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Reallocating Redevelopment Risk

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REALLOCATING REDEVELOPMENT RISK

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Abstract

Scores of cities across the country face devastating financial crises, and the COVID-19 pandemic has brought even more to the brink. But economically distressed municipalities have few places to turn for help. Saddled by rising unemployment, weak tax bases, and state law limitations on deficit spending and debt assumption, they generally cannot spend their way out. And as conditions deteriorate, mobile capital and labor move to greener pastures, further hollowing out the cities they leave behind. With state and federal lifelines tenuous at best, offers by large developers to redevelop an area of the city can thus appear to be the path to salvation: a shot in the arm that will raise property values, create jobs, attract residents, expand the tax base, and generate further interest in similar projects.

Given their outsized importance, private redevelopment projects warrant sustained scholarly attention. But nearly all of the attention they receive focuses on just two aspects of the issue: the doctrinal scope of local power to engage in them, and the law and policy steps necessary for them to achieve an efficient and just allocation of resources. These questions, though certainly important, overlook something central. Even a plan that promises a just and efficient distribution of resources may disappoint on both scores if things fail to pan out as hoped. That is, there is always risk that a project will fail to deliver on its promises—or worse, fail to get off the ground entirely. And where there is risk, there is someone who must bear it.

This Article shines a new spotlight on the problem of risk allocation in redevelopment projects. It observes that, as most of these projects are pursued, it is the municipalities that bear nearly all of the risk of failure, while developers are permitted to bear almost none. And it develops a normative theory of redevelopment risk allocation, arguing that this prevailing allocation of risk is neither efficient nor just but instead perversely increases the chance developments will fail and leave municipalities even worse off than they had been before. Accordingly, this Article theorizes and details novel ways in which three areas of law—takings, land use, and municipal finance—can work to shift risk to developers and more closely tie developers' fortunes to those of

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municipalities. Finally, it draws on and advances state and local government law and scholarship by evaluating the political economy of reallocating redevelopment risk, concluding that attempts focused at the local level will inevitably come up short. State or regional implementation of this Article's proposals, however, could chart a promising path forward.

INTRODUCTION

Municipal redevelopment projects are gambles. They are gambles by developers, who are betting that these projects will generate profits. They are gambles by local governments, which are betting that these projects will generate jobs, attract spending, expand the tax base, increase property values, and so on. And they are gambles by residents, who are betting—or are simply asked to hope—that public money that could have been spent on priorities like roads or schools or parks will not go to waste acquiring land and offering enticing tax abatements to developers instead.

Like all bets, these projects involve risk. But as they currently tend to be pursued, developers often bear very little of that risk.[1] Municipalities, not developers, frequently pay to acquire the necessary land.[2] When

1. *See infra* Part I (discussing case studies).

2. *See, e.g.*, Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 3, 2003, https://www.nytimes.com/2003/02/08/nyregion/45-wall-st-is-renting-

developers do reimburse those municipalities, they often get to do so for pennies on the dollar.[3] And the tax breaks and other incentives developers routinely receive from municipalities generally require no consideration in exchange and often demand very little in the way of benchmarks or obligations with respect to local job creation or revenue enhancement.[4] Developers are therefore permitted to dramatically limit their exposure, to be underinvested in the success of these projects, and to have insufficient incentives to see them through and actually generate promised benefits, especially when doing so necessitates further investment. But while the most that developers stand to lose is their heavily subsidized initial investment, the economically distressed localities and residents these projects purport to help all stand to suffer—in the short term by having their homes condemned and their resources diverted, and in the long term by development failures that leave their communities with holes in the ground that sit empty for years.[5] So, when things go wrong—as they often do—developers can cut their losses and walk away, while municipalities and taxpayers are left holding the bag.

This result is perversely inequitable because the localities and residents who bear this risk are poorly situated to do so. As noted, the localities are often in dire straits financially, and because of state law constraints, are often limited in their access to credit.[6] And since much of the taxpayers' wealth is built up in the equity in their homes—the very thing at risk of loss if a project goes south—they are not positioned to

again-where-tower-deal-failed.html [https://perma.cc/QT8X-HQ6W]; *Mesa Project is Reshaped, Sweetened Hotel, Sports Complex Taking on New Form*, ARIZ. REP., July 20, 1999, at 1; John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 61 (1984).

3. *See, e.g.*, Poletown Neighborhood Council v. Detroit*: Private Property and Public Use*, 88-MAR MICH. B.J. S18, S21 (2009); Bagli, *supra* note 2.

4. *See, e.g.*, Kenneth R. Gosselin, *Were $60 Million of Incentives for Pfizer Worth It?*, HARTFORD COURANT (Feb. 6, 2011), https://www.courant.com/business/hc-xpm-2011-02-06-hc-pfizer-incentives-0207-20110206-story.html [https://perma.cc/EB8B-8JS8]; Andrew Rice, *NYSE's Chairman Unplugs His Plans For a New Exchange*, OBSERVER (Dec. 3, 2001), https://observer.com/2001/12/nyses-chairman-unplugs-his-plans-for-a-new-exchange/ [https://perma.cc/U6YS-XL7C].

5. *See* sources cited *supra* note 4.

6. *See, e.g.*, Nadav Shoked, *Debt Limits' End*, 102 IOWA L. REV. 1239, 1255 (2017) ("[State laws] sometimes block localities from accessing requisite credit, ... force governments to pay higher interest rates, generate administrative expenses, [and] give birth to deals suboptimally structured from a public finance perspective . . . ." (footnotes omitted)); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 619 (2011) ("[L]ocal governments in the twenty-first century have very limited financial resources."); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1315–16 (discussing forms of debt limitations).

diversify away that risk.[7] Moreover, due to the well-known difficulties of exit and foot-voting, along with other pathologies of local democracy, residents are frequently stuck and subject to the whims of developers.[8] By contrast, the developers bear very little of the risk despite being comparatively well-situated to do so. They have other resources and can diversify their portfolios, they have easier access to credit, and most of all, they hold more of the cards in terms of determining the degree to which a project delivers to the community its promised benefits.[9] They can decide whether and how much to invest, whether and when to walk away, whether to hire in the numbers they have promised, and whether to move more or fewer corporate functions (or which ones) to that location so that they generate more or less taxable income and therefore more or less revenue for the community.[10] And while economic shocks and unexpected market developments can doom even the most well-thought-out and honestly committed projects, it is again the developers that are best positioned to bear those risks.

There is, therefore, a significant mismatch between who presently bears the risk, and who ought—and is most able—to do so. Simply put, the prevailing allocation of risk is inequitable and leaves developers with precisely the wrong set of incentives. These problems of incentives and equity—and the record of failure that is associated with both—are grist for the anti-development arguments made by libertarian and other property-rights advocates who generally oppose the seizures of private property often called for by these projects.[11] But it would be a mistake to take that more categorical position if municipalities could achieve often-necessary economic revitalization while minimizing the risks to taxpayers.[12] Fortunately, they can.

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7. *See, e.g.*, Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1059 (2008) (noting that a home is "typically the single largest [investment] in the household's portfolio, and it is often heavily leveraged" (footnote omitted)).

8. *See infra* Section III.A.

9. *See infra* notes 164–71 and accompanying text; *cf.* Gosselin, *supra* note 4 (noting that even though Pfizer brought jobs to Connecticut, the temporary boost in jobs was short-lived once Pfizer decided to close its New London facility despite the city's investment).

10. *See infra* notes 164–71 and accompanying text.

11. *See, e.g.*, Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 543 (2006) (arguing that "[t]he only way to mitigate [equity and incentivization] concerns sufficiently is by banning economic development takings altogether"); Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1007 (2004) (arguing for a "categorical ban on economic development takings"); *infra* note 28 (discussing the litigation perspective of Institute for Justice).

12. *See, e.g.*, Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1706 (2007) ("[A] flat prohibition on the use of eminent domain to assemble land from numerous owners to allow large-scale, financially profitable projects is highly problematic on the policy level.").

This Article theorizes and details novel ways in which three areas of law—takings, land use, and municipal finance—can work, short of pulling the plug on economic redevelopment projects altogether, to shift the risks of failure to the developer.

First, consider takings. When land must be assembled for a project, landowners are either bought out in consensual sales or are forced out through the government's exercise of the eminent domain power.[13] But it is often municipalities that pay these land acquisition costs, and when developers in turn receive this land, they generally are not made to reimburse municipalities in full for it.[14] This leaves developers underinvested and municipalities overleveraged.[15] By contrast, requiring developers to pay all land acquisition costs in full at the outset—a requirement that is, as yet, nearly unheard of—would reverse that misallocation of risk and reward, and would better incentivize developers to see *their* investment pay off.[16]

Second, on the land use law front, municipalities have more tools than they frequently use.[17] For one, they can shift the risk of long-term promises going unmet to the developers that make those promises by embedding specific job creation and revenue enhancement goals in development agreements and community benefits agreements.[18] They can also enter into what this Article calls "takings agreements": binding contracts providing that, in exchange for the exercise of the eminent domain power, the developer agrees to specific terms that result in a fair spreading of risk. And going a step further, localities can employ their power to extract money from developers for risk-shifting purposes.[19] When distressed municipalities subsidize development projects, that almost necessarily means redirecting finite taxpayer money from other uses like parks and roads on the premise that the investment will pay off. Exactions from developers to fund those services can be deployed to insure against the danger that the investment does not pay off and, again, gives the developer added reason to see that it does.

Finally, on the municipal finance front, municipalities often extend to developers significant tax abatements and other sweeteners to induce

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13. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

14. *See infra* Part I (collecting examples).

15. *See infra* Part I.

16. *See infra* Section II.A.

17. *See infra* Section II.B.

18. *See, e.g.*, Dorothy D. Nachman, *When Mixed Use Development Moves in Next Door: Finding a Home for Public Discourse and Input*, 23 FORDHAM ENV'T L. REV. 55, 79–97 (2012) (discussing current scope of development agreements); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements*, 24 PRAC. REAL EST. LAW. 19, 19–21, 30–33 (2008) (same for CBAs).

19. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 596, 606 (2013).

them to develop.[20] But these financial rewards tend to be front-loaded and unmoored from any particular development goals, so municipalities are obligated to lose revenue even on projects that wholly fail to meet those goals.[21] Imposing performance-linked benchmarks and withholding tax abatements until further into the future of the project places the risk of short-term failure squarely on the shoulders of the developer and better incentivizes the developer to make good on its promises. While these strategies are employed occasionally to varying degrees, the below analysis highlights much untapped potential.[22]

While this Article builds on and draws novel connections between work in all three of these fields, it also contributes a necessary new perspective. The existing literature tends to approach takings and development problems primarily if not solely in terms of achieving efficient and just allocations of *resources*—that is, by attending to who will end up with what once a project is completed and delivers on its promises.[23] This is no doubt very important. But this Article spotlights a neglected dimension of the problem: the significance of achieving efficient and just allocations of *risk*. After all, the allocation of risk influences behavior and incentives and can therefore affect the chances that a project that promises efficient and just allocations of resources ultimately achieves them. Moreover, risk allocation matters even when it does not affect the probability of success. Attending to who absorbs the consequences of failure, whatever its source, is critical to any conversation about equity and justice in economic redevelopment.

In short, bringing to life the traditional efficiency and justice concerns that animate this literature means examining those values not only in terms of resources, but also in terms of risk. This Article offers a normative theory of redevelopment risk-allocation. It argues for the necessity of shifting more risk—of erroneous ambition, flawed execution, lack of commitment, and the slings and arrows of exogenous

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20. *See infra* Part I (collecting examples).

21. *See infra* Part I.

22. *See infra* Section II.C.

23. *See, e.g.*, Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 408 (2000) ("If there is some measure of coherence or consensus in this vast and diverse body of judicial opinions and scholarly commentary, it is that the purposes of just compensation are essentially two: efficiency and distributive justice."); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 528 (2009); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 578–89 (2001) [hereinafter Bell & Parchomovsky, *Givings*]; Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 53–56 (2003) [hereinafter Bell & Parchomovsky, *Of Property*]; Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 388–89 (2000); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 997 (1999).

shocks—onto the party best able both to do something about these forces and to bear their consequences.

Finally, this Article draws on and advances state and local government law and scholarship by evaluating the political economy of reallocating redevelopment risk. It concludes that attempts to do so solely at the local level will inevitably come up short. After all, among the likely reasons why municipalities do not already drive harder bargains with developers is that, thanks to their economic distress and their need to compete with neighboring municipalities for scarce opportunities, they lack the leverage and political will needed to do so.[24]

All is not lost, however, because intervention by states or regional arrangements can avoid this troubling race to the bottom. Specifically, while still leaving many of the details to local discretion, state or regional policymakers can incentivize or even require municipalities to implement the takings, land use, and municipal finance risk-reallocation strategies advanced in this Article. Doing so would equally tie competing localities' hands for their own good, preventing them from making the bad deals that they currently see no other choice but to make.[25] It would also mitigate the problems of potential capture of local government by deep-pocketed, repeat-play developers.

In contrast to a number of other troubling areas in which some states are currently racing to preempt localities based on little more than political disagreement,[26] this is an area where state preemption or regional cooperation along the lines set out here would be more justifiable and would break through pathological dynamics of local democracy and of interlocal competition. Indeed, because it is relatively less likely that developers would write off entire states or regions—and forfeit otherwise attractive human capital or other location benefits—the result would be that, wherever they build in those states or regions, they would be unable to play municipalities against one another and would be locked into more equitably bearing the risk of failure. Accordingly, they would be better incentivized to work to avoid that failure.

This Article proceeds in three parts. Part I tells the stories of five failed development projects and draws out the risk-allocation roots and risk-allocation consequences of those failures. Part II develops the theoretical, doctrinal, and practical risk-reallocation potential of three areas of law.

24. *See infra* Section III.A (discussing pathologies of local development decisionmaking).

25. *See infra* Section III.B (exploring authority for and benefits of state and regional intervention).

26. *See, e.g.*, Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 963–74 (2019); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1169–83 (2018); Alan Greenblatt, *States Preempt Cities Almost to the Point of Irrelevance*, GOVERNING (Feb. 8, 2021), https://www.governing.com/now/States-Preempt-Cities-Almost-to-the-Point-of-Irrelevance.html [https://perma.cc/W4UK-DLUA].

First, as a matter of takings law, developers could be obligated to pay for land acquisition in full. Second, as a matter of land use law, developers could be subjected to exactions and other binding agreements that require them to meet certain economic goals, offset opportunity costs, and guarantee certain short-term deliverables. Third, as a matter of municipal finance law, developers could be given monetary and tax incentives characterized by long tails that delay vesting and by benchmarks that reward achieving goals and penalize failure. Finally, Part III surfaces the particular pathologies of local democracy that create obstacles to effective risk-reallocation along these lines at the local level. It then contends that state-level coordination and preemption, as well as regional cooperation, can overcome these structural impediments and therefore represent a more promising path forward.

I. DEVELOPMENT FAILURES

This Part explores five stories of development projects gone wrong. The aim here is not to demonstrate that all such projects are doomed to fail, though there is ample evidence that development projects far too often fall short of generating promised community benefits.[27] Rather, this Part seeks to describe the presence and allocation of the *risk* of this sort of failure. That is, it examines who bears the risk that a project will fail to deliver on its short- and long-term promises: job creation, enhanced tax revenue, economic revitalization, and even simply completion of the development itself.[28]

27. *See, e.g.*, Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 332 (2010) ("Cities appear not to gain back what they put in, either in the short term or the long term . . . ."); Yoonsoo Lee, *Geographic Redistribution of US Manufacturing and the Role of State Development Policy*, 64 J. URB. ECON. 436, 436–37, 448 (2008) (finding little evidence that development incentives are effective); DAPHNE A. KENYON, ADAM H. LANGLEY & BETHANY B. PAQUIN, LINCOLN, INST. OF LAND POL'Y, RETHINKING PROPERTY TAX INCENTIVES FOR BUSINESS, 3 (2012), https://www.lincolninst.edu/sites/default/files/pubfiles/rethinking-property-tax-incentives-for-business-full_0.pdf [https://perma.cc/75FD-5E5B] (offering evidence that development incentives have a "generally poor record in promoting economic development"); TIMOTHY J. BARTIK, W.E. UPJOHN INST. EMP. RSCH., A NEW PANEL DATABASE ON BUSINESS INCENTIVES FOR ECONOMIC DEVELOPMENT OFFERED BY STATE AND LOCAL GOVERNMENTS IN THE UNITED STATES 116 (2017), https://research.upjohn.org/cgi/viewcontent.cgi?article=1228&context=reports [https://perma.cc/5QU9-4AFS] (finding that "in many cases [incentives] are excessively costly and may not have the promised effects").

