Tenants' Rights in Police Power Condemnations Under State Statutes and Procedural Due Process

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It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. . . . The enforcement of these limitations by judicial process . . . protect[s] the rights of individuals and minorities . . . against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government.1

Tenants faced with the condemnation of their buildings under the police power have legal rights to enforce statutorily-mandated procedures in some states and, in the absence of such statutes, to invoke constitutional procedural due process rights to notice and a hearing. Although full assertion of these rights would not affect substantially the systemic problem of inadequate and unaffordable rental housing in the United States, it

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I would like to thank Peter Iskin, Carolyn Carter, and the Legal Aid Society of Cleveland for providing the inspiration from which this Note grew. Thanks also to Peter Iskin for reading a draft of this Note and suggesting improvements.


A federal report admits that “[p]roblems of housing affordability have escalated in recent years, especially for low income households,” but contends that “the overwhelming weight of available evidence indicates no current or long-run shortage of rental housing in the United States, although there may be shortages in particular rental markets.” The report attributes these shortages to “rent controls, high prices, or other market-distorting mechanisms.” 1984 HUD REPORT, supra, at 58 (citing Lowry, Rental Housing in the 1970s: Searching for a Crisis, reprinted in J. WEICHER, K. VILLANI & E. ROISTACHER, RENTAL HOUSING: IS THERE A CRISIS? (1981)).

Critics, on the other hand, maintain that “[t]he housing situation is not a crisis. It is a
would ease the plight of at least some tenants threatened with the loss of their homes through police power condemnations.  

Situations requiring the assertion of these procedural rights arise most often for the poor. This occurs for at least two reasons. First, the housing market allocates substandard, run-down buildings, the usual targets of police power condemnations, to poorer tenants. Wealthier tenants can afford to live in nicer buildings. Second, poor tenants cannot always depend upon the owners of their buildings to challenge condemnations. Virtually every state provides statutory rights to notice and a hearing for owners faced with condemnation of their buildings under the police power. But some owners may fail to contest condemnations,


3. Unambiguous national statistics tabulating the total annual number of police power condemnations do not exist. A 1980 census found that demolition or disaster claimed 1,808,000 housing units between October 1973 and October 1980. Unfortunately, the figures do not break down the categories “demolition” and “disaster.” A further 582,000 units “became vacant and were scheduled for demolition, condemned, severely damaged by disaster, or were no longer protected from the elements.” Bureau of the Census, U.S. Dep’t of Commerce, 1980 Census of Housing, vol. 4, pt. 1, at xvi (1983). Again, the respective categories are not differentiated. Another source estimates that demolition, abandonment, arson, and conversion claim more than 500,000 low-rent units each year. Hayes, supra note 2, at 83 n.14 (citing K. Hopper & J. Hamberg, supra note 2, at 32).


5. “Substandard” or “run-down” characterize some of the criteria under various state statutes for exercising the police power to condemn buildings. See infra note 73 and accompanying text.

6. State statutes regarding notice and hearing rights of owners of buildings are discussed infra notes 85-89 and accompanying text.
or, alternatively, to plead for a remedy more lenient than condemnation, such as repair or receivership.\textsuperscript{7} This scenario occurs most often in poor communities, especially in urban areas. Owners, who are often maligned as “slumlords,”\textsuperscript{8} use condemnations to discontinue owning and managing buildings that no longer yield profits.\textsuperscript{9} Tenants in these buildings find themselves threatened with the destruction of their homes, with their landlord unavailable or uncooperative.\textsuperscript{10}

Asserting the procedural rights discussed in this Note may allow some tenants to contest condemnation, independently of their landlord. At a hearing, tenants could attempt to prove that the conditions required for condemnation are absent in their case. At minimum, a hearing would provide tenants an opportunity to plead for the least drastic, shelter-preserving remedy.

Tenants may prefer to continue residing in a building subject to condemnation proceedings for a number of reasons. Although federal law gives tenants displaced by government action prior-
ity for admission to federally assisted housing,11 vacancies may not exist in some communities. As a result, condemnation of a tenant's building may force the tenant into homelessness.12 Other considerations for wanting to stay in a particular building may include a tenant's desire to remain living in the same neighborhood or to maintain family stability.

Unfortunately, the law regarding tenants' rights in condemnation proceedings remains underdeveloped. Many states simply do not provide protection to tenants facing eviction due to condemnation.13

This Note explores the legal arguments available to tenants who want to resist arbitrary or unjustified condemnations of their buildings. Part I provides an overview of the legal and constitutional structure of the police power to condemn buildings. Part II analyzes state statutes governing the condemnation of buildings. Focusing on the statutory rights to notice and opportunity for a hearing provided to tenants, Part II concludes that a majority of states provide inadequate protection for tenants facing eviction by condemnation. Part II then proposes statutory reform, based on an approach taken by a minority of states. Part III demonstrates that even in the absence of statutory requirements, states must guarantee procedural due process under the fourteenth amendment, and often under similar provisions of their own constitutions. These guarantees require notice and an opportunity for a hearing to tenants of buildings that the government seeks to condemn.


For recent studies on homelessness in the United States, see Hayes, supra note 2, at 82 n.10. See also Homeless Symposium, 31 WASH. U.J. URB. & CONTEMP. L. 135 (1987).

13. State statutory law regarding tenants' rights to notice and hearing in police power condemnations is surveyed infra text accompanying notes 91-105.
I. THE POLICE POWER TO CONDEMN BUILDINGS

A state's power to condemn buildings derives from the state's general police power.\textsuperscript{14} In the United States, the police power is recognized as an elastic concept, shaped by evolving purposes of promoting the public welfare through the exercise of governmental power.\textsuperscript{15} This Part focuses on the scope, limits, and constitutional structure of the police power with respect to buildings.

A. The Scope of the Police Power Over Buildings

The broad scope of the police power over buildings becomes apparent when contrasted with the power of eminent domain and by examining various methods of enforcement available under the police power.

1. The police power and eminent domain—The police power, a general governmental power, differs from the power of eminent domain. If a court finds a public "regulation" to be legitimately within the bounds of the police power, the procedural protections of eminent domain statutes requiring notice and a hearing do not apply. In addition, unlike eminent domain practices, police power regulation often does not require payment of "just compensation" for a "taking."

Under eminent domain, a government can condemn land, including buildings, for a public use such as a highway or a housing project. Eminent domain statutes and constitutional provisions require notice and opportunity for hearing for the impending taking.\textsuperscript{16} Moreover, the fifth amendment of the Con-

\textsuperscript{14} Sax, Takings and the Police Power, 74 YALE L.J. 36, 36 n.6 (1964); see also 6A E. McQuillin, MUNICIPAL CORPORATIONS § 24.04 (3d ed. rev. 1981 & Supp. 1988); R. Cunningham, W. Stoebuck & D. Whitman, THE LAW OF PROPERTY § 9.2, at 517 (1984) [hereinafter R. Cunningham]. Blackstone defined the police power as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners." 4 W. Blackstone, Commentaries *162 (quoted in 6A E. McQuillin, supra, § 24.02).

\textsuperscript{15} E. Freund, THE POLICE POWER §§ 2-3 (1903). Sax notes that the police power has "no exact definition." Sax, supra note 14, at 36 n.6 (citing Berman v. Parker, 348 U.S. 26, 32 (1954)). For an historical account of judicial acceptance of an expanding police power, see L. Levy, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW, ch. 13 (1957).

\textsuperscript{16} See, e.g., ARIZ. REV. STAT. ANN. § 12-1116(c) (West Supp. 1988) (requiring notice to all parties in interest and a hearing to inquire into "probable damages to each owner, possessor or person having an interest"). See generally O. Reynolds, LOCAL GOVERNMENT LAW § 129 (1982 & Supp. 1987).
stitution and parallel provisions of state constitutions require
the government to pay "just compensation" to the owner of the
donned property.\textsuperscript{17} When an eminent domain condemnation
terminates a leasehold, the tenant may recover just compensa-
tion for the "bonus value" of the leasehold. This bonus value
equals the fair market value of the remaining term less the costs
of the tenant's remaining obligations.\textsuperscript{18}

Under the police power, however, a government may regulate
the use and condition of buildings over which it has jurisdiction
without paying compensation to those disadvantaged by the reg-
ulation. This police power over buildings includes the authority:
to abate nuisances,\textsuperscript{19} to enforce health and sanitation regula-
tions,\textsuperscript{20} to enforce fire safety regulations,\textsuperscript{21} to set fire limits
within a city,\textsuperscript{22} to enforce building construction codes,\textsuperscript{23} to en-
force housing maintenance codes,\textsuperscript{24} to regulate use and occu-

\textsuperscript{17} The fifth amendment provides that "private property" shall not be "taken for
public use without just compensation." U.S. CONST. amend. V. It applies to the states
through the fourteenth amendment. R. Cunningham, supra note 14, § 9.1, at 510 (citing
Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897)). All but three state
constitutions have parallel provisions. Id. § 9.1, at 510-11 n.4 (citing 1 P. Nichols, The
Law of Eminent Domain § 1.3, at 78-79 (J. Sackman 3d ed. rev. 1979)).

\textsuperscript{18} R. Cunningham, supra note 14, § 6.35. Periodic, month-to-month tenancies may
not necessarily share in a condemnation award. Id. § 6.35 n.5 (Supp. 1985) (citing Mis-
souri ex rel. State Hwy. Comm'n v. St. Charles County Assoc's., 698 S.W.2d 34 (Mo. Ct.
App. 1985)).

\textsuperscript{19} The traditional common law power to abate a "public nuisance" extends to build-
1988). For a general discussion of nuisances, see D. Hagman & J. Juergensmeyer, Urban
Planning and Land Development Control Law, ch. 18 (2d ed. 1986) [hereinafter D.
Hagman].

\textsuperscript{20} 7 E. McQuilllin, supra note 19, § 24.558.

\textsuperscript{21} Mandelker, Housing Codes, Building Demolition, and Just Compensation: A Ration-
ale for the Exercise of Public Powers Over Slum Housing, 67 Mich. L. Rev. 635, 640-
41 (1968-69) (describing model law regulating fire hazards and authorizing the remedy of
demolition for noncompliance). See infra notes 80-84 and accompanying text.

\textsuperscript{22} Annotation, Constitutional Rights of Owner as Against Destruction of Building
by Public Authorities, 14 A.L.R. 2d 73, 80-82 (1950).

