THE "PUBLIC USE" REQUIREMENT IN EMINENT DOMAIN LAW: A RATIONALE BASED ON SECRET PURCHASES AND PRIVATE INFLUENCE

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This Article provides a rationale for understanding and interpreting the "public use" requirement within eminent domain law. The rationale is based on two factors. First, while the government often needs the power of eminent domain to avoid the problem of strategic holdout, private parties are generally able to purchase property through secret buying agents. The availability of these undisclosed agents makes the use of eminent domain for private parties unnecessary and indeed undesirable. The government, however, is ordinarily unable to make secret purchases because its plans are subject to democratic deliberation and thus publicly known in advance. Second, while the use of eminent domain for traditional public objectives does not create a danger of corruption, the use of such power to benefit private parties invites the potential for inordinate influence. Private parties that directly benefit from takings can obtain a concentrated benefit and often pay little for acquiring properties. These parties thus have a strong incentive to influence the eminent domain process for their own advantage. In light of this analysis, the Article finds that the Supreme Court's recent decision in Kelo v. City of New London *and decisions in several other important cases are problematic. The Article concludes that the theory of public use based on secret purchases and private influence provides a socially desirable, judicially administrable, and constitutionally legitimate mechanism for distinguishing between public and private uses and promoting economic development.*

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[W]hen we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion.[1]

Further efforts at providing a precise definition of "public use" are doomed to fail . . ..[2]

INTRODUCTION

Despite numerous attempts to understand the Public Use Clause,[3] both courts and legal commentators have failed to provide an intellectually compelling interpretation.[4] The primary controversy has been whether, or under what circumstances, the state may use the power of eminent domain for the benefit of a *private party* by deeming the party's use a *public use.* One view holds that a taking requires ei-

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1 Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606 (1908).

2 2A NICHOLS' THE LAW OF EMINENT DOMAIN § 7.02[5], at 7-46 (Julius L. Sackman et al. eds., rev. 3d ed. 1995) [hereinafter 2A NICHOLS].

3 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The Fourteenth Amendment incorporates the public use requirement against the states. *See* Chi. Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

4 *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 997 (1999) (concluding that "Supreme Court decisions over the last three-quarters of a century have turned the words of the Takings Clause into a secret code that only a momentary majority of the Court is able to understand"); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 605–06 (1949) [hereinafter *Requiem*] (describing a "massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification").

ther public ownership or public access. Under this view, the government may utilize eminent domain for a post office, airport, or highway.[5] A contrasting view holds that eminent domain can be justified for any private use so long as the taking ostensibly produces a general public benefit. Under this view, a taking might be justified to enable a private party to develop real estate, build a factory, or construct a stadium or casino.[6]

Concurring predominantly with this latter view, the U.S. Supreme Court and many lower federal and state courts have defined "public use" to include any "public purpose" and have upheld a broad spectrum of private projects as consistent with this requirement.[7] As a result, the number of takings for private parties has increased in recent years.[8] In Riviera Beach, Florida, for example, a $1.25 billion redevelopment project may demolish 1,700 homes and 300 businesses and displace 5,100 people.[9] In San Jose, California, one-tenth of the city's total area, which includes one-third of its population, is currently subject to condemnation.[10] On a smaller scale, one Florida family—already outraged that its home was being condemned to build a golf course—was informed that the home, instead of being demolished,

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5 *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1876) (upholding condemnations for post offices); City of Kansas City v. Hon, 972 S.W.2d 407 (Mo. Ct. App. 1998) (upholding condemnations for airport); Arnold v. Covington & Cincinnati Bridge Co., 1 Duv. 372 (Ky. 1864) (upholding condemnations for highways).

6 *See, e.g.*, City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003) (upholding condemnations for casino consortium); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (upholding condemnations for General Motors factory); N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 545 (N.J. 1972) (upholding statute permitting condemnations for sports stadiums); Courtesy Sandwich Shop v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963) (upholding condemnations for World Trade Center).

7 *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."); Gamble v. Eau Claire County, 5 F.3d 285, 287 (7th Cir. 1993) ("We can find no case in the last half century where a taking was squarely held to be for a private use.").

8 *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003) [hereinafter BERLINER, PUBLIC POWER], *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (documenting over 10,000 actual or threatened cases of private takings from 1998 through 2002); *see also* DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN IN THE POST-*KELO* WORLD (2006), *available at* http://castlecoalition.org/pdf/publications/floodgates-report.pdf (documenting over 5,000 actual or threatened cases of private takings between June 2005 and June 2006).

9 *See* Thomas R. Collins, *Many Businesses Feeling Put Out By Riviera Plans*, PALM BEACH POST, Jan. 6, 2003, at 1A; Scott McCabe, *Residents Vow to Fight Riviera Plan*, PALM BEACH POST, Dec. 17, 2001, at 1B.

10 *See* BERLINER, PUBLIC POWER, *supra* note 8, at 3; *see also* Evans v. City of San Jose, 128 Cal. App. 4th 1123, 1133–34 (Cal. App. 4 Dist. 2005) (describing the twenty-two neighborhoods included in the "Strong Neighborhoods Initiative").

would be converted into the golf course manager's new living quarters, which the court upheld as a public necessity.[11]

While many commentators agree that the current takings doctrine can be used to justify "virtually any exercise of the eminent domain power,"[12] a number of recent cases, including the Michigan Supreme Court's overruling of *Poletown Neighborhood Council v. City of Detroit*[13] and the U.S. Supreme Court's decision in *Kelo v. City of New London*,[14] have necessitated a reexamination of this issue. In light of these cases, this Article analyzes the meaning that ought to be given to the public use requirement to advance social welfare. The Article develops a judicially administrable method of interpreting public use based on two important yet previously underappreciated factors: namely, that private parties can ordinarily assemble property using *secret buying agents*—meaning that, unlike the government, private parties usually do not need the power of eminent domain to overcome the problem of strategic holdout—and that, unlike takings for traditional public objectives, takings for private projects invite the potential for *inordinate private influence* as private parties seek to use the eminent domain process for their own advantage.

One of the major plausible justifications for allowing private parties to benefit from the use of eminent domain is the same as that for the government: if property has to be purchased, this power may be needed to overcome the "holdout" problem caused by strategic sellers.[15] In the absence of eminent domain, an assembler would confront this holdout problem in cases involving the assembly of multiple properties for a single project. Potential sellers, knowing that their individual properties are each necessary for the entire project, could "hold out" in order to obtain an inflated price. This strategic behavior could prevent the transaction (and, consequently, the entire project)

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11 *See* Zamecnik v. Palm Beach County, 768 So. 2d 1217 (Fla. Dist. Ct. App. 2000) (per curiam); *see also* Marc Caputo, *County to Seize Couple's Home so Golf Manager Can Have It*, PALM BEACH POST, May 6, 2000, at 1A.