28. Institute for Justice (IJ), an organization that, among other things, opposes private development takings writ large, has compiled a list of development failures that it uses in its advocacy efforts. *See* Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651, 677 (2005) (calling IJ "[t]he only legal organization that has aggressively challenged the use of eminent domain for economic redevelopment"); CASTLE COALITION, REDEVELOPMENT WRECKS: 20 FAILED PROJECTS INVOLVING EMINENT DOMAIN ABUSE 1 (2006), https://ij.org/wp-content/uploads/2015/03/Redevelopment-Wrecks.pdf

A. *Detroit, Michigan*

One of the most frequently told stories of development failure is that of the General Motors (GM) plant project in Detroit's Poletown neighborhood.[29] By the end of the 1970s, Detroit's economy was in tatters, just like much of the Rust Belt. This decline had begun decades earlier, but the cumulative result was a massive loss of people, jobs, and, along with both, tax base.[30] As this death spiral picked up steam, "[f]ully one-fifth of the city's residents left in the 1970s (and another 15% were to depart in the 1980s)," and by 1980, the city's unemployment rate was 18%.[31] In particular, the auto industry, long the lifeblood of the Detroit economy, was shrinking catastrophically and hemorrhaging jobs.[32]

In a desperate attempt to save jobs and bolster the economy, Coleman Young, then Mayor of Detroit, asked GM "what it would take for it to expand employment in Detroit."[33] GM said it would build a new Cadillac plant "if the City could provide a 500-acre site, with adequate road and rail transportation, other improvements, and tax abatements, in a short time frame."[34] The Poletown neighborhood was the only one that ticked all of the boxes, so "GM insisted that the City condemn the area and turn it over to the company by May 1981."[35] The promised bargain was this: The city would spend $200 million to condemn the land, pay the owners the required compensation,[36] tear down the buildings, prepare the site,[37] and extend to GM "a twelve-year, fifty percent tax abatement . . . worth

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[https://perma.cc/TUE9-VJGN]. But whereas IJ's mission is, as they put it, to "stop eminent domain abuse" by governments, see INSTITUTE FOR JUSTICE, JOIN THE FIGHT TO STOP EMINENT DOMAIN ABUSE, https://ij.org/action/join-the-fight-to-stop-eminent-domain-abuse/ [https://perma.cc/H2TY-F3XC], this Article aims its sights on reducing *developer* abuse of government power and largess. Moreover, while this Article shares the premise that these projects too often fail, it does not share the premise that private development takings are unconstitutional or bad policy, or that they are even the cause of the problem. *See supra* note 11 and accompanying text; *infra* Section II.A.

29. *See* Somin, *supra* note 11, at 1006 (calling the *Poletown* story "by far the most widely publicized and notorious").

30. Poletown, *supra* note 3, at S18–19.

31. *Id.* at S19. Unemployment among Black residents of Detroit was "nearly double that rate." *Id.*

32. *Id.* at S18–19 ("[B]y the end of the 1970s, Chrysler, a major Detroit employer, was in desperate straits . . . . [I]n January 1980, Chrysler closed Dodge Main and, yet again, thousands of highly paid jobs vanished.").

33. *Id.* at S19.

34. *Id.*

35. *Id.*

36. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); MICH. CONST. art. X, § 2 ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.").

37. Poletown, *supra* note 3, at S19.

a substantial 60 million dollars."[38] In exchange, GM would make a non-binding promise to create 6,000 jobs directly at the plant, "4,000 temporary construction jobs, over 20,000 jobs created by the multiplier effect of the plant, and appreciable long-term revenues from those workers' city income tax payments."[39]

Residents of Poletown sued, arguing that the condemnation could not proceed because it was not being pursued for a "public use" as required by Michigan's constitution.[40] The Supreme Court of Michigan rejected this argument, holding that a "public use" exists where the public "benefit[s]" from the condemnation and, further, that "alleviating unemployment and revitalizing the economic base of the community" constitute public benefits.[41]

Detroit thus proceeded to acquire the necessary land—at a total cost of closer to $300 million rather than the $200 million estimate.[42] And yet, when the city sold the assembled land to GM, the latter paid just $8 million for all of it.[43] Now, in contrast to many of the other stories discussed in this Part, it should be noted that most of the funding for Detroit's acquisition of the land did not come directly from Detroit taxpayers, but from federal grants.[44] Some scholars like Professor William Fischel argue that the city's choices were distorted precisely because it was not writing its own checks.[45] But as the rest of this Part suggests and as other scholars have observed, cities frequently make the same choices when they are spending their "own" money, or at least their

38. Bukowczyk, *supra* note 2, at 61.

39. *Id.*; *see* Somin, *supra* note 11, at 1012–13 (emphasizing that "neither the city nor GM had any legal obligation to actually provide the 6,000 jobs, or the other economic benefits they had promised").

40. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981) (per curiam), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004); MICH. CONST. art. X, § 2. A 2006 amendment provides that "'[p]ublic use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues," *id.*, but that was not the law at the time. *See* Poletown, *supra* note 3, at S22.

41. *Poletown Neighborhood Council*, 304 N.W.2d at 457, 459. That court later overruled this decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

42. Poletown, *supra* note 3, at S21.

43. *Id.*

44. William A. Fischel, *Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 4 MICH. ST. L. REV. 929, 943 (2004); *see* Bukowczyk, *supra* note 2, at 61.

45. Fischel, *supra* note 44, at 944–46 (citing "the willingness of the federal government to insulate Detroit voters from fiscal consequences of the Poletown project").

taxpayers' money, as they do when they are spending the federal government's money.[46]

As easy as it is to see the problem here as simply being that Detroit gave GM an exceptionally generous sweetheart deal, the deeper issue is less the staggering handout of resources and more the risk-free nature of that handout. That is, not only was GM made to contribute next to nothing up front, but it was not required to undertake any commitment to produce the community benefits that motivated residents to accept the deal in the first place.[47] It was thus given little incentive to contribute anything to the project's broader success in the community. So, GM faced no consequence when the plant opened behind schedule and only provided "about half of the hoped-for jobs"[48]—all while likely eliminating thousands of existing jobs in the neighborhood.[49] And the touted spillover effects? Fischel reports that when he visited the site in January 2004, over twenty years after the project's start, he saw "no sign" that the area was "rejuvenating itself as a result of the plant's continued operation."[50] Indeed, before the project, the area was by many accounts a "thriving, ethnically diverse community."[51] After, "GM's new plant and parking lot occupied most of the neighborhood."[52] Disappointing though this outcome is, it ought not be a surprise, since Detroit did not give GM much of a reason to work towards anything better for the local residents who sacrificed so much.

Of the stories in this Part, Poletown might be among the closest to a success purely insofar as the development happened at all. But that says more about how low the bar is than about how successful this project was at delivering on its promises. And, ironically, the fact that the project was actually completed meant that Detroit was on the hook for the millions in tax abatements it offered GM—again, despite the paltry return to the city and its residents. Simply put, to borrow Fischel's words, "[I]f it had been

46. *See* Somin, *supra* note 11, at 1018 (similarly arguing that Fischel "is perhaps too quick to assume that cities would not undertake [these projects] in the absence of outside subsidies"); Levinson, *supra* note 23, at 420 ("[G]overnment cares not about dollars, only about votes."); *infra* notes 190–97 (discussing same); *see also* Section III.A (discussing pathologies of local government decision making).

47. *See* Somin, *supra* note 11, at 1013.

48. Poletown, *supra* note 3, at S21; Somin, *supra* note 11, at 1013.

49. *See* Bukowczyk, *supra* note 2, at 68 (noting "the 9,000 area jobs" that were projected to "disappear when the site was cleared"); Somin, *supra* note 11, at 1017–18.

50. Fischel, *supra* note 44, at 936.

51. Bell & Parchomovsky, *Givings*, *supra* note 23, at 569; *see* Bukowczyk, *supra* note 2, at 62 (discussing neighborhood vitality). *But see* Fischel, *supra* note 44, at 941 ("Poletown was not a prosperous area . . . . [and] not a socially integrated community.").

52. Bell & Parchomovsky, *Givings*, *supra* note 23, at 569; *see* Fischel, *supra* note 44, at 937 ("The GM facility is sealed off from the rest of the community by berms and fences and is accessible by gates that make it clear that the general public is not welcome.").

intended as a catalyst for urban renewal, the Poletown project would be a flop."[53]

B. *Las Vegas, Nevada*

In late 1989, a Japanese developer named Masao Nangaku, who at the time owned the Dunes Resort in Las Vegas, set his sights on a new project he called Minami Tower, a thirty-five-story office complex in downtown Las Vegas.[54] The City Council, "dazzled" by Nangaku's "blueprint for urban renewal" in an area far less vibrant than the Strip four miles south, agreed to exercise its power of eminent domain to condemn and pay for the two blocks of land he would need.[55] In addition to clearing out and compensating the small businesses and property owners that had been in place, the city reportedly "donate[d]" an additional $5 million to the project.[56] Construction began with the digging of a large hole for the tower's foundation.[57]

Within two years, Nangaku's financing dried up.[58] The Dunes Casino went bankrupt, Nangaku's real estate holdings in Japan lost value, and the Minami Tower project fell apart.[59] Nangaku's personal losses were significant—by some reports, he had poured as much as $35 million into the project.[60] But so were the city's losses. It had spent millions of dollars on acquiring the land and contributing to the project.[61] It lost income and sales tax revenue from businesses that no longer existed.[62] And, for almost six years, it was left with nothing but a massive hole in the ground.[63] The hole could not have been particularly good for the surrounding businesses and their property values, or in turn for the tax revenue the city was earning on those surrounding parcels.

Today, the parcel is the location of the Lloyd D. George Federal Courthouse and a parking lot roughly the size of a square block.[64] Then-Senator Harry Reid of Nevada said at the 1997 groundbreaking for the courthouse project that its completion "will have turned the Minami pit

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53. Fischel, *supra* note 44, at 936–37.

54. Karl Schoenberger, *Japanese Tap Out in Las Vegas*, L.A. TIMES (Mar. 15, 1993), https://www.latimes.com/archives/la-xpm-1993-03-15-mn-415-story.html [https://perma.cc/VN2B-45JE].

55. *Id.*; *Nevada*, USA TODAY, Nov. 16, 1989, at 05A.

56. *Nevada*, *supra* note 55.

57. Schoenberger, *supra* note 54.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Nevada*, *supra* note 55, at 05A.

62. *See id*.

63. Schoenberger, *supra* note 54.

64. Carri Geer, *Officials Break Ground for Courthouse*, LAS VEGAS REV. J., Nov. 18, 1997, at 3B.

into a model for municipal planning."[65] And in 2000, he crowed that "[t]here's nothing that's been done in recent years that is more important in terms of redevelopment."[66] Relative to a pit in the ground, that is almost certainly true. But relative to what had been on the land in 1989, or what Nangaku's project could have been, or what some other private enterprise could have built, things are much more complicated.

First, besides perhaps the courthouse cafeteria, the building generates little municipal revenue in the form of sales taxes. Second, given that there was already a federal courthouse across the street, there is little reason to think this one created many new jobs. Third, the federal government pays no real estate taxes.[67] And finally, perhaps most significant of all, the city *donated* the land to the federal government.[68]

In sum, when things went south in Las Vegas, the city and its taxpayers were left holding the bag and absorbing years of lost tax revenue. While the city managed to stop the bleeding by donating the land to the federal government for a tax-exempt courthouse, it never recouped the money it spent to acquire the land or the revenue it lost in the interim, and it settled for a project that itself generates negligible to no revenue.

C. *Mesa, Arizona*

In the late 1990s, a Canadian developer named Malcolm Ross proposed to build a resort, water park, ice rink, and hotel complex called Mesa Verde in downtown Mesa, Arizona.[69] The city agreed to spend over $7 million to condemn and acquire the necessary land in the hopes of "lur[ing] tourists and locals to a dormant downtown."[70] From the very start, however, Ross had trouble securing funding. Indeed, even before Ross's company had demonstrated proof of financing, the city not only spent the money on the land and gave Ross more time to come up with the funding, but it also "increased [its] subsidy for the project, adding five years to a 15-year sales tax rebate" and permitting the project to keep and use 1% of the city sales tax revenue it generated for twenty years.[71] Within months, Ross returned to the city to say he would need yet more

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65. *Id.*

66. Carri Geer, *New Courthouse Crucial to Downtown Revitalization*, LAS VEGAS REV. J., Apr. 28, 2000, at 2A.

67. *See, e.g.*, Maureen Mahoney, *Federal Immunity from State Taxation: A Reassessment*, 45 U. CHI. L. REV. 695, 695–707 (1978). Offices and courthouses are also not subject to the federal payments in lieu of taxes program. *See* 31 U.S.C. § 6901(1); KATIE HOOVER, CONG. RSCH. SERV., RL31392, PILT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED 7–8 (2017), https://fas.org/sgp/crs/misc/RL31392.pdf [https://perma.cc/TGY8-6K55].

68. Geer, *supra* note 64, at 3B.

69. *Local Builder Picked for Resort in Mesa*, ARIZ. REPUBLIC, Aug. 18, 1999, at 1.

70. *Mesa Project is Reshaped*, *supra* note 2, at 1.

71. *Id.*

time to show proof of financing; the city gave him another nine months, with each of those nine months costing Ross an additional $5,000.[72] Somewhat astonishingly, two months later, the city awarded the financially challenged developer another bid to redevelop an *additional* nearby parcel.[73] Soon after, drawn to the possibility of job creation, a better business climate, and increased property values in surrounding blocks,[74] the city handed Ross "tax breaks of about $150,000 a year for eight years" on that other project.[75]

By October 2000, with financing still elusive, Ross asked for and received from the city yet a third extension on Mesa Verde until June 2001—with the same $5,000 per month penalty.[76] But by March 2001, both projects collapsed when Ross finally conceded the money was not coming.[77] The city and its residents were left with twenty-seven acres of condemned, vacant downtown land—a "barren collection of dirt lots intersected by roads"[78]—along with the bill for the land acquisition and all of the tax revenue those parcels could have earned in the meantime, less the paltry monthly penalties the city had imposed.

That land sat vacant for the next nineteen years—providing no housing, stimulating no business, generating no jobs, contributing no tax revenue, and doing nothing to increase the property values of surrounding neighborhoods. Finally, starting in 2018, the city began to try again, this time not with "a 'silver bullet' project, one so remarkable and beautiful that it would justify Mesa's taking homes in the area through eminent domain," but instead with something similar to what was there before: a "very nice, special neighborhood, mostly residential in nature, that would complement downtown rather than compete with it."[79] In the summer of 2020, over twenty years after the original project commenced, Mesa

72. *Hotel Developer Again Gets More Time on Financing*, ARIZ. REPUBLIC, Nov. 5, 1999, at 1.

73. *Canadian Developer Adds Redoing of Bank One Building to Mesa Mix*, ARIZ. REPUBLIC, Jan. 27, 2000, at 3.

74. *Downtown Plan Gets City Dollars*, ARIZ. REPUBLIC, Aug. 30, 2000, at 1.

75. *Mesa Eyes Tax Break for Downtown Project*, ARIZ. REPUBLIC, July 19, 2000, at 1.

76. *Project Seeking Time, Money Asks City for Delay to Gain Financing*, ARIZ. REPUBLIC, Oct. 21, 2000, at 1; *Downtown Ups and Downs: Canadian Developer Drops Redevelopment Projects*, ARIZ. REPUBLIC, Mar. 8, 2001, at 1.

77. *Downtown Ups and Downs*, *supra* note 76, at 1.

78. Jim Walsh, *Mesa Rekindles Hopes to Revive Long-dormant Downtown Site*, E. VALLEY TRIB. (Aug. 12, 2018), https://www.eastvalleytribune.com/news/mesa-rekindles-hopes-to-revive-long-dormant-downtown-site/article_5d21ae50-9cf1-11e8-8042-f3fddfbd5f2c.html [https://perma.cc/QY9H-EAZ6].