\textsuperscript{23} 7 E. McQuilllin, supra note 19, §§ 24.525-.528.

\textsuperscript{24} For an account of this power and its history, see generally Note, The Enforce-
ment of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965) (authored by Richard E.
Carlton, Richard Landfield & James B. Loken) [hereinafter Enforcement of Housing
Codes]. For a somewhat more recent treatment, see Rutzick & Huffman, The New York
City Housing Court: Trial and Error in Housing Code Enforcement, 50 N.Y.U. L. Rev.
738 (1975).
pency of buildings,\textsuperscript{25} to zone,\textsuperscript{26} to eliminate urban blight for the purpose of urban renewal,\textsuperscript{27} and to control rent.\textsuperscript{28}

The police power over buildings differs from eminent domain because proper exercise of the police power does not, by definition, result in a compensable taking.\textsuperscript{29} Thus when a building is


27. 7 E. McQuillin, supra note 19, § 24.563. Under this power, a government may institute slum clearance programs, zone for low-rent districts, construct housing projects, and create housing authorities and commissions. Id. § 24.563(a)-(c). See D. Hagman, supra note 19, ch. 17.

28. 7 E. McQuillin, supra note 19, § 24.563(d); I. Levey, Condemnation in U.S.A. § 5.01, at 49-50 and n.10 (1969) (citations omitted). In Pennel v. City of San Jose, 485 U.S. 1 (1988), the Supreme Court upheld a broadly worded municipal rent control ordinance against due process and equal protection challenges, but postponed consideration of the takings issue as "premature"; see also Block v. Hirsch, 256 U.S. 135 (1921).

29. Police power "takings" occupy a middle ground between clear cases of eminent domain and legitimate noncompensable exercises of the police power. These "inverse condemnation" cases allege that a compensable taking occurred through an unjustified exercise of police power in the absence of formal condemnation procedures. See generally R. Cunningham, supra note 14, § 9.2; D. Hagman, supra note 19, §§ 10.7, 20.2; O. Reynolds, supra note 16, § 125. The "takings" problem has engendered a host of academic articles, including The Jurisprudence of Takings, 88 COLUM. L. REV. 1581 (1988); Humbach, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation, and Public Use, 34 RUTGERS L. REV. 243 (1982); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967); Sax, supra note 14; Sax, Takings, Private Property, and Public Rights, 81 YALE L.J. 149 (1971); Van Alstyne, Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1 (1971).

Inverse condemnation lies outside the scope of this Note, because the takings issue arises after the fact of condemnation. The procedural rights of tenants addressed in this Note concern what happens before condemnation.

Claims of a taking by tenants after a police power condemnation were rejected in Devines v. Maier, 728 F.2d 876 (7th Cir.), cert. denied, 469 U.S. 836 (1984). In Devines, tenants claimed a taking when the city ordered them temporarily to vacate their apartments under the authority of a housing code. In its original decision, the Seventh Circuit upheld the takings claim, relying on previous Supreme Court holdings that "leasehold interests are property interests protected by the Fifth Amendment." Devines v. Maier, 665 F.2d 138, 141 (7th Cir. 1981) (citing Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976) and United States v. Petty Motor Co., 327 U.S. 372 (1946)). The Seventh Circuit later reversed itself, however, holding that the state "created a property right entitled to constitutional protection, (i.e., a possessory interest in a leasehold) but conditioned the retention of that right on a reasonable condition (i.e., inhabitability of the leasehold)." 728 F.2d at 884.

Recent Supreme Court takings cases cast doubt on the continued vitality of Devines. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470 (1987). In particular, First English solidly affirmed that temporary takings were compensable. Nollan, finding a taking in a regula-
condemned under legitimate exercise of the police power, the owner is not compensated. Instead, the condemning authority may require the owner to demolish the building at the owner's expense or to reimburse the government for its demolition expenses.  


31. Mandelker, supra note 21, at 635, 657 ("Title to the cleared site is not affected [by a police power condemnation] and remains in the owner after the building has been demolished."); I. LEVEY, supra note 28, § 5.01, at 46-47.

32. D. HAGMAN, supra note 19, § 8.6, at 252.

33. Id. Devines, 665 F.2d at 138 involved this type of enforcement method.

34. D. HAGMAN, supra note 19, § 8.6, at 252-53; Mandelker, supra note 21, at 647-48 ("demolition is an extreme remedy to be ordered only in extreme cases"); Enforcement of Housing Codes, supra note 24, at 832. Despite a preference for less severe measures, courts have upheld government orders for demolition as a reasonable exercise of the police power to regulate buildings and housing. Mandelker, supra note 21, at 648-49. The power to demolish is usually "limited to buildings in such bad physical repair that they present a structural, fire, or other physical hazard." Id.

35. Enforcement of Housing Codes, supra note 24, at 832. Many state statutes explicitly require the agency condemning a building to give the owner the option of repairing or demolishing at the owner's expense. Courts have invalidated statutes not providing the owner this option. See, e.g., Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959) (allowing action for damages for demolition when no option to repair had been given); Abraham v. City of Warren, 67 Ohio App. 492, 37 N.E.2d 390 (1940) (holding that condemnation and demolition of building that evidence showed could have been repaired, when notice had not been given to owner to repair, violated due process).

Some statutes also confer upon the condemning agency an affirmative "power to repair" and to bill the owner for costs. E.g., N.Y. MULT. DWELL. LAW § 309(1)-(3) (McKinney 1974 & Supp. 1989); see also Enforcement of Housing Codes, supra note 24, at 835 (discussing Baltimore's approach and the example of New York City's use of the "repair power" in rat extermination programs).
Tenants’ Rights

B. Federalism and the Police Power Over Buildings

In the United States, the police power over buildings remains vested primarily in the states. The states, in turn, commonly delegate this power to municipal corporations and counties. Municipal corporations also possess impliedly delegated police powers over buildings by virtue of their creation by the state through a charter. “Home rule” provisions in many state constitutions and statutes expressly delegate to municipalities

36. D. Hagman, supra note 19, § 8.6, at 252; Enforcement of Housing Codes, supra note 24, at 833-34.
37. D. Hagman, supra note 19, § 8.6, at 253; Enforcement of Housing Codes, supra note 24, at 828-30; see also Conn. Gen. Stat. § 47a-56a-j (1983); N.J. Stat. Ann. § 40:48-2.12 (h)-(l) (West 1967); N.Y. Mult. Dwell. Law § 309(4)-(5) (McKinney 1974). This alternative has not lived up to initial expectations given the difficulty of finding willing receivers to take responsibility for substandard housing and the inefficiency of the judicial system in processing receivership cases. Sax & Hiestand, supra note 8, at 870-74; Enforcement of Housing Codes, supra note 24, at 828-30. In New York City, the inability to find receivers for substandard apartment buildings has resulted in the city itself becoming the landlord of 4,100 buildings with 33,000 families, a population roughly the size of Pasadena, California. New York City, the Landlord, supra note 9, at 1, col. 1. These buildings under city ownership are often in need of repair and, unfortunately, once in the city’s hands, are not often subject to the enforcement of housing codes. Id. at 35, col. 1.
38. Recognizing the severity of requiring occupants to vacate, a recent California statute provides that

In deciding whether to require vacation of the building or to repair as necessary, the enforcement agency shall give preference to the repair of the building whenever it is economically feasible to do so, without having to repair more than 75 percent of the dwelling, as determined by the enforcement agency, and shall give full consideration to the needs for housing.

39. E. Freund, supra note 15, § 64 (“In the distribution of governmental powers under the federal constitution, the bulk of the police power remains with the states.”).
40. E. McQuillin, supra note 14, §§ 24.02 n.18 (citation omitted), 24.07 (describing the police power as “absolutely inalienable in the state. Under our form of government the police power belongs exclusively to sovereignty and inhere in the state.”).
41. O. Reynolds, supra note 16, § 8. The equivalent of counties exist in every state, though called “parishes” in Louisiana and “boroughs” in Alaska.
42. E. McQuillin, supra note 14, §§ 24.36, 24.38. Mandelker argues that the demolition power “appears to be an exception to the usual rule that municipalities have only those powers which are conferred by statutes or home-rule constitutional provisions, as implemented through charter or local ordinance.” Mandelker, supra note 21, at 639 n.21 (citing D. Mandelker, Managing Our Urban Environment 220, 221 (1966)).
broad police power over local affairs, including regulation of buildings. The federal government may exercise the police power over buildings through congressional enactments under constitutional powers such as the commerce clause.

1. The federal role—Although Congress has enacted sweeping urban renewal legislation designed to encourage state and local use of the police power to cure "slum" conditions and improve national housing, the Housing and Community Development Act of 1974 began a retreat from direct federal involvement with housing law.

43. 7 E. McQuilllin, supra note 19, § 24.33; O. Reynolds, supra note 16, §§ 35-37 (providing a good overview of "home rule"). Approximately half of the states have adopted home rule for counties. O. Reynolds, supra, § 36, at 100 (citation omitted); see also 2 E. McQuilllin, Municipal Corporations § 9.08 (3d ed. rev. 1979).

44. See, e.g., 6A E. McQuilllin, supra note 14, § 24.02.

45. The Housing Act of 1949, ch. 338, § 2, 63 Stat. 413 (1949) (codified as amended in scattered sections of 12 U.S.C. (1982) and 42 U.S.C. (1982)), aimed specifically at "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas." 42 U.S.C. § 1441 (1982). The statute went on to state "the goal of a decent home and a suitable living environment for every American family." Id. Under the Act, federal grants and loans enabled local government agencies to pursue various strategies to clear slums and improve housing. Attaching conditions to the aid allowed the federal government to exert influence over local government housing programs utilizing the police power over buildings. O. Reynolds, supra note 16, §§ 132, 134-36 (describing in detail the various conditions). One condition, for example, required local authorities to submit a relocation plan for displaced persons before proceeding with a particular urban renewal program or low-income housing project. O. Reynolds, supra, §§ 445, 452-53; D. Hagman, supra note 19, at 528, 532.


47. Congress has terminated direct federal involvement with urban renewal projects and substituted a system of revenue sharing "block grants." D. Hagman, supra note 19, § 17.7. This approach reduces the federal role to one of oversight: reviewing applications for block grants and monitoring the progress of local housing programs using them. In this way, federal retrenchment frees state and local government housing programs from extensive federal interference, but simultaneously removes an important potential source of statutory and regulatory protection of tenants. Id. § 17.8, at 551 ("Federal involvement has generally been pared to a minimum.").


