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The Neglected Political Economy of Eminent Domain

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THE NEGLECTED POLITICAL ECONOMY OF EMINENT DOMAIN

*Nicole Stelle Garnett**

This Article challenges a foundational assumption about eminent domain—namely, that owners are systematically undercompensated because they receive only fair market value for their property. In fact, scholars may have overstated the undercompensation problem because they have focused on the compensation required by the Constitution, rather than on the actual mechanics of the eminent domain process. The Article examines three ways that “Takers” (i.e., nonjudicial actors in the eminent domain process) minimize undercompensation. First, Takers may avoid taking high subjective value properties. (By way of illustration, Professor Garnett discusses evidence that Chicago’s freeways were rerouted in the 1950s to avoid urban Catholic churches.) Second, in addition to paying compensation for the condemned property, Takers frequently must pay additional compensation to property owners in the form of “relocation assistance.” Third, Takers and property owners may voluntarily settle on above-market compensation during precondemnation negotiations. (As an example, Professor Garnett includes an empirical case study of property acquired, under the threat of eminent domain, for a manufacturing facility in Indiana.) The Article concludes by reflecting upon current efforts to reform eminent domain legislatively. Prominent legal scholars recently have proposed compensation-based reforms as an alternative to constraints on the use of eminent domain. This Article rejects that suggestion, arguing that there are two problems, unique to takings raising “public use” questions, that more money cannot solve: first, high compensation levels may undermine political resistance to questionable projects; second, private takings may generate noninstrumental harms that will persist even as compensation increases.

* Lilly Endowment Associate Professor of Law, Notre Dame Law School. I am indebted to Vicki Been, David Dana, Bob Ellickson, John Fee, Lee Anne Fennell, Rick Garnett, Michael Heller, Jim Krier, Tom Lee, John McGreevy, Tom Merrill, John Nagle, Eduardo Penalver, Peter Schuck, Christopher Serkin, and Julian Velasco for comments and suggestions. I also benefited from comments received during faculty workshops at the BYU, Notre Dame, Northwestern, and UCLA law schools, at the AALS Annual Meeting (Joint Session of the Property and Local Government Sections), and at the Richard E. Nelson Symposium on Local Government, University of Florida Levin College of Law. I could not have completed the historical portions without the help of Notre Dame Research Librarian Patti Ogden. Craig MacNab of AM General, LLC and Patrick McMahon of Project Future provided invaluable insight on the H2 project. Baird Allis, Derek Muller, and Krista Steinmetz provided excellent student research assistance. Mistakes are my own.

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INTRODUCTION

At least thirty-five Catholic churches line Chicago's Dan Ryan, Kennedy, and Stevenson Expressways.¹ Driving through the city, it is easy to forget that these churches once served as the spiritual and social hearts of neighborhoods now buried under fourteen lanes of concrete. When the expressways were

1. This number is based upon my evaluation of a map prepared for the Sesquicentennial of the Archdiocese Chicago, which is on file with Notre Dame Law Library. This map does not include parishes closed prior to 1993, including several that are adjacent to the expressway. See Archdiocese of Chicago Parish Map, http://www.bigstickinc.com/map_parish.asp (last visited May 11, 2006). Interstate 90/94 is called the Dan Ryan Expressway southeast of central Chicago and the Kennedy Expressway to the northwest of the city. The urban portion of Interstate 55 is known as the Stevenson Expressway.

built in the mid-1950s, over two million Catholics lived in the Archdiocese of Chicago, more than half of them in densely populated urban neighborhoods like the ones dissected by these freeways.² Yet, while expressway construction displaced thousands of parishioners, only five Catholic churches were destroyed. Planners assiduously avoided the Archdiocese's four hundred other churches. And, when they did not, they were made to wish that they had: in several cases, the outcry over the news that parishes were threatened by highway construction led planners to reroute the expressways.³

The history of Chicago's expressway churches yields insights valuable to current debates over the use of eminent domain sparked by the recent *Kelo v. City of New London* opinion.⁴ In *Kelo*, a divided United States Supreme Court ruled that the public use limitation of the Fifth Amendment's Takings Clause rarely prevents the government from taking property by eminent domain and transferring it to a private beneficiary. The holding in *Kelo* was not unexpected: in *Berman v. Parker*⁵ and again in *Hawaii Housing Authority v. Midkiff*,⁶ the Court had made clear that federal judicial review of eminent domain should be extremely deferential. Nonetheless, the opinion set off a firestorm of popular outrage, prompting federal and state efforts to impose legislatively the restrictions on eminent domain that the Supreme Court rejected in *Kelo*.⁷

This Article takes up the recent suggestions by prominent scholars that more money is the "answer" to the public use problem. In an important amicus brief in the *Kelo* case, for example, Professor Thomas Merrill argued that "[a]djusting compensation awards to provide more complete indemnification would be a far more effective reform of the existing system of eminent domain than increasing federal judicial review of public use determinations."⁸ This suggestion builds upon the Supreme Court's assertion that the Fifth Amendment's "just compensation" guarantee requires only that a property owner receive the fair market value of her property—i.e., "what a willing buyer would pay in cash to a willing seller" at the time of the taking."⁹ Several justices pressed the attorneys during oral argument in *Kelo* about whether

2. ALAN EHRENHALT, *THE LOST CITY: DISCOVERING THE FORGOTTEN VIRTUES OF COMMUNITY IN THE CHICAGO OF THE 1950s*, at 119 (1995).

3. STEVEN M. AVELLA, *THIS CONFIDENT CHURCH: CATHOLIC LEADERSHIP AND LIFE IN CHICAGO, 1940-1965*, at 216-17 (1992).

4. 125 S. Ct. 2655 (2005).

5. 348 U.S. 26 (1954).

6. 467 U.S. 229 (1984).

7. *E.g.*, Castle Coalition, Legislative Center, <http://www.castlecoalition.org/legislation/> (last visited May 11, 2006) (updating state and federal legislative efforts).

8. Brief for the American Planning Ass'n et al. as Amici Curiae Supporting Respondents at 28, *Kelo*, 125 S. Ct. 2655 (2005) (No. 04-108), 2005 WL 166929, at *28; *see also* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 867 (arguing that compensation levels should increase as the "publicness" of a project diminishes).

9. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

fair market value adequately compensates owners. Justice Souter commented, for example, that “what bothered Justice Breyer I guess bothers a lot of us. And that is, is there a problem of making the homeowner or the property owner whole?”¹⁰ The majority opinion, however, only mentioned the compensation issue in a footnote.¹¹

The possibility that property owners may be undercompensated in the eminent domain process is frequently cited in the literature discussing the public use problem.¹² Some commentators—including myself—cite the potential for undercompensation as one reason that judicial policing of the boundary between “public” and “private” takings is needed.¹³ Others—most recently Professors James Krier and Christopher Serkin—have explicitly suggested additional compensation as an alternative to judicial review of public use claims.¹⁴ Most of the literature discussing the risk of undercompensation, however, ignores the important role that nonjudicial actors—“Takers,” if you will—play in the eminent domain process. This Article begins to fill that gap. Understanding the role of Takers is important because judges play only a bit part in the eminent domain process. In the vast majority of cases, formal eminent domain proceedings are never commenced.¹⁵ The universal disregard for how eminent domain works outside of the courtroom may have led previous commentators—again, including me—to overstate the undercompensation problem.

Takers operate under incentives that may minimize the risk of undercompensation: They need to avoid holdouts and the political fallout from negative publicity. They are legally obligated to bargain with property owners and are penalized financially if these negotiations fail. And they almost always are legally required to provide substantial relocation assistance to displaced owners. While the evidence presented here is incomplete, this

10. Transcript of Oral Argument at 49, *Kelo*, 125 S. Ct. 2655 (2005) (No. 04-108), 2005 WL 529436, at *33.

11. *Kelo*, 125 S. Ct. at 2668 n.21 (“The *amici* raise questions about the fairness of the measure of just compensation. While important, these questions are not before us in this litigation.” (citation omitted)).

12. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183–84 (1985); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973); Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721 (1993).

13. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 944–48 (2003); see also Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 84 (1986).

14. Krier & Serkin, *supra* note 8, at 867; see also James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985).

15. See, e.g., FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., *EVALUATION OF STATE CONDEMNATION PROCEEDINGS [hereinafter EVALUATION OF STATE CONDEMNATION PROCEEDINGS]*, <http://www.fhwa.dot.gov/realestate/cndmst.htm> (last visited May 12, 2006) (summarizing study of five states that found only 20% of acquisitions resulted in the initiation of formal eminent domain proceedings).

Article represents an important first step toward understanding how Takers may affect the nature and extent of the undercompensation problem.¹⁶

This Article has both practical and theoretical components. Part I reviews why fair market value compensation may fail to indemnify owners fully for their losses. Parts II, III, and IV then discuss three ways in which Takers may act to minimize the risk of undercompensation. Part II discusses the possibility that Takers sometimes simply avoid taking property that has high subjective value. By way of illustration, this Part examines historical evidence that Chicago's expressway planners intentionally avoided demolishing urban Catholic churches. Part III discusses state and federal laws that require Takers to pay more than fair market value when property owners are displaced by eminent domain. The extent of these legislative guarantees has been overlooked in the legal literature, perhaps because commentators have failed to understand the extent to which "relocation assistance" requirements provide substantial compensation above the fair market value award. Part IV examines the precondemnation bargaining process. Not only are Takers legally obligated to attempt to negotiate a voluntary purchase before resorting to a formal eminent domain proceeding, but they operate under legal and financial incentives that strongly encourage them to succeed. As a result, they may offer property owners more than market value for their property in order to avoid costly eminent domain proceedings. Because the opaque and decentralized nature of the bargaining process makes data collection and analysis difficult, this Part studies one county's successful effort to purchase, without the threatened resort to eminent domain, fifty-two parcels of land for a large manufacturing facility near my home in South Bend, Indiana.

Finally, Part V uses an emerging understanding of Takers' role to ask whether—and how—eminent domain law should be changed. This question is critical because *Kelo* has prompted widespread legislative efforts to reform eminent domain practices. While most of the state and federal proposals under consideration would impose substantive limits on the eminent domain power, noted scholars—as discussed previously—have suggested that reforms should instead guarantee additional compensation. Learning how Takers may minimize the risk of undercompensation undercuts the theoretical foundation for both kinds of reforms. Both proponents of additional compensation and advocates for a stronger public use rule rely in part on the assumption that undercompensation is a significant problem. If, as this Article's preliminary analysis suggests, the risk of undercompensation has been overstated, perhaps the status quo is less problematic than commonly assumed. This final Part draws upon the two most notorious "economic development" takings in recent years—the destruction of Detroit's Poletown community and the redevelopment effort at issue in *Kelo*—to argue

16. For an illuminating look at the ways that courts adjust "fair market value" determinations to accommodate unique circumstances that increase the risk of undercompensation, see Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 *Nw. U. L. Rev.* 677, 682–704 (2005).

that a case for substantive limits can be made even if owners receive more than fair market value. Specifically, this Part explores two problems raised by takings posing public use questions that more money may not solve. First, although conventional economic analysis suggests that higher compensation levels will limit the exercise of eminent domain, the deterrence effect of higher compensation is unclear. As William Fischel has recently observed, providing above-market compensation might instead undermine effective political resistance to questionable projects.¹⁷ Second, private takings may generate unique noninstrumental, or “dignitary,” harms—resulting from the nature of the government’s action rather than the value that an owner attaches to the property—that could cause the undercompensation risk to persist even as compensation levels increase.

I. UNJUST COMPENSATION?

A central difficulty with *all* compulsory takings, whatever their purpose, is that the constitutionally mandated measure of compensation awarded in an eminent domain action—that is, the condemned property’s fair market value¹⁸—can fail to indemnify owners fully. As Lee Fennell has helpfully described, the losses suffered by an owner whose property is taken by eminent domain may have both a “compensated increment” (the fair market value award) and an “uncompensated increment” (the owner’s losses exceeding that award).¹⁹ The amount of—and reasons for—the “uncompensated increment” depend on each owner’s unique circumstances, as outlined below.

A. Economic Losses

A fair market value award does not compensate an owner for relocation expenses, goodwill associated with a business’s location, or the cost of replacing the condemned property.²⁰ These types of losses work to the particular detriment of small business owners: some find that they are unable to reopen after they are displaced by eminent domain, while others relocate but subsequently fail.²¹ Fair market value compensation can also generate significant losses for residents, especially when they are unable to secure comparably affordable replacement housing. Residential tenants may find themselves in a particularly difficult situation because condemnation of

17. William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929.

18. *E.g.*, *Olson v. United States*, 292 U.S. 246, 254–55 (1934); *see also* *United States v. Cors*, 337 U.S. 325, 333 (1949).

19. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962–67.

20. Merrill, *supra* note 13, at 83; Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 890–92 (1989).

21. *See, e.g.*, BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 34–35 (1997); John P. Elwood, *Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven*, 12 YALE L. & POL’Y REV. 138, 179–80 (1994).

a leasehold usually terminates a lease, rendering the remaining portion of the tenant's lease valueless.²² During the urban renewal era, for example, Professor Frank Michelman spoke of the "violent unfairness" of tenants' forced displacements.²³ Black tenants—who were frequently targeted for displacement²⁴—could find themselves in a particularly desperate situation. Continued migration from the rural South led to overcrowding in those black neighborhoods that were not demolished, and systematic housing discrimination kept white areas off-limits.²⁵ While most of those displaced eventually found replacement housing, many ended up paying more for living arrangements that were not appreciably better than those they had lost.²⁶

Eminent domain also deprives owners of the gains from trade that a market transaction might generate.²⁷ Property rule protection provides complete protection against undercompensation in the normal market setting by enabling owners to hold out for their reservation price.²⁸ Thus, the inability to say "no" unquestionably leaves many owners worse off than if they would have been permitted to freely negotiate a purchase price. Indeed, the need to avoid holdouts strategically seeking unjust gains from trade is frequently cited as a significant justification for the use of eminent domain to assemble land for large projects, both public and private.²⁹

B. Subjective Losses

Additionally, an owner may value her property more than the market price reflects.³⁰ Experimental economics suggests that *possession alone* increases an owner's valuation of her property.³¹ This "endowment effect" has

22. See Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1089 (1987). See also generally WILLIAM A. FISCHER, *REGULATORY TAKINGS* 95 (1995) (discussing the undercompensation problem).

23. E.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1255 (1967).

24. *Kelo v. City of New London*, 125 S. Ct. 2655, 2686–87 (2005) (Thomas, J., dissenting) (noting that the families displaced by urban renewal were disproportionately nonwhite and poor).

25. FRIEDEN & SAGALYN, *supra* note 21, at 29–30.

26. *Id.* at 33 (noting that the typical residents displaced by urban renewal paid 20% more rent after being relocated; subsequent studies found that from one-fourth to one-half of displaced families lived in substandard housing despite a substantial rent increase). 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, 781–817 (1971).

27. See Fennell, *supra* note 19, at 966.

28. See *infra* notes 272–275 and accompanying text.

29. See, e.g., Merrill, *supra* note 13, at 74–75; see also *Kohl v. United States*, 91 U.S. 367, 371 (1875) ("If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell . . . the government is dependent for its practical existence upon the will . . . of a private citizen.").

