities did not fare well economically in the late twentieth century. Urban cores emptied as first residents and then businesses fled to greener suburban pastures,<sup>143</sup> leaving local governments determined to do something, *anything*, to stop the downward spiral.<sup>144</sup> Many cities in this situation—and, more curiously, many which are faring much better<sup>145</sup>—have

140 Levinson, supra note 109, at 347.

<sup>141</sup> See id. at 377 (discussing the relative disinterest that dispersed voters will likely take to tax burden imposed by compensation); Farber, *supra* note 67, at 290–94 (same).

<sup>142</sup> Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting).

<sup>143</sup> See, e.g., John D. Kasarda, Industrial Restructuring and the Changing Location of Jobs, in 1 STATE OF THE UNION: AMERICA IN THE 1990'S 215, 216, 239–52 (Reynolds Farley ed., 1995) (discussing post-War War II economic trends); Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 356–57 (1990) (noting that "[s]uburban growth the emigration of people and businesses from city centers to outlying areas—has been a constant feature of . . . American urban history. . . . For more than a century, people have moved away from the older sections of cities"); Schill, Deconcentrating, supra note 118, at 799–800 (discussing suburbanization and "spacial mismatch" hypothesis).

<sup>144</sup> Schill, *Deconcentrating, supra* note 118, at 799. For an exploration of whether local governments' desire to attract development will lead to a "race to the bottom" with respect to environmental policy, see generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

<sup>145</sup> For example, a few years ago my hometown of Overland Park, Kansas (a middle class Kansas City suburb) engaged in a bidding war with ten cities to retain the NCAA corporate headquarters. After soliciting the bids, Indianapolis lured the nonprofit away with a larger subsidy, offering \$50 million compared to Overland Park's \$35 million. See Vic Feuerherd, NCAA

Perspective, 53 U. CIN. L. REV. 333, 371 (1984) ("Perhaps the major moral issue is the basic question whether it is morally acceptable for society to allow a poor person to be forced from his home in order to bring new investment and new people into a particular neighborhood. We have been doing that for at least forty years, but the question will not go away."); see also, e.g., Steigerwald, supra note 7, at 32 (noting that some of the businesses slated for displacement in Pittsburgh had remained in same location "since Grover Cleveland was president"). The businesses displaced by eminent domain are not the only historical losses-the buildings housing them are lost as well. For this reason, the National Trust for Historic Preservation placed both Pittsburgh's Fifth and Forbes area and a west Baltimore neighborhood slated for redevelopment on its "11 Most Endangered Historic Places List." Susan French, There Goes the Neighborhood: To Spark Urban Renewal, Some Towns Dynamite History, PRESERVATION MAGAZINE, Jan. 4, 2002, http://www.nationaltrust.org/magazine/archives/ach\_story/010402.htm. In Baltimore alone, as many as 150 historic buildings were slated for demolition. Id. Urban Renewal destroyed countless irreplaceable, historic buildings. Ironically, decades later, "new urbanism" has become the hottest planning trend, with developers building new neighborhoods designed to look like the ones lost forever to progress. See generally, KATZ & SCULLY, supra note 119.

demonstrated a seemingly limitless willingness to promote development through what might be called "reverse exactions." The current economic development landscape is characterized by a dizzying array of subsidized financing, tax abatements, infrastructure improvements and other "goodies" including the sale (or sometimes the gift) of property seized by eminent domain.<sup>146</sup> All of these incentives aim to induce local businesses to remain at home or to lure businesses away from other locations.<sup>147</sup> At times these inducements are offered to investors "shopping" for a location—as was the case with a recent bidding war between Dallas, Denver and Chicago for the Boeing headquarters.<sup>148</sup> At other times, as in the famed *Poletown* situation, officials face a "put up or shut up" threat from a business demanding millions of dollars in tax subsidies and the government's services as a highly effective real estate broker.<sup>149</sup>

<sup>146</sup> In the recent *99 Cents Only* case, for example, a redevelopment authority paid the owner of valuable commercial real estate a \$38-million condemnation award and then sold the property to Costco, Inc. for \$1.00. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1126 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003).

147 See, e.g., Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 382--89 (describing increasing use of public assets to keep local businesses from relocating or to lure businesses away from other states); Clayton P. Gillette, The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause, 82 MINN. L. REV. 447, 479 (1998) (discussing incentive competition between states); Schill, Deconcentrating, supra note 118, at 809-10 & n.73 (discussing enterprise zones, tax abatements and exemptions, subsidized loans and industrial revenue bonds). Government incentives for development are hardly a new phenomenon. Oscar and Mary Handlin's classic study teaches that they were common at birth of our nation, see OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH (rev. ed. 1969) (describing early state development policies), and the massive public investment in railroads during the nineteenth century provides yet another example of using incentives to spur development, see, e.g., WILLIAM CRONON, NATURE'S METROPOLIS 63-74 (1991) (discussing role of railroads in Chicago's development). The diversity of the subsidy methods and the amount of money offered, however, appears to have crested during the past two decades. See KENNETH P. THOMAS, COM-PETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL ERA 159 (2000) (estimating that total subsidies from state and local governments now totals \$48.8 billion annually); Enrich, supra, at 386-87. Thus far, Congress has declined to intervene to halt or limit the use of incentives. See Gillette, supra, at 478 (noting and disputing argument in favor of federal intervention). For discussion of whether the "dormant" Commerce Clause may restrain the use of incentives, see, for example, Enrich, supra; Walter Hellerstein & Dan Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 CORNELL L. REV. 789 (1996).

<sup>148</sup> See Mark Brown, Boeing Swoops in for a Closer Look, CHI. SUN-TIMES, Apr. 19, 2001, at 2. Chicago won the competition, with a \$61-million incentive package. See Mike Comerford, No Soft Landing, CHI. DAILY HERALD, Dec. 23, 2001, at 2.

<sup>149</sup> See Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 460 (Mich. 1981) (describing the details of GM's proposal for the condemnation of Poletown to make way

Sets Bad Example with Move, WIS. STATE J., June 10, 1997, at 1C. Well-to-do suburbs' participation in the development-attraction game is curious because localities with high levels of home ownership have traditionally tended toward exclusion rather than invitation. See, e.g., WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 162-64 (2001); Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 YALE L.J. 385, 405-09 (1977) [hereinafter Ellickson, Suburban Growth Controls] (describing homeowner preference for growth controls); Nicole Stelle Garnett, Trouble Preserving Paradise, 87 CORNELL L. REV. 158, 161-65 (2001) (characterizing municipal land use politics as a "pattern of exclusion and invitation").

Consider the extremes to which state and local governments have proven willing to go in the past decade: as a condition of building a new racetrack, Kansas International Speedway Corporation ("KISC") insisted that Kansas amend its urban redevelopment law to allow KISC to qualify for tax increment financing; declare part of economically depressed Wyandotte County a "major tourism area"; condemn a large portion of a blue-collar neighborhood to make way for a new auto racetrack; and exempt the racetrack from all property taxes for thirty years.<sup>150</sup> Alabama sought to attract a Mercedes-Benz plant by offering to acquire and improve the factory site, buy twenty-five hundred of the vehicles produced, and train and pay the salary of workers for one year.<sup>151</sup> A Michigan incentives package offered to a paper recycling mill cost the state \$2.4 million per job.<sup>152</sup> And, Amarillo, Texas mailed a check for eight million dollars to thirteen hundred companies around the country; each company was invited to cash the check in exchange for a commitment to create seven hundred new jobs in the city.<sup>153</sup> State and local governments remain locked in this seemingly ever-escalating "economic war between the states" despite the fact that available empirical evidence suggests that fierce intergovernmental competition renders development incentives ineffective.154

Both practical experience and economic theory demonstrate why the government's ability to bypass the market, and therefore avoid holdouts and other land assembly problems, makes eminent domain an attractive "incentive" to offer to private companies. The potential beneficiaries have a substantial incentive to engage in rent seeking to secure the benefit of this bypass<sup>155</sup> (not to mention to capture all or part of the "condemnation bonus"

154 See, e.g., INST. ON TAXATION AND ECON. POLICY, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 35-41 (2000) (summarizing fifteen state audits that show development incentives are generally ineffective); Franklin J. James, *Economic Development: A* Zero-Sum Game?, in URBAN ECONOMIC DEVELOPMENT 157, 161 (Richard D. Bingham & John P. Blair eds., 1984) ("There is no convincing empirical evidence that urban economic development as currently practiced is more than a zero sum game."); Enrich, *supra* note 147, at 390-405 (summarizing economic evidence and concluding that "[f]rom the states's collective vantage point, the net effect of the incentive competition is, in fact, far worse than zero-sum. For, although the states can expect to achieve no overall gain in business activity or jobs, they do incur a very substantial loss of tax revenues."); Schill, Deconcentrating, supra note 118, at 810 ("Another reason for the limited usefulness of economic development incentives is their ubiquity. Since many jurisdictions offer these benefits they cease to generate an advantage for any particular locale."). But cf. Gillette, supra note 147, at 452 (characterizing empirical studies evaluating subsidies as "inconclusive"); id. at 453-78 (reviewing and questioning argument that incentives are usually a net loss for the offering jurisdiction).

155 See, e.g., EPSTEIN, TAKINGS, supra note 29, at 161-81; Merrill, Economics of Public Use,

for new plant); FRIEDEN & SAGALYN, *supra* note 74, at 105 (describing demands made by "anchor" stores in Pasadena, California downtown mall as "unconscionable").

<sup>150</sup> See Kansas ex rel. Tomasic v. Unified Gov't, 962 P.2d 543, 549-50 (Kan. 1998).

<sup>151</sup> Ivan C. Dale, Comment, Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause, 46 ST. LOUIS U. L.J. 247, 253 (2002).

<sup>152</sup> Id. (describing several incentive packages).