Another new approach argues for the creation of "enterprise zones," defined as "locally nominated, federally designated and economically deteriorated urban area[s] into which commercial activity is to be attracted . . . by means of a partial roll-back of federal and
A significant exception relevant to police power condemnations appears in federal requirements for uniform procedures to provide relocation assistance to displaced persons. The Uniform Relocation Assistance Act of 1987 requires all "[p]rograms or projects undertaken by a Federal agency or with Federal financial assistance" to adopt a "relocation assistance advisory program." This program must, among other things,

assure that a person shall not be required to move from a dwelling unless the person has had a reasonable opportunity to relocate to a comparable replacement dwelling, except in case of—

(A) a major disaster. . .
(B) a national emergency declared by the President; or
(C) any other emergency which requires the person to move immediately from the dwelling because continued occupancy of such dwelling by such person constitutes a substantial danger to the health or safety of such person.49

Procedural regulations adopted pursuant to the Act also require ninety-day "relocation notices" to people scheduled for displacement and provide for appeals from determinations of eligibility for relocation payments.50 But neither the Act nor the regulations under it stipulate any procedural rights for tenants respecting notice and a hearing on the merits of the original causes of displacement, including police power condemnations of tenants' buildings.

2. The primacy of state statutes— Given the retreat of the federal government from the housing area, the states remain the primary, and virtually the exclusive, arbiters of the police power over buildings.51 Local government ordinances and regulations...
may not conflict with state statutes.\textsuperscript{52} Even home rule local governments, granted full constitutional powers over local matters by state statutes or constitutional provisions,\textsuperscript{53} must conform to state law,\textsuperscript{54} though some home-rule ordinances occasionally prevail over state statutes when addressing matters of purely local concern.\textsuperscript{55} Courts generally have read state statutes to preempt conflicting home rule regulation in the exercise of the police power, including regulation of buildings.\textsuperscript{56} Ultimate authority over local governmental condemnations therefore resides in state legislatures.

\textbf{C. Limits to the Police Power Over Buildings}

Limits to the police power over buildings come from a number of sources, including the origins of the power in equity, state and federal constitutional provisions, and state and local statutes.

Equitable principles constrain the police power over buildings by limiting its scope and appropriate application. Because the


The uniform relocation assistance requirements, which specifically apply to any "State or State agency" that "displaces a person," constitute an exception to this rule. 49 C.F.R. 24.2(a) (1989). See supra text accompanying notes 48-50.

\textsuperscript{52. See, e.g., Hunter v. Pittsburgh, 207 U.S. 161 (1907) (upholding the principle of complete state supremacy over municipalities and other state subdivisions).

\textsuperscript{53. See supra note 43 and accompanying text. Home rule arrangements vary considerably among the states. O. Reynolds, supra note 16, § 35, at 96. Usually, home rule provisions require incorporation, a minimum population, a charter, approval of the charter by local voters, and state approval of the home rule entity. O. Reynolds, supra, § 36, at 98-99.

\textsuperscript{54. O. Reynolds, supra note 16, § 27 (doctrine of "inherent" home rule "almost universally rejected;" "general rule of complete state control"). See also Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643 (1964).

For arguments that the "new federalism" should translate into greater independence for municipal and local government from state control, see Frug, Empowering Cities in a Federal System, 19 Urb. Law. 553 (1987); Libonati, Reconstructing Local Government, 19 Urb. Law. 645 (1987).

\textsuperscript{55. O. Reynolds, supra note 16, § 36, at 99. For example, local governments may prevail in choosing the procedures for electing and constituting the local government itself.

\textsuperscript{56. Id. § 39 ("The police power, to the extent it resides in municipal governments, is delegated from the state; and most 'police power matters' are considered of statewide concern."). Minor exceptions to the rule sometimes include traffic regulations of city streets and specific types of zoning, such as the height or set back limits of buildings. Id. Accord 7 E. McQuillen, supra note 19, § 24.510.
power to order demolition of a building originated in equity, \(^{57}\) courts customarily have held that a government cannot order a building demolished without a judicial determination that the building is a "nuisance in fact." \(^{58}\) Demolition of a building not previously found a nuisance in fact can result in liability in tort for damages. \(^{59}\)

Equitable principles also encourage courts to apply the least severe enforcement method to any particular problem, suggesting, for example, that a court directly abate a noxious use of a building, rather than resort to the power to vacate or demolish. \(^{60}\) Courts should therefore employ less drastic alternative remedies, including enjoining tenants or evacuating the building for a short time, to cure unsanitary, unsafe, or otherwise improper use of a building by its tenants. \(^{61}\)

Constitutional guarantees also limit the police power over buildings. \(^{62}\) The fifth amendment and parallel provisions of state constitutions require just compensation for damages caused to buildings under exercise of the police power if deemed a taking. \(^{63}\) In addition, the fourteenth amendment and similar clauses in state constitutions require procedural due process in police enforcement of housing codes, supra note 24, at 826-33 (describing the power to demolish as summary emergency power allowing equitable relief of housing code violations) (citing 2 J. Kent Commentaries *338-39 and C. Rhyne, Municipal Law § 26-21 (1957)).

58. Mandelker, supra note 21, at 646-47 ("Even if a statute does not explicitly provide that only buildings which are in fact nuisances can be demolished, the courts often read such a limitation into the legislation.") (citations omitted). Mandelker notes that demolition cases holding to the contrary follow the trend in other areas of land use regulation favoring a more modern due process emphasis on reasonableness. These cases uphold demolition if reasonable under all of the circumstances, without regard to the question of "nuisance in fact." Id. at 647. Nonetheless, the rule remains that "[b]ecause most of the demolition cases are based on the nuisance rationale originated in equity, they start with the basic equitable premise that demolition is an extreme remedy to be ordered only in extreme cases." Id. at 647-48 (citing Village of Zumbrota v. Johnson, 280 Minn. 390, 161 N.W.2d 626 (1968) and Polsgrove v. Moss, 154 Ky. 408, 157 S.W. 1133 (1913)).

59. Enforcement of Housing Codes, supra note 24, at 832 (citing Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959)). In theory at least, displaced tenants could also maintain a tort action for damages on this ground, perhaps in connection with an action against the landlord for breach of the warranty of implied habitability or constructive eviction. See R. Cunningham, supra note 14, § 6.84.

60. See Mandelker, supra note 21, at 648 (noting "the reluctance of equity to order demolition when the substandard condition arises from mere use of the building") (citations omitted).

61. Cf. Enforcement of Housing Codes, supra note 24, at 833-34.

62. 6A E. McQuillin, supra note 14, § 24.09, at 30-32.

63. See supra note 29 and accompanying text.
power regulation of buildings. Before condemning a building, government authorities must provide sufficient notice and a proper hearing—the traditional protection of procedural due process. Rare emergencies occasionally qualify for exceptions to these requirements.

Finally, because local regulations and ordinances generally may not supersede state statutes, these statutes pose another set of limitations to the police power over buildings.

II. STATE STATUTORY RIGHTS: REALITY AND REFORM

All of the states limit local governments in their exercise of the police power to condemn buildings by various statutes. Examining the procedures available under the condemnation power reveals these statutory constraints.

A. Applicable State Procedures

States have a number of procedures available for exercising the power to condemn, including the extreme remedies of demolition and vacating a building, both of which effectively destroy a tenant's interest in the building.

64. 7 E. McQuillan, supra note 19, § 24.561. See discussion infra Part III.


Other constitutional limitations also may constrain the exercise of the police power over buildings. For example, discriminatory enforcement of housing or building codes may result in equal protection violations. D. Hagman, supra note 19, § 8.7, at 258 (citing Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984)). For an overview of constitutional limitations on land use control regulation, see D. Hagman, supra, §§ 10.1, 10.2 (substantive due process), 10.4 (equal protection), 10.5 (free speech). Like the takings issue, these constitutional questions lie outside the procedural scope of this Note. See supra note 29.

1. Demolition— In a leading article, Professor Mandelker provides a comprehensive analysis of the various demolition statutes enacted by the states. According to his analysis, the demolition power, originating as an equitable remedy, grew out of the judicial power to abate nuisances. He finds further authority for this power in the enactment of local housing and building codes and in state demolition statutes for buildings that constitute fire hazards or are otherwise dangerous, unsafe, unsanitary, or unfit.

In the current statutory landscape, some states continue to delegate to local governments the power to demolish buildings solely through the power to abate nuisances. Most states, however, have enacted specific statutes delegating the power to demolish buildings determined “unsafe,” “dangerous,” “unfit,” “unsanitary,” “dilapidated,” “substandard,” or some combination of these characteristics. A separate category of statutes

68. Mandelker, supra note 21.
69. See supra text accompanying notes 57-58.
70. Mandelker, supra note 21, at 640.
71. Id. at 640-42. The latter type of statute, granting broad demolition powers beyond traditional “nuisance in fact” standards, responded to a perceived housing crisis in the 1950s and 1960s. Id.
72. E.g., ARIZ. REV. STAT. ANN. § 9-240 (to towns) and § 9-276 (to cities) (West 1977 & Supp. 1988); COLO. REV. STAT. §§ 30-28-203, 209 (1986) (delegating power to county commissioners to adopt broad ordinances including power to abate nuisances); MONT. CODE ANN. § 7-5-4104(1) (1987) (to towns and cities); NEV. REV. STAT. §§ 266.335 (to cities), 244.360 (to counties) (1985); S.D. CODIFIED LAWS ANN. § 9-29-13 (1981) (to municipalities).

Statutes delegating the power to local governments to abate nuisances in general often coexist with other authorizing statutes that specifically describe what kind of buildings may be condemned. E.g., MICH. COMP. LAWS ANN. §§ 125.541, 539 (West 1986) (specific statute authorizing abatement of “dangerous” buildings), § 45.515 (West 1986 & Supp. 1988) (general power of counties to abate nuisances), § 67.1 (West 1967) (general power of towns to abate nuisances). See also N.Y. MULT. RESID. LAW § 305 (McKinney Supp. 1987) (nuisances generally); N.Y. MULT. DWELL. LAW § 309(1) (McKinney 1974) (specific statute authorizing abatement of “dangerous” buildings), § 309(2) (McKinney 1974) (“untenanted hazards”); N.Y. TOWN LAW § 130(1) and (16) (McKinney 1987) (unsafe or dangerous buildings).