30. See, e.g., EPSTEIN, *supra* note 12, at 183; see also Merrill, *supra* note 13, at 83.

31. 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) ("The Tversky-Kahneman analysis predicts that an ordinary landowner would feel the loss of a psychologically

been demonstrated in experiments showing that individuals consistently demand more to part with an entitlement than they would be willing to pay for it in the first instance.³² While this “offer-ask” disparity only trivially affects most markets, it is greatest for episodic events such as an eminent domain action.³³ This has led experimental economists to advocate above-market compensation whenever property is acquired through eminent domain.³⁴

An owner’s sentimental attachment to her property may widen the disparity between subjective value and market value. This portion of the uncompensated increment is explored most completely in the work of Margaret Radin, who has argued that certain property becomes inextricably intertwined with an owner’s personhood.³⁵ The offer-ask dichotomy provides a partial, but incomplete, explanation for this phenomenon. Owners may identify property with important family relationships; for example, “We raised our family here.” Moreover, property usually situates an owner within a community. Displacement uproots the owner, forcing her to sever important social ties. Whatever the precise metaphysics of geography and community, the subjective losses associated with such displacements undoubtedly pull the heartstrings. Intuitively, there is something palpably different about the destruction of an entire community—the whole being greater than the sum of the parts.³⁶

The subjective losses imposed by geographic separation from neighbors undoubtedly increase with the cohesiveness of the affected community and the scale of the displacement. For this reason, community losses may have been the greatest tragedy of the urban renewal/expressway era. Forced displacements destroyed many close-knit urban communities and “created

vested right . . . more keenly than he would the loss of a prospect (a psychologically invested right) of identical market value.”)

32. E.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); 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); Jeffrey J. Rachlinski & Forest Jourdan, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1559–76 (1998). *Contra* Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 536–44 (2005) (suggesting that subject misconception may explain away the “endowment effect”). See generally Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects’ Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259 (1993).

33. See FISCHER, *supra* note 22, at 208–09.

34. *Id.* at 207; JACK L. KNETSCH, PROPERTY RIGHTS AND COMPENSATION: COMPULSORY ACQUISITION AND OTHER LOSSES (1983); Jack L. Knetsch & Thomas E. Borchering, *Expropriation of Private Property and the Basis for Compensation*, 29 U. TORONTO L.J. 237, 237–52 (1984).

35. E.g., MARGARET JANE RADIN, REINTERPRETING PROPERTY 35–71 (1993).

36. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 77, 113–19 (2004). The universality of this intuition is illustrated yearly in Property classes when students confront with outrage the infamous *Poletown* decision. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

nothing less than a life crisis” for residents.³⁷ 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.”³⁸ Many of these neighborhoods were ethnic Catholic enclaves, like those divided by Chicago’s freeways, where social and religious lives centered around geographically based parishes. As a result, residents were rooted in their neighborhood to an extent difficult for modern sensibilities to comprehend. It is hardly surprising, therefore, that long-term studies found that many residents displaced from such neighborhoods suffered severe psychological trauma. Herbert Gans’s classic study of Boston’s West End found that 46% of women and 38% of men suffered “fairly severe grief” after their community was destroyed.³⁹ Residents of the Southwest Washington, D.C., community destroyed for the urban renewal project at issue in *Berman* reported suffering a similar emotional toll.⁴⁰

C. Dignitary Harms

“There is just something about land that makes you think that when you own it, it is really, really yours.”⁴¹ Perhaps for this reason, individuals whose property is taken by eminent domain may suffer what can be broadly categorized as noninstrumental “dignitary harms” resulting from the nature of the government’s action, rather than from the owner’s subjective attachment to her property. Owners may feel unsettled and vulnerable when they learn that the government plans to take their property. Eminent domain obviously eviscerates the physical autonomy guaranteed by the boundaries of private property.⁴² A compulsory taking deprives an owner of her “most essential right” to exclude others—including, especially, the government—from her property.⁴³ Expanding the scope of the takings power may increase all property owners’ feelings of vulnerability. As Justice O’Connor observed in *Kelo*, “The specter of condemnation hangs over all property. Nothing is to

37. FRIEDEN & SAGALYN, *supra* note 21, at 34.

38. *Id.* at 33.

39. Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL: THE RECORD & THE CONTROVERSY 359 (James Q. Wilson ed., 1966); see HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* (1962).

40. See DANIEL THURSZ, *WHERE ARE THEY NOW* 100–01 (1966).

41. Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1143 (1996) (book review).

42. See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345 (1996).

43. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (“[T]he landowner’s right to exclude [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."⁴⁴

To the extent that that property owners also may attach independent, noninstrumental significance to the *economic* autonomy that property guarantees, its loss also increases the uncompensated increment.⁴⁵ As discussed more completely below, the loss of economic autonomy may be particularly upsetting in the economic development context, for two related reasons. First, owners may be offended by the government's implicit suggestion that the current use of their property is less than socially optimal and that some other private owner would put it to a "better" use. Moreover, the targets of eminent domain may not share in the generated benefits that are used to justify economic development projects. The original owner does not directly recoup any of these benefits because the fair market value is calculated *before* those benefits accrue. She may not indirectly benefit either if her relocation removes her from the affected community.⁴⁶

Second, property owners also may feel that the government has treated them unfairly *vis-à-vis* others whose property was not taken. The regulatory takings literature suggests that the need for compensation is highest when "the government's aims could have been achieved in many ways but the means chosen placed losses on an individual . . ."⁴⁷ Yet, every exercise of eminent domain "singles out" individual property owners to bear the cost of broader societal goals.⁴⁸ The government usually chooses from a range of policy alternatives to advance its policy goals. Moreover, when the government decides to exercise the power of eminent domain, Takers usually have total discretion to select which properties to condemn and which to spare. The knowledge that the government could have advanced its plans by taking *someone else's* property may leave property owners asking, "Why me?" This reality is vividly illustrated by Chicago's expressways: when planners rerouted the freeway to avoid demolishing a church, they instead destroyed homes that would have been spared according to the original plans.

II. AVOIDING SUBJECTIVE LOSSES: CHICAGO'S EXPRESSWAY CHURCHES

Academic discussions tend to assume that there are two ways to minimize the risk of undercompensation. The first solution is substantive limits on the use of eminent domain. Margaret Radin has argued, for example, that "personal"—as opposed to "fungible"—property should be entitled to spe-

44. *Kelo v. City of New London*, 125 S. Ct. 2655, 2676 (2005) (O'Connor, J., dissenting).

45. Fennell, *supra* note 19, at 967.

46. See *infra* notes 265–270 and accompanying text.

47. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1345 (1991); see also Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1954–55 (1992); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 880 (1995).

48. Durham, *supra* note 14, at 1306.

cial protection from condemnation.⁴⁹ And Thomas Merrill has argued that the courts should carefully scrutinize the decision to exercise the power of eminent domain when the risk of subjective loss is particularly high.⁵⁰ The second solution, which is discussed in more detail in Part III, is more money—that is, above-market compensation in appropriate circumstances.⁵¹

The academic commentary on eminent domain to date has completely overlooked a third possibility: Takers simply may avoid taking properties with high subjective value. They have important incentives to do so. Owners who are sentimentally attached to their properties may be more likely to resist Takers' voluntary overtures. Their strong attachment may also cause them to generate unwanted—and potentially effective—political opposition to the government's plans. The complete lack of attention to this dynamic is unsurprising, but unfortunate. It is unsurprising because the government usually owes a property owner nothing until it takes her property⁵²—which is why most of the “takings” literature concentrates on discerning when a taking has occurred, rather than how much is owed once it has.⁵³ It is unfortunate because, as the “singling out” insight illustrates, the government's plans frequently are flexible. That is, it can pursue policy objectives by various means, and, in the eminent domain context, with different parcels of property. The following discussion uses a historical case study—the preservation of Chicago's expressway churches—to explore how Takers can exercise this flexibility to minimize subjective losses. While a complete understanding of precondemnation planning requires more comprehensive study, the story of Chicago's expressway churches provides an opportunity to reflect on how Takers' planning decisions affect the extent of the undercompensation problem.

A. Political Rallying Points

Chicago's expressways were constructed at a time when America's urban landscapes were being reshaped on a massive scale by unparalleled government intervention. City planners, municipal leaders, and federal officials alike

49. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687 (1988); Margaret Jane Radin, *Property and Personhood*, 35 STAN. L. REV. 957, 1005 (1982).

50. Merrill, *supra* note 13, at 84.

51. See *infra* Part III.

52. See, e.g., Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 558–59 (2001) (describing noncompensable “derivative takings” resulting from government's action on neighboring property). Under certain narrow circumstances, the government may be required to compensate owners who have not lost title to or possession of their property. Regulatory takings are the most obvious example. The government may also be required to compensate owners for economic losses resulting from a *threatened* condemnation, see 4 PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 12B.17 (3d ed. 2006) (condemnation blight), and to provide “severance damages” when a partial physical taking decreases the value of an owner's remaining property, see, e.g., *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1331–33 (9th Cir. 1982).

53. E.g., Serkin, *supra* note 16, at 682–83.

hoped to rectify the problem of urban "blight" primarily through the wholesale destruction and reconstruction of existing neighborhoods.⁵⁴ Beginning in the 1940s, the federal urban renewal program underwrote the widespread exercise of eminent domain by local governments to condemn blighted areas and to sell the properties to private investors at bargain-basement prices.⁵⁵ Urban renewal efforts displaced hundreds of thousands of families and tens of thousands of businesses. Several hundred thousand more families were displaced during the same period to make way for the interstate highway system.⁵⁶

Initially, Catholics—in Chicago and elsewhere—supported urban renewal, for both practical and ideological reasons. As Steven Avella has described, in Chicago the Great Depression and World War II were "glaciers freezing the urban landscape."⁵⁷ The resulting overcrowding made urban renewal projects particularly attractive to urban Catholics.⁵⁸ Not only was Catholic teaching generally sympathetic to economic intervention by the government,⁵⁹ but Church leaders predicted that renewal projects would first provide jobs, and later housing, for their flock.⁶⁰ The growing realization that urban renewal would demolish some Catholic neighborhoods and threaten others with unwanted integration, however, tempered this enthusiasm.⁶¹ Chicago's Cardinal Stritch appointed a priest to monitor urban renewal activities and to serve as a liaison between the Church and government officials concerned with urban policy.⁶²

The Catholic response to expressway construction in Chicago was more haphazard. Cardinal Stritch attempted to deal with the expressways as he had with urban renewal—by appointing Father James Doyle to oversee their construction. But Doyle was overextended, and individual parish priests and ethnic groups were left to negotiate with expressway planners to protect their parishes from the wrecking ball.⁶³ These negotiations were critically important to threatened religious congregations. For urban Catholics in the 1950s, parishes were more than church buildings—they were the geographic

54. FRIEDEN & SAGALYN, *supra* note 21, at 16 (noting 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).

55. 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 (1968).

56. FRIEDEN & SAGALYN, *supra* note 21, at 29.

57. AVELLA, *supra* note 3, at 187.

58. *Id.* at 188–89.

59. JOHN T. MCGREEVY, *PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH* 125–27 (1996).

60. AVELLA, *supra* note 3, at 195–98; MCGREEVY, *supra* note 59, at 124–26.

61. AVELLA, *supra* note 3, at 208–15; MCGREEVY, *supra* note 59, at 127–30.

62. AVELLA, *supra* note 3, at 198.

63. *See id.* at 216–17 (noting that Father Doyle also was, somewhat ironically, the Archdiocesan director for displaced persons from Iron Curtain countries).

building blocks of community life. As historian John McGreevy has observed, “Catholics used the parish to map out—both physically and culturally—space within all of the northern cities.”⁶⁴ Identity with the parish was so complete that when asked “Where are you from?” most Catholics would respond with their parish name rather than their addresses or the name of their neighborhood.⁶⁵ In Chicago, residents identified in a particularly strong way to their neighborhood and parish.⁶⁶ “The ‘City of Neighborhoods’ was in certain areas more a ‘City of Parishes.’”⁶⁷ Ideally, churches were placed no more than one mile apart, so that a church would fall within walking distance of all of the homes within the parish boundaries. Other, “national” parishes, which served non-English-speaking immigrants, frequently were located within the boundaries of “territorial” parishes.⁶⁸

Parish life was “disciplined and local.”⁶⁹ Catholic doctrine held that the parish church was responsible for all of the souls within its territorial boundaries.⁷⁰ Not surprisingly, parish priests sought to cultivate a geographic “rootedness” among their flock.⁷¹ Parishes were massive operations, which included a church, a parochial school, a convent, and dozens of formal social organizations.⁷² Parishioners were expected to attend mass each week, to send their children to the parish school, and to contribute socially and financially to the life of the parish. Priests encouraged—even commanded—parishioners to purchase homes within the parish boundaries; they sponsored parish festivals and visited the homes of all of their parishioners at least once a year. Some pastors even refused to visit neighboring parishes.⁷³ In the national parishes, this geographic connection to a parish was undoubtedly reinforced by the link between religious life and ethnicity,⁷⁴ but territorial parishes commanded intense loyalty as well. As one Chicago resident observed, “There

64. MCGREEVY, *supra* note 59, at 15; *see also* JAY P. DOLAN, *IN SEARCH OF AMERICAN CATHOLICISM* 130 (2002).

65. MCGREEVY, *supra* note 59, at 24; *see also* AVELLA, *supra* note 3, at 187; EILEEN M. MCMAHON, *WHAT PARISH ARE YOU FROM?: A CHICAGO IRISH COMMUNITY AND RACE RELATIONS* 24 (1995).

66. *See* AVELLA, *supra* note 3, at 187.

67. MCMAHON, *supra* note 65, at 114.

68. In Chicago, the “territorial” parishes tended to be *de facto* Irish parishes, as other ethnicities were drawn to “national” churches. *See id.* at 18.

69. MCGREEVY, *supra* note 59, at 15.

70. *Id.* at 10.

71. For a fascinating account of how Catholic parish structure contributed to this “rootedness,” *see* GERALD GAMM, *URBAN EXODUS: WHY THE JEWS LEFT BOSTON AND THE CATHOLICS STAYED* (1999).