<sup>153</sup> See Melvin L. Burstein & Arthur J. Rolnick, Congress Should End the Economic War Among the States, THE REGION, March 1995, available at http://minneapolisfed.org/pubs/ar/ar 1994.html (noting that "[w]hat is so remarkable about these two initiatives is that they are not remarkable").

discussed above).<sup>156</sup> This incentive only increases if the government is willing to transfer title to a private beneficiary at below-market prices<sup>157</sup>—or along with an attractive package of tax incentives. A basic lesson of public-choice theory is that governments respond to connected insiders' demands and discount the needs of unorganized individuals. This reality undercuts Fischel's prediction that public outcry resulting from forced displacements will limit the instances of "cases that flirt with the borderlines of public use," by forcing reputation-minded public officials to "respond[] to the potential for inefficiency and unfairness in using eminent domain."158 Even if the targets of the government wrecking ball have the high stakes that give them an organizational advantage over disconnected taxpayers, they will not necessarily be able to turn elected officials' eyes away from the prize offered by a wellheeled developer promising economic salvation.<sup>159</sup> This is especially true if elected officials believe that they are locked in a prisoners' dilemma with other locations, making it practically impossible to be the first to cry "chicken" in the incentive game.<sup>160</sup>

For these reasons, the democratic process may be better able to limit the use of development exactions than the exercise of eminent domain. For example, Vicki Been has drawn upon the work of Albert Hircshmann<sup>161</sup> and Charles Tiebout<sup>162</sup> to argue that local governments' ability to impose land use

156 See supra text accompanying notes 91–93.

157 See 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1126 (C.D. Cal. 2001), appeal dismissed as moot, 60 Fed. Appx. 123 (9th Cir. 2003) (invalidating government plan to purchase property for \$3.8 million and transfer it to Costco Corporation for \$1.00).

158 FISCHEL, REGULATORY TAKINGS, supra note 63, at 74-77.

159 See Farber, supra note 67, at 289–90 (questioning whether targets of takings are as disadvantaged as the literature predicts but admitting that "[a]ll things being equal, it probably is still true that the dispossessed are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout ....").

160 See Enrich, supra note 147, at 396 ("[T]he political costs of adopting tax breaks for businesses are lower than the costs of failing to participate aggressively in the incentive bidding competition. Consequently, the states find themselves caught in a classic prisoners' dilemma.... [I]f the other states are going to offer a widening array of tax breaks, then none can afford the costs—more political than economic—of abstaining."); Matthew Schaefer, State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma, 28 N.M. L. REV. 303, 311-12 (1998). Former Illinois Governor Jim Edgar has claimed that a unilateral cutback in business incentives would be "just as unrealistic as it would be for the United States to have withdrawn unilaterally from the nuclear arms race." Jim Edgar, Are Economic Development Incentives Smart?, STATE Gov'T NEws, Mar. 1993, at 12. But cf. Gillette, supra note 147, at 471-72 (asserting that while public choice arguments about inevitability of subsidies "have a ring of truth" they discount the ability of opponents to organize and limit them).

161 See Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States (1970).

162 See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).

supra note 17, at 85–87. Some commentators have suggested that an *anticompensation* requirement might more effectively contain the rent-seeking problem by creating in the uncompensated losers a powerful lobby against government projects. *See, e.g.*, Farber, *supra* note 67, at 291–92; Levinson, *supra* note 109, at 377 (suggesting that regulatory takings may in fact generate more political opposition than compensated ones).

exactions is limited by private developers' ability to reject their demands and take their development business elsewhere.<sup>163</sup> Been observes that a "community must compete with other jurisdictions if it wants to encourage development because a developer dissatisfied with a community's exactions policy can take the project to another jurisdiction that offers better terms."<sup>164</sup> Therefore, posits Been, market forces—rather than judicial scrutiny—will adequately prevent overregulation in most cases.<sup>165</sup> The public-choice model reinforces this assumption; if developers are politically organized and influential (as much of the land use literature assumes that they are), their arguments against exactions may carry significant weight.<sup>166</sup>

Leaving aside the question of whether Professor Been's conclusions about exactions are correct as an empirical matter,<sup>167</sup> the political "market" for development would appear to be better able to check exactions than the exercise of the eminent-domain power. Professor Been's analysis is based upon the assumption that developers choosing where to locate can influence land use regulators.<sup>168</sup> The "victims" of eminent domain, however, are not outsiders making a locational decision, and therefore lack the developers' power of "exit" (which is actually the refusal to enter). A property owner displaced by eminent domain is situated where Professor Been admits that market forces will not adequately police government overreach: she has already made the decision to situate within a community,<sup>169</sup> perhaps—as Tie-

165 Id. at 545.

168 Been, supra note 50, at 509.

169 Id. at 539-40 (discussing situations when market forces will not adequately constrain government action); Farber, *supra* note 67, at 290 (observing that the "one-shot nature" of property-owners' involvement in a taking disadvantages them in political process); Levmore, *Just Compensation, supra* note 25, at 305-19 (arguing that the compensation requirement is needed to protect "occasional individuals" singled out for a taking because they are politically powerless).

<sup>163</sup> Been, supra note 50, at 509-28.

<sup>164</sup> *Id.* at 509; *see also id.* at 511–28 (discussing empirical evidence supporting Tiebout's hypothesis that "jurisdictions compete for residents by attempting to offer desirable public service tax packages").

<sup>166</sup> See, e.g., Dana, supra note 18, at 1272 (describing "under regulation account," which attributes lax land use regulation to developers' political influence); Ellickson, Suburban Growth Controls, supra note 145, at 407–09 (describing "developer influence" model of land use law); Gillette, supra note 147, at 470 (discussing argument that "[p]olitical officials . . . have a bias in favor of unchecked business development, regardless of its effects"). For a recent example of developers' political clout, see Nicole Stelle Garnett, Trouble Preserving Paradise?, 87 CORNELL L. REV. 158, 171–73 (2001) (attributing failure of state-wide growth control initiatives to developers political clout).

<sup>&</sup>lt;sup>167</sup> See, e.g., Stewart E. Sterk, Competition Among Municipalities as a Constraint on Land Use Exactions, 45 VAND. L. REV. 831 (1992) (questioning Professor Been's conclusions). One possible counter to Been's conclusion is that, in many localities, the dominant political force may be homeowners who stand to benefit from overregulation, rather than developers who would prefer a more relaxed regulatory scheme. See, e.g., Dana, supra note 18, at 1269–71 (if dominant political forces benefit from overregulation, local politicians might respond to their demands, even at the detriment of the overall welfare of the community); Ellickson, Suburban Growth Controls, supra note 145, at 510 (arguing that majoritarian preferences of homeowners might lead to exclusion of development justifying judicial review). For a comprehensive discussion of the effect of homeowner political clout on local government policies, see generally FISCHEL, THE HOMEVOTER HYPOTHESIS, supra note 145.

bout would predict—because of the package of goods and services offered by the local government, but, more likely, as the result of a complicated array of social and economic factors. As Professor Been observes, "even a family that has few emotional ties to a community will have to incur moving costs in order to exit the community . . . Many families also would suffer psychological costs if they moved, and thus could be made to pay a substantial exaction before they would leave the community."<sup>170</sup> Property owners in such a situation must resort to what Hirschman calls "voice," that is, rallying public opposition to a taking.<sup>171</sup> While such efforts have succeeded in some cases,<sup>172</sup> as Fischel predicts, the threat of public opposition to an exercise of eminent domain does not promise the systematic deterrent provided by the developers' power of exit.

#### D. The Ends Question (Again)

Finally, the *means* scrutiny demanded by *Nollan* and *Dolan* inevitably provides courts with insight about the *ends* of government action. In other words, means-ends analysis permits the courts to scrutinize beyond simply whether the government is securing property by constitutionally valid means. It also gives the courts a "back door" way to determine whether the property is being taken for a constitutionally appropriate purpose (or, at least, will be used for the purpose asserted by the government *ex ante*) or whether it will be put to another, perhaps illegitimate, use. As Professor Sunstein has observed in another context, "[t]he careful scrutiny of means-ends connections operates to 'flush out' impermissible ends."<sup>173</sup> This use of the means-ends analysis is readily demonstrated in *Nollan*, when the Court expresses concern that "the lack of a nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was."<sup>174</sup>

<sup>&</sup>lt;sup>170</sup> Been, *supra* note 50, at 540; *see also* EPSTEIN, BARGAINING, *supra* note 51, at 185 (noting that *Nollan* itself is "case in point" that "real estate developers are not the only persons who are at risk from [exactions].... If the Coastal Commission had prevailed, the Nollans could not have picked up their stakes and moved their house to another locale.").

<sup>171</sup> HIRSCHMAN, supra note 159, at 30.

<sup>&</sup>lt;sup>172</sup> See, e.g., V. David Sartin, Recount on Project Likely; Mayor Loses, CLEVELAND PLAIN DEALER, Nov. 5, 2003, at A1 (discussing the narrow defeat of a proposal to raze an entire neighborhood in an aging suburb to make way for an upscale retail project, and noting that a D.C. public-interest law firm had "made the project a centerpiece in a campaign against the use of eminent domain for private development"); Tom Barnes, *Fifth-Forbes Foes Express Relief in Party Atmosphere*, PITTSBURGH POST-GAZETTE, Nov. 25, 2000, at A13; see also David Nitkin, *Series of Missteps Brought About Demise of Condemnation Bill*, SUN (Balt. Md.), Nov. 9, 2000, at A1 (discussing successful public relations campaign to defeat a Baltimore County redevelopment plan); Conor O'Clery, *People Power Wins Victory over Might of World Furniture Giant—Overwhelmed by Fierce Opposition, IKEA Scrapped Plans for 17-Acre Superstore*, IRISH TIMES, Feb. 9, 2001, at 53 (detailing demise of New Rochelle, NY plan to condemn neighborhood for IKEA furniture store). But see, e.g., Tom Barnes, *Fifth and Forbes: Fears of Eminent Domain Bring* D.C. Law Firm Back, PITTSBURGH POST-GAZETTE, March 9, 2002, at C-5 (discussing City's effort to revive plan).

<sup>173</sup> Sunstein, supra note 9, at 878.

<sup>174</sup> Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

True, judicial efforts to uncover whether legislation enacted for the asserted "purpose of protecting the public health or welfare, [was], in reality, passed from other motives,"<sup>175</sup> especially to benefit special interests, is often cited as a discredited hallmark of *Lochner*-era jurisprudence.<sup>176</sup> But, leaving aside the vigorous debate over whether *Nollan* and *Dolan* inappropriately resuscitate *Lochneresque* scrutiny,<sup>177</sup> the need to ensure that condemned property will in fact be used as the government promises is at least as acute in the public-use context as in the exactions context. Judicial deference to a decision to exercise the eminent-domain power is predicated on the assumption that the elected branches of government are in a better position than the courts to determine what uses of land are in the "public interest," and, moreover, that the elected branches are more accountable than the judiciary regardless of whether their decisions are substantively good or bad.<sup>178</sup>

176 Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. REV. 605, 622–24 (1996) [hereinafter McUsic, Ghost] (Lochner-era courts sought to uncover and invalidate redistributive "class" legislation); Sunstein, supra note 9, at 878 (Lochner's means-ends scrutiny used to "flush out" impermissible ends, especially "raw interest group politics").