79. *Id.*

began negotiating new memoranda of understanding with residential developers.[80]

D. *New York, New York*

In the summer of 2000, Rudy Giuliani, then Mayor of New York City, and Richard Grasso, then Chairman of the New York Stock Exchange (NYSE), planned a massive project: an over $1 billion relocation of the stock exchange to a new facility across the street from its historic location.[81] The NYSE had been complaining for years that it needed more space, and it had threatened to move to New Jersey if the city did not help secure that space.[82] So, the city got to work acquiring the necessary land. It contracted to purchase some of the necessary property in consensual sales, and it also exercised its power of eminent domain to condemn an apartment building at 45 Wall Street.[83] The rent-stabilized tenants at 45 Wall Street sued to challenge the taking as lacking the requisite public use under the New York State Constitution,[84] but the Appellate Division of the New York Supreme Court concluded that the city had sufficiently demonstrated the public benefits of keeping the NYSE in the Financial District—including the "increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center."[85]

It looked like all was a go from a development standpoint: the NYSE would stay in the Financial District, land would soon be cleared, a new fifty-one-story office building would be built, the exchange floor would move into the building, and the office space above it would be leased to a big-name corporate tenant soon to be identified.[86] The city spent about $6 million moving tenants out of 45 Wall Street,[87] to say nothing of tens of millions of dollars in deposits on purchase contracts on the other properties and in planning and engineering expenses.[88] The plan as a whole would have also called for the city, along with the State of New York, to extend $160 million in tax breaks to the NYSE.[89]

Tragedy struck, however, in the form of the terrorist attack on the World Trade Center on September 11, 2001. It became impossible to

80. Jim Walsh, *Slowly but Surely, Mesa Getting a New Downtown*, E. VALLEY TRIB. (July 13, 2020), https://www.eastvalleytribune.com/news/slowly-but-surely-mesa-getting-a-new-downtown/article_90d17964-c2f2-11ea-bd9c-4b82a6f6f4de.html [https://perma.cc/DN46-7QUW].

81. Rice, *supra* note 4.

82. Bagli, *supra* note 2.

83. *See In re Fisher*, 730 N.Y.S.2d 516, 516 (App. Div. 2001).

84. *Id.*; N.Y. CONST. art. I, § 7(a).

85. *In re Fisher*, 730 N.Y.S.2d at 516–17.

86. Rice, *supra* note 4.

87. Bagli, *supra* note 2.

88. *See id.*; Rice, *supra* note 4.

89. Rice, *supra* note 4.

locate a developer interested in building a new skyscraper in Lower Manhattan, and commercial tenants also became scarce.[90] Grasso himself "abruptly changed course, saying the idea of a 900-foot skyscraper above the symbolic center of American commerce is not 'salable'—meaning no developer would want to build it and no tenant would want to work in it."[91] Word started to leak that Grasso had never fully committed to the project, vacillating even before the September 11 attacks, all while the city was writing multi-million-dollar checks to support his project.[92] Finally, when the city—facing enormous budget problems of its own and under the new leadership of Giuliani's successor, Michael Bloomberg—demanded that the NYSE contribute a larger share of the project's costs, the NYSE walked away from the project for good.[93] Once again, the city was left holding the bag.[94]

And quite an expensive bag it was. By the city's own estimates, "unwinding the ill-fated project [would] cost taxpayers about $109 million."[95] By comparison, the NYSE "spent about $10 million."[96] The city also ended up returning the properties to their original owners, forfeiting the deposits on the contracted purchases and paying $1 million a month in rent on the condemned apartment building at 45 Wall Street until the building was fully leased again.[97] In contrast to the other stories in this Part, at least the city was not left with a hole in the ground or barren tracts of land. And at least the project was scuttled before the city moved ahead with its planned $950 million bond offering—a significant amount of debt the city would have had to service.[98] But that only underscores that the city spent over $100 million to end up back where it started, with the NYSE trading floor still in its historic headquarters in Lower Manhattan.[99]

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90. *Id.*

91. *Id.*

92. *Id.*

93. Bagli, *supra* note 2.

94. *Compare* Rice, *supra* note 4 ("[City officials are] insisting that if the skyscraper is scrapped, the stock exchange should make up the difference in cost."), *with* Bagli, *supra* note 2 (reporting two years later that the stock exchange did not make up the difference in cost).

95. Bagli, *supra* note 2.

96. *Id.*

97. *Id.*

98. Rice, *supra* note 4.

99. *See* Yun Li, *NYSE to Temporarily Close Floor, Move to Electronic Trading After Positive Coronavirus Tests*, CNBC (Mar. 18, 2020, 8:05 PM), https://www.cnbc.com/2020/03/18/nyse-to-temporarily-close-trading-floor-move-to-electronic-trading-because-of-coronavirus.html [https://perma.cc/A85B-CRBE] (noting that the exchange has been located in its present "location at 18 Broad St. in lower Manhattan [since] 1903").

E. *New London, Connecticut*

It is not possible to study development failures without including perhaps the most infamous story of all: the redevelopment of the Fort Trumbull neighborhood in New London, Connecticut. New London, once a busy port and site of substantial naval installations, had been in significant economic decline through the 1980s and 1990s.[100] In 1996, the federal government closed the Naval Undersea Warfare Center, a major employer in the city.[101] By 1998, the unemployment rate was twice as high in New London as in the rest of Connecticut, and the city's population had shrunk to the size it had been in 1920.[102] Hoping to revitalize the city, state and local officials devoted their attention to a massive redevelopment plan anchored by a Pfizer research facility.[103] The idea was that the Fort Trumbull Pfizer facility would employ as many as 2,000 people,[104] and would, in turn, attract additional new businesses that would employ still more people, draw in higher-earning residents, and expand the tax base.[105] Planners also hoped to "make the City more attractive and to create leisure and recreational opportunities on the waterfront" and in the neighborhood's to-be-improved park.[106]

The bargain with Pfizer was similar to the bargains in the other stories. For example, Pfizer was given "a 10-year, 80 percent property tax abatement from New London, valued at about $30 million"—half of which would be reimbursed by Connecticut and the other half of which New London would forfeit altogether.[107] The state also extended to Pfizer "$20 million in sales and use tax exemptions" designed to encourage Pfizer to buy locally, and $5.5 million in construction grants.[108] Some contemporaneous local news reports refer to a total of "more than $118 million in financial incentives and other amenities" being "offered by the state and the city to convince Pfizer to build in New London,"[109] but whatever the precise total offered or spent, it is clear that these direct incentives amounted to many tens of millions of dollars.

Pfizer was also the beneficiary of eminent domain, though not in quite the same way as the other projects discussed here. Rather than acquire land for Pfizer's facility, which Pfizer had already assembled, New

100. Kelo v. City of New London, 545 U.S. 469, 473 (2005).

101. *Id.*

102. *Id.*

103. *Id.*

104. Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY (Oct. 16, 2005), https://www.theday.com/article/20051016/BIZ04/911119999 [https://perma.cc/W25M-V7RD].

105. *Kelo*, 545 U.S. at 473.

106. *Id.* at 474–75.

107. Gosselin, *supra* note 4.

108. *Id.*

109. Mann, *supra* note 104.

London moved to purchase or condemn the *rest* of the Fort Trumbull area.[110] This neighborhood, adjacent to a sewage treatment plant that emitted unpleasant odors, was "a hodgepodge of industrial properties, warehouses, and old, small homes . . . sandwiched between Amtrak rail lines on the west and the abandoned naval base on the north."[111] It was primarily the acquisition, destruction, and planned redevelopment of *that* territory that came out of taxpayer coffers.[112] And on that score, taxpayers ultimately spent in the neighborhood of $80 million.[113]

This exercise of eminent domain was controversial. As in Poletown, some of the property owners sued, arguing that the taking was unconstitutional because it was not for the "public use" required by the Takings Clause of the U.S. Constitution.[114] And as in Poletown, they lost, this time with the U.S. Supreme Court holding in *Kelo v. City of New London*[115] that a "public use" is established by a "public purpose" for the taking and, further, that courts must "define[] that concept broadly" to include economic development and must defer "to legislative judgments" as to the measures that will achieve that goal.[116]

And while Pfizer had publicly insisted that it made no demands with respect to the surrounding area—that the city made its own independent choices about what to do with Fort Trumbull—and while the courts in the *Kelo* litigation found or accepted that to be true,[117] there is some evidence that Pfizer had at best expressed its expectation that the redevelopment occur, and at worst outright insisted on it as a condition of building its facility.[118] In July of 2005, about a month after the Supreme Court issued its decision in *Kelo*, Pfizer released a statement denying that "Pfizer is somehow involved in this matter" and insisting that the company "has no requirements nor interest in the development of the land that is the subject of the case."[119] But according to reporting by the *New London Day*, officials at the time believed that Pfizer "would not have done the deal

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110. *See* George Lefcoe, *Jeff Benedict's* Little Pink House*: The Back Story of the* Kelo *Case*, 42 CONN. L. REV. 925, 934 (2010) (book review) ("[N]one of the condemnations were for Pfizer's direct use.").

111. *Id.* at 931–32 (quoting JEFF BENEDICT, LITTLE PINK HOUSE 15 (2009)).

112. The State of Connecticut also agreed to pay to clean up the Pfizer property, which "had piles of rubble atop land contaminated with all sorts of industrial pollutants." *Id.* at 933–34.

113. Gosselin, *supra* note 4.

114. Kelo v. City of New London, 545 U.S. 469, 475–77 (2005).

115. 545 U.S. 469 (2005).

116. *Id.* at 480–84.

117. *See, e.g.*, *id.* at 492 (Kennedy, J., concurring) ("The trial court concluded . . . that benefiting Pfizer was not 'the primary motivation or effect of this development plan' . . . . Even the dissenting justices on the Connecticut Supreme Court agreed . . . .").

118. Mann, *supra* note 104. Justice Thomas observed in his *Kelo* dissent that the New London redevelopment plan was "suspiciously agreeable to the Pfizer Corporation." *Kelo, 545* U.S. at 506 (Thomas, J., dissenting).

119. Mann, *supra* note 104.

without the commitment to make the surrounding area more livable."[120] A 1997 "vision statement" prepared by Pfizer's design firm and presented to officials "suggested various ways the existing neighborhood and nearby vacant Navy facility could be replaced with a 'high end residential district,' offices and retail businesses, expanded parking and a marina"[121]—all of which made it into New London's plans.[122] Then-Governor John Rowland reportedly said as early as 1998, "[Pfizer] wanted a good quality of life. . . . So they wanted to know what was going to happen to the surrounding property. It was an easy sell once they saw what was going to happen."[123]

At bottom, though, whether Pfizer demanded or merely hoped to see these changes is not exactly material. The city took the steps it took because it perceived that they would be necessary to capture and secure Pfizer's investment, jobs, and tax revenue, and to attract the virtuous circle of development that would follow.[124] Yet again, the city spent millions of dollars of taxpayer money and condemned numerous parcels of private property in service of a developer's "vision" and in the largely unsecured hope that its benefits—in terms of investment, jobs, and tax base—would come to fruition.

And, yet again, those benefits never came, at least not durably.[125] Pfizer did build its facility on its own land, and it did employ people—lots of them, in fact—which also meant that "suppliers in Connecticut got more work; construction workers and, later, researchers were hired—leading to houses being purchased and money being spent at restaurants and stores."[126] But as soon as the ten-year property tax abatement expired, Pfizer announced it would abandon New London as part of a larger corporate restructuring and would relocate 1,400 jobs to nearby Groton.[127] Legislators were disappointed, pointing out that the state and

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120. *Id.*

121. *Id.*

122. *See Kelo*, 545 U.S. at 474 (describing plans).

123. David Collins, *Pfizer is to Blame for Destroying the Fort Trumbull Neighborhood*, THE DAY (June 24, 2015, 7:05 AM), https://www.theday.com/article/20150623/nws05/150629736 [https://perma.cc/7RMN-5SVY]; *see* Tom Condon, *Kelo Case a Planning Failure*, HARTFORD COURANT (Feb. 1, 2009), https://www.courant.com/news/connecticut/hc-xpm-2009-02-01-plccondon-art-story.html [https://perma.cc/2KCH-3WZR] ("Pfizer, not unreasonably, wanted the area around its new facility improved.").

124. *See Kelo*, 545 U.S. at 473.

125. *See* Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html [https://perma.cc/K4SR-3YJY].

126. Gosselin, *supra* note 4.

127. *See* McGeehan, *supra* note 125 ("That arrangement is scheduled to end in 2011, around the time Pfizer, which is currently the city's biggest taxpayer, expects to complete its withdrawal.").

city had invested and "made those commitments for the long term," not just for a temporary boost.[128]

But the far worse result has been that little to none of the surrounding Fort Trumbull property has been developed.[129] Professor Ilya Somin, one of the leading experts on the *Kelo* saga and its aftermath,[130] reports that even as of June 2020, "the condemned property—on which fifteen homes once stood—remains empty, used only by feral cats" and that, "[d]espite a variety of proposals since then, the City of New London still has not been able to find a productive use for the land."[131] So, for all of its trouble, all of its expense, and all of its forgone property tax revenue, the people of New London and Connecticut achieved an expanse of newly vacant (if less toxic) land and a building[132]—one that they subsequently spent *another* $15 million to entice a defense contractor to occupy.[133]

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These five stories of development failure are just that: five stories. They do not demonstrate that all such projects are destined to fail, that developers always take advantage of municipalities, or that municipalities always strike bad deals—though one could certainly tell other such stories.[134] Indeed, "[m]ost" of these efforts "appear to cost

128. Gosselin, *supra* note 4 (internal quotation marks omitted) (quoting Democratic Senator Eileen Daily).

129. *See* Michael A. Valenza, *From the Editor-in-Chief*, 47 REAL EST. L.J. 137, 138 (2018) ("[T]he planned additional commercial development did not materialize. The land previously occupied by Susette Kelo's 'little pink house' and by the other homes and businesses remained vacant."); William Fulton, *Eminent Domain Outrage in Connecticut*, GOVERNING (Jan. 2010), https://www.governing.com/columns/transportation-and-infrastructure/Eminent-Domain-Outrage-in.html [https://perma.cc/W5EL-D7XM] (describing "the mostly vacant Fort Trumbull neighborhood nearby, which was never redeveloped as the city had hoped"); Lee Howard, *Pfizer Pulls Up Stakes in NL*, THE DAY (Nov. 10, 2009, 5:31 PM), https://www.theday.com/article/20091110/NWS01/311109920 [https://perma.cc/TZW3-SFM7] ("The loss of Pfizer as a keystone business in New London could put in further jeopardy the Fort Trumbull development that started in conjunction with Pfizer's move into the city but has left little but flattened buildings and eminent-domain angst in its wake.").

130. *See generally* ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN (2015) (arguing that the Court's decision in *Kelo* was in error and evaluating options for reform).

131. Ilya Somin, *The 15th Anniversary of* Kelo v. City of New London, THE VOLOKH CONSPIRACY (June 23, 2020), https://reason.com/2020/06/23/the-15th-anniversary-of-kelo-v-city-of-new-london/ [https://perma.cc/TXN9-4JFU].

132. *See* McGeehan, *supra* note 125 (quoting city councilman Robert M. Pero saying, "[b]asically, our economy lost a thousand jobs, but we still have a building." (internal quotation marks omitted)).

133. Gosselin, *supra* note 4.

134. *See, e.g.*, Keona Gardner, *Cleveland Clinic, FIU, Christ Fellowship Help Port St. Lucie Make Good on Failed Economic Projects*, COURIER POST (May 29, 2019), https://www.courier

cities money without changing the actual locational choices" of the capital being wooed.[135] And because there is "little evidence" to suggest that the incentives so frequently offered by municipalities are effective at attracting development or capturing its long-term promises, economists "have been fairly skeptical" about their use, finding that "the costs of attracting new industry or business through tax incentives are often not offset by local economic benefits."[136]

More to the point, though, these stories illustrate that the *risk* of such failures and shortfalls is primarily borne by cities and their taxpayers, not by the developers themselves. So, while it is not as if developers bear no risk, the terms of the arrangements frequently entail the shifting of both up-front costs (like land acquisition) and long-term carrying costs (like real estate and other taxes) onto the shoulders of taxpayers, with little guarantee that the investment will pay off.[137] Taxpayers also incur significant opportunity costs when land remains locked up for years while developers string cities along with promises of financing or job creation that never materialize. Finally, adding insult to injury, it is often the taxpayers who, compared to the developers, are least well-situated to bear these risks. This is true in equitable terms, particularly in the sorts of economically distressed communities that are attractive targets for redevelopment projects, and in practical terms, given that it is developers who often have the most control over levers—like investment and financing, hiring, attraction of corporate partners, and more—that will generate both short- and long-term success.