72. MCGREEVY, *supra* note 59, at 15.

73. *Id.*

74. *Id.* at 9–10.

was no reason to stretch out to any other place . . . because you had that wide territory of your own people.’”⁷⁵

Against this backdrop, it is easy to imagine the emotion generated by news that a parish church was slated for demolition or even that a highway might divide a parish geographically. At one point, the Department of Public Works announced plans to reroute the Kennedy Expressway through St. Stanislaus Kostka Church and school. This proposal enraged Chicago’s Polish Catholics—the Archdiocese’s most important ethnic minority. If, as historians argue, the national parish was “the most important Polish-American institution,” then St. Stanislaus Kostka was the most important national parish in the most Polish of all American cities. Established in 1867, it was the largest Catholic parish in the world by the turn of the twentieth century.⁷⁶ The parish website claims that St. Stanislaus was, at the time, “the largest parish in the United States, if not the world, with 8,000 families, totaling 40,000 people” and that it remains “the mother Catholic Church of Polish parishes.”⁷⁷ The neighborhood surrounding the church, known as Stanislawowo (later Kostkaville), was the first settled by Polish immigrants in the nineteenth century and played a large role in the cultural life of Chicago’s Polish community.⁷⁸ Upon learning that the church was threatened by the expressway, the Polish community quickly organized to oppose the demolition and demanded that Cardinal Stritch intervene to save its church. Accounts of exactly why the church and school buildings were spared differ.⁷⁹ It is clear, however, that Stritch personally approached the governor of Illinois and that the expressway was subsequently rerouted. William Stratton, governor at the time, later claimed that he personally made the decision to spare the church.⁸⁰

According to historian Steven Avella, expressway routes were altered at least three other times to preserve the geographic integrity of parish boundaries. Interestingly, in none of these cases was the actual parish church threatened. Motorists on the Dan Ryan veer around “Gallery Bend”—named for John Ireland Gallery, pastor of St. Cecilia’s parish—near 45th Street on

75. McMAHON, *supra* note 65, at 114 (quoting parishioner Mildred Joyce).

76. JAY P. DOLAN, *THE AMERICAN CATHOLIC PARISH: VOLUME II*, at 340 (1987).

77. St. Stanislaus Kostka, Who We Are, <http://www.ststansk.com/whoweare.html> (last visited May 17, 2006).

78. See JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE* 198 (1992).

79. Compare JOHN IWICKI, *RESURRECTION CHARISM: A HISTORY OF THE CONGREGATION OF THE RESURRECTION, VOLUME III: 1932–1965*, at 257–58 (1991) (asserting that the rerouting resulted “[a]fter a great deal of discussion and flexing of political muscle”), with William Braden, *Expressway Churches: Kennedy, Ryan Bend to Polish-Catholic Clout*, CHI. TRIB., Apr. 11, 1993, at 38 (speculating that Kennedy was rerouted to spare the ancestral home of former Congressman Dan Rostenkowski, which was across the street from the church), and Wes Smith & Jack Houston, *Things Looking Up at Holy Trinity: Once Marked for Closing, Church Enters ’87 with Mission*, CHI. TRIB., Jan. 2, 1987, at C19 (“The Chicago City Council spared the churches when it was discovered that routing the highway around them would be cheaper than cutting through them.”).

80. Braden, *supra* note 79, at 38.

the city's South Side.⁸¹ Gallery vociferously objected upon learning that the expressway would dissect his parish and, apparently, succeeded in getting the road moved to the edge of the parish boundaries.⁸² Two bends in the Kennedy were made at the behest of Monsignor William Gorman of Resurrection parish, who also objected to plans to divide his parish, and Monsignor John D. Fitzgerald of Ascension parish, who killed plans for an off-ramp into his parish.⁸³ Perhaps not surprisingly, all three of these men served on the Archdiocese's steering committee for "neighborhood conservation," and Gallery was a leader in efforts to preserve neighborhood stability and to prevent the mass exodus of white residents in the face of integration.⁸⁴

B. *The Few and the Many*

Some commentators, notably William Fischel, have asserted that the political process often can effectively police the exercise of eminent domain.⁸⁵ A similar assumption is reflected in the Supreme Court's deferential public use review: the Court assumes that the political process is better equipped than the judiciary to determine when an exercise of eminent domain will serve the public interest.⁸⁶ The preservation of expressway churches provides an opportunity to think critically about the related question of whether, and when, political actors can be expected to refrain from the use of eminent domain. Political actors are likely to be most responsive to the concerns of political insiders like Father Gallery (of Gallery Bend), who wrote a letter to parish priests during the late 1950s advising that "[a] little 'muscle' on the right person has always gotten more results than headlines in the paper."⁸⁷ And, as Justice O'Connor observed in her *Kelo* dissent, the city of New London opted not to acquire the Italian Dramatic Club—a well connected political organization—despite its plans to demolish the adjacent structures.⁸⁸

That highway planners in mid-twentieth century Chicago avoided demolishing Catholic churches is hardly surprising. Neil Komesar has described a "two-force" political model, in which democratic actors are prone to both majoritarian and minoritarian biases, leading to both the "fear

81. See AVELLA, *supra* note 3, at 217. St. Cecilia's parish was demolished in 1972. *Id.* at 210.

82. *Id.* at 217.

83. *Id.*

84. *Id.* at 211–14.

85. See FISCHEL, *supra* note 22, at 73–75.

86. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

87. MCGREEVY, *supra* note 59, at 131.

88. *Kelo v. City of New London*, 125 S. Ct. 2655, 2671–72 (2005) (O'Connor, J., dissenting).

of the few” and the “fear of the many.”⁸⁹ In Chicago, the individuals who rallied to save expressway churches were, in a sense, both the few *and* the many—both majoritarian and minoritarian forces favored church preservation. Not only did Catholics make up a majority of the city’s voters, and certainly Democratic voters, but church preservation efforts were characterized by the close social connections and intense focus that frequently correlates with successful political action.

That Catholics could flex majoritarian muscle in 1950s Chicago is beyond question: the city’s powerful Irish Catholic mayor, Richard J. Daley, undoubtedly preferred, when possible, to avoid disrupting the spiritual lives of thousands of co-religionists—who also happened to vote Democratic.⁹⁰ He not only coveted their votes, but also understood the centrality of the parish in their lives. Mayor Daley’s own Nativity parish, which held his “deepest loyalties,” was located only a few blocks from Father Gallery’s St. Cecilia Church.⁹¹ Thus, while it is impossible to know with certainty what factors influenced the *original* freeway plans, there are reasons to assume that many expressway churches were saved, *ex ante*, by planners. After all, the Catholic Church was a player in the urban renewal and expressway planning process.⁹² Moreover, Mayor Daley was the chair of a Transportation Advisory Group, which, in the mid-1960s, issued guidelines indicating that “parish boundaries” should be considered when determining freeway routes.⁹³

Majoritarian clout is not the *sine qua non* of successful political advocacy, however. Another important lesson of the Chicago expressway churches may be that high subjective values may correlate with successful efforts by smaller, narrowly-focused coalitions to prevent takings. Subjective attachment to property provides an incentive to oppose takings and increases the intensity of the opposition. Because Takers will reasonably prefer the path of least resistance, this intensity may correlate with political success. If so, Takers can be expected to minimize the risk of undercompensation with avoidance. Figure 1 suggests three possible graphical representations of this dynamic, each suggesting that the likelihood of avoidance is some function of the owner’s political influence and subjective attachment to her property. Note that, in each scenario, while Takers may be influenced to a greater or lesser degree by an owner’s political influence and/or her subjective attachment, each of the three curves (A, B, C) are hypothetical representations of the likelihood of avoidance, which increases as the owner’s political influence

89. NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 60–70 (2001); *see also* Fennell, *supra* note 19, at 967–68 (applying Komesar’s model in eminent domain context).

90. *See* ADAM COHEN & ELIZABETH TAYLOR, *AMERICAN PHARAOH: MAYOR RICHARD J. DALEY* 13–30 (2000); MCGREEVY, *supra* note 59, at 125.

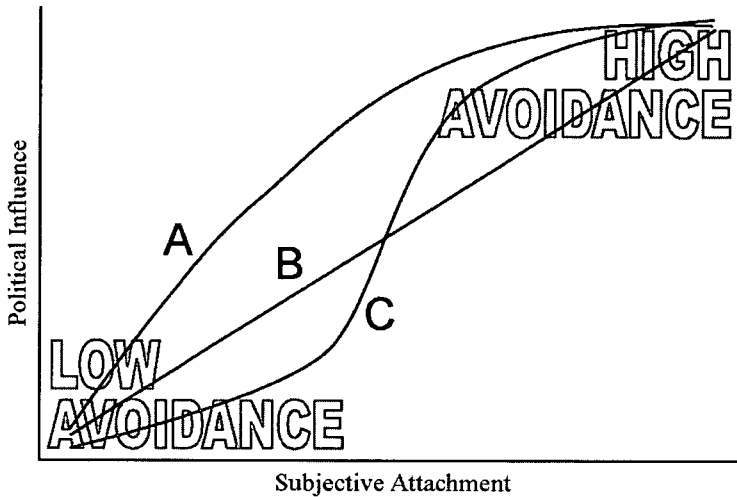
91. *See* COHEN & TAYLOR, *supra* note 90, at 17.

92. *See supra* text accompanying notes 62–63; MCGREEVY, *supra* note 59. My colleague, Rev. Timothy Scully, C.S.C., recalls that his late father—who served as the Archdiocese’s lawyer during this period—recounted stories about highway negotiations on behalf of the Church.

93. Report of Transportation Advisory Group (on file with author).

and subjective attachment to her property increase. All three curves predict that Takers are least likely to avoid low subjective value property owned by the politically powerless; they are most likely to avoid high subjective value property owned by the politically connected. Because Chicago's parish churches fell into this latter category, it is not surprising that most were bypassed during expressway construction.

FIGURE I



This two-dimensional representation, however, neglects a third important factor influencing the Takers' decision to preserve Chicago's expressway churches: namely, the parishes' collective importance to tight-knit communities, which made them natural rallying points for collective action. While the episodic nature of physical takings may disadvantage property owners in the political process,⁹⁴ public choice theory also teaches that political actors are particularly responsive to cohesive, well-organized, and narrowly-focused coalitions like those that characterized parish-preservation efforts.⁹⁵ Indeed, Daniel Farber could have been describing Chicago parishes when he suggested that some groups of residents may be uniquely positioned to successfully oppose a taking:

They form a small group (relative to the electorate, at least) and often have high stakes (since they are about to have large amounts of property seized by the state). They also have the advantage of sharing a geographical

94. See Saul Levmore, *Just Compensation and Just Politics*, 22 *CONN. L. REV.* 285, 306-07 (1990).

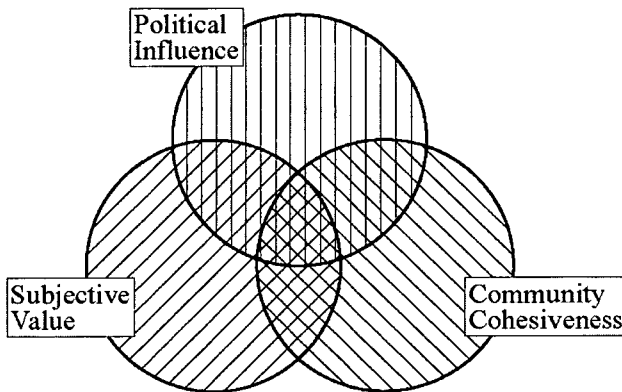
95. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 12-21 (1991); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 *MICH. L. REV.* 930, 978-80 (1988). On collective action and small group influence, see RUSSELL HARDIN, *COLLECTIVE ACTION* 38-49 (1982), and MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-65 (1965).

connection, and that proximity makes it easier to form into a group and to identify them in the first place. As neighbors, they are likely to have community ties that make organization easier.⁹⁶

Just as the subjective value that Catholics attached to parishes undoubtedly increased the intensity of church-preservation efforts, so also did the affected communities' cohesiveness reduce impediments to organization.

The lesson of Chicago's expressway churches therefore might be better represented in three dimensions, reflected in Figure 2. Takers are most likely to avoid a property characterized by all three (represented in the triple shaded area): a high subjective value property, important to a cohesive community of politically powerful owners. Saint Stanislaus Kostka's importance to Chicago's Polish community led to the rapid organization of an intense "Save the Church" campaign; and the Church's political influence undoubtedly made it difficult for the governor to say no to Cardinal Stritch's direct request for intervention.

FIGURE 2



Takers also have significant incentives to avoid properties that fall into any of the three double-shaded areas: (1) high subjective value property owned by the politically powerful; (2) properties owned by members of politically influential, cohesive communities; and (3) high subjective value properties owned by members of cohesive groups, regardless of their political influence. For example, the decision to spare churches in other cities during massive demolition efforts provides anecdotal evidence that political actors may avoid condemning properties that fall into the double-shaded area at the bottom of the diagram—properties that are highly valued by an

96. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992).

entire community.⁹⁷ The Poletown battle is case in point. The fight was spearheaded by a religious leader, Father Joseph Karasiewicz, and centered around the Immaculate Conception Catholic Church.⁹⁸ Although the Poles were not politically powerful in Detroit, the effort was partially successful: General Motors actually offered to spend millions of dollars to move and refurbish Immaculate Conception Church and then give it back to the Archdiocese of Detroit. The Archdiocese, which supported the Poletown project, rejected the offer, citing the decline in parish membership and the availability of other parishes to serve the city's Polish community.⁹⁹ It is reasonable to assume that *any* of the three factors portrayed in the Venn diagram—political influence, subjective value, or community cohesiveness—increases the likelihood of Taker avoidance, although they certainly do not guarantee it.

C. *The Limits of Avoidance*

Both Figures 1 and 2 suggest why the political process alone will not eliminate the undercompensation problem. Importantly, Takers may be less likely to avoid private homes than property valued highly by a cohesive community because targets of ad hoc physical invasions will be unorganized and therefore disadvantaged in the political process.¹⁰⁰ Homeowners may lack a communal rallying point that the parish church represented in post-war Chicago. By sparing expressway churches, Chicago's political process may have reduced the subjective losses resulting from highway construction, but it did not eliminate them. Many parishioners lost their homes, and others suffered what Abraham Bell and Gideon Parchomovsky call "derivative takings"—noise, fumes, physical separation from their neighbors, decreased property values—for which they received no compensation.¹⁰¹ Moreover, saving the church buildings did not necessarily mean saving the *parish*. Even when the church was saved, the expressways disrupted Catholic community life in a number of ways. The roads crossed the territorial boundaries of at least twenty-five different parishes—sometimes more than once.¹⁰² The massive concrete structures divided, physically and psychologically, people who had always identified themselves as one. Thousands were displaced during the construction process; many others later moved to escape the noise,

97. I first noticed "expressway churches" on a business trip to Milwaukee a decade ago. Old St. Dominic's in Washington, D.C., which hovers above Interstate 395 just south of the U.S. Capitol, was one of the only buildings spared during the wholesale demolition at issue in *Berman v. Parker*, 348 U.S. 26 (1954). See Linda Wheeler, *Broken Ground, Broken Hearts: In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A1.

98. See JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 105–07, 153–64 (1989).

99. *Id.* at 160–61.

100. See Levmore, *supra* note 47. But see Farber, *supra* note 96, at 289 (suggesting that high stakes and geographic connections will augment owners' efforts to oppose physical takings).

101. See Bell & Parchomovsky, *supra* note 52, at 559.

102. See AVELLA, *supra* note 3, at 216.

fumes, and congestion generated by the freeways.¹⁰³ For example, while St. Stanislaus Kostka was spared, the disruption resulting from the proximity to the highway—including the mass relocation of parishioners—is frequently cited as contributing to the parish's rapid decline.¹⁰⁴ These losses were understandably devastating—not only did the high incidence of homeownership likely multiply the endowment effect discussed above,¹⁰⁵ but forced relocations also wrested parish members from an all-encompassing social and religious community.