177 This debate has been ably waged elsewhere, beginning, fittingly, with the Justices themselves. Compare Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (warning that "[e]ven more consequential than its incorrect disposition of this case . . . is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago"), with id. at 384 n.5 (rejecting dissent's suggestion that "this case is actually grounded in 'substantive' due process"); Nollan, 483 U.S. at 842 (Brennan, J., dissenting) (arguing that Court has resorted to a legal standard that has been "discredited for the better part of this century"), with id. at 834 n.3 (rejecting Brennan's characterization). Academics have also weighed in on the debate. See, e.g., BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITU-TION 5 (1990) (modern takings doctrine threatens to revive Lochner); Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse, 88 COLUM. L. REV. 1630, 1650-52 (1988) (wrong to characterize Nollan's nexus test as return to Lochner); Lunney, Critical Reexamination, supra note 100, at 1896 (1992) ("[T]he Court's approach is either to ignore precedent or to use name calling-"Lochnerism"); McUsic, Ghost, supra note 176, at 631 ("The modern Court also adopts the Lochner era's approach by analyzing the proper nexus between the owner, the regulation, and the public goal."); Merrill, Rights as Public Goods, supra note 54, at 865 (noting Justice Steven's observation in Dolan dissent that "style of review mandated by the decision was functionally very similar to, and would operate in the same general area as, Lochner-style review"); Michelman, Takings, supra note 40, at 1609 (rejecting the suggestion that Nollan is "Lochner redivivus"); Jed Rubenfeld, Usings, 102 YALE LJ. 1077, 1099 n.133 (1993) ("The only way a court could plausibly determine whether a law was not legitimately harm-preventing would be to engage in precisely the same kind of super-legislative judgments that were the hallmark of Lochner-era cases."); Richard G. Wilkins, The Takings Clause: A Modern Plot for an Old Constitutional Tale, 64 NOTRE DAME L. REV. 1, 8 (1989) (suggesting that "[t]he decision in Nollan marks the return—with a vengeance—of a strict 'means/ends' analysis"). Lochner-era courts regularly invalidated economic legislation both because the ends of the legislation was not within the police power and because the government failed to establish a close fit between the ends of legislation and the means that the government chose to advance those ends. See, e.g., Sunstein, supra note 9, at 877 (noting two distinct features of Lochner are sharp limits on the permissible ends of government action and careful means-ends scrutiny); see also McUsic, Ghost, supra note 176, at 620-21 (Lochner demanded evaluation of both the ends of legislation and the determination whether "a legislative act rectified the harm caused by the plaintiff").

178 See Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("Judicial deference is re-

<sup>175</sup> Lochner v. New York, 198 U.S. 45, 64 (1905).

If, however, the public-use limitations in the federal and state constitutions place outer limits on the eminent-domain power—as the United States Supreme Court has insisted with respect to the Fifth Amendment<sup>179</sup>-the justification for deference disappears if property will be diverted to a purely private purpose following condemnation. Yet, under current constitutional standards in virtually every state and federal court, the government need not provide any assurances that a given exercise of eminent domain is necessary, or even related, to any particular policy. So long as some conceivable purpose justifies the exercise of eminent domain, the means by which the government acquires land is essentially beyond scrutiny.<sup>180</sup> By demanding that a condemning entity link the means by which and the *particular* reason for which it seeks to acquire land, a court may well uncover "ulterior" purposes for the exercise of eminent domain. Furthermore, as discussed in more detail below, a condemnation is initiated by pleadings setting forth the purpose for which the government seeks to acquire land. This stated "purpose" would enable courts to undertake a means-ends evaluation while avoiding the obvious pitfalls associated with discerning the true purpose of a government's action.

#### II. What Would a Means Test Mean?

Assuming that the acquisition of property by eminent domain raises the concerns that might justify scrutiny of exactions, it remains necessary to formulate a workable version of means-ends scrutiny for a public-use challenge. Again, *Nollan* and *Dolan* may provide insight into this problem. These cases require a reviewing court to determine whether an exaction is "roughly proportional" to the impact of the development proposed by the landowner.<sup>181</sup> On its face, this proportionality test would not map easily onto a public-use challenge. When property is taken by eminent domain, it could be said that this proportionality is *never present* because the property owner bears a qualitatively different burden than the taxpayers who must pay the compensation; *always present* because compensation is paid; or, perhaps, *present only if* fair-market-value compensation adequately accounts for all of the losses suffered by the property owner.<sup>182</sup>

The solution to this puzzle may lie with the Court's reason for choosing the "rough proportionality" formula in *Dolan*. The Court considered several different state-court tests for reviewing exactions before concluding that the

quired because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.").

<sup>&</sup>lt;sup>179</sup> See id. at 241 (defining rationality limits of eminent-domain power). The recent cases discussed in the Introduction may be the first post-*Midkiff* federal decisions to find that a government in fact reached those limits. See Daniels v. Area Plan Common, 306 F.3d 445, 445 (7th Cir. 2002); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), appeal dismissed as moot, 60 Fed. Appx. 123 (9th Cir. 2003).

<sup>180</sup> As Richard Epstein has observed, the "expression 'conceivable public purpose' suggests that the court, in its search for a 'rational basis,' can supply a purpose the legislature itself missed." EPSTEIN, TAKINGS, *supra* note 29, at 162.

<sup>181</sup> See Dolan, 512 U.S. at 395-96.

<sup>182</sup> For an exploration of the final suggestion, see Durham, supra note 61.

correct federal standard required "the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development."<sup>183</sup> It expressed concern, however, that the phrase "reasonable relationship" might be confused with traditional rational-basis review and chose the "rough proportionality" standard as its rough equivalent.<sup>184</sup> The Court defined the rough proportionality formula as follows: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development."<sup>185</sup>

The fact that the government has choices about how to acquire land to advance the public interest permits courts to conduct a similar review in a public-use challenge. When the government decides that it needs property to advance the public interest, it can purchase it on the market, condemn it, or, in some cases, demand it as an exaction. If the government decides to proceed with a condemnation, it makes additional choices about how to exercise the power of eminent domain: How much, and which, land should be condemned? Should it avail itself to "quick-take" procedures? If the property is to be transferred to a private party following the condemnation, should the government simply delegate its power of eminent domain to the ultimate beneficiary *ex ante*? Should that beneficiary be required to guarantee that the property will be used for the purpose for which it is to be condemned?

Because the government can, and does, make decisions about how to acquire land, a court reviewing a public-use challenge could require a showing similar to that demanded in an exactions case: Can the government link the means by which and purpose for which it seeks to acquire land? That is, can the government demonstrate that a given exercise of eminent domain was "reasonably necessary" to advance, or "related in nature and extent" to, the public purpose for which the condemnation power was invoked? This inquiry would continue to reflect the view that legislators, rather than judges, should determine what projects are in the public interest. It would reject, however, the conclusion in *Midkiff* that a court need only satisfy itself that "the exercise of eminent domain power is rationally related to a *conceivable* public purpose."<sup>186</sup> Instead, the courts would ask the government to make a colorable showing that an exercise of eminent domain is actually needed to advance the *particular* purpose justifying it.

While this review departs from *Midkiff*, it maps rather easily onto standard eminent-domain procedures. In fact, established rules governing the forced taking of private property simplify means-ends analysis by requiring, *ex ante*, a statement of the "ends" justifying the condemnation. In most states, and for all takings by the federal government, eminent domain is a judicial proceeding.<sup>187</sup> After satisfying the necessary prerequisites,<sup>188</sup> the

<sup>183</sup> Dolan, 512 U.S. at 390.

<sup>184</sup> Id. at 391.

<sup>185</sup> Id.

<sup>186</sup> Haw. Hous. Auth v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added).

<sup>&</sup>lt;sup>187</sup> 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.05[1] (3d ed. 2002) (noting the prevalence of judicial model in states); *see also* FED. R. CIV. P. 71A (setting forth procedure for condemnations in federal courts). In several states, takings may be effected administratively,

condemning entity files an action against the persons whose property it seeks to take.<sup>189</sup> To do so, the condemning entity must submit pleadings which, *inter alia*, describe the land to be taken, and, importantly, set forth the public use for which it is being taken.<sup>190</sup> The purpose used to justify the taking in these pleadings, which must be stated with particularity in many states,<sup>191</sup> could easily serve as the "ends" portion of the public-use equation, just as the "impact of the proposed development" is used for rough proportionality review of exactions.<sup>192</sup>

The fact that the government must already justify every exercise of eminent domain with an ex ante statement of purpose undercuts Midkiff's insistence that a proper respect for the prerogatives of the political branches requires courts to speculate about conceivable justifications for an exercise of eminent domain.<sup>193</sup> The Court has held that such speculation is inappropriate when the government has articulated the purpose of its policy. In the equal protection context, the Court has rejected the "conceivability" test under circumstances present with every exercise of eminent domain-that is, where the government stated, with particularity, the purpose of its action. For example, in Allegheny Pittsburgh Coal Co. v. County Commission,<sup>194</sup> the Court considered an equal protection challenge to a county's practice of reassessing property for tax purposes only when title changed hands.<sup>195</sup> The Court invalidated the assessment scheme because similarly situated property owners bore drastically different tax burdens.<sup>196</sup> Three years later, in Nordlinger v. Hahn,<sup>197</sup> the Court rejected an equal protection challenge to California's Proposition 13, which had a nearly identical effect on property owners.<sup>198</sup> In distinguishing the cases, the Court relied upon the fact that the county in Allegheny Pittsburgh Coal Co. had asserted that its assessment scheme was "rationally related to its purpose of assessing properties at true current value."199 (Which, as a matter of logic, it could not be.) The Court then implied that, when the government articulates a purpose for its action, it will be held to it: "The Equal Protection Clause does not demand for pur-

192 See Dolan v. City of Tigard, 512 U.S. 374, 390 (1994).

<sup>193</sup> The reliance on this statement of purpose is, furthermore, more deferential than the *Nollan/Dolan* standard, which limits the universe of legitimate governmental justifications for exactions to *one*—the mitigation of "the impact of the proposed development." *Id.* at 395–96.

194 Allegheny Pittsburg Coal Co. v. County Comm'n, 488 U.S. 336 (1989).

by passing a statute or resolution to take certain designated land and awarding compensation to the owners. 6 SACKMAN, *supra*, § 24.04.

