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LOCAL PROPERTY LAW: ADJUSTING THE SCALE OF PROPERTY PROTECTION

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This Article proposes that issues surrounding the protection of private property should be resolved at the local level, and that local governments should be allowed to select the property protection that they want to offer. Specifically, this Article proposes state legislation to create a mechanism for local precommitments around the most contested takings and land use issues. The resulting local variation in property regimes would allow consumers—homeowners, developers, and any other property owners—to select the property protection they want by choosing where to live and invest. Implicit in this proposal is the idea that property protection can be viewed as a tool for attracting investment. Given the opportunity, local governments should offer property protection when the costs of that protection—in the form of increased compensation and decreased flexibility—are less than the benefits from increased investment.

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INTRODUCTION

The Fifth Amendment's Takings Clause proscribes government takings of private property without just compensation.¹ What counts as property, and as a taking of property, remain vital but unanswered questions, as courts and scholars have been unable to provide a good, single answer to the takings puzzle.² Perhaps, however, the search for a grand unified theory of takings is misguided. A land use decision by New York City may look quite different—and implicate different concerns—than a similar decision by York village.³ This Article proposes embracing variation in limits on local government regulations. Nonuniform property protection could provide a previously unidentified source of interlocal competition, allowing different communities to satisfy different demands

1. U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

2. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1626 (2006) [hereinafter Serkin, *Big Differences*] (“The lack of coherence does not necessarily reflect a problem with the theories themselves, however, but is instead rooted in the unrealistic expectation that they each apply with equal descriptive and prescriptive force in all situations.”); cf. William A. Fischel, *The Homevoter Hypothesis* 14–16 (2001) [hereinafter Fischel, *Homevoter Hypothesis*] (suggesting takings as a solution to local land use controls, but arguing generally that local governments’ character is different from character of larger governments); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 205 (2004) (“[Federalism] concerns make it inappropriate for the Court to use the Takings Clause as a vehicle for articulating a comprehensive theory of the limits on government power to regulate land.”).

3. York is approximately forty-five minutes south of Rochester in upstate New York. It has a population of approximately 3,500, and could not be more different from New York, New York. See York, New York, at <http://www.city-data.com/city/York-New-York.html> (last visited Jan. 25, 2007) (on file with the *Columbia Law Review*).

by offering competing packages of property rights.⁴ Institutionalizing this competition would allow local governments to decide for themselves whether and how to ratchet up protection from the Takings Clause's constitutional baseline.

Specifically, this Article proposes state legislation that would give local governments a choice of various property regimes—a choice to which they would then be held as a matter of statutory, instead of constitutional, law. If a municipality wants to increase protection—in response to *Kelo v. City of New London*,⁵ for example—then it should have a way to do so that courts will enforce. On the other hand, if a city wants to retain broader authority to act without paying compensation, it should be free to do that too, so long as it is consistent with the constitutional floor.⁶ The kinds of options this Article proposes making available to local governments consist of different positions on many of the most contested takings and land use issues. These include, for example, defining “public use” narrowly or broadly,⁷ deciding how much of a diminution in property value is too much before compensation is due,⁸ and selecting the level of compensation that property owners then receive.⁹ In effect, a local government could choose the property regime it wants to offer, and then the state legislation would hold it to that choice for a certain amount of time. The key to this proposal is that precommitments by local governments will allow homeowners, developers, and investors to choose among the property regimes that best satisfy their needs.¹⁰

4. This argument is at least somewhat related to a recent suggestion that individual property owners be allowed to import ownership forms from other states, in effect creating enforceable choice of law rules governing property rights. See Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *Yale L.J.* 72, 102–05 (2005). Bell and Parchomovsky focus on interstate instead of interlocal competition, however, and therefore emphasize a different arena for competition over property rights. See *id.* at 76–78 (describing differences in state law).

5. 545 U.S. 469 (2005).

6. That constitutional floor is defined primarily by the Takings Clause. U.S. Const. amend. V.

7. See *Kelo*, 545 U.S. at 489–90 (defining “public use”); see also Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 *Pepp. L. Rev.* 335, 336 (2006) (describing Supreme Court’s “failing” in *Kelo*); Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 *Real Est. L.J.* 157, 164–70 (2005) (describing backlash in response to *Kelo*).

8. See, e.g., *Allegretti & Co. v. County of Imperial*, 42 *Cal. Rptr. 3d* 122, 135 (Ct. App. 2006) (applying diminution of value test); *Dorman v. Twp. of Clinton*, 714 *N.W.2d* 350, 357–58 (Mich. Ct. App. 2006) (same).

9. See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 *Nw. U. L. Rev.* 677, 682–704 (2005) [hereinafter Serkin, *Meaning of Value*] (identifying different approaches to compensation under fair market value standard).

10. This proposal bears some relationship to Robert Nelson’s suggestion that people living in existing neighborhoods be given the chance to form a private neighborhood. See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 *Geo. Mason L. Rev.* 827, 833–34 (1999). Underlying Professor Nelson’s suggestion is an intuition that competition

A local solution to the takings problem is particularly appropriate because of competition between local governments.¹¹ According to Charles Tiebout's famous hypothesis, local governments compete for residents who, in effect, vote with their feet by moving to—or investing in—a particular municipality.¹² That is to say, people decide where to live, and developers decide where to develop, based on the mix of taxes and services that a local government offers. For individuals and families, the choice will often turn on the quality of the local schools and the level of property taxation.¹³ Developers can often choose among a package of incentives offered, or fees demanded, by competing municipalities, depending on the desirability of the development and the costs and benefits it is expected to create.¹⁴ Creating different local property regimes allows for a new dimension in Tiebout-style sorting. Satisfying individual preferences for property regimes will unlock additional property values as people pay premiums to receive the property protection that they want.

Beyond its specific proposal, this Article also offers a new way of thinking about the nature of property protection generally, and the Takings Clause in particular. Instead of, or in addition to, protecting individual liberties, property rights should be viewed as a mechanism for attracting investment.¹⁵ This is a familiar consideration in the international context where a country's commitment to property rights, often reflected in bilateral investment treaties, is a powerful tool for attracting

over property rights can drive more efficient property offerings. *Id.* at 832 (discussing benefits of privatizing neighborhoods).

11. See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 *Stan. L. Rev.* 1, 43 (2004) (“[M]ajor cities have declined as first residents and then businesses left for greener suburban pastures. . . . [A] major culprit is the structure of local government law, which encourages the development of ‘metropolitan areas’ with major cities ringed by many dozens, if not hundreds, of independent municipalities.” (footnote omitted)); Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 *J. Affordable Housing & Community Dev. L.* 229, 230 (2003) (“[M]unicipalities frequently compete to lure desirable employers into their jurisdictions. Further, millions of central city residents have migrated into surrounding suburbs in pursuit of superior public education and other services.” (footnotes omitted)).

12. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 417–20 (1956).

13. See Vicki Been, *“Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 *Colum. L. Rev.* 473, 521 (1991) [hereinafter *Been, Exit*] (“Consumer information about the ‘best places to live’ routinely includes information about a city’s taxes, how much a city spends for education, and other indices of public service quality.” (footnote omitted)).

14. See Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 *N.Y.U. Rev. L. & Soc. Change* 151, 153–55 (2005) (discussing various financial and property-based incentives and disincentives that local governments employ to influence development).

15. See, e.g., Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 *Cal. L. Rev.* 267, 290 (1988) (discussing liberty-based conception of Takings Clause).

foreign capital.¹⁶ This insight also applies domestically, between local governments, where “foreign” investment includes everything from commercial investors choosing where to build to homeowners choosing where to live. In arguing for local choice in property protection, this Article asks what kind of property protection a government should offer, if given the ability to choose. The answer will depend, at least in part, on balancing the costs to the government of protecting private property against the benefits of increased investment. To the extent that the Takings Clause attempts to provide a constitutional answer to this same question, its interpretation should include a similar inquiry, and this may prove very different from other, more traditional takings analyses.¹⁷

The importance of interlocal competition to land use regulations is not entirely new to the takings literature. In a leading article, Professor Vicki Been identified local competition as an important market constraint on local governments’ use of exactions (fees local governments impose as a condition to permitting a particular development).¹⁸ Professor Been argued that, in the face of high exactions, a developer can always move or threaten to move elsewhere, thus constraining any extortionate use of exactions. She referred to this interlocal pressure as competitive federalism, and it is the same force harnessed by this Article’s proposal.¹⁹ Exactions, however, occupy a narrow niche in land use regulations. They apply almost exclusively to developers, and they are often

16. See George Y. Gonzalez, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 *Harv. Int’l L.J.* 305, 316 (1993) (discussing increases in foreign investment as primary goal for industrial property protection regimes); Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 *Colum. J.L. & Arts* 277, 284 (2004) (discussing difference in foreign investment in countries with varying property protection systems and highlighting “rising influx of foreign direct investment” in countries with more protective laws). But see Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 *N.Y.U. L. Rev.* 30, 139–43 (2003) (finding unpersuasive justification of expanded property protections as tool to encourage foreign investment).

17. The more traditional takings analyses have been divided into concerns of efficiency and fairness. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 *Harv. L. Rev.* 997, 998 (1999). The former involves creating efficient regulatory incentives for government and efficient investment incentives for property owners to develop their own property. See *id.* at 997–99 (offering solution to competing concerns of creating efficient regulatory incentives for government and efficient investment incentives for property owners). Fairness, on the other hand, has been described as barring “[g]overnment from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Harlan, J., dissenting).

18. See Been, *Exit*, *supra* note 13, at 476 (identifying exit, or “the opportunity a dissatisfied person has to . . . move from the jurisdiction,” as important market constraint on local governments); *id.* at 478–83 (describing exactions).

19. *Id.* at 509–11 (describing effect of competitive federalism on local land use exactions). But see Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *Vand. L. Rev.* 831, 834–38 (1992) [hereinafter Sterk, *Competition*]

calculated according to statutory schedules that can be anticipated before investing too much money and time into a project.²⁰ Other aspects of a local government's treatment of land—from the prospect of hostile rezoning in the face of development, to the willingness to grant zoning variances and enter into development agreements—are far less apparent ahead of time. Exactions, too, are sometimes imposed on an ad hoc basis, thus requiring developers to invest a lot of money before knowing the extent of the concessions the local government will demand.²¹ This Article therefore builds on Professor Been's important descriptive claim that exactions are constrained by a kind of market for regulations, offering a new proposal to make the market for land use regulations function more efficiently and apply more broadly than to exactions alone.

Already, local governments with a reputation for hostility to developers may see development decline.²² Conversely, those with a reputation for encouraging development will likely see it increase. There is, in other words, already natural variation among local governments around land use regulations.²³ The problem with relying on these reputational conse-

(responding to Professor Been and arguing that local governments do not compete for some uses).

20. See, e.g., Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 644 (2004) (“[M]any jurisdictions across California, and presumably elsewhere, have established new but costly procedures for calculating exactions.”); Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 Wake Forest L. Rev. 563, 591–92 (2000) (describing Georgia statute requiring schedules for impact fees).

21. See Been, *Exit*, *supra* note 13, at 481 (“Local governments impose exactions either according to a nondiscretionary, predetermined schedule, or through case-by-case negotiations.”). In recent years, there has been a move toward less discretionary fee schedules for exactions and impact fees. See Fenster, *supra* note 20, at 645 n.176 (citing sources supporting trend). Nevertheless, the complexity of impact fee and exaction requirements can make it difficult to predict how they will be imposed in a particular instance. Cf. Edward J. Sullivan & Isa Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 Urb. Law. 53, 53–54 (2005) (“[M]unicipalities across the country are busy quantifying impacts [of development], and developers continue to be frustrated by the extent of municipal infrastructure finance demands. . . . [T]here is no mechanism to assure that . . . infrastructure financing demands imposed on developers will not cost more than the actual total impact of the development.”).

22. See, e.g., Purvette A. Bryant, *Rules, Image Affect Business Development*, Orlando Sentinel, Dec. 15, 1994, at 11 (“[W]est Volusia has an image problem it must overcome in order to strengthen itself economically.”); Janet Clayton, *Overlapping Communities Add Up to 4,000 Miles of Red Tape*, L.A. Times, Nov. 15, 1987, § 4, at 9 (“But some leaders now say the Southland’s reputation for crazy-quilt regulation could force out some businesses and keep others from coming in.”); cf. Eric Sturgis, *DeKalb Tries New ‘Overlay District’ Planning*, Atlanta J.-Const., June 10, 2002, at C3 (“Planners caution overlay districts can become another layer of bureaucracy that discourages developers from coming to an area.”).

23. See Shelia R. Foster, *From Harlem to Havana: Sustainable Urban Development*, 16 Tul. Envtl. L.J. 783, 803–04 (2003) (discussing employment of local groups and community-based “decision-making structures” in land use and planning to utilize resources that promote economic and social development). In fact, local governments and local residents employ all kinds of signaling mechanisms and proxies to attract the

quences is that they are insufficiently sticky to generate the real benefits of Tiebout-style sorting. A local government has no way of guaranteeing that its regulatory forbearance in one instance will carry forward in the future.

Local governments can change. Land use restrictions in place when someone buys property may not be in place later. Such changes are quite common and are at the heart of much takings litigation against local governments. Not only can a local government rezone individual property, it can amend its zoning ordinance to redefine locally permitted uses.²⁴ Electoral changes or shifts in demographics can also cause subtle or not-so-subtle shifts in a local government's attitude toward private property generally, perhaps leading to greater scrutiny of subdivision applications or simply a newly obstructionist attitude toward development.²⁵ Sometimes, plans can even be thwarted by popular referendum changing the applicable land use regulations.²⁶

This Article ultimately does not propose locking in specific land uses or zoning ordinances, or removing local governments' flexibility in addressing new land use issues. Local flexibility in this arena is undoubtedly a good thing. Zoning ordinances are often amended because of genuine changes in the character of a community, technological changes, or shifts in local priorities.²⁷ A local government's attitude toward condemnation may change as it faces new and unexpected economic challenges. In-

kinds of uses and neighbors they want and to repel those they do not. Cf. Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 *Stan. L. Rev.* 1365, 1388 (1997) (describing "social meaning" of jurisdictional boundaries); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 *Va. L. Rev.* 437, 454–55 (2006) (arguing that local governments use investment in "club goods" that only certain demographics favor in order to discourage others from entering community).

24. See, e.g., *Parkview Homes, Inc. v. City of Rockwood*, No. 05-CV-72708-DT, 2006 WL 508647, at *1–*3 (E.D. Mich. Feb. 28, 2006) (discussing city's change in permitted uses following issuance of building permit); 1 John J. Delaney et al., *Handling the Land Use Case* § 20:1 (3d ed. 2006) ("Another method of downzoning is to amend the text of a zoning ordinance to change the allowable uses . . .").

25. Cf. *Vanderveen v. City of Arroyo Grande*, No. B178611, 2006 WL 41149, at *1 (Cal. Ct. App. Jan. 9, 2006) (discussing differing approach of "newly constituted city council" to conservation of agricultural land within city).

26. See *Trafalgar Corp. v. Miami County Bd. of County Comm'rs*, No. 2002-CA-20, 2004 WL 68014, at *1–*2 (Ohio Ct. App. Jan. 16, 2004) (upholding voters' denial, by referendum, of rezoning because that denial was based upon rational concerns).

27. See, e.g., *C.R. Johnson Co. v. City of Selah*, No. CV-04-3104-LRS, 2006 WL 319308, at *1 n.1 (E.D. Wash. Feb. 10, 2006) (discussing moratorium enacted in recognition of water system problems caused by booster pumps in developments at high elevations); *Vanderveen*, 2006 WL 41149, at *1 (discussing amended designation and subsequent redesignation of property under comprehensive plan amendment); *Riya Finnegan, LLC v. Twp. Council of S. Brunswick*, 900 A.2d 325, 325–28 (N.J. Super. Ct. Law Div. 2006) (discussing amendment to zoning ordinance inconsistent with township's master plan motivated by residents' desire for "less intensive use" of property); see also Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 *Va. L. Rev.* 739, 753–69 (2002) (discussing importance of flexibility in land use decisions).

stead, this Article addresses a higher-level issue: What treatment will property owners receive in the face of change? How much can property owners rely on existing property rules and what will their remedies be when their expectations are not met?²⁸ These more fundamental questions of property protection are now treated uniformly under the Takings Clause, or under equivalent state constitutional provisions.²⁹ And instead of preserving flexibility, forced uniformity around these questions inappropriately ties local governments' hands. If a particular local government wants to precommit to greater property protection, such a precommitment might be better for everyone. It will give local governments another bargaining chip in the competition for desirable local uses, and will give developers, investors, and even individual homeowners the ability to select from a variety of competing property regimes.

This is not a proposal to be undertaken lightly. Interlocal competition around property protection could lead to a race to the bottom and a general abdication of local land use controls if all property owners' interests are aligned in the same direction, preferring the strongest possible property protection.³⁰ In fact, they are not. True, many developers and

28. These remedies will sometimes include liability rules, see *infra* text accompanying notes 121–158 (describing options with damages as remedy), and sometimes property rules, see *infra* text accompanying notes 114–119, 159–163 (describing options with property-rule protection), to use the terminology pioneered by Calabresi and Melamed. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972).

29. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation.” (citation omitted)); *Bailey v. Myers*, 76 P.3d 898, 900–03 (Ariz. Ct. App. 2003) (discussing state constitution); *Bd. of County Comm’rs of Muskogee County v. Lowery*, 136 P.3d 639, 650–52 (Okla. 2006) (same). Some state statutory provisions may also be applicable. See *Redev. Agency of Chula Vista v. Rados Bros.*, 115 Cal. Rptr. 2d 234, 238–40 (Ct. App. 2001) (discussing statute limiting use of eminent domain); *Talley v. Hous. Auth. of Columbus*, 630 S.E.2d 550, 552–53 (Ga. Ct. App. 2006) (discussing state constitutional amendment and subsequent legislation that specifically allows for acquisition of private property using eminent domain when that property is to be sold to private party for private use); *Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Sewer Comm’n*, 625 S.E.2d 227, 232–33 (S.C. Ct. App. 2005) (discussing S.C. Code Ann. § 28-2-470 (1991), which authorizes landowner to bring separate action challenging condemner’s right to condemn subject property and automatically stays all proceedings under condemnation until disposition of that action), overruled on other grounds by *Edwards v. SunCom*, 631 S.E.2d 529 (S.C. 2006).

30. See generally Ted Janger, *The Public Choice of Choice of Law in Software Transactions: The Dim Prospects for Uniformity*, 26 *Brook. J. Int’l L.* 187, 190–91 (2000) (describing generally phenomenon of interjurisdictional competition resulting from differing laws and regulations designed to attract business and investment that potentially creates a “race to the bottom” by which problematic externalities are imposed on competing jurisdictions); Scott R. Saleska & Kristen H. Engel, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 *Cornell J.L. & Pub. Pol’y* 55, 61–62 (1998) (describing “race to the bottom” in environmental context, whereby relaxation of local standards leads to decline in locality’s social welfare).

some property owners might well prefer strong protection for their property. A precommitment to offer heightened property protection will, indeed, attract developers who otherwise might fear that their investment in land—a significant immovable asset—will be subject to capricious political pressures.³¹ Individuals who favor strong property rights will be similarly drawn to such jurisdictions. But others might well prefer to live in a place with less property protection. They may willingly exchange some protection of their own property for a say in what their neighbors can do on their property, in the form of aesthetic zoning, or maximum density requirements, to name just two examples. In other words, some people prefer to live in places with robust zoning and other land use controls. Others, however, prefer a more libertarian, hands-off approach when it comes to property. People should be able to choose which they prefer.

The property regime that will reflect most local governments' best interests will be the one that maximizes local property values.³² For some, it will consist of robust property protection to attract new development.³³ For others, however, it will include retaining strong regulatory control over local land uses.³⁴ The best property regime is different depending on the relative costs and benefits of property protection in the specific local context.³⁵ This attention to local variation has largely been missing from the property rights debate.