12 Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 212–13 (2004).

13 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

14 545 U.S. __, 125 S. Ct. 2655 (2005).

15 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40–42 (2d ed. 1977) (maintaining that eminent domain is justified in economic terms only in the context of certain holdout situations); Richard A. Epstein, *Holdouts, Externalities, and the Single Owners: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993) (stating that eminent domain is used "typically to prevent holdouts"); Thomas Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1570 (1986) (book review) (pointing out that eminent domain "traditionally has been employed to promote a more efficient allocation of resources hy overcoming holdouts and free riders"); *see also infra* note 107 (collecting cases).

from occurring.[16] According to the conventional wisdom, private parties seeking to assemble multiple properties are just as afflicted by holdouts as the government and thus just as much in need of the power of eminent domain to overcome the problem.

In this Article, however, I explain that takings for the benefit of private parties are generally unnecessary—even if a private project potentially also has a public benefit—because private parties can avoid the holdout problem using secret buying agents. These undisclosed agents[17] overcome the holdout problem by purchasing property without revealing the identity of the assembler or the nature of the assembly project to existing owners. Moreover, secret buying agents actually promote economic development because, unlike eminent domain, which may cause an erroneous condemnation, buying agents facilitate only socially desirable transfers.

By contrast, the state is generally unable to use buying agents for its own projects. The transparency of democratic deliberation and the nature of public scrutiny prevent the government from maintaining the secrecy necessary for the effective utilization of buying agents. Thus, while eminent domain is ordinarily unnecessary for private parties who can obtain and assemble property through buying agents, the takings power is necessary for the state. Perhaps surprisingly, this fundamental distinction has not been properly appreciated. Although some commentators have noted in passing that private parties sometimes employ buying agents,[18] these commentators have not recognized the importance of this stratagem. Significantly, these

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16 *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW ch. 6, § 2.3, at 124 (2004) ("[T]he problem of an impasse in bargaining may become severe when there are many private owners who own parcels and when, if any one of them does not sell, the whole project would be seriously affected or halted."); EUGENE SILBERBERG, PRINCIPLES OF MICROECONOMICS 288 (2d ed. Pearson Custom Publishing 1999) (1995)(describing the classic holdout problem if an assembly project becomes public knowledge); Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 468–69 (2003) (same).

17 *See generally* Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1971–74, 1990 (1987) (describing the law of undisclosed agency); Francesco Parisi, Symposium, *Freedom of Contract and the Laws of Entropy*, 10 SUP. CT. ECON. REV. 65, 81–83 (2003) (same).

18 *See, e.g.*, POSNER, *supra* note 15, at 43–44 (noting that shopping center developers and others can overcome holdout problems without using eminent domain); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81 (1986) (noting that some who object to eminent domain for assembling property "point out that real estate developers and others are frequently able to assemble such parcels by using buying agents, option agreements, straw transactions, and the like"); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 479 (1976) (explaining that "[i]f holdout behavior is anticipated," private parties will incur "[e]xpenditure[s] on devices to circumvent or eliminate the incentive to hold out[,] . . . includ[ing] concealment of the identity of the buyer, the purpose and extent of the planned assembly and prices paid for parcels, and the use of brokers").

commentators have not noticed that, because the government usually cannot employ this technique, secret purchases provide a mechanism for distinguishing between public and private uses.

While the use of undisclosed agents to assemble land might at first seem implausible, private parties can (and indeed, already do) use buying agents to overcome the holdout problem. Harvard University, for example, working through a real estate development company, used secret agents to avoid strategic holdouts and purchase fourteen parcels of land for $88 million.[19] Similarly, Disney has used buying agents in Orlando, Florida, and Manassas, Virginia, to assemble thousands of acres for its theme parks.[20] The Sixth Circuit has pointed out that, among shopping center developers and real estate purchasers, the use of these agents is a "common arms-length business practice."[21] Even the U.S. Supreme Court recently recognized that "private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable projects."[22]

The use of eminent domain for private parties, however, is not only unnecessary but also socially undesirable because eminent domain, unlike acquisitions through secret purchases, sometimes leads to inefficient transfers. Because courts have no mechanism for determining how much existing owners actually (i.e., subjectively) value their property, courts routinely ignore actual value and instead rely on a property's "fair market value" to determine "just compensation" for the owners' loss.[23] However, because market value neither calculates nor compensates for a taking's full costs (i.e., the actual value to the existing owners), a socially undesirable transfer may occur whenever the existing owners' actual value deviates from the court-determined objective value. As a result, eminent domain may force a transfer

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19 *See* Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth $88M in Allston*, BOSTON GLOBE, June 10, 1997, at A1 (explaining that Harvard bought land "without revealing its identity to the sellers, residents, local politicians, or city officials because property owners would have drastically inflated the prices if they knew Harvard was the buyer").

20 *See* Mark Andrews, *Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K-2 ("Working under a strict cloak of secrecy, real estate agents who didn't know the identity of their client began making offers to landowners"); Tim O'Reiley, *Playing Secret Agent for Mickey Mouse*, LEGAL TIMES (Wash., D.C.), Jan. 10, 1994, at 2 (describing "Disney's elaborate scheme to hide its identity as it amassed about 3,000 acres for a proposed theme park in Northern Virginia").

21 Westgate Vill. Shopping Ctr. v. Lion Dry Goods Co., No. 93-3760, 1994 WL 108959, at *7 (6th Cir. Mar. 30, 1994) (noting that using secret buying agents to develop shopping centers is "a common arms-length business practice that has to do with keeping real estate prices from escalating").

22 Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2668 n.24 (2005).

23 *See infra* notes 136–43 and accompanying text.

where the existing owners value the land more than the private assembler.

Secret buying agents eliminate this risk of erroneous condemnation because, unlike eminent domain, buying agents facilitate a transfer if and only if the transfer is socially desirable. Voluntary exchange using buying agents allows the existing owners' actual value to be taken into account while preventing existing owners from strategically inflating that value. Consequently, a transfer will occur only if the value to the assembler is greater than the actual value to the existing owners. Requiring voluntary transactions through secret purchases thus enables mutually beneficial transactions to occur, while preventing the socially undesirable transactions that eminent domain sometimes allows. Secret buying agents therefore provide a better mechanism than eminent domain for promoting economic development because buying agents combine the primary advantage of eminent domain—namely, overcoming bargaining problems—with the primary advantage of consensual exchange—namely, ensuring that transfers are socially desirable.