<sup>&</sup>lt;sup>188</sup> Such prerequisites include, for example, the requirement in most states that the condemnor attempt to purchase the property before instituting a condemnation. 6 SACKMAN, *supra* note 187, § 26A.02[1].

<sup>189</sup> Id. § 24.05[1].

<sup>&</sup>lt;sup>190</sup> See id. § 26A.02[1] (excerpting state statutes); see also FED. R. CIV. P. 71A(c)(2) (directing that "the complaint [for condemnation of property] shall contain a short and plain statement of . . . the use for which the property is to be taken").

<sup>191 6</sup> SACKMAN, supra note 187, § 26A.02 [1] nn.5 & 24.

<sup>195</sup> Id. at 337.

<sup>196</sup> Id. at 341.

<sup>197</sup> Nordlinger v. Hahn, 505 U.S. 1 (1992).

<sup>198</sup> Id. at 17.

<sup>199</sup> Id. at 15.

poses of rational-basis review that a . . . governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. . . . [But] this Court's review does require that a purpose may conceivably or may reasonably have been the [decisionmaker's] purpose and policy."<sup>200</sup> The Court cited as authority for this proposition *Wheeling Steel Corp. v. Glander*,<sup>201</sup> observing that "after the Court in *Wheeling Steel* determined that the statutory scheme's stated purpose was not legitimate, the other purposes did not need to be considered because '[h]aving themselves specifically declared their purpose, the . . . statutes left no room to conceive of any other purpose for their existence."<sup>202</sup>

Of course, a court evaluating a pubic use challenge must still connect the dots to determine whether a given exercise of eminent domain is reasonably necessary to advance the purpose used to justify it. This is, to be sure, no small task. Courts, however, must regularly evaluate the "reasonableness" of government action. (Consider, for example, the "reasonable suspicion" and "probable cause" determinations required in the Fourth Amendment context.) And, determining the "reasonable necessity" of an exercise of eminent domain certainly is no more difficult than comparing an exaction to the impact of a proposed development. Over time, lower courts undoubtedly will develop standards to guide means-ends review in public-use cases, just as judicial standards are beginning to emerge to gauge the proportionality of an exaction.<sup>203</sup>

For example, it is possible that courts might come to ask the government to make several different types of "necessity" showings. First, at the broadest level, a court might review whether the larger *project* for which property is being condemned is reasonably necessary to advance the government's policy goals. For example, a court might ask whether a redevelopment project to be enabled by eminent domain is reasonably necessary to stem the tide of suburban sprawl, to renew a lifeless downtown, or to advance whatever goal the government uses to justify the exercise of eminent domain. The difficulty is that this approach comes perilously close to an ends-oriented inquiry. The distinction between—"is this policy goal (e.g., economic development) in the public interest?"—and—"is this particular project reasonably necessary to promote economic development?"—may be real. But, entertaining such a distinction may prove an exercise in casuistry that intervention-wary courts are simply unwilling to undertake.

Alternatively, a reasonable necessity test might require courts to ask a means-ends question familiar from other areas of constitutional law—that is,

<sup>200</sup> Id.

<sup>201</sup> Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

<sup>&</sup>lt;sup>202</sup> Nordlinger, 505 U.S. at 16 n.7 (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959)).

<sup>&</sup>lt;sup>203</sup> For cases applying the "rough proportionality" formula, see, for example, McClure v. City of Springfield, 28 P.3d 1222, 1228 (Or. Ct. App. 2001) (upholding street and sidewalk dedication requirements); Benchmark Land Co. v. City of Battle Ground, 49 P.3d 860, 865 (Wash. 2002) (city failed to establish rough proportionality between street improvement conditions and impact of development); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18, 44 (Tex. App. 2002) (same); Isla Verde Int'l Holdings v. City of Camas, 990 P.2d 429, 431 (Wash. Ct. App. 1999) (invalidating city's open space set-aside ordinance under *Dolan* formula).

whether the government's actions are "overinclusive" (or, at least theoretically, "underinclusive").<sup>204</sup> In other words, a court seeking to determine whether a condemnation is "related in nature and extent" to the public purpose justifying it might inquire whether the government is acquiring more land than necessary or whether the government needs the particular parcel of land at issue. That is a clear purport of *Dolan*; the Court invalidated the exaction because the government failed to demonstrate that it could not accomplish its policy objectives with less land.<sup>205</sup> In fact, some state courts already entertain such challenges, permitting property owners to argue that the size of the taking is excessive.<sup>206</sup> In most cases, however, continued judicial deference to the *ends* of the government to define the "public interest" justifying a condemnation necessarily carries with it significant latitude to determine the amount of land needed to advance that interest.

Finally, aside from scrutiny of the *amount* of land acquired, means-ends scrutiny in a public-use case might entail an evaluation of whether the government could have acquired the land in question through other, noncoercive, means. Such a requirement might work much like Merrill's "basic model" of means review.<sup>207</sup> Merrill would permit the use of eminent domain where, "market exchange, if not impossible to achieve, is nevertheless subject to imperfections."<sup>208</sup> To satisfy this burden, the government might show that it attempted to negotiate with the property owner about a reasonable price for the land and that its offer was rebuffed, making a resort to eminent domain reasonably necessary to eliminate holdouts that impede the public project.<sup>209</sup> Alternatively, the government could present evidence that it chose to acquire the land through eminent domain rather than through privately negotiated transfers because, given the facts of the particular project, the probability that individual property owners would engage in rent-seeking behavior is high.<sup>210</sup>

Consider, for example, the salutary role that heightened means-ends scrutiny could have played in a recent federal case. In 99 Cents Only Stores v. Lancaster Redevelopment Authority, a district court did what many had come

<sup>204</sup> See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 50–51, 58 (1993) (characterizing ban on signs in residential neighborhoods as both overinclusive and underinclusive, and ultimately invalidating based on overinclusiveness).

<sup>205</sup> Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) (noting that the applicable regulations already required Dolan to maintain 15% of her land as open space and that "[t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control").

<sup>&</sup>lt;sup>206</sup> See 7 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.07[3][c][iii] (3d ed. 2002) (discussing the "excessive taking" defense to condemnation).

<sup>207</sup> See Merrill, Economics of Public Use, supra note 17, at 74-81.

<sup>208</sup> Id. at 74-75.

<sup>209</sup> See Merrill, Rent Seeking, supra note 9, at 1570 (eminent domain to overcome holdouts is often necessary to achieve efficient use of resources).

<sup>&</sup>lt;sup>210</sup> Permitting a public-use defendant to argue "we asked and were rejected" minimizes a serious practical difficulty with Merrill's "basic model"—the fact that it would require a court to evaluate market conditions to determine whether a high potential for inefficient rent-seeking behavior, especially that which impedes land assembly, exists. Merrill, *Economics of Public Use*, *supra* note 17, at 74–81.

to believe was undoable: it held that an exercise of the power of eminent domain ran afoul of the Fifth Amendment's public-use limitation.<sup>211</sup> The Lancaster Redevelopment Authority ("Authority") sought to condemn property leased by the plaintiff in order to accommodate the expansion demands of the discount retailer, Costco Wholesale Corporation ("Costco").<sup>212</sup> Both stores were located in a shopping center known as "The Power Center," which the court characterized as the "highest quality commercial retail property in Lancaster."<sup>213</sup> Although a recent comprehensive study had found that Costco's expansion needs would be better met by a vacant parcel of land, Costco demanded that the Authority condemn the space occupied by 99 Cents Only.<sup>214</sup> "Fearful of Costco's relocation to another city," the Authority relented.<sup>215</sup> The Authority agreed to acquire the 99 Cents Only property from its landlord through a "friendly' eminent domain proceeding," in which the city would purchase the property for \$3.8 million, relocate 99 Cents Only, and sell the property to Costco for \$1.00.<sup>216</sup>

The district court rejected the assertion that the condemnation advanced the Authority's goal of preventing the "reestablishment of blight," finding that justification "palpably without reasonable foundation" and thus invalid even under *Midkiff*'s lax standards.<sup>217</sup> In order to reach this conclusion, however, the court was forced to engage in the very type of judicial second guessing rejected in *Midkiff* by holding that the city's asserted public purpose—the prevention of future blight—was pretextual.<sup>218</sup> Had the court instead required Lancaster to demonstrate a connection between the means by which and the ends for which it acquired the property, the court need not have rejected the city's assertion that the "avoidance of future blight" was in fact a valid public purpose.<sup>219</sup> Instead, the court might have asked more narrow questions: Was it reasonably necessary to concede to Costco's demand for this particular parcel of land to avoid future blight?

Only time will tell how "rough proportionality" review will play out in exactions cases, but it is likely that many exactions will pass muster.<sup>220</sup> The

219 Id. at 1131.

<sup>220</sup> The government presumably will have little difficulty proving, for example, that street dedication requirements are "related in both nature and extent" to the impact of a new subdivision. Early evidence in fact suggested that both *Nollan* and *Dolan* had little effect on exactions demanded by local governments and that state-court opinions continued to reflect substantial deference toward regulatory agencies. See Dana, supra note 18, at 1287 (reviewing early evidence); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter*?, 6 FORDHAM ENVTL.

<sup>211 99</sup> Cents Only Stores v. Lancaster Redevelopment Auth., 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001), appeal dismissed as moot, 60 Fed. Appx. 123 (9th Cir. 2003).

<sup>212</sup> Id. at 1129.

<sup>213</sup> Id. at 1126.

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> Id.

<sup>217</sup> Id. at 1129–30.

