

REVIVING NECESSITY IN EMINENT DOMAIN

ROBERT C. BIRD*

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Necessity is not a word to be taken lightly. The necessity defense in criminal law can excuse most criminal acts.¹ Manifest necessity permits a court to declare a mistrial in a criminal pro-

* Assistant Professor and Ackerman Scholar, Department of Marketing, School of Business, University of Connecticut. I appreciate helpful research assistance from Jeannine DePhillips. I gratefully acknowledge support from the University of Connecticut's Center for Real Estate and Urban Economic Studies. All errors and omissions are my own.

1. 21 AM. JUR. 2D *Criminal Law* § 140 (2008) ("The defense of necessity excuses criminal actions taken in response to exigent circumstances, and is based on the premise that illegal action should not be punished if it was undertaken to prevent a greater harm."); see also George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999).

ceeding.² The business necessity defense permits employers to retain a discriminatory hiring policy.³ Military necessity condones armed conflict and the destruction of enemy property in wartime.⁴ Dictionaries use words like indispensable, unavoidable, and imperative to define it.⁵

Few doctrines have relied on the necessity concept longer than eminent domain. In 1625, Hugo Grotius, the Dutch jurist credited with coining the phrase “eminent domain,” described “extreme necessity” as one condition under which the State may alienate or destroy private property for a public purpose.⁶ Necessity doctrine has influenced American land use since colonial times. As early as 1700, a Pennsylvania law required that “no such road shall be carried through any man’s improved lands, but where there is a necessity for the same.”⁷ The concept appeared periodically in state court cases throughout the nineteenth century and remains present today.

2. See *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (“The words ‘manifest necessity’ appropriately characterize the magnitude of the prosecutor’s burden [of demonstration required to obtain a mistrial.]”); see also Robert F. Holland, *Improving Criminal Jury Verdicts: Learning from the Court-Martial*, 97 J. CRIM. L. & CRIMINOLOGY 101, 122 (2006) (“[W]hen a trial judge declares a mistrial under circumstances of manifest necessity, the jeopardy of the first trial does not end, and a subsequent retrial is considered to continue the same jeopardy. Thus, re-prosecution after a mistrial does not violate the double jeopardy prohibition.”); Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 98 (2007).

3. See Mark R. Bandsuch, *Dressing Up Title VII’s Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 300 (2009) (describing business necessity defense and recent congressional amendments); Linda Lye, Comment, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 319–20 (1998) (discussing business necessity defense generally); see also *El v. SEPTA*, 479 F.3d 232, 242 (3d Cir. 2007) (describing business necessity defense as a “require[ment] that employers show that a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question”).

4. See Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT’L L.J. 177 (2007); Peter A. Ragone, *The Applicability of Military Necessity in the Nuclear Age*, 16 N.Y.U. J. INT’L L. & POL. 701, 702–04 (1984) (discussing various definitions of military necessity in international law).

5. 10 OXFORD ENGLISH DICTIONARY 277–78 (1989).

6. 1 NICHOLS ON EMINENT DOMAIN § 1.12[1] (Julius L. Sackman ed., 3d ed. 2007) (quoting HUGO GROTIUS, *DE JURE BELLI ET PALIS*).

7. Act of 1700, ch. LV, reprinted in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 16, 17 (Alexander James Dallas ed., Philadelphia, Hall & Sellers 1797). The Supreme Court of Pennsylvania discussed the Act in *Feree v. Meily*, 3 Yeates 153, 155 (Pa. 1801).

The necessity doctrine is a fundamentally simple idea—a government entity may only take property via eminent domain when it is necessary to further a proposed public use.⁸ The burden of proof for establishing the necessity of the taking rests on the condemning authority.⁹ The landowner can present her own supporting evidence. If a court finds lack of necessity, it can prevent the proposed taking.¹⁰

Eminent domain represents one of the government's "most drastic non-penal incursions" into individual rights.¹¹ "It requires that [private] owners relinquish their property without their consent," pitting private interests against a public good.¹² Common sense would suggest that a municipality must work to show sufficient necessity to use eminent domain. An eminent domain taking can impose lasting trauma, and the power should not be used lightly.¹³

8. 71 AM. JUR. 3D *Proof of Facts* 97, § 6 (2003).

9. 5 NICHOLS ON EMINENT DOMAIN § 18.04 (Julius L. Sackman ed., 3d ed. 2006).

10. See 27 AM. JUR. 2D *Eminent Domain* § 500 (2004) (citing examples such as bad faith, fraud, and abuse of discretion).

11. Zygmunt J.B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 663–64 (1989).

12. James W. Ely Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov.–Dec. 2003, at 31, 31.

13. See Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 984 (2008) ("Losing a home because of eminent domain undoubtedly carries with it lasting trauma for an unwilling seller."); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 230 (2006) ("[A]xiomatically[,] innocent people have constitutional rights too, and their legitimate interest should receive a modicum of fair treatment from the judicial system as well, particularly when they are being subjected to the trauma of eviction from their homes and businesses without having done anything to deserve it."); see also Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1106–07 (2009) (describing the influence of residential protectionism in the context of criticizing it). Stern writes:

Following Radin's landmark article, a generation of legal scholars adopted the personhood perspective and focused in particular on the role of the home in human flourishing. The personhood perspective provided the normative basis for proposals to protect the "sanctity of home" from the alleged misuse of government eminent domain power Commentators noted that the home warrants enhanced protection as a psychologically vital and archetypal possession—the home is like "an extension of [owners'] selves, or like a part of their family." In this view, the home is so critical to the maintenance of self and psychological well-being that displacement amounts to an emotional trauma.

Yet this common sense fails. In theory, necessity is an important check against abusive government action. In practice, necessity is a green light to seize almost any land a government entity wishes. The condemnor does not need to present plans, goals, feasibility studies, or other documentation, but must simply desire a parcel and be willing to pay for it. Judges have concluded *en masse* and with little debate that involuntary government land seizures require little judicial attention. Assuming other requirements apart from necessity have been met, the result in practice is that the land a municipality wants, a municipality gets. Although many takings are genuinely beneficial and well-reasoned, the necessity “requirement” has become a fig leaf for government recklessness. In spite of this widespread judicial abdication, the necessity requirement remains largely unexplored by scholars, who shine the spotlight on its far more popular and controversial cousin, the requirement of public use.¹⁴

This Article proposes a modest revival of the necessity requirement in eminent domain. Part I explores the dormant state of necessity doctrine. It also highlights examples of abuses of eminent domain power afforded by a lack of necessity constraint. Part II questions the effectiveness of two positions on the role of necessity, one recommending total nonreviewability of necessity questions and the other suggesting that takings be subjected to strict scrutiny review. Part III presents a “less drastic means” necessity model that strikes a balance between protecting government discretion and curbing abuse. This Article reasons that a limited revival of necessity review in eminent domain cases could protect landowners against reckless tak-

Id. (footnotes omitted). The landmark article referred to above is Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

14. Voluminous scholarship debates the appropriate interpretation of the Fifth Amendment phrase “nor shall private property be taken for public use, without just compensation.” *E.g.*, David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 129 n.1 (2007); Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 2 (2006); Daniel A. Lyons, *Public Use, Public Choice, and the Urban Growth Machine: Competing Political Economies of Takings Law*, 42 U. MICH. J.L. REFORM 265, 265 (2009); Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 46 (2008). For a lengthy bibliography on the subject of public use, see Lauren A. Wiggins & Timothy Sandefur, *A Bibliography of Sources on “Public Use” in Eminent Domain*, 10 CHAP. L. REV. 235 (2006).

ings while allowing government planners to retain broad discretion to implement public projects.

I. THE ROLE OF NECESSITY IN EMINENT DOMAIN

Necessity doctrine has the jurisprudential deck stacked against it. An attorney, judge, or law clerk wanting to educate himself about necessity would likely consult *Nichols on Eminent Domain*,¹⁵ the leading treatise on condemnation law.¹⁶ Turning to section 4.11, the very first line of the section confronts the reader with the jurisprudential subtlety of a gavel, proclaiming that “[t]he overwhelming weight of authority makes clear that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.”¹⁷ If that announcement did not convince the reader to declare necessity dead and return the tome to its shelf, then twelve consecutive pages of cases cited in support of this single sentence would undoubtedly persuade. Perhaps the editor held his tongue firmly in cheek when he titled the section the “*Question of Necessity*.”¹⁸

Works from an earlier century appear no less categorical. An 1879 treatise states that “[i]f the use is certainly a public one, then the legislative authority over the subject cannot be restrained or supervised by the courts.”¹⁹ A contemporaneous treatise remarked that “whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature.”²⁰ In spite of these pronouncements, *Nichols* does acknowledge that, at least in theory, necessity review can check the exercise of eminent domain. *Nichols* notes that a few state statutes assign an oversight

15. See NICHOLS ON EMINENT DOMAIN, *supra* note 6.

16. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 173 (1996) (describing *Nichols on Eminent Domain* as “arguably the leading treatise on its subject”); Oswald, *supra* note 14, at 54 n.37.

17. 1A NICHOLS ON EMINENT DOMAIN § 4.11 (Julius L. Sackman ed., 3d ed. 2006).

18. *Id.* (emphasis added).

19. HENRY E. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN § 11 (St. Louis, F.H. Thomas & Co. 1879). The treatise further states that “[t]he legislature is the proper body to determine the necessity of the exercise of the power, and the extent to which the exercise shall be carried.” *Id.* (footnote omitted).

20. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 238 (Chicago, Callaghan & Co. 1888) (footnote omitted).

role to the judiciary,²¹ and explains that Florida courts, for example, have articulated five criteria that a condemnor must consider in order to exercise its discretion properly.²² *Nichols* also states that a theoretical limit exists beyond which a legislature cannot pass.²³ Exceptions for bad faith, abuse of power, and exceeding statutory authority appear to be uncontroversial, though very narrow, exceptions.²⁴

These exceptions have produced a small number of cases that under extreme conditions prevented a taking due to a lack of necessity, as discussed in an earlier coauthored article.²⁵ Examining cases across fifty states and over a one-hundred-year period, that article concluded that three conditions exist where a necessity challenge might not be an impossible task. First, courts have found lack of necessity when the eminent domain plan was utterly speculative or remote in time.²⁶ This situation might occur when a redevelopment plan is especially uncertain or when the timing of the plan is so vague as to be extremely distant in the future or entirely unknowable.²⁷ Second, procedural or regulatory hurdles may prevent the condemnor from proceeding with development.²⁸ Third, in isolated instances

21. NICHOLS ON EMINENT DOMAIN, *supra* note 17, § 4.11[4] (citing statutes and collecting cases).

22. *Id.* § 4.11 (listing availability of an alternative route, costs, environmental factors, long-range area planning, and safety as considerations). *Nichols* cites *Florida Light & Power Co. v. Berman*, 429 So. 2d 79 (Fla. Dist. Ct. App.), *rev. denied*, 436 So. 2d 98 (1983), for support.