The use of eminent domain for private parties should also be disfavored for a second reason: private takings allow inordinate private influence to distort the eminent domain process. In a taking primarily for a private benefit (e.g., the assembly of land for a real estate development), the single beneficiary of the taking (the developer) can obtain a relatively concentrated benefit. By contrast, in a taking primarily for the public benefit (e.g., the acquisition of land for a new highway), the beneficiaries of the taking (the future users of the road) are more numerous and can obtain only a relatively dispersed benefit. As a result, private parties that would directly benefit from takings have a stronger incentive than the general public to subvert the takings power for their own advantage in ways that are not necessarily socially desirable.

Using eminent domain for private parties tends to encourage two additional types of inordinate influence. First, private parties that directly benefit from the state's use of eminent domain are typically not required to reimburse the state for the cost of the condemnations.[24] Because private actors can use eminent domain to acquire land costlessly for their own objectives, these actors have an incentive to engage in excessive takings. Second, potential private beneficiaries can exploit disparities in legal and financial resources to obtain the state's condemnation authority. Indeed, while the primary beneficiaries of private takings tend to be real estate developers and corporations, the primary victims of these takings tend to be the

24 *See infra* notes 185–88 and accompanying text.

economically disadvantaged, the elderly, and racial and ethnic minorities.[25] Hence, because of the increased potential for inordinate private influence as well as the availability of buying agents, eminent domain is not only unnecessary for transfers between private parties but also may allow private transfers that are detrimental to economic development.

Finally, this Article analyzes several potential counterarguments to the foregoing rationale for the public use requirement. The primary objection involves the possibility of positive externalities—i.e., benefits to the community that parties to the transaction cannot internalize.[26] In certain situations in which a significant externality exists, a project's private benefit may not be substantial enough to induce private parties to assemble property even though the externality makes the project socially desirable. While a common solution to this type of externality is the use of a public subsidy,[27] an ex ante subsidy may not maintain the anonymity of secret buying agents. However, an ex post subsidy may be feasible to provide private parties with the sufficient ex ante incentive to undertake the project through secret purchases. The Article addresses positive externalities as well as several other counterarguments regarding unwilling sellers, timing problems, collusion, distrust, and resentment, and analyzes under what circumstances, if any, these objections would alter the preceding analysis.

Overall, this Article suggests that the current public use test, focusing as it does on the character of the use, is misconceived because takings for private parties are unnecessary and indeed often socially undesirable. The Article thus reexamines the public use requirement and articulates a new theory based on secret purchases and private influence. Part I reviews the constitutional framework, including two recent developments: the overruling of *Poletown* and the holding in *Kelo*. Part II, which contains the heart of the economic analysis, examines secret buying agents and inordinate private influence, as well as several potential counterarguments. Part III applies this economic analysis to the two most common situations: the assembly of land for economic development, illustrated by *Kelo*, and the elimination of urban blight, illustrated by *Berman v. Parker*.[28] Part III also explains why the traditional exception allowing private parties to use eminent domain to assemble land for instrumentalities and utilities supports, rather than undermines, the new theory. The Article concludes that

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25 *See infra* notes 194–98 and accompanying text.

26 *See generally* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 751 (15th ed. 1995) (discussing externalities); THE MIT DICTIONARY OF MODERN ECONOMICS 146 (David W. Pearce ed., 4th ed. 1992) (same).

27 *See* A.C. PIGOU, THE ECONOMICS OF WELFARE ch. 9, § 13, at 192–94 (4th ed. 1932).

28 348 U.S. 26 (1954).

this new rationale is not only socially desirable, judicially administrable, and constitutionally legitimate but also superior to the status quo as a mechanism for distinguishing between public and private uses in both legislative and judicial decisionmaking.

I
THE CONSTITUTIONAL FRAMEWORK

A. A Short History of "Public Use"

Three major themes recur throughout eminent domain jurisprudence. First, courts have widely assumed that there is no practicable mechanism for distinguishing between public and private uses. Second, courts, believing that legislatures are better situated to determine which projects will benefit the public, have almost universally deferred to legislative determinations of public use. Third, courts have assumed that eminent domain is necessary for implementing private projects with incidental public benefits because, otherwise, the holdout problem would prevent such projects from occurring. This Article questions each of these assumptions. But before exploring the role of buying agents and private influence in this regard, a brief overview of the Public Use Clause and the cases interpreting the public use requirement is necessary for understanding the nature of the problem.

The government's sovereign authority to seize property for "public use" if it provides "just compensation" originated at English common law and appeared in America as early as the seventeenth century.[29] In colonial America, government officials invoked the power of eminent domain infrequently, due in part to the relatively limited number of uses for eminent domain at the time.[30] However, James Madison, who drafted the original language of the Public Use Clause, feared that the government's power to take property, if left unrestricted, could jeopardize private property rights.[31] As a result, the drafters of the Bill of Rights adopted Madison's proposal as part of

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29 *See* 2A NICHOLS, *supra* note 2, § 7.01[3], at 7-16 ("The principle that private property may be taken for public uses can be traced back to English common law where it was presumed that the king ultimately held the title to all the land. This meant that if the king needed the property, he was permitted to take it.").

30 *See Requiem*, *supra* note 4, at 600 ("Prior to the adoption of the federal and early state constitutions, governments rarely needed privately owned land.").

31 *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314–15 (1996) (noting that Madison's "concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property" and that "by 1787 a decade of state legislation had enabled Madison to perceive how economic and financial issues could forge broad coalitions across society, which could then actively manipulate the legislature to secure their desired ends").

the Fifth Amendment, which limits eminent domain to the taking of "private property . . . for public use."[32]

The Supreme Court did not decide a case involving the federal government's use of eminent domain until 1875.[33] Even in this first case, the Court noted the connection between eminent domain and the holdout problem:

> If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, . . . the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen.[34]

In several cases in the late nineteenth and early twentieth century, the U.S. Supreme Court indicated that takings for private parties with incidental public benefits violated the Public Use or Due Process Clause.[35] The view of these early Supreme Court decisions, as well as most nineteenth century jurists, was that the use of eminent domain for these purposes violated the public use requirement.[36]

However, due in part to unprecedented technological innovation during the second half of the nineteenth century, private corporations increasingly began to seek (and sometimes obtain) the power to condemn property for their own objectives.[37] As a result, the Supreme Court, led by Justice Oliver Wendel Holmes, Jr., expanded the definition of public use and repudiated the previous interpretation, which required actual use by the public.[38] Indeed, in *Fallbrook Irriga-*

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32 U.S. CONST. amend. V.