<sup>&</sup>lt;sup>218</sup> *Id.* at 1129 ("In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.").

same goes for the "reasonable necessity" evaluation of eminent domain outlined above. In many cases, eminent domain may in fact be "reasonably necessary" to enable government policy. The government usually seeks to purchase property on the market before resorting to eminent domain; and, in many contexts, is required to do so by law.<sup>221</sup> Even where not legally obligated to bargain with property owners, the government has every incentive to do so in order to avoid the high "due process costs" that attend an exercise of eminent domain.<sup>222</sup> (Of course, a reasonable necessity inquiry presumably would allow the finder of fact to evaluate whether an offer was made in good faith, rather than a "low ball" offer designed to bypass means-ends review.) Finally, as Merrill and others have observed, when the government does choose to exercise the power of eminent domain, it frequently does so in "thin market" settings where the prospect for holdouts is high.<sup>223</sup>

Because exercises of eminent domain will generally be upheld, meansends review in public-use cases will not cure all of the ills that attend forced property acquisitions. A reasonable necessity test might not, for example, prevent the City of Pittsburgh from using its eminent-domain power to eliminate holdouts standing in the way of the "Fifth and Forbes" project<sup>224</sup> even if the development will be a total flop, ruining the proprietors of the displaced businesses, and resulting in the destruction of irreplaceable historical buildings.<sup>225</sup> The fact that means-ends review is not a panacea, however, does not render it pointless. A reasonable necessity standard would place structural limits on the power of eminent domain while minimizing the federalism, separation of powers, and institutional competency perils inherent in the traditional public-use invitation to question whether the ends of government action are "public" enough. It would give courts the opportunity to demand a factual justification for subsidized land transfers like those at issue in the 99 Cents Only case,<sup>226</sup> which likely strike many as outrageous. For example, the condemnation proceeding in 99 Cents Only could prove difficult to justify in

221 See 6 SACKMAN, supra note 187, § 26A.02[1].

223 See FISCHEL, REGULATORY TAKINGS, supra note 63, at 68–69, 75–77; Merrill, Economics of Public Use, supra note 17, at 74–75, 97–98 (reviewing 308 public-use cases and finding over ninety percent arose in thin market settings). But see Patricia Munch, An Economic Analysis of Eminent Domain, 84 J. POL. ECON. 473, 475 (1976) (arguing that the use of eminent domain to overcome impediments to land assembly is rarely, if ever, advisable); but cf. FISCHEL, REGULA-TORY TAKINGS, supra note 63, at 69 (noting that "Munch's study is often cited, but it has not been replicated").

224 See supra note 7 for description of the project.

<sup>225</sup> Of course, a rule precluding inefficient and unwise government projects would have significantly more bite. But, such a rule is out of the question so long as the courts continue to avoid making judgment calls about the ends of government policy.

<sup>226</sup> 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003).

L.J. 523, 555 (1995) (noting that "research indicates that landowners have not been successful at using the state courts to limit restrictive regulation"). More recent cases may call this early assumption into question. *See, e.g., supra* note 203.

<sup>222</sup> See Merrill, Economics of Public Use, supra note 17, at 77-80 (arguing that the "'due process' costs of eminent domain—obtaining legislative authority, drafting and filing the complaint, serving process, securing a formal appraisal, and so forth"—make eminent domain more expensive than market transfers in "thick market" settings); see also FISCHEL, REGULATORY TAKINGS, supra note 63, at 74.

light of the fact that it was a "friendly" one (i.e., the owner of the property, Burnham Pacific, agreed to cooperate).<sup>227</sup>

Finally, and importantly, by requiring the government to justify *how* it chooses to acquire property, a reasonable necessity test likely would limit the government's ability to resort to a number of relatively commonplace eminent-domain "shortcuts," each of which amplifies the concerns discussed in the first half of this Article. Requiring the government to explain why it chose one of the shortcuts discussed below would enable courts to protect property owners from eminent-domain abuses while preserving the right of political actors to condemn land needed to advance their policy goals.

## A. Short Cut #1: Quick-Take

The federal government and most states have adopted "quick-take" eminent-domain statutes which permit the government to obtain title and possession to property prior to a final judgment in an eminent-domain action.<sup>228</sup> Governments usually justify quick-take procedures by something akin to the Fourth Amendment doctrine of "exigent circumstances"—that the delay attendant to a condemnation proceeding would jeopardize the government's actions.<sup>229</sup> For example, the leading eminent-domain treatise states that quick-take statutes were enacted after "urgent public transportation, communication and urban renewal projects . . . illustrated the many inadequacies in the traditional [eminent domain] procedures."<sup>230</sup>

Quick-take procedures are potentially problematic for a number of the reasons addressed above. First, the literature on the "dignitary value" of due process suggests that the lack of a predeprivation opportunity to litigate the legitimacy of a condemnation may impose additional uncompensated losses on property owners.<sup>231</sup> This literature—and much of the due process canon—assumes that "the right to be heard" prior to an adverse government action is itself intrinsically valuable.<sup>232</sup> The Court's decisions permitting postdeprivation procedures in certain narrow circumstances accept this fact,

230 6 SACKMAN, supra note 187, § 24.10[2].

232 See Brennan, supra note 231; Michelman, supra note 231; MASHAW, supra note 231.

<sup>227</sup> Id. at 1126.

<sup>&</sup>lt;sup>228</sup> See Declaration of Taking Act, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C. §§ 3114–3116, 3118 (Supp. 2003)); 6 SACKMAN, supra note 187, § 24.10. The standard quick-take procedure requires the condemnor to file a "declaration of taking" and to deposit the appraised fair market value of the property with the court. *Id.* 

<sup>229</sup> On the exigent circumstances exception, see Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (noting that "warrants are generally required . . . unless the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment").

<sup>&</sup>lt;sup>231</sup> See, e.g., William J. Brennan, Jr., Reason, Passion and the "Progress of the Law," 10 CARDOZO L. REV. 3, 19–20 (1988) (arguing that posttermination hearing may not adequately protect dignitary interests); Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part One, 1973 DUKE L.J. 1153, 1172 (identifying, among purposes of hearing requirement, "dignity values" including "concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate," and "participation values," such as "an appreciation of litigation as one of the modes in which persons exert influence, or have their wills 'counted'"). See generally JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 222–53 (1985).

but proceed on the assumption that an aggrieved individual can be made whole *post hoc*.<sup>233</sup> If fair-market-value monetary compensation fails to make an aggrieved property owner whole, a law that enables the government to condemn real property without a prior determination that it has the legal right to do so is particularly problematic. In many cases, a postcondemnation challenge to the legality of a taking may deny property owners a realistic opportunity to secure the only remedy that will fully compensate them: the continued right to possess their property as it is. If the government avails itself to quick-take procedures, a postdeprivation determination that its actions were illegal may come too late. After all, quick-take procedures are justified by the government's need to secure land quickly in order to *change* it quickly. By the time the propriety of a quick taking is litigated, the property may have been inalterably changed.

Second, quick-take procedures may reduce the administrative costs associated with a condemnation, eroding any deterrent effect that such costs have on the government's acquisition of property. The available empirical evidence suggests that increased compensation requirements limit the exercise of the condemnation power.<sup>234</sup> It is reasonable to assume that higher administrative costs will have a similar deterrent effect.<sup>235</sup>

And, third, the "quickness" of a quick-take procedure may preclude the effective exercise of "voice" by affected property owners and their sympathizers. An assumption underlying *Midkiff* is that the political process—rather than the judiciary—is better able to determine when an exercise of eminent domain serves the public interest.<sup>236</sup> William Fischel has gone farther, arguing that "[t]he cases that flirt with the borderlines of public use, such as *Poletown*, are also limited by popular revulsion at the government's action."<sup>237</sup> Of course, the possibility that public outcry will actually curb eminent-domain abuse decreases dramatically as the condemnation time line constricts. This was one of many of the "bad faith" allegations launched against the city of Detroit during the Poletown controversy. Justice Ryan, in dissent, angrily complained: "[T]he city, aided by the Michigan 'quick-take' statute, marshalled and applied its resources to insure that [the condemnation plan] was a *fait accompli* before meaningful objection could be regis-

235 See Merrill, Economics of Public Use, supra note 17, at 77 (discussing deterrent effect of administrative costs associated with condemnation); see also Joseph A. Cordes & Burton A. Weisbrod, When Government Programs Create Inequities: A Guide to Compensation Policies, 4 J. POL'Y ANALYSIS & MGMT. 178 (1985) (discussing administrative costs of implementing compensation requirement and suggesting such costs might lead administrators to choose "implicit" compensation, such as postponing public projects).

236 See Haw. Hous. Auth. V. Midkiff, 467 U.S. 229, 244 (1984) ("Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.").

237 FISCHEL, REGULATORY TAKINGS, supra note 63, at 74.

<sup>233</sup> See, e.g., Parratt v. Taylor, 451 U.S. 527, 543 (1981) ("Moreover, the State . . . has provided respondent with the means by which he can receive redress for the deprivation.").

<sup>234</sup> See FISCHEL, REGULATORY TAKINGS, supra note 63, at 96 (discussing evidence supporting deterrent effect of compensation); Joseph J. Cordes and Burton A. Weisbrod, Government Behavior in Response to Compensation Requirements, 11 J. PUB. ECON. 51-59 (1979) (finding that increased compensation deterred highway development).

tered or informed opposition organized."<sup>238</sup> When a condemnation proceeds "quickly," a public protest may come too late to prevent the losses. Professor Fischel may be right that the public outcry resulting from the Poletown fiasco ensures that "in the future Detroit or any other city will think hard before it razes an established neighborhood for the benefit of a large corporation."<sup>239</sup> Unfortunately, he also is right that this future deterrence "is small comfort for the Poletown residents who were actually displaced,"<sup>240</sup> and who, it might be added, were deprived by the quick-take proceeding of a chance to organize an effective political resistance.

All of that said, any constitutional challenge to quick-take procedures must contend with a long line of cases that approve of them in principle. In the 1890 case Cherokee Nation v. Southern Kansas Railway Co.,241 the Court upheld a federal statute that authorized the defendant to enter into tribal lands for the purpose of constructing a railroad.<sup>242</sup> The Court rejected the Cherokee Nation's argument that the law violated the Takings Clause because it did not require the railroad to provide compensation before occupying the land and beginning construction.<sup>243</sup> The Court observed that "[t]he Constitution declares that private property shall not be taken for 'public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken."244 The Court has reaffirmed this holding on several subsequent occasions.<sup>245</sup> The principle underlying these decisions also is reflected in the Court's more recent decisions holding that adequate postdeprivation remedies may obviate the need for a preseizure hearing in the procedural due process context.246

The Court has never directly addressed the issue whether quick take might unconstitutionally deprive a property owner of the opportunity to a predeprivation determination on the public-use question<sup>247</sup>—a position

- 242 Id. at 659.
- 243 Id. at 658-59.

<sup>238</sup> Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting).

<sup>239</sup> FISCHEL, REGULATORY TAKINGS, supra note 63, at 74-75.

<sup>240</sup> Id. at 74.

<sup>&</sup>lt;sup>241</sup> Cherokee Nation v. S. Kan. Railway Co., 135 U.S. 641 (1890).