23. NICHOLS ON EMINENT DOMAIN, *supra* note 17, § 4.11[2].

24. LEWIS, *supra* note 20, § 393; *see also* 26 AM. JUR. 2D *Eminent Domain* § 35 (2004) (“A valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or abuse of discretion by the condemning authority.” (footnote omitted)). Yet as this Article shall discuss a number of courts reject even these grounds as a basis for challenging legislative or municipal action. *See infra* Part II.A.

25. Robert C. Bird & Lynda J. Oswald, *Necessity as a Check on State Eminent Domain Power*, 12 U. PA. J. CONST. L. 97 (forthcoming 2010).

26. *Id.*

27. *See, e.g.*, *Conn. Light & Power Co. v. Huschke*, 409 A.2d 153, 157 (Conn. Super. Ct. 1979) (ruling that taking of easement for transmission line without development plan or timeline for that line was abuse of utility’s powers of eminent domain); *State v. 0.62033 Acres of Land*, 112 A.2d 857, 860 (Del. 1955) (State Highway Department could not condemn land for highway without development plans or knowledge of when in the future the highway would be developed).

28. Bird & Oswald, *supra* note 25; *see, e.g.*, *Pub. Serv. Co. of Okla. v. B. Willis, CPA, Inc.*, 941 P.2d 995, 999 (Okla. 1997) (failure of condemnor to make a prima facie case of necessity as required improper); *State v. Pac. Shore Land Co.*, 269

courts have found no necessity when the property at issue was a peripheral property in a development plan and other factors further militated against the taking.²⁹

Although organized by type, these decisions do not represent a body of precedent from which to divine a national trend. Rulings finding no necessity like these are isolated and rare indeed. Most of the time courts simply defer to the condemning authority even on slim showings of necessity, if the question is even raised at all. For example, a taking for a future use is theoretically limited to uses fairly anticipated within a reasonable time.³⁰ Yet courts have upheld involuntary seizures of land that the condemning authority would not need for twenty or even thirty years.³¹ Similarly, just as speculative takings theoretically lack sufficient necessity under eminent domain, courts have allowed authorities to seize land when the exact nature of the use was not known, and the authority could not state when the land would actually be utilized.³² Thus most courts allow necessity doctrine to play only a negligible role in overseeing municipal conduct.

It would not be entirely unwelcome if government planners were to face stiff necessity challenges. Planners need to exercise discretion in order to optimize redevelopment goals. If necessity places virtually no limits on what city planners can take for economic development, then there is no incentive to consider equally viable alternative options or the likelihood of the success of the development plan. With such a lackluster necessity

P.2d 512, 520 (Or. 1954) (land sought fell outside right of way specified in state's own plan and thus held not necessary for taking).

29. Bird & Oswald, *supra* note 25; see *City of Helena v. DeWolf*, 508 P.2d 122, 128 (Mont. 1973) (finding no necessity to take non-blighted parcel in blighted area because land stood at the "extreme edge" of the larger redevelopment plan and could "be eliminated . . . without harming the balance of the project"); see also *Ball v. City of Tallahassee*, 281 So. 2d 333, 337 (Fla. 1973) (requiring municipality to present evidence pinpointing need to condemn particular property in overall plan). Four years later the Supreme Court of Florida withdrew from this requirement in *City of Jacksonville v. Griffin*, 346 So. 2d 988, 991 (Fla. 1977).

30. See 26 AM. JUR. 2D *Eminent Domain* § 40 (2004).

31. See, e.g., *City of McGee v. Williamstown*, 308 S.W.2d 795, 797 (Ky. 1957) (upholding a seizure for use thirty years in advance); *City of Mount Vernon v. E. Hudson Parkway Auth.*, 257 N.Y.S.2d 51, 53 (N.Y. Sup. Ct. 1965) (upholding a seizure for use twenty years in advance). But see *Bd. of Educ. v. Baczewski*, 65 N.W.2d 810, 811-13 (Mich. 1954) (thirty years denied).

32. See, e.g., *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So. 2d 149, 150-51 (Fla. Dist. Ct. App. 1977).

doctrine, judges will be insulated from investigation or appreciation of the costs imposed on citizens who have their land taken by eminent domain. For judges, necessity thus becomes yet another procedural rule and the landowner's home just another object to be parceled according to the commands of books and briefs.³³ Yet this problem is not merely theoretical. People and businesses suffer. Neighborhoods are torn apart. The municipal recklessness that a nonexistent necessity doctrine invites imposes severe consequences for landowners. The following section chronicles two such examples of inappropriate government action.

A. *Unnecessary Necessity: The Cases of
Pequonnock and Poletown*

The lack of a necessity doctrine invites abuse. One need not look past the very state that produced the landmark decision *Kelo v. City of New London*³⁴ to find it. Five years before *Kelo*, a land dispute was taking place a short drive from New London, Connecticut, in a similarly struggling urban municipality. The City of Bridgeport sought to take a triangular-shaped piece of coastal land called Steel Point by eminent domain.³⁵ The City demolished homes, removed businesses, and cleared the parcel with one exception—an isolated tract of land owned by the Pequonnock Yacht Club (PYC).³⁶ Unlike some landowners, the largely working-class retirees who populated the club used their meager resources to fight back.³⁷

33. See Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 138 (1993) ("Judicial officers who lack concrete exposure to and understanding of societal problems may either change unexpectedly or produce opinions that are disconnected from the human society that is affected by judicial decisions."); Christopher E. Smith, *Federal Judicial Salaries: A Critical Appraisal*, 62 TEMP. L. REV. 849, 866 (1989) ("Judges who experience some of the trials and tribulations of daily life in American society and are not completely insulated from the pressures that face the average citizen should be better able to comprehend and address the human problems which the judiciary confront.").

34. 545 U.S. 469 (2005). *Kelo* simmered in the Connecticut state court system years before the United States Supreme Court published its opinion. See *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

35. *Pequonnock Yacht Club v. City of Bridgeport*, 790 A.2d 1178, 1181 (Conn. 2002). The Author participated in *Pequonnock* by writing the brief on behalf of the plaintiff-landowner before the Connecticut Supreme Court.

36. *Id.*

37. *Id.* at 1181–82.

A review of the trial court record reveals what could charitably be called a disorganized assertion of municipal power. The club's two-acre property was a small part of a contiguous fifty-acre site already acquired by the City.³⁸ The City's plan was to redevelop the site by attracting private economic development.³⁹ The City had been trying to redevelop the parcel since January of 1970, when the City issued its first redevelopment plan of Steel Point.⁴⁰ Since 1970, the City amended the plan eight times.⁴¹

For twenty-seven years the City did not consider taking water-dependent users' land, which included the club's tract.⁴² In 1998, however, the City sought the entire fifty-acre site.⁴³ The club responded that it would be willing to do pretty much anything the City wished to integrate itself into a development plan.⁴⁴ Except for offering relocation to inferior coastal land, the City refused to negotiate, calling the club's request to remain in place "not an option."⁴⁵ The City then sought to take the land by eminent domain.⁴⁶

The exchange between the City and the club might lead a reasonable observer to believe that the City had specific plans for the land. Quite the opposite was true. The City could not keep a developer interested. First, a developer working with the City contacted an Australian retail development company that expressed interest, but eventually that company withdrew from the project.⁴⁷ Then, a Tennessee investment group expressed interest but also ultimately withdrew.⁴⁸ Finally, a Minnesota developer expressed interest in the site and presented a

38. *Id.* at 1181.

39. *Id.* at 1186.

40. *Id.*

41. *Id.* at 1181.

42. *Id.*

43. *Id.*

44. *See id.* at 1182. A former PYC Commodore testified: "When I mentioned the impassioned plea, I told [the City's representative] that . . . we would build a Taj Mahal or a pagoda or anything that they wanted us to build in order to stay in place. We even offered to look at any plans they might want to show us and we would build them according to whatever the city wanted to—to make us blend in with the new facility." Brief of the Plaintiff-Appellee at 2, *Pequonmock*, 790 A.2d 1178 (No. 1650) (alterations in original).

45. *Pequonmock*, 790 A.2d at 1182.

46. *Id.*

47. Brief of the Plaintiff-Appellee, *supra* note 44, at 4.

48. *Id.*

tenant list, but that list was not satisfactory to the City and was rejected.⁴⁹ After these attempts, the City abruptly switched its focus from a retail use to a commercial use.⁵⁰ On the last day of trial, the latest Request for Proposals was only four days old.⁵¹

In sum, the City had no developer, no bonding, no cost projections, no governmental sources of funding, and no assessment of meeting other statutory requirements.⁵² When the plaintiff's attorney asked a City representative at trial about funding, the representative's response was frustratingly circular. The representative stated that project financing depended on state bond underwriting, but such underwriting would then be determined by project financing.⁵³

All the City appeared to have in support of its commercial efforts were oral statements by City representatives. At trial, one representative characterized the development goal as "[an] increase in interest in large enough land assembly to do a—what's known as a back office or second level office use, which is heavily relying on computers, telecommunications."⁵⁴ City witnesses even appeared to contradict each other. Although

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. The exchange between the plaintiff's attorney and the City representative follows:

Q [Counsel for plaintiff]: Yeah, but when is the developer going to know how much money he's going to have to put up?

A [Director, Planning & Economic Development]: Developer is going to know the size of the deal by the early part of March.

Q: Okay. And what is that number going to be?

A: I can't tell you.

Q: You can't tell me today?

A: I can't tell you today, no, sir.

Q: What's going to dictate what that number's going to be?

A: Return to the City; return to the State. Will underwrite bonds. If it doesn't underwrite bonds, the deal doesn't—

Q: Yeah, but wait a minute. The return to the City and return to the State is going to be based on what's going to be built there?

A: Correct.

Q: Okay. And who is going to determine that?

A: The City, the State, and its partners.

Transcript of Record at 19–20, *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 2000 WL 1918045 (Conn. Super. Dec 19, 2000) (No. CV980355031S).