Grounds of “nuisance” may also be incorporated in a more specific authorizing statute. E.g., N.Y. MULT. DWELL. LAW § 309(1) (McKinney 1974) (delegating to cities, towns and villages power to define and abate “nuisances” as well as “dangerous” buildings); ME. REV. STAT. ANN. tit. 17, § 2851 (1983) (municipalities may abate a building as a nuisance if structurally unsafe, unstable, unsanitary, a fire hazard, unsuitable or improper for use or occupancy, a hazard due to inadequate maintenance, dilapidated, obsolescent, abandoned, or otherwise unsafe); OR. REV. STAT. §§ 221.915, 916(10) (1987) (general municipal police powers over “any and all” subjects “concerning the public morals, public safety, public health, and public convenience” as well as over nuisances).
delegates demolition power over buildings deemed fire hazards. 74 Other statutes authorize local governments to adopt building and housing codes, with the power of demolition granted explicitly or implicitly as a remedy. 75

2. Vacating a building and other enforcement methods—The power to vacate a building generally follows the same statutory structure as the power to demolish. 76 The power to con-

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More general statutes also often include this ground for demolition. These statutes specifically authorize demolition for purposes of fire prevention and usually give the state fire marshal or designated deputy the power to order demolition. Under more general statutes, choice of the enforcement authority is left to local governments. E.g., N.D. Cent. Code § 40-05-02 (1983) ("substandard according to local ordinance and including "fire hazard," "dangerous," or "dilapidated").


Most housing and building code ordinances provide for civil and even criminal penalties for noncompliance. Under the Model Penal Code, for example, an owner may be subject to criminal sanctions for causing or risking a "catastrophe," defined as including "collapse of a building." Model Penal Code § 220.2 (1962). For a state provision following this model, see PA. Stat. Ann. tit. 18, §§ 3302, 3303 (Purdon 1983).

76. Enforcement of Housing Codes, supra note 24, at 832-34.
Demn encompasses both remedies. Like demolition, vacating a building severely inconveniences tenants, throwing them temporarily or permanently out of their homes. Other remedies short of demolition, such as ordering repair or fining the owner for building or housing code violations, have a similar statutory structure.

3. The complexity of multiple authorizing statutes—Under the usual statutory scheme of delegation, a number of local government entities, including specialized housing agencies, may exercise concurrent jurisdiction over the same buildings. Such complexity occasionally leads to jurisdictional disputes and questions regarding what law or ordinance governs a particular case. Complicating matters further, many delegating statutes specifically exempt certain sources of the police power to condemn buildings, such as the common law power over nuisances and broad powers of home rule. This complexity creates a problem when a claimant asserts procedural or substantive rights under one state statute and a condemning agency responds that it is operating under a different authority.

Some states resolve this problem by granting power to state agencies or departments to resolve jurisdictional disputes.

77. Id.; D. Hagman, supra note 19, § 8.7, at 258; cf. 7 E. McQuillen, supra note 19, §§ 24.560-.561.
78. D. Hagman, supra note 19, § 8.7, at 258. See supra text accompanying notes 35-38. For a recent example, see Devines v. Maier, 728 F.2d 876 (7th Cir.), cert. denied, 469 U.S. 836 (1984), discussed supra note 29.
79. See supra notes 32-38 and accompanying text.
80. Enforcement of Housing Codes, supra note 24, discusses this problem in the context of code enforcement.
82. For example, California, Delaware, and Rhode Island have adopted a State Housing Code applicable to all local government units. Local officials under such a system have direct responsibility for enforcing state law. Cal. Health & Safety Code §§ 18901-18949 (West 1984 & Supp. 1989) (State Building Standards Code), §§ 17960 (West 1984) (enforcement provision); Del. Code Ann. tit. 31, §§ 4108, 4110 (1985) (providing responsibility to enforce State Housing Code adopted in 1985 and providing for coordination of enforcement to prevent multiple or conflicting orders); R.I. Gen. Laws § 23-27.3-107.1
Statutes may also grant priority to one local government unit over another in cases where jurisdictions overlap. 83 Absent a controlling state statute, courts must construe the state's particular statutory and constitutional framework delegating the police power to condemn. As a general rule, rights asserted under state statutes prevail over municipal ordinances due to the supremacy of states in matters concerning the police power over buildings. 84

B. Procedural Rights of Owners and Tenants under State Statutes

Most states require any agency contemplating condemnation to give the owner of the building reasonable notice and opportunity for a hearing, either before the condemning agency itself with a right of appeal or before a local court. 85 Statutes not re-

(1985) (granting local authorities power to administer State Building Code), § 23-27.3-100.1.7 (withdrawing local authority over codes to prevent possible conflict with state law).


84. See supra text accompanying notes 51-56.

quiring notice and a hearing for the owner have been declared unconstitutional, though emergency condemnations constitute a major exception to this rule. Local governments must adhere strictly to statutory notice and hearing provisions. And an

days to abate condition; less time if "imminent danger" exists); N.Y. MULT. RESID. LAW §§ 305(2), 306 (McKinney 1952 & Supp. 1989) (thirty days notice to abate condition, or less if emergency exists, and "special proceeding in the supreme court" required for order to vacate or demolish); N.Y. TOWN LAW § 130 (16) (McKinney 1987) (general notice provision); OHIO REV. CODE ANN. § 715.26(B) (Anderson 1988) (thirty days notice; less if emergency exists); VA. CODE ANN. § 15.1-11.2(2) (1981) ("reasonable notice and a reasonable time" to comply with an order); W. VA. CODE § 8-12-16 (1984) (generally provides that "complaints and orders" must be issued); WIS. STAT. ANN. § 66.05 (West 1965 & Supp. 1988) (service of process, court order to demolish or vacate required, and hearing to appeal order must be held within twenty days). A complete list of state statutes and their procedural requirements is on file with the University of Michigan Journal of Law Reform.

See also E. McQUILLIN, supra note 19, §§ 24.560 (notice and hearing required for vacation), 24.561 (notice and hearing required for demolition).

66. ROWLAND v. CITY OF PADUCAH, 512 S.W.2d 514 (Ky. 1974), similarly held unconstitutional under the state constitution an ordinance that did not give the owner of a building reasonable time to comply with a repair order. Like Florida, Kentucky repealed the judicially invalidated statutes. KY. REV. STAT. ANN. §§ 80.660, 80.670 (Michie/Bozby-Merrill 1980). Johnson nonetheless appears to apply to ordinances enacted under other enabling statutes. KY. REV. STAT. ANN. §§ 83.420, 82.081, 82.082 (Michie/Bozby-Merrill 1980) (delegation of municipal powers).


Municipalities also commonly enact summary emergency procedures pursuant to state enabling legislation. Demolitions carried out under such procedures have been upheld. See, e.g., CITY OF CHICAGO v. GARRET, 91 Ill. Dec. 127, 136 Ill. App. 3d 529, 483 N.E.2d 409 (1985) (upholding summary demolition under municipal ordinance in an emergency caused by snow caving in a roof).

These statutory exceptions reflect the constitutional emergency exception. See infra text accompanying notes 195-98.

owner may demand adherence to notice and hearing requirements by the exceptional procedures of mandamus or injunction.89

Most of the procedural protections under state statutes covering owners also extend to mortgagees, lienholders, and certain other parties in interest concerned with the condemned property.90 Tenants and other occupants, however, have usually not been deemed "parties in interest" under these statutes.91

In contrast to this regime of protection to owners and other parties in interest, only a minority of states provide tenants with similar protection. A small number of statutes provide tenants with procedural rights that virtually mirror the rights provided to owners.92 Other statutes appear to extend limited protection to tenants, but are not specific regarding the extent of coverage.93 In addition, even explicit statutory protections for tenants may not apply if the condemning agency successfully claims to be acting under a different statutory or constitutional authority.94

89. 7 E. McQuilln, supra note 19, § 24.562; O. Reynolds, supra note 16, § 207.
90. See the statutes cited supra note 85.
94. See supra text accompanying notes 80-82. One state statute may require notice to tenants; but under another statute, under common law, or under a home rule constitutional provision, no such notice may be required. Thus, the statutes cited supra notes 92-93 do not necessarily require notification of tenants in any condemnation proceeding occurring within the entire state. Although some statutes seem to require notice to tenants in any condemnation proceeding, no matter what the statutory authority, e.g., Del. Code Ann. tit. 31, §§ 4108, 4128 (1985) (requiring affirmative duty to enforce State Housing Code and comply with procedural provisions), others do not. Many probably do not extend so far as to bind home rule units.
Some state statutes that do not require notice and opportunity for hearing to tenants at least require a judicial determination as to condemnation and allow an appeal by any party affected by the decision. State rent control legislation also may confer rights to tenants against evictions, including those threatened through condemnation proceedings.

A few recently enacted state statutes provide tenants fairly comprehensive rights to notice and a hearing. California recently amended a statute to require that

notwithstanding local ordinances, tenants in a residential building shall be provided notice of any violation [of the state housing or building code] which affects the health and safety of the occupants . . . , an order of the code enforcement agency issued after inspection of the premises declaring the dwelling to be substandard, the enforcement agency's decision to repair or demolish, or the issuance of a building or demolition permit following the abatement order of an enforcement agency.

Under this statute, the enforcement agency may charge the owner with the cost of providing notice and tenants must receive notice before the condemning agency applies to a court for an enforcement order.

Delaware's State Housing Code also protects tenants by requiring code enforcement officials to serve written notice of an intent to condemn a building to "the occupants" as well as the

95. E.g., S.C. CODE ANN. § 31-15-70 (Law. Co-op. 1977) (providing that "[a]ny person affected" by a demolition or vacation order may petition a court for an injunction to restrain the action, with the hearing to occur within twenty days of the request); TENN. CODE ANN. § 13-21-106 (1987) (virtually identical to South Carolina); VT. STAT. ANN. tit. 24, § 3117 (1975) (appeal permitted by "person interested"); WASH. REV. CODE § 35.80.030(1)(g) (1987) (appeal rights to "party in interest").