In short, though not every redevelopment project will end in tears, the reality is that all of them might and many do—to potentially catastrophic effect for municipalities and taxpayers, especially those already in economic distress. More focused attention to risk allocation and to its incentive effects is therefore necessary, both for the practice of economic redevelopment itself and in order for the associated scholarship to better

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postonline.com/story/news/local/shaping-our-future/property-values/2019/05/29/cleveland-clinic-port-st-lucie-ex-vgti-property/1269369001/ [https://perma.cc/YC2W-KA7Q] (discussing $220 million in losses over ten years of similarly failed development projects). Stadium construction deals are likewise frequently bad investments for municipalities. *See, e.g.*, Rick Paulas, *Sports Stadiums Are a Bad Deal for Cities*, THE ATLANTIC (Nov. 21, 2018), https://www.theatlantic.com/technology/archive/2018/11/sports-stadiums-can-be-bad-cities/576334/ [https://perma.cc/P77S-PXHT] (describing professional sports teams as "bad business deals"); Andrew Zimbalist & Roger G. Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (June 1, 1997), https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost/ [https://perma.cc/E8GT-WH5B].

135. RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 126 (2016).

136. *Id.* at 126–27 (internal quotation marks omitted); *see* Lee, *supra* note 27, at 436–37.

137. For more on why municipalities strike these sorts of deals, see *infra* Section III.A.

understand and evaluate the forces at play. The balance of this Article answers that call.

II. PUTTING DEVELOPERS ON THE HOOK

In light of the record set out above, it may be tempting to reject the very idea of government-financed, government-aided, or government-driven private development projects.[138] But abandoning these projects and the paths out of very real economic distress that they represent would be a mistake if they could be done better—both by improving their chances of success and by more equitably allocating the risk of failure.

This Part draws on and contributes to scholarship in takings, land use, and municipal finance by detailing the risk-reallocation potential—and not simply the resource-reallocation potential—of each of these areas of law. Part III, explores the political economy—at the state, local, and regional levels—of implementing the sorts of measures that emerge from this analysis. In so doing, it also engages further with objections to shifting more risk to developers.

A. *Land Acquisition Costs*

One of the most common features of development failures is a locality that spends millions or even hundreds of millions of dollars on land acquisition for a private developer that, in turn, is not obligated to even come close to reimbursing the locality for those expenditures. That should change, not simply in order to redistribute resources from developers to taxpayers, but as a means of reallocating risk from taxpayers to developers.

Localities acquire land for development in two ways. The first is no different from how any other entity would acquire such land: a consensual sale in which a willing property owner agrees to sell their property for an agreed-upon price. This setting will be discussed in a moment. The second, unique to government, is by exercising the power of eminent domain: a forced sale from an unwilling property owner to the government in exchange for "just compensation"—generally defined, not by a negotiated price, but simply as the fair market value of the property

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138. The problems that animate this Article, and the measures discussed below, have to do with private projects that directly generate private benefits and only indirectly promise to generate public benefits. Purely public projects like parks, public housing, or train stations raise far fewer risk-allocation concerns because the government has comparatively more control over outcomes and because the public benefits are direct. That is, while there is still risk that purely public projects do not ultimately benefit their communities, government and taxpayers *rightly* bear that risk because they also stand to gain nearly all of the upside. The focus in this Article is therefore on the projects where private developers stand to gain most of the direct upside while the public, whose upside is indirect at best, currently bears most of the risk.

being acquired.[139] The Takings Clause of the Fifth Amendment to the U.S. Constitution, along with similar provisions of the states' constitutions, imposes only one additional limit on this power to "take" or condemn private property: the taking must be for a "public use."[140]

As mentioned above, the Supreme Court held in *Kelo* that a "public use" is established within the meaning of the Fifth Amendment as long as the legislature reasonably believes it is pursuing a redevelopment plan that will contribute to economic revitalization and growth.[141] The Michigan Supreme Court had done essentially the same under its state constitution in *Poletown Neighborhood Council v. City of Detroit*.[142] The key import of holdings like these is that governments are empowered to condemn property even if the acquired property will be owned and used by a different private owner rather than by the government or general public.[143]

One reading of *Kelo* is that it changed very little about eminent domain law—that its holding was essentially always true, as the prior existence of decisions like *Poletown* suggests. And indeed, as the Court explained in *Kelo*, it had previously concluded in *Berman v. Parker*[144] that condemnation of a "blighted" area for purposes of (private) redevelopment was consistent with the Takings Clause notwithstanding the absence of public ownership or use by the public.[145] The Court reached the same conclusion, in *Hawaii Housing Authority v. Midkiff*,[146] with respect to taking title to property from lessors and distributing it to (private) lessees for the purpose of reducing the concentration of ownership.[147]

But cases like *Berman* and *Midkiff* involved an at least plausibly distinct factual premise: the pre-condemnation land use was actively harmful to the public interest.[148] The development context, by contrast, does not involve pre-condemnation land uses that are actively harmful

139. U.S. CONST. amend. V; *see* United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (stating that compensation owed is "to be measured by 'the market value of the property at the time of the taking'" (quoting Olson v. United States, 292 U.S. 246, 255 (1934))); 29A C.J.S. *Eminent Domain* §§ 135–36 (2021) (collecting citations across states).

140. U.S. CONST. amend. V; *e.g.*, ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; N.Y. CONST. art I, § 7(a); TEX. CONST. art. I, § 17; *see also* FLA. CONST. art. X, § 6 ("public purpose").

141. Kelo v. City of New London, 545 U.S. 469, 483–84 (2005).

142. 304 N.W.2d 455, 457, 459 (Mich. 1981) (per curiam), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

143. *Kelo*, 545 U.S. at 483–87.

144. 348 U.S. 26 (1954).

145. *Id.* at 35–36.

146. 467 U.S. 229 (1984).

147. *Id.* at 231–32.

148. *See Berman*, 348 U.S. at 32–33; *Midkiff*, 467 U.S. at 232; *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

but rather land uses that are merely not *as* beneficial to the local economy as they were held out to be.

This is not the place to relitigate *Kelo*. But whether *Kelo* and its state court counterparts took or simply confirmed a step beyond takings of the blight-removal sort, these decisions had an important and underappreciated effect. The narrower the universe of permissible "public uses," and the closer they are to government ownership or actual land use by the public (like a road or a park), the better the match between condemnor, beneficiary, and payor. Take the simplest version where, say, the government condemns a few houses in order to demolish them and installs a public highway. The government as the representative of the public is the condemnor, the public is the beneficiary, and the government as trustee of the public fisc is the payor. With one important complication explored below,[149] this is a fairly closed loop: the public acts, the public benefits, and the public pays.

The larger the universe of permissible "public uses" and the more distant or theoretical the public benefits, however, the looser the loop becomes: the public acts, the public pays, but a *private* interest directly benefits. Of course, the Supreme Court has emphasized that a locality "would no doubt be forbidden from taking . . . land for the purpose of conferring a private benefit on a particular private party,"[150] but short of that far end of the spectrum, the argument for permitting development takings is based on the *promise* that the public benefits indirectly too. But the more speculative that promise, the greater the disconnect between beneficiary and payor. And indeed, the more the developer is in the driver's seat in terms of selecting the site, conceiving the project, and creating the plan, the more the government is the condemnor in name only, acting at the behest of the developer. In these settings, it is the developer who drives the action and directly benefits, while the public pays and only hopes to enjoy trickle-down benefits.

The consequences of this mismatch have the potential to be quite striking. After all, the purpose of the compensation requirement is ostensibly to deter the government and push it to exercise the power of eminent domain only when doing so is efficient. If the government did not have to compensate property owners at all, the story goes, it would make takings decisions only by examining its own benefits and without regard to the costs imposed on the dispossessed property owners or society at large.[151] In other words, the government "would not feel

149. *See infra* notes 188–97 and accompanying text.

150. *Kelo*, 545 U.S. at 477.

151. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 56–57 (9th ed. 2014); Heller & Krier, *supra* note 23, at 1001; Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 882–83 (1995); Robert C.

incentives, created by the price system, to use those resources efficiently."[152] By forcing a condemning government to compensate owners, a compensation requirement addresses the "fiscal illusion" under which governments operate and makes those governments internalize the costs they impose, not just the benefits they enjoy.[153] But if the developer is driving the condemnation, and if the developer is the direct or most guaranteed beneficiary, then compensation requirements as currently understood and imposed on municipal governments mean that governments internalize *only* the costs and *externalize* many of the benefits.

The other side of the coin, of course, is that developers are left to operate like a government freed from the compensation requirement—to internalize only benefits, externalize costs, and make takings decisions without regard to the risks they impose on the public. The predicted result would be numerous inefficient condemnations that fail to seriously weigh costs and benefits. And that is exactly what has happened. Indeed, on this account, the failures recounted in Part I ought hardly to have been a surprise.

Solving this mismatch would be an important step towards reallocating the risk of these sorts of development failures. The mismatch could be solved in one of two ways. The first would be to limit the scope of the "public use," which would close the beneficiary-payor loop on the beneficiary side by ensuring that the public internalizes all of the benefits of any taking. And some states have made some gestures toward restricting what sorts of purposes might qualify as "public uses."[154] Some scholars have questioned just how effective these restrictions have been.[155] But even if they were effective, this approach would come at the cost of potentially preventing even socially beneficial redevelopment projects.[156] Without the power of eminent domain in these settings, individuals whose property is crucial to the assembly of necessary parcels would be able to hold out for extraordinary sums of money that either

Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977).

152. Heller & Krier, *supra* note 23, at 999.

153. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 621–22 (1984).

154. *See* Dana Berliner, *Looking Back Ten Years after* Kelo, 125 YALE L.J. F. 82, 84–88 (2015).

155. *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (discussing the legislative response to *Kelo* and its shortcomings).

156. *See, e.g.*, Lehavi & Licht, *supra* note 12, at 1706 ("[A] flat prohibition on the use of eminent domain to assemble land from numerous owners to allow large-scale, financially profitable projects is highly problematic on the policy level.").

shut down projects or result in inefficient and unjust wealth transfers from the public to the holdouts.[157]

For this reason, the superior way of addressing the mismatch is to close the beneficiary-payor loop on the *payor* side—ensuring that developers internalize the costs of any taking by requiring them, rather than governments, to pay the compensation out of their own pockets. Moreover, unlike efforts to pare back *Kelo*, this solution on the payor side *also* addresses the fact that the same mismatch occurs when the government consensually purchases property for development purposes. Recall that we initially bracketed the consensual sale setting, but there, too, developers who do not have to pay the negotiated purchase price do not internalize those costs. Indeed, though the *Kelo* decision neatly illustrates the problem, it does not describe its full scope. The problem extends to all land acquisition costs, not just those associated with the exercise of eminent domain.

Consider the track record. In Poletown, the government paid $300 million for the land that GM needed for its plant; GM kicked in $8 million.[158] In Mesa, the city spent $7 million for the necessary property; the developer paid nothing but a couple thousand dollars in penalty payments when it was unable to secure financing.[159] In New York City, the government spent many tens of millions of dollars on land acquisitions and condemnations; the NYSE spent about $10 million.[160] And these are not just cherry-picked anecdotes. As Yun-Chien Chang has described, "Often the government first condemns the properties, compensates the condemnees, and then resells the properties to the developers," but "there is no necessary connection between the amount of takings compensation that the government pays and what the government charges to developers."[161] So there are "many examples" of governments selling condemned properties at massive discounts.[162] The result is that municipalities routinely "insulate" developers "from condemnation's social costs."[163]

The consequence of this insulation—whether from the costs of consensual purchases or condemnations—is, as explained above, that developer behavior takes no account or too little account of the risk of

157. *See, e.g.*, Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1473 (2008); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 971–72 (2004); Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993).

158. *See supra* notes 42–43 and accompanying text.

159. *See supra* notes 70, 76 and accompanying text.

160. *See supra* notes 95–96 and accompanying text.

161. Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation is Efficient?*, 20 SUP. CT. ECON. REV. 35, 60 (2012).

162. *Id.*

163. *Id.*; *see* Bell, *supra* note 23, at 568; Lehavi & Licht, *supra* note 12, at 1722.

failure and the costs that failure would impose. Developers are invited to free-ride on the government and the taxpayers. For their part, they pay pennies on the dollar for the property they plan to build on, so when those projects go south, their losses are limited to their relatively small up-front costs. Governments and taxpayers, by contrast, experience that failure as the loss of their much more substantial up-front costs.

Requiring developers to instead pay dollar-for-dollar the compensation owed to condemnees and the price owed to consensual sellers would have three primary salutary effects. First, it would lead the developer to internalize both costs and benefits and, accordingly, to make more efficient and prudent development and takings decisions. Simply put, it would help ensure that the projects developers pursue are not more outlandish than they themselves would be willing to risk. The result might well be fewer projects pursued, but a higher proportion of those projects ought to bear fruit. Just as important, if not more, the developer's payment of compensation up front would represent an investment *they make* in the long-term success of the project. With cities and taxpayers bearing these costs, developers currently have little to no skin in the game, so they have little incentive not to throw in the towel as soon as things get dicey. But if they had to put their money where their mouths are in the form of full payment for the property in question, developers would have a greater incentive to do what it takes in the days and months and years after the property acquisition itself to see that investment succeed.

Second, on those occasions when projects do fail or fail to meet expectations, the costs will rest with the party in the best position to have *prevented* or at least mitigated that failure. After all, while even the best laid plans can falter, the worst laid ones falter more frequently. And it is often the developers themselves—as the stories in Part I put into bold relief—who have the most control over the circumstances that will generate communitywide benefits: making smart site selection choices up front, securing financing, and maintaining a stream of financial support, hiring local contractors and employees to stimulate the local economy, and so on.

Third, if a project does fail, the costs will likely rest with the party in the best position to *absorb* the consequences. With some obvious exceptions like the New York City story discussed above, many of these projects are pursued in distressed communities like New London and Detroit precisely because they are the communities most in need of development, job creation, and a larger tax base. It is therefore especially perverse that the risks of failure are piled onto the shoulders of cities and taxpayers already in dire economic straits and at the end of their rope in terms of their ability to squeeze any more revenue out of the stone of a shrunken tax base. Developers, by contrast, have the luxury of choosing how far to leverage themselves. They can diversify their portfolios with different sorts of projects in different locations, whereas municipalities are stuck with the territory they have and taxpayers tend to be all-in financially on their homes and face unrealistic exit options.[164] And developers generally have greater resources, greater flexibility, and greater access to credit than municipalities given that municipalities throughout the country are chronically underfunded and strictly limited by state law in terms of their ability to run deficits or borrow money.[165]

Take deficits first. In contrast to the federal government and private firms, "nearly all state (and local) governments are required to balance their budgets annually"—required by law, that is, not simply by prudence.[166] And while these requirements vary in terms of the degree to which they constrain,[167] the point is simply that they impose yet another limitation on local financial flexibility.

Now consider debt. In nearly every state, municipalities face caps on the amount of debt they may assume—often a percentage of the assessed value of taxable property, which, again, is likely to be low in precisely those communities in need of redevelopment—as well as special referendum procedures for issuing debt which are geared, "not towards *optimizing* debt levels," but "simply *limiting* debt levels."[168] To be sure, localities have identified some creative ways to partially evade these limits,[169] and state courts have struggled to differentiate between debts that are subject to these limits and debts that are not.[170] But while municipalities certainly can and do issue some bonds and assume some

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164. *See, e.g.*, Fennell, *supra* note 7, at 1059 ("Homebuyers . . . make an investment. This investment is typically the single largest one in the household's portfolio, and it is often heavily leveraged." (footnotes omitted)); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 626 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001)) ("[H]omeowners are often in no position to comparison shop; moving is relatively costly and may be extraordinarily painful if it means realizing a loss.").

165. *See* Selmi, *supra* note 6, at 619 ("[L]ocal governments in the twenty-first century have very limited financial resources.").

166. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2592 (2005); *see* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 866 ("Forty-one state constitutions include balanced budget requirements.").

167. *See* Robert Ward Shaw, Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1226–28 (2004).

168. Shoked, *supra* note 6, at 1253; *see* Sterk & Goldman, *supra* note 6, at 1315–16 (discussing forms of debt limitations). That is, even though there is an "extensive and robust market for local bonds," localities' "capacity to act on their inclination to borrow is still limited—by law." Shoked, *supra* note 6, at 1251.

169. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 925–26 (2011); Sterk & Goldman, *supra* note 6, at 1302 (agreeing but arguing that even weakened constraints "protect against the worst sorts of legislative abuse").

170. *See* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 983 (1988).

debt, it remains the case that these limits "sometimes block localities from accessing requisite credit," "force governments to pay higher interest rates, generate administrative expenses, give birth to deals suboptimally structured from a public finance perspective," and more.[171]

Most takings scholars overlook both the problem of developer free-riding and the solution of developer payment. Instead, they tend to focus on finding the right *measure* of takings compensation, in large part because of their focus on the distribution of resources rather than the distribution of risk.[172] But while there might well be reasons to address the widely recognized problem of undercompensation,[173] focusing on valuation overlooks the deeper problem that the wrong *entity* is paying that compensation and that there is, accordingly, a misallocation of risk. It also overlooks the problems in government-paid consensual purchases.

An important exception on the takings front is the work of Professors Abraham Bell and Gideon Parchomovsky. Bell and Parchomovsky identify and describe "givings" as occurring when a government grants a private actor a property interest or, in some circumstances, enhances private property value by means of regulation.[174] Among other things, they argue that just as governments compensate for takings, they should "assess charges for givings" and impose those charges on the beneficiaries.[175] But while their prescription is similar, their argument—like so much of the takings literature—focuses on "efficiency principles" and "the demands of corrective justice" in terms of *resources*, and with a focus on addressing distortions in *government* incentives in takings and

171. Shoked, *supra* note 6, at 1255 (footnotes omitted). Indeed, the greater the risk of a development project failing and threatening municipal revenue, the more powerful is the argument that the municipality's financing attempts really do involve issuing "debt" within the meaning of these legal limits. *See* LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW 634 (5th ed. 2015).

172. *See, e.g.*, Chang, *supra* note 161, at 39–40 (arguing for an ex post assessment method); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 242 n.10, 256–61 (2007) (discussing multiple compensation reform proposals); Heller & Hills, *supra* note 157, at 1473 (discussing holdout problems); Fennell, *supra* note 157, at 979, 982 (discussing different mechanistic tests). *See generally* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007) (offering a self-assessment mechanism).

173. *See, e.g.*, Heller & Hills, *supra* note 157, at 1475; Bell & Parchomovsky, *supra* note 172, at 873; James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866; Fennell, *supra* note 157, at 962–67. *But see generally* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006) (arguing that scholars overstate the undercompensation problem and overlook ways outside of the constitutional process in which governments make owners whole).

174. Bell & Parchomovsky, *Givings*, *supra* note 23, at 563.

175. *Id.* at 577–78; *see id.* at 597 ("[W]hen compensable takings are associated with chargeable givings, the recipients of the giving should compensate the victims of the taking.").

givings.[176] The foregoing has shown, by contrast, that an equally if not more salient justification is securing on-the-ground commitment, buy-in, and long-term success—in light of a pattern of failure that Bell and Parchomovsky do not examine—by addressing risk-based distortions in *developer* incentives in both the initial acquisition and the long-run course of the project.[177]

One other proposal deserves mention. In a later publication, Bell goes many steps further and suggests that developers should be delegated the power of eminent domain directly and altogether.[178] Bell notes some precedent for this practice in eighteenth- and nineteenth-century delegations to utility and railroad companies,[179] and he argues that this practice "should be preferred" because the government's role in takings is "frequently counterproductive and inefficient" and because "there are times when the discipline of markets is more effective than the discipline of politics."[180]

This intriguing piece has much to offer, and its thrust resonates with the argument advanced here. But Bell's recommendation is suboptimal for a few reasons. First, in line with the practice he identifies, Bell focuses first on utility companies or similar potential takers whose need for repeated takings over time may make it "unnecessarily burdensome to require external ratification of each exercise of the takings power."[181] In these settings, this is not an unreasonable position. Similarly, the federal government has delegated its eminent domain authority to certain private industries like those constructing bridges or qualifying natural gas pipelines.[182] This sort of delegation is likewise justifiable by the sheer, often interjurisdictional scope of such an undertaking and the

176. *Id.* at 600; *see id.* at 578–89 (analyzing through lenses of fairness and efficiency). The same is true of their later, narrower brush with development takings and developer payment obligations in the context of their "conservation commons" proposal. *See* Bell & Parchomovsky, *Of Property*, *supra* note 23, at 53–56.

177. *Cf.* Bell & Parchomovsky, *Givings*, *supra* note 23, at 557 ("invit[ing]—and acknowledg[ing] the need for—future development and refinement" of their givings framework). To be sure, the literature also considers incentives for would-be condemnees, *see, e.g.*, Levinson, *supra* note 23, at 388–93, but it tends to overlook the incentives for condemnation's non-government beneficiaries. Further, insofar as Bell & Parchomovsky aim to insure against failure, focusing on the payment of compensation on the front end can only go so far. More is needed, particularly to prevent other features of development programs like tax abatements from wiping out the beneficial effect of developer-paid compensation. *See infra* Section II.C.

178. Bell, *supra* note 23, at 521.

179. *See id.* at 545–48.

180. *Id.* at 521.

181. *Id.* at 562.

182. *See* Penneast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2255–56 (2021) (discussing practice); Act of July 25, 1947, ch. 333, 61 Stat. 459 (codified as amended at 15 U.S.C. § 717f(h)). Some states have likewise delegated the power of eminent domain to "common carrier" pipelines. *See, e.g.*, TEX. NAT. RES. CODE § 111.019.

consequential magnification of holdout power. But development takings like those discussed here are a far cry from either of these cases, and there seems little argument in the development context that government retention of the takings power is unduly burdensome for either government or developer.

Bell nonetheless makes the case for private eminent domain in the broader context of land assembly for development,[183] and he does so by once again focusing generally on values of distributive justice and planning efficiency.[184] But in so doing he overlooks the important values that drive this Article: allocation, not just of resources, but of risk. Even a project that appears—based on assumptions in place at the time—that it will strike a just and efficient distribution of resources may turn out not to do so if the relevant assumptions about, say, budget projections or job creation fail to pan out. A regime built around efficient and just resource-allocation with insufficient attention to efficient and just risk-allocation may therefore create more problems than it ultimately solves. Specifically, while Bell is certainly right that politics provides only imperfect accountability,[185] so do markets.[186] Trading one for the other might be worth doing to get financial commitment from the developer, but fortunately, we need not choose between the two. Whereas Bell's approach largely gives up on political accountability,[187] the path outlined here splits the eminent domain atom—government power and developer payment—and thus keeps *both* government and developer on the hook for the consequences. Imperfect though each may be, this belt-and-suspenders approach to accountability stands a better chance of securing commitment and imposing consequences—that is, of achieving efficient and just allocations of risk—than either one does alone.

Finally, the developer-pays proposal articulated here—which addresses problems Bell and Parchomovsky do not and avoids pitfalls that Bell risks—is only slightly complicated by a reservation flagged above.[188] Earlier, we supposed that the government's role in a truly public taking—for a park or a road, for example—was represented by that closed loop of benefit and cost and that the government was disciplined by the compensation requirement to act efficiently.[189] But as Professor Daryl Levinson has famously argued, that is a serious oversimplification

183. Bell, *supra* note 23, at 567–71.

184. *See id.* at 528, 567–71.

185. *See id.* at 575.

186. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260–70 (2003) (discussing dynamics and imperfections of both political and market accountability).

187. *See* Bell, *supra* note 23, at 544 ("[T]he reliance on public decisionmaking by a state apparatus, rather than the discipline of the market, seems unlikely to reach efficient results.").

188. *See supra* note 149 and accompanying text.

189. *See supra* notes 151–52 and accompanying text.

because government does not internalize costs in the way the theory assumes—that is, in the way that private firms do.[190] According to Levinson, government does not consider financial outflows or inflows in terms of money but only in terms of political costs and benefits.[191] And while those political incentives may be "causally connected to social costs and benefits, . . . they are not the same thing."[192] More problematic still, Levinson demonstrated that that causal connection is itself indeterminate.[193] There is therefore some reason to question the standard account of the way in which compensation requirements discipline government in the eminent domain setting.

Assuming Levinson is correct, though, his account only further supports the argument that the developer needs to pay.[194] First and most importantly, if government does not adequately respond to the incentive effects created by the compensation requirement, and if developers are not paying in full, then nobody is properly internalizing the costs of land acquisition. This is yet another reason that compensation ought to be paid in appropriate circumstances by an entity that *can* be expected to respond rationally to financial costs: a private firm like a real estate developer.[195] In other words, insofar as pathologies of government decisionmaking minimize the efficacy of a compensation obligation, shifting that obligation to an entity that will better respond to it is not only warranted for the reasons outlined above, but also because it will lead to more efficient development decisionmaking.

Second, if Levinson is right that governments only respond to political costs, there is good reason to think that dynamic is especially distorting in the development context. While the actual financial outlays come in the short term, the realization that those costs are not going to be repaid in the form of a successful development project will often not occur for years.[196] This means that a local legislator or mayor can escape the

190. Levinson, *supra* note 23, at 359.

191. *Id.* at 361 ("[T]he accountability argument starts from the understanding that elected officials make decisions based solely on political costs and benefits."); *see id.* at 420 ("[G]overnment cares not about dollars, only about votes.").

192. *Id.* at 357.

193. *Id.*

194. I have elsewhere expressed reservations about some aspects of Levinson's account as applied to bureaucrats rather than elected officials. *See* Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 122–31 (2019).

195. *See* Levinson, *supra* note 23, at 346 ("No one doubts, for example, that a profit-maximizing firm will tend to ignore social costs that are not reflected in financial outflows, or that it will take account of costs that are reflected in financial flows and perhaps change its behavior in response." (emphasis omitted)); *id.* at 355 (noting that investor control and selection "justify—within reasonable limits—modeling firms operating in economic markets as profit-maximizers").

196. Even if this temporal problem were not present, there is some reason to suspect that the government also tends to overestimate benefits and underestimate costs. *See* Michael H. Schill,

political reckoning that comes from failure: today's legislature can effectively externalize the political costs of failure onto tomorrow's legislature while internalizing the political benefits that come from grand promises of jobs and prosperity.[197] As a result, even political costs will not adequately discipline governments here. Levinson's work thus provides yet another reason to shift payment obligations to developers in the interest of shifting risk and thereby incentivizing rational, efficient development decisionmaking on the front end, and commitments to durable success and community benefits on the back end.

B. *The Land Use Toolkit*

Getting a project off the ground is significant, but it is only part of the battle. As stories like Poletown and New London illustrate, municipalities and taxpayers also take on the risk that even a completed project will not generate the benefits that developers promise and that local officials hope for. To reallocate *that* type of development risk, we need other tools beyond the payment of land acquisition costs.

We can adapt some from the context of land use regulation. To begin with the most fundamental, zoning is how communities allocate the siting of permissible land uses.[198] Acting pursuant to delegations of authority from the states, local legislatures enact zoning ordinances that carve localities into zones and that declare which land uses and which shapes and sizes of buildings are permitted where—either as of right or under designated circumstances—or not at all.[199] While property owners are permitted to seek variances from local administrative agencies like a board of adjustment or board of zoning appeals, variances are only authorized under relatively narrow circumstances.[200] Sometimes owners or prospective owners and developers therefore want or need a parcel to be rezoned entirely, which means convincing the local legislature to

Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. PA. L. REV. 829, 859 n.116 (1989) (collecting studies).

197. To be sure, today's legislature cannot externalize onto tomorrow's the immediate political costs of the condemnation itself, but because the condemnees are often a numerical minority in a larger constituency that theoretically stands to benefit—and because developers themselves have power and can be significant campaign contributors—those political costs are likely to be comparatively small. *Cf.* Levinson, *supra* note 23, at 376 (observing the possibility that "government will over-take because social benefits are politically inflated and social costs politically discounted").

198. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–90 (1926).

199. *See* Selmi, *supra* note 6, at 600.

200. *E.g.*, Commons v. Westwood Zoning Bd. of Adjustment, 410 A.2d 1138, 1141–43 (N.J. 1980).

amend the zoning ordinance.[201] Local legislatures therefore have some leverage to make demands of developers.[202]

One way to exploit that leverage—again, not to extract resources but to better allocate risk—is through development agreements. A development agreement is a legally binding contract between a property owner and a local legislature.[203] As they are currently practiced, the government rezones a parcel for a property owner's benefit and "freezes" those land use regulations in place during the limited course of the project; in exchange, the property owner provides "funding, land, and other support for schools, parks, community facilities, or affordable housing projects."[204] Development agreements have become "an increasingly popular approach to land use decisionmaking" because they provide developers with certainty and give municipalities the opportunity to have a voice in the project and to advance their own planning goals.[205]

To be lawful, or at least to mitigate doubts about their lawfulness, development agreements must satisfy three conditions. First, they generally must be authorized by state law.[206] Second, they must be carefully crafted so they do not "contract away," for the benefit of a particular developer, the government's police power to regulate in the public interest.[207] Third, and related, today's legislature must not exercise (or commit not to exercise) the powers of tomorrow's legislature.[208] All of that said, however, courts have tended to uphold state-authorized development agreements so long as they reserve some governmental control and are limited in duration with a "fixed termination date" somewhere less than "decades away."[209] Once these hurdles are cleared, development agreements can be an effective tool of land use planning.

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201. *See* Selmi, *supra* note 6, at 600.

202. *See* Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 865 (2019) ("[M]uch of private development depends on public levers and largesse—be it tax credits or land rezoning. Accountable development would ask for a public benefit in exchange.").

203. Nachman, *supra* note 18, at 80.

204. *Id.* at 79; *see* Selmi, *supra* note 6, at 597.

205. Nachman, *supra* note 18, at 80.

206. *See* 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, 665 (2001) ("[A] bilateral agreement, particularly one sanctioned by the state through enabling legislation reciting the public purpose behind such agreement, is by far a more legally sound way to proceed."); Nachman, *supra* note 18, at 82; *cf. infra* Section III.B (discussing role of state legislation).

207. Selmi, *supra* note 6, at 594; *see* Callies & Tappendorf, *supra* note 206, at 672.

208. *See* Selmi, *supra* note 6, at 616 (emphasizing "the concept that government cannot, through an agreement with a developer, tie its hands from acting in the future").

209. Callies & Tappendorf, *supra* note 206, at 676; *see* Nachman, *supra* note 18, at 96; Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 409, 489–95 (2004).

And while they vary in terms of their authorized scope and process,[210] they are not paper tigers: courts "have been strict in forcing the parties to live up to their bargains" and have even ordered property owners to make promised, bargained-for infrastructure improvements.[211]

In the sorts of redevelopment projects at issue here, land might well need to be rezoned and municipalities might make use of—and in many cases likely are making use of—development agreements in that land use planning process. And indeed, some of the common terms are capable of spreading some of the risk, particularly when it comes to the opportunity costs borne by taxpayers. As discussed with respect to a few of the case studies in Part I, these opportunity costs represent some of the biggest costs of potential failure: forgone tax revenue and public dollars spent on land acquisition represent money that could have been spent on roads and parks and schools, and land that is locked up for a project that never comes to fruition is land that could have been any number of other things that benefited taxpayers—either by generating revenue or by being a public resource.[212] Binding agreements from developers to improve infrastructure, for example, work to some extent to defray those opportunity costs. Accordingly, where authorized, municipalities should continue in this vein or should start making use of this tool along these lines. And, in states that do not yet permit municipalities to enter into development agreements, these agreements' potential to mitigate the risk of failure ought to weigh in favor of authorizing them.

But municipalities—and their states' authorizing statutes[213]—can also go further, both with respect to the terms and the settings of these agreements.[214] Take the terms first, with just a few examples. Agreements for developers to improve infrastructure are not the only way, or even necessarily the best way, of reallocating risk. First, municipalities might instead (or in addition) negotiate for commitments to employ a certain

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210. *See* Nachman, *supra* note 18, at 81–86 (discussing variation).

211. Callies & Tappendorf, *supra* note 206, at 691. Daniel Selmi has argued that development agreements represent "at least a partial abandonment of the hierarchical relationship" between government and developer and constitute an "admission by the government that it cannot afford to fund the public services that the public has come to expect." Selmi, *supra* note 6, at 613–15. For better or for worse, though, that admission is accurate. If anything, governments have assumed too *subordinate* a role vis-à-vis developers such that use of development agreements could restore at least parity. *See* JULIAN GROSS, GREG LE ROY & MADELINE JANIS APARICIO, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 4 (2005), https://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf [https://perma.cc/323F-NH96] (similarly observing that "the public-private partnerships at the local level are being driven for the most part by the private sector").