Takers may be least concerned with avoiding the subjective losses of those political outsiders, including racial minorities and the poor, who are not attached to cohesive communities.¹⁰⁶ During the urban renewal period, for example, the evidence suggests that Takers may have avoided the costs of inflaming the passions of politically powerful groups by simply taking the properties owned by those who were powerless and lacked the wherewithal to mount effective opposition. Urban renewal was called “Negro Removal” by detractors,¹⁰⁷ and the appellation was deserved in some cases. Miles Lord, who oversaw the 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 . . . [a]nd 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.¹⁰⁸

Chief highway lobbyist Alf Johnson also confirmed that this practice was both common and intentional.¹⁰⁹ In Chicago, it is widely believed that Mayor Richard Daley gerrymandered the path of the Dan Ryan Expressway to protect South Side Catholic neighborhoods from the city's expanding “black belt.” Daley biographers Adam Cohen and Elizabeth Taylor recount that the initial plans called for a more direct route. But when the “final plans were announced, the Dan Ryan had been ‘realigned’ several blocks eastward . . . along Wentworth Avenue”—the city's traditional, and increasingly porous,

103. *Id.* at 215–16; see also FISCHER, *supra* note 22, at 95. For a classic and tragic description of the effects of highway construction on community life, see ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 1850–94* (1974) (describing construction of the Cross-Bronx Expressway and the decline of the East Tremont neighborhood).

104. *E.g.*, AVELLA, *supra* note 3, at 217.

105. See *supra* text accompanying notes 31–34.

106. See Brief for NAACP et al. as Amici Curiae Supporting Petitioners at 7, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2811057, at *7 (asserting that “the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly . . . have been targeted for the use and abuse of eminent domain power in the past and there is evidence that . . . these groups will be both disproportionately and specially harmed by the exercise of that expanded power.”).

107. See 12 THOMPSON ON REAL PROPERTY § 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin).

108. FRIEDEN & SAGALYN, *supra* note 21, at 28–29 (quoting Miles Lord).

109. *Id.*

racial dividing line: "It was a less direct route, and it required the road to make two sharp curves in a short space, but the new route turned the Dan Ryan into a classic racial barrier between the black and white South Sides."¹¹⁰ This troubling history serves as a reminder that, while Taker-avoidance may minimize the overall undercompensation problem, the risk of undercompensation persists in individual cases, especially when the would-be targets lack political clout.

III. LEGAL ENTITLEMENTS TO ABOVE-MARKET COMPENSATION

Laws mandating above-market compensation may fill gaps left when Takers cannot—or choose not to—avoid taking property with high subjective value. Frequently, owners are legally entitled to substantially more than the fair market value of their property. Interestingly, however, the legal literature focuses almost exclusively on the compensation mandated by the U.S. Constitution, rather than the amount of compensation that Takers are statutorily obligated to pay property owners. This oversight may be partially the result of confusion over vocabulary: "relocation assistance" can result in a substantial financial benefit for dislocated residents—and, to a much lesser extent, businesses.¹¹¹ In order to fully understand the undercompensation problem, it is necessary to understand what federal and state laws require governments to pay when property is taken by eminent domain. This Part provides a brief outline of these legal entitlements.

A. Federal Relocation Assistance

Congress enacted the Uniform Relocation Assistance and Real Properties Acquisition Act (or "Uniform Act") in 1971, in response to the concern—based in part upon a sizable empirical literature—that the individuals displaced by highway and urban renewal projects suffered substantial financial hardship.¹¹² The Uniform Act requires federal agencies, as well as state and local agencies receiving federal funds, to provide relocation assistance whenever they displace property owners.¹¹³ Because it prohibits Takers from dislocating any occupant without first ensuring that she can secure comparable replacement housing, the Uniform Act operates in many cases to guarantee that owners receive the replacement value—rather than the market value—of their property.¹¹⁴ Condemnors must compensate displaced property owners for actual moving expenses as well as mortgage and closing costs; businesses are also entitled to receive up to

110. COHEN & TAYLOR, *supra* note 90, at 188–89.

111. See Ellickson, *supra* note 12, at 737 n.195 (describing relocation assistance as "[b]onus payments disguised as relocation payments").

112. See generally Hartman, *supra* note 26.

113. 42 U.S.C. § 4630 (2000).

114. *Id.* § 4626(b).

\$10,000 for “reestablishment” expenses.¹¹⁵ The Act also requires displacing agencies to provide relocation advisory services to help both owners and lessees search for a new home or business location.¹¹⁶ This relocation advisory service must provide information about the “availability, sales prices, and rental charges or comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations.”¹¹⁷ As a last resort, when comparable replacement housing is not readily available, the displacing agency may “take such action as is necessary or appropriate to provide such housing,” including payments in excess of the replacement-value subsidies discussed below or the purchase, rehabilitation, or construction of a dwelling for the displacee.¹¹⁸

Under some circumstances, the replacement-dwelling guarantee substantially improves the housing situation of displaced occupants. The Uniform Act requires that the replacement dwelling be “decent, safe, and sanitary,” “adequate in size to accommodate the occupants,” “within the financial means of the displaced person,” and “in a location generally not less desirable than the location of the displaced person’s dwelling with respect to public utilities, facilities, services, and the displaced person’s place of employment.”¹¹⁹ These provisions may require that the displacing agency secure a larger, more expensive home for a resident—for example, because a family’s current dwelling lacks the appropriate number of bedrooms for their children under local housing codes.¹²⁰ The Uniform Act directs displacing agencies to pay up to \$22,500 to enable a homeowner to purchase an appropriate residence.¹²¹ Tenants are entitled to a payment of up to \$5,250 to make up the difference between their current rent and new rent; this payment may also be used for a down payment on a new home or to guarantee that a tenant will pay no more than 30% of her income to secure a new residence.¹²² In some cases, however, these limits are disregarded. An audit conducted by the Arizona Department of Transportation, for example, concluded that relocation assistance payments routinely exceeded the statutory limits: for one project, payments to homeowners ranged from \$7,400 to \$25,236 (averaging \$17,950); more surprisingly, the rental assistance payments all exceeded the statutory maximum, ranging from \$6,300 to \$20,840 (averaging \$13,725).¹²³ The same audit further found that the Department

115. *Id.* § 4622(a); see also Kirk A. Schnitker, *Relocation Claims and Federal Relocation Rules*, in ALI-ABA, EMINENT DOMAIN AND LAND VALUATION LITIGATION COURSE OF STUDY MATERIALS (2003).

116. 42 U.S.C. §§ 4622(a), 4625(b) (2000).

117. *Id.* § 4625(c)(2).

118. *Id.* § 4626(a); see also 49 C.F.R. § 24.404(c) (2005).

119. 42 U.S.C. § 4601(10).

120. See 49 C.F.R. § 24.2(a)(8)(iv).

121. 42 U.S.C. § 4623.

122. See 49 C.F.R. § 24.402(b); 8A ROHAN & RESKIN, *supra* note 52, § 20.04[3].

123. See DOUGLAS R. NORTON, STATE OF ARIZ. OFFICE OF THE AUDITOR GEN., PERFORMANCE AUDIT OF ARIZONA DEPARTMENT OF TRANSPORTATION: HIGHWAY PLANNING AND

misused the “last resort” provision of the Uniform Act, apparently securing alternative housing whenever a relocation agent found that relocation payments would exceed the statutory maximum. In one case, for example, the Department replaced a 1969 two-bedroom, one-bath house that included a car port with a 1988 three-bedroom, two-bath house that included a two-car garage and a spa.¹²⁴ The Department also used the *highest* asking price of three comparable properties to calculate the relocation assistance payment.¹²⁵

B. State Relocation Assistance

Since federal funds help finance many highway and redevelopment projects,¹²⁶ the extent of the Uniform Act’s guarantee is quite broad. Moreover, only a handful of states actually limit the availability of relocation assistance to those projects covered by the Uniform Act.¹²⁷ Most states require relocation assistance for all projects receiving state funds,¹²⁸ and a few require it for condemnations by any public entity.¹²⁹ In general, state relocation assistance practices mirror federal ones. The most common legal provisions either require compliance with the Uniform Act or incorporate nearly identical language.¹³⁰ In addition, there is a trend toward providing additional compensation for dislocated businesses:¹³¹ Direct recovery of business losses, such as the loss of goodwill associated with a location, is allowed in

ENGINEERING FUNCTIONS 17 (1997), available at http://www.auditorgen.state.az.us/Reports/State_Agencies/Agencies/Transportation,%20Department%20of/Performance/97-09/97-9.pdf.

124. *Id.* at 16–17.

125. *Id.* at 17–18.

126. Congress responded to *Kelo* with bills directed at federally-funded state projects. See Protection of Homes, Small Businesses, and Private Property Act, H.R. 3083, 109th Cong. § 3 (2005) (forbidding “economic development” from the definition of “public use” for “all exercises of eminent domain power by State and local government through the use of Federal funds”); Private Property Rights Protection Act, H.R. 3135, 109th Cong. § 2 (2005) (forbidding “the project” and “the exercise and enforcement” of eminent domain for economic development “if Federal funds would contribute in any way”).

127. See, e.g., ALASKA STAT. § 34.60.020 (2004); ARK. CODE ANN. § 22-9-701 (2005); COLO. REV. STAT. § 24-56-102 (2005); FLA. STAT. ANN. § 421.55 (West 2006); GA. CODE ANN. § 32-8-1 (2005); KY. REV. STAT. ANN. § 56.610 (LexisNexis 1997); MONT. CODE ANN. § 70-31-102 (2005); N.Y. GEN. MUN. LAW § 74-b (McKinney 2006).

128. See, e.g., CONN. GEN. STAT. § 8-268 (2005); HAW. REV. STAT. § 111-6 (2004); IND. CODE ANN. § 8-23-17-13 (West 2005); MICH. COMP. LAWS ANN. § 213.322 (West 2006).

129. See, e.g., CAL. GOV’T CODE § 7262 (West 2006); KAN. STAT. ANN. § 17-4748 (1905); NEV. REV. STAT. §§ 342.015, 342.045 (2003); OR. REV. STAT. § 35.510 (2005); 26 PA. CONS. STAT. ANN. § 1-601A (West 2006); WIS. STAT. ANN. § 32.19 (West 2006).

130. See, e.g., ALA. CODE §§ 18-4-1 to -19 (LexisNexis 1997); LA. REV. STAT. ANN. §§ 38:3101–3110 (2005); MD. CODE ANN., REAL PROP. §§ 12-201 to -212 (LexisNexis 2003); N.C. GEN. STAT. § 133-5 to -18 (2005); OHIO REV. CODE ANN. § 163.51–163.62 (LexisNexis 2001); WYO. STAT. ANN. §§ 16-7-102 to -110 (2005).

131. See FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., NATIONAL BUSINESS RELOCATION STUDY (2003).

a handful of states.¹³² Additionally, almost all states compensate for a loss of income derived from the land—including income from crops, minerals, and rent.¹³³ Other states have allowed owners to recover business value when the business and land are uniquely intertwined, making the business difficult to relocate.¹³⁴ Even when business income and goodwill are not included in a compensation award, evidence of business income is admissible as a factor bearing on the value of the property.¹³⁵

C. Relocation-Assistance Studies

Most empirical studies of the relocation problem were conducted prior to the enactment of the Uniform Act in the early 1970s.¹³⁶ More recent studies—conducted primarily for government agencies—have chronicled how relocation assistance programs work in practice. Three themes emerge from these studies. First, the dollar amount of relocation assistance received by *residents* displaced by eminent domain usually is quite generous. Second, relocation assistance frequently falls short of fully compensating *businesses* for their losses. Third, the quality of relocation assistance services is spotty, which, again, tends to work to the detriment of businesses that must relocate.¹³⁷ The U.S. Department of Transportation's Relocation Retrospective Study, conducted in 1995, provides the most complete recent picture of *residential* relocation assistance.¹³⁸ This study found that residential property owners were pleased overall with the relocation assistance that they received. In fact, nearly 90% of the homeowners surveyed indicated that they were "able to significantly upgrade" their housing.¹³⁹ Forty-six percent of the homeowners surveyed indicated that they incurred unreimbursed costs as the result of their displacement. These costs were almost exclusively associated with higher property taxes and utility bills, which averaged \$484 and \$434 more per year respectively.¹⁴⁰ A number of homeowners also complained

132. See CAL. CIV. PROC. CODE § 1263.510 (West 2005); FLA. STAT. ANN. § 73.071(3) (West 2004); VT. STAT. ANN. tit. 19, § 501(2) (2000); WYO. STAT. ANN. § 1-26-713 (2005).

133. Jack R. Sperber, *How Does Your State Stack Up? A National Survey of Selected Compensation Laws and Rules*, in ALI-ABA, EMINENT DOMAIN AND LAND VALUATION LITIGATION COURSE OF STUDY MATERIALS 641, 649 (2005).

134. *Id.*

135. *Id.* at 650.

136. See Hartman, *supra* note 26.

137. The studies' relatively small sample sizes call the generalizability of the data into question. See FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., NATIONAL BUSINESS RELOCATION STUDY § 3 (2002) [hereinafter U.S. DEP'T OF TRANSP., BUSINESS RELOCATION STUDY], available at <http://www.fhwa.dot.gov/REALESTATE/nbrs2002.htm> (noting that conclusions were based on review of 224 businesses); FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE STUDY 2 (1996) [hereinafter U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE] (noting that report was based upon interviews with thirty-nine residential owners, thirty-four residential tenants, and eighty-eight business owners).

138. See U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE, *supra* note 137.

139. *Id.* at app.

140. *Id.*

about the quality of the relocation assistance services. Interestingly, however, a majority of the homeowners declined to use the relocation assistance services at all, and a substantial majority (77%) secured replacement housing through their own efforts.¹⁴¹

Residential *tenants* may benefit the most from relocation assistance programs. All but three of the tenants surveyed reported that they were able to “significantly upgrade” their housing as a result of the assistance, and a substantial majority of tenants reported that they were fully reimbursed for all of the costs associated with relocation.¹⁴² Moreover, in some states, tenants routinely received rental-subsidy “super payments” in excess of the statutory maximum—a finding that is consistent with the Arizona study discussed above.¹⁴³ The study’s authors concluded that the size of the rental subsidy was largely attributable to three factors: first, the requirement that tenants pay no more than 30% of their income for rent (along with relocation officials’ frequent underestimation of tenants’ income); second, the tendency of displacing agencies to make lump-sum payments rather than to invest in the services needed to help tenants secure replacement housing; and third, the requirement that the subsidy be sufficient to secure “comparable” replacement housing, even if such housing is significantly more expensive than the condemned residence.¹⁴⁴ The Department of Transportation study expressed concern that many tenants failed to spend their subsidy payments on replacement housing;¹⁴⁵ over 50% of those surveyed were no longer living in their replacement housing a year after receiving the payment. Those that remained had all opted to use the lump-sum assistance payment to purchase a home.¹⁴⁶

In contrast to the relative generosity of residential-relocation assistance, both the Relocation Retrospective Study and the Federal Highway Administration’s 2002 Business Relocation Study questioned the sufficiency of the relocation assistance provided to businesses. The more comprehensive Business Relocation Study, which surveyed 224 businesses displaced by eminent domain, found that many of the relocation-related difficulties facing businesses had not changed since the mid-1960s, when Congress first considered adopting a relocation assistance program.¹⁴⁷ Importantly, the report found that business-reestablishment payments were “almost universally considered inadequate.”¹⁴⁸ The maximum reestablishment payment—\$10,000—has not increased since Congress added this benefit in 1987.¹⁴⁹ Interestingly,

141. *Id.*

142. *Id.*

143. *Id.* at 11.