Part I of this Article lays out the theoretical foundation for proposing locally variable property protection. Part I discusses the need for local variation and introduces the Tiebout Hypothesis. Part II offers up this Article's specific proposal, describing the important dimensions for any legislation allowing for local option property protection. Part III examines the costs and benefits of the proposal. Part IV then identifies the likely preferences of different governments. Part IV also suggests how

31. William A. Fischel, *Regulatory Takings* 139 (1995); see also Carol M. Rose, *Takings, Federalism, Norms*, 105 *Yale L.J.* 1121, 1126–27 (1996) [hereinafter Rose, *Takings*] (reviewing Fischel's book and discussing Fischel's "Federalism Thesis").

32. See, e.g., Fischel, *Homevoter Hypothesis*, *supra* note 2, at 8–10 (discussing "special motivation" of homeowners to maximize collective community property values); Paul E. Peterson, *City Limits* 24 (1981) ("[U]nless it can alter [its] land area, through annexation or consolidation, it is the long-range value of [its] land which the city must secure—and which gives a good approximation of how well it is achieving its interests.").

33. See, e.g., Matt Harrington, *Dell Eyeing More Than One Triad Suitor*, *Bus. J. Greater Triad Area* (Greensboro, N.C.), Aug. 6, 2004, available at <http://www.bizjournals.com/triad/stories/2004/08/09/story1.html> (on file with the *Columbia Law Review*) (discussing incentive packages put together by economic developers to attract Dell to competing counties in North Carolina).

34. See William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Envtl. L.* 105, 106, 112–17 (2006) (discussing beneficial effects land use and zoning regulations have on property values).

35. See Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 *U.C. Davis L. Rev.* 103, 105–06 (2001) (discussing infrastructure costs as impetus for exactions).

these preferences might help shape our understanding of property protection and the Takings Clause.

I. THE LOCAL DIMENSION OF PROPERTY LAW

Holding all local governments to the same level of private property protection makes little sense.³⁶ Limitations on the government's power to regulate or even to condemn property will have a very different impact on rural towns, suburbs, and central cities. While permitting condemnations for economic redevelopment might be necessary for a city like New London, Connecticut—the site of the Supreme Court's recent controversial property decision³⁷—it may seem outrageous in a wealthy, outer-ring suburb.

This Part first puts a new gloss on two recent takings issues: the Supreme Court's decision in *Kelo v. City of New London*,³⁸ and the threatened taking by a town of a private golf course in Long Island to convert it into a public course.³⁹ In addition to the obvious sources of controversy—well worn already in the takings literature and popular press⁴⁰—both cases also present particular but previously unidentified systemic challenges for local governments, challenges that this Article's proposal addresses.

A. Two Examples of Local Takings

1. *Kelo v. City of New London*. — In its recent and already famous decision, *Kelo v. City of New London*, the Supreme Court held that the Public Use requirement in the Takings Clause did not prevent New London from condemning property from individual homeowners to

36. The best justifications turn, in essence, on cost-effectiveness, suggesting a tradeoff between simplicity and closeness of fit. Here, the costs of simplicity include the forgone benefits of interlocal competition over property rights, and the benefits of simplicity are limited at best. Few laud takings law for its simplicity.

37. *Kelo v. City of New London*, 545 U.S. 469 (2005); see also Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *Geo. L.J.* 1985, 2003–04 (2000) (discussing Myron Orfield's characterization of outer-ring suburbs as communities that yield disproportionate political influence and enjoy disproportionate infrastructure investments without internalizing a proportional share of the region's social burdens).

38. 545 U.S. 469.

39. See Vivian S. Toy, *A Property Battle Pitting Two Giants*, *N.Y. Times*, Mar. 12, 2006, § 14, at 1 (discussing North Hills's efforts to condemn Deepdale Golf Club); see also Lauren Collins, *Long Island Postcard: Liberté, Egalité, Golf*, *New Yorker*, Apr. 3, 2006, at 27, 31 [hereinafter Collins, *Long Island*] (describing opposition to North Hills's plan); Collin Nash, *No Deal on a Deepdale Takeover*, *Newsday*, July 6, 2006, at A19 (discussing Mayor's efforts to stop condemnation).

40. See, e.g., Kanner, *supra* note 7, at 336–38 (describing Supreme Court's "failings" in *Kelo*); John M. Broder, *States Curbing Right to Seize Private Homes*, *N.Y. Times*, Feb. 21, 2006, at A1 (describing state movements toward limiting use of eminent domain for economic development); see also Sanders & Pattison, *supra* note 7, at 164–70 (describing backlash in response to *Kelo*).

transfer to a developer for the purpose of economic redevelopment.⁴¹ The case caused a public outcry.⁴² Many people worried that the Court's ruling cast all property rights into doubt.⁴³ Anyone's home could be taken, people feared, if the government said it could be put to more productive use in another's hands.⁴⁴ Some property rights activists went so far to make this point that they tried to convince Weare, New Hampshire to condemn Justice Souter's family home to make an inn—they proposed to call it the Lost Liberty Hotel—as a form of retaliation for joining the majority opinion.⁴⁵

To many people, the reaction to *Kelo* has seemed overwrought.⁴⁶ The fact is that most local governments do not engage in the kind of economic redevelopment that New London undertook.⁴⁷ Most local gov-

41. *Kelo*, 545 U.S. at 488–90.

42. See, e.g., Marc B. Mihaly, Public-Private Redevelopment Partnerships and the Supreme Court: *Kelo v. City of New London*, 7 Vt. J. Envtl. L. 41, 41 (2006), at <http://www.vjet.org/articles/pdf/sorryforthe.pdf6.pdf> (on file with the *Columbia Law Review*) (“[P]roperty rights groups and libertarian think tanks excoriated the majority opinion and celebrated the dissents. More interesting is the reaction of the rest of the population. Though with less animus than the organized political right, Americans of most political persuasions found the majority decision wrong-headed and oppressive.”).

43. At least one prominent property rights advocate forecast this sentiment after the Supreme Court granted certiorari in *Kelo*. See Ilya Somin, Robin Hood in Reverse: The Case Against Economic Development Takings, Policy Analysis (Cato Inst.), Feb. 22, 2005, at 4, available at <http://www.cato.org/pubs/pas/pa535.pdf> (on file with the *Columbia Law Review*) (discussing “dangers of the economic development rationale for condemnation” as a “blank check” for utilization of power of eminent domain on behalf of private interests); see also Paul Craig Roberts, The *Kelo* Calamity, Wash. Times, Aug. 7, 2005, at B04 (arguing that “the *Kelo* decision threatens all private property” by eliminating distinction between public and private uses).

44. See, e.g., Susette Kelo, Editorial, Government Has No Right to Take Private Homes, Buffalo News, July 5, 2006, at A8 (“One year ago, the U.S. Supreme Court ruled that my home could be taken by the government and handed over to another private party for its private use. . . . There went my property rights, and yours, too.”). This slippery slope argument has infected most of the post-*Kelo* rhetoric. See David Barron, Eminent Domain Is Dead! (Long Live Eminent Domain!), Boston Globe, Apr. 16, 2006, at D1 (“Spurred by the warning in Justice Sandra Day O’Connor’s dissent that the ruling threatened to trade in every Motel 6 for a Ritz, press accounts played up the likelihood that cities would soon seize middle-class homes and small businesses to enhance the local tax base.”); cf. Castle Coal., About Us, at <http://www.castlecoalition.com/profile/index.html> (last visited Feb. 1, 2007) (on file with the *Columbia Law Review*) (“The Castle Coalition is the Institute for Justice’s nationwide grassroots property rights activism project. [We] teach [] home and small business owners how to protect themselves and stand up to the greedy governments and developers who seek to use eminent domain to take private property for their own gain.”).

45. See John Tierney, Op-Ed, Supreme Home Makeover, N.Y. Times, Mar. 14, 2006, at A27 (discussing activists’ efforts to condemn Justice Souter’s Weare, N.H. home to better serve public interest as hotel named Lost Liberty Hotel).

46. See, e.g., Thomas W. Merrill, Six Myths About *Kelo*, Prob. & Prop., Jan.–Feb. 2006, at 19 (describing misconceptions about judgment).

47. Although there is no precise way to measure the frequency of attempts to condemn property for economic development, the limited number of cases challenging a taking for failure to meet the public use requirement is at least telling. Between 1954 and

ernments would not dream of condemning a Motel 6 and transferring the property to a more expensive Ritz Carlton.⁴⁸ Chances are, property rights are no less safe after *Kelo* than they were before *Kelo*, because the most important check on government power remains political and not judicial.⁴⁹ And politically, only certain kinds of governments, facing certain kinds of economic problems, are likely to engage in the high-stakes gamble of condemnations for the purpose of economic redevelopment.

Perhaps people's central problem with *Kelo*, then, is not that it actually undermines their property rights but that they have no way of knowing whether their own community might use New London-style economic development tactics. *Kelo* is seen as a threat to property rights primarily because local governments have no way of credibly reassuring property owners that they would not engage in condemn-and-retransfer plans to put people's property to more valuable use. Some local governments have attempted to reassure local property owners by promising to forgo condemnations for economic redevelopment. These are funny kinds of promises, subject to amendment, or even repeal, if the local government later changes its mind, which is to say, if a majority of voters in the town decides that a condemnation for economic redevelopment is a good idea.⁵⁰ Of course, this is precisely the condition that would lead to a condemnation in the absence of a local ordinance, making the ordinance a symbolic but not particularly substantive constraint on local politicians.⁵¹

1986, only 308 state and federal cases addressed the question of whether a condemnation was for a public use. See Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 95 (1986) [hereinafter Merrill, *Public Use*]; see also Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 *Real Prop. Prob. & Tr. J.* 251, 257 (2004) (updating Merrill's study for 1986–2003 and finding only 236 additional cases challenging public use of condemnation).

48. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) ("The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

49. See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 *Geo. Wash. L. Rev.* 934, 982 (2003) ("Just as political restraint, rather than judicial intervention, is necessary to limit most regulatory excesses, the political branches rather than the judiciary must provide the front-line defense against a temptation to overuse the eminent-domain power.").

50. E.g., *Town of Seymour, Conn., Ordinance Restricting Eminent Domain* (2005), available at www.seymourct.org/pdf/ordinance%20eminent%20domain.pdf (on file with the *Columbia Law Review*); Sara Welch, *Milford Lawmakers Vote to Limit Eminent Domain*, *WTNH News Channel 8*, July 11, 2005, at <http://www.wtnh.com/Global/story.asp?S=3581034&nav=3YeXc0on> (on file with the *Columbia Law Review*) (describing ordinance similar to *Town of Seymour's* in another Connecticut city).

51. This is true whether local governments are in fact majoritarian—as the claim assumes—or under the control of special interest groups. There is no reason to think that the conditions that would lead a local government to condemn property for economic redevelopment—whether majoritarian or minoritarian political pressure—would not also lead the government to reverse an ordinance preventing such a condemnation.

At least this part of the concern over *Kelo* would disappear if local governments that do not want the power to condemn and retransfer could make a more credible commitment that they would not do so, while those that wanted to retain the power could put current and future residents on notice. Presumably, if given the choice, some local governments would choose to retain the power to condemn and retransfer property as in *Kelo*, and some would give it up. To foreshadow the substantive discussion in Part IV, it is simply not the case that everyone would prefer to buy into a town that cannot condemn and retransfer property to promote economic redevelopment.⁵² Indeed, those local governments with the greatest power to engage in aggressive economic redevelopment may fare the best in the Tiebout-style battle for residents and property values. While living in such a town comes with some risks—risks that yours will be the property that ends up being taken—it may also come with significant economic benefits. People, and local governments, should be allowed the choice.

2. *A Private Golf Course in Long Island.* — In a story recently percolating through the mainstream and not-so-mainstream press, the wealthy town of North Hills in Long Island considered condemning Deepdale, an exclusive and extremely expensive private golf course.⁵³ The town's plan, ultimately abandoned, was to turn Deepdale into a public golf course. According to some, the reason for the condemnation was simply that certain townspeople were unhappy that they could not become members of the club and wanted to be able to golf there instead of at the half-dozen-or-so public courses within a thirty-mile range.⁵⁴ In some ways, this is an easier case of public use than *Kelo* because the condemned property would actually have been open to the public. On the other hand, the town did not claim that the public golf course would have created more jobs or generated more money for the town than the private golf course, nor that it would have given rise to any of the other ancillary benefits that condemnations are usually said to create.⁵⁵

52. This point is discussed *infra* Part IV.B.

53. See Collins, Long Island, *supra* note 39, at 27 (discussing Village of North Hills's contemplation of eminent domain to acquire Deepdale golf course); Mike Hughes, Eminent Domain Move Should Concern Industry, *Golf Course News*, Mar. 16, 2006, at <http://www.golfcoursenews.com/news/news.asp?ID=2284> (on file with the *Columbia Law Review*) (discussing "slippery slope" concerns raised by municipality's potential ability to condemn privately owned golf courses for conversion to upscale municipal courses); see also The Daily Show with Jon Stewart: Course Correction (Comedy Central television broadcast May 2006), at <http://www.comedycentral.com/shows/index.jhtml?playVideo=63619> [hereinafter Daily Show] (describing planned condemnation and satirizing North Hills's justifications for it).

54. See Daily Show, *supra* note 53.

55. James Krier & Christopher Serkin, Public Ruses, 2004 Mich. St. L. Rev. 859, 861–63. In *Kelo*, New London argued that it was creating substantial ancillary benefits to the local economy by engaging in aggressive economic redevelopment. Brief of the Respondents at 8–11, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108).

In addition to making an interesting story, this proposed use of eminent domain highlights a concern that condemnations can lead to systemic underinvestment in property. Imagine a golf course builder considering building a new private golf course elsewhere in Long Island. The project necessarily comes with costs and potential gains. In addition to the familiar costs, however, the developer will also have to consider the possibility that the town might seize the golf course and turn it public. This risk might transform a project from a net winner to a net loser, leading some golf course developers, at least on the margin, not to build.⁵⁶

But what if this next town really wanted to attract a private golf course? What if it was actively trying to create the cachet that a private golf course would bring to the community? The town again has no credible mechanism for reassuring the golf course builder that it will not eventually condemn the golf course and turn it public.⁵⁷ The only way the town can induce the developer to build is to give economic concessions equal in value to the risk of future condemnation. From the town's perspective, this is a particularly bad bargain, especially if it has no intention of condemning the golf course. It must compensate for harms that it will never impose, simply because it has no way of guaranteeing that it will not impose them. A mechanism for making such a guarantee would be far more efficient for both parties.

Obviously, this problem applies to more than just golf courses.⁵⁸ Any decision to develop or invest in property involves weighing the costs and benefits of the investment and will include some risk of government action. A local government could stimulate investment by reducing that risk. While reducing risk can always take the form of economic and other concessions up front, such concessions are likely to prove more costly to a local government than precommitting to refrain from actions it has no intention of undertaking in the future. The local government is then assuming some risk that its hands will be tied in the event of unforeseen changes in local conditions, but this is a risk that the local government can choose to assume or not.⁵⁹

56. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509, 512–14 (1986) (discussing effect of compensation on investor incentives).

57. The best current option for some local governments is to enter into a development agreement. Development agreements, however, are an imperfect solution. See *infra* Part I.D.

58. Another recent example involves the attempt by a town in Martha's Vineyard to condemn a closed movie theater in order to force it to reopen. See Max Hart, *Capawock Stays Closed for Now*, *Vineyard Gazette* (Edgartown, Mass.), Aug. 11, 2006, available at http://www.mvgazette.com/news/2006/08/11/capawock_theatre.php (on file with the *Columbia Law Review*).

59. See Richard A. Posner, *Economic Analysis of Law* 88 (6th ed. 2003) [hereinafter *Posner, Economic Analysis*]; Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *J. Legal Stud.* 1, 4 (1978) (discussing efficiency of imposing risk on lowest cost avoider); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Legal Stud.* 83, 87–88 (1977).

B. *Property Protection: One Size Does Not Fit All*

There is a natural temptation to resolve questions of property protection on the state level. That has, in fact, been the predictable and widespread response to *Kelo*. Most states have passed or are considering legislation to tighten the public use requirement.⁶⁰ Instead of allowing some local governments to precommit not to take property for economic development, these kinds of state responses would effectively mandate such precommitment by forbidding categories of condemnations altogether.⁶¹ But a statewide response operates at the wrong scale. Certainly, it will settle property rights in the state, but at tremendous cost. The power to condemn and retransfer property is far more important to some governments than to others, particularly those whose density means that any project will require bargaining with many people and that holdout problems are almost inevitable.⁶²

Consider New York City's recent development projects that have depended on the power to condemn and retransfer property to a private developer. In 2002, New York City condemned most of the block on 8th Avenue, between 41st and 42nd Streets, to transfer to the New York Times in order to keep the paper's headquarters in the city.⁶³ The resulting bundled property was incredibly valuable.⁶⁴ Although there were plenty of objections to the project, few people disputed the city's power to assemble land in this way.⁶⁵ Indeed, it is hard to imagine how New York City could create any large-scale project without the power—or at

60. See Sibley Fleming & Parke Chapman, *Eminent Outrage*, Nat'l Real Est. Investor, Feb. 1, 2006, at 20, 21 (describing legislation).

61. See Patricia E. Salkin & Margaret Lavery, *Irresponsible Legislating: Reeling in the Aftermath of Kelo*, 34 Real Est. L.J. 375, 385–88 (2005) (describing state legislative responses prohibiting condemnations for economic development).

62. The common justification for the power of eminent domain is to overcome holdout problems. Merrill, *Public Use*, supra note 47, at 75.

63. See Paul Moses, *The Paper of Wreckage: The "Times" Bulldozes Its Way to a Sweetheart Land Deal You Will Pay for*, Village Voice (New York, N.Y.), June 25, 2002, at 34 (describing deal); see also Michael A. Heller & Roderick M. Hills, Jr., *LADs and the Art of Land Assembly 4* (Oct. 24, 2006) (unpublished manuscript, on file with the *Columbia Law Review*) (same).

64. The building was leased by the New York Times for \$85.6 million, which amounts to approximately \$63 per square foot. Moses, supra note 63. A plot of land purchased across the street was worth \$180 per square foot. *Id.*

65. See David W. Dunlap, *Blight to Some Is Home to Others: Concern over Displacement by a New Times Building*, N.Y. Times, Oct. 25, 2001, at D1 (discussing objections to development of New York Times building in Manhattan based on inappropriate designation of blight and use of precondemnation that decreased values and discouraged private investment). This is also true of current plans to develop the Brooklyn Rail Yards. See Nicholas Confessore, *Blight, like Beauty, Can Be in the Eye of the Beholder*, N.Y. Times, July 25, 2006, at B1 (discussing contention over "blighted" designation of twenty-two acre site where Forest City Ratner hopes to develop stadium and high-rise residential buildings); see also *Develop Don't Destroy Brooklyn*, at <http://developdontdestroy.org> (last visited Feb. 2, 2007) (on file with the *Columbia Law Review*) (opposing use of eminent domain for development around Atlantic Rail Yards in

least the credible threat—of eminent domain.⁶⁶ A statewide redefinition of “public use” would have a very different impact on New York City than it would on, say, the small upstate village of York,⁶⁷ and a statewide redefinition of public use fails to capture these differences.

More generally, any statewide changes in property protection designed to induce investment will miss their target if they fail to account for differences between local governments. Certainly, the expected value of a development will increase as the risk of government regulation or condemnation decreases. But restricting the power of a local government to regulate or condemn property comes with its own substantial costs, costs that vary from government to government.

Take, for example, fees and exactions that local governments sometimes charge developers.⁶⁸ A state could stimulate development by limiting a local government’s power to impose fees or exactions, thus reducing the expected costs of development. In a community with insufficient infrastructure to handle new development, the marginal cost of development is higher than for communities with excess capacity in their infrastructures.⁶⁹ The inability to pass on some of the costs of new development to developers will hurt the former communities more than the latter. In effect, then, statewide changes in local governments’ ability to regulate or condemn property will have unintended distributional consequences between communities. The costs to at least some communities may prove much greater than the gains supposedly created by greater statewide property protection.

C. *Tiebout and Competition for Property Protection*

This Part has so far focused on the costs created by local governments’ inability to precommit to a particular level of property protection. There are, in addition, specific gains that nonuniform property protection can generate. These arise from the interlocal competition described famously by Charles Tiebout.⁷⁰

Brooklyn, N.Y., as an inappropriate, abusive, and unconstitutional use of power to condemn).