33 *See* Kohl v. United States, 91 U.S. 367 (1875).

34 *Id.* at 371.

35 *See, e.g.*, Clark v. Nash, 198 U.S. 361, 369 (1905) ("[W]e do not . . . approv[e] of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."); Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law . . . .").

36 *See, e.g.*, THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 654 (1868) ("[T]he due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it."); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 178 (1985) ("The nineteenth century view, abstractly considered, was that it was a perversion of the public use doctrine to acquire land by condemnation for these purposes.").

37 *See* William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 932 (2004) ("As new technologies changed modes of transportation and production, private firms were often lent the right of eminent domain." (citing JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 75–78 (2d ed. 1992))).

38 *See* Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) (Holmes, J.) (concluding that "[t]he inadequacy of use by the general public as a universal test is established"); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527,

tion District v. Bradley,[39] the Court interpreted the Public Use Clause to require only that the legislature posit a conceivable "public purpose."[40] At the same time, the Court announced in several cases that legislative determinations of public use should receive a significant degree of deference from the Judiciary.[41] Indeed, after the Second World War, the Supreme Court abandoned almost any judicial limitation on the use of eminent domain by suggesting that a legislative determination of public use foreclosed judicial review.[42]

In 1954, in the seminal case of *Berman v. Parker*,[43] the Court reviewed a challenge to the constitutionality of the District of Columbia Redevelopment Act of 1945.[44] The Act targeted blighted areas in the southwest portion of the nation's capital.[45] The appellants owned and operated a department store within the condemnation zone.[46] Writing for a unanimous Court, Justice William Douglas upheld the condemnation even though the redevelopment zone included nonblighted property. The Court asserted that, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[47] The holding of *Berman* confirmed the Court's broad definition of public use and its deference to legislative determinations.[48]

Thirty years later, in *Hawaii Housing Authority v. Midkiff*, the Court considered Hawaii's efforts to remedy the islands' problem of concentrated land ownership.[49] Hawaii permitted tenants to request governmental condemnations of their landlord's property and then allowed

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531 (1906) (Holmes, J.) (stating that earlier cases have "recognized the inadequacy of use by the general public as a universal test" (citing *Clark*, 198 U.S. at 369)).

39 164 U.S. 112 (1896).

40 *Id.* at 161 (noting that eminent domain could be conferred if "property . . . was to be taken for a public purpose"); *see also Mt. Vernon-Woodberry*, 240 U.S. at 32 (equating "public use" with "public purpose").

41 *See* Old Dominion v. United States, 269 U.S. 55, 66 (1925) (Holmes, J.) (emphasizing that when "Congress has declared the purpose to be a public use[,] . . . [i]ts decision is entitled to deference until it is shown to involve an impossibility"); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 709 (1923) (asserting that the power of appropriating private property for public use "resides in the Legislature" and is "not a judicial question").

42 *See* United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551–52 (1946) (stating that "it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority").

43 348 U.S. 26 (1954).

44 *See* D.C. CODE §§ 6-301.01 to 6-301.20 (2001).

45 *See Berman*, 348 U.S. at 30.

46 *Id.* at 31.

47 *Id.* at 32.

48 *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1282 (1985) (pointing out that "the *Berman* Court not only gave an almost unlimited meaning to public use, it also drew a very limited role for courts reviewing whether such actions were taken in the public welfare").

49 467 U.S. 229, 231–32 (1984).

these tenants to purchase the property for a nominal fee.[50] In another unanimous opinion, Justice Sandra Day O'Connor upheld the condemnations and reiterated that the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[51] Concluding that the public use requirement is "coterminous with the scope of a sovereign's police powers,"[52] the Court seemed to imply, as many commentators have observed, that review of legislative determinations of public use requires only minimal judicial scrutiny under the rational basis standard (which applies to all other economic legislation).[53] The Court's deferential approach in *Midkiff* signaled that almost any governmental taking, including a taking involving a private transfer, would qualify as a legitimate public use.[54]

B. The Overruling of *Poletown*

Like the earliest federal decisions, many state courts, in interpreting the public use requirements in their own state constitutions,[55] originally favored a definition of public use that required public ownership or public access.[56] These courts prohibited certain compulsory

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50 *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 481 (2001) (describing the Hawaii Land Reform Act of 1967).

51 *Id.* at 241 (quoting United States v. Gettysburg Elec. R.R. Co., 160 U.S. 668, 680 (1896)).

52 *Id.* at 244.

53 *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) ("[T]he modern understanding of 'public use' holds that any state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking . . . ."); SULLIVAN & GUNTHER, *supra* note 50, at 480 (2001) ("[T]he contemporary Court has extended the same deference toward legislative determinations of what constitutes 'public use' as it now does under economic due process scrutiny."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987) ("[T]he public use requirement has been rendered effectively unenforceable, much like the rationality requirement of the due process clause post-*Lochner*.").

54 *See* Mark C. Landry, Note, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 TUL. L. REV. 419, 430 (1985) ("Justice O'Connor . . . has so narrowed the scope of judicial review that overturning a legislatively authorized taking may be logically and practically impossible."); Thomas J. Loyne, Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME L. REV. 388, 404 (1985) ("The [*Midkiff*] decision . . . almost ensures that all government takings will be upheld.").

55 Forty-nine states have constitutional restrictions similar to the Public Use Clause of the Fifth Amendment. *See* Michael A. Lang, Note, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 450 (2006). *See, e.g.*, CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."); N.Y. CONST. art. I, § 7(a) ("Private property shall not be taken for public use without just compensation.").