96. See, e.g., N.Y. UNCONSOL. LAWS §§ 8581-8589 (Emergency Housing Rent Control Act), 8621-8634 (Emergency Tenant Protection Act of 1974) (McKinney 1987). Rent and Eviction Regulations adopted under these statutes by the State Division of Housing and Community Renewal allow eviction or other method of dispossession only upon certain grounds, including orders to demolish or vacate. Even then, however, in condemnation cases, tenants must get ten days notice and a hearing before a court on the grounds for eviction; in some other cases, tenants must get seven days notice. The regulations explicitly state that no tenant covered under rent control "shall be removed or evicted unless and until such removal or eviction has been authorized by a court of competent jurisdiction." Rent and Eviction Regulations §§ 2104.1-.3, 2504.1-.3, reprinted in N.Y. UNCONSOL. LAWS (McKinney 1989).

97. CAL. HEALTH & SAFETY CODE § 17980(c) (West Supp. 1989).

98. Id. § 17980(e).

99. Id. §§ 17982-83 (West 1984).
The notice must include "an explanation of the owner's and/or occupant's right to seek modification or withdrawal of the notice by a petition to a Board of Appeals." Any person adversely affected by a local board's decision may appeal to this State Board of Appeals and ultimately to a state court.

A hearing at the condemnation stage permits tenants to argue against condemnation and for alternative plans to repair, finance, and stay in their present building. At a hearing, tenants may raise objections to the condemnation of their building, arguing, for example, that applicable statutory requirements (e.g., "dilapidated," "structurally unsound," or "unfit for human habitation") do not describe their building. Alternatively, tenants may plead for less drastic enforcement methods, such as undertaking repairs themselves or having a receiver appointed. A hearing could also allow tenants to assert rights to relocation benefits or replacement housing.

In a majority of states, however, tenants are not afforded a statutory right to notice and an opportunity for a hearing in police power condemnations. In these states, it is the building's owner who is given the opportunity to make a case against condemnation on behalf of tenants—or to make no case at all.

C. A Proposal for Statutory Reform

Because tenants cannot always depend upon owners to oppose police power condemnations, every state should enact statutes to protect the important and independent property interests of tenants in the buildings in which they live. Any government agency's condemnation action should provide tenants with written notice of the intent to condemn, a right to appear at a con-
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demnation hearing, and a right to appeal an adverse determination to a state court. States not providing such protection should amend their statutes authorizing local governments to condemn buildings so that the provisions for notice and an opportunity for a hearing given to owners includes “tenants” and “occupants.”

In considering how to amend a particular state’s statutes to accord procedural rights to tenants, legislators should remember that a variety of statutes may be involved. Amending some state statutes, for example, may not cover local governments operating under home rule. In these cases, a state housing code that includes tenant notice and hearing protections may provide a more effective solution. A tenant protection measure embedded in a statewide code has the advantage of universal application to all local governments within the state, regardless of home rule provisions and delegating statutes.

States also could simply adopt a new statute to protect the procedural interests of tenants faced with condemnation proceedings. Legislators could draw on the models of California and Delaware, at the same time ensuring that the statute covers all of the various delegating statutes of the state. The statute should provide for a hearing in a local court prior to any order of condemnation. Written notice of the hearing served on all affected tenants should require: (1) a description of the building sufficient to identify it; (2) a description of the code or ordinance violations giving rise to the problem; (3) an account of any repairs or improvements that the landlord has been ordered to undertake; (4) a statement of the time, date, and place of a hearing on condemnation; (5) an explanation of the tenant’s rights at the hearing, including the right to contest the police power action and the right to plead for alternative enforcement methods; (6) an explanation of the tenant’s rights to relocation benefits and comparable replacement housing, if the condemnation ultimate...
mately results in an eviction; and (7) a description of the right to appeal an adverse determination at the initial hearing.

Congress could provide an alternative solution by amending The Uniform Relocation Assistance Act. An amended Act could give tenants the right to challenge local police power condemnations on the merits, in addition to the already established right to contest the amount of relocation benefits or the availability of comparable replacement housing. Specifically, the ninety-day notice period required for relocation benefits could be extended to apply to mandatory notice and hearing rights prior to any condemnation.

III. CONSTITUTIONAL RIGHTS OF PROCEDURAL DUE PROCESS

In the absence of state statutes or local ordinances providing tenants with rights to notice and an opportunity for a hearing before condemnation, tenants can claim a constitutional right to procedural due process under the due process clauses of the

112. See supra text accompanying notes 48-50.
115. See supra text accompanying note 50.
116. Procedural due process cannot always be easily distinguished from substantive due process. Some commentators maintain that review of state governmental practices under procedural due process standards determines only whether the procedures are basically fair. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 417 (2d ed. 1983) [hereinafter J. NOWAK]. This view, however, begs the question of what substantive interests warrant heightened judicial attention to the procedures employed to deprive someone of them.

Professor Tribe describes two ways that cases decided on grounds of procedural due process embody substantive judgments. In the first, courts focus on the "intrinsic value in the due process right to be heard" that "grants to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity to express their dignity as persons." In a second "more instrumental approach," courts look instead to the "means of assuring that the society's agreed-upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed. Rather than expressing the rule of law, procedural due process in this sense implements law's rules—whatever they might be." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 666-67 (2d ed. 1988) (emphasis in original) (citations omitted). In line with Tribe's analysis, Justice Marshall characterizes "the two central concerns of procedural due process" as "the promotion of participation and dialogue by affected individuals in the decisionmaking process" and "the prevention of unjustified or mistaken deprivations." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citing Carey v. Piphus, 435 U.S. 247, 259-62, 266-67 (1978)).
The rights of notice and an opportunity to be heard are central to procedural due process under the fourteenth amendment. To determine whether police power condemnations implicate those guarantees, however, a court must first establish that a condemnation deprives a tenant of a protected interest. If so, the court must then decide whether the protected interest qualifies as a fundamental or core constitutional interest requiring procedural protection or whether a balancing test should be used to weigh the protected interest in the tenancy against the

117. The fifth amendment requires that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

118. This Note analyzes tenants' rights to procedural due process under the federal Constitution. But many state constitutions may also support claims to notice and a hearing. Most state constitutions have provisions parallel to federal due process language. E.g., Mich. Const. art. 1, § 17, ("No person shall be. . . deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."). State courts commonly follow federal courts in interpreting the expanse and scope of state constitutional rights. E.g., Direct Plumbing Supply v. Dayton, 138 Ohio St. 540, 544-45 (1941) ("due course of law" protection under the Ohio constitution has been held "equivalent" and to "run parallel" to the fourteenth amendment) (citing Ohio Const. art. I, § 16).

State courts may sometimes be even more flexible than federal courts in their interpretation of procedural due process rights. E.g., Stanton v. Tax Comm'n, 114 Ohio St. 658, 671, 151 N.E. 760, 764 (1926) (suggesting that the "due course of law" clause is "much broader than the due process clause of the Fourteenth Federal Amendment"). Other states also read state constitutional safeguards for affording due process to impose a higher standard than under the federal constitution. E.g., Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 379 N.E.2d 1169 (1978); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78 (1978).

Justice Brennan has recently remarked upon what he called a "truly thrilling development," noting that "[m]ore and more state courts are construing state constitutional counterparts of provisions of the federal Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even though identically phrased." Remarks, 36 Rutgers L. Rev. 725, 727 (1984).

119. The Supreme Court has stated that:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.


120. Under the Constitution, the fifth amendment limits federal power; the fourteenth amendment limits the power of the states. 16A Am. Jur. 2d Constitutional Law §§ 804-821 (1979). Because proceedings to condemn occur under the police power of the states rather than the federal government, the fourteenth amendment applies. However, there is no great difference, in terms of the standards applied, between fifth and fourteenth amendment protection of procedural due process. Id. § 804.

121. See infra Part III-A.
competing governmental interest in the police power to condemn.\textsuperscript{122} If the court deems the tenant's interest a core constitutional right or if the constitutional balance favors the tenant's protected interest, the court must then determine what type of hearing and notice are constitutionally required.\textsuperscript{123}

\section{A. Tenancies as a Protected Interest}

To trigger procedural due process analysis under the fourteenth amendment, a state government or its authorized agent\textsuperscript{124} must "deprive" a person of "life, liberty, or property."\textsuperscript{125} But what constitutes constitutionally protected life,\textsuperscript{126} liberty, or property is not self-defining. Although a claim based on a "liberty" interest may be possible,\textsuperscript{127} the strongest claim for tenants is one asserting a cognizable "property" interest in their tenancies.

1. \textit{Property interest}— In a variety of circumstances, courts recognize the interests of tenants as property interests.\textsuperscript{128} Courts often differ, however, as to whether a tenancy is "real" or "personal" property.\textsuperscript{129} Courts analyzing tenancies as a property interest under procedural due process have taken two approaches. The currently prevalent view treats tenancies as a fundamental property interest, warranting full procedural protection. A second, less accepted approach views tenancies as purely a creation

\begin{enumerate}
\item[122.] \textit{See infra} Part III-B.
\item[123.] \textit{See infra} Part III-C.
\item[124.] The fourteenth amendment applies "not only to the states as states, but also to their agents." L. Tribe, \textit{supra} note 116, § 10-14, at 730 (emphasis in original) (citing \textit{Ex parte} Virginia, 100 U.S. 339 (1897)).
\item[125.] \textit{See supra} note 117.
\item[127.] \textit{See infra} Part III-A-2.
\item[128.] R. Cunningham, \textit{supra} note 14, § 6.11 (a tenant's property interest as "an estate in land in the strictest sense").
\item[129.] R. Schoshinski, \textit{supra} note 107, takes a legal realist view of the cases, observing that [w]hether a leasehold should be treated as real or personal property continues to be litigated in a variety of . . . contexts. Given the hybrid [historical] character of the interest, it is not surprising to find the courts in considerable discord on this issue. A consistent rationale for adopting either classification cannot be perceived in the cases. It appears that courts will either rely on the historical chattel characteristic of the lease [dating back to the end of the fifteenth century] or ignore it, depending upon which view supports the desired result in a given dispute.
\item[130.] \textit{Id.} § 1.2, at 6.
\end{enumerate}
of state law. Under this approach, a state may narrowly circumscribe tenancy interests or, in some cases, eliminate them.

The Supreme Court has traditionally recognized that procedural due process requirements apply to common law property interests, including tenancies. In *Lindsey v. Normet*, for example, the Court assumed without question that periodic, month-to-month tenancies constituted a property interest merit ing fourteenth amendment protections. Recognizing this interest, the Court struck down as a violation of the equal protection clause the requirement of a double bond to appeal an eviction under a state forcible entry and wrongful detainer statute.