<sup>244</sup> *Id.* at 659. The Court went on to observe that the "owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.* 

<sup>&</sup>lt;sup>245</sup> See Bragg v. Weaver, 251 U.S. 57, 62 (1919); Sweet v. Rechel, 159 U.S. 380, 400-01 (1895).

<sup>246</sup> See, e.g., Gilbert v. Homar, 520 U.S. 924, 930–35 (1997) (holding that sufficiently prompt postsuspension hearing satisfied due process where tenured employee was suspended without hearing after being charged with drug felonies); Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–37 (1982) (declining to extend *Parratt* although recognizing validity of principle that postdeprivation hearing may satisfy due process in some cases); Parratt v. Taylor, 451 U.S. 527, 538–43 (1981) (holding that where prisoner was deprived of property due to unauthorized failure of state agent to follow proper procedures rather than inadequacy of procedure itself, postdeprivation process leading to compensation satisfied due process).

<sup>247</sup> See Bragg, 251 U.S. at 58 ("It is conceded that the taking is under the direction of public officers and is for a public use.").

adopted by the Mississippi Supreme Court.<sup>248</sup> Given the small probability of an erroneous deprivation on this ground,<sup>249</sup> however, it is unlikely that the Court would find a *per se* federal impediment to the acquisition of property through quick-take eminent-domain procedures.

The fact that quick-take procedures are not unconstitutional on their face, however, does not mean that they are constitutional in all of their applications. On the contrary, the Court has expressed a strong preference for "as applied" challenges to the constitutionality of a law.<sup>250</sup> The cases discussed above would not, therefore, preclude courts from interpreting the public-use limitation to require the government to demonstrate why it was necessary to resort to them in any given case. On the contrary, limiting quick-take eminent domain to cases where it is needed would be consistent with the procedural due process principle that "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of the postdeprivation hearing to compensate for the taking."251 Furthermore, in a situation analogous to the taking of property by eminent domain, the Supreme Court invalidated on due process grounds state laws permitting the replevin of personal property prior to a preconfiscation hearing.<sup>252</sup> Thus far, however, lower courts have rejected efforts to extend this rule to invalidate quick-take eminent-domain procedures.253

A reasonable necessity requirement also would not be out of step with laws governing quick-take eminent domain in some states. Although the Mississippi case appears to be an outlier, other states require, either by statute or judicial decision, some showing of necessity prior to the invocation of the quick-take powers.<sup>254</sup> The justifications offered for resorting to a quick-

251 Zinermon v. Burch, 494 U.S. 113, 132 (1990); *see also Parratt*, 541 U.S. at 541 (rejecting demand for predeprivation hearing because "it is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place").

252 Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

253 See Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1322 (4th Cir. 1983); Vazza v. Campbell, 520 F.2d 848, 850 (1st Cir. 1975); Joiner v. City of Dallas, 380 F. Supp. 754, 772–73 (N.D. Tex. 1974), aff'd, 419 U.S. 1042 (1974).

Lemon v. Miss. Transp. Comm'n, 735 So. 2d 1013, 1023 (Miss. 1999) (holding that state quick-take procedures fail to provide "a predeprivation opportunity for the landowner to challenge the taking and make the condemnor satisfy its burden on the issue of public use").

<sup>249</sup> See Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (including among factors to be considered to evaluate whether procedure is constitutionally deficient "the risk of an erroneous deprivation").

<sup>250</sup> See, e.g., United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid ....").

<sup>254</sup> See, e.g., State v. Barbara's Creative Jewelry, Inc., 728 So. 2d 240, 242 (Fla. 1998) ("'The condemning authority initially must come forward with proof that there is a public purpose for the taking and a reasonable necessity that the land in question is being taken for the contemplated public use.'" (quoting City of Lakeland v. Bunch, 293 So. 2d 66, 69 (Fla. 1974))); Dep't of Transp. v. Sunnyside P'ship, 785 N.E.2d 1018, 1022 (Ill. App. 2003) (discussing statutory requirement that condemnor demonstrate necessity of resort to quick-take eminent domain); City of Rochester v. People's Coop. Power Ass'n, 483 N.W.2d 477, 480 (Minn. 1992) (noting that "utili-

take condemnation are judicially reviewable. As the Alaska Supreme Court has observed, "'A decisional document, done carefully and in good faith, serves several salutary purposes. It facilitates judicial review by demonstrating those factors which were considered. ... It assists interested parties in determining whether to seek judicial review. And it tends to restrain agencies from acting beyond the bounds of their jurisdiction."<sup>255</sup> The court went on to assert, "We think that 'quick take' decisions deserve explanation, and that the necessary explanations be made in a decisional document filed contemporaneously with the declaration of a taking."256 Such requirements, if applied in public-use cases generally, would serve to channel the use of quick-take eminent domain to cases where exigency in fact exists. For example, a government would likely find it more difficult to justify the need to resort to quick-take eminent domain to enable a long-term economic development effort than to expand a road or sewer. While the latter classic public improvements might well proceed in a piecemeal fashion (perhaps as funding becomes available), a new shopping mall or factory presumably would take months of planning, during which time property owners could be afforded predeprivation hearings on their condemnations.<sup>257</sup>

## B. Short Cut # 2: Delegation

Aside from exercising "quick-take" powers, government agencies sometimes choose to expedite the acquisition of property by empowering a private party to condemn the land for itself. Such a delegation of eminent-domain power (including the delegation of quick-take powers) to nongovernmental entities has a longstanding pedigree.<sup>258</sup> The Supreme Court, in fact, simultaneously rejected a federal constitutional challenge to the delegation of the power of eminent domain and approved the principle of quick-take in *Cherokee Nation v. Southern Kansas Railway Co.*<sup>259</sup> Given that many of our "public utilities" are regulated private companies, the delegation of eminentdomain powers makes sense in some circumstances.<sup>260</sup> Even when the goal of an exercise of eminent domain is economic development, the delegation of

258 See, e.g., BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT 123-80 (2001) (reviewing 19th century decisions addressing private property and the power of eminent domain).

zation of the 'quick-take' procedure requires a showing by the condemnor of necessity for acquiring title and possession prior to the filing of the commissioners' award and payment or deposit with the court of its approved appraisal value").

<sup>255</sup> Ship Creek Hydraulic Syndicate v. Alaska, 685 P.2d 715, 717 (Alaska 1984) (quoting Southeast Ala. Conservation Council, Inc. v. State, 665 P.2d 544, 549 (Alaska 1983)).

<sup>256</sup> Id. at 718.

<sup>257</sup> See, e.g., STEVEN ELROD, THE POWER OF EMINENT DOMAIN—INTRODUCTION AND OVERVIEW § 1.35 (Supp. 1998) (observing that "quick-take is intended to be used only when the immediate use of the property is necessary and the project cannot wait until the procedural safeguards of traditional condemnation have been satisfied"). For this reason, the use of quicktake in the redevelopment context remains controversial. *Id.* 

<sup>&</sup>lt;sup>259</sup> Cherokee Nation v. S. Kan. Railway Co., 135 U.S. 641, 656–58 (1890).

<sup>&</sup>lt;sup>260</sup> The private providers of these services may be better situated to determine the placement of sewer and rail lines, telephone poles, and power lines. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 62–63 (5th ed. 1998) (arguing that the need of utility companies to prevent holdouts in acquisition of land may justify eminent domain).

eminent-domain powers to a private party with redevelopment expertise is not always indefensible: a federal law requirement that local governments assemble land and conceive a redevelopment proposal before soliciting the participation of private developers has been blamed for some of the failures of urban renewal.<sup>261</sup>

For many of the reasons discussed above, however, it is easy to see why the delegation of the eminent-domain power could be especially demoralizing for property owners targeted by the private condemner. They may feel singled out for, using Michelman's words, "capricious redistribution" at the behest of politically powerful interests who have been given the right to take their property in order to put it to a "better" use.<sup>262</sup> In addition, the proliferation of open-meeting and other "sunshine laws"<sup>263</sup> suggests that these resentments are likely exacerbated when a *de facto* delegation results from an unacknowledged backroom deal with the party standing to benefit from the condemnation. In this situation, the government, in an act tantamount to a delegation of the condemnation power, simply agrees to condemn the particular parcel of property that a private beneficiary desires. For example, in the *99 Cents Only* case, the facts clearly revealed that the government sought to condemn the plaintiff's store because Costco demanded that particular parcel of property.<sup>264</sup>

Not surprisingly, therefore, individuals seeking to defeat an exercise of eminent domain occasionally argue that a *de facto* delegation itself runs afoul of the public-use limitation on the takings power. Several such challenges have succeeded. The *National City Environmental* case is one example.<sup>265</sup> There, the Illinois Supreme Court found that the redevelopment authority's taking was unconstitutional because it was, in essence, "selling" the power of eminent domain for a profit.<sup>266</sup> In addition, a Pennsylvania trial court recently stopped a condemnation because it found that the government was simply acting as the agent for a private developer.<sup>267</sup> Other well-publicized

<sup>&</sup>lt;sup>261</sup> Federal law prevented local governments from inviting proposals from developers until actual demolition was nearly completed. In effect, government officials had to conceive and plan a projected redevelopment, acquire the necessary land via eminent domain, and then clear all existing structures from the land before developers could be solicited. The process could be underway for a great many years before developers could weigh in on the desirability of building on the proposed land. *See, e.g.*, FRIEDEN & SAGALYN, *supra* note 74, at 43; Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 Law & CONTEMP. PROBS. 732, 735–40 (1960).

<sup>262</sup> Michelman, Property, Utility, and Fairness, supra note 21., at 1214.

<sup>263</sup> On sunshine laws generally, see, for example, Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. REV. 173 (1997); David A. Barrett, Note, Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act, 66 TEX. L. REV. 1195, 1199-1200 (1988); Teresa Dale Pupillo, Note, The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws, 71 WASH. U. L.Q. 1165, 1165 (1993).

<sup>&</sup>lt;sup>264</sup> 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003) (noting that the city condemned the 99 Cents property because "Costco... demanded that it be allowed to expand into the space").

<sup>265</sup> Southwest Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1 (Ill. 2002).

<sup>266</sup> Id. at 8, 11.