144. *Id.* at 12–15.

145. *Id.* at 12.

146. *Id.*

147. U.S. DEP’T OF TRANSP., BUSINESS RELOCATION STUDY, *supra* note 137, § 2.

148. *Id.* § 1.

149. *Id.* § 10.

business owners' most significant complaint was that the maximum reestablishment payment falls far short of the costs needed to make modifications required by various regulatory codes, especially the Americans with Disabilities Act.¹⁵⁰ Even in states that guaranteed more than the \$10,000 federal maximum, business owners complained that their code-compliance costs were not covered.¹⁵¹ Displaced business owners also expressed concern that the reestablishment payments did not compensate for the "downtime" associated with searching for a new location;¹⁵² a minority complained that the payments failed to cover increased rent and non-code-related remodeling expenses.¹⁵³

IV. BARGAINING IN THE SHADOW OF THE LAW

Most academic discussions of the undercompensation problem overlook another important fact: the compensation that a property owner receives almost always results from a bargain between the owner and a Taker, rather than a judicial determination of the property's fair market value.¹⁵⁴ State and federal laws require Takers, in most instances, to seek to purchase property on the market before resorting to eminent domain. Even if precondemnation bargaining were not required, the government would have important incentives to negotiate in order to avoid the high "due process costs" associated with a formal eminent domain proceeding.¹⁵⁵ Commentators should not necessarily be faulted for their relative inattention to precondemnation bargaining. There are significant impediments to gaining a more complete understanding of the bargains struck between the government and the potential targets of eminent domain. The opaque, decentralized nature of the bargaining process—the eminent domain power is exercised by tens of thousands of different state, local, and federal agencies—makes data collection and analysis extremely difficult. Mindful of these limitations, this Part seeks to gain a greater understanding of the mechanics of the bargaining process, in part by examining the assembly of land for a large manufacturing facility near my home in South Bend, Indiana.

150. *Id.* § 5.

151. *Id.*; see also U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE, *supra* note 137, at 17–18.

152. U.S. DEP'T OF TRANSP., BUSINESS RELOCATION STUDY, *supra* note 137, § 1.

153. U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE, *supra* note 137, at 17.

154. See 7 ROHAN & RESKIN, *supra* note 52, § 6.02[8][a].

155. See 6 *id.* § 26A.02[1]. A recent report of condemnation negotiations in five states by the U.S. Department of Transportation found that 80% of rights-of-way for federally-funded roads were acquired without initiating an eminent domain proceeding. See EVALUATION OF STATE CONDEMNATION PROCEEDINGS, *supra* note 15. Well over 95% of these cases settled prior to final judgment (even in Florida, where formal proceedings were initiated in nearly 43% of acquisitions, 95.6% of the cases settled prior to a final judgment in an eminent domain action). *Id.*

A. Precondemnation Bargaining

Anecdotal accounts accusing the government of “low balling” property owners during precondemnation negotiations are not uncommon.¹⁵⁶ Owners frequently complain that the government tried to force them out for pennies on the dollar.¹⁵⁷ For many of the reasons discussed above, it is difficult to evaluate these claims. Some property owners may become indignant when faced with the loss of autonomy that the threatened eminent domain action represents and direct their anger at the amount of money that the government offers them.¹⁵⁸ Indeed, property owners who challenge takings on public use grounds sometimes sound as if they are motivated by perceived insults during the planning stages of a project. Owners also have an incentive to overstate the value of their property—or to assert that the government is understating it—during precondemnation negotiations. After all, the government might offer more than market value to avoid costly eminent domain proceedings or simply to avoid political fallout from being accused of unfair dealing. Even truthful owners may overestimate the value of their property for any number of reasons, ranging from a mistaken belief that the market price would reflect their subjective value to the subconscious realization that their self-valuation may affect the ultimate price offered.¹⁵⁹

The negotiations that precede a condemnation differ in material respects from arms-length negotiations between private individuals. Precondemnation negotiations really do occur “in the shadow of the law.”¹⁶⁰ Eminent domain is the classic example of liability rule protection of an entitlement: both parties to the negotiations understand that an objecting property owner cannot ultimately say no.¹⁶¹ As Henry Smith recently observed, when an entitlement is protected by a liability rule, an owner’s “willingness” to sell may reflect her recognition that she has little leverage against the government.¹⁶² Owners have little incentive to ask for more than market value if

156. My colleague Julian Velasco reports that when the government announced its intention to take his father’s bodega supply business by eminent domain, it threatened to subtract significant environmental cleanup costs from the condemnation award if he objected to the initial offer.

157. See, e.g., Chris L. Jenkins & Timothy Dwyer, *Property Firm Approaches Stadium Sites’ N. Va. Owners*, WASH. POST, Apr. 17, 2003, at B1; T.J. Milling, *Ballpark-site Land Owners Complain of Unfair Offers*, HOUS. CHRON., Sept. 8, 1997, at A1; Dean Starkman, *Big-Box Stores Benefit from Use of Eminent Domain*, CHI. TRIB., Dec. 19, 2004, at 5D; April M. Washington, *City’s offers on houses criticized; Officials deny accusations of low-ball bids*, DALLAS MORNING NEWS, Mar. 30, 2002, at 1J.

158. Fennell, *supra* note 19, at 966–67.

159. See, e.g., Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1030 (1995); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Roll of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401–02 (2005).

160. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

161. Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in TAKING PROPERTY & JUST COMPENSATION: LAW & ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE 163, 168 (Nicholas Mercuro ed., 1992).

162. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1770–71 (2004).

they realize that they will not get it. Of course, if a property owner believes that the government is understating the value of her property, she could exercise her legal right to challenge the amount of compensation offered in court. But even if she secures a favorable judgment, she will have incurred attorneys' fees, court costs, the loss of her time, and so on. A rational property owner therefore will not force the government to follow through on its threat to condemn her land unless the expected value of the valuation proceeding—that is, the award minus these due process costs—exceeds the government's offer.¹⁶³

Moreover, the relative strength of a Taker's bargaining position increases when it can threaten to resort to "quick-take" authority. Most states (and the federal government) have adopted quick-take statutes that permit the government to obtain title and possession to property prior to a final judgment in an eminent domain action.¹⁶⁴ While quick-take procedures are usually justified by the need to avoid legal delays that might jeopardize many public projects,¹⁶⁵ they are potentially problematic for a number of reasons. 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. 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.¹⁶⁶ 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.¹⁶⁷ And, third, the "quickness" of a quick-take procedure may preclude the effective exercise of "voice" by affected property owners and their sympathizers.¹⁶⁸ This was one of many "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, marshaled and ap-

163. Of course, this expected benefit calculus is an extremely crude one for most people. Especially when targets of eminent domain are poor and unsophisticated, a decision to forgo legal action may be more a product of other factors—such as a lack of familiarity with the legal system and access to legal counsel—than satisfaction with the government's offer.

164. See Declaration of Taking Act, 40 U.S.C. §§ 258a–258e (2000); 6 ROHAN & RESKIN, *supra* note 52, § 24.10. The standard quick-take procedure requires the condemnor to file a "declaration of taking" as well as a deposit of the appraised fair market value of the property with the court. *Id.*

165. See 6 ROHAN & RESKIN, *supra* note 52, § 24.10[2].

166. See, e.g., William J. Brennan, Jr., *Reason, Passion and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 19–20 (1988); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153. See generally JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 222–53 (1985).

167. Joseph J. Cordes & Burton A. Weisbrod, *When Government Programs Create Inequities: A Guide to Compensation Policies*, 4 J. POL'Y ANALYSIS & MGMT. 178 (1985) (concluding that the administrative costs associated with distributing relocation assistance contributed to the reduction in highway construction); see also FISCHER, *supra* note 22, at 96; Merrill, *supra* note 13, at 77.

168. ALFRED O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30–33 (1970).

plied its resources and power to insure that [the condemnation plan] was a *fait accompli* before meaningful objection could be registered or informed opposition organized.”¹⁶⁹ When a condemnation proceeds “quickly,” in other words, a public protest may come too late to influence the political determinations preceding a taking.

That said, there are reasons to suspect that accusations of bad-faith negotiations are overstated. Importantly, a number of state and federal laws make formal condemnation proceedings a disfavored last resort. The government is not only required to bargain in good faith with property owners before resorting to eminent domain,¹⁷⁰ but it also operates under significant incentives to reach a mutually advantageous agreement. For example, the Federal Uniform Relocation Assistance and Real Property Acquisition Act, discussed above, requires the acquiring entities to make every reasonable effort to acquire property through negotiations with the landowners.¹⁷¹ The targeted property must be appraised (with the owner present), the appraisal must be reviewed by a second “review appraiser,” and the owner must be provided with a written offer at least as high as the final appraisal.¹⁷² Most state eminent domain statutes also require the government to engage in good-faith negotiations, based upon one or more formal appraisals, prior to initiating a condemnation proceeding.¹⁷³ Most condemnors resort to the review-appraisal process even when it is not required.¹⁷⁴

Many states also penalize the government for failed negotiations. For example, twenty states award the property owner attorneys’ fees and costs if the final judgment in an eminent domain proceeding exceeds the government’s final offer.¹⁷⁵ Five states award attorneys’ fees any time the final judgment is in excess of the offer by any amount; others require the final judgment to be at least ten percent higher.¹⁷⁶ A handful of states require the condemnors—or certain classes of condemnors—to pay attorneys’ fees

169. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting) (citation omitted).

170. There is a sizable body of case law discussing the meaning of “good faith” in this context. As a rule, however, property owners rarely succeed in asserting a “bad faith” claim against the government.

171. See 42 U.S.C. § 4651 (2000); see also *id.* § 4655; 49 C.F.R. § 24.102 (2005).

172. 42 U.S.C. § 4651(2)–(3); see also 49 C.F.R. § 24.410; EVALUATION OF STATE CONDEMNATION PROCEEDINGS, *supra* note 15.

173. See 1 ROHAN & RESKIN, *supra* note 52, § 1A.02[3]; 6 *id.* § 24.11[3][a]; 7 *id.* § 6.02[6]; see also Dennis J. Drasco, *Bad Faith Conduct of a Condemnor: A Property Owner’s Rights and Remedies*, in CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, & BENEFITS 22, 22–27 (Alan T. Ackerman ed., 1994).

174. 7 ROHAN & RESKIN, *supra* note 52, § 6.02[6][c][i].s

175. See, e.g., COLO. REV. STAT. § 38-1-122 (2005) (stating that if the final value of the property determined by the court exceeds \$10,000, attorneys’ fees shall be awarded if the award equals or exceeds 130% of the final offer made prior to the filing of the condemnation action); see also CAL. CIV. PROC. CODE § 1250.410 (West 2005); MICH. COMP. LAWS ANN. § 213.66 (West 1998); N.Y. EM. DOM. PROC. LAW § 701 (McKinney 2005); OR. REV. STAT. § 35.346 (2005); TEX. PROP. CODE ANN. § 21.047 (Vernon 2000).

176. Sperber, *supra* note 133, at 644.

and/or court costs in all cases.¹⁷⁷ Most states also consider reimbursement for certain costs, e.g., expert witness costs, to be part of a “just compensation” award.¹⁷⁸ After formal proceedings are initiated, fee-shifting “offer of settlement” or “offer of judgment” statutes may apply against the government. These fee-shifting statutes penalize the government for unreasonably refusing to settle prior to trial.¹⁷⁹ As a California appellate court recently observed, “one would expect a prudent condemnor to offer its best estimate of fair market value *plus* some reflection of its own savings from avoiding trial, with a further upward adjustment for elimination of potential liability for the condemnee’s litigation expenses.”¹⁸⁰

Finally, even if litigation-related expenses do not concern a Taker—perhaps because the project funds are provided by a higher level of government¹⁸¹—the risk of litigation-related *delay* may provide a significant incentive for a Taker to bargain successfully with property owners. In the case study that follows, for example, the Taker’s primary concern was *time*, not money. The Taker—a county engaged in a major property acquisition for a new manufacturing facility—happily paid owners significantly above the market value of their property in order to convince them to move voluntarily and expeditiously, thereby assuring the project’s timely completion.¹⁸²

B. Building the H2 Plant: A Bargaining Case Study

Because the negotiations between property owners and Takers are opaque and decentralized, it is difficult to obtain information about how the bargaining process works. The remainder of this Section therefore provides a case study of an economic development project completed a few years ago near my home in South Bend, Indiana. This project required the assembly of fifty-two parcels in order to construct a manufacturing facility that promised to generate significant economic benefits to a relatively depressed economic area. This case study is not generalizable, but it does yield insights into the kinds of factors influencing Takers’ negotiations with property owners.

AM General has manufactured High Mobility Multi-Purpose Wheeled Vehicles—or “Humvees”—for the U.S. military at a plant in unincorporated St. Joseph County, Indiana, since 1984. In 1992, AM General began to use

177. *Id.* at 645–46.

178. *Id.* at 646.

179. 7 ROHAN & RESKIN, *supra* note 52, § 6.05[1] (noting that some courts have ruled that application of these statutes against the property owners would violate the “just compensation” guarantee).

180. *Emeryville Redevelopment Agency v. Elementis Pigments, Inc.*, 125 Cal. Rptr. 2d 12, 29 (Ct. App. 2002); *see also* Fischel, *supra* note 17, at 950–51 (attributing higher-than-market compensation in Poletown situation to provision requiring payment of attorneys’ fees if court award exceeded government’s offer).

181. *See infra* notes 236–242 and accompanying text.

182. A Taker’s ability to use “quick-take” eminent domain authority to take title to and possession of property before any compensation-litigation occurs, *see supra* text accompanying notes 164–168, obviously would reduce the deterrent effect of litigation delay.

this plant to manufacture ultra-luxury sports utility vehicles—known as “Hummers” or “H1s”—for civilian use.¹⁸³ In December 1998, General Motors (GM) approached AM General about purchasing the “Hummer” trademark, a move which would enable GM to manufacture a more affordable Hummer sports utility vehicle. Several months of negotiations followed. In July 1999, the two automakers agreed that GM would acquire exclusive rights to the Hummer trademark and that AM General would manufacture the smaller, more affordable, “H2” for GM. This agreement, which was finalized in December 1999, was conditioned upon AM General acquiring the property for a new 630,000-square-foot manufacturing facility quite quickly.¹⁸⁴ The H2 facility was projected to create 1,500 new manufacturing jobs.¹⁸⁵

AM General and GM decided to build the new plant directly adjacent to the existing Humvee facility.¹⁸⁶ While AM General owned enough property for the plant at the Humvee site, it needed to acquire additional land for a parking and vehicle-staging area. The property needed for these purposes consisted of fifty-one parcels in a low-density, blue-collar, residential neighborhood immediately adjacent to AM General’s property.