54. Brief of the Plaintiff-Appellee, *supra* note 44, at 4 n.2 (alteration in original).

one testified that there “would never be an operating marina [at Steel Point],” another testified that there would be “multiple [waterfront uses—t]o try to achieve an economic development off the waterfront edge, maritime based shipping, marinas.”⁵⁵

Although the trial court was by no means compelled to do so by Connecticut common or statutory law, it accepted the necessity argument and prohibited the taking. Noting the City’s failed attempts to find a developer and the absence of any specific development plan, the trial court concluded that the defendant’s taking was speculative and found in favor of the plaintiff.⁵⁶ The Supreme Court affirmed the trial court’s decision, but did not rely on the necessity rationale. Instead, it utilized the more narrow ground that the defendant unreasonably failed to consider integration of the plaintiff’s property into the development plan as required by a Connecticut statute.⁵⁷ Success in court was by no means inevitable. Even with what turned out to be a short-lived victory,⁵⁸ the time, expense, and crushing uncertainty placed great stress on club members.

Municipal actions like those in *Pequonnock* are problematic not simply because they amount to cavalier city planning, but because such poorly organized efforts obscure from public scrutiny the motivations and justifications for a municipal taking. They deny the public the opportunity to participate in the debate over how government, acting through elected officials, should treat private citizens. Not every state court will have a conveniently specific statute by which to check unfettered municipal discretion.

The *Pequonnock* case exemplifies what can happen when a municipality is left entirely on its own to determine the necessity of a particular taking. Planners have little incentive to prepare, organize, or consider the effects of their actions under the

55. *Id.* at 12 n.5.

56. *Pequonnock Yacht Club v. City of Bridgeport*, 790 A.2d 1178, 1181 (Conn. 2002).

57. *Id.*; see also CONN. GEN. STAT. § 8-125(b) (2009) (defining “redevelopment area” as an “area within the state that is deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community. An area may consist partly or wholly of vacant or unimproved land or of land with structures and improvements thereon, and may include structures not in themselves substandard or insanitary which are found to be essential to complete an adequate unit of development . . .”); *Pet Car Prods., Inc. v. Barnett*, 184 A.2d 797, 798 (Conn. 1962) (applying statute).

58. For a summary of the club’s fate after the *Pequonnock* decision, see *infra* text accompanying notes 217–18.

current laissez-faire system. The lack of a necessity doctrine exacts a terrible human cost. The loss of one's home may be one of the most traumatic events a person suffers in his lifetime. Necessity cases rarely expose the human element, as many cases can be disposed of quickly through cold and theoretical legal machinations.⁵⁹ Academic questions of precedent, deference, and original intent have little relevance to owners threatened with eminent domain.⁶⁰ Legal opinions marginalize the pain and emotional trauma that people experience.⁶¹ Underlying necessity review is quite often a homeowner or group of homeowners who will be turned out and dispossessed in a hearing in which they might never participate and by a judge they might never meet.

Although the loss of recreation and, for some, living quarters of the more than two hundred PYC members is no small loss, it pales in comparison to the wreckage created by one of the most infamous eminent domain cases of the twentieth century, *Poletown Neighborhood Council v. City of Detroit*.⁶² In *Poletown*, General Motors (GM) offered to build a plant in Detroit, Michigan if certain criteria could be met by the City of Detroit. These criteria included provision of a four-hundred-fifty to five-hundred acre rectangular plot and access to a rail line and freeway system.⁶³ Residents of the site that was chosen unsuccessfully challenged the City's taking; the Supreme Court of Michigan concluded that the seizure of land for GM did not infringe upon rights in the Michigan Constitution.⁶⁴

Although commentators commonly discuss *Poletown* as a public use case,⁶⁵ it brightly illuminates the consequences of

59. See Peter W. Salsich, Jr., *Privatization and Democratization—Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 756 (2006) (quoting a neighborhood businessman's declaration that "[i]t is very hard to appreciate the fear, concern and downright terror that people experience when they are threatened with the loss of their home or business. We have failed to identify the intangible human element in eminent domain.").

60. *Id.*

61. See generally Daniel Ibsen Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 CHAP. L. REV. 187, 229 (2006) ("Legal opinions always seek to minimize damaging facts and emphasize favorable ones.").

62. 304 N.W.2d 455 (Mich. 1981) (per curiam).

63. *Id.* at 460 (Fitzgerald, J., dissenting).

64. *Id.* at 457 (per curiam opinion) (citing MICH. CONST. of 1963, art. X, § 2).

65. See, e.g., William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L.

judicial abdication of necessity review. Far from the only plot available, the Poletown section of Detroit was one of the last stable and integrated neighborhoods—a neighborhood reminiscent of the city's past.⁶⁶ City officials presented nine potential sites to GM.⁶⁷ Even though these sites were relatively free of the churches, homes, and small businesses that Poletown contained, GM rejected them all.⁶⁸

One might expect that GM's rejection of eight undeveloped sites in favor of destroying over one thousand properties containing the homes of over three thousand people⁶⁹ might be for truly compelling reasons such as irremediable polluted land or insurmountable terrain. Instead, GM rejected the other sites because they were not sufficiently rectangular.⁷⁰ The rectangular shape was not critical for production feasibility or for efficient plant management, but was preferred because GM wanted to use the same blueprint layout of parking lots and assembly plants from a site in Oklahoma.⁷¹ Although the parking structures and buildings apparently could have been modified, GM refused to do so.⁷² As one GM employee remarked, "[o]nce we had decided what we wanted, we would not retrench."⁷³ Based on these facts, City planners presumably weighed the alternatives and concluded that the inconvenience imposed upon a large multinational corporation to redraw building schematics outweighed the destruction of hundreds of homes, the forced removal of three thousand residents, and the annihilation of a stable and diverse Detroit neighborhood.⁷⁴

REV. 929; Glen H. Sturtevant, Jr., Note, *Economic Development as Public Use: Why Justice Ryan's Poletown Dissent Provides a Better Way to Decide Kelo and Future Public Use Cases*, 15 FED. CIR. B.J. 201 (2005).

66. Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL'Y 651, 652–53 (2006).

67. *Poletown*, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).

68. Plater & Norine, *supra* note 11, at 675 n.37.

69. Sandefur, *supra* note 66, at 653 (citing Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 48–49 (2003)).

70. Plater & Norine, *supra* note 11, at 675 n.37.

71. *Id.*

72. *Id.*

73. *Id.*; see also *Poletown*, 304 N.W.2d at 470 (Ryan, J., dissenting) ("The evidence then is that what General Motors wanted, General Motors got.").

74. Plater and Norine phrased this question well: "The question of 'specific contextual necessity' . . . came down to whether the creation of jobs and tax

Even under the most deferential view of necessity, it strains the imagination to think that the cost of modifying an architectural plan would compel the destruction of a city neighborhood.

In fairness to Detroit City planners, they were placed under enormous pressure by GM, which threatened to transfer its Cadillac plant out of Detroit if its demands were not met.⁷⁵ By conceiving the project idea, allocating financial burdens, selecting the site, and imposing deadlines for taking title of the property,⁷⁶ the auto firm simply co-opted the City's eminent domain power for its own purposes. Perhaps City planners felt a strong necessity for the taking, not because the Poletown neighborhood provided a justifiable plot of land, but because of the economic threats from GM that would harm the City if its wishes were not fulfilled. Although too late for Poletown residents, Justice Ryan's hope that the "precedential value of this case will be lost in the accumulating rubble" was eventually fulfilled. In 2004, the Michigan Supreme Court overruled *Poletown* in *County of Wayne v. Hathcock*,⁷⁷ holding that the taking of private property for private economic development violated the state's constitution.⁷⁸

Many scholars considered the *Poletown* decision to be the requiem of private property rights.⁷⁹ Municipalities remain aggressive in using their takings powers without a rational justification of necessity even when under no pressure whatsoever from private companies. Although *Poletown* eventually was overruled, such casual planning is most likely not unique to municipal eminent domain actions. It is difficult to say for sure, however, because of the difficulty of ferreting out the back

base . . . required that a rural Oklahoma factory layout design be replicated in an urban Detroit neighborhood without any modifications." Plater & Norine, *supra* note 11, at 675 n.37.

75. *Id.* at 675–76 n.38.

76. *Poletown*, 304 N.W.2d at 470 (Ryan, J., dissenting).

77. 684 N.W.2d 765 (Mich. 2004).

78. *Id.* at 787 ("Because *Poletown's* conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the Court's eminent domain jurisprudence . . . [it] cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled." (footnotes omitted)).

79. David Schultz, *The Property Rights Revolution That Failed: Eminent Domain in the 2004 Supreme Court Term*, 21 *TOURO L. REV.* 929, 965–66 & n.167 (2006).

story behind such takings. Some of the most egregious details of municipal mismanagement, in *Pequonnock* for example, are found only in the transcripts and depositions, sources not easily located by commentators using commercial databases—and this may be true of takings cases in general. Thus, the failure of municipalities to balance the necessity or reasonableness of a taking against the rights of property owners may be even more of a problem than judicial opinions reveal.

The dormancy of necessity doctrine creates a license for municipalities to exercise eminent domain power with little concern for planning, outcomes, or impacts on affected interests. Given the national outrage *Kelo* sparked, most Americans likely would find the City's actions not only surprising, but also unjust. But, in the absence of a convenient state statute, the doctrine as currently interpreted *would* permit the taking if necessity doctrine were considered at all. *Pequonnock* and *Poletown* are just two examples of a more prevalent and fundamental problem with necessity in eminent domain.

B. *The Aftermath of Kelo v. City of New London: Has Public Outrage Prompted Meaningful Eminent Domain Reform?*

At first glance, one would think that much reform of eminent domain has already been completed. *Kelo v. City of New London*⁸⁰ brought the topic of eminent domain generally, and of public use specifically, to the forefront of public consideration.⁸¹ Quickly disseminated through mainstream media, *Kelo* allowed many laypeople to learn about eminent domain for the first time.⁸² Although the *Kelo* case relied upon fifty-year-old

80. 545 U.S. 469 (2005).

81. Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 844 (2007) (noting the suggestion that “public reaction against *Kelo v. City of New London* has been so strong because of the same ‘basic moral intuition’ that says that ‘intentional trespass or theft is wrong’” (footnote omitted)); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 344 (2006) (sharply criticizing the conclusion by one scholar that strong public reaction was the result of an “extraordinary PR job by the property rights movement” (footnote omitted)); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 193 (2007) (“Doctrinally, the Court’s decision in *Kelo* was unsurprising; nonetheless, the decision provoked fierce public opposition. It is hard to say exactly why *Kelo* provoked such a strong public reaction where previous takings cases did not” (footnotes omitted)).