<sup>&</sup>lt;sup>267</sup> In re Condemnation of 110 Washington St., 767 A.2d 1154, 1159 (Pa. Commw. Ct. 2001).

but failed efforts to press similar arguments include the famed *Poletown* decision, where the dissent complained bitterly about the fact that General Motors was calling the shots,<sup>268</sup> and a more recent New Jersey case involving the New Jersey Casino Reinvestment Development Authority's efforts to condemn a private home and two small businesses that Donald Trump wanted for a limousine holding lot.<sup>269</sup>

The decision in the abovementioned Pennsylvania case, which Professors Dana and Merrill recently characterized as a "promising step,"<sup>270</sup> required that a delegation of the power of eminent domain proceed pursuant to express *statutory* (as opposed to administrative) authorization, and concluded that the power of eminent domain "may not be delegated by agreement or contract."<sup>271</sup> In *Daniels*, the Seventh Circuit adopted a variant of this approach.<sup>272</sup> There, the court refused to defer to the county's administrative decision to void a covenant because "the legislature has not made a specific determination of what constitutes a 'public use'... and instead has delegated that duty to the local Plan Commission."<sup>273</sup> The court reasoned that only statutorily designated "public uses" are entitled to *Midkiff* deference.<sup>274</sup>

This approach has theoretical appeal. While it stops short of rejecting the longstanding federal rule that the power of eminent domain is delegable, it also requires the government to make ex ante determinations as to when delegation is appropriate. Perhaps policymakers' zeal for the magic bullet of "economic development" would be tempered if they were forced to set forth clear guidelines defining the circumstances under which delegation is appropriate and to pass legislation expressly delegating the power of eminent domain to private beneficiaries rather than simply bending to their demands to condemn land for them. Moreover, the decision to delegate to a private entity the final say over whether and where a condemnation will occur is often tantamount to a decision to condemn. Thus, at the very least, predelegation notice and debate of enabling legislation would enhance the effectiveness of "voice" by enabling opposition to organize and force legislatures to listen to dissent from within the community before the delegation/condemnation deal was sealed.<sup>275</sup> Further, public participation itself might dispel resentment and minimize accusations about the mistreatment of underrepresented interests in the planning process.

As an application of the Fifth Amendment, however, such an approach would require federal courts to review the decision-making procedures of state and local governments to determine *who* has, and should, make a dele-

<sup>268</sup> See Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 468 (Mich. 1981) (Ryan, J., dissenting) ("Behind the frenzy of official activity was the unmistakable guiding and sustaining, indeed controlling, hand of the General Motors Corporation.").

<sup>&</sup>lt;sup>269</sup> See Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 106 (N.J. Super. Ct. Law Div. 1998).

<sup>270</sup> THOMAS W. MERRILL & DAVID A. DANA, PROPERTY: TAKINGS (2002).

<sup>271</sup> In re Condemnation of 110 Washington St., 767 A.2d at 1159.

<sup>272</sup> Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002).

<sup>273</sup> Id. at 460-61.

<sup>274</sup> Id. at 460-66.

<sup>275</sup> FISCHEL, REGULATORY TAKINGS, *supra* note 63, at 74 (noting public outery as a limit on the power of eminent domain).

gation decision. Such review would seem to raise significant federalism and separation of powers concerns. It would also pose practical problems, given the fact that the legislative, administrative, and adjudicative functions of many local government entities with the power of eminent domain are not clearly delineated.<sup>276</sup> The rule adopted by the Seventh Circuit in *Daniels*, questioning a delegation of eminent-domain authority from state to local government agency, is even more problematic. Not only is a decision of a county planning commission difficult to classify as "legislative" or "administrative," but most states permit local governments to contract with other governmental entities for their services—including the exercise of eminent-domain powers.<sup>277</sup>

A reasonable necessity test again offers a more narrow approach that would serve the same purpose as a delegation-by-statute requirement. Rather than requiring a legislative act of delegation, a court could simply closely scrutinize the government's decision to delegate. As with quick-take, a reviewing court might ask the condemning entity to justify its decision to delegate the power of eminent domain and review whether such a delegation was in fact "reasonably necessary" to advance the public purpose for which the land is being condemned.<sup>278</sup> Not only could scrutiny of the decision to delegate the power of eminent domain minimize the high demoralization costs associated with delegation, it also might expose and limit the government's tendency to respond to rent-seeking on the part of the would-be beneficiaries of a condemnation. Not surprisingly, the available evidence strongly suggests that private parties standing to benefit from an exercise of eminent domain frequently exert political pressure on the condemning government.<sup>279</sup> While a reasonable necessity requirement would not eliminate such rent seeking,<sup>280</sup> a requirement that the government make such an argument might serve a "shaming function" that would deter some excesses of eminent domain.

The Illinois Supreme Court undertook such an analysis in the *National City Environmental* case.<sup>281</sup> In that situation, there was no question that the Southwestern Illinois Development Authority ("Authority") had delegated the power of eminent domain to a private party. After all, Gateway Interna-

281 Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1 (Ill. 2002).

<sup>276</sup> Richard Briffault, Who Rules at Home? One Person/One Vote and Local Governments, 60 U. CHI. L. REV. 339, 341 (1993) (discussing variations in form of local governments).

<sup>277</sup> See VALENTE ET AL., STATE & LOCAL GOVERNMENT LAW 412 (5th ed. 2001) (noting that forty states specifically authorize intergovernmental cooperation).

<sup>278</sup> Perhaps in appropriate cases, for example, a court would permit delegation enabling the government to enlist a developer early in the planning stages of a project.

<sup>279</sup> Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 50, 65–85 (1998) (characterizing well-publicized condemnations cases as "rent-seeking in operation"); see also Merrill, Economics of Public Use, supra note 17, at 61–63 (reviewing several of the well-publicized condemnation cases).

<sup>280</sup> On the contrary, a reasonable necessity requirement might permit the government to justify an exercise of eminent domain based upon rent seeking. The government could argue, for example, that the use of eminent domain was reasonably necessary to attract new development. See Merrill, Economics of Public Use, supra note 17, at 66-67; see also Farber, supra note 67, at 291 (suggesting that scrutiny of eminent domain would deter rent seeking, but acknowledging the problems identified by Merrill such as judicial legitimacy and competence).

tional Motorsports filed an application asking the Authority to condemn a particular parcel of land in exchange for a commission.<sup>282</sup> It was also clear that, at least in the abstract, the policy justifying this condemnation—economic development—could support an exercise of eminent domain.<sup>283</sup> The court invalidated the condemnation, however, because it found that the government failed to demonstrate that the condemnation-on-demand scheme was justified by legitimate policy goals:

[The Authority]'s true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. [The Authority] did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking.... It appears [the Authority's] true intentions were to act as a default broker of land for Gateway's proposed parking plan.<sup>284</sup>

Finally, a court might ask the *private party* exercising (actual or *de facto*) delegated eminent-domain powers to demonstrate that its actions were reasonably necessary to advance the public purpose justifying the initial delegation. Such scrutiny might prove fatal in many cases: consider, again, the 99 *Cents Only* case.<sup>285</sup> If a court were to find that the development authority in fact delegated the eminent-domain power to Costco, then it would fall upon *Costco* to demonstrate that the decision to demand the particular parcel of land in question (out of all of those available) was reasonably necessary to "prevent future blight." This would be a particularly difficult burden to meet in the 99 *Cents Only* case. Not only did Costco refuse to bargain for the space, but the available evidence suggested that Costco's expansion needs would be best served with a *different* and *unoccupied* parcel of land.<sup>286</sup>

## C. Short Cut #3: Failure to Guarantee the Continuation of a Public Use

Finally, and significantly, means-ends scrutiny might require the government to take reasonable steps to ensure that the land actually will be used for the purpose for which it was condemned—at least where a private party is to be entrusted to carry out that purpose. Such a requirement would be in keeping with the state legislative trend toward requiring greater accountability for development incentives generally. A number of states have considered or adopted "clawback" legislation penalizing the recipient of development incentives for failing to follow through on promised investment or job creation.<sup>287</sup> Others have attempted to assure greater accountability

<sup>282</sup> Id. at 4.

<sup>283</sup> Id. at 9.

<sup>284</sup> Id. at 10.

<sup>285 99</sup> Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), appeal dismissed as moot, 60 Fed. Appx. 123 (9th Cir. 2003).

<sup>286</sup> Id. at 1126.

<sup>287</sup> See Kary L. Moss, The Privatizing of Public Wealth, 23 FORDHAM URB. L.J. 101, 138–39 (1995) (describing accountability statutes); Ivan C. Dale, Note, Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause, 46 ST. LOUIS U. L.J. 247, 266–69 (2002) (describing proliferation of accountability legislation).

contractually.<sup>288</sup> Such measures theoretically give the government the right to recapture all or part of the costs of its investment if the recipient leaves prematurely or fails to follow through with promised job creation.<sup>289</sup>

Especially when eminent domain is offered as a locational inducement, the public-use limitation might similarly be interpreted to require the government to either reserve "clawback" rights before transferring land acquired by eminent domain to a private beneficiary or demonstrate why it was necessary to forgo them. An application of this form of "means" analysis is illustrated by a recent decision of a New Jersey court. The case concerned the New Jersey Casino Redevelopment Authority's ("Authority") efforts to condemn a private home and two small businesses at the behest of Donald Trump, who sought the land for a limousine holding lot and private green space.<sup>290</sup> The owners of the property slated for condemnation challenged the exercise of eminent domain, arguing that the Authority was condemning land for a purely private purpose, in violation of the state and federal constitutions.<sup>291</sup> The court accepted the Authority's argument that the parking lot, green space, and additional hotel rooms would serve a public purpose-to assist in the development of the city's "Corridor Area."292 Nevertheless, it found that the agency's exercise of eminent domain was inappropriate. The court reasoned that, because "Trump is not bound to use these properties for those purposes," the condemnation raised the possibility that "a public agency . . . will have effectively created an assemblage of land for future development by Trump."293

288 See Fran Ansley, Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base, 81 GEO. L.J. 1757, 1819–30 (1993) (discussing use of contract claims to stop plant closings); Moss, supra note 287, at 151 (discussing accountability contracts); see also ARIZ. REV. STAT. § 41-1505.07 (1999) (requiring companies to submit a "memorandum of understanding" that contains performance standards and provides for readjustment or recapture of subsidy if recipient fails to meet standards); NEB. REV. STAT. §§ 77-4104, 77-4107 (2001) (requiring memorandum of understanding providing for recapture of subsidy for any business that fails to meet goals within six years).