212. *See supra* Part I (discussing development failures).

213. *See infra* Section III.B (discussing role of state legislation).

214. This Article is not suggesting any unlawful expansion of development agreements. *See supra* notes 207–10 and accompanying text. The municipality would be getting *more* out of the agreement, not less, and at no greater cost to its police powers.

number of local workers in both construction and the finished project, and to pay them a living wage. These would help to shore up promises of collateral economic benefits to the surrounding community and mitigate the risk of creating another Poletown fiasco.[215] Second, where the developer itself is going to be the corporate occupant of the completed project—like GM in Poletown,[216] or the NYSE in New York City[217]—the development agreement might also require the developer to subsidize the cost of local housing for any employees not hired from the existing community. That would represent an incentive for employees to live in town as opposed to in a neighboring community, thereby contributing to the tax base of the same locality that authorized (and bore risk for) the development. Third, in cases like New London, where Pfizer allegedly demanded the city make the surrounding area fit its "vision" of an attractive residential and business district,[218] a development agreement could obligate a partner to contribute financially to attracting new businesses to serve a revitalized local community, along with residential developers and other amenities. Fourth, monetary penalties could be baked into the development agreement in the event that the developer fails to attract tenants for its project or new business to the surrounding area—or, as the Mesa City Council belatedly observed and as Las Vegas seemingly never did, fails to attract financing for the project.[219]

In many cases, of course, developers may not need land to be rezoned. But localities are nonetheless not without power. First and foremost, it holds the keys to variances and other discretionary authorizations—all of which are also potential pressure points for development agreements. Second, the locality has one critically important piece of leverage: the sole power to condemn the necessary land. As discussed above, land assembly aided by the exercise of eminent domain is often critical to a development project, and only the government can bring that tool to the table. In other words, even if developers are made to pay the compensation along the lines set out above, they cannot carry out the taking on their own. Localities and states therefore should consider expanding development agreements into what this Article calls "takings agreements." Recognizing that they have something that the developer needs, localities can refuse to exercise their eminent domain power unless the developer contractually agrees to terms that result in a fair spreading of risk. These terms should naturally include the developer's full payment

215. *See supra* notes 42–52 and accompanying text.
216. *See supra* notes 34–35 and accompanying text.
217. *See supra* notes 81–89 and accompanying text.
218. *See supra* notes 117–23 and accompanying text.
219. *See supra* notes 59–63, 72–78 and accompanying text.

of the land acquisition costs, but they should also include other risk-shifting terms like those just discussed.[220]

The potential utility of takings agreements is another reason why it would be a mistake, contrary to Bell's argument highlighted above, for governments to delegate the eminent domain power altogether and increase the universe of private takings.[221] This power could translate into a meaningful bargaining chip for local governments to which they could attach individualized conditions tailored to the circumstances of particular projects. Bell's block-grant approach, by contrast, would give away all of that potential for beneficial coercion. That is, in addition to the critiques already offered,[222] not only does splitting the atom of eminent domain double the chances for accountability in the case of failure, but it can stave off failure by empowering governments to check developers and to better bind them to their promises.[223] To use a different metaphor, if both keys need to be turned to activate the eminent domain machine, the government can refuse to turn its key until it receives sufficient binding commitments that mitigate the risk shouldered by the public.

A second and related land use regulation tool that can be used for risk-reallocation purposes is the community benefit agreement (CBA).[224] A CBA is similar to a development agreement in that it is a binding contract, but rather than being made by the developer and the locality, a CBA is made by the developer and one or more community groups.[225] The general framework is that, in exchange for the community groups' support for a new development project, the developer will agree to certain measures and policies that benefit the community.[226] Though not generally framed as such, many common provisions fit neatly under a risk-reallocation heading and therefore could be a valuable part of a strategy to address the problems that animate this Article.[227] For example,

220. Takings agreements, which buy the municipality assurances or concessions from the developer, pose no greater risk of illegality than any other development agreement. In fact, they pose even less because there is no danger that the municipality is contracting away its long-term police power. *See supra* notes 207–10 and accompanying text.

221. *See* Bell, *supra* note 23, at 543–44; *supra* notes 178–80 and accompanying text (discussing same).

222. *See supra* notes 181–87 and accompanying text.

223. One might object that local governments cannot be trusted to use this power efficiently or effectively. *See, e.g.*, Bell, *supra* note 23, at 575. Even so, it is far from clear that placing relative faith in developers is appropriate instead. For further discussion of how states might encourage local governments towards exercising this power effectively, see Section III.B, *infra*.

224. *See generally* Salkin & Lavine, *supra* note 18 (discussing community benefit agreements in depth).

225. *See, e.g.*, *id.* at 19; Selmi, *supra* note 6, at 642.

226. Salkin & Lavine, *supra* note 18, at 19.

227. *Cf. id.* at 20 (noting that CBAs came out of "increased public concern for developer accountability").

many CBAs include commitments from the developer to pay living wages, hire local workers, guarantee certain minimums for hiring minority employees, provide affordable housing, and mitigate environmental impacts.[228] Some CBAs even commit developers to, for example, "attract a grocery store operator who pays living wages and benefits" or provide funding "for arts, youth, and culture services in the surrounding communities."[229] Needless to say, these sorts of commitments have the potential to go a long way towards ensuring that completed projects generate, not only private returns for the developer, but also the broader public benefits that developers promise.

CBAs do, however, have important limitations because they are purely private arrangements. While they sidestep the aforementioned doctrinal hurdles with respect to the authority to contract away the police power,[230] they risk being a less meaningful constraint on developers because they rely on private enforcement by community groups that might lose interest, be bought off, lack resources to litigate, or not fairly represent the community as a whole.[231] Developers also have to be interested in negotiating with community organizations and in securing their support in the first place.[232] These obstacles all make turning CBAs into a reliably effective tool of risk-shifting a fairly tall order. The argument here is thus simply that CBAs can represent another pressure point at which developers can be bound to a number of measures that work to minimize the community's risk that even a completed project fails to meet expectations. Where the opportunity presents itself, then, community organizations should continue to aggressively approach these negotiations with an eye toward commitments that serve that goal. And local governments should have their backs when they do so by, for example, supporting their efforts and incorporating those CBAs into parallel development agreements—where those are authorized—so that the localities have the power to enforce them too.[233]

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228. *See id.* at 19, 23–25.

229. *Id.* at 24 (internal quotation marks omitted).

230. *See* David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 662 (2007) ("CBAs generally are contracts between two private parties—a developer and a community coalition. Consequently, they are not subject to the legal problems that confront public entities, such as a city, when entering into a development agreement with the same developer." (footnote omitted)); *supra* notes 207–09 and accompanying text.

231. Salkin & Lavine, *supra* note 18, at 32.

232. *Id.* at 30–31; *see* Selmi, *supra* note 6, at 642 (contending that CBAs are "not widespread, in part because developers have little incentive to enter into them"). *But see* Marcello, *supra* note 230, at 659–60 (emphasizing that "[t]he public subsidies so often sought by large developers provide a principal point of leverage for community groups in CBA negotiations" (footnote omitted)).

233. Salkin & Lavine, *supra* note 18, at 20, 32.

A third land use regulation device that could be made to serve as a risk-reallocation tool is the exaction. Whereas development agreements and CBAs are negotiated bargains, an exaction is a tool—albeit more limited in scope—with which local government can unilaterally reallocate risk. In the exactions setting, local government essentially places a condition on its granting of permission to develop: the property owner must, in exchange, dedicate either real property or money to the municipality. This arrangement might smack of "extortion,"[234] but it addresses a very real concern—namely, the "reality . . . that many proposed land uses threaten to impose costs on the public that dedications of property can offset."[235] For example, a new, more intense land use could increase traffic congestion, so a municipality might legitimately want the owner, in exchange for approval of the project, to relinquish land necessary to widen the adjacent road.[236] Because "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy," the Court has "long sustained such regulations against constitutional attack."[237] Localities are limited, however, to make only those demands—again, in the form of real property or money—that bear an "essential nexus" to the social costs imposed by the development and that are in "rough proportionality" to the extent of those costs.[238]

These doctrinal hurdles naturally limit localities' power to extract money or property from developers.[239] They also exert an "in terrorem" effect on localities fearful of treading close to the line and exposing themselves to costly litigation.[240] These are among the reasons why development agreements or CBAs might be superior options, assuming they are authorized by state law and assuming the developer agrees to their terms. After all, a municipality might be able to get more out of a developer in a development agreement than it permissibly could under

234. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

235. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).

236. *See id.*

237. *Id.*

238. *Id.* at 606; *see id.* at 612 (holding that these tests also apply to "monetary exactions"); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("rough proportionality"); *Nollan*, 483 U.S. at 837 ("essential nexus").

239. *But see* Selmi, *supra* note 6, at 607 (noting that "[s]ome argue that [these] decisions merely create procedural hurdles that municipalities can readily overcome").

240. *Id.* at 606–07 (observing that the Court's language "spoke powerfully to some local officials, suggesting that the Court would continue to look unfavorably on local power to impose requirements on developers").

this doctrine, and yet, "by signing the contract the developer would voluntarily waive any objections."[241]

All of that said, however, localities still have meaningful room to maneuver in the face of developer intransigence, even under the Court's holdings. Municipalities "often" permissibly impose exactions in the forms of "in-kind dedications for infrastructure, such as roads, parks, and schools, and 'in-lieu' fees for the same purpose."[242] They also lawfully impose "impact fees, or special assessments, to cover the cost of development" and to "shift to the developer the costs of the public infrastructure that the development requires."[243] Even as currently practiced, then, exactions are *themselves* a form of risk reallocation because they relieve local government from spending taxpayer money on infrastructure that may turn out to be a metaphorical bridge to nowhere in the event of the project's failure.[244] This logic is also another way of justifying requirements that developers pay for land acquisition costs, as discussed above.[245]

But localities can go further. Whereas ordinary small-scale development that is entirely in the owner's hands generates little social risk, and therefore does not justify any exaction designed to mitigate such risk, large-scale redevelopment projects are quite different. As shown above, municipalities take significant gambles in these settings.[246] And recall that one of the most significant aspects of local risk is not the dollars spent themselves, but the opportunity cost they represent.[247] Every taxpayer dollar spent on a development project that fails is a taxpayer dollar not spent on schools, parks, and other public services. These localities are therefore forced in the short term to either spend less on those services or raise taxes to cover the cost, with the risk that failure in the long term only requires more of the same. But in distressed communities with small tax bases, raising taxes is often simply not an

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241. *Id.* at 610; *see* Green, *supra* note 209, at 394 (noting that development agreements allow municipalities to gain "public benefits otherwise not obtainable under regulatory takings doctrine").

242. Bell & Parchomovsky, *Givings*, *supra* note 23, at 609 (footnote omitted); *see* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 481 n.42 (1991) (reporting that "at least 89% of all communities in the United States impose some form of dedication requirement (either of land or of facilities)" and that "[f]ifty-eight percent require fees-in-lieu-of-dedications or impact fees").

243. Bell & Parchomovsky, *Givings*, *supra* note 23, at 609.

244. *Cf.* Been, *supra* note 242, at 482–83 (explaining that exactions not only serve to shift costs, but in so doing may "induce a more efficient use" of infrastructure and public resources and may "prevent the developer from appropriating wealth created by the activities of the local government").

245. *See supra* Section II.A.

246. *See supra* Part I.

247. *See* Bell & Parchomovsky, *Givings*, *supra* note 23, at 610 (emphasizing "the opportunity cost to the community as a result of bestowing the benefit").

option. The very undertaking of a large-scale redevelopment project that involves municipal financing thus almost inevitably means the contraction of other public services and the risk that even further contractions will be necessitated in the future.

This reasoning significantly expands the set of exactions a municipality might consider imposing. That is, there ought to be in many cases a "nexus" between a project itself and the harm done to public services by draining them of funding.[248] This is not to say that every case will clear the bar, but at a minimum, many will be stronger than the one the Court rejected in *Nollan v. California Coastal Commission*,[249] where the exaction demanded was an affirmative easement on the property—a right of access—yet the harm to the community of the development in question was primarily visual (blockage of an ocean view) and "psychological[]."[250] An exaction in the form of a roughly proportional fee to replenish the budget for those services forgone in order to fund the development therefore ought to be able to pass constitutional scrutiny.[251] To be sure, a developer could object that a project's success will *increase* the tax base and therefore provide added funding in the long run for those same services. This is certainly the goal, and the fact that it might come to pass requires not assessing the developer for the full extent of the opportunity cost. But even under the best-case scenario, that expanded tax base is years in the future, so its present value should be discounted and the developer made to fill the gap. Moreover, the fact that that best-case scenario might *not* come to pass warrants assessing the developer for the present value of the expected shortfall. Like the other risk-reallocation strategies discussed above, such an exaction would result in a fairer distribution of risk, prevent localities from being left high and dry, and leave developers with stronger incentives—in the form of more significant investment—to pursue efficient projects and to avoid failure in executing them.[252]

C. *Benchmarked and Long-Tailed Incentives*

The risk-reallocation strategies discussed so far may not be sufficient on their own to provide developers with the right incentives if developers can expect to get paid back for any required financial outlays in the form

248. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (describing the "essential nexus" that must exist between an exaction's terms and the harms they seek to prevent).

249. 483 U.S. 825 (1987).

250. *See id.* at 828–29.

251. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

252. *See* Been, *supra* note 242, at 489 ("Land use exactions thus serve an important and legitimate purpose by creating incentives for developers to take the efficient level of precaution against harm and by forcing developers to consider all costs in determining how much to develop.").

of attractive tax incentives and abatements that have the net effect of leaving the taxpayers to pay for everything anyway.[253] Indeed, the more risk allocated to developers, the more they are likely to demand precisely these sorts of rewards. And because municipalities already commonly offer them, as illustrated in Part I, municipal finance is a necessary component of any conversation about development projects and taxpayer risk.

To start, of all the ways in which municipalities take on risk from development projects, tax abatements and incentives are among the least bad from a risk-allocation standpoint. This is for the obvious reason that they at least give developers more motivation to complete their projects. That is, unlike taxpayer-funded land acquisition, which puts a municipality on the hook regardless of whether a project delivers on its promises or even happens at all, and which represents an immediate benefit to developers with no corresponding obligation, a program of tax abatements will not provide its greatest benefits to developers until a project is built and in operation. And in the event of total failure, again in contrast to land-acquisition costs and the like, the taxpayers do not realize much if any up-front loss. Moreover, making developers pay for land acquisition and then permitting them to "recoup" that money through tax abatements is still better than never making them pay at all because it allows municipalities to dangle that reimbursement as a reward for completion of the project. If success is defined narrowly as a completed project—as opposed to a hole in the ground—tax incentives can help achieve it.

But as discussed above, that is too limited a conception of success. Consider Poletown and New London. In both cases, the developers and local governments both had something to show for their efforts: buildings were built, companies moved to town, and people were hired. But the benefits were far from what the taxpayers had been promised. GM created only half the hoped-for jobs for the people of Poletown.[254] In fact, its project eliminated thousands of existing jobs by displacing existing businesses, so the net effect on employment was not clearly positive.[255] And there was little evidence that the area was in fact revitalized as a result of the project, so the net effect on the tax base was also not clearly positive.[256] As for Pfizer, it created many jobs, but it only stayed in New London for ten years—until the expiration of the property tax abatement it had enjoyed—before moving most of the jobs out of town.[257]

253. *See supra* note 177 and accompanying text.

254. *See supra* note 48 and accompanying text.

255. *See supra* note 49 and accompanying text.

256. *See supra* note 50 and accompanying text.

257. *See supra* note 127 and accompanying text.