82. James W. Ely, Jr., *Kelo: A Setback for Property Owners*, 20 PROB. & PROP. 14, 15 (2006).

precedent regarding public use and arguably did not change the law,⁸³ to most of the public the decision was novel and shocking. Citizens viewed the policy as an unwarranted intrusion into cherished ownership rights.⁸⁴

Congress acted promptly in response to the public outcry. Soon after *Kelo* was decided, Congress proposed legislation that, if passed, would have suspended federal economic development funds for any state or political subdivision that used eminent domain power for economic development purposes.⁸⁵ The bill defined economic development broadly as “taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.”⁸⁶

Unlike a general resolution decrying *Kelo*, the bill had the power to restrict significantly eminent domain activity. The National League of Cities, for example, opposed the bill because it would “freeze the process of public-private economic develop-

83. See Corinne Calfee, *Kelo v. City of New London: The More Things Stay the Same, the More They Change*, 33 *ECOLOGY L.Q.* 545, 567 (2006) (“*Kelo* was entirely consistent with *Berman* and *Midkiff*, so it did not change the law, contrary to O’Connor’s implied critique. Rather, it was O’Connor’s narrow public use definition that would have changed existing law.”); G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 *NOTRE DAME L. REV.* 1653 (2006). Mathues writes:

Kelo did not open the door to a Brave New World of unlimited eminent domain powers. At worst, it alerted the public to the breadth of an existing power. At best, it affirmed settled precedent. The majority opinion, academic commentary, and, most of all, the dissent, prove that *Kelo* did not change the law of eminent domain. *Kelo* merely held that economic development satisfied the Court’s deferential test for condemnation under the Public Use Clause.

Id. at 1695; see also Michael Gardner, *Lawmakers Rethink Land-Seizure Laws*, *SAN DIEGO UNION-TRIB.*, Aug. 17, 2005, at A1 (quoting John Shirey, representative of California Redevelopment Association, as saying “[t]here’s a hue and cry about how bad things are in California. Yet *Kelo* changed nothing.”).

84. Two national surveys conducted in the fall of 2005 revealed that 81% and 95% of respondents were opposed to the *Kelo* decision. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100, 2109 (2009). Opposition crossed racial, ethnic, gender, and political lines. *Id.*

85. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (as reported by S. Comm. on the Judiciary, Nov. 4, 2005).

86. *Id.* § 8(1).

ment projects across the country.”⁸⁷ Federal funding wields great influence over state activities, and the restriction of such funding would likely compel state governments to comply.⁸⁸ Eventually, however, the bill stalled in Congress. The last major action taken on the bill was in November of 2005, when it was referred to the Senate Committee on the Judiciary.⁸⁹

By contrast, state legislatures were more successful in enacting post-*Kelo* legislation. A 2006 article reports that approximately one-half of the states had enacted laws since *Kelo* that increase regulation of eminent domain takings in some fashion.⁹⁰ A 2008 article reports that, as of January of that year, thirty-five state legislatures had enacted post-*Kelo* laws.⁹¹ Meaningful reform appeared to be at hand, with what some would call the most extreme of *Kelo*'s implications muted in a majority of states.

A closer look, however, reveals that legislative momentum quickly slowed.⁹² Many legislative endeavors were largely symbolic and did not effect real change. According to one analyst, at least sixteen of these state laws have created little meaningful protection for property owners against eminent domain.⁹³ These

87. Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 765 (citing NAT'L LEAGUE OF CITIES, CONFUSING AND VAGUE BILL MAY PRODUCE CHILLING EFFECT ON ECONOMIC DEVELOPMENT (2005), available at <http://www.nlc.org>).

88. See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001) (noting that the spending power of Congress is “the greatest threat to state autonomy”).

89. See *supra* n.85.

90. Sandefur, *supra* note 87, at 711–12 (summarizing legislation passed in response to *Kelo* to restrict eminent domain powers); see also Am. Inst. of Architects, *Eminent Domain and Statute Matrix 2008*, <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia078815.pdf> (chronicling enacted and unenacted state legislation on eminent domain after *Kelo*).

91. Somin, *supra* note 84, at 20. Alabama was the first state to enact such a reform. See 2005 ALA. LAWS 644 (prohibiting eminent domain takings for commercial development purposes); see also 29 DEL. C. § 9505(15) (2008) (limiting acquisitions to “recognized public use[s]”); TEX. GOV'T CODE ANN. § 2206.001(b) (2007) (“A governmental or private entity may not take private property through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes . . .”).

92. See Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Organizations*, 56 AM. U. L. REV. 455, 468–69 n.47 (2007).

93. Sandefur, *supra* note 87, at 727.

laws accomplish little, imposing minor procedural burdens on redevelopment officials or simply reaffirming the existence of vague terms such as “public use.”⁹⁴ Subsequent research by another analyst chronicles similar ineffectual reform efforts.⁹⁵ *Kelo*-style public use has received modest pruning, but in the main, the deferential doctrine remains intact. As interest fades even more, the likelihood of further public use reform disappears with it.

If public use requirements are not going to limit the abuse of eminent domain power, only necessity doctrine remains. Although the necessity doctrine has largely been ignored by judges and obscured by debates over public use, it could become an effective restraint if it were to experience a limited revival. The core of any such revival would center around the level of deference courts give to legislative determinations of need. The following Parts evaluate various roles that necessity should play in eminent domain proceedings.

II. RUBBER STAMPS AND HIGH HURDLES

Many options exist along the possible continuum of necessity review. This Part examines two of the most extreme positions. First, this Part discusses the current position of some federal and state courts that necessity determinations are nonreviewable and are the sole province of the legislature. The next Part assesses the viability of a close and searching judicial role in eminent domain takings akin to strict scrutiny review found in certain constitutional cases.

A. *Judicial Nonreviewability Invites Government Abuse*

For nearly a century, the federal government relied upon the power of the States to take private land.⁹⁶ Not until 1875 did the Supreme Court affirm the validity of federal eminent domain

94. *Id.* In Ohio, one of the states that most frequently condemns property for transfer to private parties, the legislature did little more than enact a one-year moratorium on condemnations of nonblighted private property primarily for the purpose of economic development. *Id.* at 749–51 (“Some sort of prize, however, should be reserved for Ohio for enacting the least protective law in the wake of *Kelo*.”).

95. See Somin, *supra* note 84.

96. Plater & Norine, *supra* note 11, at 698–99. The federal government once filed its condemnation cases in state courts. *United States v. Carmack*, 329 U.S. 230, 237 (1946).

power.⁹⁷ Once the Court established federal power, it did not take long for it to shelve any oversight role. In 1893, the Court ruled that once it had determined that private property would be taken for a public use, the judicial function in eminent domain was exhausted.⁹⁸ Almost thirty years later, the Court reaffirmed this approach.⁹⁹ The Court specifically announced that necessity was outside the scope of judicial review and that the landowner was not even entitled to a hearing on the question.¹⁰⁰

In 1923, *Rindge Co. v. Los Angeles County*¹⁰¹ addressed a county government highly covetous of what must have been a stunningly beautiful tract of land known as the Malibu Ranch.¹⁰² The County, no doubt chafing from repeated failed attempts to turn Malibu Ranch roads into public byways forcibly,¹⁰³ sought to seize not just roadway access but the entire tract through eminent domain. The county legislative body, without notice to the ranch owners, adopted two resolutions

97. *Kohl v. United States*, 91 U.S. 367, 371 (1875).

98. *Shoemaker v. United States*, 147 U.S. 282, 298 (1893) (“[W]hile the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted . . .”).

99. *Bragg v. Weaver*, 251 U.S. 57, 58 (1919).

100. *Id.* (“[T]he necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.”).

101. 262 U.S. 700 (1923).

102. A scenic picture emerges through the language of a near century-old judicial opinion:

[A] large tract of land lying on the shore of the Pacific Ocean, known as the Malibu Ranch, extending in an easterly and westerly direction about twenty-two miles and varying in width from one-half mile to one and one-half miles. It lies at the base of a high and rugged mountain range which parallels the shore at a distance of from three to four miles, its northern line extending along the slope and foothills of this mountain range, and is traversed by many ridges and intervening canyons leading from the mountains toward the shore.

Id. at 702.

103. According to the Court, by then “much litigation” had taken place between the ranch owners and various government officials. *Id.* at 703 n.2. The ranch owners had thus far expended significant resources to keep their private roadways across the ranch out of the hands of public officials. *See United States v. Rindge*, 208 F. 611, 615 (S.D. Cal. 1913) (describing a complex legal case with a voluminous record and finding in favor of the landowner); *see also People v. Rindge*, 164 P. 633, 637 (Cal. 1917) (holding that “the road to the beach road was unquestionably a private way”).

stating that public interest and necessity required construction of two highways across the ranch.¹⁰⁴ The planned roads did not seem to go anywhere. They extended like tendrils across the ranchland from public roads and simply terminated.¹⁰⁵

The ranchers were ready for yet another fight, “vigorously resist[ing]” with voluminous evidence of their own the condemnation supported by the “large mass” of evidence the County presented.¹⁰⁶ Two defenses were available to the ranchers in this uphill battle: lack of public use and necessity. A successful public use defense was highly unlikely, as road construction has long been one of the core purposes of eminent domain.¹⁰⁷ That left a challenge to the necessity of the taking, which was at least arguable. The proceedings were infected with the presence of self-serving motives, an absence of planning, questionable utility, and possible bad faith from prior litigation. This unpleasantness was no business of the Court, however, which found the County’s resolutions alone to be conclusive evidence of the necessity to take. The Court concluded that, “upon a public necessity for the taking duly established . . . [the landowners] have not been deprived of their property in violation of the Fourteenth Amendment.”¹⁰⁸ The long-suffering landowners lost their property via eminent domain.

Although the judiciary’s willful blindness in these cases evidences a baffling unwillingness to consider a modest regulatory role,¹⁰⁹ what is most unsettling about them is the unyielding principle these courts articulate. Under these cases, some

104. *Rindge*, 262 U.S. at 703.

105. *Id.*

106. *Id.* at 704.

107. PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN § 61 (1917) (“Public highways were the earliest objects for the exercise of eminent domain . . . and in some of the states the only one authorized before the Revolution. It has never been doubted that land might be taken for the purpose of laying out, extending or widening a public highway.” (footnote omitted)).

108. *Rindge*, 262 U.S. at 710; *see also id.* at 709 (“The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers.”).