66. See Diane Cardwell, *Bloomberg Says Power to Seize Private Land Is Vital to Cities*, N.Y. Times, May 3, 2006, at B1 (discussing Mayor Bloomberg’s contention that authority to condemn under New York State’s existing eminent domain powers is essential component of successful development in cities).

67. See *supra* note 3 and accompanying text (describing York).

68. See Been, *Exit*, *supra* note 13, at 478–79 (“Exactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit.”).

69. See Carlson & Pollak, *supra* note 35, at 117 (“The theory behind imposing exactions is that new development strains public services; exactions are designed to offset some or all of the burden the new development imposes.”).

70. Tiebout, *supra* note 12, at 422.

According to the Tiebout Hypothesis, local governments are in direct competition with each other to attract residents.⁷¹ The terms of the competition are the particular mix of services and taxes that the local government can offer. All else being equal, a town with better schools will see demand for its property increase, and thus its property values rise. Conversely, a town that charges higher property taxes will see the opposite. Indeed, empirical studies confirm that property taxes are capitalized almost fully into property values so that an increase in property taxes results in a corresponding decrease in property values.⁷² Property values therefore reflect whether and the extent to which the value of local services exceeds their cost in property taxes.

Of course, not all property owners want the same thing. Families with school age children are likely willing to pay more in property taxes for better schools than those without.⁷³ Some older couples without school age children may prefer their tax dollars to be spent maintaining roads and on public safety.⁷⁴ Preferences for services are diverse, and people will tend to sort themselves into communities that share their particular priorities.⁷⁵

71. This argument relies not only on Tiebout's seminal article, but also on the work of subsequent contributors to Tiebout's theory, the most influential of whom include Fischel, Homevoter Hypothesis, *supra* note 2, at 59–60 (arguing that homebuyers are aware of and able to act on differences in communities); Bruce W. Hamilton, Zoning and Property Taxation in a System of Local Governments, 12 *Urb. Stud.* 205, 208–09 (1975) (suggesting constraints on Tiebout's Hypothesis to improve accuracy of model); Wallace E. Oates, The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis, 77 *J. Pol. Econ.* 957, 968 (1969) (concluding that empirical study of correlation between property values and property taxes and education expenditures supports Tiebout's Hypothesis); Wallace E. Oates, The Effects of Property Taxes and Local Public Spending on Property Values: A Reply and Yet Further Results, 81 *J. Pol. Econ.* 1004, 1006–08 (1973) (responding to criticism of his study).

72. To be precise, property values decrease by the present value of the annual increase in property taxes. Fischel, Homevoter Hypothesis, *supra* note 2, at 49–51.

73. E.g., Ira Mark Ellman, Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines, 2004 *U. Chi. Legal F.* 167, 196 (“[A]dults with children pay a premium for homes in child-friendly locations with better schools and easy access to parks or other child-centered recreational opportunities, so that the children’s presence in the household accounts for more than their per capita share of the housing cost.”); Martha Minow, Lecture, Reforming School Reform, 68 *Fordham L. Rev.* 257, 281 (1999) (“Wealthier, more educated, and more motivated parents already choose to live in districts with better schools, to pay for private schools, or to press for scholarships or slots in magnet schools, Metco programs, or a particularly effective teacher’s classroom.”).

74. Roy Bahl, Local Government Expenditures and Revenues, in *Management Policies in Local Government Finance* 77, 77–78 (J. Richard Aronson ed., 4th ed. 1996) (“[T]he government should try to deliver the package of government services and taxes that the population wants. This ‘preferred’ package can be affected by a number of factors. Syracuse requires more snow removal than does St. Petersburg, which requires more services for elderly residents.”).

75. Been, *Exit*, *supra* note 13, at 525 n.249 (citing sources). As one leading commentator describes the Tiebout Hypothesis:

[S]ince persons differ in their preferences for governmental revenue and expenditure patterns, any potential resident will gravitate to a locality that offers

This account gets considerably more complex as the interlocal competition becomes more sophisticated. For local governments, there is a distinct hierarchy in the uses they want to attract to the town. Most desirable are people, or businesses, that bring a high tax base without burdening public services, like schools and roads.⁷⁶ Among the least desirable are low-income families with school age children.⁷⁷ The former reduce the costs of public services to everyone else; the latter, the opposite.

Instead of indiscriminate competition for residents, then, local governments in fact compete to attract specific kinds of uses and residents. This competition tends to be fought with land use controls—precisely the intersection of local governments and substantive property protection.⁷⁸ Here, again, there is diversity in the specific approaches local governments might take depending on their particular priorities. To give just a few examples, some well-established and well-developed communities that already offer an attractive mix of services and taxes may want to limit new growth as much as possible in order to minimize supply and thereby maintain or increase property values.⁷⁹ Think, here, of towns like Greenwich, Connecticut, or other wealthy New England towns. Their tactics might include aggressive zoning, stringent building codes, fees and exactions, and procedural hurdles that will increase building costs.⁸⁰

Communities with room to grow, like many outer-ring suburbs, may focus their efforts on developing a residential housing market, seeking to attract more expensive homes while excluding low-income housing, like

the package providing him with the greatest net benefits. Some persons may prefer that local revenues be devoted to open space for parks and recreation. Others might favor additional police and fire protection, and proximity to the workplace. A third group might prefer expenditures for education or for government-supported care for children and the elderly. As long as the variety of local governments is sufficient to accommodate these diverse interests, nurturing local preferences will generate a more efficient arrangement of local public goods as persons are able to reside where they can obtain the service packages they desire and can avoid paying for services they disfavor.

Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. Rev. 1030, 1073–74 (1983) (footnote omitted).

76. As a leading scholar explains:

Local governments may engage in exclusionary zoning or impose impact fees to keep out newcomers who would cost the communities more in additional public services than they would provide in new taxes, much as they deploy their tax and zoning powers to induce new investment that would expand their tax bases.

Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum. L. Rev. 365, 472 (1999).

77. See Myron Orfield, *American Metropolitcs 90–91* (2002) (describing wealthy suburbs' efforts to exclude poor and middle class families in order to maintain property values).

78. Fischel, *Homevoter Hypothesis*, *supra* note 2, at 51–52.

79. *Id.*; see also Sterk, *Competition*, *supra* note 19, at 837 (identifying diversity in local government preferences for new residents).

80. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 390–92 (1977).

high density, multifamily units. They can do this in a number of ways. They may charge per-unit exactions and other fees to developers who will therefore have an incentive to build fewer, more expensive units.⁸¹ They may also use zoning and other forms of growth controls—like minimum lot sizes, density restrictions, or minimum floor space requirements—to keep the price of new developments up and thereby keep low-income families out of town.⁸²

Larger local governments face more complex tradeoffs still. In addition to the tactics described above, they may also compete to attract businesses that will increase their tax base. Here, they will offer various incentives, like tax concessions and promises to rezone. Sometimes they will even offer to condemn property to overcome potential holdout problems for larger projects.

Literature around the Tiebout Hypothesis—and there is a lot—has focused primarily on its effect on local government decisionmaking.⁸³ Indeed, Tiebout's goal in his original article was to explain how local governments could provide efficient levels of public goods.⁸⁴ It is important, however, to step back to examine this same interlocal competition from the perspective of potential residents, developers, or other investors and to ask what the choice between local governments looks like for them.⁸⁵

Start with developers, because their interests are easiest to discern. For developers—whether residential or commercial—the choice of local government is an important one. When developers purchase undeveloped property, they lock themselves into a significant and immovable asset.⁸⁶ One of the key components of the value of that asset is the regulatory environment in which it is located.⁸⁷ For land, this means primarily the zoning ordinance that applies to the property, as well as the nature of the permitting process and other regulatory requirements that may have to be satisfied before development can begin. The problem for develop-

81. Cf. *Oakwood at Madison, Inc. v. Twp. of Madison*, 371 A.2d 1192, 1211 (N.J. 1977) (striking down exactions as exclusionary).

82. See, e.g., Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 *Minn. L. Rev.* 459, 487–88 (2005) (book review) (identifying minimum lot size as an exclusionary technique).

83. See, e.g., Been, *Exit*, *supra* note 13, at 478 (describing purpose of article as “analyzing whether competition in the market for development is sufficient to constrain local governments”); Rose, *Takings*, *supra* note 31, at 1131–35 (arguing that exit constrains local governments).

84. See Been, *Exit*, *supra* note 13, at 507 (identifying source of Tiebout Hypothesis as “response to the claim of Paul Samuelson and Richard Musgrave that there is no mechanism by which local governments can accurately ascertain the amount of public goods that they should supply to satisfy the preferences of consumer-voters” (footnote omitted)).

85. Bell and Parchomovsky attempt to harness the same phenomenon, arguing that Tiebout-style sorting would create a race to the top for statewide property regimes. See Bell & Parchomovsky, *supra* note 4, at 96–98.

86. See *supra* note 31 and accompanying text.

87. See Fischel, *Homevoter Hypothesis*, *supra* note 2, at 56 (finding that zoning is capitalized into property values).

ers is that the regulatory environment may change—or may not change in the way that they expected when they purchased the property—in which case they are stuck with less developable, or even undevelopable, property.

Consider two typical examples. In one, a developer buys land for a new residential development. The developer faces a risk that the town might act to stop, or at least scale back, the planned development. As a first pass, the town might deny the developer's application for a subdivision permit.⁸⁸ It might also try to extract significant financial concessions from the developer, increasing the costs of the development.⁸⁹ It might even try to change the zoning ordinance.⁹⁰ Some or all of these actions might ultimately be unconstitutional takings of the developer's property, but even the prospect of having to litigate complex constitutional claims, with at best uncertain outcomes, could dissuade the developer from building in the first place. Or, consider a commercial developer who buys property with the promise from the local government that it will change the applicable zoning ordinance to permit some light industrial use, and will also provide additional concessions. Here, the developer faces the risk that the government may have second thoughts and refuse to change its zoning ordinance, or will otherwise engage in regulatory obstruction like denying permits and seeking additional concessions.⁹¹

In the Tiebout world of interlocal competition, how would a local government that actually wants these uses go about attracting them? The problem now is that a local government has no good way of guaranteeing that it will not engage in this kind of obstructionist conduct.⁹² But if a local government had a mechanism for precommitting to certain heightened property protection, this might serve as a valuable bargaining chip in the competition for development. A developer might be willing to pay a premium to buy land in a municipality that has precommitted to remov-

88. See *Dunn v. County of Santa Barbara*, 38 Cal. Rptr. 3d 316, 319 (Ct. App. 2006) (discussing county's permit denial to subdivide six-acre property into two three-acre lots); *Wensman Realty, Inc. v. City of Eagān*, No. A05-1074, 2006 WL 1390278, at *1 (Minn. Ct. App. May 23, 2006) (discussing city's denial of permit to developer for alteration of golf course).

89. See *B.A.M. Dev., L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1164 (Utah 2006) (discussing exactions, and subsequent increase in exactions, imposed by county as condition for building permit); see also *Been*, *Exit*, *supra* note 13, at 481 n.44 (noting cases in which financial exactions have been imposed upon developers).

90. See *Dorman v. Twp. of Clinton*, 714 N.W.2d 350, 355 (Mich. 2006) (considering landowner's action for inverse condemnation following township's rezoning of property subsequent to landowner's purchase).

91. Cf. *Johnson Oil Co. v. Area Plan Comm'n of Evansville & Vanderburgh County*, 715 N.E.2d 1011, 1013 (Ind. Ct. App. 1999) (discussing inverse condemnation claim involving claim that permit had been promised and then later denied).

92. The tools available to local governments are *ex ante* development agreements, see *infra* Part I.D, and application of the vested rights doctrine once the use is in place, see *infra* Part II.B.7. Neither is a substitute for a more comprehensive method of local precommitment for the reasons identified in those discussions.

ing certain regulatory risks. Such a precommitment mechanism, then, could be an important inducement to development and result in increased property values.

This precommitment approach is not just prodevelopment, however. Recall that both local governments' and prospective property owners' interests are quite diverse. To take another example, consider the risks facing a well-to-do retired couple choosing where to live. They might buy into a town with a stable tax base and few schoolchildren, only to find that some developer of lower-income multifamily housing buys into the town right afterwards, potentially raising everyone else's property taxes as the burden on public services dramatically increases. A town that wanted to attract the couple in this example would not relinquish its power to engage in aggressive zoning and other land use controls that have the effect of making property more expensive to develop.

It is easy to extrapolate from these examples and see how diverse the interests of property owners might be. Some homebuyers might value environmental protection or scenic beauty, and prefer a town that has retained broad authority to regulate for these purposes. Some developers might fear eminent domain; others might value eminent domain as a tool the government might use on their behalf in the future. Some commercial developers might want the fewest regulatory hurdles possible; others might decide that the success of their project depends on the long-term success and desirability of the community, and so prefer a place that has retained broad zoning and other regulatory powers.

Different levels of property protection could add an important dimension to Tiebout-style sorting. It would allow potential residents and other investors to include the government's approach to property protection as another service to consider when weighing a local government's offerings.

D. *Development Agreements*

In some states, interlocal competition for specific developments already takes the form of governments offering different levels of property protection. Development agreements available in California and Hawaii, in particular, function as a kind of enforceable precommitment by the local government not to change applicable land use regulations in exchange for some specific concession from the developer.⁹³ These development agreements, authorized by state statutes, operate similarly to this Article's proposal, but with some important differences. They tie local governments' hands both more and less than the proposal here, and both in undesirable ways. Nevertheless, the existence of development

93. The most comprehensive academic article on development agreements is David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities after Nollan and Dolan*, 51 Case W. Res. L. Rev. 663 (2001).

agreements demonstrates that demand for enforceable property precommitments does exist and that developers will offer a considerable amount of money in exchange for guaranteed land use controls.

A development agreement imposes a greater limit on government power because, so long as it is enforceable, it will prevent the government from making any changes to the applicable land use regulations. Even where a local government enacts an entirely new zoning ordinance, courts have held that it cannot apply to land subject to a development agreement.⁹⁴ Using this Article's proposal, a local government may retain greater flexibility than with a development agreement.

Development agreements also may offer local governments too much latitude because they apply only to one specific property instead of to all local property uniformly. This is an open invitation for a giveaway to a developer or other special interest. Especially in larger local governments, the per taxpayer cost of a development agreement may be relatively insignificant, even if it represents a very bad deal for the public.⁹⁵ The conditions are therefore ripe for the kind of special interest group pressure described by public choice theorists.⁹⁶ Moreover, development agreements may not be particularly visible to most voters, taxpayers, and potential investors, making any Tiebout-style sorting based on the content of development agreements difficult at best.

In contrast, and for the reasons foreshadowed here but discussed more fully below, the local option property protection this Article proposes would apply uniformly within the locality. This will allow an investor not only to rely on the treatment he or she has been promised, but also to rely on the same property protection applying to future investors, too. A generally applicable local property regime also dramatically increases the stakes of a local government's decision about what level of protection to offer and therefore decreases the risk that the decision will not reflect the best interests of a majority of local voters and taxpayers—although admittedly it would also increase the costs of successful interest group capture.

The emergence of development agreements is therefore important because it demonstrates that developers will compete for favorable regulatory treatment. Development agreements do not, however, go far

94. *Id.* at 688–89 (citing cases, including *Cummings v. City of Waterloo*, 683 N.E.2d 1222, 1230 (Ill. App. Ct. 1997), which found that these agreements are valid and enforceable).

95. Neil Komesar has argued that it is the per capita stakes of any particular decision that are relevant for assessing applicable political pressures. See Neil K. Komesar, *Law's Limits* 61 (2001).

96. See Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 373–77 (2000) (describing public choice theory literature in context of Takings Clause); Serkin, *Meaning of Value*, *supra* note 9, at 726–28 (same). See generally Daniel A. Farber & Philip P. Frickey, *Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873, 875–83 (1987) (describing public choice theory).

enough to institutionalize property rights as a dimension for interlocal competition. For that, something more comprehensive and more visible is needed.

With this theoretical background in place, it is now possible to discern the form that local competition over property regimes might take. The following Part describes this Article's specific proposal to allow local governments to precommit to specific forms of private property protection.

II. THE PROPOSAL: LOCAL OPTION PROPERTY PROTECTION

In the face of vastly different needs, different local governments should have the opportunity to select from different levels of property protection across a number of dimensions. This Part lays out in detail what form these choices should take and offers a mechanism for enforcing them. Present and future property owners, developers, and other investors will then have the opportunity to choose between competing property regimes, just as they choose between local governments based on other criteria.

A. *The Proposal and Constitutional Constraints*

Because local governments are essentially creatures of the state, local governments on their own are unable to create an enforceable precommitment to a particular level of property protection.⁹⁷ What is needed, then, is state legislation creating a range of property options from which local governments can choose. For purposes of clarity, this Article will refer to the state enabling legislation as Local Option Property Protection (LOPP) legislation, and will refer to the individual choice selected by a local government under LOPP legislation as the Locally Applicable Property Protection (LAPP).

LOPP legislation must contain two key features, although the specific details may vary state-by-state. First, LOPP legislation must set out the range of options available to local governments, allowing them to pick and choose among a slate of various property protections.⁹⁸ The section immediately following this one describes those alternatives in considerable detail. Second, LOPP legislation must also specify the decision rules governing how a local government's choice is to be adopted and how it can be modified or repealed. Here, too, there is a range of options available to specific local governments, from a one-time choice that

97. Even home rule jurisdictions require state enabling legislation to create enforceable precommitments because the rules against legislative entrenchment will prevent a jurisdiction from unilaterally tying its own hands in the future. See *infra* text accompanying notes 103–105.

98. Ideally, this will include a broader range of options than current state statutes regulating land uses necessarily permit, although constitutional constraints still necessarily apply. See *infra* text accompanying note 99 (describing existence of constitutional floor).

serves as a permanent precommitment, to a sunset provision defining the lifespan of the resulting LAPP (which this Article ultimately endorses, with some additional modifications). These alternatives are described in Part II.C, below. In short, state LOPP legislation should define the array of choices available to individual local governments and then bind those local governments as a matter of state law.

Before turning to the details of the proposal, however, two constitutional concerns have to be addressed: (1) the Takings Clause and (2) the problem of legislative entrenchment, which prohibits a legislature from binding future legislatures. They are considered here in order.

In its purest if highly theoretical form, LOPP legislation would permit local governments to diverge from the constitutional limits of the Takings Clause in both directions, allowing governments to offer either higher or lower levels of protection for private property than are currently guaranteed by the Fifth Amendment. This would increase the range of options available and permit local governments to satisfy a greater range of preferences. As a matter of constitutional doctrine, however, the Takings Clause must continue to provide the baseline property protection available to all property owners. Local governments, necessarily, will not be able to select less protection than the Fifth Amendment already provides.

This should give considerable comfort to people inclined to object that this Article's focus on creating more efficient local property regimes misses the important countermajoritarian protection of the Takings Clause. Fairness remains a critical animating principle of property protection in many judicial formulations.⁹⁹ A local government's LAPP will not, indeed cannot, undermine this critical protection from overreaching government power. Against this constitutional backstop, then, LOPP legislation will only allow local governments to ratchet up property protection in specific ways.

Certain LOPP provisions, however, are aimed at increasing the protection for neighbors of regulated property, thus decreasing protection for the regulated property.¹⁰⁰ These LOPP provisions, then, shift the bal-

99. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). This principle has been cited by the Supreme Court most recently in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). This formulation, often repeated by the Supreme Court, is a straightforward articulation of the fairness rationale. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

100. This distinction between the rights of a regulated landowner and the rights of his or her neighbors is used persuasively throughout a leading land use casebook. See Robert C. Ellickson & Vicki L. Been, *Land Use Controls: Cases and Materials passim* (3d ed. 2005).

ance of property rights toward the neighbors, but across specific nonconstitutional dimensions that do not run afoul of the Takings Clause.¹⁰¹

The second constitutional concern involves the principle of entrenchment, which prohibits a legislature from tying the hands of a future legislature.¹⁰² Doctrinally, this turns out to be something of a red herring, although it presents some lingering normative questions taken up generally in Part III.