56 *See* Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 901–05 (2004) (discussing the "public use" doctrine in the nineteenth century); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 504–10 (2006) (discuss-

transfers for private parties even if such transfers had the potential to provide incidental public benefits.[57] Several state courts adopted this more restrictive interpretation because of concerted efforts by private parties to capture eminent domain for their own advantage.[58] These state courts also recognized the connection between eminent domain and the holdout problem. The New Jersey Supreme Court, for example, noted that "the exercise of the power of eminent domain is absolutely necessary" for building state highways because "[i]f this were not the law, then a single individual could hold up a state project."[59]

For most of the twentieth century, however, state courts followed the U.S. Supreme Court's approach of defining public use as "public purpose" and deferring to legislative determinations of public use.[60] In the wake of *Berman*, for example, many state courts upheld the use of eminent domain for private parties in urban renewal programs aimed at eliminating blight.[61] Subsequently, many state courts expanded the definition of public use to include promoting economic development even in the absence of blight.[62]

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ing the meaning of "public use" in the nineteenth and early twentieth centuries). *But see* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 619–24 (1940) (discussing early state cases broadly defining "public use"); *cf.* Cohen, *supra*, at 507 (noting "some scholarly disagreement over how widespread this use-by-the-public view ever became").

57 *See, e.g.*, Minn. Canal & Power Co. v. Koochiching Co., 107 N.W. 405, 411–14 (Minn. 1906) ("[I]ndirect advantages to the general public do not justify the exercise of the power of eminent domain."); Loughbridge v. Harris, 42 Ga. 500, 505 (1871) (invalidating public use determination even though purposes were "in a general sense for the public").

58 *See* Cohen, *supra* note 56, at 507 (explaining that the "impetus" behind the emergence of the more restrictive view was "increasing concern among courts . . . that legislatures had been co-opted into favoring powerful private interests over the public good"); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 10 (2003) (explaining that "an increasing number of judges attempted to restrict the use of eminent domain by private parties" because they "[w]orried about the rise of 'class legislation' that favored certain interests over the public good"); *cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 260 (1977) (noting that "a widespread fear of legislatively authorized redistribution of wealth began to overshadow the enthusiasm for eminent domain").

59 Everett W. Cox Co. v. State Highway Comm'n, 133 A. 419, 513 (N.J. 1926).

60 *See* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2662 (2005) ("[W]hile many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time."); *see also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 12.4.2, at 1182 (3d ed. 2002) ("[M]ost state supreme courts have interpreted their state constitutions in a manner consistent with the federal interpretation . . . .").

61 *See, e.g.*, Mayor of Balt. v. Chertkof, 441 A.2d 1044, 1055 (Md. 1982) (relying on *Berman* to conclude that "an urban renewal ordinance may lawfully command the condemnation of private industrial property for public use in pursuance of a genuine urban renewal plan").

62 *See, e.g.*, City of Shreveport v. Chanse Gas Corp., 794 So. 2d 962, 973 (La. Ct. App. 2001) (relying on *Berman* and *Midkiff* to conclude that "economic development, in the form of a convention center and headquarters hotel, satisfies the public purposes and pub-

These precedents culminated in *Poletown Neighborhood Council v. City of Detroit*, which came to be the most influential state case defining public use in the modern era.[63] In *Poletown*, the city of Detroit utilized eminent domain to condemn an entire neighborhood for the construction of a new General Motors manufacturing plant.[64] The affected homeowners argued that the taking constituted an unconstitutional private use because the direct and primary beneficiary of the taking was General Motors. The Michigan Supreme Court, however, upheld the condemnations by concluding that "public use" was interchangeable with "public purpose."[65] The court concluded that "even though a private party will also, ultimately, receive a benefit," a municipality's use of eminent domain to alleviate unemployment and revitalize the local economy constitutes two "essential public purposes."[66]

Relying on *Poletown*, many state courts interpreted their own state constitutions in a similar manner and equated public use with public purpose.[67] As a result, under most state constitutions, as well as the U.S. Constitution,[68] courts generally upheld almost any project as a public use even if a private party received the primary benefit.[69] During the second half of the twentieth century, state courts were somewhat less deferential than federal courts to legislative determinations

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lic necessity requirements of [the state constitution]"); People *ex rel.* City of Urban v. Paley, 368 N.E.2d 915, 920–21 (Ill. 1977) (finding that the public purpose "can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health" but also extends to "[s]timulation of commercial growth and removal of economic stagnation").

63 304 N.W.2d 455 (Mich. 1981) (per curiam).

64 *See* 2A NICHOLS, *supra* note 2, § 7.06[7][c][iv], at 7-183 ("Over 465 acres, 3,500 people, and 1,176 buildings, including 144 businesses, 3 schools, 16 churches, and 1 cemetery were taken by the City of Detroit for a cost exceeding $200 million in order to provide land for a new General Motors facility.").

65 *See Poletown*, 304 N.W.2d at 457 ("[T]he terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit.").

66 *Id.* at 459.

67 *See, e.g.*, Jamestown v. Leevers, 552 N.W.2d 365, 369, 372–74 (N.D. 1996) (discussing *Poletown* and concluding that "the stimulation of commercial growth and removal of economic stagnation . . . are objectives satisfying the public use and purpose requirement"); City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986) (citing *Poletown* and concluding that "revitalization of deteriorating urban areas and the alleviation of unemployment are certainly public goals").

68 *See supra* note 55 and accompanying text.

69 *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354 (1982) ("[T]he arguments deployed [in *Poletown*] in support of the publicness of this venture could be deployed in support of virtually any venture one can imagine."); Susan Crabtree, Note, *Public Use in Eminent Domain: Are There Limits After* Oakland Raiders *and* Poletown?, 20 CAL. W. L. REV. 82, 103 (1983) ("Equating mere public benefit with public use has effectively destroyed public use as a restraint on eminent domain.").

of public use.[70] Indeed, unlike the approach of *Poletown* and its progeny, several state courts at the beginning of the twenty-first century interpreted "public use" less deferentially.[71] These courts also reaffirmed the distinction between public use and public purpose.[72]

More than twenty years after *Poletown*, an opportunity arose for the Michigan Supreme Court to reconsider that decision in *County of Wayne v. Hathcock*.[73] Characterizing *Poletown* as a "radical departure from fundamental constitutional principles," the *Hathcock* court unanimously held that condemnations for a 1,300-acre business park, which would be privately owned and controlled, were unconstitutional under the Michigan constitution.[74] The Court rejected the notion that "a private entity's pursuit of profit was a 'public use' . . . simply because one entity's profit maximization contributed to the health of the general economy."[75] The Court also noted that *Poletown*'s economic-benefit rationale would "validate practically *any* exercise of the power of eminent domain on behalf of a private entity" because "[e]very business, every productive unit in society does . . . contribute

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70 *See* Merrill, *supra* note 18, at 96 (surveying federal and state public use decisions from 1954 to 1985 and concluding that "lower federal courts have been faithful to *Berman*'s deferential standard of review," while "[s]tate courts . . . seem more willing to depart from *Berman*'s virtual abandonment of judicial review"); *see also* Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 REAL PROP. PROB. & TR. J. 251, 274 (2004) (updating Merrill's survey by examining a similar set of decisions from 1987 to 2003 and finding "a modest increase in the percentage of appellate decisions disallowing a taking because of the Public Use Clause").