109. *See Adirondack Ry. v. New York*, 176 U.S. 335, 349 (1900) (“The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes.”); *United States v. Jones*, 109 U.S. 513, 518–19 (1883).

federal and state courts abdicate their role of review altogether.¹¹⁰ Combined with the long-standing deferential interpretation of public use, the federal courts are just a rubber stamp when it comes to determining what lands may be seized by eminent domain. The issue of necessity, according to these cases and their progeny, is a “purely political” question.¹¹¹

Characterizing necessity as a political question places it within a special class of circumstances that is completely removed from judicial oversight. The political question doctrine holds that courts should abstain from resolving constitutional issues better left to other branches of government.¹¹² *Baker v. Carr* provides a detailed, though convoluted, explanation of when this doctrine applies.¹¹³ Nonjusticiability on the basis of a political question is appropriate when one of the following features is present: constitutional language that specifically assigns the issue to the executive or legislative branch, a lack of judicially manageable standards, the impossibility of deciding without a policy determination, an unusual need for unquestioning adherence to a political decision, or the possibility of embarrassment from multiple pronouncements across branches

110. State courts articulating the nonreviewability doctrine use language similar to that used by their federal counterparts. *See, e.g.,* *Chicagoland Chamber of Commerce v. Pappas*, 880 N.E.2d 1105, 1121 (Ill. App. 2007) (“The necessity or propriety of exercising the right of eminent domain is a political question—one which belongs exclusively with the legislature to determine.” (quoting *Forest Preserve Dist. v. Brown Family Trust*, 753 N.E.2d 1110, 1114 (2001))); *State ex rel. Wagner v. St. Louis City. Port Auth.*, 604 S.W.2d 592, 599 (Mo. 1980) (“The necessity, expediency and propriety of exercising the power of eminent domain are questions essentially legislative (or, as is sometimes said, political), and not judicial, in nature . . .”).

111. *Rindge*, 262 U.S. at 709; *see also* *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 678 (1923) (“The question [of necessity] is purely political, does not require a hearing, and is not the subject of judicial inquiry.”); *West, Inc. v. United States*, 374 F.2d 218, 221 (5th Cir. 1967) (“[Necessity is a] legislative rather than judicial question[.]”); *United States v. 170.88 Acres of Land*, 106 F. Supp. 623, 624 (D. Ky. 1952) (“[T]he question as to the degree or quantity of interest to be taken is, like other political questions, exclusively for the legislature; and that when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.”); *United States v. Certain Parcels of Land in Fairfax County, Va.*, 89 F. Supp. 567, 570 (E.D. Va. 1950) (similar).

112. Jesse H. Choper, *Introduction* to *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 1 (Nada Mourtaba-Sabbah & Bruce E. Cain eds., 2007).

113. 369 U.S. 186, 217 (1962); *see also* *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (condensing the *Baker* test into a three-part test).

on the same issue.¹¹⁴ The Court carefully noted that “[u]nless one of these formulations is inextricable . . . there should be no dismissal for non-justiciability on the ground of a political question’s presence.”¹¹⁵

None of these considerations is present in the context of eminent domain. Neither constitutional command for legislative delegation nor the possibility of government embarrassment exists in these cases. Judicially manageable standards are widely available, and the cases can be decided without determination of policy or a political decision.¹¹⁶ Typically, the political question doctrine is reserved for critical issues where deference to the executive or legislative branch seems crucial, such as military matters, national security affairs, and foreign policy questions.¹¹⁷ A city proposal for a drainage ditch or parking lot is not on par with questions of national security,¹¹⁸ diplomacy,¹¹⁹ or the legitimacy of a state government.¹²⁰ Measured deference to legislative planning often is appropriate; total abdication of judicial reviewability is not.¹²¹

114. *Baker*, 369 U.S. at 217.

115. *Id.* The Court further noted that the political question doctrine does not necessarily mean that courts must avoid political cases. The judiciary may adjudicate cases that determine whether a political action exceeds the legislature’s constitutional authority. *Id.*

116. See Plater & Norine, *supra* note 11.

117. E.g., *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (“The Court also has recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive.’ . . . Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981))); see also Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291, 1305–17 (1988); Gregory E. Maggs, *The Rehnquist Court’s Non-interference with the Guardians of National Security*, 74 GEO. WASH. L. REV. 1122, 1124–38 (2006); Peter E. Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 433 (1989).

118. *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989).

119. *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007).

120. *Luther v. Borden* 48 U.S. (7 How.) 1, 47 (1849); see also Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra* note 112, at 23, 28–29 (discussing *Luther*).

121. Cf. *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 562 (2002) (describing appropriate deference towards agency action as “[r]estraint, yes, abdication, no” (citation omitted)); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (“The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . .”).

Fortunately, modern federal courts need not ignore *Rindge* and similar cases to put to rest the nonreviewability of necessity concept. In *United States v. Carmack*, a landowner challenged a government taking of land to build a post office and custom house.¹²² At trial, the landowner argued that the government's choice of site was arbitrary and capricious.¹²³ The Court easily could have referred to *Rindge*, *Shoemaker*, and other cases to reassert that the necessity defense was a dead letter. Curiously, the Court instead remarked that

[i]n this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capriciously and arbitrarily" that their action was without adequate determining principle or was unreasoned.¹²⁴

The Court then defined the key words "arbitrary" and "capricious."¹²⁵ The Court did not explicitly overturn prior cases, but seemed to leave open the question of whether courts have a role in necessity review.¹²⁶ Some federal courts have followed *Carmack's* lead, however cautiously, by conducting a substantive review in necessity cases.¹²⁷ Thus there is little logical or jurisprudential need to apply a nonreviewable necessity standard that would thoroughly disable private land owners from challenging reckless takings.

B. *Strict Scrutiny Review Would Unduly Interfere with Legislative Will*

A government's exercise of eminent domain can be an unjust and traumatic process that favors the wealthy and hurts the poor.¹²⁸ It also disproportionately affects minority groups.¹²⁹ A

122. 329 U.S. 230 (1946).

123. *Id.* at 234.

124. *Id.* at 243.

125. *Id.* at 243 n.14.

126. NICHOLS ON EMINENT DOMAIN, *supra* note 17, § 4.11[2].

127. Plater & Norine, *supra* note 11, at 700–01.

128. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 38–51 (2006) (noting that community redevelopment favors middle- and upper-class development); Nicholas P. Devereux, Note, *Wake of the Flood: The Dissipation of Property Rights Through a Model of Post-Katrina New Orleans*, 13 WASH. & LEE J. C.R. & SOC. JUST. 389, 408 (2007) ("*Kelo* exacerbates the problems of the poor and racial

number of books chronicle the impact that insensitive municipal planners and overzealous developers have on the targets of eminent domain.¹³⁰ *Kelo* has only amplified this perception, creating a backlash against land use controls and prompting a flurry of legislative activity.¹³¹

A natural reaction would be to control tightly the exercise of eminent domain. Under this regime, government agencies would be able to seize land only under the most extraordinary and compelling of circumstances. Judicial review would be searching and aggressive. Planners would need to submit voluminous and compelling evidence showing the absolute necessity of the taking. The public use would have to be clear and unambiguous. Abuse would virtually disappear and private property rights would become extremely resistant to government interference.

This high hurdle can be constructed from the familiar strict scrutiny judicial review. Strict scrutiny is a level of judicial review that asks whether a government action is narrowly tailored to promote a compelling government interest.¹³² It now applies to government decisions involving suspect classifications,¹³³ or infringements of a fundamental right.¹³⁴ Applied to a government's exercise of eminent domain, strict scrutiny would require the government to show that there is a compel-

minorities by tipping the balance of power further towards rich private developers. In the urban renewal craze, the spoils will disproportionately fall to wealthy development interests, the loss to the poor minorities."); James Freda, Note, *Does New London Burn Again?: Eminent Domain, Liberty and Populism in the Wake of Kelo*, 15 CORNELL J.L. & PUB. POL'Y 483, 504 (2006) ("[S]ince the only protection for a landowner is the just compensation clause, it will rarely be the wealthy or the politically powerful who will suffer the consequences of redevelopment. The land of the poor and disconnected is cheaper.").

129. See Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) (describing the racial impact of eminent domain).

130. See, e.g., JEAN BOGGIO, *STOLEN FIELDS: A STORY OF EMINENT DOMAIN AND THE DEATH OF THE AMERICAN DREAM* (2008); STEVEN GREENHUT, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* (2004); CARLA T. MAIN, *BULLDOZED: "KELO," EMINENT DOMAIN, AND THE AMERICAN LUST FOR LAND* (2007).

131. See Somin, *supra* note 84 (chronicling the *Kelo*-fueled backlash in depth).

132. See *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (discussing the standard in the context of a content-based speech restriction).

133. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

134. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

ling necessity to transfer land from a private individual to the state and that the transfer minimizes any unnecessary impact.

Subjecting the exercise of eminent domain to strict scrutiny holds a certain logic. The essential showing of strict scrutiny, that of a compelling state need, sounds similar to the plain meaning of the word “necessity.”¹³⁵ Necessity implies imperativeness or indispensability, and strict scrutiny would require a condemnor to show precisely that. Real property is unique because every parcel of land has a distinct location and distinct value.¹³⁶ The irreplaceable nature of that unique property should provoke a heightened judicial review.¹³⁷ Local planners with disproportionate power who are easily enticed by new tax revenues would be brought to heel when seeking unreasonable condemnations.¹³⁸

Perhaps the most elegant argument for the application of strict scrutiny to eminent domain is that the Framers believed that individual property rights are fundamental to liberty and should be protected fiercely,¹³⁹ and heightened judicial review of property rights best reflects this understanding.¹⁴⁰ Property rights, because of their importance, should be considered fundamental rights within the protected “penumbra” of specific guarantees of the Bill of Rights.¹⁴¹ Property rights are personal rights in the context of eminent domain because property ownership is bound up with a personal interest in remaining free

135. See *supra* text accompanying notes 1–5.

136. See Loren A. Smith, *The Morality of Regulation*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 507, 518 (1998).

137. Kristi M. Burkard, Note, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 HAMLINE J. PUB. L. & POL’Y 115, 152 & n.132 (2005).

138. *Id.* at 152–53.

139. *Id.* at 151; see also Ely, *supra* note 12, at 35 (“In the mind of the framers respect for property rights was closely linked to the preservation of individual liberty. The Constitution and Bill of Rights were written in large part to strengthen the protection of property rights. The public use language of the Takings Clause should be read in light of this broad commitment to private ownership.”).

140. Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000).

141. *Id.* at 307–08. The concept of penumbras is reflected most prominently in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

from government interference.¹⁴² Property ownership is a “tangible manifestation of personhood” and should be protected with the same standard of review that is granted to other fundamental personal rights.¹⁴³ Strict scrutiny would be applied not as a “strict in theory but fatal in fact”¹⁴⁴ standard, but as one that separates “ostensible public uses from those legitimately benefiting the community.”¹⁴⁵

Strict scrutiny review appears attractive. Deprivation of private property is one of the most drastic nonpenal actions a government entity can take against an individual. If concepts such as privacy, which is nowhere explicitly mentioned in the Constitution, can create fundamental rights, then notions of private property, which are mentioned explicitly, should be construed similarly. In practice, however, a necessity doctrine governed by strict scrutiny would restrict government so much that worthwhile endeavors such as highway, park, and seaport development might never be implemented. A strict scrutiny inquiry effectively would place the judiciary in the role of a super-review board of the legislature. The decision to proceed with a given project is often the result of complex and subjective considerations involving planning, predicted growth, budget limitations, and other criteria.¹⁴⁶ A court would need to weigh these criteria to determine whether any reasonable alternative means of accomplishing the compelling government interest existed. Not only are courts ill-equipped to make these types of determinations, but long-term flexible city planning, already challenging given the political complexities inherent in eminent domain, would be difficult if not impossible. Even if

142. Jones, *supra* note 140, at 309–10 (“Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.” (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972))).