It is well settled that the doctrine of entrenchment prohibits a legislature from making ordinary legislation unrepealable.¹⁰³ Whatever the source of the limitation—whether constitutional or rooted in democratic theory more generally¹⁰⁴—a legislature today is said to lack the power to bind future legislatures tomorrow. Indeed, this entrenchment problem is the very reason that LOPP legislation is necessary; a local government cannot unilaterally precommit itself to future actions (or inactions).

State legislation, however, removes the doctrinal entrenchment concerns entirely. Instead of a local government tying itself to the mast, the state LOPP legislation is doing the tying, although allowing local governments to decide for themselves just how tight the ropes should be. This presents no more of an entrenchment problem than when Congress permits agencies to bind themselves to future conduct, or constrains state legislation through the Supremacy Clause.¹⁰⁵ At least as a matter of con-

101. These include increasing the standards for granting a variance or a special exception and requiring greater consistency between a zoning ordinance and a municipality's comprehensive plan. For discussion of these LAPP provisions, see *infra* Parts II.B.10–11.

102. There is a large amount of literature on entrenchment. Leading articles include Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 *Am. B. Found. Res. J.* 379 (exploring rationale behind entrenchment prohibition and proposing new way to assess “retroactive legislative efforts”); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L.J.* 491, 502 (1997) (taking “systemic look at entrenchment problems in constitutional law” and arguing “development of a self-contained, and *majoritarian*, anti-entrenchment theory of judicial review” is needed to address entrenchment problem); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665 (2002) (arguing against rule barring legislative entrenchment); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *Cal. L. Rev.* 1773 (2003) (arguing for rule barring legislative entrenchment). The LOPP proposal implicates a form of intertemporal entrenchment, to be distinguished from other forms that arise from agency problems. See Klarman, *supra*, at 498–99 (describing different kinds of entrenchment problems).

103. See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (describing entrenchment doctrine as “centuries-old concept”). The source of the doctrine, however, remains up for grabs. See Posner & Vermeule, *supra* note 102, at 1665–66 (“The goal of the academic literature has been to supply the definitive rationale for the rule [of entrenchment], although the theorists’ favorite rationales are all different.”).

104. Some people locate the prohibition on entrenchment squarely, if impliedly, in the constitutional text, while others find it necessary under democratic theory more generally. See Posner & Vermeule, *supra* note 102, at 1673–93 (comparing theories of entrenchment).

105. *Id.* at 1702.

stitutional doctrine and democratic theory, there is no prohibition on state LOPP legislation binding future local governments.

Having situated the general LOPP proposal so as to be consistent with both takings law and the doctrine of entrenchment, the next step is to detail the range of choices available to local governments in adopting a specific LAPP.

B. *The Array of Specific Choices*

In theory, there is no limit to the range of choices local governments should be given when choosing which LAPP to adopt. The broader the array of choices, the more diversity there will be among local governments, giving potential investors a broader array of options. In its purest form, the Tiebout Hypothesis requires as many choices as there are potential residents.¹⁰⁶ Nevertheless, there are certain natural limits to the kinds of options LOPP legislation will allow, including the information costs facing potential investors if LAPPs are too different from each other.¹⁰⁷ Most importantly, each choice available to a local government must be a genuine choice. That is to say, there must be some diversity of approach that local governments could reasonably take to achieve various ends. It would make little sense, for example, to include an option preventing regulations for public safety because such regulations are at the heart of any government's responsibilities.¹⁰⁸

Similarly, LOPP options are only appropriate where there is some reasonable protection that a local government might choose to offer that exceeds the existing constitutional baseline. Where current law already sets a high bar for property protection, there is little or no need for added protection under LOPP legislation. For example, there is little use for a LAPP constraining denials of special exceptions. Special exceptions are uses presumptively permitted under a zoning ordinance, but only after seeking a permit.¹⁰⁹ Courts already tend to prevent attempts by local governments—or neighbors—to stop the issuance of special exceptions.¹¹⁰

106. See Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 *UCLA L. Rev.* 1389, 1393 (2004) (describing Tiebout as assuming infinite jurisdictions).

107. Cf. Bell & Parchomovsky, *supra* note 4, at 105–08 (discussing effect of information costs on selection of property regime).

108. In fact, case law suggests that local governments cannot bargain away their responsibilities under the police power. See Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 *N.C. L. Rev.* 957, 966 (1987) (discussing *Stone v. Mississippi*, 101 U.S. 814 (1879)).

109. See Delaney et al., *supra* note 24, § 30:1 (defining special uses); Roderick M. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 *J. Urb. L.* 287, 289–90 (1966) (describing special exceptions).

110. See Delaney et al., *supra* 24, § 30:4 (citing cases and describing entitlement to special use permits).

In addition, LAPP alternatives must have some valence for property owners. The more esoteric the LAPP provisions are, the less likely they are to have an actual impact on property owners' decisionmaking. While some of the LAPP alternatives described below may still seem opaque to some property owners, they track important and relatively visible choices in land use regulation. For example, any property owner can understand the effect of increased compensation in the event compensation is due.¹¹¹ On the other hand, excluded from LAPP provisions for lack of transparency is the vexing problem of conceptual severance.¹¹² Although theoretically appropriate for varied local solutions, it is hard to imagine property owners choosing where to buy based on how a local government treats the problem of conceptual severance.¹¹³

What follows, then, is a discussion of those critical components of property protection that meet all three of these criteria: There is a range of reasonable approaches to each issue; the current legal baseline is sufficiently low that some local governments might prefer to offer greater protection; and the choices are likely to be apparent and important to property owners.

1. *Public Use.* — The first LAPP option allows local governments to designate what purposes will justify the exercise of eminent domain. As *Kelo* held, the constitutional floor here is almost nonexistent.¹¹⁴ Local governments wanting the broadest authority to condemn property will adopt the constitutional baseline, in which case their discretion will be largely unfettered. Building up from there, however, the range of options increases dramatically.

There are a number of places to look for the kinds of likely restrictions a government might adopt. Some state courts, like the Michigan Supreme Court, have developed their own public use tests that are more restrictive than the test announced in *Kelo*.¹¹⁵ Michigan, for example, permits condemnations only for "public necessity of the extreme sort"; when the ultimate transferee remains accountable to the public (as in a regulated industry); or when the selection of the land is itself based on a

111. See *infra* text accompanying notes 121–127 (discussing compensation).

112. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1676–78 (1988) (discussing conceptual severance).

113. Some people may object that none of the LAPP options are likely to be relevant to property owners. Their impact, some might argue, will be overshadowed by the more pressing concerns of school quality and property taxes. Capitalization studies, however, demonstrate how fine-grained people's preferences are, suggesting they involve information heuristics to locate their preferences, and therefore do not need to understand fully the issues at stake in each LAPP provision. See Fischel, *Homevoter Hypothesis*, *supra* note 2, at 61 (describing information heuristics).

114. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) ("The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.")

115. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004).

public concern (as in blight removal).¹¹⁶ Others simply reject condemnations for economic redevelopment.¹¹⁷ Blight, too, remains a controversial justification for public use.¹¹⁸

Given the choice, other local governments might prefer to adopt a LAPP that focuses on the presence of market failures necessitating condemnation. These could limit the power of eminent domain to situations where a bilateral monopoly or holdouts are particularly likely.¹¹⁹

The most protective LAPP a local government could adopt would prevent condemnations altogether. Effectively renouncing the power of eminent domain, a local government could precommit itself to going to the market for any land acquisition. All of these present viable options for LAPP protection. As with each of the provisions that follow, the pros and cons of these LAPP choices are discussed more fully below.¹²⁰

2. *Compensation.* — The constitutional baseline for compensation is the fair market value of the property taken.¹²¹ This excludes, however, whole categories of damages that property owners likely suffer when their

116. *Id.* (permitting condemn-and-retransfer plans only “(1) where ‘public necessity of the extreme sort’ requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of ‘facts of independent public significance,’ rather than the interests of the private entity”).

117. See *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006) (“We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of . . . the Ohio Constitution.”).

118. See 60 Minutes: Eminent Domain (CBS television broadcast Sept. 28, 2003) (transcript on file with the *Columbia Law Review*) (discussing owner’s frustration with town’s construction of term “blighted,” which rendered homes in century-old community “blighted” if they did not have the “[t]hree bedrooms, two baths, an attached two-car garage and central air” determined to be standard for area structures); Castle Coal., *Blight Makes Right: Unjustified Blight Determinations Pave the Way for Condemnation*, at <http://castlecoalition.org/publications/report/reportsidebars/13.html> (last visited Feb. 2, 2005) (on file with the *Columbia Law Review*) (arguing that local governments, having chosen to seize private property for benefit of private developers, designate areas as blighted to justify taking of property and maintaining that “blight designation places all properties in the area at the mercy of both bureaucrats and developers” and should be seen as first move in “land-grab”); Castle Coal., *Is This Property Blighted? You Be the Judge*, at <http://castlecoalition.org/castlewatch/bogusblight/index.html> (last visited Feb. 2, 2007) (on file with the *Columbia Law Review*) (providing photographs of properties receiving questionable “blighted” designations).

119. One of the most sophisticated examples of this approach has been proposed by Lee Anne Fennell in *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 992–1002.

120. See *infra* Part IV.

121. E.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984); *Aja. Power Co. v. FCC*, 311 F.3d 1357, 1368 (11th Cir. 2002); *Palm Beach Isle Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000). This rule is subject to two narrow and seldom applied exceptions. Fair market value does not apply where it would be too difficult to measure or where manifest injustice would result. E.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

property is taken, most notably subjective and consequential damages.¹²² Local governments should be able to adopt a LAPP that increases compensation from the fair market value.

LAPP options, then, could include compensation for some of the specific damages currently excluded from just compensation. Consequential damages, like moving expenses and, for businesses, the loss of goodwill, could be awarded, following the lead of the federal Relocation Assistance Act.¹²³ A LAPP could also add a percentage kicker to the property's fair market value, giving, for example, fair market value plus 25%.¹²⁴

At the high end of the compensation spectrum, a LAPP could award what amounts to restitution, paying the owner of the condemned property the value the property has *for the government*. This would allow property owners a share of the gains created by the condemnation.¹²⁵ So, for example, where a government creates value by bundling separate properties through condemnation, the property owners could receive a portion of the assembled value, and not just the value of their property standing alone.¹²⁶ In many cases, this might eliminate the government's incentive to condemn property in the first place. Nevertheless, it would test the government's claim that the condemnation creates some additional community benefit aside from the specific project for which the property is being taken.¹²⁷

Between fair market value and a gain-based award, there is a broad range of approaches to compensation that a local government could select in its LAPP.

3. *Diminution of Value*. — Under the current *Penn Central* regulatory takings test, a government must only compensate a property owner when a regulation goes too far.¹²⁸ Most courts have interpreted this to mean a regulation that reduces the value of property by some percentage, often

122. See Serkin, *Meaning of Value*, supra note 9, at 678–79.

123. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101, 121–23 (2006) (describing Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. §§ 4601–4655 (2000)).

124. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 Yale L.J. 2091, 2114–15 (1997) (describing payments of 50% premium over fair market value for government takings in cases construing Mill Act, 1868 N.H. Laws 152, ch. 20).

125. See Serkin, *Meaning of Value*, supra note 9, at 687–89 (describing compensation based on harm versus gain).

126. *Id.*; see also Krier & Serkin, supra note 55, at 870–73 (proposing giving property owners part of property's bundled value).

127. This is an idea explored in greater depth in Krier & Serkin, supra note 55, at 872.

128. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978) (stating that to determine “whether a particular governmental action has effectuated a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole”).

in the neighborhood of 85%.¹²⁹ A diminution in value less than this percentage generally does not require compensation under the Takings Clause.¹³⁰ A LAPP could change the percentage value that triggers the compensation requirement. A local government could, for example, precommit in its LAPP to compensating property owners whose property values are reduced by 50%, or even by 25%. At the most protective end of the spectrum, a LAPP could commit a local government to pay for any reduction in value due to a government regulation. This extreme position was in fact recently adopted in Oregon by popular referendum.¹³¹ While this new law has come under considerable and justifiable criticism as a statewide approach to regulatory takings,¹³² it might make perfect sense for some local governments to adopt in order to make themselves attractive to a particular kind of investment.

Expressed as a percentage, a LAPP could require compensation for any decrease in property value, at one extreme, and only for decreases in property value in excess of 85%, at the other.

4. *Denominator*. — Closely related to defining the relevant diminution of value that triggers compensation, defining the relevant denominator to use in identifying the extent of any diminution of value has proven particularly difficult.¹³³ The larger the denominator, the more the property must decrease in value before triggering a compensation requirement. If someone owns ten lots, for example, and a government regulation renders one of them valueless, that regulation could be seen as taking anything from 100% to 10% of the property's value, depending on whether the denominator is limited to the burdened lot or includes all of the property owner's property. Because the content of the constitutional

129. *Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001) (discussing Supreme Court cases suggesting that diminutions "approaching 85 to 90 percent do not necessarily dictate the existence of a taking"); see also Hanoach Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741, 744-45, 782-84 (1999) (discussing diminution of value test).

130. *Walcek*, 49 Fed. Cl. at 271.

131. See Measure 37, Gen. Election, Nov. 2, 2004 (Or.), available at <http://www.sos.state.or.us/elections/irr/2004/036text.pdf> (on file with the *Columbia Law Review*) (codified at Or. Rev. Stat. § 197.352 (2006)). Oregon's Measure 37 has already been the subject of much discussion. See, e.g., *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 311-12 (Or. 2006) (upholding constitutionality of Measure 37); Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 *Yale L. & Pol'y Rev.* 587, 587-88 (2005). In 2006, California, Idaho, and Washington State all rejected similar proposals. Terry Pristin, *Voters Back Limits on Eminent Domain*, *N.Y. Times*, Nov. 15, 2006, at C1.

132. See Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 *J.L. & Pol.* 397, 439-40 (2005) (noting critics' arguments that Measure 37 "portends doom for comprehensive land use planning in Oregon"); Galvan, *supra* note 131, at 599 ("Critics charge that Measure 37 threatens not only to undermine all of Oregon's land use protections, but also to bankrupt local governments in the process.").

133. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 *Mich. L. Rev.* 1835, 1862 & n.98 (2006) (discussing denominator problem).

test remains murky, at best, any LAPP legislation runs the risk of violating the constitutional baseline.¹³⁴ Nevertheless, a local government could still commit to a particular position on the denominator problem.

The least protective LAPP provision would include all of the property owner's property, wherever situated, in assessing the impact of some government action or regulation. The more narrowly the denominator is drawn, the more protective the LAPP becomes, from including only all local property, to including only all contiguous property, to, finally, including only the specific lot being burdened.

5. *Temporary Takings*. — Ever since *First English*,¹³⁵ property owners can theoretically recover for "temporary" takings, where a property owner is denied the use of his or her property for a limited time.¹³⁶ Compensation is generally valued by the fair rental value of the property during the period of the taking.¹³⁷

The Supreme Court, however, has resisted creating a new bright-line rule imposing liability for temporary takings, relying instead on the ad hoc balancing test in *Penn Central* to determine whether a temporary taking has occurred.¹³⁸ There is unlikely to be liability for normal delays in obtaining building permits or applying for zoning variances.¹³⁹ The Takings Clause does not necessarily require compensation even for building moratoria, so long as they are temporary in nature.¹⁴⁰

Governmental responsibility for compensating temporary takings is therefore quite limited. The constitutional baseline for a LAPP provision is only to pay for regulations that deprive owners of all beneficial use of their property for a considerable period, and at least for longer than a normal delay. Building up from there, however, is an array of different approaches to temporary takings. A modest increase in property protec-

134. See *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 793-94 (Ill. App. Ct. 2003) (discussing parcel of owner's lots as proper denominator determinative in regulatory takings claim); *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 1006442, at *2 (Mich. Ct. App. Apr. 18, 2006) (per curiam) (same).

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

136. *Id.* at 318 ("[T]emporary' takings which . . . deny a landowner all use of his property[] are not different in kind from permanent takings, for which the Constitution clearly requires compensation.").

137. See *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("The usual measure of just compensation for a temporary taking . . . is the fair rental value of the property for the period of the taking." (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949))).

138. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) ("Resisting '[t]he temptation to adopt what amount to *per se* rules in either direction,' we conclude that the circumstances in this case [of temporary taking] are best analyzed within the *Penn Central* framework." (citation omitted) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring))).

139. *Tahoe-Sierra*, 535 U.S. at 329; (distinguishing between temporary takings and normal delays); *First English*, 482 U.S. at 321 (same).

140. *Tahoe-Sierra*, 535 U.S. at 332.

tion would set some duration of a taking beyond which the local government would have to pay, for example 180 days. If a local government sat on a building permit application for greater than 180 days, it would then have to start compensating for the delay the property owner faces before being allowed to build. The highest level of protection in a LAPP would award compensation for the entire delay, no matter how brief and how reasonable. If a government takes only two weeks to respond to a building permit, it nevertheless would have to pay the fair rental value of the property for those two weeks.

6. *Exactions and User Fees.* — Exactions refer to fees or in-kind concessions that a local government requires as a condition for allowing some building or development.¹⁴¹ They were designed originally to shift to the developer the infrastructure costs imposed by the new development, like roads, sewers, and even schools.¹⁴² Over time, they also came to be used to mitigate additional costs a development might impose on a neighborhood.¹⁴³ But, as Professor Vicki Been has persuasively argued, exactions can serve as powerful tools to attract or discourage investment.¹⁴⁴ Costly exactions restrict growth by increasing the costs of development; this allows local governments to bid for development by reducing the exactions they will impose.¹⁴⁵

Under the Supreme Court's proportionality requirement, exactions must bear some reasonable relationship in both nature and scale to the costs imposed by the building or development.¹⁴⁶ This, then, is the fed-

141. See Been, *Exit*, *supra* note 13, at 478–79 (“Exactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit.” (footnote omitted)). Exactions take many forms, from on-site dedications of property, to off-site dedications, fees-in-lieu-of-dedication, and impact fees. See *id.* at 479–80.

142. *Id.* at 479–82.

143. According to Been, these costs might include “increased traffic congestion, noise, and environmental degradation.” *Id.* at 482.

144. See *id.* at 509–11.

145. *Id.* at 483 (“[A] local government may use exactions to try to discourage all growth, or to prevent certain kinds of development, such as low- and moderate-income housing, in order to preserve the exclusiveness of a community or to preserve its fiscal position.”). Been also articulates a subtle argument that exactions can be used to encourage growth by buying off the opposition of neighbors. *Id.* In general, though, the higher the exaction, the more costly the development, and the more anti-development the exaction is.

146. The *Nollan/Dolan* test is comprised of two elements. There must be: (1) an “essential nexus” between the interests served and the required dedication; and (2) evidence that the dedication is related to the impact of the development in a way that is “roughly proportional.” See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (describing requirement of “nexus between the condition and the original purpose of the building restriction”); see also D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 *Cornell L. Rev.* 699, 702 (2006) (discussing essential nexus and rough proportionality tests as “dual hallmarks of the *Nollan/Dolan* doctrine”). Under some states’ constitutional law, exactions must

eral constitutional baseline, although some state constitutions provide even greater protection.¹⁴⁷ More protective approaches to exactions, though, would limit the size to some fixed amount per unit of development, or limit the use of exactions to specific, enumerated costs like sewer hookups or parking. The most protective LAPP would preclude the use of exactions altogether.

7. *Vested Rights*. — One significant land use controversy relevant to all developers is the content of the vested rights doctrine. In general, land use regulations, like zoning, are prospective. Existing buildings and developments are grandfathered in so that only new uses are subject to the regulations. This raises the often difficult question of determining when a right vests. At the time the property is purchased?¹⁴⁸ When a building permit is issued?¹⁴⁹ When the last discretionary administrative hurdle has been cleared?¹⁵⁰ Once the property owner has expended substantial sums in reliance on the existing land use regulations?¹⁵¹ As the preceding footnotes demonstrate, courts have adopted each of these tests.

As a practical matter, the earlier rights vest, the more property owners are able to rely on the existing property regime. The least protective regime would make rights vest only at the completion of a building or development. This could lead to real inefficiencies as property owners expend substantial amounts of money developing property only to have the particular use declared impermissible the day before completion. Not only would this create deadweight losses, it would also force property owners ex ante to take a steep discount on the value of a project, reflecting the risk of a last minute regulatory change.