During the negotiations with GM, AM General secured assurances that St. Joseph County would acquire the land needed by eminent domain if necessary to complete the project on time.¹⁸⁷ Specifically, the county began to take steps to pave the way for condemnations: it set in motion the process necessary to declare the homes in the acquisition area “blighted,” and it established both a redevelopment district and a tax increment financing district.¹⁸⁸ These initial legal moves upset residents, several of whom filed objections to the blight designation and angrily confronted AM General and local political officials at a meeting in February of 2000.¹⁸⁹ Lawyers for objecting property owners threatened to challenge the county’s acquisitions on public use grounds.¹⁹⁰

After this meeting, the county agreed to postpone the blight designation to allow more time for private negotiations.¹⁹¹ AM General also invited all of

183. See AM General, Corporate Information: History, http://www.amgeneral.com/corporate_history.php (last visited May 11, 2006).

184. Interview with Craig MacNab, Dir. of Public Relations, AM General, in South Bend, Ind. (July 8, 2005) [hereinafter MacNab Interview]; see also Anita Munson, *Concrete Poured for Plant*, SOUTH BEND TRIB., Aug. 16, 2000, at b8.

185. See Jack Colwell, *Homeowners Near Plant Get More Time, AM General Will Proceed*, SOUTH BEND TRIB., Feb. 23, 2000, at a1.

186. MacNab Interview, *supra* note 184; see also Munson, *supra* note 184.

187. Interview with Patrick McMahon, Executive Dir., Project Future, in South Bend, Ind. (July 29, 2005) [hereinafter McMahon Interview].

188. *Id.*

189. Colwell, *supra* note 185.

190. See Rick Thackeray, *Proposed Hummer Plant Raises Eminent Domain Questions*, IND. LAWYER, Mar. 29, 2000, at 6.

191. *Id.*

the affected residents to a meeting at the Humvee plant.¹⁹² At the meeting, AM General's President, James Armour, assured residents that they would be well compensated. He also told the residents that he ran a small, local company that wanted to provide additional manufacturing jobs for the community. He promised residents that they would improve their living situations by selling voluntarily, but he also warned that the new manufacturing facility would, should they remain in their homes, negatively affect their quality of life. According to AM General's public relations director, this meeting changed the mood among residents, as "nobody wanted to spoil the deal for their neighbors."¹⁹³ After the meeting, in March 2000, AM General itself acquired the seven parcels of property directly adjacent to its existing land.¹⁹⁴ These property owners received, on average, 141% of the appraised value of their homes.¹⁹⁵ Included in the group were several of the initial opponents to the project.¹⁹⁶ Between March and June of 2000, the county purchased the remaining parcels. The county now leases the property back to AM General. AM General broke ground for the new factory in August 2000—only one year after it entered into the agreement with GM. The prototype of the H2 first rolled off the new assembly line in December 2000.¹⁹⁷

The county's negotiations with affected property owners were directed by Project Future, a local nonprofit economic development agency. In preparation for these negotiations, county officials consulted with several private companies that had previously successfully assembled land for large projects in the area. These experts indicated that assembling property that is not currently on the market usually requires prices that exceed market value by 20–25%. Apparently in response to this advice, county officials decided to comply with the federal relocation assistance guidelines. While the county did not believe that it was bound by these rules for this project, generous relocation assistance was seen as expedient, given the time constraints on the bargaining process.¹⁹⁸

Before approaching a landowner, the county acquired two appraisals of the targeted property. According to Patrick McMahan, who directed the negotiations, the county approached owners with offers based upon an average

192. Deanna McCool, *AM General Offers to Buy Seven Sites*, SOUTH BEND TRIB., Mar. 3, 2000, at a1.

193. MacNab Interview, *supra* note 184.

194. Deanna McCool, *Two Owners Find AM General Deal Fair*, SOUTH BEND TRIB., Mar. 29, 2000, at d1. By acquiring these properties, the company sought to ensure that neighboring property owners' objections would not trigger the supermajority voting requirement for a zoning variance needed to begin manufacturing the H2 plant. MacNab Interview, *supra* note 184.

195. Data provided by Craig MacNab, Director of Public Relations, AM General (on file with author).

196. MacNab Interview, *supra* note 184.

197. *Id.*

198. *Id.*

of these appraisals, but “tended toward the higher end.”¹⁹⁹ Furthermore, while the county believed that it was bound by law not to depart from an accurate appraisal, owners were encouraged to include realtors in the negotiations because the realtors were equipped to challenge the appraisal technique in order to demand a higher price.²⁰⁰ The county also presented the property owners with an estimate of the relocation assistance that they would receive in an effort to demonstrate that the fair market value award was only part of the compensation that they would receive.²⁰¹ The county’s determination of what kind of property would be considered “comparable” for relocation-assistance purposes was also generous. For example, negotiators respected parents’ desires not to move their children to a new school, honored the request of an owner to relocate near her aging mother, and, in one case, agreed to move a tree that a resident had brought with her when she immigrated from Japan.²⁰² Finally, AM General independently offered to pay every property owner a \$5,000 bonus for meeting the voluntarily negotiated time schedule, half of which was paid at the closing and the other half when the owner vacated the property.²⁰³

Tables 1 and Table 2 summarize the compensation that St. Joseph County paid owners and residents dislocated by the H2 project (this compensation does not include the \$5,000 bonus that each owner received from AM General).²⁰⁴ Table 1 provides an overview of the average appraised value of, and compensation received for, all of the parcels purchased by St. Joseph County.

TABLE I

Average Appraised Value	\$79,092.17
Average Sale Price	\$81,681.69
Average Total Compensation	\$121,346.00
Average Relocation Assistance	\$41,424.32
Replacement Value Subsidy*	\$40,529.10
Tenant Assistance Subsidy*	\$9,294.00
* Average payment received by those receiving subsidy.	

Table 2 compares various components of compensation received by individual owners.

199. McMahon Interview, *supra* note 187.

200. *Id.*

201. See Thackeray, *supra* note 190.

202. McMahon Interview, *supra* note 187.

203. MacNab Interview, *supra* note 184.

204. Data reflecting the appraisal values and purchase prices of the properties acquired for the H2 project are on file in the St. Joseph County, Ind., administrative offices.

TABLE 2

Total Compensation as a Percentage of Average Appraised Value	157.18%
Sale Price as a Percentage of Average Appraised Value	103.65%
Relocation Assistance as a Percentage of Total Compensation	32.92%
Replacement Subsidy as a Percentage of Sale Price	44.81%
* Average percentage for individual parcels.	

This data reveal several very interesting things about the bargains between the county and the targeted property owners. First, by and large, the negotiated sales price paralleled a property's average appraised price. The *total* compensation received by all property owners, however, far exceeded fair market value (at least so far as that value is reflected in the appraisals conducted for the negotiations). Property owners received, on average, 157% of the average appraised value of their property. Second, a significant part of the total compensation that owners received came in the form of relocation assistance. As a result, the total compensation received by owners displaced by the county actually exceeded the compensation received by the seven owners who negotiated directly with AM General. While AM General paid significantly more for the homes that it acquired, it was not obligated to pay relocation assistance. The owners that sold directly to AM General received, on average, 141% of the average appraised value—all in the form of compensation for the property itself.

Third, the high compensation levels were almost universally attributable to payments received to bridge the price differential between the value of the owner's original residence and a replacement residence. With one exception (an unoccupied house), the county paid some form of replacement subsidy. The average replacement value stipend received by homeowners was \$40,529.10 (nearly twice the statutory maximum); the payments ranged from a low of \$441.74 to a high of \$85,500. On average, owners received a replacement-value stipend equal to 44.81% of their sale price. Some stipends exceeded the sale price: one owner received \$56,000 for his house and \$85,500 to secure a replacement dwelling; another received a \$74,300 replacement subsidy for his \$69,000 house. A handful of tenant-assistance payments were disbursed, ranging from \$5,250 (the statutory maximum) to \$24,308.²⁰⁵ According to Pat McMahon, the county exceeded the statutory maximums for two reasons. First, given the time pressure, the county felt obligated to take advantage of the Uniform Act's "last resort" provision and to essentially purchase a new house for all of the displaced residents. Second, many of the residents were living in substandard housing situations.

205. Some of the houses were occupied by both tenants and owners.

Overcrowding was a particular problem that required the county to purchase a *bigger* house for many of the residents.²⁰⁶

This case study does not, and cannot, demonstrate how the precondemnation bargaining process works in every case. It is only a snapshot of the land assembly efforts for a single manufacturing facility by one Rust Belt county. Precondemnation bargaining is context-specific and undoubtedly is influenced by local legal, political, and economic circumstances. That said, the H2 case study may lend insight into other Takers' behavior, at least in the economic development context. St. Joseph County's desire to ensure the success of the H2 project was certainly not out of the ordinary. Obviously, economic development expenditures proceed from the expectation of success; all Takers have the incentive to ensure that the promised economic benefits materialize. It is reasonable to assume that Takers also realize that generous compensation will help overcome potential holdouts and ensure voluntary purchases. Nor is there reason to believe that the close working relationship between AM General and the county officials was an unusual one. On the contrary, the observation that private beneficiaries collude with local governments is frequently cited as reason to limit economic development takings.²⁰⁷ For example, in *Kelo*, the plaintiffs and their amici also suggested that the waterfront redevelopment was part of a deal with the Pfizer Corporation.

Whether precondemnation bargaining yields similarly high levels of compensation elsewhere may turn on the presence or absence of three significant factors influencing the St. Joseph County's negotiations with targeted owners. First, the county and AM General operated under tremendous time pressure. County officials were clearly more concerned about the *time* involved in the eminent domain process than the expense the process would entail. They correctly perceived the connection between generous compensation and the rapid acquisition of targeted properties. The time constraints led the county to rely on the federal relocation guidelines generally and to use the "last resort" provision of the Uniform Act for all of the displaced residents. These provisions almost universally guaranteed that residents improved their living arrangements substantially. The time pressure also influenced AM General's decision to pay owners the \$5,000 bonus for vacating on schedule. While most Takers need to move quickly,²⁰⁸ the AM General/GM agreement arguably imposed extraordinary time constraints on the Takers.

Second, and relatedly, the initial opposition to the blight designation increased the political costs of resorting to eminent domain. The local press coverage of the dispute was sympathetic to the property owners, making voluntary negotiations preferable to compulsory ones. County officials may

206. McMahon Interview, *supra* note 187.

207. See, e.g., Garnett, *supra* note 13, at 956–58; see also EPSTEIN, *supra* note 12, at 180–81; Merrill, *supra* note 13, at 85–87.

208. Indeed, "quick-take" powers are justified by the connection between expeditious property acquisition and successful projects. See 6 ROHAN & RESKIN, *supra* note 52, § 24.10[2].

have worried that they would be unable to muster the political will to follow through on the blight designation, which is a prerequisite for economic development takings in Indiana.²⁰⁹ The takings also occurred before the *Kelo* decision. Several owners contacted the Institute for Justice—Susette Kelo’s attorneys—and made noises about challenging the takings on public use grounds. This threat likely increased the pressure on the county and AM General to negotiate successfully. Not only did they worry about the legality of using eminent domain, but county political leaders also wanted to gain political capital for attracting a new manufacturing facility to their Rust Belt community. They clearly preferred that the community focus on the plant’s promised economic benefits rather than the legality of the takings. *Kelo* may have answered the constitutional question about such a project,²¹⁰ but the popular outrage generated by the decision likely will increase Takers’ concerns about the political costs of forced takings for private beneficiaries.

Finally, the relative poverty of the dislocated owners resulted in high housing replacement payments—and thus vastly inflated the amount of compensation received by the owners. Wealthier owners—or, at least owners with more expensive homes—likely would not have received similar subsidies. Further study is needed to understand (1) whether Takers anxious to reach amicable bargains might substitute relocation assistance with other forms of compensation, and (2) the extent to which the typical displaced resident—who, at least in the redevelopment context, probably is not wealthy—would be entitled to high housing replacement payments. Little is also known about the extent to which lower-income individuals are able to absorb the costs of maintaining new homes, especially the housing upgrades that may result from the relocation assistance bonuses discussed above.

V. REFORMING EMINENT DOMAIN: IS MORE MONEY THE ANSWER?

In their landmark article, Guido Calabresi and Douglas Melamed distinguish between two categories of entitlement protection. “Property rules” guarantee an entitlement holder the right to say “no”—that is, to set the price at which she is willing to part with her entitlement. “Liability rules,” on the other hand, allow third parties to take the owner’s entitlement involuntarily if they pay officially determined damages.²¹¹ By and large, the Fifth Amendment’s Takings Clause provides only liability rule protection for

209. During my data collection, a member of the County Economic Development Authority told me that she did not believe that the County Commission would have voted to declare the property blighted.

210. Both Justice Stevens’s majority opinion and Justice Kennedy’s concurring opinion raise the possibility that a court might carefully scrutinize takings that appeared to be for purely private ends but were clothed in a pretextual assertion that they were for the purpose of “economic development.” *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005); *id.* at 2669 (Kennedy, J., concurring).

211. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

property owners: the government may take private property by eminent domain as long as it pays the judicially determined “fair market value” award. To the extent that the public use limitation provides some absolute limit on the power of eminent domain, however, it is a property rule. That is, if the government wishes to acquire property for nonpublic purposes, it must bargain with the property owner on the open market. Property owners are free to tell the government “no”; compulsory acquisitions are prohibited. In *Kelo*, the court reaffirmed that the property rule protection afforded by the public use limitation is extremely limited, but the Court’s opinion suggests that the Takings Clause continues to provide such protection in a certain narrow class of cases.²¹²

Almost all post-*Kelo* reform proposals would extend property rule protection against eminent domain, either by prohibiting “economic development” takings outright or by limiting the funds available for such takings. This final Part evaluates whether such prohibitions are necessary, or whether instead increasing compensation can adequately address the public use problem.²¹³ The latter liability rule proposals flow naturally from the substantial literature, discussed above, linking the public use problem to the risk of undercompensation. If, however, property owners receive substantially *more* than fair market value when their property is taken by eminent domain, it might fairly be said that there is less need to guarantee owners additional compensation. Indeed, if the public use problem is primarily about the adequacy of compensation, evidence that owners are well-compensated would tend to negate the case for *any* eminent domain reform at all.

This final Part challenges the suggestion that more money is the answer to the public use question. Drawing upon evidence from the *Poletown* and *Kelo* cases, I suggest that there are two problems posed by takings raising public use questions that more money cannot solve. First, higher-than-market compensation might not adequately deter the exercise of eminent domain; in some cases, it might undermine the normal political impediments to questionable takings. Second, the dignitary harms of eminent domain may be high when the government forces the sale of land from one private party to another, causing the uncompensated increment to persist even as compensation levels increase. These realities may justify some prohibitory limits on eminent domain; they do not lead me to endorse any particular reform proposal. Current proposals to limit the eminent domain power pose important institutional design questions, which are worthy of careful thought and are beyond the scope of this Article.²¹⁴

212. *Kelo*, 125 S. Ct. at 2661–62.

213. These proposals would transform the nature of the public use limitation from property rule to liability rule protection. *See, e.g.*, Krier & Serkin, *supra* note 8, at 872–75.

214. Indeed, there is reason to worry that the current political climate may lead legislatures to enact reforms hastily and without giving due regard to their potential unintended consequences.