71 *See* Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) ("[P]ower of eminent domain cannot be used to accomplish a project simply because it will benefit the public."); Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 9 (Ill. 2002) ("[T]o constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement.") (internal quotation marks and citations omitted); Manufactured Hous. Communities of Wash. v. State, 13 P.3d 183, 196 (Wash. 2000) (en banc) ("[T]he use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.").

72 *See Ga. Dep't of Transp.*, 586 S.E.2d at 856 ("The 'public purpose' discussed in [tax and bond revenue] cases is not the same as a 'public use,' a term that is narrowly defined in the context of condemnation proceedings."); *Southwestern Ill. Dev. Auth.*, 768 N.E.2d at 8 ("While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case."); *Manufactured Hous. Communities*, 13 P.3d at 189 ("Case law demonstrates these terms are not synonymous."); *cf.* Comment, *Public Purpose: Role of the Judiciary in Conduct of Home Rule Municipal Affairs*, 11 STAN. L. REV. 788, 790 (1959) ("[E]minent domain and the powers to tax and spend are not necessarily governed by the same considerations; and what constitutes 'public use' for the former is not necessarily a 'public purpose' when applied to the latter.").

73 684 N.W.2d 765 (Mich. 2004).

74 *See id.* at 769–70.

75 *Id.* at 786–87.

in some way to the commonwealth."[76] Because *Poletown* provided the underlying rationale for many state decisions, its overruling signaled a potential shift in eminent domain jurisprudence.[77]

C. *Kelo v. City of New London*

The opportunity for the U.S. Supreme Court to reexamine the public use requirement came shortly thereafter in *Kelo v. City of New London*.[78] New London, Connecticut, had delegated its eminent domain authority to a private development corporation charged with revitalizing the downtown and waterfront areas of the city.[79] The development corporation decided to remove existing homes and businesses on ninety acres of real estate and replace them with privately owned office buildings and a riverfront hotel that would complement a new Pfizer global research facility.[80] After nine property owners refused to sell, the development corporation took title to the land through eminent domain.[81] The development corporation later announced that it planned to lease much of the land it had acquired to private developers.[82] City authorities argued that the condemnations and the transfers to private developers were justified because the city had endured "[d]ecades of economic decline," including severe un-

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76 *Id.* The Court further explained that characterizing private economic development as a public use would "render impotent our constitutional limitations on the government's power of eminent domain." *Id.*

77 *See* Mary Massaron Ross, *Public Use: Does* County of Wayne v. Hathcock *Signal a Revival of the Public Use Limit to the Taking of Private Property?*, 37 URB. LAW. 243, 247–48 (2005) (asserting that "the recent decision in *County of Wayne v. Hathcock* reflects a trend toward increased review of governmental takings when the property is to be given over to private use").

78 545 U.S. __, 125 S. Ct. 2655 (2005).

79 The New London Development Corporation (NLDC), a private nonprofit entity, had been reactivated in 1998 to facilitate the economic revitalization of New London, particularly the Fort Trumbull area adjacent to the Thames River. *See Kelo*, 125 S. Ct. at 2658–59. That same year, the State authorized over $15 million in support of NLDC's planning activities and the creation of a new state park in Fort Trumbull. *See id.* at 2659. New London "designated the NLDC as its development agent in charge of implementation," *id.* at 2659–60 (citing CONN. GEN. STAT. § 8-188 (2005)), and "authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name," *id.* at 2660 (citing CONN. GEN. STAT. § 8-193 (2005)).

80 *See id.* at 2659. After the NLDC had been reactivated but before its use of eminent domain, Pfizer announced that it planned to build a $300 million research facility on a site immediately adjacent to Fort Trumbull. *See id.* Local officials hoped that "Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation." *Id.*

81 *See id.* at 2660.

82 The Supreme Court subsequently noted, for example, that the development corporation "was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants," and that "[t]he negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed." *Id.* at 2660 n.4 (citing Kelo v. City of New London, 843 A.2d 500, 509–10, 540 (Conn. 2004)).

employment, and had no other viable options for increasing its revenue.[83]

Writing for the Court in a five-to-four decision, Justice John Paul Stevens held that the city's use of eminent domain to transfer property from one private owner to another for the purpose of economic development constituted a legitimate public use.[84] The Court based its conclusion on two lines of cases. First, relying on *Fallbrook Irrigation District v. Bradley*,[85] the Court continued to define public use broadly by equating public use with public purpose.[86] Second, relying on *Berman* and *Midkiff*, the Court continued to defer to legislative determinations of public use.[87] The Court, quoting *Midkiff*, reiterated that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[88] As a result, the Court concluded that the potential for increased jobs and tax revenue incidental to private development satisfied the public use requirement.[89]

In a concurring opinion, Justice Anthony Kennedy suggested that his agreement with the majority in this case did not "foreclose the possibility that a more stringent standard of review . . . might be appropriate" for private transfers with a higher "risk of undetected impermissible favoritism of private parties."[90] Justice Kennedy concluded, however, that this case did not entail the "impermissible favoritism of private parties."[91] He noted that the primary motivation of these takings was not for the private benefit of Pfizer. Rather, the condemnations were part of a "comprehensive development plan."[92]

In contrast, Justices Sandra Day O'Connor and Clarence Thomas argued, in two dissenting opinions, that the majority's interpretation exposed almost any private property to the use of eminent domain for a more productive private project.[93] Justice O'Connor, on behalf of

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83 *Id.* at 2658.

84 *See id.* at 2665 (concluding that "[p]romoting economic development is a traditional and long accepted function of government").

85 164 U.S. 112 (1896).

86 *See Kelo*, 125 S. Ct. at 2663 (concluding that "[w]ithout exception, our cases have defined that concept broadly").

87 *See id.* (describing the Court's "longstanding policy of deference to legislative judgments in this field").

88 *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984)).

89 *See id.* at 2665.

90 *Id.* at 2670 (Kennedy, J., concurring).