These two cases thus illustrate a separate aspect of the risk-allocation problem: lack of long-term commitment. Even when developers face the right financial incentives to complete a project, there is little keeping them in town and little holding them to implementation promises like creating jobs, expanding the tax base, or attracting other businesses. Development agreements and CBAs can create some stickiness for developers on these fronts, but as discussed, developers may not be willing to negotiate and can also buy off their counterparties in the event of breach with side deals and targeted benefits that deter them from enforcing the agreement.[258] Some development agreements might also, as discussed, face doubts as to their validity under state law.[259]

Municipalities should therefore phase in any offered tax incentives over a longer period of time. For example, rather than real estate tax abatements that apply for the first ten years like those Pfizer enjoyed in New London, municipalities might offer abatements that do not take hold *until* some number of years down the road—or that start off small and increase over a number of years. Such a structure would balance the city's interest in attracting a developer with its interest in keeping the developer accountable to its vision. It would also save the municipality money on the front end when it is in fiscal distress, shift its costs to a future in which the tax base is projected to be healthier, and incentivize the developer to stay on the premises and see to it that the project works and generates revenue in the long run. After all, as most retirement plan participants know, delaying the vesting of benefits in order to secure commitment on the part of the beneficiary—and in order to limit the losses of the party extending those benefits in the event the beneficiary does not live up to its promises—is common.[260] The same logic holds in the redevelopment context.[261]

But delayed vesting might again lead developers, who naturally discount future benefits, to demand more generous incentives. There is a potential win-win solution here, though, and that is explicit performance-based abatements.[262] Under one option, the developer might be offered

258. *See supra* notes 231–32 and accompanying text.

259. *See supra* notes 207–10 and accompanying text.

260. *See, e.g.*, EMP. BENEFITS SEC. ADMIN, U.S. DEP'T OF LABOR, FAQS ABOUT RETIREMENT PLANS AND ERISA 4–5, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf [https://perma.cc/E6FN-QJ7L].

261. Another option could be a municipal threat to claw back any benefits in the event expectations are not met. *See* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 508–09 (2009). But a resource-strapped city would still have had to forgo revenue in the short term and then fight to get it back, which could be costly and time-consuming.

262. Some cities have already employed some version of these in some high-profile settings. *See, e.g.*, *Amazon Selects New York City and Northern Virginia for New Headquarters*, ABOUT

some base amount of tax abatements at the start of the project—which it would be able to count on regardless of what transpired. But the municipality could go on to offer a schedule of benchmarks that would trigger escalated abatements. A simple version could provide an additional percentage of a rate reduction for every *x* number of local jobs created. Under another option, the developer might be invited to share in the financial benefits of a more robust tax base as an incentive for the developer to complete the project, create jobs, and attract other businesses that will contribute to municipal revenue. For example, a city could do as Mesa, Arizona did in the project discussed in Part I: offer the developer a percentage of added sales tax revenue for a defined period of time.[263] Better still from the city's revenue perspective, the city could identify its goals for total tax revenue and start by setting the developer's abatement at a low enough level that the city can expect to achieve that goal. The city would make a binding deal, however, that the more the tax base expands due to the developer's efforts, the developer's tax would be abated proportionally for some defined amount of time. Again, the developer would be permitted to directly reap some of the rewards of a more robust tax base and would thereby be incentivized to expand that tax base by attracting other businesses, creating more high-paying jobs, and the like. But compared to Mesa's approach, this one should be expected to cost the city much less or, if designed right, even be revenue neutral.[264]

All of these approaches, and many others one could imagine, are superior to the condition-free offers of tax reduction that many municipalities currently offer to developers.[265] This is for the simple reason that the developer has to deliver in order to get these benefits or maximize their generosity. Moreover, they do not cost the municipality anything unless the project is successful. And they result in the developer recouping its own outlays for land acquisition or other up-front costs only if the project generates the promised spillover benefits for the municipality. In this way, the municipality would take on less risk by making these offers, would satisfy developers' understandable demands for rewards commensurate with their new risks, and would do so by effectively aligning the developers' interests with its own.

AMAZON (Nov. 13, 2018), https://www.aboutamazon.com/news/company-news/amazon-selects-new-york-city-and-northern-virginia-for-new-headquarters [https://perma.cc/99HC-LN3Z] (announcing tax incentives with job-creation benchmarks).

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

264. This approach is distinguished from maligned programs that divert workers' income tax revenue from public services to those workers' employers. *See* PHILIP MATTERA, KASIA TARCZYNSKA, LEIGH MCILVAINE, THOMAS CAFCAS & GREG LEROY, PAYING TAXES TO THE BOSS 3–4 (2012), https://www.goodjobsfirst.org/sites/default/files/docs/pdf/taxestotheboss_execsum.pdf [https://perma.cc/MR8T-MNDU].

265. *See supra* Part I.

III. IMPLEMENTATION, COORDINATION, AND COOPERATION

Having identified and framed both the neglected risk-allocation problem and the risk-reallocation potential of takings, land use, and municipal finance law, it is now necessary to address the serious obstacles to effective risk reallocation posed by pathologies of local democracy and of interlocal competition. In other words, there are fairly entrenched reasons why stories like those set out in Part I keep happening. This Part sets out that landscape and then pivots to explore both the doctrinal and theoretical potential of state- and regional-level action designed along the lines set out in Part II to overcome these pernicious local dynamics.

A. *Local Power and Local Obstacles*

Local governments in the United States generally operate under one of three self-governance arrangements. All begin with the premise that power resides in the first instance in the state government; any power that a locality exercises must thus be delegated to it by the state.[266] Some states adhere to the traditional arrangement under which those powers must be expressly delegated *seriatim*.[267] Most, however, operate under one of two forms of "home rule." In an *imperio* home rule arrangement, localities are delegated "the full police power with respect to municipal affairs."[268] Alternatively, in a legislative home rule arrangement, localities are granted "all the powers the legislature could grant, subject to the legislature's authority to restrict or deny localities a particular power or function" at any time; that is, "all powers are granted until retracted."[269]

Some of the steps discussed in Part II are comfortably within general conceptions of all three of these forms of local power. For example, land use regulation is widely understood to be a quintessentially local issue as a descriptive, normative, and legal matter.[270] That is, states tend to delegate the power to regulate land use to localities and that power is often held to be within the scope of the locality's municipal affairs.[271] Others assume a preexisting local power. For example, while not all localities have free rein to tax,[272] the modified approach to abatements

266. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990).

267. *See id.* at 10–11 (observing that nine states do not provide a form of "home rule" to local governments).

268. *Id.* at 10.

269. *Id.*

270. *See* Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 708–09 (2017).

271. *See id.* (describing the normative commitments underpinning local control of land use).

272. *See* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENVER U. L. REV. 1241, 1245–46 (2009).

discussed above assumes a locality with the power to offer the sort of unrestricted abatements that are common in the redevelopment context. Still others might, depending on the jurisdiction, require some added delegation or some loosening of state limits.[273]

One simple reason why local governments may not be able to effectuate some of these proposals on their own is the absence of necessary authority. That alone is reason for action at the state level. But even assuming a municipality with all the necessary power, action at the state level is still likely necessary to make these interventions effective because local governments cannot reasonably be expected to do what it takes to reallocate the risk of redevelopment failure.

On the one hand, developers know that they have something valuable and tend to behave accordingly.[274] They can often make the credible threat that they will simply relocate their projects, with all of their promised benefits, to some other nearby municipality if that other municipality offers terms that are more generous to the developer.[275] Over deterring development is therefore a legitimate concern that any municipality reasonably might have. That dynamic makes local policymaking difficult—lest a general policy about, say, land acquisition costs lead to suboptimal levels of development. A municipality instead might approach the problem on an ad hoc basis, but as discussed in more detail below, developers have powerful tools to make ad hoc bargains come out in their favor as well.

On the other hand, even if developers make no actual threats, municipalities in distress are still understandably desperate for lifelines. They know that each of the proposals set out in Part II has the potential to make a deal less attractive to developers, so in accordance with the adage that beggars can't be choosers, desperate municipalities are not likely in the first instance to drive hard bargains or to set policies ex ante that insist on these sorts of terms. Local governments are effectively coerced by their circumstances, their fear of missing out on projects, and competition with their neighbors into accepting more risk than they ought

273. *See* Callies & Tappendorf, *supra* note 206, at 670 (discussing need for state authorization for development agreements).

274. *See, e.g.*, Derek Thompson, *Amazon's HQ2 Spectacle Isn't Just Shameful—It Should Be Illegal*, THE ATLANTIC (Nov. 12, 2018), https://www.theatlantic.com/ideas/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539/ [https://perma.cc/PPW9-E5MJ] ("Amazon announced a national beauty contest, in which North American cities could apply to win the honor of landing the retailer's second headquarters.").

275. *See* Been, *supra* note 242, at 511 (noting that localities "face[] competitive pressures" such that "the developer will take, or threaten to take, its capital elsewhere: from the overreaching community to another community, from the residential market most often affected by exactions to the commercial market, or from the building market to other forms of investment"); Schragger, *supra* note 27, at 332 ("[F]irms play one city or region against another, generating a subsidy race with dubious welfare effects.").

to bear—whether as a matter of general policy or in any individual development bargain.[276] Indeed, one might predict that, in the absence of some coordinating authority, municipalities would attempt to outbid one another in a contest of which can take on the *most* risk and thereby make itself the most developer-friendly location.[277]

One way of averting this race to the bottom would be with robust public opposition. If the voters in a particular community were unwilling to pay the cost of failure, then they might be expected to exercise their voices and their votes and demand that local officeholders insist on shifting risk to the developer by means of some or all of the proposals set out in Part II—even if it means losing the project.[278] This prospect is no doubt why scholars like William Fischel contend that "[l]ocal governments are generally responsive to the concerns of their communities, especially when the issues involve spending their own tax money" and that "[w]hen using their own resources, [local governments] do not usually displace their own citizens without strong reasons."[279]

But local democracy is unlikely to serve as a reliably effective brake here for two reasons. The first is timing. Local officials who want to win reelection need successes to campaign on, so the temptation to deliver a major investment to one's constituents is naturally significant. And at the point when the project is simply full of potential, it is relatively easy to build a narrative in which one can wave away the risks and the up-front

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276. *Cf.* Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937) (observing that states failed to adopt tax-funded unemployment programs because they were "paralyzed by fear" that, in "laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors").

277. *See* SCHRAGGER, *supra* note 135, at 116 (calling "costly inter-local subsidy battles for mobile capital" a front in the "war to keep high-value capital in"). *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1236–44 (1992) (not disputing that units of government will compete by deregulating in order to attract capital but arguing that the result ought to be socially optimal where government faces no constraints with respect to taxation of capital).

278. *See, e.g.*, Fennell, *supra* note 164, at 626 (observing that, because exit is costly, "people are also motivated to act politically, using 'voice' to influence the actions taken by the municipality"). And indeed, public opinion does sometimes scuttle large-scale development projects. *See, e.g.*, Caroline Spivack, *The Industry City Megadevelopment That Wasn't, and How the Deal Fell Apart*, CURBED (Sept. 23, 2020), https://www.curbed.com/2020/09/industry-city-rezoning-defeated-nyc-development.html [https://perma.cc/3TF3-YH2N] (documenting how local activists defeated a rezoning effort); Eliza Relman, *"Queens is Not for Sale": Alexandria Ocasio-Cortez and New York Activists Celebrate Amazon's Decision to Cancel HQ2 in Long Island City*, BUS. INSIDER (Feb. 14, 2019, 3:09 PM), https://www.businessinsider.com/alexandria-ocasio-cortez-celebrates-amazon-hq2-retreat-from-new-york-2019-2 [https://perma.cc/32HX-433T] ("Rep. Alexandria Ocasio-Cortez celebrated Amazon's . . . announcement that it would not build its second headquarters . . . in . . . Queens, New York, as a result of local political opposition.").

279. Fischel, *supra* note 44, at 954.

costs.[280] This dynamic is no doubt part of why municipalities keep taking the risks they take. To be sure, some voters will be skeptical—especially those whose property is being condemned or whose jobs will be lost. But as long as those individuals are relatively few in number, and particularly if they are not politically powerful, their opposition is unlikely to stand in the way of reelection.[281] Finally, the officials who agree to a project may reasonably expect that, by the time any failure will become apparent in the longer run, they will no longer be in power due to retirement or election to some other office.[282] As a result, today's decisionmakers can externalize both the costs of a bad decision and the risks of making a bad decision today to tomorrow's decisionmakers, who of course have no vote today.[283] The result is that failure and the prospect of failure act only as weak deterrents for local officials, while the mere promise of success represents a meaningful electoral advantage.[284]

The second reason why local democracy is unlikely to produce efficient and equitable allocations of risk here is somewhat more sinister. Considering local elected officials as first and foremost "self-interested maximizers of their chances of reelection," interest-group theory predicts that those officials will not act to achieve the public good per se, but to achieve reelection.[285] Insofar as those two impulses point in the same direction, the difference might be negligible, but they may not point in the same direction when the benefits of a policy choice inure to a diffuse majority and the costs are imposed on a concentrated minority with political influence.[286] In that setting, there is a "systematic 'tendency for the "exploitation" of the great by the small.'"[287] Developers, though

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280. *See* Somin, *supra* note 11, at 1016, 1023 (noting the short-term political incentives of supporting and overstating the economic benefits of redevelopment projects)

281. Opposition is also unlikely to materialize because "the alleged public benefit . . . is a generalized contribution to the local economy that the average citizen cannot readily measure or even verify the existence of" and the existence of which—or not—"is usually apparent only years after" the project began. Somin, *supra* note 11, at 1022.

282. *See id.* at 1023 (arguing that "a rational, self-interested . . . political leader might well have been willing to support the *Poletown* condemnations" despite knowledge that they would not provide the promised benefits, because "[b]y the time [the failure] became evident to the public, [the political leader] would probably be out of office").

283. *See supra* notes 196–97 and accompanying text (discussing weaknesses in using political costs to hold local governments accountable).

284. One potential downside to the various proposals set out in Part II is that, by making projects appear less costly in the short run from the perspective of local government coffers, they will exacerbate politicians' myopia and lead them to promote *more* projects with only superficial appeal. But if those projects truly are bad investments, those politicians will be unable to find private development partners willing to assume the risk. *See supra* notes 185–87 and accompanying text (discussing the double security of political and market accountability).

285. Levinson, *supra* note 23, at 374.

286. *See id.*

287. *Id.* (quoting MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 3 (1965)).

smaller in numbers than the broad swath of taxpayers who would benefit from these risk-shifting policies, are a significant political force themselves.[288] They each stand to lose more than any individual taxpayer stands to gain, so they are likely to be more motivated to oppose these measures than a given taxpayer would be motivated to support them.[289] And because of collective action problems, those taxpayers are likely to remain unorganized.[290] Moreover, developers have deep pockets that allow them to lobby powerfully and can contribute to the campaigns of local officials who support their efforts (or to the opponents of those who do not).[291] They can also shape policies and ad hoc bargains to their benefit, and they can enter the political fray themselves, advertising to increase public support of their projects and to move public opinion in their favor.[292] Finally, they can even buy the support of citizens who might otherwise voice opposition to the project by promising them targeted benefits in a CBA or voluntarily offering them added compensation for land acquisition costs.[293] One could go a step further and add outright corruption to the list of reasons why local democracy might be captured by developers,[294] but even these above-board, lawful interactions between developers and the local political process create an environment in which that process is unlikely to move aggressively to reallocate development risk onto the shoulders of developers.

288. *See* John T. Goodwin, Note, *Justice and the Just Compensation Clause: A New Approach to Economic Development Takings*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 219, 234 (2010).

289. Condemnees, too, are a concentrated group with more at stake than the diffuse body of taxpayers. *Cf.* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130–31 (1992) (arguing that powerful property owners will thwart efficient takings unless they are paid enough to quiet their opposition). But their resources are likely not to match those of developers—another concentrated group with even more to lose, and with more to spend to avert that loss. *See* Goodwin, *supra* note 288, at 234 ("[T]he targets of economic development takings generally have few resources relative to the proponents of development plans.").

290. Levinson, *supra* note 23, at 374.

291. *See* Goodwin, *supra* note 288, at 234 ("Corporations have political influence because they can afford to pay the best lobbyists for advocating development plans to local governments and they can afford to provide generous campaign contributions.").

292. *See id.*

293. *See* CMTY. BENEFITS L. CTR., DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS 6 (2014), https://www.forworkingfamilies.org/sites/default/files/publications/1114%20PWF%20CBA%20 Handout_web.pdf [https://perma.cc/W6GS-58MS] (advising elected officials to try to secure CBA benefits when dealing with land developers).

294. *See, e.g.*, Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 41 (2006) ("Disparities in legal and financial resources also may cause quid pro quo corruption between local officials and private developers.").

B. *State and Regional Coordination*

In contrast to action at the local level, state-level risk reallocation, lawmaking, and coordinating would be on even sounder legal footing and would avoid many implementation problems while generating only negligible new ones. It also would not remove local governments from the negotiating table or eliminate their roles in economic redevelopment.