A. *The Uncertain Relationship between Compensation and Deterrence*

The regulatory takings literature suggests that compensation deters the government from overconsuming private property²¹⁵ and “constrain[s] government inclinations to exploit politically vulnerable groups and individuals.”²¹⁶ Against this backdrop, above-market compensation has been proposed, most notably by Richard Epstein, as a way to deter the government from overusing the eminent domain power.²¹⁷ Since government actors respond to political rather than market incentives, however, it is unclear the extent to which the necessity of paying above-market compensation actually will promote an “efficient” takings policy.²¹⁸

1. *Higher Compensation as Deterrent*

The primary objection to substantive limits on the eminent domain power is that holdouts may impede socially beneficial projects. Thomas Merrill explained this objection succinctly in testimony before the United States Senate Judiciary Committee:

The basic problem with the prohibitory strategy . . . is that lawyers and judges are not particularly good at anticipating the ways in which reconfigurations of ownership rights may produce significant public benefits. Nor are they very good at articulating abstractions that will capture a high percentage of the situations in which reconfiguration would be desirable.²¹⁹

If, as Professor Merrill suggests, Takers are better positioned than courts and legislators to determine on a case-by-case basis when “reconfigurations of ownership rights” are socially beneficial, then Takers should be empowered to eliminate holdouts standing in the way of such reconfigurations. By

215. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 84–85 (1993); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992); William A. Fischel & Perry Shapiro, *Takings, Insurance and Michelman: Comments on Economic Interpretations of “Just Compensation” Laws*, 17 J. LEGAL STUD. 269, 269–70 (1988); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

216. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 96–97 (1980); Levmore, *supra* note 94, at 309.

217. See EPSTEIN, *supra* note 12 (arguing that the condemnation award should total 150% of the property’s fair market value). See generally Durham, *supra* note 14. Again, this argument would seem to apply to all eminent domain takings, regardless of their purpose. In fact, some state courts already entertain “overinclusiveness” challenges in eminent domain proceedings, permitting property owners to argue that the size of the taking is excessive regardless of its purpose. See 7 ROHAN & RESKIN, *supra* note 52, § 2.07[3][c][iii].

218. See, e.g., Levinson, *supra* note 215.

219. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *The Kelo Decision*] (statement of Thomas A. Merrill, Charles Keller Beekman Professor of Law, Columbia University).

extension, the government should be permitted to use eminent domain to overcome such holdouts by force when necessary.²²⁰

Determining the “efficiency” (whether Pareto or Kaldor-Hicks) of any project enabled by eminent domain is difficult at best, given the multiplicity of a project’s possible costs and benefits, the length of the relevant time horizons, and so on. That said, in the economic development context, however, there may be at least as much need to deter *inefficient* government takings as to enable efficient ones. First, the would-be beneficiaries of an economic development taking have a substantial incentive to engage in rent-seeking: Takers’ ability to bypass the market drastically reduces the transaction costs associated with land assembly and almost always generates a substantial economic surplus that beneficiaries need not share with the original owners.²²¹ The willingness of a local government to respond favorably to such rent-seeking frequently is evident in public use disputes. Consider, for example, Justice Ryan’s bitter dissent in the notorious *Poletown* case: “Behind the frenzy of official activity was the unmistakable guiding and sustaining, indeed controlling, hand of the General Motors Corporation.”²²²

More recently, it was clear that New London, Connecticut, developed the plan at issue in *Kelo* at least in part in response to the desires of the Pfizer Corporation, which had opened a major research facility in the city. As the petitioners’ brief highlighted, Pfizer had imposed certain “requirements” as a condition of building the facility, and the development plan reflected all of them: “a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors . . . as well as the overall ‘redevelopment’ of the Fort Trumbull neighborhood adjacent to Pfizer.”²²³ The Court itself recognized the risk that private beneficiaries might unduly influence the takings process, suggesting that the public use limitation would prevent the city from “tak[ing] property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”²²⁴ Both Justice Stevens’s majority opinion and Justice Kennedy’s concurrence, however, rejected the suggestion that Pfizer was the primary beneficiary of the New London project.

Second, it is no secret that many economic development efforts simply fail, a reality which itself suggests that politicians also—to borrow Professor Merrill’s phrase—“are not particularly good at anticipating the ways in which reconfigurations of ownership rights may produce significant public

220. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (asserting that eminent domain may be needed in urban areas where multiple small parcels and depressed economic conditions make government-sponsored land assembly necessary to attract investors).

221. See, e.g., EPSTEIN, *supra* note 12, at 161–81; Fennell, *supra* note 19, at 978; Merrill, *supra* note 13, at 85–87.

222. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468 (Mich. 1981) (Ryan, J., dissenting).

223. Brief of Petitioners at 5, *Kelo*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2811059, at *5; see also Petition for Certiorari at J.A. 18, 21–25, *Kelo*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2967525, at *21–25.

224. *Kelo*, 125 S. Ct. at 2661.

benefits.”²²⁵ Urban renewal is case in point. 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] the human toll caused by displacement and the destabilization of nearby residential communities casts doubt upon the efficacy of subsidized site assembly.”²²⁶ More recently, New London’s waterfront development plans had begun to fall through before the *Kelo* case was even argued in the Supreme Court.²²⁷

To the extent that government responds rationally to fiscal incentives, increasing the level of compensation required should help deter the government from responding to such rent-seeking with inefficient takings.²²⁸ The difficulty is, however, that Takers tend to respond to political incentives rather than economic ones. In an important study, Joseph Cordes and Burton Weisbrod found that the additional compensation required by the Uniform Act appeared to reduce highway construction.²²⁹ But these results may not hold true in all cases. Again, Chicago’s expressways are illustrative: planners spent millions to bypass St. Stanislaus Kostka rather than inflame the city’s Polish minority. Especially in the economic development context, political incentives may favor overinvestment in questionable projects. As James Krier and Christopher Serkin recently observed, “the price the government must pay the condemnees is not necessarily the same as the price the government then charges the subsequent transferee.”²³⁰ If the government believes that an economic development project will generate benefits in excess of outlays, it may resell the property for less than the purchase price.²³¹

Today’s fiercely competitive “market” for economic development strongly suggests that many government actors may well *overestimate* the benefits of condemning property to enable a private project. State and local governments continue to demonstrate a seemingly limitless enthusiasm for economic development incentives that economists deride as fiscally irresponsible and irrational.²³² Many governments with their “economic back[s]

225. *The Kelo Decision*, *supra* note 219.

226. Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 808–09 (1991); *see also* Garnett, *supra* note 13, at 953–54; Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POL’Y DEBATE 443, 448–49 (2000).

227. William Yardley, *Eminent Domain Project at Standstill Despite Ruling*, N.Y. TIMES, Nov. 21, 2005, at A1.

228. *See, e.g.*, Krier & Serkin, *supra* note 8, at 871.

229. *See* Joseph J. Cordes & Burton A. Weisbrod, *Government Behavior in Response to Compensation Requirements*, 11 J. PUB. ECON. 47–58 (1979); *see also* FISCHEL, *supra* note 22, at 96–97.

230. Krier & Serkin, *supra* note 8, at 872.

231. *See id.* at 871–72. *But see* Merrill, *supra* note 13, at 85 (“In the case of profit-oriented entities, however, restitution could eliminate the use of eminent domain altogether.”).

232. *See* Garnett, *supra* note 13 (arguing that the economic development climate suggests that fiscal incentives will not adequately check eminent domain). On the effectiveness of economic development incentives, *see, for example*, SARA HINKLEY ET AL., INSTITUTE ON TAXATION AND ECONOMIC POLICY, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 35–41 (2000); Franklin J. James, *Economic Development: A Zero-Sum Game?*, in URBAN ECONOMIC DEVELOPMENT 157, 161 (Richard D. Bingham & John P. Blair eds., 1984); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110

to the wall”²³³ seek to promote renewal through a dizzying array of subsidized financing, tax abatements, infrastructure improvements, and other “goodies”—including property seized by eminent domain.²³⁴ That governments in this position frequently *give away* property as part of an incentive package may suggest that the deterrent effects of increased compensation will be limited. In the *Kelo* case, for example, the New London Development Corporation sought to lease the condemned property to a private developer for \$1 per year for ninety-nine years.²³⁵

The need to deter inefficient projects may weigh in favor of reform proposals that tie eminent domain limits to state and federal funds. For example, in the wake of *Kelo*, several bills were introduced to prohibit federal funds from being spent on economic development takings.²³⁶ These funding limitations might provide a significant deterrent for inefficient projects without absolutely prohibiting efficient ones: in the economic development context, most Takers are local officials who perceive that the political costs of spending someone else’s money are very low. When the funding for a project comes from a higher level of government, therefore, Takers have little incentive to consider whether the economic benefits of a proposed project will ultimately materialize.²³⁷ In his excellent recent case study, William Fischel notes that “the voters and elected officials in Detroit had little financial interest in determining whether the Poletown project made economic sense.”²³⁸ This was because the project was financed almost entirely by “nonfungible gifts” from the state and federal governments—that is, the city was given a large amount of money to finance the GM Poletown plant, but nothing else. Fischel suggests that the city might have given more thought to the wisdom of leveling the Poletown community if it was spending local funds—or even if, in response to the threatened departure of General Motors, the state and federal governments had given the city unrestricted redevelopment funds.²³⁹ A similar case can be made about the project at issue in the *Kelo* case. The state of Connecticut earmarked \$120

HARV. L. REV. 377, 390–405 (1996); and Schill, *supra* note 226, at 810. *But cf.* Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 452 (1997) (characterizing empirical studies evaluating subsidies as “mixed”); *id.* at 453–78 (reviewing and questioning the argument that incentives are usually a net loss for the offering jurisdiction).

233. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting).

234. *See, e.g.*, Enrich, *supra* note 232, at 382–89; Gillette, *supra* note 232, at 479; Schill, *supra* note 226, at 809–10 & n.73; *see also* 99 Cents Only v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (noting that redevelopment authority sought to pay the owner of valuable commercial real estate a \$3.8 million condemnation award and to sell the property to Costco, Inc. for one dollar).

235. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 n.4 (2005).

236. *See Eminent Domain Limit*, N.Y. TIMES, Nov. 4, 2005, at A18.

237. *See* Fischel, *supra* note 17, at 943–44.

238. *Id.* at 944.

239. *Id.* at 944, 949.

million in nonfungible funds for the effort, which included all of the \$73 million earmarked for property acquisition.²⁴⁰

Local government officials spending *local* money, on the other hand, are constrained politically by the need to keep taxes low. Local officials also operate under a number of legal constraints that disfavor an aggressive takings policy: many state constitutions restrain local taxation and most limit local government's ability to borrow money by capping total indebtedness, by requiring voter approval of new debt, or both.²⁴¹ Were local governments forced to internalize the costs of their takings, it is reasonable to assume that eminent domain would become a much less attractive economic development tool.²⁴²

2. Higher Compensation May Impede Political Resistance

If higher compensation levels will not deter inefficient government takings, then effective political resistance becomes all the more crucial. Yet, as the H2 case study illustrates, Takers may use high compensation levels to limit resistance. A Taker anxious to complete a project has an incentive to pay owners more money precisely to avoid costly and politically damaging battles in both courts of law and courts of public opinion.²⁴³ Indeed, under certain circumstances, *overcompensation* may become problematic, especially when it undermines political resistance to questionable projects. As Daniel Farber has observed, the government has an incentive to pay compensation to quell the opposition of those most affected by its actions.²⁴⁴ This incentive flows naturally from public choice theory: we can expect a great deal of overlap between those most intensely affected by government action and those most likely to organize to oppose it.²⁴⁵ Assuming that this account is descriptively accurate, therefore, it is reasonable to expect that compensation will become a *legal* (i.e., litigated) issue only when the political costs of paying compensation exceed the political costs of denying it.²⁴⁶ This is most likely to be the case when the targets of government action are politically powerless.²⁴⁷ The same analysis can be applied to a Taker decid-

240. See, e.g., Press Release, Executive Office of Governor John C. Rowland, Governor Rowland Announces \$10 Million for Fort Trumbell Improvements (Apr. 24, 2002), <http://www.ct.gov/governor/rowland/cwp/view.asp?A=1335&Q=256544>.

241. See OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 360–68 (2d ed. 2001).

242. One potential pitfall of this approach is that it might increase the risk of undercompensation when takings do occur, as many state relocation assistance laws limit protection to projects funded by state or federal funds. See *supra* notes 126–132.

243. See Fennell, *supra* note 19, at 961 n.16; see also Farber, *supra* note 96, at 297.

244. Farber, *supra* note 96, at 288–93.

245. *Id.* at 289–90; see also *supra* notes 89–94 and accompanying text.

246. See Farber, *supra* note 96, at 296.

247. *Id.* at 298 (“Optional compensation not only leaves politically weak owners uncompensated, but also makes it more likely that their land will be used, even if other land would be more suitable.”).

ing whether to pay more than market value for property. Because of the political fallout that could result from undercompensation, Takers have obvious incentives to fully compensate, or even overcompensate, owners.²⁴⁸ By so doing, Takers can minimize political opposition to a project and ensure the rapid acquisition of desired property.

Both *Kelo* and *Poletown* illustrate this phenomenon. In *Kelo*, only seven property owners objected to the project, which involved the acquisition of 115 parcels. The other owners' willingness to sell may have reflected the State of Connecticut's guarantee to residents and small businesses of up to \$250,000 above their Uniform Act entitlement for down payment assistance and business reestablishment.²⁴⁹ Similarly, Fischel observes that, in *Poletown*, local political resistance was undercut by the fact that many younger homeowners sold out quickly, leaving older Polish residents to wage an unsuccessful effort to stop the project: "[t]he great divide was young and mobile versus old and immobile."²⁵⁰ While *Poletown* was a relatively integrated community, most of its African American residents moved voluntarily. This created the impression that the resistance was a racial issue, which made it virtually impossible for local politicians in the majority-black city to oppose the project.²⁵¹ Moreover, as the local community diminished in size, the organized resistance came to be dominated by outsiders—notably Ralph Nader—which made it distasteful to Detroit residents outside of *Poletown*.²⁵² Finally, above-market compensation might also have influenced the Catholic Church's decision to support the *Poletown* project, both because declining urban churches were increasingly a financial liability²⁵³ and because the Church leaders wished to avoid taking sides in a "racial" dispute. Whatever its motivation, the Archdiocese's decision not to oppose the project deprived the resistance of a powerful political ally.

B. Private Takings May Generate Unique Dignitary Harms

The risk of inadequate political deterrence is particularly problematic in cases raising the public use question because "private" takings may themselves generate additional uncompensated—and uncompensable—harms. The reasons for this are not immediately evident. Indeed, while the public use literature is replete with references to the undercompensation problem,²⁵⁴

248. I am indebted to Lee Anne Fennell for this point. See also Fennell, *supra* note 19, at 961 n.16.

249. Brief of Respondent at 7, *Kelo v. City of New London*, 125 S. Ct. 2655 (No. 04-108); Petition for Certiorari, *supra* note 223, at J.A. 258.

250. Fischel, *supra* note 17, at 951–52.

251. *Id.* at 952 (noting that Detroit had demolished many Black neighborhoods in the face of local opposition and speculating that a positive response to the *Poletown* resistance could be seen as reflecting a double standard).