91 *Id.*

92 *Id.*

93 *See id.* at 2671 (O'Connor, J., dissenting) ("Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a

all four dissenters, contended that, while previous decisions such as *Berman* had focused on some "harmful property use," the majority had expanded the meaning of public use.[94] She noted that, under the majority's interpretation, the state could transfer property from one private use to another "so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure."[95] Similarly, Justice Thomas argued that the majority's opinion provided no principled line for judicial decisionmaking.[96] He maintained that the majority's application of *Berman* and *Midkiff* is "further proof that the 'public purpose' standard is not susceptible of principled application."[97]

In response to the dissenters, Justice Stevens defended the Court's holding by asserting that the Public Use Clause retained meaning. He noted that "transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes . . . would certainly raise a suspicion that a private purpose was afoot."[98] The Court, however, did not provide any standard for distinguishing between purported public uses (as in *Kelo* itself) and potential private uses (as in the hypothetical transfer from citizen *A* to citizen *B*).[99]

II
A RATIONALE FOR THE PUBLIC USE REQUIREMENT

A. Secret Purchases

1. *Circumventing the Holdout Problem*

Many private projects, like the one in *Kelo v. City of New London*, involve a development corporation that seeks to assemble a parcel of land encompassing a large number of individual properties. Often, one or more of the existing owners will refuse to sell, and this may cause a "holdout problem" for the assembler.[100] The holdout problem, however, is not equivalent to an owner's refusing to sell. Rather,

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way that the legislature deems more beneficial to the public—in the process."); *id.* at 2678 (Thomas, J., dissenting) ("If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution . . . .").

94 *Id.* at 2675 (O'Connor, J., dissenting).

95 *Id.*

96 *See id.* at 2683 (Thomas, J., dissenting).

97 *Id.*

98 *Id.* at 2666–67 & n.17 (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)).

99 *See id.* at 2667 (arguing that "the hypothetical cases posited by petitioners can be confronted if and when they arise" and "do not warrant the crafting of an artificial restriction on the concept of public use").

100 For instance, in *Kelo*, nine owners refused to sell. *See Kelo*, 545 U.S. __, 125 S. Ct. at 2660.

the holdout problem arises because of the difficulty of distinguishing strategic holdouts from those owners who value their property more than the assembler's offer price.

On the one hand, the nine property owners in *Kelo* may have been refusing to sell because they were opportunistically "holding out" for a higher price. That is, the existing owners, knowing that their individual properties were each necessary for the assembler to complete the entire project, may have held out to obtain an inflated price.[101] This type of strategic behavior among owners could prevent the entire project from proceeding even when the transfer would be socially desirable.[102]

On the other hand, the nine property owners may have been refusing to sell not because of strategic reasons but rather because the owners actually valued the property more than the assembler's offer price. This type of bargaining impasse often occurs regardless of how many parcels are involved. In this circumstance, the assembler should increase his offer price and a transfer should occur if and only if the assembler's offer price exceeds the existing owners' valuation of the property.

It has long been assumed, however, that there is no practicable way to distinguish between those property owners who are refusing to sell for opportunistic reasons and those who are refusing to sell because an assembler's offer price is too low. The existence of strategic sellers, coupled with the lack of a mechanism for distinguishing between strategic and nonstrategic sellers, is the crux of the holdout problem. Consequently, all owners in assembly situations who refuse to sell are ordinarily classified as "holdouts" because each stands in the way of the overall project.[103]

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101 *See* Munch, *supra* note 18, at 474 ("Consolidation of many contiguous but separately owned parcels of land under one owner supposedly creates a holdout problem, with each seller having an incentive to hold out to be the last to settle and capture any rent accruing to the assembly.").

102 *See* Merrill, *supra* note 18, at 74–75 ("Without an exercise of eminent domain, . . . [e]ach owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains."). Some holdout situations may not prevent an entire project from occurring but may transfer the social surplus of the transaction from the buyer to the existing owner. Such a situation raises interesting distributive issues, especially if the increase in the value of the property is due to the assembly itself. *Cf.* 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 12.03, at 12-92 (Julius L. Sackman et al. eds., rev. 3d ed. 1995) (noting that, in determining just compensation, "[t]he general rule forbids consideration of the effect of the proposed project upon the value of property taken"). This situation, however, would most likely only raise welfare considerations if, as discussed below, the project contains a significant positive externality that would cause a buyer's private incentive to diverge from the optimal social incentive. *See infra* Part II.C.1.

103 Often, strategic holdout is not possible because an assembler can find other locations for a project. Holdout is usually only possible when the assembler has few, if any,

According to the conventional justification for eminent domain, private parties, as well as the government, need the power of eminent domain to overcome this holdout problem among sellers.[104] As noted above, this connection between the holdout problem and eminent domain was widely recognized even prior to the modern "law and economics" movement.[105] Contemporary courts, including the *Kelo* Court,[106] have also identified the holdout problem as a major, if not the "principal," justification for the state's use of eminent domain.[107]

While most commentators and courts have assumed that this holdout rationale applies equally to both takings for the government and takings for private parties,[108] the use of eminent domain for private parties is usually unnecessary. Indeed, private parties can circumvent the holdout problem and assemble land using secret buying

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alternatives. Typically, the lack of available alternatives occurs when a developer has already assembled a number of properties and the developer needs to assemble a large contiguous parcel. The lack of alternatives may also occur because of a natural condition (e.g., if only one particular hill in a town can be used for a mobile telephone tower, *see* Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684, 685 (Utah 1979)), or because of some artificial constraint (e.g., if a city is offering subsidies to a developer, *see* Merrill, *supra* note 18, at 111 (noting that "subsidies could easily degenerate into bidding wars between states and localities competing for plant sites . . . rather than ensure efficient siting decisions")).

104 *See supra* note 15 and accompanying text. Indeed, the primary advantage of eminent domain is the state's ability to avoid holdouts and simply appropriate property. *See* SHAVELL, *supra* note 16, ch. 6, § 2.4, at 126 ("[T]he problems in bargaining that can prevent or delay consummation of purchase of property are avoided when the state can appropriate property. If the state wants to assemble land to build a road, it can simply take the land; it need not bargain with the many owners to acquire the land and face delay or unwillingness to sell. This is a primary advantage of the use of eminent domain powers over acquisition by purchase.").

105 *See, e.g.*, *supra* notes 34, 59 and accompanying text.