The first and simplest reason on the doctrinal front is that, in many states, the legislature may preempt local policymaking without much limitation.[295] Accordingly, in legislative home rule states—where local power can be retracted by the state—and in jurisdictions that do not enjoy home rule power at all, there is essentially no general legal obstacle to a state simply imposing some or all of these risk-reallocation measures.[296] An exception arises in some of the *imperio* home rule jurisdictions with state constitutions that afford localities immunity from preemption in defined arenas like "municipal matters."[297] Given that local development and land use tend to fall under that umbrella,[298] there would be a serious question whether a state could require a locality with such immunity to adopt against its wishes many of the measures in Part II. But aside from that handful of jurisdictions, the legal path is fairly clear for state intervention.

Second, states need not always resort to mandates to achieve these goals. Just as the federal government sometimes displaces state and local decisionmaking and sometimes shapes it with deliberative or other process rules, and just as it sometimes does so by fiat and sometimes with incentives and conditional spending programs,[299] states can also use more creative tools with respect to municipalities. For example, particularly in settings like New London where states partner with localities to pursue redevelopment projects,[300] states can condition their involvement and their financial support on the locality adopting certain of the measures set out in Part II. These sorts of nudges can bypass local immunity, preserve

295. *See, e.g.*, Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1115–16 (2007) (explaining how state legislatures can explicitly and implicitly preempt local governments and how such "intrastate preemption" is a "problematic shadow" over local governments).

296. *See supra* note 268–68 and accompanying text.

297. *E.g.*, COLO. CONST. art. XX, § 6 (providing cities and towns with imperio home rule authority over "local and municipal matters" as well as immunity from preemption in that ordinances "in such matters shall supersede . . . any law of the state in conflict therewith").

298. *See, e.g.*, Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 B.Y.U. L. REV. 177, 183 (2016) ("Courts consider land use to be a paradigmatically 'local' matter and afford local governments wide-ranging home-rule authority with respect to land use.").

299. *See* Pollack, *supra* note 270, at 727–37 (framing these choices in the context of federal intervention in local land use law).

300. *See supra* Section I.E.

local autonomy, and mitigate pushback from local officials wary of being displaced without sacrificing too much in terms of efficacy.[301]

Either way, states could take a few concrete steps to advance the takings, land use, and municipal finance strategies described above. First, states could require—again, as a mandate or as a condition of state financial support for projects—that, in any private redevelopment project of a certain size or financial scope, localities may not exercise the power of eminent domain unless the developer pays the required compensation up front. Municipalities would still exercise the power of eminent domain to the full extent authorized by law—and still decide whether and when to do so—but developer-paid compensation would help deter pie-in-the-sky projects and reduce the number of inefficient development takings. Property owners and taxpayers alike would also receive some solace in that they would be protected from some of the risk of the venture failing.

Related steps could include state mandates or conditions that developers pay all land acquisition costs, including in consensual transactions. Or that localities demonstrate that they have structured any tax abatements offered to developers such that they will not result in net revenue losses. Or that localities secure some number of risk-shifting binding commitments from developers off of a state-created menu in the form of a development agreement, CBA, or exaction. Localities would still take the lead on setting these specific terms and negotiating these agreements in ways they see fit, but their decisionmaking would be structured and their ability to assume what should be the developer's risk would be minimized.

Finally, where necessary, states can also enable some of the proposals set out in Part II by *expanding* local power. For example, states could more widely authorize municipalities to enter into development agreements. And if a state were concerned about the scope of such agreements,[302] it could limit some of the authorized terms in these deals by, say, authorizing only takings agreements or only agreements designed to obligate developers to bear risk. States could also structure local tax power in a way that enables localities to use well-structured abatements as carrots for development.

These forms of state intervention would all be superior to what has been, thus far, the most common form in a number of states post-*Kelo*: prohibiting nearly all development takings.[303] For one thing, unlike such prohibitions, these moves all recognize the real possibility of socially beneficial redevelopment projects and would preserve their ability to get off the ground. But for another, many of these bans are actually quite

301. *See* Pollack, *supra* note 270, at 749–52 (discussing same in land use context).

302. *See supra* note 207 and accompanying text (discussing constitutional limits).

303. *See* Berliner, *supra* note 154, at 84–88.

ineffective at achieving their stated goals.[304] For example, many states do not prohibit takings for the purpose of remedying blight, and state courts have in turn interpreted that exception so broadly as to nearly swallow the rule.[305] The result, ironically, is very little regulation of development takings. The proposals offered here, by contrast, regulate the actual substance of projects' financing and risk-allocation, making them likely to both be better tailored and more effective.

Activity at the state level is also normatively desirable here. As discussed above, a significant obstacle to localities standing up for themselves and their taxpayers is their natural and understandable fear that developers will pass on them and work with localities that are willing to take on more risk.[306] This dynamic is a real problem for any uncoordinated attempt to discipline redevelopment. States, however, can make a comparatively more credible threat to developers. While developers might be happy to choose between Town A and Town B based only on which offers more generous terms, they are less likely to forgo development in State A altogether in order to take advantage of more favorable terms in State B, simply because the consequences are more dramatic. In addition to the economic costs of abandoning numerous viable markets, developers would also have to weigh the costs of sacrificing at a large scale the human capital and other benefits offered throughout a given territory.[307] To take an extreme example, it might be easy to imagine developers abandoning San Francisco for Oakland or Los Angeles for Riverside on the margin, but much harder to imagine developers abandoning California altogether.[308] At the very least, it would take a lot more in the way of costs to cause such flight.[309]

To be sure, state-level intervention in local policymaking—or outright preemption of local policy—has come in for criticism when it relates to politically hot-button issues like civil rights or responses to the COVID-

304. *See* Somin, *supra* note 155, at 2115–20.

305. *See id.* at 2120–31 (discussing broad interpretations of blight loopholes).

306. *See supra* notes 274–76 and accompanying text.

307. *Cf.* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 90–93 (2013) (discussing agglomeration and human capital explanations for worker mobility to concentrated areas of educated and skilled people).

308. *Cf.* SCHRAGGER, *supra* note 135, at 120 ("No matter how low the taxes are in Anchorage, it is not going to become a banking center that can compete with New York.").

309. One related concern might be that larger developers absorb these costs and squeeze out smaller, perhaps more local, developers that cannot afford them. Insofar as supporting local business is an important component of economic redevelopment, this result might be considered counterproductive. *Cf. infra* note 321 and accompanying text (observing that this dynamic might lead larger developers not to oppose some degree of risk-reallocation). Determining the correct *level* of regulation thus requires striking a balance that accounts for considerations like these.

19 pandemic.[310] There are indeed reasons to be concerned about the political dynamics of state power and its relationship to local democracy in some of those settings.[311] But development risk is not quite such a setting. To the contrary, for the reasons discussed, it presents a fairly strong case for preemption on the basis that disuniformity is a structural obstacle to sound and desirable policy innovations from which municipalities stand to benefit if only a central authority could resolve that disuniformity.[312]

Of course, at some point, a state's efforts could absolutely go too far and overdeter developers. The claim here is therefore not that states should require localities to bear no risk at all, to drive the hardest bargains in all cases, or to pay no attention to competition from other states. It is of course crucial for these interventions to be carefully balanced and tailored. Perhaps municipalities in some states are already doing a relatively good job of allocating risk such that no intervention is required there. Perhaps states that already limit the scope of the eminent domain power beyond the *Kelo* floor would find changes to tax abatement policy more effective at allocating risk. And so on. But it is also important not to overstate the danger of overdeterrence. That objection assumes that the status quo is or is close to optimal in terms of risk-sharing and the quantity of development. As Part I sets out, it is hardly clear that either is the case. Indeed, it is not even clear that it is good *for developers* in the aggregate that municipalities bear as much risk as they do. If the misallocation of risk makes failure more likely, then it makes undeveloped holes in the ground more likely too. Those failures pull down property values in surrounding areas and make other projects that might even be successful more likely to fail or underdeliver due to lack of demand.[313] Perhaps some measure of development deterrence is called for—or is at least a lesser evil than the risk-free bonanzas developers are too often offered.

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310. *See, e.g.*, Davidson, *supra* note 26, at 963–74; Schragger, *supra* note 26, at 1169–83; David A. Graham, *The Battle for Local Control Is Now a Matter of Life and Death*, THE ATLANTIC (July 26, 2020), https://www.theatlantic.com/ideas/archive/2020/07/why-states-wont-let-cities-save-themselves/614539/ [https://perma.cc/UQN6-SAB8].

311. *See* Davidson, *supra* note 26, at 999–1000 ("At the moment, too many state legislatures are approaching their responsibility through the lens of partisan politics, with insufficient respect for local democracy.").

312. *See, e.g.*, Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 825 (Cal. 2005) ("[T]he state's interest in uniformity . . . demonstrably transcends the concerns of a particular municipality, and is a 'convincing basis for legislative action . . . based on sensible, pragmatic considerations.'") (alteration in original) (quoting Cal. Fed. Sav. & Loan Ass'n. v. City of Los Angeles, 812 P.2d 916, 926 (Cal. 1991)).

313. *Cf.* Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 91–92 (2012) ("Just as taxpayers and business investment may flee jurisdictions that impose excessive tax burdens, they may also flee jurisdictions that fail to provide adequate infrastructure or environmental protection.").

One other important concern is that the same interest group politics that make local adoption of risk-reallocation measures difficult will do the same at the state level.[314] This is a serious problem—implementing these proposals in the face of developer resistance is a tall order—and one response might be to propose these measures in a direct referendum or initiative where authorized.[315] But putting that possibility to the side, the sheer size of state government relative to local government ought to make interest group capture a relatively more difficult—or at least more expensive—prospect. Moreover, as James Madison recognized, concentrated interest groups like developers, which he referred to as "factions," tend to be more successful in small polities rather than in large ones.[316] Because of their size alone, Madison suggested, "larger republics are more likely to contain opponents of a policy who can coalesce and compete with advocates of the proposal."[317] So, in place of dispersed taxpayers who might want to see their municipality bear less redevelopment risk but who lack the resources, clout, and coordination to make that happen locally, state politics might be more likely to see property rights, fiscal responsibility, and other good government advocacy groups saddle up against developer interests.[318] The state-level anti-development responses to *Kelo* are something of a case in point.[319] Moreover, developers themselves might be less hostile to state-level regulation for two reasons. First, uniformity reduces transaction costs insofar as developers could make one single adaptation to their business model instead of numerous ones for each locality's baroque approach.[320] Second, larger developers that already have significant market share in a given state might support these sorts of measures for the self-interested goal of boxing out competitors or new market entrants.[321]

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314. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 565–68, 571 (2001) (arguing that environmental groups face the same or similar obstacles to effective lobbying at the federal level as they do at the state level).

315. *See* Gillette, *supra* note 170, at 981 ("[D]ecisions made by legislators may be far more susceptible to interest group pressure than plebiscitary ones."). *But see, e.g.*, Christopher S. Elmendorf & David Schleicher, *Informing Consent: On Voter Ignorance and Election Law*, 2013 U. ILL. L. REV. 363, 390–92 (arguing that voters are poorly informed in initiative votes).

316. *See* THE FEDERALIST NO. 10 (James Madison).

317. Clayton P. Gillette, Comment, *Interest Groups in the 21st Century City*, 32 URB. LAW. 423, 426 (2000).

318. *Cf. id.* (observing in the federal-versus-local context that, while "[m]anufacturers, banks, and utilities may have their interest groups that lobby Congress consistently, . . . so do consumers and labor").

319. *See supra* notes 154–55 and accompanying text.

320. *Cf.* Revesz, *supra* note 314, at 573 ("Firms in such industries [with strong economies of scale] tend to prefer uniform federal regulation to a patchwork of different state standards.").

321. *See id.* at 572 (noting that regulated firms might support regulation in order to erect "barriers to entry that give them an advantage over their competitors").

All of that said, these dynamics certainly still remain complicated at the state level. Some states may simply not be interested in averting these races to the bottom, and there may be arenas where developer interests are equally or even better able to organize and oppose risk-reallocation measures at the state level.[322] But at a minimum, the interlocal competition problem that can be expected to stymie local leadership on this score likely makes state-level efforts more plausibly successful than purely local action.

Finally, a potential response to the risk of developers abandoning Town A for Town B, or State A for State B, is for Towns A and B or States A and B to band together in a regional cooperative arrangement. An approach like this might make sense somewhere like the Research Triangle Area of Raleigh, Durham, and Chapel Hill in North Carolina or the Tri-State Area of New York, New Jersey, and Connecticut. After all, one could easily imagine a developer choosing to develop in northern New Jersey just across the Hudson River from New York in the event that New York or New York City refused to bear risks that New Jersey or Newark was willing to bear. After all, remember that the NYSE project took shape precisely because of a threat to relocate the trading floor from Lower Manhattan to New Jersey.[323] The same could be true with respect to choosing Durham over Raleigh, for example. Cooperation across those jurisdictions would make those threats much less powerful. Of course, actually achieving that sort of cooperation requires the relevant governments not to undercut their neighbors along the lines set out above.[324] But there is some cause for optimism that regional cooperation along these lines could be a real possibility, particularly given that neighbors are irrevocably interdependent, with fortunes tied to one another's success and with no shortage of opportunities to retaliate tomorrow for today's defection.[325] Indeed, some states have recently demonstrated their ability to work together in the public interest even at the potential cost to business by coordinating economic planning in the face of the COVID-19 pandemic.[326] If successful, the positive

322. *See* Gillette, *supra* note 317, at 427 ("Some groups may be better able to organize at more centralized levels, while other groups are better able to organize at a decentralized level.").

323. *See supra* note 82 and accompanying text.

324. *See supra* notes 275–76 and accompanying text.

325. *See* Gillette, *supra* note 317, at 431–32; Daphne A. Kenyon, Adam H. Langley & Bethany B. Paquin, *Property Tax Incentive Pitfalls*, 65 NAT'L TAX J. 1011, 1014–15 (2012) (discussing metro area agreements to minimize interlocal tax competition).

326. *See* Marie J. French & Sam Sutton, *New York Region Governors Plan Coordinated Economic Restart*, POLITICO (Apr. 7, 2020, 5:52 PM), https://www.politico.com/states/new-jersey/story/2020/04/07/new-york-region-governors-plan-coordinated-economic-restart-1273313 [https://perma.cc/E54G-TR8G].

coordinating effect at the regional level would achieve similar outcomes as coordination at the state level.[327]

The bottom line is simply this: There is at least some amount of risk reallocation a given municipality can afford to do without scaring off developers. Insofar as it has the power, it should take that step. Insofar as it does not, the state should give it that power. There is some likely larger amount of risk reallocation a state can afford to do without scaring off developers because it covers a larger territory and has enough to offer in terms of human capital and other benefits such that a developer is less likely to abandon it entirely. It should take those steps. There is also some perhaps even larger amount of risk reallocation a regional or interlocal cooperative can afford to do, and there are good reasons to consider as much. Finally, there is a point at each level of government beyond which the danger of losing efficient development outweighs the potential benefits of a given risk reallocation measure. That's where to stop. It would no doubt be up to officials to find that point as they engage in on-the-ground implementation in their communities and their states, but it seems safe to say that there is still substantial slack in the line at each level of government.

CONCLUSION

Economic redevelopment is a critical goal for distressed municipalities. And in the absence of a magic wand, these municipalities inevitably must partner with private developers to make it happen. There is nothing intrinsically wrong with that, but every project risks failing to launch and even launched projects risk failing to reach their promised heights. So, while these sorts of partnerships ought to continue, it is critical for scholars and policymakers to attend, not just to the distribution of resources in these arrangements, but the distribution of risk. It is critical from an equity perspective in terms of allocating risk to the party best situated to bear it, and it is critical from an incentives perspective in terms of allocating risk to the party best equipped to mitigate it.

At present, it is too often the people who live in these distressed municipalities who bear the risk despite being least well situated to bear it and least equipped to mitigate it. But there is significant potential in takings law, land use law, and municipal finance law for localities, states, and regional arrangements to reallocate risk to the better-situated and better-equipped developers. Taking even some of the steps that emerge from the analysis presented in this Article stands to help economic redevelopment better achieve its traditional efficiency and justice goals.

327. Insofar as some states do not permit municipalities to enter into interlocal compacts without state authorization, *see, e.g.*, N.Y. CONST. art. IX(1)(c), those states ought to permit or even incentivize these sorts of cooperative arrangements.

And spotlighting issues of risk allocation alongside those of resource-allocation stands to help takings, land use, and state and local government scholarship better understand and evaluate the forces at play in municipal development.