At the most protective end of the spectrum, rights would vest at the purchase of property. This would ensure almost complete stasis in land use regulations, preventing any prospective change until the property changed hands. This, too, might create perverse incentives, making some property far more valuable to the existing owner than to any potential

satisfy a dual rational nexus test, which may be different from the *Nollan/Dolan* standard. See generally Richard Duane Faus, Exactions, Impact Fees, and Dedications—Local Government Responses to *Nollan/Dolan* Takings Law Issues, 29 Stetson L. Rev. 675 (2000).

147. See Julian C. Juergensmeyer & James C. Nicholas, Impact Fees Should Not Be Subjected to Takings Analysis, in *Taking Sides on Takings Issues* 357, 362 (Thomas E. Roberts ed., 2002) (“[W]e maintain that the dual rational nexus test is more stringent when properly applied to impact fees than the *Nollan/Dolan* takings principles.”).

148. See generally Grayson P. Hanes & J. Randall Minchew, On Vested Rights to Land Use and Development, 46 Wash. & Lee L. Rev. 373, 387 (1989) (suggesting that fee simple ownership includes development right that does not need “vesting catalyst”).

149. E.g., *N. Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge*, 546 S.E.2d 850, 853 (Ga. Ct. App. 2001).

150. E.g., *Avco Cmty. Developers v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 551 (Cal. 1976).

151. E.g., *Hussey v. Town of Barrington*, 604 A.2d 82, 85 (N.H. 1992).

purchaser because of the applicable land use regulations.¹⁵² A new regulation that would apply upon sale would create tremendous pressure for the existing property owner to develop the property to the maximum extent permitted under the old, grandfathered land use regulations, even if this represents a much higher level of development than he or she otherwise would have chosen.

These two poles on the spectrum of vested rights are theoretically possible but unlikely to be attractive to many local governments. Far more likely are the variety of options within these two extremes, from a test focused on the conduct of the property owner—like vesting rights upon the substantial reliance by the owner on the existing regulations—to a test focused on the permitting process—like vesting rights upon the granting of a building permit. Possible LAPP provisions, however, include all of these options.

8. *Amortization.* — Once rights vest, many local governments still retain the power to regulate a use out of existence without paying compensation, so long as the use is allowed to exist for long enough to amortize the cost of the owner's investment.¹⁵³ Many courts have held that allowing a nonconforming use to continue in existence for a specified amount of time can count as just compensation.¹⁵⁴

The amortization period varies depending on the nature of the use. Zoning ordinances prohibiting billboards, for example, can be enacted without compensating owners of existing billboards so long as they are given between three and seven years to amortize the investment.¹⁵⁵ Adult entertainment businesses, another common target of amortization, can be given as little as ninety days to amortize costs before being forced to shut down without any additional compensation.¹⁵⁶ Nonconforming buildings, on the other hand, may require as long as forty years to amortize their investments.¹⁵⁷

The range of possible LAPP provisions thus includes, at one extreme, forbidding the practice of amortization in lieu of just compensation altogether.¹⁵⁸ At the other extreme is using the shortest amortiza-

152. As the Supreme Court has recognized, this is not a particularly appealing rule. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001).

153. For a discussion of this practice, see generally Margaret Collins, *Methods of Determining Amortization Periods for Non-Conforming Uses*, 3 Wash. U. J.L. & Pol'y 215 (2000).

154. *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1164 n.6 (4th Cir. 1991) (citing amortization cases).

155. Julian Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 148 (2003).

156. *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1156 (Wash. 1979).

157. *City of Los Angeles v. Gage*, 274 P.2d 34, 44 (Cal. Ct. App. 1954). *Gage* is a leading case discussing amortization.

158. Pennsylvania courts already forbid the practice as a taking without just compensation. *Pa. Nw. Distrib., Inc. v. Zoning Hearing Bd. of Moon*, 584 A.2d 1372, 1376 (Pa. 1991).

tion periods that are constitutionally permissible. Between these two lie increasingly generous amortization periods during which nonconforming uses are permitted to continue operating.

9. *Development Agreements.* — Development agreements represent another response to the problem of vested rights.¹⁵⁹ They are agreements between a local government and a developer to preserve the land use regulations applying to a particular piece of land for a specific amount of time. As described above, development agreements may be very appealing to developers because they lock current regulations in place for a definite period of time.¹⁶⁰ Homeowners, or other local taxpayers, may fear, however, that such deals are not in their best interest and may represent too great a concession by the local government.¹⁶¹ They might prefer that the local government not give away its power to change the applicable land use regulations.

In terms of LAPP provisions, then, development agreements represent something of a binary choice. Local governments can elect either to have the power to enter into such agreements or not. If they do not have the power to enter into development agreements, then any purported bargains with developers would be made unenforceable.

There is room for some additional specificity in the LAPP provisions. For one, a LAPP can limit the duration of development agreements, making them unenforceable, for example, after ten years.¹⁶² This will prevent a local government from bargaining away its regulatory power for too long. A LAPP could also require development agreements to demand certain kinds of consideration from the developer. This might include, for example, certain levels of fees or exactions. For some commercial developments—like the expansion of a factory—a LAPP might also require as a condition for enforceable development agreements a promise from a company to stay in the area or actually create the jobs or other benefits the company projects.¹⁶³

159. The leading article describing development agreements frames them as a response to the vested rights problem. Callies & Tappendorf, *supra* note 93, at 669–70.

160. See *supra* Part I.D.

161. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 *Stan. Envtl. L.J.* 269, 328 (2005) (“Development and annexation agreement regimes, as currently adopted, are essentially invitations to local government capture.”); Anne Drost & Jane Matthews Glenn, *Mont-Tremblant Resort: An Integrated Approach to Ecosystem Protection*, 26 *Vt. L. Rev.* 593, 628 (2002) (noting potential for capture of development agreements by strong economic interests, such as those of resort industry, over ecological protections).

162. Some statutes require this kind of termination of development agreements. E.g., *Fla. Stat. Ann.* § 163.3229 (West 2006).

163. This would address situations like *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)), in which General Motors forecast tremendous economic benefits that were never realized. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock*, *Economic Development Takings, and the Future of Public Use*, 2004 *Mich. St. L.*

LAPPs, then, can specify whether or not the local government has the power to enter into development agreements and, if so, whether there are any restrictions on their duration and other terms.

The LAPP provisions discussed so far are all focused primarily on the rights of the owner of regulated property. Two additional LAPP provisions shift the focus to the rights of others to prevent a change in the regulations applying to others' property. The more robust these protections are, the more local property owners can prevent the relaxation of existing land use restrictions, and the more settled their expectations can become. The two LAPP provisions that follow are not arrayed around takings controversies. Instead, they involve critical issues in land use more generally that only implicate the Takings Clause when pushed to an extreme.

10. *Requirements for a Variance.* — Variances provide flexibility in a zoning ordinance. By granting a variance, a board of zoning appeals can permit a use, or simply an intensity of use, that is impermissible under the current zone.¹⁶⁴ In theory, the variance is to be a seldom-used escape valve, limited only to cases where application of the zoning ordinance works an unnecessary hardship.¹⁶⁵ In fact, most studies agree that variances are granted in a staggeringly high percentage of cases.¹⁶⁶ Limiting the availability of variances would increase certainty in zoning, and allow greater reliance on existing land uses. The costs of decreased flexibility would be borne primarily by property owners and developers seeking more intensive land uses.

The theoretical answer is straightforward and joins a chorus of academic calls for increasing the requirements for granting a variance.¹⁶⁷ Implementation turns out to be another story, however. First, increasing

Rev. 1005, 1013. Likewise, there are numerous examples where companies extract regulatory concessions from a local government and then leave the area before creating promised benefits. *Id.* at 1012.

164. E.g., Bryden, *supra* note 109, at 290–91 (describing variances); Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 *Wm. & Mary L. Rev.* 1191, 1241 n.222 (2001) [hereinafter Garnett, *Castles and Commerce*] (same); David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 *Colum. J. Envtl. L.* 279, 280–82 (2004) (same).

165. Owens, *supra* note 164, at 287 (“[T]he common tenor set very early was that the ‘power of variation is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature’” (quoting *Hammond v. Bd. of Appeal of Bldg. Dep’t of Springfield*, 154 N.E. 82, 83 (Mass. 1926))).

166. See *id.* at 295–96 (citing studies showing between 70% and 80% approval rates in local governments of all sizes).

167. See, e.g., 2 Stuart Meck, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change 10–53* (rev. ed. 2002) (proposing increased requirements for granting variance); Garnett, *Castles and Commerce*, *supra* note 164, at 1241 n.222 (citing sources expressing concern over liberal variance practices); Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 *Harv. Envtl. L. Rev.* 277, 307 n.118 (1994) (same).

the legal standard may have at best a limited effect, because most zoning boards charged with granting variances are staffed by laypeople who make their decisions informally and in relative secrecy.¹⁶⁸ Moreover, a recent study in North Carolina reveals that only 7% of variance decisions were appealed to a court, further limiting the effect of an increased legal standard.¹⁶⁹

The most promising approaches to limiting the use of variances include procedural changes to the variance process. There is an increasing trend nationally to require boards of zoning appeals to make written findings justifying a variance.¹⁷⁰ This serves as an important record in the event of an appeal and also increases transparency and political accountability even without resort to the courts.¹⁷¹

A more profound procedural change would redefine the trigger for judicial review. Now, only people suffering pecuniary damage have standing to challenge a variance in court.¹⁷² Expanding this group will increase the likelihood of judicial oversight of the variance process. Under one proposal, a zoning ombudsman would be appointed to oversee the zoning process.¹⁷³ Alternatively, any property owner within a local government could be given standing to sue. This latter alternative could appropriately reflect the broader community-based concerns that changes in land use often implicate, whether or not property values suffer directly and quantifiably.

Increased procedural requirements, and increased opportunities for oversight, would limit the use of variances and therefore better police the boundaries of the zoning ordinance. Of course—and this is the important if unorthodox point—not all local governments are likely to want these increased protections. Limiting the availability of variances is not

168. See Owens, *supra* note 164, at 298 (describing system that “failed to provide even the minimum degree of fair play”). Owens updates the traditional concerns with variances by offering new statistics on the use of variances in North Carolina in 2002. Still, variances were granted 72% of the time. *Id.* at 309.

169. See *id.* at 303 n.110 (citing David W. Owens & Adam Bruggemann, *Survey of Experience with Zoning Variances* (UNC Inst. of Gov’t, Special Series No. 18, Feb. 2004), available at <http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/zonvar.pdf> (on file with the *Columbia Law Review*)).

170. See *id.* at 307–08 (“The most common means used to prepare the findings is to include them in the minutes of the board making the decision rather than as a separate decision document.”).

171. Other proposed changes include changing the qualification requirements for serving on a board of zoning appeals. See *id.* at 300.

172. *E.g.*, *Cnty. Planning Bd. No. 2 v. Bd. of Standards & Appeals*, 350 N.Y.S.2d 138, 140 (App. Div. 1973) (“[N]earby owner of rentable property may well suffer pecuniary damage from the downgrading of his neighborhood by disorder, and such damage is the usual measure of the status of ‘aggrieved person.’”); see also Delaney et al., *supra* note 24, § 12:2 (describing standing rules).

173. See Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 Md. L. Rev. 3, 21 (1969) (stating that ombudsman proposal would make “preservation of the zoning ordinance and protection it affords to various neighborhoods . . . a public duty”).

necessarily an improvement for the zoning process generally. It comes with costs to developers and those who traditionally benefit from variances, making local governments with strict variance limits less attractive to them. On the other hand, such limits make local governments more attractive to property owners who want certainty in land use controls and want to limit growth. The most protective regime for regulated property owners is therefore the current one, with de facto flexibility in issuing variances. Increased procedural rules occupy a middle ground, and the least protective option—the one giving the greatest rights to neighbors—also includes expanded standing to challenge variances.

11. *Requiring Greater Consistency with the General Plan.* — In addition to granting a variance, a local government can change the permissible uses of property by rezoning it. The greater the local government's ability to rezone, the less property owners can rely on the existing zoning regulations. Of course, property can be rezoned to benefit developers by upzoning to permit more intensive uses, or to benefit neighbors by downzoning to limit use.¹⁷⁴ Both upzoning and downzoning can take many specific forms, from changing the intensity of permissible uses through minimum lot sizes and the like, to redefining the zoning ordinance to change the uses permitted in a type of zone, to actually changing the use classification of a particular property.¹⁷⁵

One check on local rezonings of property is the consistency requirement. Under the Standard State Zoning Enabling Act (SZE), a zoning ordinance must be consistent with the general plan.¹⁷⁶ The SZE appears to have contemplated local governments preparing two separate documents: a comprehensive plan, and a zoning ordinance consistent with that comprehensive plan.¹⁷⁷ Although some states have found the SZE's "consistency" requirement met solely with reference to the zoning ordinance itself—in effect, forgoing the need for a separate comprehensive plan—many states do, in fact, require two documents, either by statute or through judicial interpretation.¹⁷⁸ The more teeth given to the

174. See William A. Fischel, *The Economics of Zoning Laws* 22 (1985) (defining upzoning and downzoning).

175. See Delaney et al., *supra* note 24, § 20:1 (discussing forms of downzoning).

176. See Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 Wash. U. J.L. & Pol'y 295, 298 (2000) [hereinafter Meck, *Legislative Requirement*] (reviewing history and provisions of the SZE's zoning plan requirement).

177. Courts and commentators have disagreed about whether the SZE was intended to require a separate comprehensive plan. See, e.g., Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 899, 901–02 (1976) ("It is not clear whether [the SZE was] intended to require that zoning be consistent with a comprehensive plan . . ."). For a compelling historical reconstruction of the SZE concluding that its drafters did intend to require a separate plan, see Meck, *Legislative Requirement*, *supra* note 176, at 299–306.

178. Compare *Kozesnik v. Twp. of Montgomery*, 131 A.2d 1, 7–8 (N.J. 1957) (interpreting New Jersey's zoning statutory scheme), with *Cal. Gov't Code §§ 65350–65362* (West 1997) (delineating California's comprehensive zoning plan), and *Fasano v. Bd. of*

consistency requirement, the less a local government will be able to rezone property, either through upzoning or downzoning.

Because of the reciprocal nature of upzonings and downzonings, decreased flexibility in rezoning does not obviously benefit one group of property owners over another. In reality, however, restricting rezoning is a more important tool for existing neighbors than for developers. Developers receive other protections from downzonings, like the vested rights doctrine and the ability to enter into development agreements locking in existing land use controls.¹⁷⁹ Neighbors, on the other hand, have no comparable judicial protections from upzonings of nearby property. Ratcheting up the consistency requirement gives neighbors a way to police the status quo and limit new development. Property owners who want more assurance that the existing zoning regime will remain in place into the future will prefer requiring more consistency between zoning and planning.

Increasing the consistency requirement means, first and foremost, mandating a separate comprehensive plan.¹⁸⁰ Once the plan has been drafted, courts can also apply greater scrutiny to the consistency determination, giving it even greater bite.¹⁸¹ This can be accomplished by defining rezonings as quasi-judicial instead of legislative, thereby justifying more searching review than the rational basis test that often applies.¹⁸² Again, the entire array of options, from not requiring a separate plan, to requiring a separate plan and providing searching review for consistency with the plan, are all available choices in a LAPP.

County Comm'rs, 507 P.2d 23, 28 (Or. 1973) (discussing comprehensive plan enacted by Oregon state legislature). All three sources, inter alia, are cited in Meck, Legislative Requirement, *supra* note 176, at 305 nn.24–25, 307 n.29.

179. For a discussion of each of these protections, see *supra* Parts II.B.7 & II.B.9, respectively.

180. Some scholarship suggests that such a requirement results in higher quality planning. See, e.g., Daniel R. Mandelker, Planning and the Law, 20 Vt. L. Rev. 657, 658 (1996).

181. See, e.g., *Fasano*, 507 P.2d at 27 (applying heightened scrutiny to zoning changes). For a comparison of different judicial approaches in recent cases, see Edward J. Sullivan, The Evolving Role of the Comprehensive Plan, 32 Urb. Law. 813 *passim* (2000).

182. For a discussion of the distinction between quasi-judicial and legislative land use decisions, see Carol Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Cal. L. Rev. 837, 871–73 (1983) [hereinafter Rose, Planning and Dealing].

TABLE I. SPECIFIC CHOICES IN A LAPP

	Least Protective	Middle Ground	Most Protective
Public Use	Any public purpose, conterminous with the police power	Prohibitions on takings for economic development or other substantive limits	Prohibiting all condemnations
Compensation	Fair market value	Market value plus additional specified damages, or plus a percentage kicker	Restitution measured by the government's gain
Diminution of Value	85% reduction in market value	Fixed percentage diminution of value less than 85%	Requiring compensation for any loss of value
Denominator	All property wherever situated	Only local or contiguous property	Only the burdened lot
Temporary Takings	Compensation only for total denials of use for extended time	Compensation for delay beyond a fixed duration	Compensation for the entire period of delay
Exactions	Reasonable relation to the costs imposed	Limited to specific dollar amounts, or specific kinds of costs	No exactions
Vested Rights	Vest upon completion	Vest upon substantial reliance	Vest upon purchase of the property
Amortization	Reasonable duration	Long duration	Not permitted
Development Agreements	Not allowed	Allowed with time limitations	Allowed
Variances	New procedural requirements and more lenient standing	New procedural requirements	No new limits on variances
Consistency with the Plan	Separate plan, and heightened scrutiny	Separate plan	No separate plan

C. The General Requirements

In addition to the specific choices available to local governments, LOPP legislation would also have to include certain general requirements to satisfy various political and economic concerns. These include the following.

1. *Uniform Application to Local Property.* — For a LAPP to function properly, it must meet the same kind of uniformity requirements that apply to zoning ordinances so that similar uses are not subject to different kinds of property protection.¹⁸³ In zoning, this requirement prevents

183. The uniformity requirement is a kind of statutory equal protection requirement. See John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574, 621 (1972) (“[C]ommentators are in general agreement that the statutory requirement of uniformity duplicates the constitutional requirement of equal protection.”).

parcel-by-parcel regulation, thus limiting the risk of zoning that targets individuals instead of regulating uses.¹⁸⁴ The same concern applies to LAPPs, and a uniformity requirement would prevent LAPPs from making a particular bargain with an individual developer enforceable, or from singling out a particular property owner for harsher regulatory burdens.¹⁸⁵

For some local governments, particularly smaller local governments seeking to restrict growth, all local property may be subject to a single LAPP. Other local governments, however, may want to distinguish between the LAPP protections that apply to commercial and residential property, or make even more fine-grained distinctions. A LAPP can provide a new set of regulatory commitments overlying the zoning map, so that property zoned "Light Industrial," for example, not only comes with a specific set of permitted uses but also with a set of regulatory precommitments specifying how the zoning law will be applied and what the consequences of a change in the applicable land use regulations will be for the government.

Importantly, a uniformity requirement is likely to minimize the impact of special interest groups in adopting a LAPP. A significant risk surrounding the actual selection of a LAPP is the potential influence of developers or other groups with specific interests that diverge from those of the rest of the community.¹⁸⁶ Where conditions are ripe for spot-zoning (or reverse spot-zoning), the conditions are equally ripe for spot-LAPP adoption, targeting specific individuals or interest groups for benefits or burdens based solely on their political influence instead of the good of the community.¹⁸⁷ Requiring uniformity does not by itself prevent such self-interest, but it makes it harder and more costly to effectuate, given

184. See *id.* at 621 n.178 ("The chief draftsman of the Standard State Zoning Enabling Act has written that the purpose of the uniformity requirement is 'to make it understood that all property situated alike [would] be treated alike.'" (alteration in original) (quoting Edward M. Bassett, *Zoning 50* (reprinted with additions 1940))); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978) (describing impermissible, "'reverse spot' zoning as a 'land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones'").

185. Development agreements provide the most likely method of providing property-owner-specific land use regulations. See *supra* Part II.B.9.