A somewhat more recent case also treats tenancies as fundamental property interests worthy of constitutional protection. In *Greene v. Lindsey*, the Supreme Court held that public housing tenants faced with summary eviction proceedings possessed a property interest sufficient for procedural due process requirements to apply. The Court recognized that the tenants "[had] been deprived of a significant interest in property: indeed, of the right to continued residence in their homes."

Together, *Greene* and *Normet* stand for the proposition that tenancies remain constitutionally recognized property interests, deserving procedural due process protections, including some kind of notice and an opportunity for a hearing.

Another approach taken by the Supreme Court considers property interests protected by procedural due process as "not created by the Constitution," but rather "created and their dimensions ... defined by existing rules or understandings that stem from an independent source such as state law ... ." As Professor Simon restates this rule, "legislatures create property, and courts protect it."
In all types of tenancies, property rights and interests are created and defined through the operation of state statute and common law.\(^\text{138}\) State law recognizes a tenant's right of possession,\(^\text{139}\) an implied covenant of quiet enjoyment,\(^\text{140}\) a statutory or implied warranty of habitability,\(^\text{141}\) notice requirements with which a landlord must comply before terminating tenancies,\(^\text{142}\) and other rights incident to a tenancy.\(^\text{143}\) On the surface, then, a tenant's property interest seems to qualify clearly for the protection of procedural due process.

A recent trend in procedural due process cases, however, suggests that determining simply that a state creates the property interest of tenants may not render that interest constitutionally protected. For example, in Texaco, Inc. v. Short,\(^\text{144}\) the Supreme Court upheld a state statute that terminated property interests in coal, oil, gas, or other minerals left unused for twenty years, without providing for individual notice to affected mineral owners.\(^\text{145}\) Although recognizing that the state had "defined" a mineral estate as a "vested property interest,"\(^\text{146}\) the Court said that "just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."\(^\text{147}\) Short illustrates a trend in procedural

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138. The different kinds of tenancies recognized by state law are described in R. Cunningham, supra note 14, §§ 6.14-.20; see also R. Schoshinski, supra note 107, §§ 2:1 to 2:26.
139. R. Cunningham, supra note 14, §§ 6.21-.23.
140. Id. § 6.30; R. Schoshinski, supra note 107, §§ 3:3 to 3:9.
142. R. Schoshinski, supra note 107, §§ 2:9 (tenancy for years), 2:13 to 2:14 (periodic tenancy), 2:18 to 2:19 (tenancy at will), 2:21 to 2:22 (tenancy at sufferance), 2:26 (tenancy created under void or unenforceable lease); 6:13 (notice under summary eviction process).
143. Id. §§ 3:35 to 3:38 (rights created by repair and deduct statutes), 3:39 to 3:43 (rights under rent escrow statutes), 3:44 to 3:45 (rights under receivership statutes), 7:1 to 7:10 (rights under rent control) 12:1 to 12:13 (protections against retaliatory evictions).
144. 454 U.S. 516 (1982).
145. Id. at 518-20. The case did not present the issue of a constitutionally sufficient hearing, because filing a statement of claim within the statutory period completely foreclosed, without a hearing, divestment of the mineral interest. Id. at 519 (citations omitted).
146. Id. at 525 (citation omitted).
147. Id. at 526 (emphasis added).
due process cases indicating "a reluctance to look beyond state law as a source of rights protected by due process guarantees."\(^{148}\)

In *Devines v. Maier*,\(^{149}\) the Seventh Circuit purported to apply the analysis adopted in *Short* to deny a takings claim by tenants who had been forced temporarily to vacate their homes through enforcement of a municipal housing code.\(^{150}\) Analogizing to the statute upheld in *Short*, the court held that the state had "created a property right entitled to constitutional protection, (i.e., a possessory interest in the leasehold) but conditions [sic] the retention of that right on a reasonable condition (i.e., inhabitability [sic] of the leasehold)."\(^{151}\)

Under this reasoning, the state can take away the property interest in tenancies that it created. The state, by conditioning the property interest of tenancies upon police power regulation through building and housing codes, could avoid not only challenges for takings, but also any problems of procedural due process with respect to condemnations.

The logic of *Devines* is not persuasive, however. The court misread the scope of *Texaco v. Short*, which involved exceptional circumstances. *Short* said only that a "[s]tate has the power to condition the permanent retention of [a] property right [created by the state] on the performance of reasonable conditions that indicate a present intention to retain the interest."\(^{152}\) In contrast, the tenants in *Devines* strongly indicated an intention to retain their property interest, some of them refusing to comply with an order to vacate even under threat of prosecution.\(^{153}\)

The factual circumstances of *Devines* also differ from *Texaco v. Short* in another important respect. In *Short*, a mineral owner could protect the mineral interest simply by filing a statement of claim as provided under the statute.\(^{154}\) But in *Devines*, the tenants had no such alternative to protect their property inter-

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149. 728 F.2d 876 (7th Cir.), cert. denied, 469 U.S. 836 (1984).
150. See *supra* note 29 and accompanying text for a brief discussion of the takings issue addressed in *Devines*.
151. *Devines*, 728 F.2d at 884. The court then argued that the housing code violations, upon which the order to vacate was based, resulted from "the inattention of the landlord, as owner of the premises[,] and/or the inattention of the tenant, as owner of a possessory interest in the premises." *Id.*
152. *Short*, 454 U.S. at 526 (emphasis added).
153. *Devines v. Maier*, 665 F.2d 138, 144 (7th Cir. 1981), rev'd, 728 F.2d 876, cert. denied, 469 U.S. 836 (1984). The threat to prosecute "in some instances was carried out." *Id.*
ests. Although the court in Devines recognized that the housing code violations could have resulted from a landlord's negligence, it perceived no unfairness in allowing the building inspector's retribution to fall on potentially innocent tenants.

The Seventh Circuit's misapplication in Devines of the Supreme Court's reasoning in Short points also to a more fundamental problem in procedural due process analysis. The constitutional rule that "legislatures create property, and courts protect it" has been gradually expanded in cases such as Short to mean: Legislatures create property and condition the circumstances of its retention; and courts protect the state's power to do so in any way that it wants. The problem with this approach lies in the circularity of looking to state law to see if it creates a property interest, but then looking to state law again to see what conditions it sets that can destroy that interest. Carried to its extreme, this framework of analysis effectively allows states to deprive people of fundamental property interests, including their homes, in circumstances such as those illustrated in Devines.

Professor Tribe describes this problem in terms of the emerging "instrumental" approach to procedural due process. He traces the origin of this "positivist" perspective to Arnett v. Kennedy. Announcing what has been dubbed the "bitter with the sweet" doctrine, the Supreme Court said in Arnett that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant must take the bitter with the sweet." At first, the Court applied the doctrine to

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155. See supra note 151.
156. Recognizing this unfairness, the initial Seventh Circuit decision in Devines remarked that the city "had various options available to it. It might, for example, have sought to enforce its orders to repair directly against the owners of substandard structures." Choosing instead to evict tenants through the power to vacate, the city "placed a disproportionately heavy burden on those individual members of the community who have little or no choice but to live in low cost, often substandard, housing." Devines v. Maier, 665 F.2d 138, 146 (7th Cir. 1981), rev'd, 728 F.2d 876, cert. denied, 469 U.S. 836 (1984).
157. See supra note 137.
158. As Justice Brennan has observed, giving the states "'unfettered discretion' in defining 'property' for purposes of the Due Process Clause" effectively allows the states to "avoid all due process safeguards attendant upon the loss even of the necessities of life, merely by labelling them as not constituting 'property.'" Bishop v. Wood, 426 U.S. 341, 353 n.4 (1976) (Brennan, J., dissenting) (citation omitted).
159. See supra note 116.
161. See L. Tribe, supra note 116, § 10-12, at 707-08.
162. Arnett, 416 U.S. at 153-54.
cut back the scope of the *Goldberg v. Kelly* line of entitlement cases. More recently, in cases like *Texaco v. Short*, the same "instrumental" framework threatens to shrink protection of interests that had been traditionally considered fundamental or "core" constitutional interests.

Professor Tribe maintains, however, that this approach does not "portend a significant cutback in all of the 'core' interests protected by due process." With respect to at least some core interests, presumably including the property interest of tenants, a majority of the Court probably still agrees with Justice White that "[w]hile the State may define what is and what is not property, once having defined those rights the Constitution defines due process." A majority of the Court explicitly adopted this approach in *Cleveland Board of Education v. Loudermill*.

Holding that procedural due process required a pre-discharge hearing under a state statute allowing public employment firings only for cause, Justice White's majority opinion found the "bitter with the sweet" approach of *Arnett v. Kennedy* "clearly rejected." On this view, legislatures cannot define away the property interest in tenancies, which have roots in the common law as well as in state statutes.

2. **Liberty interest**— Although a tenant's interest in police power condemnations qualifies as a protected property interest, it may also implicate "liberty." The Supreme Court noted in

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163. [397 U.S. 254 (1970)].
166. Id. § 10-11, at 704.
169. Id. at 541 (citing Vitek v. Jones, 445 U.S. 480, 491 (1980) and Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982)). The Court also stated that:

   [T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation . . . . The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."

   *Id.* at 541 (quoting *Arnett* (Powell, J., concurring in part)).
170. See *supra* text accompanying notes 138-43.
Board of Regents v. Roth\textsuperscript{171} that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."\textsuperscript{172}

Courts could construe broad language appearing in some precedents to recognize a liberty interest for tenants. For example, in Meyer v. Nebraska,\textsuperscript{173} the Supreme Court stated that:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{174}

Cases like Meyer could be read to apply to tenants needing a place to live and a home for themselves and their children. Conceivably, the argument could even be advanced that the liberty interest requires government to provide some sort of shelter or home to its citizens, whether in the form of tenancies or otherwise. But the argument that tenancies are "property" interests protected under the constitution is more plausible and more substantially supported by precedent.\textsuperscript{175}

B. Balancing the Protected Interest of the Tenancy Against the Governmental Interest in Police Power Condemnation

After identifying a tenancy as a protected interest, a court must then make a choice as to whether (1) the interest constitutes a constitutional core interest significant enough to require some kind of notice and hearing prior to deprivation without further discussion or (2) the protected interest should be bal-

\textsuperscript{171} 408 U.S. 564 (1972).
\textsuperscript{172} Id. at 572 (citations omitted).
\textsuperscript{173} 262 U.S. 390 (1923). Meyer struck down a state statute making the teaching of the German language a crime as an infringement of the liberty interest protected under procedural due process.
\textsuperscript{174} Id. at 399 (emphasis added).
\textsuperscript{175} See supra Part III-A-1.
anced against the governmental interest in police power condemnation.