143. *Id.*

144. This phrase has been widely used among commentators to describe strict scrutiny review. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Court has attempted to counter the perception. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (citation omitted)).

145. Jones, *supra* note 140, at 312.

146. Plater & Norine, *supra* note 11, at 694.

courts avoid “strict in scrutiny, fatal in fact,” all but the most utterly compelling city plans would be prevented.¹⁴⁷

In addition, cities in economic difficulty might not be able to effectively implement legitimate plans of redevelopment. Suppose a city like New Orleans exercised eminent domain to rebuild from a natural disaster.¹⁴⁸ If a court applied strict scrutiny to the city’s takings, it would use a strong presumption against the validity of every action.¹⁴⁹ City officials would be unable to easily construct a citywide plan of development. Each eminent domain proposal would face the argument that other parts of the city present adequate alternatives for development. The difficult prospect of attracting commercial investment to a devastated area would become even more challenging. Economic redevelopment might be relegated to the unpopulated fringes or the least attractive locations of a municipality, hampering the economic benefits that city planners use eminent domain to achieve.

Strict scrutiny review of necessity, to the extent it should exist at all in the context of eminent domain, would be most persuasive in situations where landowners are particularly vulnerable to government abuse. For example, Ralph Nader and Alan Hirsch argue that eminent domain takings should be subject to strict scrutiny where the land will be transferred to a private party, the landowner has a strong interest in the land that money cannot readily compensate, and the owner is relatively powerless politically.¹⁵⁰ This rule would reduce the burden on those who have the least access to the judicial system and the fewest resources to withstand actions of a municipality.

The problem with such a policy change is that strict scrutiny would impair the discretion of municipalities to act on behalf of their citizens. The multifactor criteria are also too vague to apply easily. Additional eminent domain litigation would develop to determine whether or not the landowner is deserving of heightened protection. As a result, the threat of judicial scru-

147. *Id.* at 742 (“At the level of strictest scrutiny, deference is barely discernible, for, after a court announces that it is applying that standard, it is difficult to find a regulatory survivor.”).

148. Devereux, *supra* note 128, at 428 (discussing this hypothetical situation).

149. *Id.*

150. Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 224 (2004).

tiny would so hamstring city planners that they would not undertake projects with significant benefit to the public good.¹⁵¹

That does not mean, however, that heightened review is entirely unwarranted. Politically vulnerable landowners might benefit from a closer judicial review given the imbalance of power between them and the government. Instead of using a three-factor test, courts might reserve closer review for takings involving the removal of blighted property. Blighted property is among the most vulnerable to municipal action because of the potential for increased tax revenue that a private-to-private transfer of land can provide. Moreover, blighted property is most vulnerable to misuse of eminent domain because of the “socially constructed understanding of urban decay which rests on a doubtful analogy to a gangrenous limb.”¹⁵² Blight as a concept is already well-embedded into most state statutes,¹⁵³ but the definition of blighted property is elusive. Requiring a modestly heightened scrutiny for takings of blighted properties would serve the purpose of constructing a judicial check on a concept most vulnerable to abuse by municipalities.

Heightened protection for such vulnerable groups, however, should come from the legislature rather than the courts. The legislative branch is better equipped than the judiciary to gather facts on the problems of eminent domain, find the interest groups most severely affected by these problems, and then define the criteria necessary to receive heightened review under eminent domain. Because numerous state statutes already define the concept of blight,¹⁵⁴ meaningful measurements of community impact by eminent domain already exist and can be incorporated into legislative provisions. Additionally, one author recommends that legislatures require the use of social

151. See Michael A. Lang, Note, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 479 (2006) (noting that, under strict scrutiny, “the condemning authority will never be certain whether or not a court will deem a taking’s justification ‘compelling’”).

152. George Lefcoe, *Redevelopment Takings After Kelo: What’s Blight Got to Do With it?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 827 (2008) (quoting J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL’Y 131, 141 (2005)); see also Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305 (2004) (discussing definitions of blight).

153. See Lefcoe, *supra* note 152, at 819–27 (discussing state eminent domain statutes and their definitions of blight).

154. See *id.*

capital impact assessments, analogous to environmental impact statements popularized in the 1960s and 1970s, to measure the effect of proposed economic development takings on average citizens.¹⁵⁵ These assessments would ensure that planners consider the necessary alternatives and consequences before proceeding.¹⁵⁶ A notice and comment period would ensure the opportunity for community participation.¹⁵⁷ Requiring heightened scrutiny of necessity for takings against vulnerable interest groups is thus laudable but must be carefully circumscribed so that vague standards do not expand beyond their limited focus.

III. TOWARD A MODEST REVIVAL OF NECESSITY IN EMINENT DOMAIN

Although a rigorous review for vulnerable groups might be necessary under narrow conditions, the remaining question is what role necessity doctrine can play in a general eminent domain context. Strict scrutiny would straitjacket government planners, but abdication of judicial review would encourage abuse.¹⁵⁸ The purpose of this Part is to articulate a meaningful role for necessity in eminent domain that retains discretion for city planners while curbing reckless and ill-considered seizure of private land. Thus, it suggests a “less drastic means” test for judicial review of takings.

An immediate concern of courts and commentators is the perceived inability of judges to understand the technical and fact-sensitive issues that surround eminent domain. Such an inquiry might require a judge to delve into matters of expertise that he is poorly equipped to handle and result in unnecessary litigation.¹⁵⁹

155. Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-Balancing of Power Between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J.L. & PUB. POL’Y 187, 216–27 (2006).

156. *Id.* at 222.

157. *Id.* at 224.

158. See Plater & Norine, *supra* note 11, at 741 (“On one side is the Scylla of the court as ‘super legislature,’ with the image of monolithic courts battering down decisions of the other branches of government. On the other is the Charybdis of abdication of judicial deference, the whirl of politics swallowing up the separate role of the courts as long-term defenders of fundamental principles.”).

159. Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 855 n.90 (1993).

Such judicial handwringing about supposed technical matters beyond a judge's competence, however, seems wholly unnecessary. In situations where a legislature has required judicial review by statute, courts have no difficulty adjudicating whether the condemnor has complied with the statutorily imposed necessity demonstrations.¹⁶⁰ Furthermore, courts have never admitted difficulty with reviewing highly technical planning and engineering decisions involving transportation, water, traffic, waste disposal, air quality, pollution, endangered species protection, and a multitude of other topics.¹⁶¹ Judges "freely pass judgment on the quality and completeness of the handiwork of engineers, scientists, planners and the like, frequently disagreeing with their conclusions."¹⁶² As one author comments, "[w]hy courts abruptly lose the capacity to do so when the litigation is labeled 'eminent domain' rather than 'environmental review' no one has, to the best of my knowledge, attempted to explain."¹⁶³ If courts can deferentially evaluate the nuances of scientific findings, a limited necessity review of a proposed taking should not strain judicial abilities.

A. *An Arbitrary and Capricious Standard is Too Lax*

If the judiciary is capable of evaluating determinations of necessity, then the level of judicial review it should apply must still be determined. One obvious choice is that courts would not bar an eminent domain proceeding unless the condemnor's

160. See NICHOLS ON EMINENT DOMAIN, *supra* note 17, § 4.11[4] (citing statutes and collecting cases).

161. Kanner, *supra* note 81, at 352; see also Patrick A. Fuller, Note, *How Peer Review of Agency Science Can Help Rulemaking: Enhancing Judicial Deference at the Frontiers of Knowledge*, 75 GEO. WASH. L. REV. 931, 961 (2007) (describing the development of "hard-look review of science-based decisions" in the District of Columbia Circuit).

162. Kanner, *supra* note 81, at 352.

163. *Id.* One court unequivocally concluded that courts generally are more capable of determining whether eminent domain is an appropriate tool in a given context than are legislatures:

As to what are the material resources of the state depends upon facts, and as to whether those material resources can be completely developed without the exercise of the right of eminent domain also depends upon facts, and it must be conceded that the courts are better equipped to investigate and determine those questions than is the Legislature, and to determine whether a logging railroad is necessary to the "complete development" of the timber resources of the state.

Blackwell Lumber Co. v. Empire Mill Co., 155 P. 680, 683–84 (Idaho 1916).

decision was arbitrary and capricious. The well-known arbitrary and capricious standard, the narrowest scope of judicial review, applies to fact findings of an administrative agency.¹⁶⁴ Originally formulated by Justice Brandeis in a dissent¹⁶⁵ and then codified by the Administrative Procedure Act, the standard requires a court to set aside an agency decision when the court finds it to be arbitrary or capricious.¹⁶⁶ Arbitrary and capricious review provides a check on the excesses of state power by ensuring that government acts are based on established legal principles and have some rational and factual basis.¹⁶⁷

The problem with arbitrary and capricious review, however, is that courts rarely strike down government actions on this basis. Courts seem ready to articulate the principle but “almost never define it analytically,” and it is mentioned most commonly in cases where the challenged official acts are neither arbitrary nor capricious.¹⁶⁸ The review is “very limited” and the condemnor need not provide more than “some evidence” of necessity.¹⁶⁹ The proposed taking will be invalid only when it is “so unnecessary as to not serve any public purpose whatsoever.”¹⁷⁰

Even specific statutory or constitutional commands to the judiciary to engage in necessity review do not seem to change the reflexively deferential behavior of the courts under this standard.¹⁷¹ For example, in *State ex rel. Washington State Convention and Trade Center v. Evans*,¹⁷² the court was bound by a state constitution requiring that the judiciary, rather than the legislature, determine “whether the contemplated use be really public . . . without regard to any legislative assertion that the use is

164. JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, 6 ADMINISTRATIVE LAW § 51.03 (2008) (citing *Abbott Labs v. Gardner*, 387 U.S. 136 (1967)).

165. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 285 (1932) (Brandeis, J., dissenting).

166. STEIN ET AL., *supra* note 164, § 51.03.

167. Plater & Norine, *supra* note 11, at 667 n.16.

168. *Id.* at 668–69.

169. 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.06[2][a][ii][B] (Michael Allan Wolf ed., 2009).