186. I have previously argued that small, local governments tend to be dominated by homeowner majorities, minimizing the risk of special interest group capture. See Serkin, *Big Differences*, *supra* note 2, at 1646–52 (discussing Fischel's Homevoter Hypothesis); see also *supra* note 32 and *infra* notes 272–277 and accompanying text (same). The adoption of a LAPP poses a more serious risk, however, because it is a one-time choice for the local government. This situation makes special interest group pressure more likely. Moreover, there is no doubt that special interest groups enjoy a considerable political advantage in larger local governments.

187. The phenomenon of spot-zoning is well developed in the land use literature. See, e.g., Osborne M. Reynolds, Jr., "Spot Zoning"—A Spot That Could Be Removed from the Law, 48 *Wash. U. J. Urb. & Contemp. L.* 117, 134–37 (1995) (defining spot-zoning as "a description of a process of singling-out a particular piece of property for treatment that differs from that accorded neighboring properties" but arguing that "spot zoning"

the requirement that LAPP provisions cannot be tailored to individuals or specific parcels of land. Additional protection along these lines should come from the built-in protection of a sunset provision, taken up next.

2. *Sunset Provision.* — In its purest form, this Article's proposal contemplates local governments making a one-time election of the property protection they will then offer forever. This allows for the greatest reliance by property owners and precipitates the most effective sorting of owners according to local property regime. The benefits of a LAPP precommitment must be weighed against the cost of decreased flexibility, however. The perfect LAPP today may not be so perfect tomorrow. Some measure of flexibility is therefore important, but not so much that it undermines the LAPP's benefits.

In an imaginary world with perfect information, a LAPP's effect on property values would reflect the importance of retaining flexibility to account for changes in local conditions. In the real world, a one-time LAPP enactment will inevitably lead to long-term winners and losers in the competition between local governments.¹⁸⁸ Inevitably, then, some LAPPs will be the result of special interest group capture, while others will reflect shortsightedness by a majority of property owners.¹⁸⁹ Either could have dire long-term consequences for a municipality. The draconian response is that creating some perennial losers is the necessary result of satisfying preferences for property protection as effectively as possible. Moreover, the current system fares no better distributionally. The gap between the wealthiest and poorest local governments continues to widen.¹⁹⁰ LAPP legislation with a one-time election at least gives local governments one more opportunity than they currently have to level the playing field by offering competitive property protection.

Given the likelihood of some political failures and miscalculations about the long-term effects of a LAPP, it is important to consider other, less callous alternatives. The first is to create voting procedures that minimize the risk of special interest group capture. The most obvious would be to require some form of supermajority.¹⁹¹ With turnout in local elec-

terminology is unhelpful because "the term covers a number of grounds and lacks precision").

188. This kind of interregional competition has been called the "second war between the states." See *The Second War Between the States*, *Bus. Wk.*, May 17, 1976, at 92, 92, quoted in Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 *Harv. L. Rev.* 377, 401 & n.125 (1996).

189. For a more complete discussion of both of these problems, see *infra* text accompanying notes 228–229.

190. See, e.g., Serkin, *Big Differences*, *supra* note 2, at 1678 (describing flight from cities to outer-ring suburbs).

191. Since LAPPs can be thought of as a kind of local constitutional commitment, a supermajority requirement might seem particularly apt. Cf. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 89 (2005) (noting that constitutional rules can usually be overruled only by legislative supermajorities).

tions notoriously low, however, this may still not be enough to prevent frequent special interest group capture.¹⁹² Moreover, it does nothing to combat the potential problem of shortsighted majorities—even supermajorities—adopting an ultimately harmful LAPP.

An alternative response would allow future amendment or rejection of a LAPP through the political process. Of course, the rules for changing a LAPP must require something other than a simple majority or the LOPP proposal would add nothing to the current system of local land use control. One option, then, would be to require symmetrical voting rules for adopting and for modifying a LAPP. If a supermajority is required to adopt a LAPP, a supermajority could also undo it. This proposal goes too far in the other direction, however, providing insufficient stability in a LAPP regime. Supermajorities are relatively easy to come by in local governments, especially in small ones.¹⁹³ Making LAPPs this easy to undo significantly limits the benefits of the LOPP proposal.

The best tradeoff between flexibility and rigid precommitment is a preset sunset provision setting the duration of local LAPPs, coupled with a supermajority requirement for adopting the LAPP in the first place. To be clear, the state legislation itself does not expire, but each individual LAPP would lapse after a fixed amount of time measured from the date of local adoption. Until its natural expiration under the statute, the LAPP cannot be changed or repealed. The sunset provision would have to be quite long because of the investment horizon for most property. Some period between fifteen and thirty years might best serve the twin goals of reliance and flexibility. Finally, adding a supermajority requirement would minimize special interest group pressure in the LAPP adoption process.¹⁹⁴

This solution is still not perfect. A LAPP's benefits will decrease over time as the sunset date approaches. Property values might become quite volatile as the date of expiration approaches and uncertainty over long-term property protection increases. This cost can again be minimized by including some relatively long period between the nonrenewal of a LAPP and its actual expiration. Imagine here a LAPP with a twenty-year sunset provision. Voters could vote after fifteen years whether to renew or not, and if they choose not to, the LAPP will lose its force only after five more

192. See Robert D. Putnam, *Bowling Alone* 31–47 (2000) (describing local voter turnout that affects state and local, as well as national, elections and noting nationwide decline in all forms of political participation, especially at local level). But see Fischel, *Homevoter Hypothesis*, *supra* note 2, at 89–90 (noting that low local voter turnout may be “sign of satisfaction” and that “serious controversy can easily double or triple the participation rate”).

193. The smaller the government, the more majoritarian it is likely to be. For a list of sources supporting this point, see Serkin, *Big Differences*, *supra* note 2, at 1644 n.76.

194. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 *Wm. & Mary L. Rev.* 365, 372 (1999) (“[Supermajority rules] may promote a more harmonious political existence by making it harder for interest groups to acquire other people’s resources for themselves.”).

years.¹⁹⁵ In effect, the overhang between the vote to amend or revoke a LAPP and its actual change functions as a statutory amortization period for reliance on the LAPP.¹⁹⁶

An alternative, consistent with this Article's overall proposal, would be to allow local governments to choose for themselves the rules for enacting, amending, and repealing a LAPP. Some could choose to make LAPPs truly perpetual, others could choose to make LAPPs revocable by supermajorities.¹⁹⁷ The harder a local government makes it to change a LAPP, the more it benefits from—or potentially is harmed by—the level of property protection it selects. This has more theoretical than practical appeal. Special interest groups are just as likely to capture the process for deciding the terms for amending or revoking a LAPP as they are the substance of the LAPP provisions. It is therefore no real protection at all to allow local governments a choice in this dimension. A sunset provision in the enabling LOPP legislation is the better solution.

Admittedly, the combination of a supermajority requirement, inflexibility during the duration of a LAPP, and a preestablished date for termination can only minimize, not eliminate, the costs of special interest group capture and bad decisionmaking by local majorities. There is no guarantee against giveaways to special interests or shortsightedness by existing property owners. This, however, is not fatal to the proposal because the same problems exist now. The question is whether the LOPP legislation will exacerbate or mitigate them. By focusing public attention on the problem of creating the right level of investment incentives, the process for adopting a LAPP may actually be better, in the long run, than the largely bilateral and below-the-radar planning decisions that larger local governments make now, including entering into development agreements.¹⁹⁸ Moreover, the LOPP proposal has to be judged against the realities of the current system in which a one-size-fits-all property regime already burdens certain local governments disproportionately. Ulti-

195. This is consistent with the approach taken by many bilateral investment treaties—the principal international mechanism for generating foreign direct investment. See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 *Law & Soc. Inquiry* 757, 771 (2000) (describing termination provisions in bilateral investment treaties). Another alternative would allow voters to amend a LAPP at any time, but with the amendments only becoming effective after a relatively long waiting period, say two or five years, to vindicate property owners' reliance interests. This proposal, however, could result in the unsettling situation where a LAPP is amended several times before any of the amendments become effective. The first amendment to become effective would therefore have already been repealed by subsequent amendments and yet would still be in force for some time.

196. For a discussion of amortization, see *supra* Part II.B.8.

197. There is no need for a LAPP that can be changed by majority vote because this is or at least approximates the existing system and does not present the entrenchment problem that necessitates the LOPP. For a discussion of entrenchment, see *supra* notes 102–105 and accompanying text.

198. See *supra* Part I.D (describing development agreements).

mately, the benefits of this proposal should easily outweigh any potential costs, as the next Part demonstrates.

III. STRUCTURAL ADVANTAGES AND DISADVANTAGES OF THE LOPP PROPOSAL

Having fleshed out the details of the LOPP proposal, this Part focuses on some of the benefits and costs of allowing local governments to precommit to certain kinds of property protection. A principal benefit of the proposal is that LOPP legislation will shift at least some, if not most, litigation away from the Takings Clause and to the LOPP statutes instead. Allowing courts an opportunity to avoid constitutional rulings will ratchet down the stakes of the property debate, but may also make courts more willing to extend property protection to individual property owners in more cases.

Second, in the muddled area of takings law, certainty about the rules is itself a benefit. Individual LAPPs will allow both governments and property owners alike to know in advance what actions will be compensable, and this will increase the quality and efficiency of their decisionmaking.

Some disadvantages are important to acknowledge, too. The first is the potential impact on settled property rights and, closely related, the impact on the poor and on locally undesirable uses. There is a trend away from local autonomy in land use issues because of the regional effect of local land use decisions. LOPP legislation, with its focus on interlocal competition, relies on local sovereignty around land use issues, and this is at least in tension with the regionalism movement.

The second disadvantage of LOPP legislation is that it might invite regulatory forum shopping. Where a local government has precommitted not to regulate in a particular way, there is no guarantee that the state or the federal government will not come in and regulate where the local government has said it will not. LAPPs therefore provide imperfect protection, the limits of which need to be acknowledged.

A. *The Benefits of Statutory Protection*

The disarray in takings jurisprudence is the subject of frequent criticism by courts and commentators alike.¹⁹⁹ Nevertheless, rigid rules might be even worse.²⁰⁰ The reason, simply, is that any precise definition of property protection threatens to ratchet up or down the scope of the

199. See, e.g., Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 *Colum. L. Rev.* 2182, 2186 & n.18 (2004) (collecting claims of takings law's unintelligibility).

200. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan. L. Rev.* 577, 600 (1988) [hereinafter *Rose, Crystals and Mud*] (arguing that "crystalline rules seem less the king of the efficiency mountain than we may normally assume"); cf. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 *Ariz. L. Rev.* 559, 614 (2001) (identifying similar "wrongheaded infatuation with crystalline statutory drafting" in bankruptcy context).

Takings Clause against all governments for all kinds of actions, and these do not all implicate the same underlying concerns. Most takings cases are not strictly limited to their facts, and an expansion in the definition of property rights against the government in one case can easily spill over into others.²⁰¹ Likewise, expanding a government's authority to act in one case can be taken by others as *carte blanche* for similar authority in the future, even if different facts would actually implicate very different substantive concerns.²⁰²

Of course, this is by no means unique to takings law; any constitutional litigation poses the same problem. It is, however, particularly pernicious in the takings context because of the inability of courts to identify even the relevant variables for distinguishing one case from another. Should the purpose of the government action matter, for example, whether it is a regulation to protect public health, the environment, or just wealthy constituents' views of the ocean?²⁰³ Does the government actor matter? That is, should it make a difference whether government action is undertaken by the federal government, the state, a local government, or an agency? I have previously argued that it should,²⁰⁴ but courts have not, by and large, taken up the call. The list of possible variables is long indeed and courts are left making the frequent pronouncement that identifying a taking is an *ad hoc* factual inquiry.²⁰⁵

The consequences of government liability would be far less dire if they were the result of statutory instead of constitutional interpretation.²⁰⁶ This is especially true if LOPP legislation and the resulting

201. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220, 233–34 (2003) (relying in part on extensions of Takings Clause to government appropriations of rooftops for cable television access and private airspace for governmental planes to further extend Takings Clause to “interest on lawyers’ trust accounts”).

202. *Kelo* is a good example of this fear. *Kelo v. City of New London*, 545 U.S. 469 (2005); see *supra* notes 42–46 and accompanying text (discussing *Kelo* fear). Alternatively, courts may gloss over or simply ignore earlier cases implicating different concerns, even if the holdings in those cases appear to be on point. Cf. Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in Brown v. Legal Foundation of Washington*, 37 *Ind. L. Rev.* 417, 427–29 (2004) [hereinafter Serkin, *Valuing Interest*] (describing inconsistencies between *Hodel v. Irving* and *Brown v. Legal Foundation of Washington*, and failure by the Court in *Brown* even to cite *Hodel*).

203. Cf. Gregory S. Alexander, *The Global Debate over Constitutional Property* 131–38 (2006) (identifying focus in German law on public purpose of government regulations of property).

204. Serkin, *Big Differences*, *supra* note 2, at 1697–98.

205. E.g., *Parkwood Homes, Inc. v. City of Rockwood*, No. 05-CV-72708-DT, 2006 WL 508647, at *8 (E.D. Mich. Feb. 28, 2006) (“The Supreme Court has held that regulatory takings cases are characterized by *ad hoc*, highly factual inquiries.”); *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 128 (Ct. App. 2006) (“[R]egulatory takings challenges are governed by the ‘essentially *ad hoc*, factual inquiries’” (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978))).

206. See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1185 (2003) (“[S]tatutes are significantly easier to amend than the Constitution, sharply raising the stakes in

LAPPs are rolled out slowly over time. The LAPP provision adopted by one municipality could be subjected to judicial scrutiny and interpretation before other local governments decide to adopt it. Moreover, if courts interpret the provision differently than the state intended, the state could modify the LOPP statute without recourse to a constitutional amendment.²⁰⁷

B. *Increased Certainty of Property Rules*

A constant refrain among courts and takings scholars is that takings law is in a state of perpetual disarray. There is some reason to think that, as a matter of constitutional law, this vagueness has its benefits or is at least an inevitable result of hard choices in hard cases.²⁰⁸ But increased certainty in this arena comes with substantial benefits.²⁰⁹

The current vague takings standard makes it very difficult for local governments and property owners alike to predict how the Takings Clause will apply in many cases. This creates inefficiencies for both parties. From the government's perspective, uncertainty about takings liability may lead risk averse local government decisionmakers to underregulate.²¹⁰ The stakes of liability are so high, especially for small local governments, that they may overestimate the likelihood of liability.²¹¹ A clearer definition of takings liability will allow more accurate cost-benefit decisions since local decisionmakers will not have to rely on reading tea leaves to determine whether the government will be held liable.

From a property owner's perspective, increased certainty also reduces the risk of investing in property. Now, any cost-benefit analysis about a new development must include some risk that the government will erect or enforce regulatory hurdles, greatly increasing costs.²¹² Even commitments by local decisionmakers will not eliminate the risk, be-

constitutional interpretation where mistakes in interpretation may not be so easily reversed."). Of course, the consequences to an individual town of an undesirable property regime may be no different whether its source is the Takings Clause or a LAPP, but the systemwide costs of property protection are much lower.

207. Of course, local governments should not be able to amend the LAPPs so easily for fear of attempts to strategically change the terms of the property protection afforded by the LAPP, in direct contravention of the point of the precommitment. See Part II.C.2.

208. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 *Cardozo L. Rev.* 93, 93 (2002) ("[T]he vagueness in takings doctrine is quite functional and entirely appropriate."); Rose, *Crystals and Mud*, *supra* note 200, at 600 (calling into question efficiency of "crystalline rules").

209. See Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 *Va. L. Rev.* 1435, 1449–50 (2000) (decrying uncertainty in takings rules); cf. Daniel J. Curtin, Jr., *Foreword to Taking Sides on Takings Issues*, *supra* note 147, at xxi ("Takings law is notoriously complex, and a desire for clarity exists among many of those who must deal with it.").

210. See Serkin, *Big Differences*, *supra* note 2, at 1666–74.

211. See *id.*

212. See Kaplow, *supra* note 56, at 522–36 (analyzing risk and incentive effects of uncertainty about future government policy).

cause, as already noted, such commitments are presently unenforceable unless they take the form of formal development agreements.²¹³ Making these commitments enforceable increases the expected value of a development by limiting the risk of adverse local regulatory actions. To the extent potential investors now try to assess that risk by divining the regulatory climate in a particular locality, the existence of a LAPP will greatly reduce information costs.

Viewed through another lens, predictability in property regimes adds to the overall fairness of the regulatory system.²¹⁴ If property owners know ahead of time what regulations will apply, they are able to choose whether or not to invest. As Professor Carol Rose explains: "One protects oneself against the predictable evil by not participating in the risky venture, by not purchasing the property that needs the seldom-granted zoning change."²¹⁵ Increased certainty about applicable property protection therefore increases the fairness of local property regimes.

C. *Interference with Settled Property Rights*

Adopting a LAPP at the initial incorporation of a local government is one thing. Adopting one midstream seems quite different. Once adopted, a LAPP will not affect all local property owners the same way and will undoubtedly create relative winners and losers. The question, then, is how a local government can adopt a LAPP now, potentially changing settled expectations about property rights.

As a first response, it is important to reiterate that the takings baseline still applies so that no one will end up with less property protection than he or she currently enjoys. The LAPP proposal will undoubtedly have different long-term effects on different people, but it will not undermine anyone's existing property rights. It may, however, have an adverse impact on property values, and that raises distributional concerns that need to be addressed.

There are two specific risks in adopting a LAPP. The first is the risk of overregulation, driving up the costs of new development, excluding newcomers, and thwarting prodevelopment factions within a local government. The specific concern is that local majorities will ignore the interests of minority groups, including the interests of outsiders, developers, and others with a softer political voice, and adopt a LAPP that maximizes the government's power to engage in highly restrictive land use regulations. The second concern is the opposite one, that local governments will overprotect property and therefore underregulate. This may occur either because local majorities discount the costs associated with property protection or, more likely, because adoption of a LAPP will

213. See *supra* Part I.D (describing development agreements).

214. Carol Rose persuasively links foreseeability with fairness. See Rose, *Planning and Dealing*, *supra* note 182, at 907-08.

215. *Id.* at 908.

sometimes result from special interest group pressure to the detriment of the majority of property owners.²¹⁶ To put it starkly, special interest groups, like developers or commercial interests, may receive greater property protection under specific LAPPs at the expense of everyone else. Ratcheting up property protection to prevent exactions, for example, might dramatically increase the cost of new development to existing taxpayers who will have to bear more of the cost of new infrastructure. Both problems are addressed in turn.

Perhaps counterintuitively, the problem of underprotecting property and thereby overregulating is likely to result where a LAPP adoption process is controlled by local homeowners, the dominant political group in most small governments.²¹⁷ Why would a local property owner want to limit the local protection of his or her property? Because, having already locked in his or her own land use, decreased property protection actually means an increase in the regulatory burdens on those coming after.²¹⁸ Homeowners, at least self-interested ones, are likely to want to benefit from the lax regulation of their own property and then kick that ladder of permissiveness down behind them, subjecting any newcomers to more stringent regulations. The predictable result is local property owners choosing a LAPP that gives the greatest regulatory latitude while preserving the most stringent limitations on granting variances and rezonings. By limiting the supply of new buildings, newcomers would have to pay a premium to buy into the town. A highly protective LAPP therefore amounts to a transfer of wealth from newcomers (who have to pay more for property) to existing property owners (who receive more for their property).

This kind of LAPP also threatens existing owners of low-valued property. Land use regulations may be designed to eliminate mobile homes, for example, or other property that is perceived to be a drag on local property values.²¹⁹ This can put a particularly mean spin on the Tiebout Hypothesis where regulatory burdens are placed on people without the resources to move.²²⁰ At least some of the benefits of jurisdictional competition are only available to people who can pay the ante to move to a place that better satisfies their preferences. Under this view, LAPPs will

216. For a discussion of public choice theory, see sources cited *supra* note 96.

217. The smaller the local government the greater this threat. See Ellicksor., *supra* note 80, at 405 ("If the majoritarian model reflects reality anywhere, however, it is in small municipalities."); Fischel, *Homevoter Hypothesis*, *supra* note 2, at 87–92.