289 See Moss, supra note 287, at 138–43 (describing statutory and contractual accountability measures); Lawrence W. Reed, *Time to End the Economic War Among the States*, REGULATION, Spring 2002 (discussing Louisiana, Ohio and Texas clawback laws); see also ALASKA STAT. § 45.81.040 (Michie 2002) (mandating repayment of new business incentive grant); ARK. CODE ANN. § 15-4-1606 (Michie 2001) (incentives terminated if number of full-time employees drops below agreed-upon levels); IOWA CODE § 15E.193(3) (2000) (business receiving subsidy under state enterprise zone law subject to repayment if it fails to meet obligations); LA. REV. STAT. ANN. § 51:2457 (West 2003) (terminating incentives if recipient's payroll does not exceed \$1 million); MICH. COMP. LAWS § 445.601 (2002) (requiring any business that received a subsidy to locate in a specific place to repay the incentive if it relocates); S.D. CODIFIED LAWS § 10-45B-8 (Michie 1996) (withholding ten percent of subsidy until project is completed and investment projections are met); WIS. STAT. § 66.1103 (2003) (requiring "job projection estimates" before a municipality can agree to publicly financed projects).

290 Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998); see also David M. Herzenhorn, Widowed Homeowner Foils Trump Bid in Atlantic City, N.Y. TIMES, July 21, 1998, at B1; Laura Mansnserus, What Public? Whose Use? In Casino Shadows, Testing Limits of Land-Seizure Law, N.Y. TIMES, Mar. 22, 1998, at 14-1.

291 Banin, 727 A.2d at 103.

292 Id. at 104-05.

293 Id. at 110.

In the typical public-use challenge, the government might employ a number of standard private land use controls to satisfy a future assurances requirement. Obviously, if a private party received an unencumbered fee simple title to condemned land, it is free to change the use of the land at any time. To avoid this problem, a condemnor might encumber the title to the condemned land with a restrictive covenant requiring that the land be used for its intended purpose for some reasonable period of time.<sup>294</sup> If the property ceased to be used as designated,<sup>295</sup> the government could, in most states, secure an injunction enforcing the requirement.<sup>296</sup> Furthermore, the requirement would "run with the land"—that is, bind subsequent owners<sup>297</sup>—thereby preventing the party receiving title to the condemned land from reaping a windfall through a subsequent sale.<sup>298</sup>

The government might instead choose, perhaps to avoid concerns about the practical and legal difficulties posed by enforcement of such a covenant, to convey less than a full fee simple interest in the condemned property.<sup>299</sup>

<sup>296</sup> Theoretically, the requirement that a restrictive covenant "touch and concern" the land could prevent the government from using the device to ensure that condemned property continues to be used as intended. The practical meaning of this requirement is quite amorphous; courts have suggested variously that a covenant "touches and concerns" the land if it limits the use or enjoyment of the land, or, more broadly, affects the market value of the land. Most restrictive covenants are negative covenants, which invariably satisfy the touch and concern requirement because they prohibit certain land uses. A covenant that a landowner continue to use land for a certain purpose (e.g., the purpose for which it was condemned), however, would likely be considered an "affirmative covenant." Traditionally, affirmative covenants did not satisfy the touch and concern requirement and did not "run with the land" and therefore did not bind subsequent owners. (In this situation, the agreement between the original parties would be enforceable as a contract.) Although the clear trend is toward abandoning this traditional rule, some courts continue to express hesitancy about enforcing covenants that require subsequent owners to continue particular uses of property. On the "touch and concern requirement," see Gregory S. Alexander, Freedom, Coercion and the Law of Servitudes, 73 CORNELL L. REV. 883, 890-98 (1988); Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. Rev. 1353, 1358-64 (1982); see also Restatement (Third) of Servitudes § 3.2 (2000) (eliminating the "touch and concern" requirement). A negative covenant requiring that the property owner use the land for no purpose except that for which it was condemned would "touch and concern the land." It would not, however, guarantee that the land was in fact used for that purpose; the owner could comply with the restriction by doing nothing with it. See generally SINGER, supra note 295, § 6.3.

- 298 See id. § 6.3 (discussing cases dealing with enforcement of covenants).
- 299 See supra note 296 (addressing validity of affirmative covenants).

<sup>&</sup>lt;sup>294</sup> For example, the agreement between Trump and the Casino Redevelopment Authority included a restrictive covenant requiring Trump to use the property "for a hotel development project." *Id.* at 108. The court found that this requirement was not stated with sufficient specificity to satisfy the relevant statutory standards. *Id.* at 110–11.

<sup>&</sup>lt;sup>295</sup> In most cases, restrictive covenants benefit a particular parcel of land, known as the "dominant estate." See JOSEPH W. SINGER, INTRODUCTION TO PROPERTY § 6.1 (2001). The "benefit" of the covenant is enjoyed by subsequent owners of the dominant estate, just as the "burden" of the covenant is borne by subsequent owners of the encumbered land, or "servient estate." Id. If the benefit of the covenant is not tied to ownership of any particular parcel of land—as would be the case if it was held by the government—the covenant is said to be "in gross." Id. § 6.3.2. Because the benefit of a covenant encumbering condemned land would be, in most cases, "in gross," the government could not, in some states, validly transfer the right to enforce it to a third party. Id.

<sup>297</sup> SINGER, supra note 295, § 6.1

For example, the government might convey a fee simple determinable that would terminate, with title passing automatically back to the government,<sup>300</sup> if the property ceased to be used for its intended public purpose. Less drastic alternatives, including the retention either of a right to entry giving the government the option of terminating the estate<sup>301</sup> or an option to repurchase the property if the public use is abandoned, presumably would also satisfy the constitutional requirement. The government might permit the condemnee to retain the future interest created by the conveyance of less than a full fee simple, providing that, upon abandonment of the public use, title to the property reverts back to the former owner (as is almost always the case upon abandonment of an easement) or the former owner is permitted to repurchase the property (as is the case in five states already).<sup>302</sup> Finally, the government might retain title to the land but enter into a long term lease providing that the private party use the land for the intended public purpose. Under these circumstances, the abandonment of the public purpose would be considered a material breach and grounds for termination of the lease.

Arguably, a future assurances requirement runs counter to the well-established principle that once the government has condemned land for a valid public purpose, it is free to change the use of the land at a later date.<sup>303</sup> Presumably, if the condemnor is free to change the use of condemned land at any time, it need not encumber the land to guarantee the public use for which the land was condemned will continue. On the other hand, when the public use is to be carried out by a private party, a future-assurances requirement simply could be seen as a guarantee that the property is in fact being condemned for the reason given by the government. (The latter position was taken by the court in the Trump case.)

In any event, concerns about undermining the traditional presumption that public uses may be abandoned could be addressed by permitting the government to demonstrate that the transfer of an unencumbered fee simple was a necessity given the circumstances. The reasonable necessity hurdle likely will be highest, however, when the government wishes to transfer condemned property to a private beneficiary as an unencumbered fee simple. Such a transfer implicitly suggests that the private beneficiary's intentions are not altogether pure—that its purpose for seeking the land may be something

<sup>300</sup> In this case, the government would hold a possibility of reverter.

<sup>301</sup> Such a conveyance would create a fee simple subject to a condition subsequent.

<sup>&</sup>lt;sup>302</sup> See R.I. CONST. art. VI, § 19 (providing that the condemnee has the first right to purchase or lease any "remainder"); Ky. REV. STAT. ANN. § 416.670(1) (Banks-Baldwin 2002) (providing that condemnor must offer property to condemnee at condemnation price if development is not commenced within eight years); MONT. CODE ANN. § 70-39-321(1) (2002) (providing for public auction of condemned property upon abandonment of the public use); N.H. REV. STAT. ANN. § 498-A:12(I) (1997) (providing condemnor must offer property to condemnee at the condemnation value if it has been substantially improved and is sold within ten years of the condemnation); N.Y. EM. DOM. PROC. LAW § 406 (A) (McKinney 2003) (providing that, within first ten years of acquisition, condemnor must give former property owner a right of first refusal to purchase property at fair market value if public use is abandoned and property sold); see also Kevin L. Cooney, Note, A Profit for the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use, 74 WASH. U. L.Q. 751, 757 n.38 (1996) (citing statutes).

<sup>&</sup>lt;sup>303</sup> See, e.g., United States v. 125.2 Acres of Land, 732 F.2d 239, 244 (1st Cir. 1984); Higginson v. United States, 384 F.2d 504, 507 (6th Cir. 1967).

other than the "public" one that purportedly supports the condemnation.<sup>304</sup> In an outlier case, however, the Court might accept an argument that the future assurances requirement prevents the government from attracting reputable private investors to participate in a project with a high risk of failure.<sup>305</sup>

## Conclusion

The prevailing legal wisdom holds that monetary compensation minimizes the need for judicial review of an exercise of eminent domain. This Article questions that assumption. A forcible taking of property for fair-market-value compensation raises many of the same concerns as a demand that an owner voluntarily exchange property rights for regulatory approval. By definition, an exercise of eminent domain "singles out" an individual to bear the burden of a government policy (wise or unwise)—a burden for which the owner may not be fully compensated. In light of this reality, this Article suggests that means-ends scrutiny in public-use cases is as justified (or more justified) than the scrutiny now required of exactions.

Means-ends scrutiny will necessarily be a less-than-complete antidote to the ills that may attend eminent domain. Requiring a relatively tight connection between an exercise of eminent domain and the public policy justifying it will put the government "to its proof," so to speak. So long as courts continue to refuse to second guess the *ends* of government action, however, means-ends review will provide only a limited, but important, structural constraint on the power of eminent domain. Just as political restraint, rather than judicial intervention, is necessary to limit most regulatory excesses, the political branches rather than the judiciary must provide the front-line defense against a temptation to overuse the eminent-domain power. By requiring the government to link the means and ends of an exercise of eminent domain, courts would place important structural limitations on the power of eminent domain while respecting the prerogative of the political branches to determine what policy ends are in the public interest.

<sup>304</sup> See, e.g., Sunstein, supra note 9, at 878 (noting that means-ends review operates to "flush out" such pretext).

<sup>&</sup>lt;sup>305</sup> Local governments routinely encumbered land condemned for urban renewal for up to fifty years by retaining a right of reverter and inserting multiple covenants on the deed prior to transferring it to private developers. See Eugene B. Jacobs, Land Drafting Problems in Redevelopment and Urban Renewal Projects, 5 REAL PROP. PROB. & TR. J. 373, 377–78 (1970) (describing standard redevelopment agreement). These encumbrances have been cited as a contributing factor to the program's failures. See, e.g., Lyman Brownfield, The Disposition Problem in Urban Renewal, 25 LAW & CONTEMP. PROBS. 732, 754–57 (1960) (criticizing right of reverter clauses as heavy-handed and inflexible).