This analytical decision is usually made implicitly in procedural due process cases. The outcome may depend on whether the court characterizes the interest as tapping a constitutional "core" or as deriving solely from state law. When a core interest is involved, a court may assume that the Constitution requires a prior hearing and notice, asking only the procedural question of what form these guarantees must take. Greene v. Lindsey and Lindsey v. Normet take this approach with respect to tenancies. On the other hand, a court may find that the balancing test announced in Mathews v. Eldridge must precede a decision on the form of constitutional guarantees. In addition, a court may find that exceptions under circumstances of "emergency" or "indirect adverse effects" waive procedural due process requirements.

1. The Eldridge test— The Supreme Court set forth a balancing test, purporting to apply to all procedural due process questions, in Mathews v. Eldridge. The Court held that procedural due process determinations entailed balancing "the governmental and private interests that are affected." The Court proceeded to erect a cost-benefit framework for reviewing procedural due process decisions, declaring that the following factors must be balanced: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

In Eldridge, the Court applied this balancing approach to the question of whether procedural due process required evidentiary pre-termination hearings before cutting off Social Security disability benefits. In holding that such hearings were not constitu-

176. See supra text accompanying notes 130-35, 165-70.
177. See supra text accompanying notes 136-51.
179. 405 U.S. 56 (1972).
180. See supra text accompanying notes 131-35.
182. See infra Part III-B-2.
183. See infra Part III-B-3.
184. 424 U.S. at 334 (citations omitted).
185. Id. at 335.
tionally required, the Court distinguished *Goldberg v. Kelly*, which had required evidentiary hearings prior to certain welfare payment terminations. The Supreme Court concluded that a less formal procedure allowing full evidentiary hearing only after termination of disability benefits satisfied procedural due process standards. *Eldridge*, now the established test in the administrative benefits context, undercuts the reach and continuing vitality of *Goldberg*.

Initially, *Eldridge* seemed limited to administrative benefits or “new property” cases. But Justice Powell’s opinion foreshadowed a wider application outside of the government benefits context. Preceding the announcement of its new balancing test, the Court in *Eldridge* walked through some of the major procedural due process cases, many of which concerned mainstream “liberty” or “old property” rights having nothing to do with expectations of government benefits. Such a treatment suggests that *Eldridge* balancing may have been meant, by at least some of the Justices, to apply to all procedural due process

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187. See supra note 164.
190. With respect to government housing benefits, tenants have for the most part fared well even under the *Eldridge* balancing test. Lower-income tenants receiving federal housing assistance have been held to have a protected property interest in their continued expectation of receiving benefits, requiring a hearing before termination of their tenancies “for cause.” See, e.g., Swann v. Gastonia Hous. Auth., 675 F.2d 1342, 1345-48 (4th Cir. 1982); Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 925 (11th Cir. 1982) (“Section 8 tenants have constitutionally protected property rights in an expectation of continued occupancy and receipt of rent and utility subsidies.”). See generally Note, *Procedural Due Process in Government-Subsidized Housing*, 86 Harv. L. Rev. 880 (1973).
cases. To date, the Court has not limited the scope of application of the *Eldridge* balancing test.\(^{193}\)

*Eldridge*, however, must have some limits with respect to core constitutional interests. For example, *Eldridge* balancing presumably would not allow the substitution of a highly accurate lie detector for civil trials simply because the instrument rendered "erroneous deprivations" all but impossible. Other rights, including the right to be secure in one's home, should also be considered core rights worth the full constitutional protection of procedural due process—without balancing.\(^{194}\)

2. The emergency exception—In certain extreme circumstances, established precedent favors the police power to condemn without according any procedural protections. This occurs in emergencies such as those brought about by natural disasters calling for immediate governmental response.\(^{195}\)

The Supreme Court has not specifically addressed this "emergency exception" to procedural due process guarantees in the context of the regulation of buildings.\(^{196}\) But lower courts have found that emergencies caused by fire, flooding, or epidemic, which pose an immediate threat to public health and safety, per-


194. See supra text accompanying notes 130-35, 165-70.


That a State, in a *bona fide* exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass.

*Id.* at 704-05 (emphasis added).

mit immediate police power condemnation of buildings.¹⁹⁷ Conditions in a building causing imminent threat of fire or structural collapse also pose emergency situations authorizing summary police power condemnation for the protection of a building's tenants and occupants, as well as neighbors and passersby.¹⁹⁸

3. The "indirect adverse effects" exception—In O'Bannon v. Town Court Nursing Center,¹⁹⁹ the Supreme Court carved out what may be called an "indirect adverse effects" exception to the general rule of procedural due process requirements. In Town Court, the Court found elderly nursing home residents receiving Medicare or Medicaid not entitled to procedural due process protections when a federal agency revoked their nursing home's certification and thus indirectly cut off their government benefits, forcing them to find another nursing home or alternative place to live. In upholding the decertification, the Supreme Court revived an old principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action."²⁰⁰ Applying this indirect adverse effects principle, the Court held that the decertification under "valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty or property."²⁰¹

The reasoning of Town Court should not justify depriving tenants of procedural due process because receipt of government benefits is easily distinguishable from the private property interest of a tenancy. In addition, the condemnation of one's building is a direct, not an indirect, deprivation of the protected interest that is one's home. In Town Court, the elderly patients could transfer to another certified facility, thus retaining their benefits.²⁰² No possibility of retention exists in the case of a condemned tenancy. Although tenants may look elsewhere for hous-

¹⁹⁷. Sources collecting cases on this score include 7 E. McQuillin, supra note 19, § 24.561, at 545-46; 16 AM. JUR. 2d Constitutional Law § 588 (1979); Annotation, supra note 22, at 78-82.

¹⁹⁸. Annotation, supra note 22, at 78-82.


²⁰⁰. Id. at 789 (emphasis added) (citing The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871) and Martinez v. California, 444 U.S. 277 (1980) (upholding state immunity statute barring tort liability of a parole board that had released an inmate who subsequently tortured and murdered a fifteen-year-old girl)).

²⁰¹. Id. at 790.

²⁰². See Cospito v. Heckler, 742 F.2d 72, 80-82 (3d Cir. 1984), for a case similar on its facts to and following Town Court, but intimating a different result in situations involving nontransferable government benefits or the unavailability of another facility for the patients.
ing, the interest in the condemned tenancy is completely destroyed.

4. **Application of the Eldridge test**— In the absence of an emergency or other exception that permits circumvention of procedural due process, a court may decide to apply a form of the **Eldridge** balancing test to determine whether due process for tenants is required in police power condemnation proceedings.

The first **Eldridge** factor, "the private interest," is substantial in the case of tenants facing condemnation of their building. Their interest is "keeping a roof over their heads." The second **Eldridge** factor, "the risk of erroneous deprivation" under existing condemnation procedures, is more difficult to calculate. If the owner of a building vigorously and in good faith contests the condemnation, the risk of erroneous condemnation seems quite low. But when an owner prefers condemnation as a means to increase profits or colludes with the condemning agency, the risk of erroneous deprivation may be quite high. In any event, the tenant's substantial interest probably outweighs even a minimal risk of erroneous deprivation.

On the other hand, the third **Eldridge** factor, "the Government's interest" in police power condemnations, is also substantial. State and municipal power to abate nuisances, to enforce housing and sanitation codes, and to eliminate "urban blight" is necessary to protect the public health and safety, and to remedy problems of urban housing degeneration.

In the final analysis, the appropriateness of procedural due process requirements in police power condemnations may turn, under an **Eldridge** analysis, on how to balance the purposes and

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203. See supra Part III-B-1.
204. As Justice Blackmun has noted, it is well recognized that the Due Process Clauses of the United States Constitution grew out of the "law of the land" provision of Magna Carta and its later manifestations in English statutory law. That the home was at the center of those property interests historically sought to be protected by due process is underscored by the fact that the phrase "due process of law" first appeared in the following codification: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 792 n.2 (1980) (Blackmun, J., concurring) (quoting 28 Edw. III, ch. 3 (1354)).

For a more expansive treatment of this factor, see Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.L.-C.R. L. Rev. 557, 562 (1988). Scherer seems to concede too quickly, however, that the **Eldridge** test must apply.

205. See supra notes 8-10 and accompanying text.
206. See Scherer, supra note 204, at 573.
207. See supra text accompanying notes 19-27.
severity of a specific kind of police power enforcement against a tenant's right to a home. The difficulty of comparing these two general interests of the state and the tenant favors a presumption of tenants' procedural rights to notice and the opportunity for a hearing. This presumption might be made rebuttable by a showing of an extraordinary governmental interest, such as an imminent threat to public health or safety implicating the emergency exception. Courts should not, however, find routine condemnations, such as those in the interest of the enforcement of housing codes or "urban renewal," to fit this exceptional category. Courts should therefore ordinarily view the tenant's interest in a home as outweighing any governmental inconvenience or expense that procedural protection may cause.

C. More Balancing: The Type of Hearing and Kind of Notice Required

Justice Powell has observed that in procedural due process cases "the Court has spoken sparingly about the requisite procedures." He recalls the "truism" that procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but is "flexible and calls for such procedural protections as the particular situation demands." The type of hearing and notice required varies from one setting to another.

1. Type of hearing—As a general rule, "some kind of hearing is required at some time" before a government or its agent can constitutionally deprive a person of a protected property or liberty interest. Judge Friendly outlines several elements characteristic of a hearing in accordance with procedural due process requirements: (1) an unbiased tribunal; (2) notice of the proposed action and the ground for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses, to know the evidence against one, and to

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209. Id. at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

210. Id. (quoting Morrissey v. Brewer, 408 U.S. 571, 481 (1972)).

211. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring) (holding, among other things, that procedural due process requirements applied to prison disciplinary measures, including decisions to impose solitary confinement and to revoke "good-time credit" for satisfactory behavior)).
have a decision based only on the evidence presented; (5) the right to counsel; (6) the making of a record and a statement of reasons for the decision; (7) public attendance; and (8) judicial review.212

One way to accommodate procedural due process requirements in a police power condemnation would require a judicial determination on the merits of the condemnation, perhaps most appropriately in specialized housing courts.213 At minimum, some administrative agency should hold a hearing.