252. See *id.*

253. See *infra* note 280 and accompanying text.

254. See Fischel, *supra* note 17, at 932 (observing that "[m]uch ink has been spilled in articles pointing out that eminent domain practices fall short of 'just compensation'").

most accounts are decidedly vague about what, if anything, compensation has to do with the public use problem.²⁵⁵ Undercompensation is frequently used to justify heightened review in public use cases, but proponents of judicial intervention (including, admittedly, myself) tend to gloss over the precise connection between the amount of compensation and the purpose of a taking. Market value compensation might be “unjust” because owners are systematically undercompensated when their property is taken by eminent domain. But the question of what level of compensation is “just” applies to all eminent domain takings.²⁵⁶ For example, owners affected by expressway construction suffered uncompensated losses even though public roads are the quintessential public use. Indeed, the risk of undercompensation may be particularly high in those cases because of the derivative takings associated with expressway construction—noise, smoke, physical division from neighbors, and so on—for which nondisplaced property owners receive nothing.²⁵⁷ Moreover, the experimental economics evidence discussed above suggests that the potential for undercompensation exists with any eminent domain taking. When confronted with a property owner’s assertion that she could accept her fate if the government had taken her land for a traditional public use, an economist might “impatiently exclaim, ‘but you’ve lost your home in either case!’”²⁵⁸

1. *Why Private Takings Are Different*

There are, however, a number of reasons why the size of the uncompensated increment might vary with a taking’s purpose. First, “private” takings may generate collective anxieties that public ones do not. As Fischel explains, “Expansion of eminent domain’s scope raises the anxiety that even more uses will soon be found, and no one’s property will be safe.”²⁵⁹ Recall, for example, Justice O’Connor’s warning that, after *Kelo*, “[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”²⁶⁰ Or consider the Becket Fund for Religious Liberty’s warning, in an amicus brief in *Kelo*, that local governments might condemn churches, which do not pay property taxes, in order to transfer the

255. Cf. Krier & Serkin, *supra* note 8 (arguing that the amount of compensation should increase as the “publicness” of a project decreases).

256. See John Fee, *Eminent Domain and the Sanctity of the Home* (draft manuscript, on file with author).

257. See *supra* notes 101–105 and accompanying text. See generally FISCHEL, *supra* note 22, at 210–12.

258. Fischel, *supra* note 17, at 949.

259. *Id.* Fischel’s hypothesis is consistent with Frank Michelman’s prediction that takings generate 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.” Michelman, *supra* note 23, at 1214.

260. *Kelo v. City of New London*, 125 S. Ct. 2655, 2676 (2005) (O’Connor, J., dissenting).

property to for-profit entities, which do.²⁶¹ Second, and relatedly, the government's decision to take property from one private owner and give it to another may generate "expressive" harms.²⁶² Especially in the economic development context, owners may perceive the taking as an insult—tantamount to a government declaration that their property would be put to a more socially beneficial use by someone else. Not surprisingly, some owners sound as if they were motivated to file public use claims in part because they are so offended by the message sent by the taking.²⁶³ The collective anger generated by a local government's decision to declare a neighborhood blighted—a statutory prerequisite to taking property for redevelopment in many states—reflects this phenomenon, as illustrated in the H2 example.

Third, these dignitary harms likely are exacerbated by private takings' frequent failure to generate implicit, in-kind compensation. Owners displaced for public projects usually can take advantage of the benefits generated by the condemnation of their property.²⁶⁴ For example, a woman who lost her house during the construction of the Kennedy Expressway might use the expressway to travel to her granddaughter's baptism at St. Stanislaus Kostka. Some private projects (e.g., shopping centers) may generate similar in-kind benefits; others (e.g., the high-end condos planned in New London, Connecticut) will not. As Krier and Serkin observe, economic development condemnations may leave displacees in a particularly unenviable position: not only have they been singled out to bear the brunt of generating public benefits, but their very displacement also makes it likely that they will not be permitted to enjoy the benefit of the prosperity promised by the economic development project.²⁶⁵

Finally, owners may take an additional "dignitary" hit because the private beneficiaries frequently receive a windfall from the transaction. In the economic development context, an exercise of eminent domain almost always generates assembly gains that raise the value of the property. Because the fair market value determination is made *before* the condemnation, however, the original owner does not share in any increase of that value.²⁶⁶ The allocation of the "condemnation bonus" entirely to the private beneficiaries

261. Brief for Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 11, *Kelo*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2787141, at *11.

262. On expressivism, see, for example, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000) ("A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her.").

263. See Eleanor Charles, *Eminent Domain Challenged in New London Project*, N.Y. TIMES, Apr. 1, 2001, at sec. 11, p. 9; Sylvian Metz, *Family Awarded for Nissan Land Battle*, THE CLARION-LEDGER (JACKSON, MISS.), Mar. 31, 2003, at 1B.

264. See generally EPSTEIN, *supra* note 12, at 161–82, 195–216.

265. Krier & Serkin, *supra* note 8, at 867–69.

266. See *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."); EPSTEIN, *supra* note 12, at 163–64; Merrill, *supra* note 13, at 85; cf. *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.").

of takings may demoralize property owners. As Abraham Bell and Gideon Parchomovsky recently observed, “[w]hile people can view windfalls that befall another with sanguinity, when the windfall arises as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration.”²⁶⁷ The extent of the windfall (and resentment) is even higher when, as is not uncommon in the economic development context, the government offers to transfer the property to the private beneficiary at below-market prices as an inducement to convince it to invest in a project.²⁶⁸ And, importantly, when the windfall is enjoyed by the politically powerful at the expense of vulnerable political outsiders,²⁶⁹ the risk of a significant dignitary “hit” may compound a preexisting risk of undercompensation whenever takers target the politically powerless.²⁷⁰

2. Beyond Information Costs

In a recent article, Henry Smith examines a puzzling disconnect between the law and legal theory:

Property rules find relatively few defenders among legal economists, which is . . . surprising since property rules abound in the law. If anything, the law treats property rule protection as the norm and liability rule protection as the exception—the opposite of what the bulk of recent economic commentary would lead one to expect.²⁷¹

Smith hypothesizes that property rules continue to dominate the law of property because they have “information cost advantages.”²⁷² By limiting an owner’s exposure to official—i.e., judicial—determinations of value, property rules maximize decentralized decisionmaking about the appropriate uses of property.²⁷³ This is particularly important to would-be targets of eminent domain because the “signature risk” of liability rules is *undercompensation*.²⁷⁴ Thus, even if courts *were* authorized to calculate “actual” value, property

267. Bell & Parchomovsky, *supra* note 52, at 579.

268. See Garnett, *supra* note 13, at 948–49.

269. See, e.g., David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20.

270. See Fennell, *supra* note 19, at 961 n.16; *supra* notes 106–110 and accompanying text.

271. Smith, *supra* note 162, at 1721–22 (citation omitted). For examples of the tendency of legal scholars to favor liability rule protection, see Ayres & Talley, *supra* note 159; Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164, 2169–70 (2004); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996). On the dominance of property rules in the law of property, see, for example, Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2096–2111 (1997). See also Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2194–97 (1997).

272. Smith, *supra* note 162, at 1753.

273. *Id.* at 1773–75.

274. See Epstein, *supra* note 271, at 2095.

owners would have reason to prefer that their legislative representatives extend partial property rule protection against eminent domain.²⁷⁵

The information cost challenges facing courts asked to establish market value in an eminent domain proceeding should not be underestimated.²⁷⁶ The task would become inestimably more difficult if courts were asked to value, for example, the subjective losses attendant to an exercise of eminent domain. As Tom Ulen has observed, not only is an adversarial hearing “an exceedingly crude method of determining subjective value,” but such a proceeding would reintroduce the self-valuation difficulties discussed above: “Everyone will have an incentive to manufacture such a value whether they truly have any or not.”²⁷⁷ By way of illustration, return again to Chicago’s St. Stanislaus Kostka Church. An “accurate” assessment of a displaced parishioner’s losses would include some compensation for the loss of the community. But how would a court evaluate the value of “community” to a displaced resident? How might it segregate the losses attributable to the exercise of eminent domain as opposed to forces beyond Takers’ control? Since the mid-1950s, for example, the membership at St. Stanislaus Kostka has plummeted, undoubtedly in part because of the forced displacements and the derivative harms caused by the construction of the Kennedy Expressway.²⁷⁸ On the other hand, the membership of *most* of Chicago’s urban parishes declined precipitously over the past half-century. Dozens of parishes have been closed or consolidated, and the expressways were only one—and certainly not the only or even the most important—reason for their decline. Between 1948 and 1958, the Archdiocese of Chicago created an average of six to eight new parishes a year; the vast majority of them were in the suburbs.²⁷⁹ The suburbanization of Chicago’s Catholics had many causes—including integration, Catholics’ improved economic circumstances, and even theological developments.²⁸⁰ The decline of the old neighborhoods undoubtedly also entailed tremendous social costs, for which the expressway planners were marginally responsible at best.

275. See *id.* at 2112–13.

276. See Serkin, *supra* note 16, at 682–704.

277. See Ulen, *supra* note 161, at 182.

278. See Polish Genealogical Society of America, St. Stanislaus Kostka Church History, <http://www.pgsa.org/ArchChiPolPar/StStanKostkaChi.htm> (last visited May 11, 2006) (“Many of the Polish families whose homes were in the path of the expressway relocated in other parishes on the northwest side of Chicago. Not only was the base of support for the parish diminished, but the reimbursement from the State of Illinois did not cover the expenses incurred in building the new high school and in remodeling the old grammar school.”); St. Stanislaus Kostka Parish, Who We Are, <http://www.ststansk.com/whowear.html> (last visited May 11, 2006).

279. AVELLA, *supra* note 3, at 79.

280. See generally DOLAN, *supra* note 64, at 180–86. On improving economic status of Catholics as impetus for suburbanization, see, for example, MCGREEVY, *supra* note 59, at 79–80; STEPHAN THERNSTROM, *THE OTHER BOSTONIANS: POVERTY AND PROGRESS IN THE AMERICAN METROPOLIS, 1880–1970*, at 153 (1973). On the urban Catholic response, and resistance, to integration, see generally MCGREEVY, *supra* note 59, at 111–32. On integration and Catholic neighborhood change in Chicago, see AVELLA, *supra* note 3, at 249–88, and MCMAHON, *supra* note 65, at 130–56.

Most actual proposals for above-market compensation do not require courts to determine a property owner's "true" losses and their causes. Richard Epstein has proposed that owners receive 150% of market value; Tom Ulen has proposed 125% of market value; Robert Ellickson suggests that scheduled damages might take account of various factors that are likely to increase an owner's subjective attachment to her property—such as length of residence.²⁸¹ These proposals minimize some of the information-cost difficulties associated with a liability rule calculation of damages. But they generate other problems. As Ulen notes, fixed bonus schemes create both the risk of overcompensation and of undercompensation, precisely because they eschew any effort to actually calculate how much an owner values her property.²⁸² These dual risks are present even in more nuanced schemes, such as Ellickson's proposal, which make predictive judgments about which factors may increase an owner's subjective attachment. For example, a recent Polish immigrant might value living in the Kostkaville neighborhood more than a twenty-one year-old, second-generation Polish-American who grew up in the community.

Finally, and importantly, to the extent that the losses associated with private takings are noninstrumental and "dignitary," resulting from the nature of the government's action rather than the owner's subjective attachment to her property, even accurate valuation methods may fail to make owners whole. The Susette Kelos of the world—owners who go to the extreme of pursuing a public use challenge—universally assert that they do not want more compensation; what they want is property rule protection from the act of eminent domain. Therefore, it may well be that they are not "holdouts" in the classic sense, but rather what Gideon Parchomovsky and Peter Siegelman have called "holdins"—owners motivated by noninstrumental concerns rather than strategic economic behavior.²⁸³ Moreover, the outcry over *Kelo* itself suggests that the dignitary losses associated with the kinds of takings raising public use questions may be very high. Indeed, the outcry may suggest that even the *risk* of compensated private takings generates dignitary losses, as property owners become anxious that they may be the next target of an economic development project. *Kelo* moved the debate over the proper scope of the eminent domain power out of the courts and into the legislatures, where owners' dignitary interests in their property—and the collective anxieties generated by the knowledge that owners are not afforded property rule protection from private takings—rightfully make up part of the case for substantive limits on the eminent domain power.

281. EPSTEIN, *supra* note 12, at 2114; ELICKSON, *supra* note 12, at 736–37; ULEN, *supra* note 161, at 180.

282. ULEN, *supra* note 161, at 180–81.

283. PARCHOMOVSKY & SIEGELMAN, *supra* note 36, at 83.

CONCLUSION: THE POST-REFORM POLITICAL ECONOMY
OF EMINENT DOMAIN

Property rights proponents have reason to believe that, with *Kelo*, they lost the battle but are winning the war. The political momentum clearly favors the widespread adoption of the substantive restrictions on eminent domain that the Supreme Court refused to endorse. The previous Part of the Article set forth several justifications for some version of these reforms, even if undercompensation is less of a problem than commonly believed. By way of conclusion, this Part offers some initial thoughts about how new eminent domain ground rules may affect the political economy of eminent domain.

More study is needed to understand how eminent domain works in practice and, importantly, how reforms will affect Takers' behavior. Numerous empirical questions remain unanswered: How often will community pressure overcome property owners' temptation to engage in strategic behavior? How much more money will Takers be forced to pay to overcome holdouts? Will any amount of money matter to "holdins"? Can Takers develop around holdouts, or alternatively, use the threat of developing around them to overcome their resistance?²⁸⁴ How often do resistant owners prevent efficient land assembly and how often do they derail inefficient and unwise projects?

Still, a more complete understanding of pre-reform eminent domain practice offers some practical insights into the ways that prohibitory reforms might change the land acquisition process. The conventional wisdom suggests that prohibitory reforms would end, or severely restrict, the government's practice of assembling land for economic development. A more nuanced understanding of Takers' behavior suggests that prohibitory limits would not end government-sponsored land assembly, although they would certainly change the nature of the bargaining process between property owners and Takers. Owners would be empowered to reject the government's overtures and, at least theoretically, to derail (or change) the government's plans. But that does not mean that plans would be frequently derailed. On the contrary, this Article has illustrated how Takers already seek to minimize the risk of holdouts through compensation and avoidance strategies. If government-sponsored land assembly is in fact critical to the success of economic development efforts, then restoring partial property rule protection from eminent domain would be just as likely to lead Takers to redouble these efforts as to abandon land acquisition plans altogether.

That is not to say that prohibitory limits are cost-free. Presumably such limits would increase the cost of assembling land for economic development. They would also increase the risk of *over*compensation, especially because property owners will continue to be entitled to relocation assistance

284. See *id.* at 123 (predicting that a buyout of the majority of the community would send a signal to remaining residents that holding out was not tenable).

even if eminent domain is taken off the table.²⁸⁵ And, of course, they empower holdouts to derail socially beneficial projects. But compensation-based reforms also entail risks: compensation strategies increase the likelihood of overcompensation; they rely on economic incentives to prevent political actors from undertaking inefficient projects; and, at best, they minimize the dignitary harms associated with private takings. *Kelo* has placed the “public use” question squarely in the hands of legislators, who may justifiably balance the risks of prohibitory eminent domain reform—including the possible reduction in socially beneficial land assembly—against the costs of private takings.

285. See 42 U.S.C. § 4622 (2000) (defining the scope of relocation assistance as “[w]henver a program or project to be undertaken by a displacing agency will result in the displacement of any person”).