170. *Id.*

171. *Id.*

172. 966 P.2d 1252 (Wash. 1998); see generally Cristin Kent, Comment, *Condemned if They Do, Condemned if They Don't: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections*, 30 SEATTLE U. L. REV. 503, 516–17 (2007) (summarizing the court's decision).

public” in eminent domain cases.¹⁷³ The state condemned property for a convention center, even though a portion of the land would be sold to a private developer for retail space.¹⁷⁴ Although the private development would partially fund the exhibit hall, the court concluded that it did not “corrupt the public nature of that project.”¹⁷⁵ The court should have taken its constitutional mandate more seriously.

A further problem with arbitrary and capricious review is that it omits important interests from the eminent domain calculus. The review focuses on whether the government has a sound legal and factual basis for its decision. But the person whose interests are most at stake—the landowner whose land is subject to the government taking—is not a meaningful part of the calculus. Although the landowner can bring evidence about his or her plight, that evidence must focus primarily on the agency’s decision and reasoning. The condemning authority obviously is more familiar and comfortable with its own factual and legal rationales and is in a better position to argue about them before the court. The heavy evidentiary burden on the landowner, combined with the nearly reflexive attitude of the judiciary, means that arbitrary and capricious review prevents few unwarranted takings.

B. The Less Drastic Means Test: Measured Judicial Review

On the other hand, the landowner’s interests cannot dominate judicial review. If landowner impairment were the court’s primary concern, then eminent domain would rarely be successful. That does not mean, however, that landowner impact cannot play some role. Instead of focusing solely on whether the condemnor acted outrageously, necessity review should ask whether the condemnor acted somewhat reasonably. A “less drastic means” test would incorporate the needs of landowners while maintaining a deferential necessity review.

The test would ask whether the condemnor’s purpose can be accomplished through less intrusive governmental means. For example, a court applying this standard would ask whether a highway could be aligned differently to minimize harm to a

173. WASH. CONST. art. I, § 16.

174. *Evans*, 966 P.2d at 1253–54.

175. *Id.* at 1256.

landowner without compromising the safety or efficiency of the project, and might require a municipality to use an easement rather than a taking.¹⁷⁶

Despite its language, which sounds rather restrictive, this review provides for considerable deference to the condemning authority. A reviewing court could not impose what it considers to be an optimal decision from among a range of options. Judges understand well that they cannot act as supervisory planning boards in land use cases. A multitude of political, financial, economic, and other concerns underlie a government entity's decision to take a parcel of land. A court should not evaluate the propriety of a government's choice between two or more substantially similar parcels of land. A judge also should not generally second guess a condemnor's development decision. If a municipality decides to construct a train depot on land taken through its exercise of eminent domain, for example, a court should not prevent the taking because it concludes that an airport would better serve the transportation needs of the city.

Judicial necessity review would be limited to whether the government entity chooses to condemn a given parcel in lieu of reasonable alternatives that do not thwart government goals. Landowners could challenge the taking by showing the presence of cheap, nondisruptive alternatives that reasonably satisfy condemnation goals. The condemnor could rebut this evidence by showing that no reasonable alternatives exist or that reasonable alternatives compromise plan goals. The court would then decide whether a rational decision maker would have made the same decision to seize that particular parcel by eminent domain. The task for the court is not to demand that the condemnor use the *least* drastic means possible, but rather to inquire whether a rational decision maker would have made the choice given that less drastic means are available.

A less drastic means test could have saved the one thousand properties sustaining over three thousand people in *Poletown*. Recall that in *Poletown* City officials presented GM with nine alternatives for its sought-after automotive facility. GM rejected them on the ground that the sites' shapes were not sufficiently rectangular and would therefore require new blueprints.¹⁷⁷ A

176. Plater & Norine, *supra* note 11, at 691.

177. *Id.* at 675 n.37.

typically deferential court, using the arbitrary and capricious standard, would rubber stamp the proposed taking by pressured City planners. Detroit's determination that it needed the land for private economic development, a legitimate public use, would suffice for the court.

Under a less drastic means test, however, the Poletown residents challenging the taking would have had some chance of success. If Detroit had no other reason for taking the particular site over the alternatives, and GM could have constructed the automotive facility on alternative parcels without destroying the homes of three thousand Detroit citizens, then the landowners would have a strong case. If the nine alternatives were somehow inferior to the selected parcel, however, then the landowners would have the burden to rebut that evidence.¹⁷⁸ A court would inquire whether the decision was reasonably supported by the facts, given the alternatives available and the degree of the losses.¹⁷⁹

Scattered examples exist of courts applying a less drastic means test. In *State v. Superior Court of Washington for Yakima County*, the court determined that the condemnor's refusal to consider an alternate plan that fully satisfied the goals of improving public safety related to a railroad crossing was im-

178. The chosen parcel did not appear to stand out especially among the alternatives:

In the *Poletown* situation I do not think anybody could have said that it was not rational to take that particular parcel that they were trying to assemble for the Poletown plant. It was near several expressways, next to railroads, and centrally located. The parcel they were assembling was of the right size and of the dimension needed for the kind of facility they wanted to construct. There were a lot of rational reasons to take that particular parcel. There were, however, a lot of other parcels, about nine total in the city of Detroit, that met the same criteria at the same time.

Mark A. Richardson, *The Role of the Public Trust Doctrine in Eminent Domain Decisions*, 1995 DETROIT C.L. REV. 55, 60.

179. As Mr. Richardson succinctly explained:

The interesting thing about those other parcels was that all of them were open fields and I believe most of them were already owned by public authority. Additionally they met all the other requirement criteria. So the question arises, why wipe out 500 businesses and destroy the family homes of several thousand people if you already have nine open fields which meet all the other criteria? Is it rational in that light? That is not really a means ends test, it is a different type of rationality. Is it rational in light of alternatives?

Id.

proper.¹⁸⁰ In *State v. 2.072 Acres*, the court ruled that the state's failure to consider alternative options for moving the center line of a roadway, given the multiple safety issues, was arbitrary.¹⁸¹ The court noted that various reasons could have made the alternate movement of the center line more costly or less safe but that the state failed to provide evidence of such reasons.¹⁸²

Another useful example of an applied less drastic means test is in *Madison County v. Elford*, where the County sought to seize private land to construct a public county road.¹⁸³ Montana statutes required a petition to establish a county road to set forth the "necessity for and advantage of the petitioned action."¹⁸⁴ Montana law also stated that seized land must be "located in the manner which will be most compatible with the greatest public good and the least private injury."¹⁸⁵ Vacating the trial court's grant of the County's prescriptive easement and condemnation of land, the Supreme Court of Montana concluded that the County arbitrarily chose the road route.¹⁸⁶ County officials claimed that the route "maximized the public good and caused the least harm to the private landowners."¹⁸⁷ They failed, however, to assess landowner damages, construction costs, and relative costs and benefits between the proposed route and an alternate route available.¹⁸⁸ The court concluded that the County did not satisfy the statutory requirements and prevented the taking.¹⁸⁹

Under this standard, a landowner's necessity challenge can certainly fail. For example, in *Schara v. Anaconda Co.*, a mining company filed a condemnation proceeding against landowners to convert their land into a dumping site for mining waste.¹⁹⁰ Unlike in the prior case, the taking authority here considered two alternative properties.¹⁹¹ It rejected one because lack of

180. 222 P. 208, 210 (Wash. 1924).

181. 652 P.2d 465, 468-69 (Alaska 1982).

182. *Id.* at 467-68.

183. 661 P.2d 1266, 1267 (Mont. 1983).

184. *Id.* at 1269 (citing MONT. CODE ANN. § 7-14-2602 (6)).

185. *Id.* at 1271 (citing MONT. CODE ANN. § 70-30-110 (1)).

186. *Id.* at 1267, 1271.

187. *Id.* at 1267.

188. *Id.* at 1267-68.

189. *Id.* at 1271.

190. 610 P.2d 132, 134 (Mont. 1980).

191. *Id.* at 137-38.

technology and market conditions prevented its use and the other because the cost of transporting waste a considerable distance was excessive.¹⁹² The court found that the condemnor sufficiently considered alternatives, thereby establishing the necessity of its taking by eminent domain.¹⁹³

Montana courts' interpretation of necessity balances consideration of landowner harm with deference to knowledgeable government authority.¹⁹⁴ The condemnor's choice of location is given "great weight" because it has the "expertise and detailed knowledge" of factors influencing the decision to take.¹⁹⁵ The court also notes that only if substantial evidence supports the conclusion that the proposal was "excessive or arbitrary" will it intervene.¹⁹⁶ It will not replace the expertise of government planners with its own judgment.¹⁹⁷ Montana case law is thus not a landowner free-for-all; rather, it weighs government discretion against consideration of landowner interests and alternatives.

A less drastic means test offers a suitable and modest method of reviving necessity review in eminent domain. An important characteristic of this test is that it preserves government discretion. The courts and the literature all agree that city planners have the experience necessary to decide the appropriateness of taking land via eminent domain. When properly re-

192. *Id.*

193. *Id.* at 138.

194. *Id.* at 137. The court's necessity guidance is instructive:

The taking of private property by condemnation proceedings must be compatible with the greatest public good and the least private injury. . . . The greatest good on the one hand and the least injury on the other are questions of fact to be determined in passing upon the question of necessity. . . . These questions commonly arise in connection with the location of the proposed improvement. Since the condemnor has the expertise and detailed knowledge of considerations involved in determining location of the improvement, its choice of location is given great weight. . . . Such choice will not be overturned except on clear and convincing proof that the taking has been excessive or arbitrary, it not being the function of the judiciary to determine as an engineer the best location of the proposed improvement[s]. . . . On the other hand when the condemnor fails to consider the question of the least private injury between alternate routes equal in terms of public good, its action is arbitrary and amounts to an abuse of discretion.

Id. (citing *Montana Power Co. v. Bokma*, 457 P.2d 769, 774-75 (Mont. 1969)).

195. *Id.* (citing *Montana Power Co.*, 457 P.2d at 775).

196. *Id.*

197. *Id.*

searched, government development plans to condemn property consider a wide variety of complex factors. A condemning authority often has a significant degree of technical knowledge.¹⁹⁸ That authority may also have to coordinate property development over a broad region, which might not be apparent to the court or landowner.¹⁹⁹ A reasonable condemnation effort that considers relevant factors while investigating alternatives in a systematic way should be upheld by any court tasked with reviewing it. The proposed test should ensure that the deck is not stacked against the government authority.²⁰⁰

This test also encourages consideration of landowner interests in the eminent domain process. When a court considers alternative means, it necessarily measures those options against the interests of the landowner. Some interests are easy to measure, such as the financial losses incurred by a landowner's business that is forced to move. Certain businesses, such as a restaurant or marina, may be location sensitive and suffer greater harm than other enterprises. Landowners, especially homeowners, can also suffer significant psychological and social harm from condemnation. Courts have traditionally avoided considering such psychological and social interests because of the difficulty of placing a value on them.