Normal or routine condemnations, then, present a relatively easy case. Tenants should receive the same opportunity for a hearing that owners receive in the jurisdiction,214 usually in a judicial or quasi-judicial forum with evidentiary procedures and the opportunity to have a lawyer present.215 In some states and municipalities, an administrative agency may qualify to stand in as a “neutral” arbiter.

Procedural due process usually requires that a hearing occur before the deprivation of the protected interest takes place.216 An exception to the rule requiring a pre-termination hearing occurs only when “some valid governmental interest is at stake that justifies postponing the hearing until after the event.”217

Whether a governmental interest in a condemnation is substantial enough to permit a post-deprivation hearing depends again on Eldridge balancing. In Eldridge, the Supreme Court

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213. New York City has established perhaps the most powerful specialized housing court, a “housing part” created within the New York City civil court system. N.Y. CITY CIV. CT. ACT § 110 (McKinney Supp. 1989). For discussion of this court, see Rutzick & Huffman, supra note 24. Other cities with specialized housing courts, though with more limited roles, include Baltimore, Boston, Chicago, Detroit, New Orleans, Philadelphia, Pittsburgh, and St. Louis. Id. at 740-41 (citations omitted). For a critique of Detroit’s housing court experiment, see Mosier & Soble, Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit’s Landlord-Tenant Court, 7 U. MICH. J.L. REV. 8 (1973).

214. See supra note 85 and accompanying text.

215. The argument has been advanced that procedural due process should also require a right to appointed counsel on behalf of indigent tenants. See Scherer, supra note 204.

216. As the Supreme Court stated in Bell v. Burson, 402 U.S. 535 (1971): “it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.” Id. at 542 (emphasis in original). For other cases holding that procedural due process requires a hearing before deprivation, see L. Tribe, supra note 116, § 10-14, at 719 n.6.

found a post-deprivation hearing sufficient for cutting off Social Security benefits.\(^{218}\) In other recent cases, the Court has allowed post-deprivation hearings under certain extenuating circumstances.\(^{219}\) These cases can be easily distinguished from the setting of police power condemnations of buildings. Some cases refer to special environments, such as the regulation of minors in public schools.\(^{220}\) Others involve circumstances that make a pre-deprivation hearing virtually impossible.\(^{221}\)

Cases like *Mackay v. Montrym*,\(^{222}\) upholding revocation of a driver's license without a prior hearing for refusal to submit to a breathalyzer test, fall under the emergency exception to full procedural due process protections.\(^{223}\) Because some state statutes may describe an “emergency” in terms of “slum,” “ghetto,” or “blighted” housing,\(^{224}\) a court could possibly find a “statutory emergency” and dispense with the requirement for a pre-deprivation hearing.

But such an approach would ignore the important interests and expectations of tenants. A poor tenant may prefer to put up with substandard housing in a slum or a ghetto to living on the street, moving into more crowded conditions with relatives or friends, or finding another place to live. Absent immediate danger to public health or safety, the importance of the tenant's interest in a home should outweigh supposed statutory emergencies. As then Justice Rehnquist noted, cases falling under the emergency exception allowing post-deprivation hearings recognize “the necessity of quick action by the State or the impracticability of providing any meaningful predeprivation process.”\(^{225}\)

He then observed that “[o]ur past cases mandate that some kind

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218. See supra text accompanying note 188-90.
220. Ingraham v. Wright, 430 U.S. 651 (1977) (permitting corporal punishment without a prior hearing); Goss v. Lopez, 419 U.S. 565, 567 (1975) (requiring a hearing for a temporary suspension from school “either prior to suspension or within a reasonable time thereafter”).
223. See supra Part III-B-2. See also Barry v. Barchi, 443 U.S. 55 (1979) (revocation of horse trainers license permitted without prior hearing when post-race urinalysis showed horse had been drugged).
of hearing is required at some time before a State finally deprives a person of his property interest."

In a police power condemnation, a pre-deprivation hearing is necessary because the condemnation itself deprives the tenants of their property interest. In addition, only a pre-deprivation hearing provides tenants with remedies such as enforcement orders to repair or otherwise preserve the tenancies. Where deprivations are "truly irreversible," the "right to notice and a hearing . . . [must] be granted at a time when the deprivation can still be prevented." Exceptions to the procedural due process requirement of a pre-deprivation hearing in the context of police power condemnations of buildings should therefore apply only when a real, specific and immediately dangerous emergency occurs.

2. Form and timing of notice— The Supreme Court has recognized that a hearing "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." As this language suggests, notice is also a vital element of procedural due process. Because notice ordinarily accompanies a hearing, tenants faced with police power condemnations should claim some opportunity for a hearing to make out a related claim for notice.

Procedural due process requires that notice of a hearing be given in writing. The notice should also be written in a language that a recipient can reasonably be expected to understand. In addition, the notice must state "the charges or basis for government action." Notice of a police power condemna-

226. Id. at 540.
227. See supra text accompanying notes 6-10, 32.
230. For an argument that notice may be procedurally required even in the absence of a prior hearing, see DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986) (requiring notice, but not a hearing, to tenants before termination of public utilities at a landlord's request).
231. Friendly, supra note 212, at 1280 & n.76. After remarking "that notice [must] be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it," Judge Friendly notes that "[s]ubsidiary questions are whether the notice must be written and how long prior to the hearing it must be given." Id. Oral notice may sometimes be constitutionally sufficient. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (finding either written or oral notice to be sufficient, at the discretion of the administrative official, in cases of hearings for suspension from school).
tion must therefore set forth the grounds for the condemnation. Failing to give adequate notice of grounds for condemnation would deprive tenants of their vital interest in "an opportunity to present reasons why the proposed action should not be taken." Finally, the notice should describe what will occur at the hearing.

Several Supreme Court cases are instructive as to the form of the notice required. In *Mullane v. Central Hanover Bank & Trust Co.*, the Court affirmed that the notice "must be of such nature as reasonably to convey the required information," affording a "reasonable time for those interested to make their appearance.

Two later Supreme Court cases involving eminent domain condemnations followed *Mullane*. Both *Walker v. City of Hutchinson* and *Schroeder v. City of New York* held notice of eminent domain proceedings by publication in local newspapers, even if supplemented by the posting of notices along the property affected, constitutionally insufficient. Both cases considered use of the mail, a reliable and reasonable alternative, constitutionally required.

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234. Friendly, supra note 212, at 1281.
235. See L. Tribe, supra note 116, § 10-15, at 732 n.6 (notice "must include not only information that a hearing is about to occur but information about what the hearing will entail—including both 'the nature of the charges [and] also . . . the substance of the relevant supporting evidence'") (quoting Brock v. Roadway Express, 481 U.S. 252 (1987)) (emphasis in original).
237. Id. at 314 (citations omitted). *Mullane* held unconstitutional a statute allowing notice by publication of adjudication affecting financial interests in a common trust fund, when the names and addresses of the holders of these interests were known, making notice by mail easily possible. Justice Jackson's majority opinion in *Mullane* argued that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at 315. He found notice by publication "inadequate" compared to notice by mail
not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication.

Id. at 319.
238. 352 U.S. 112 (1956).
240. *Walker* involved the condemnation of part of an owner's property for the purpose of widening a city's streets. Finding notice by publication to be constitutionally insufficient, the Court reasoned:

In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such
Greene v. Lindsey,241 also following Mullane, held that in forcible entry and detainer actions, notice given solely by posting a copy on the tenant's door, even after a personal service attempt had failed, did not satisfy procedural due process. The Court again virtually required notice by mail as a constitutional minimum.242

Finally, Mennonite Board of Missions v. Adams,243 following Mullane and Greene, extended the same rationale to notice of a tax sale of real property to a mortgagee, holding notice by publication and by posting in a county courthouse constitutionally insufficient.244 Mennonite concluded with an even broader holding than Mullane or Greene: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."245

In the situation of tenants faced with police power condemnations, notice by mail as well as direct posting appears constitutionally required unless personal service is accomplished. Condemning officials, who may have difficulty ascertaining tenants'
names, at least know the address of the building. They therefore could fulfill the form of notice requirement by mailing letters to “Residents” or “Occupants” addressed to the subject building, as well as by posting notice on the tenants’ doors.

As for the time period required for the notice, case law suggests only that notice must grant a “reasonable time” to prepare for the hearing.246 In gauging the necessary time period between giving notice and the hearing itself, courts “look to the realities of the case” involved.247

In determining reasonable tenant notice in police power condemnations, courts should consider traditional standards applied when tenants are removed. Federal law requires notice of any action taken pursuant to a federally-funded program that may displace a person a full ninety days before the action is scheduled to take place.248 Where it applies, this federal requirement takes care of the timing problem. In the absence of this requirement, analogy to state statutes and common law requirements for giving notice to end a tenancy may be appropriate.249 It seems reasonable to suggest that the same period of time required for a private landlord to end a particular tenancy under state law should apply when the state seeks to end the tenancy through police power condemnation, unless an emergency justifies a shorter time.250 Another solution to the timing problem would give tenants the same time for notice of the hearing as that given to owners under almost all state statutes.251

CONCLUSION

This Note has shown that a majority of states do not provide tenants of buildings the same procedural protections in police power condemnations as provided to owners and landlords. Even states with some built-in statutory protections often leave loop-

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249. See supra text accompanying note 142.
250. However, because Lindsey v. Normet, 405 U.S. 56 (1972), upheld the constitutionality of a forcible entry and wrongful detainer statute allowing only four to six days notice before a hearing, id. at 64-67, courts may not find more than several days notice constitutionally required. See supra note 132.
251. See supra note 85 and accompanying text.
holes that enable municipalities or other authorized agencies to ignore these protections. In particular, home rule provisions can allow the enactment of ordinances regulating police power condemnations that lack procedural protections. This Note proposes that tenants receive the same procedural protections given to owners when threatened with police power condemnation. They should participate at the earliest stages in hearings aimed at determining the appropriateness of demolition or evacuation. State legislatures therefore should give tenancies full protection in these situations. In the absence of protections from statutes or ordinances, courts should recognize the tenants' interests as constitutionally protected, requiring notice and opportunity for a hearing under the due process clause of the fourteenth amendment.