218. This is a function of the vested rights doctrine, considered *supra* Part II.B.7.

219. See, e.g., *City of Lewiston v. Knieriem*, 685 P.2d 821, 826 (Idaho 1984) (upholding statute requiring removal of mobile home because statute was held to be rationally related to protecting property values); *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 795 (Tex. 1982) (upholding ordinance restricting mobile homes in order to protect property values).

220. See, e.g., Ford, *supra* note 23, at 1411 ("The often significant costs of movement mean that locational decisions reflect personal wealth rather than preference."). For a description of the Tiebout Hypothesis, see *supra* Part I.C.

do nothing to increase the overall welfare of people who are trapped by economics or other factors in a municipality that adopts a LAPP antithetical to their interests.

As a first response to the problem of majoritarian interest in overregulation, this political dynamic is independent of the LOPP proposal. Exclusionary zoning and all forms of growth control are ubiquitous issues in the land use and takings literature and in the case law.²²¹ Because LAPPs do not expand the available slate of land use regulations, the problem of overregulation is the same under the LOPP proposal as under existing law. If a local government chooses to retain the broadest range of regulatory power by adopting a highly permissive LAPP, it is in precisely the same position all local governments currently occupy.

Additionally, a LAPP creates systemic constraints on the use of growth controls driven by property owners' desire to increase local property values.²²² This, in turn, ensures diversity among local property regimes because not all local governments maximize property values by retaining the broadest possible regulatory power. In some situations, property values are indeed best preserved by preventing new development to the greatest extent possible and excluding newcomers. In many, if not most, situations, however, property values will be enhanced by attracting at least some kinds of development, whether commercial development to increase the tax base, or high-end residential development to drive up property values generally, under the rising-tide-lifts-all-boats theory of property values.²²³ A homeowner majority therefore adopts the least protective LAPP at its peril. Such a community will find itself at a relative disadvantage in the competition for new business and development. Even local governments dominated by homeowner majorities are likely to adopt LAPPs that reflect some outsiders' interests and, in particular, some commercial and developer interests.

Local homeowner majorities using regulations to increase their property values may sometimes raise distributional concerns, permitting existing property owners to benefit at the expense of newcomers, but this is not qualitatively different from any successful local initiative, like improving the quality of the schools or the level of services provided. To put a different and more positive gloss on the effect of a LAPP, newcomers are, in fact, willing to pay more to buy into a local government because they are receiving more in return, namely, an enforceable commitment to the property regime that they want. All of this is to say that underprotection of property is less of a concern where homeowners are

221. E.g., Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 *Seton Hall L. Rev.* 1, 37-72 (2001) (discussing judicial responses to exclusionary zoning).

222. See Fischel, *Homevoter Hypothesis*, *supra* note 2, at 4; Serkin, *Big Differences*, *supra* note 2, at 1655-61 (discussing local governments' responsiveness to property values).

223. Cf. Andres Duany, *Three Cheers for Gentrification*, *Am. Enterprise*, Apr.-May 2001, at 36, 37 (describing gentrification as a "rising tide that lifts all boats"), quoted in Ellickson & Been, *supra* note 100, at 10.

internalizing the costs and benefits of their decisions.²²⁴ Homeowners will bear the consequences of a badly drawn LAPP. Property values will fall if development and growth are curtailed too much.

No doubt, there may remain some systemwide biases against truly undesirable local uses that are nevertheless important for society. A wealthy town that chooses to retain broad regulatory power may want to exercise that power to exclude poor families with children, to take a likely example.²²⁵ If too many local governments adopt the property regime that best prevents certain undesirable uses, then no amount of Tiebout-style sorting will provide for them, or at least enough of them. This problem is again hardly unique to the LOPP proposal, however, and property protection turns out to be a remarkably crude tool for fighting exclusionary zoning. The challenge of low-income housing and a local government's regional responsibilities are better taken up elsewhere in the law. The New Jersey Supreme Court's famous *Mt. Laurel* decision provides one avenue, requiring local governments to provide their fair share of low-income housing.²²⁶ Statutory responses, including a shift toward regional planning, provide another useful approach. Regionalism seems particularly in vogue, with its emphasis on the negative externalities of local land use decisions.²²⁷

Removing local governments' ability to exclude the poor is not at all inconsistent with this Article's proposal for local property protection. There are many reasons beyond exclusionary zoning why a local government might want to retain robust regulatory powers, from environmental protection, to preservation of a downtown, to aesthetic regulations and the prevention of gentrification, to name just a few. A mandate to permit low-income housing will not undermine these other reasons for local land use regulations.

224. For a lengthier discussion of when homeowners do, in fact, internalize costs and benefits, see Serkin, *Big Differences*, supra note 2, at 1655–65.

225. Ellickson, supra note 80, at 452 (“The normal profit-maximizing strategy of a suburb dominated by a homeowner majority is to discourage construction of modest-priced housing suitable for occupancy by families with school-age children.”); see also Jerry Frug, *The Geography of Community*, 48 *Stan. L. Rev.* 1047, 1083–84 (1996) (identifying property values as one reason property owners seek to exclude “the wrong kind of people”); Sterk, *Competition*, supra note 19, at 837–38 (describing incentives to exclude poor residents).

226. See *S. Burlington NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 724 (N.J. 1975).

227. At least some scholars have proposed explicitly replacing local governments with regional governments. See David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2255, 2270–76 (2003) (describing this approach). For an introduction to regionalism—sometimes called “metropolitanism”—see Orfield, supra note 77, at 10–14; see also William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's “Privatizing the Neighborhood,”* 7 *Geo. Mason L. Rev.* 881, 890–95 (1999) [hereinafter Fischel, *NIMBY Syndrome*] (describing shift from local government to metropolitan government). For an interesting proposal to deal with the externalities generated by local governments, see Amnon Lehari, *Intergovernmental Liability Rules*, 92 *Va. L. Rev.* 929, 962–76 (2006).

Overprotection of property through the adoption of a highly restrictive LAPP is the flip side of the problem. A local government that gives away too much regulatory power may find itself at the mercy of developers and others who impose net costs instead of generating net benefits. That is, they consume more resources than they contribute in taxes, fees, and other sources of revenue.

Existing property owners have a strong incentive not to permit overprotection and the consequent underregulation of property because of the negative impact on property values. But what if property owners are systemically shortsighted about the costs and benefits of different LAPP provisions?²²⁸ Property owners' investment horizon tends to be quite long but may nevertheless be short relative to the life of a local government. Moreover, adoption of a LAPP will sometimes result from special interest group pressure to the detriment of property values.²²⁹ Ratcheting up property protection to prevent exactions, for example, might dramatically increase the cost of new development to existing taxpayers who will have to bear more of the cost of new infrastructure.

For cities, in particular, the problem is acute. Some kinds of concessions for commercial interests may be entirely appropriate. Figuring out what LAPP provisions to adopt, however, will implicate tradeoffs that are likely to be altogether too complex for the average voter to comprehend in more than a superficial way.²³⁰ The conditions are therefore ripe for special interest groups to take control of LAPP adoptions and engineer bargains that are good for them but potentially bad for the city as a whole.²³¹

There is no magic slipknot to prevent local governments from tying their own hands too tightly. The structural response is to permit escape from an ill-advised LAPP through the sunset provision described above.²³² But with a twenty-year sunset provision, for example, a particular local government may find itself with a two-decade penalty in the fierce race between local governments. That is, admittedly, one of the potential costs of the proposal. Of course, if increased property protec-

228. Such shortsightedness is a common thread in behavioral economics. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1568 (1998) (describing potential criminals discounting prison sentences); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 *U. Chi. L. Rev.* 1175, 1194 (1997) (describing people's myopia about future events).

229. For a discussion of public choice theory, see sources cited *supra* note 96.

230. The kinds of tradeoffs are discussed in more detail in Part IV where the Article identifies those property protections that are particularly expensive for different kinds of governments.

231. Public choice theorists have demonstrated that special interest group power is greatest when it comes to deciding technical or complex questions. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U. Chi. L. Rev.* 63, 88 (1990) ("The influence of special interests is strongest when the statutory provision at issue is narrow or merely technical, the legislator feels that her constituency will not care one way or the other, and the provision does not ultimately conflict with the legislator's own ideology.").

232. See *supra* Part II.C.2.

tion is really as valuable as members of the property rights movement think, then property values will not suffer but will actually benefit from increasing protection because of the resulting increase in demand.

D. *Regulatory Forum Shopping*

Another objection to the LOPP proposal is that it does not go far enough. By their nature, LAPPs bind only local governments to a property regime. A LAPP provides no guarantee that the state or even the federal government will not step in and do precisely what the local government has promised not to do. This is, in fact, true. As now, property owners will continue to face some risk of state or federal regulation.

This, in turn, opens the door to regulatory forum shopping. In the most likely example, imagine a developer seeking to assemble land for a new development and wanting to enlist the government's condemnation power on its behalf. If a local government has precommitted not to condemn property for economic redevelopment or to prevent blight—the two most common justifications for condemn-and-retransfer plans—the developer is not necessarily out of luck. Instead, the developer can petition the state to condemn property on its behalf. It is not hard to find real world examples of this dynamic. Presently, New York State is threatening condemnations around the Atlantic Rail Yards in Brooklyn on behalf of a private developer, Forest City Ratner, to create a new and revitalized downtown Brooklyn. Instead of enlisting the city to assemble land for the project, the Empire State Development Corporation, a state agency, is threatening to condemn the property.²³³ This opportunity to bypass local decisionmakers allowed Forest City Ratner to select the forum likely to be friendliest to the proposal. Indeed, conventional wisdom holds that developers more often succeed in the state political process than in the local political process.²³⁴

There is no quick and easy fix for this problem. The LOPP proposal cannot apply to state and federal regulations. The benefits of interlocal competition rely on real elasticity in the property market and actual choice by property owners about where to live and invest. This kind of elasticity exists at the local level, especially as between the suburbs and

233. See, e.g., Charles V. Bagli, *Arena Project for Brooklyn Wins Approval* from M.T.A., N.Y. Times, Sept. 15, 2005, at B1 (describing plans).

234. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. Rev. 1243, 1274 n.137 (1997) (citing sources arguing that developers are more successful in state politics).

towns around a central city.²³⁵ The same is simply not true at the state level where there is far less elasticity.²³⁶

This does not undermine the benefits of the LOPP proposal, however. Local government actions are a frequent source of takings litigation, and providing a clearer definition of local power will eliminate—or at least clarify—a substantial source of risk for property owners. Large projects like the development of the Brooklyn Rail Yards are indeed high profile but are nevertheless quite rare compared to run-of-the-mill local development. Smaller local developers—those others besides the Forest City Ratners of the country—may have a much harder time enlisting the state to aid their developments. Although some risk of action by higher levels of government remains, reducing the risk surrounding local regulations is a substantial benefit.

IV. LOPPs, LAPPs, PROPERTY PROTECTION, AND THE TAKINGS CLAUSE

Implicit in the LOPP proposal is a new way of thinking about restrictions on government power to regulate private property, restrictions that primarily are found in the Takings Clause. The question the LOPP proposal presents is what level of property protection is most appropriate for a particular local government to attract foreign investment. The idea, at its heart, is that property protection can be construed as a tool for encouraging investment. Perhaps this is how the Takings Clause itself should be interpreted, as offering those protections that are important to investment, and the content might change significantly depending on the governmental actor.

This suggestion might seem like a strange, if not dangerous, way of thinking about property rights against the government. The Takings Clause is usually thought to limit the relationship between a government and property owners within its borders. Competing political theories provide different content to this relationship. James Madison viewed the Takings Clause as a central bulwark protecting property owners from the increasing political power of the propertiless.²³⁷ Similarly, political process theorists view the Clause like other provisions in the Bill of Rights as protecting small minorities against majoritarian abuse.²³⁸ Current eco-

235. Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in *Perspective on Public Choice* 73, 84 (Dennis C. Mueller ed., 1997) (“A few large governments (counties) are not sufficiently competitive to ensure efficiency.”); see also Been, *Exit*, *supra* note 13, at 519 (noting that people working in New York City can choose among hundreds of local governments under which to live).

236. Interstate competition certainly exists, but usually for investments that are relatively transportable, like corporate charters and self-insurance.

237. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 850 (1995) (quoting James Madison, Note to his Speech on the Rights of Suffrage, in *The Records of the Federal Convention of 1787*, at 450, 452 (Max Farrand ed., 1966)). For alternate theories, see *id.* at 817 n.186 (identifying sources that discuss possible influence of Locke).

238. See *id.* at 882–83 (articulating process theory).

conomic theories view the government's power to take property as a tool that should be limited to preventing holdouts and market failures, and should be constrained by remedies designed to promote efficient regulatory incentives.²³⁹ Each of these theories specifies a different inquiry into the appropriate limits of the Takings Clause in any particular case: Is the government discriminating against landed property owners? Is a government action motivated by majoritarian or minoritarian political pressures? Is the exercise of government power necessary to overcome specific market failures?

In addition to these theories with their focus on the relationship between individual property owners and the government, property protection can also serve the purely instrumental goal of attracting foreign investment. This presents a very different question, namely, what kind of property protection should a local government offer to best encourage investment? The more protective the property regime, the less risk there is for developers and other investors. However, any increase in property protection increases the real costs to the government of all sorts of government actions, from condemnation to regulation. If the government could take property for free, building roads, parks, or even the occasional factory would be much less expensive. A government that reserved for itself the power to take property for free, however, would suffer real economic consequences from a disadvantage in attracting any investment at all. Presumably, then, a government should offer property protection only when such protection will cost less than the benefits it will generate in increased investment.

Revealingly, this utilitarian formula offers some new insights into perennial takings problems. What, for example, is the significance of protecting only "distinct investment-backed expectations," to quote the cryptic phrase from *Penn Central*?²⁴⁰ Perhaps this should be the natural limit of property protection because it is all that is necessary to encourage the investment in the first place.²⁴¹

Looking at property this way is not as radical as it might initially seem. In international law, it is commonplace to think of treaties and other international commitments to respect property rights as tools that developing countries use to induce foreign investment. Bilateral investment treaties often include commitments by developing countries to pro-

239. See Posner, *Economic Analysis*, supra note 59, at 54–56 (defending eminent domain when necessary to offset market failures, such as risk of monopoly, and justifying compensation requirement as incentive for efficient regulation); Levinson, supra note 96, at 348–50 (describing traditional economic account of Takings Clause).

240. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 127 (1978).

241. Protecting windfalls is unnecessary to attract an efficient level of investment. Cf. Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 *J. Intell. Prop. L.* 1, 29 (2005) ("The most bizarre disconnect between economic rationality and copyright is the retroactive extension of copyright terms. Works that are in existence can hardly be subject to further incentives. Any additional gains are windfalls and any costs to the public unnecessary.").

tect the investments of wealthier developed countries.²⁴² NAFTA also includes its own version of the Takings Clause—arguably providing stronger protection than the Takings Clause—and it is generally viewed as protecting investments by Canada and the United States in Mexico.²⁴³ More generally, too, the effect of property protection on owner investment incentives is a central justification for the Takings Clause.²⁴⁴ Many scholars have observed that without a compensation requirement, people would underinvest in property.²⁴⁵

This same idea can be applied directly to local governments, where foreign investors are broadly defined to include anyone who might invest in property. This includes homeowners, developers, and companies deciding where to do business.²⁴⁶ Local governments now compete for

242. See Kenneth J. Vandavelde, A Brief History of International Investment Agreements, 12 U.C. Davis J. Int'l L. & Pol'y 157, 170–71 (2005) (“[T]he motivation for the developing country to conclude the [bilateral investment] agreements in most cases was to attract foreign investment. The theory was that offering legal protections to foreign investment would induce foreign investors to invest.” (citation omitted)); cf. Michael Heller & Christopher Serkin, Revaluating Restitution: From the Talmud to Postsocialism, 97 Mich. L. Rev. 1385, 1404 (1999) (arguing that restitution rules in former communist countries were designed to attract foreign investment). Of course, the unequal bargaining positions between developed and developing countries can force the latter into significant concessions that limit or even eliminate the value of increased foreign investment. Cf. Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?, 26 Nw. J. Int'l L. & Bus. 95, 99 (2005) (arguing that in African countries, “the desire for [foreign direct investment] overwhelmingly precludes the possibility of effectively using the results of a thorough analysis of economic, political, and social or other gains that may come from such inflows, and therefore what laws and policies need to be erected to realize such gains”). This outcome is less likely in interlocal competition because the Takings Clause provides a constitutional floor of rights offered, and the states themselves can, in their LOPP legislation, limit the terms of the competition by defining the options available in a LAPP.

243. See Been & Beauvais, *supra* note 16, at 37–42 (describing NAFTA's Investor's Bill of Rights generally, and asserting that while “many have argued that NAFTA simply ‘exports’ the U.S. regulatory takings standard into international law . . . in fact, the NAFTA tribunal decisions and dicta significantly exceed U.S. takings protections” (footnote omitted)); Jacqueline Granados, Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA, 13 Cardozo J. Int'l & Comp. L. 189, 223 (2005) (concluding that NAFTA has helped shift Mexico's investment policy toward greater protections for foreign investors).

244. See Charles E. Cohen, Eminent Domain After *Kelo v. City of New London*: An Argument for Banning Economic Development Takings, 29 Harv. J.L. & Pub. Pol'y 491, 542 (2006) (“[The just compensation requirement] enables private investment in property as such investment would be unlikely if the government could freely take private property without ‘just compensation.’”).

245. See Dagan, *supra* note 129, at 748–49 (arguing compensation requirement promotes efficient investment in property).

246. Broadly construed, it includes both prospective and existing property owners. Existing owners can be viewed as “foreign” investors in that they are forgoing the decision to move their investment somewhere else. They are “foreign” in the sense that their investment is still something that a local government must seek to attract.

these foreign investments in many arenas.²⁴⁷ Adding property protection to the mix is a natural extension of this interlocal competition.

It is obviously no easy task to decide what level of property protection will maximize investment. The answer will vary considerably depending on the nature and character of the local government. Indeed, variation among local governments is central to the Tiebout Hypothesis and therefore to this Article's legislative proposal. But the takings inquiry is already a fact intensive and largely ad hoc affair. A focus on creating the property regime that will best attract local investment simply changes the nature of the inquiry. The following sections therefore offer some starting assumptions and generalities about the competing interests of different kinds of local governments, suggesting which particular forms of property protection are likely to be the most and the least costly, and which are likely to generate the greatest investment gains. This is useful both theoretically and also as a roadmap for local governments given the opportunity to adopt LAPP-style property protection.

A. *Local Government Preferences*

There are many ways to differentiate local governments from each other. Size, wealth, economic base, geographic region, climate, diversity, and other factors, all might affect a local government's preferences when it comes to local property protection. Indeed, this diversity is what makes the LOPP proposal so appealing. The distinctions with the most likely systemic impact on LAPP preferences, however, track the size and density of the government, its proximity to a central city, and the complexity of the bureaucratic infrastructure.

First, and perhaps most obviously, the present level of development in a locality will affect how important the power of eminent domain is, especially for large development projects. For a town or suburb with a significant amount of undeveloped land, chances are that property for a development can be assembled without the power of eminent domain.²⁴⁸ Given an adequate supply of land suitable for development, the market for the land is likely to be competitive and, in fact, preferable to the expense of formal condemnation.²⁴⁹ As the supply of undeveloped land decreases, however, the power to condemn becomes more important and

247. See James Surowiecki, *It Pays to Stay*, *New Yorker*, Dec. 13, 2004, at 40, 40 (describing how cities "dangle a lure" to investors).

248. See Fennell, *supra* note 119, at 972 ("If markets are sufficiently thick, the would-be holdout's tactics will be unavailing; the purchaser can simply buy a different parcel of land elsewhere."). The exception comes when a development or other public project requires a particular building site. Cf. Eric Kades, *Windfalls*, 108 *Yale L.J.* 1489, 1558 (1999) ("When the government is trying to buy a specific piece of property, however, it is in a bilateral monopoly with one landowner.").

249. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 *Mich. St. L. Rev.* 929, 934 ("Eminent domain is an expensive way to acquire property." (citing, *inter alia*, Merrill, *Public Use*, *supra* note 47)).

more valuable. That is to say, alternatives to eminent domain are more costly to developed cities than to communities with more available property, especially when it comes to projects that require assembling property owned by multiple owners.²⁵⁰

For similar reasons, amortization is a particularly important tool for cities to create comprehensive zoning and land use regulations. Almost every existing use is a potential nonconforming use in the event of a zoning change. The extent of existing development in developed cities means that changes in applicable zoning must either include an enormous number of nonconforming uses—potentially undermining the efficacy of the zoning regime—or come with some plan for eliminating the nonconforming uses over time. A city can always buy out nonconforming uses, either through voluntary sales or condemnation, but this is an expensive proposition. Cheapest, by far, is to amortize existing nonconforming uses in lieu of compensation, thus regulating them out of existence.²⁵¹ Limiting the power to amortize uses in this way is more expensive for a city than for a town or suburb simply because of the quantity of potentially nonconforming uses in a more developed area.

The more complex the bureaucracy in a local government, the higher the costs of temporary takings. A local administrative officer in a small town may have the unilateral power to grant a zoning permit, requiring only that the permit be posted in one public place.²⁵² Requesting a variance from the zoning ordinance can often be done without a lawyer in a brief meeting with people who may also happen to be neighbors, if not friends.²⁵³ Contrast this with a city like New York. Trying to build in New York involves jumping through numerous administrative hoops, each of which is fraught with peril for even the most sophisticated builder or developer. Multiple layers of review for projects of any size can pit different local authorities against each other as they try to navigate the competing constituencies and interest groups they represent. Large city land use decisions are complex and slow, even under the best of conditions. For a relatively nimble small government, the threat of compensation during the pendency of the regulatory approval process is not partic-

250. This is not limited just to cities. Old, inner-ring suburbs often have little available land, even though they may be much less dense than a city. See Robert Bruegmann, *Sprawl* 61–64 (2005) (describing increasing population density in certain suburban areas). Nevertheless, assembling land will still often require dealing with holdouts that might prevent a project from going forward at all.

251. For a discussion of amortization, see *supra* Part II.B.8.

252. E.g., Vt. Stat. Ann. tit. 24, § 4449 (2004) (requiring “administrative officer” responsible for issuing zoning permits to “[p]ost a copy of the permit in at least one public place in the municipality”); Zoning Regulations, Town of Marlboro, Vt. § 202 (2003) (on file with the *Columbia Law Review*) (setting out requirements that must be met before “Administrative Officer” can issue zoning permit).

253. See, e.g., Zoning Regulations, Town of Marlboro, Vt. § 204(2) (requiring that variances may only be granted in compliance with Vt. Stat. Ann. tit. 24, § 4468, which requires notice of a public hearing before municipal panel and which allows for lawyers but does not require their presence).

ularly daunting. The amount of time needed for approval is sufficiently short that damages, if any, will be minor, if not *de minimis*. For cities, on the other hand, having to compensate developers for delays arising out of regulatory approvals could prove crippling to land use controls.

Some LAPP protections are likely to prove less important for larger local governments. For example, exactions are a less important tool for cities because of their diverse economic base. Cities have many ways of raising money and so are not as dependent on new developments entirely paying their own way. More generally, too, the effect of compensation on a city's land use decisions and regulatory incentives will be substantially less than in smaller governments. The per capita costs of a government action are more important politically than the absolute value.²⁵⁴ The costs of a \$500,000 project spread over one million people will come with far lower political costs than a \$100,000 project spread over one thousand people. A large population, combined with a relatively diverse tax base, will make a city government less price sensitive than a smaller government.

Suburban governments face their own unique set of issues. The smaller and more residential a suburb is, the more it will be motivated by homeowner interests.²⁵⁵ Suburbs therefore will want to retain a robust zoning power in order to control housing supply and median house prices. Because of their dependence on property taxation, suburbs want to minimize free riders on public services.²⁵⁶ Every family that moves school age children into the suburb but pays less than the median share of property taxes will, in effect, increase the cost of the schools to everyone else.²⁵⁷ In terms of LAPP provisions, this means increasing the threshold for liability, as well as giving neighbors the ability to block new development by requiring greater consistency with the general plan.

Suburbs' other relevant characteristic is the extent to which they are at the mercy of regional development pressures. A thriving central city will create spillover development pressures on neighboring suburbs as demand for housing in the city outstrips supply and people are forced to the geographical margins.²⁵⁸ Retaining a broad power to impose exactions is particularly important for suburbs in this situation. A precommitment to limit or prohibit the use of exactions will make it impossible for a suburb to extract the full marginal cost that new development im-

254. See Komesar, *supra* note 95, at 61 ("Interest groups with small numbers but high per capita stakes have sizeable advantages in political action . . ."); Serkin, *Big Differences*, *supra* note 2, at 1651 ("Even where the absolute value of the government action is high, it may still be difficult to mobilize a majority of voters or taxpayers unless their per capita stakes are also high.").

255. This claim has been explored most exhaustively by Fischel, *Homevoter Hypothesis*, *supra* note 2, at 16.

256. See *id.* at 68–69.

257. See *id.* (citing Bruce W. Hamilton, *Capitalization of Intra-jurisdictional Differences in Local Tax Prices*, 66 *Am. Econ. Rev.* 743 (1976)).

258. New York is a perfect example of this phenomenon.

poses.²⁵⁹ Therefore, each new development threatens to become a net loser for the suburb, increasing taxes and potentially leading to a downward spiral of increased taxes and decreased services. The more development that comes in, the more the suburb loses.

Needless to say, there is no one right answer for any given community. Indeed, the point of the LOPP proposal is to recognize the variation in local governments' interests. Nevertheless, this discussion provides a starting point for navigating some of the competing costs of local property protection.

B. *Investor Preferences*

The costs of different kinds of property protection vary with the nature of the local government. The benefits, on the other hand, vary with the preferences of the investors it is trying to attract. Just as it is possible to generalize—at least as a starting point—about the interests of different kinds of governments, it is also possible to generalize about the interests of different kinds of investors in local property. The number of different kinds of local investors is enormously varied. A fine-grained snapshot would distinguish between homeowners with school age children and those without, businesses with low-wage employees who need affordable places to live and those without, stores dependent on local consumers and those that cater to nonlocals. The list is nearly endless.

Despite this diversity of actual interests, general classes of potential investors whose preferences cohere enough to discuss in the abstract include homeowners, developers, and businesses. Although individual members of each of these groups will undoubtedly have their own unique preferences, it is again possible to construct some common interests as a starting point in generating local property protection.

As a group, developers are likely to want the highest level of property protection. Most developers want as much assurance as possible that their projects will not face significant regulatory hurdles. They therefore favor expedited permit processes and liability if the government sits on a permit application for too long. In addition, they prefer a relatively low threshold before a diminution of value is compensable. The absence of any assurance of property protection among these variables poses a significant risk to developers and, at least on the margin, may prevent some developments from being built. For a local government that wants to attract development, then, these are particularly important assurances to be able to provide.

Other forms of property protection are surprisingly less important to many developers. Consider compensation. Of course, developers generally prefer more compensation than less. But how much is necessary to

259. See *Been, Exit*, *supra* note 13, at 482 (claiming that principal impetus for municipalities to impose exactions upon developers is to accommodate infrastructure-based costs to communities in which development occurs).

induce developers to invest? The fair market value of the property may be all that is required. One of the most trenchant criticisms of compensation based on fair market value is that it excludes the property owner's subjective value in his or her property.²⁶⁰ For a developer, however, investments in land reflect rational business decisions. Compensable subjective damages should therefore be all but nonexistent. Moreover, the property's fair market value is determined in reference to its highest and best use.²⁶¹ For developers, most takings challenges arise out of government actions that prevent the development of the property in the first place. The undeveloped property's value will therefore be its value as if it had been developed, minus the anticipated costs of development.²⁶² Depending on how the standard is actually applied, a developer may be indifferent as between developing the property and receiving its fair market value as compensation from the government.²⁶³ The fair market value standard, then, is not going to make an otherwise appealing development proposal suddenly unappealing for the developer.

The impact of exactions, too, will be quite context dependent. If developers can pass along the cost of the exaction to the ultimate purchaser, they may be relatively indifferent as to the presence and size of exactions.²⁶⁴ If those are costs that will eat directly into their profits, on the other hand, they will oppose exactions—or favor communities that impose smaller exactions or none at all. The ability of developers to pass on the costs of exactions depends almost entirely on the elasticity in the development market.²⁶⁵

Finally, developers are likely to support a broad power of eminent domain, especially for economic development, because they stand to be partial beneficiaries of any such government program, either directly or indirectly through improved economic conditions.²⁶⁶ The ability to as-

260. See Serkin, *Valuing Interest*, supra note 202, at 425–26 (examining compensation rules); see also Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 *BYU L. Rev.* 789, 793–94 (listing excluded categories of damages from fair market value, including “good will, lost profits, and sentimental attachment”).

261. See Serkin, *Meaning of Value*, supra note 9, at 689 (“It is black letter law that fair market value is based on the value of property as put to its most profitable use, usually referred to as its highest and best use.”).

262. See *id.* at 690.

263. One of the biggest question marks here is where the risk of actually developing the property is allocated. See *id.* at 689–92.

264. See Ellickson, supra note 80, at 399–400.

265. See *id.*

266. See Am. Planning Ass'n, *Policy Guide on Public Redevelopment 10* (2004), available at <http://www.planning.org/policyguides/pdf/Redevelopment.pdf> (on file with the *Columbia Law Review*) (“[American Planning Association] and its Chapters encourage state legislation preserving the ability of cities to use redevelopment tools and techniques, including eminent domain, when appropriate to achieve a well-defined public purpose adopted through an inclusive public process.”).

semble land may be an important tool for local governments to attract development, especially in areas that are already developed.

Businesses—whether malls, factories, stores, office space, etc.—wear two hats. In the first, they may have to build or remodel property for their specific use. This aligns their interests closely with developers. They want to be able to build quickly, with a minimum of regulatory burdens, and to open for business as soon as possible. Unlike developers, however, they will have no ability to pass on the cost of any exactions to some subsequent purchaser of the property and so will generally oppose them.

Wearing their other hat, as ongoing businesses within a community, they are likely to have still different interests. First, they are much more likely to care about the extent of compensation in the event their property is taken. Unlike a developer whose property is usually taken before it is even developed, a business is likely to face considerably higher losses in the event it has to move.²⁶⁷ In general, the fair market value standard does not include moving expenses or the loss of goodwill that businesses incur. A business will therefore strongly prefer some higher measure of compensation, and fair market value may seem particularly unjust.

A business is also likely to have a complicated attitude toward the power of eminent domain, especially for economic redevelopment. A preexisting business is unlikely to be the direct beneficiary of a condemn-and-retransfer plan, although a large business sometimes will be.²⁶⁸ Moreover, businesses have some reason to fear that their property might end up in redevelopment's crosshairs.²⁶⁹ But most economic redevelopment initiatives are intended to stimulate the local economy, and this usually means good news for preexisting local businesses too.²⁷⁰ In general, then, the attitude of a business toward the government's power of eminent domain may depend a lot on the nature of the business and the extent to which it believes it might be at risk of condemnation.

Homeowners' interests are the most diverse. What property interests will best induce homeowners to move or to stay in a municipality? Some

267. See *Smith v. State of La., Dep't of Transp. & Dev.*, 872 So. 2d 594, 596–600 (La. Ct. App. 2004) (discussing business owner's claim for moving expenses, expenses of business reestablishment, loss of leasehold advantage, reimbursement for improvements to business space, and loss of business attributable to relocation).

268. *Poletown* is one example, where Detroit controversially condemned a large swath of property to convey to General Motors. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981), overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

269. One of the leading cases on public use, *Berman v. Parker*, 348 U.S. 26 (1954), involved the condemnation of an unblighted sports apparel store for economic redevelopment. Likewise, in Justice O'Connor's parade of horrors in her *Kelo* dissent, she singled out a motel owner whose property could be taken to turn into a Ritz Carlton. See *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

270. This is usually the principal justification of economic redevelopment. See *Krier & Serkin*, *supra* note 55, at 869 (observing that putative public benefit in most condemn-and-retransfer cases is diffused economic benefit).

homeowners might value historic preservation, others aesthetic or demographic homogeneity, others environmental protection, and others strong property protection.²⁷¹ The list goes on and on, and these differences are reflected in the heterogeneity of different communities, allowing for the kind of sorting described by the Tiebout Hypothesis. There is, however, a core interest that all homeowners share, at least to some extent, in preserving and enhancing the value of their property.²⁷² This may or may not be the most important interest for particular homeowners, but it is the best place to look for some consistency among homeowners that cuts across their idiosyncratic preferences.²⁷³

Of course, deciding what kind of local property protection will be best for property values is no easy task. If homeowners believe that property values will benefit most from attracting more development, then they might be willing to adopt the property protection most appealing to developers. Nevertheless, homeowners as a group also have their own independent interests. For one, homeowners stand to lose a lot if the government takes their property because of the significant subjective values that homeowners usually place on their homes.²⁷⁴ This militates in favor of high compensation when property is taken.²⁷⁵

On the other hand, increasing takings liability for local governments comes with some significant costs for homeowners. In the event that increased liability means paying property owners more often—and potentially more money—this will require raising more money in property

271. See Serkin, *Big Differences*, supra note 2, at 1656–57 (describing subjective values in property).

272. According to Fischel:

The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government. . . . They balance the benefits of local policies against the costs when the policies affect the value of their home, and they will tend to choose those policies that preserve or increase the value of their homes.

Fischel, *Homevoter Hypothesis*, supra note 2, at 4. Developers and businesses are also interested in the financial impact of a LAPP, but their interests will turn more on income streams than on the value of the underlying property. This is particularly well reflected in the valuation standard for businesses, which uses a discounted cash flow as the driver instead of focusing on the property itself. See Richard B. Peiser & Anne B. Frej, *Professional Real Estate Development* 81 (2d ed. 2003).

273. See Serkin, *Big Differences*, supra note 2, at 1657 (arguing that, even accounting for diverse homeowner interests, “homeowner preferences contain[] a large measure of concern for property’s objective market value”).

274. Limitations on use create their own harms. Moreover, people are harmed simply when the government tells them that they cannot do something on their property. These kinds of extra harms are catalogued in Michelman’s famous category of demoralization costs. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *Harv. L. Rev.* 1165, 1214–16 (1967).

275. An alternative, more radical proposal would offer homeowners insurance to protect against a decrease in property values. See Fischel, *NIMBY Syndrome*, supra note 227, at 886–89.

taxes.²⁷⁶ Higher property taxes mean decreased property values.²⁷⁷ Alternatively, if increased liability results in the local government regulating less, this might pave the way—literally—for low-income housing and other locally undesirable land uses (LULUs) that will decrease residential property values.²⁷⁸ If nothing else, a decrease in land use controls is likely to result in more housing, and an increase in supply is also likely to decrease existing property values.²⁷⁹

These various considerations make it more likely that homeowners want their local governments to retain a relatively broad power to regulate without triggering a compensation requirement. This means a high threshold under the diminution of value test before compensation is due. On the other hand, homeowners are likely to favor requiring greater consistency with the comprehensive plan as an important tool in protecting their own property's value. Homeowners can also prevent many undesirable local uses by policing local governments' variances and rezonings. This combination of limited takings liability and the strong enforcement of the comprehensive plan creates a strong roadblock to change and preserves the status quo.

Finally, homeowners' interests surrounding the government's power of eminent domain are shaped by the same competing pressures felt by local businesses. Eminent domain is a threat to homeowners' property rights.²⁸⁰ Moreover, because the stakes are so high if their property is taken, they will be particularly loathe to concede broad condemnation power to the government.²⁸¹ On the other hand, a community that gives up the power to condemn in some circumstances will face higher costs for assembling property and may have a harder time attracting develop-

276. See Serkin, *Big Differences*, *supra* note 2, at 1652–55.

277. Fischel, *Homevoter Hypothesis*, *supra* note 2, at 39–42 (discussing capitalization).

278. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *Yale L.J.* 1383, 1388–89 (1994) (maintaining that ultimate result of locally undesirable land use is “likely to be that the neighborhood becomes poorer than it was before the siting of the LULU” in part because less desirable neighborhood may decrease property values). But see Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 *Cornell L. Rev.* 1001, 1020–23 (1993) (discussing possibility that locally undesirable land uses do not have detrimental effect on values of neighboring property).

279. See Lawrence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 *J.L. & Econ.* 149, 158–59 (1987) (demonstrating that house prices are 17% to 38% higher in communities in San Francisco Bay Area with growth controls than in those communities without growth controls); Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 *Geo. L.J.* 2039, 2055 (1994) (observing that restrictive development policies may raise value of existing homes).

280. See *supra* Part I.A (discussing perceived threat to property rights of broad condemnation power).

281. See Fischel, *Homevoter Hypothesis*, *supra* note 2, at 8–12 (noting that central importance of their property values leads homeowners to be more risk averse and to participate more fully in community affairs).

ment to the detriment of some communities. Homeowners' preferences for LAPP limitations on eminent domain are therefore likely to be highly contextual and depend on the nature of the community and on whether particular property owners feel at risk of government expropriation.

C. Pairing Investors and Local Governments

If a property regime benefits a local government by attracting investment but imposes costs in the form of decreased flexibility and increased compensation associated with regulation, the question a local government should ask is which LAPP precommitments are likely to generate the greatest benefits at the lowest cost. As always, the answer for any specific local government will depend at least in part on factors outside this analysis, but it is now possible to suggest, or at least gesture toward, some general answers. Where a particular property protection is cheap for a certain government and valuable for the property owner, there are real opportunities for mutual gain. Conversely, if the property protection is expensive for the government and not particularly valuable to the investor, property protection comes at a high cost.

There are only a few points of convergence where the cost to the government of offering property protection is low and the benefit to potential property owners is high, or vice versa. Most obviously, large, densely developed cities should not limit their ability to condemn property, even for economic development. A broad power to condemn is a particularly valuable power for such cities and is potentially important for attracting business and development. Not everyone favors broad powers to condemn, however, and the cost of potential condemnations will come primarily from chilling homeowner investment in the city. To offset this concern, cities should also offer increased compensation when property is taken. This confers a substantial benefit to property owners at relatively small cost to cities who are able to spread the costs of compensation across a broad tax base.²⁸²

Less developed local governments, on the other hand, may be more willing to concede the power of eminent domain in order to attract homeowners. Their other precommitments should depend on whether they want to attract new development or limit growth. If the former, they should precommit to paying compensation for many regulatory delays. Because of their relatively streamlined permitting process, smaller suburbs in particular will be able to limit or eliminate unwanted liability for regulatory delays. But, if a suburb or other small local government wants to limit growth, it should pay compensation only for a substantial diminution of value, and require consistency with the general plan. The result: less liability, and neighbors with a greater ability to police variances and rezonings.

282. See *supra* text accompanying note 254.

This synthesis of property owner and government interests is hardly comprehensive. But even this quick treatment adds important specificity to the central insight that the costs of different kinds of property protection will vary considerably with the size and character of the local government and will provide heterogeneous benefits to different classes of property owners. A well-functioning property regime should take these differences into account.

CONCLUSION

Interlocal competition for property protection could provide an important and cost-effective means for local governments to attract foreign investment, whether in the form of developers, businesses, or homeowners. This competition does not happen now because local governments have no good way of precommitting to a particular level and kind of property protection. If such a mechanism for precommitment existed, investors could choose the property regime most consistent with their preferences. This would encourage Tiebout-style sorting between jurisdictions and unlock property values that now must reflect some uncertainty about the regulatory treatment property will receive.

This Article has proposed the mechanism for providing locally applicable property protection, including both the specific and general characteristics that such protection must have. Importantly, too, thinking about property protection as a form of creating investment incentives helps to clarify the intersection between private property rights and the government's right to regulate. That point of intersection may change depending on the characteristics of the government, the nature of the property owner, and the particular interest he or she is claiming. This, in turn, suggests a new inquiry for deciding the content of property protection in general, and the Takings Clause in particular. The question is when, and under what specific conditions, will extending property protection generate more benefit from increased investment incentives than it will cost in decreased regulatory authority. This is a new question about an old problem, and even if it is quite hard to answer in a particular situation, it offers a new way of analyzing the important competing interests that property protection and the Takings Clause necessarily represent.