An objective measurement of such assessments can still be accomplished under a necessity review. As mentioned earlier,²⁰¹ social capital impact statements can evaluate nonmonetary interests associated with a particular condemnation.²⁰² Such statements can articulate the impact of a condemnation on neighborhood integrity, disruption of existing land uses, marginalization of homes and businesses, opportunities to integrate current residents, opportunities to resettle current residents locally, and the economic or social vulnerability of the persons impacted as measured by household income, race, fam-

198. Joris Naiman, Comment, *Judicial Balancing of Uses For Public Property: The Paramount Public Use Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 893, 919 (1990).

199. *Id.*

200. See Gideon Kanner, "[Un]Equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1100 (2007) ("No one, to the best of my knowledge, argues that condemners should be unjustly treated by the courts.").

201. See *supra* text accompanying notes 155–157.

202. Johnson, *supra* note 92, at 509–13.

ily structure, and other characteristics.²⁰³ These factors can be considered in light of interests furthered by the condemnation with due deference to the expertise of planning authorities. This does not mean that landowner interests, however compelling, necessarily override decisions of government planners. Rather, the less drastic means test encourages the acknowledgement and integration of these issues into the decision making of planners or a court faced with resolving a necessity dispute.

A less drastic means test also encourages nonjudicial settlement of land disputes. Under current necessity review, a city planner has little incentive to rigorously plan a development scheme or consider possible alternatives. Similarly, landowners have little incentive to propose alternatives or question factual assumptions. A court will most likely not consider those alternatives or factual challenges meaningfully. Given the low likelihood of a successful necessity defense, landowners may decide to devote their limited resources to challenging the valuation of the condemned property rather than the condemnation itself. Thus, the optimal development choice may not be selected. By contrast, if necessity challenges become viable and courts engage in at least some factual review, incentives increase for both sides to augment their information bases. The landowner now has an incentive to investigate the factual basis for the taking, develop a case showing a lack of a reasonable plan, and propose alternatives.

The evidence-gathering process thus creates two opposing parties with much more factual information about the condemnation than they would have in a world without necessity review. These facts can be exploited in litigation, of course, but can also be utilized to promote non-judicial resolutions. In the process, government officials might discover an alternative that meets planning goals and avoids litigation costs incurred from fighting a recalcitrant landowner. Officials might also find an alternative that reduces or eliminates a politically negative reaction that eminent domain proceedings can engender. An educated landowner may be better able to find and agree to mutually beneficial compromises. If a landowner learns of another publicly owned parcel that would suit his business, for example, he might be able to negotiate a transfer with city officials.

203. *Id.* at 511-12.

A less drastic means necessity test might encourage creative solutions that have been used before. When a developer in Euclid, Ohio wanted the City to condemn land for a marina and luxury high-rise, the City, avoiding the politically sensitive route of eminent domain, wrote polite letters requesting cooperation from landowners and expressing its willingness to reach a mutually satisfactory solution.²⁰⁴ Most landowners did not fight the condemnation in court, and the City allowed a holdout to keep his home while the development was constructed around him.²⁰⁵

In another example, Pittsburgh officials avoided resorting to eminent domain against a long-standing pizzeria holdout by obtaining the agreement of the new commercial developer to keep the restaurant in its parking lot.²⁰⁶ When a California city voted against using eminent domain to condemn a mall and transfer it to private owners, planners awarded the project to developers who successfully included the holdout discount retailers in their development plan.²⁰⁷ Although a revived necessity review is not a precondition for negotiated action, the presence of a less drastic means review can significantly encourage factual inquires that would make these and other innovative solutions, such as eliminating administrative hurdles for relocating owners, more readily apparent.

A less drastic means test may also improve the quality of government planning decisions. As one Florida court explained in *Knappen v. Division of Administration, State Department of Transportation*, “[t]he reason that Florida courts have consistently held that a judicial inquiry is permissible into the necessity of taking stems from their awareness of the ‘tunnel vision’ that so often plagues a bureaucracy which deems itself immune from judicial review.”²⁰⁸ A government agency that is virtually protected from judicial review has little incentive to carefully circumscribe plans and thoroughly consider nongovernmental impacts. When, however, government experts engage in economic redevelopment, the risk of examination by an outside entity such as a court can counteract overconfidence and an

204. Johnson, *supra* note 155, at 215.

205. *Id.*

206. *Id.* at 216.

207. *Id.*

208. 352 So. 2d 885, 891 (Fla. Dist. Ct. App. 1977) (citation omitted).

overly narrow focus that can plague bureaucratic decision making.²⁰⁹ Facing increased necessity scrutiny, government planners will not only consider the proposed condemnation more carefully but may also seek other options that equally meet planning goals while having greater factual support for their necessity. Judicial oversight, or at least the possibility of it, may have the indirect effect of increasing the incentive to find innovative land development strategies.

Lastly, the less drastic means test improves the democratic process and increases the accountability of government. Encouraging the submission of factual support in eminent domain cases by both parties facilitates public discourse about the propriety of eminent domain practices. Publicly available court records can be published through normal journalistic media and, through this information transmission, further involve the public in the process. Government planners might be subjected to increased civic pressure, which will have the positive effect of forcing officials to consider the taking option more carefully. The elected representatives who appoint city officials would also be held accountable for these appointments because communities would be given a "golden opportunity to determine their representatives' stance on a proposed taking."²¹⁰ This phenomenon, in turn, would lead to expression of these concerns on election day, further increasing government accountability.²¹¹

CONCLUSION

The Supreme Court has stated that "there is no place in our constitutional system for the exercise of arbitrary power."²¹² Despite this maxim, arbitrary power has found a comfortable home in eminent domain doctrine. The public use requirement has lain dormant for decades in federal courts. Not even the considerable citizen uprising against *Kelo* has been able to provoke a sustainable revival.

209. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 596-97 (2001).

210. Johnson, *supra* note 92, at 512.

211. *Id.*

212. *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908); see also *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 321 n.20 (1943) (Reed, J., dissenting); *Balt. & Ohio R.R. v. United States*, 298 U.S. 349, 370 (1936).

Although public use doctrine recently received the final nail in its proverbial coffin, necessity doctrine has been buried for decades. Necessity challenges rarely arise in judicial opinions and when they do appear, judges usually dismiss them. Instead, they provide a rote recitation of arbitrary and capricious review and the inevitable conclusion that the taking is neither. Other courts dispense entirely with the façade of review and simply call the question nonjusticiable. Apparently, questions of national security, foreign policy, and drainage ditches so compellingly fall within the province of the legislature that courts dare not interfere with their examination. And so, with few exceptions, the necessity doctrine remains firmly obscured under the jurisprudential rubble of over-deference.

This state of affairs need not continue. The demise of the public use requirement makes revival of the last remaining pillar of eminent domain oversight all the more compelling. As the flurry of post-*Kelo* public use research demonstrates, various options exist. Some have advocated for highly rigorous scrutiny of eminent domain proceedings. Yet too little deference can be as problematic as too much deference. Such an exacting review would discourage officials from engaging in meaningful land use planning that could improve the communities that they serve. Officials might decline to proceed with even conservative takings out of fear of extensive litigation costs and the uncertainty that necessarily accompanies searching judicial review of a decision. The review would derail otherwise valid land use plans and potentially crown the court a de facto municipal planning review board.

The wishes of government bureaucrats, however, should not be given free rein. The sunshine of judicial oversight is the best disinfectant against legislative subterfuge.²¹³ Without such oversight, even the most well-meaning government planner can unwittingly engage in abusive eminent domain practices. *Pequonnock* and *Poletown* are two such examples. If current practices do not change, cities and landowners are likely to repeat these unfortunate scenarios.

213. Cf. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 568 (2008).

The less drastic means test offered in this Article may not be the only solution, but it is one that balances the competing interests in eminent domain. Landowners are given the opportunity to present facts about costs and alternatives. Government officials, although obligated to bring forth evidence supporting the necessity of the taking, retain significant discretion to shape development plans, to which judges defer. It is unclear whether this test would appease pro-government groups such as the National League of Cities or property rights groups such as the Castle Coalition. It is neither a blank check for government nor the landowner's holy grail.

The underlying issue in eminent domain today is about not only economic development, but institutional choice as well.²¹⁴ Courts struggle—or should struggle—“with the question of which institutions in our society should decide what the proper limits of eminent domain are.”²¹⁵ As Justice Stevens stated, “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”²¹⁶ This Article endeavors to provide a modest contribution to one of the most important public and ongoing constitutional controversies of our time.

Finally, whatever happened to the members of the Pequonock Yacht Club? The City of Bridgeport, presumably stung by the unfavorable decision, knew it would need to present some factual basis for proceeding with the taking of the Yacht Club. City planners did exactly that by acquiring a definite plan, developer, funding, and state backing for a new project.²¹⁷ Feeling the pressure and threatened with even more legal costs, PYC leaders entered into negotiations with the City to relocate from

214. Douglas W. Kmiec, *2006 Templeton Lecture: Eminent Domain Post-Kelo*, 9 U. PA. J. CONST. L. 501, 527 (2006).

215. *Id.*

216. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

217. Pequonock Yacht Club, Commodore Message, <http://www.freewebs.com/pycbeacon/augustnews.htm> (last visited Oct. 21, 2009) (“The Connecticut Supreme Court granted PYC a stay of eminent domain execution several years ago by ruling that the City of Bridgeport did not have a plan, funding or developer thus allowing PYC to remain on Steel Point until such a time as the City had a viable plan for the site. Today, the City of Bridgeport has a developer, a plan, funding, and state backing.”).

their one-hundred-year-old home.²¹⁸ The property will inevitably change hands from a century-old club to the City, and then to a private developer.

A resolution, however, remains uncertain. Navigating the concrete byways of Interstate 95 in Bridgeport, Connecticut, one looking southward will find that Steel Point remains a barren stretch of land sandwiched between a highway and the Long Island Sound, with nothing present but a tangled web of weeds, unused streets, and chain link fences. The City lost the battle but won the war, yet years have passed and little has changed. Only time will tell whether the club's forced resettlement was worth all the effort, and whether the complex legal mechanisms of eminent domain served the highest public good.

218. *Id.* ("While fighting to remain a part of the Steel Point Development is certainly an option, the cost of this battle, emotionally and financially, and the cost of successive battles sure to follow would place a recurring hardship on our members. . . . By taking a proactive stance now, we bring an end to the extensive legal cost of defending our club against takeover by the City of Bridgeport.").