106 The majority mentions the debate over the "necessity and wisdom" of using eminent domain for private development projects, Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2668 (2005), and alludes to the underlying "holdout problem[ ]," *id.* at 2668 n.24 (noting that some argue that "the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly"). Moreover, at oral argument, Justice Kennedy asserted that "[t]he rationale for this is essentially the rationale for the railroads, for the public utility line condemnations and so on. There isn't another practical way to do it." Transcript of Oral Argument at 15, 545 U.S. __, 125 S. Ct. 2655 (2005) (No. 04-108), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf.

107 *E.g.*, Diginet, Inc. v. City of Chicago, 958 F.2d 1388, 1400 (7th Cir. 1992) ("[H]old-up potential is the principal argument for investing right of way companies with the power of eminent domain . . . ."); *see also* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) ("Eminent domain can . . . be an effective tool against free-riders who hold-out for exorbitant prices when private developers are attempting to assemble parcels for public places . . . ." (quotation omitted)).

108 *See, e.g.*, Richard Posner, *The* Kelo *Case, Public Use, and Eminent Domain*, BECKER-POSNER BLOG, June 26, 2005, http://becker-posner-blog.com/archives/2005/06/the_kelo_case_p.html ("[T]he rationale for eminent domain is unrelated to whether the party exercising the eminent domain power is the government or a private firm.").

agents.[109] These buying agents are able to avoid the holdout problem using a double-blind acquisition system.[110] First, existing owners do not realize that buying agents are attempting to purchase property for a larger assembly project.[111] These owners thus have neither the incentive nor the ability to inflate their asking prices. They will sell if the assembler's offer price exceeds their actual valuation of the property.[112] Second, the buying agents themselves usually do not know that they are attempting to purchase property for a larger project.[113] The agents thus have neither the incentive nor the ability to assist existing owners in holding out for a higher price. Because neither the existing owners nor the buying agents suspect that the property is being purchased for an assembly project, the use of secret purchases prevents the holdout problem. As a result, private parties generally do not need the state's power of eminent domain.[114]

The use of secret buying agents in the context of eminent domain parallels the use of undisclosed agents in the context of agency law and contract theory.[115] Undisclosed agency law involves situations in which an undisclosed principal has an agent, that agent makes an agreement with a third party, and the existence and identity of the undisclosed principal are unknown to the third party.[116] The Restatement (Second) of Agency Law "expressly clarifies that withholding the

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109 Clearly, private parties are often able to assemble property without using either eminent domain or buying agents. Thus, the claim is not that private parties will always use buying agents or even that they should always use buying agents, but simply that private parties have the option of using buying agents, when necessary, to overcome the holdout problem.

110 *See, e.g.*, O'Reiley, *supra* note 20, at 2 (noting that when Disney used buying agents to purchase land in secret for its theme parks, the existing owners did not know that Disney was the actual buyer or the nature of the assembly project, and "great care was taken to make sure that none of the buyers knew about each other, even if they worked in the same firm").

111 *See, e.g., id.*

112 *See* Parisi, *supra* note 17, at 82 ("Because the actual purchaser is not known to the seller, that person will not artificially raise his asking price, or otherwise hold out on the realization of the transaction; he might act differently if he knew the broader context of the sale itself. . . . If, however, he were dealing with an undisclosed agent, he would negotiate a price that reflected the actual worth of the land and his willingness to part with it.").

113 *See, e.g.*, O'Reiley, *supra* note 20, at 2.

114 *Cf.* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 750 (1986) ("The law of eminent domain often reflects this anti-holdout rationale by confining the power to situations where holdout is a genuine threat.").

115 *See* Parisi, *supra* note 17, at 82 ("[A]nother way that the common law protects against entropy in property is to allow undisclosed agency, the practice of one party acting on behalf of another in order to disguise the latter's identity.").

116 *See* Barnett, *supra* note 17, at 1969; *see also id.* at 1990 ("[U]ndisclosed agency law should permit [an agent] secretly to represent anyone when contracting with [a third party], provided that the obligations of [the third party] are not adversely affected by the agency relationship, and are subject to any valid contract defense that [the third party] might assert. The actual law of undisclosed agency is in accord.").

identity of the purchaser in order to avoid having the seller raise the price is a legitimate practice."[117] In the context of assembling land, the undisclosed principal is the assembler, the agent is the secret buying agent, and the third party is the existing owner. A private assembler may employ a number of secret buying agents who purchase real estate from existing property owners. Because the existence and identity of this assembler remain unknown to existing property owners, the existing owners do not artificially inflate their prices.

While the use of undisclosed buying agents might at first seem impractical, private parties—including Harvard, Disney, and even smaller urban developers—already utilize such agents on a regular basis. As noted above, Harvard University, working through a real estate development company, used buying agents to purchase fourteen separate parcels for $88 million.[118] One Harvard official, arguing that nonprofit organizations regularly conceal their roles in real estate transactions to prevent excessive prices, stated, "'We were really driven by the need to get these properties at fair market value' and avoid 'overly inflated acquisition costs.'"[119] The university pointed out that the use of an intermediary is a "common practice" in real estate deals "among institutions that want to avoid being charged above-market rates."[120]

Likewise, Disney used undisclosed agents in Orlando, Florida, and Manassas, Virginia, to avoid the holdout problem and assemble thousands of acres for its theme parks.[121] In Orlando, buying agents "quietly negotiated one deal after another—sometimes lining up contracts to buy huge tracts for little more than $100 an acre."[122] Similarly, in Manassas, Disney "amassed about 3,000 acres for a proposed theme park in Northern Virginia" by creating a "network of dummy companies that included agents from two other law firms" and participating in "as secretly as possible 11 separate deals, ranging in size from one acre to 1,800 acres."[123] Disney's overriding concern in using

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117 *Id.* (citing RESTATEMENT (SECOND) AGENCY § 304 cmt. c (1958)).

118 *See* Marcella Bombardieri, *Summers Boosts Allston Plan*, BOSTON GLOBE, Oct. 22, 2003, at A1; Cassidy & Aucoin, *supra* note 19.

119 Cassidy & Aucoin, *supra* note 19 (quoting James H. Rowe, Vice President for Public Affairs, Harvard University).

120 Joanna Weiss, *The New Harvard Yard?*, BOSTON GLOBE, Dec. 6, 2001, at C1.

121 *See* Alvin A. Arnold, *Development: How the Site Assembler Operates*, MORTGAGE & REAL EST. EXECUTIVES REP., Feb. 15, 1995, at 7 (describing Disney's assembly of land in Orlando as a "classic example"); David S. Hilzenrath, *Disney's Land of Make-Believe: Acquisition Agent Used Ruse to Prevent Real Estate Speculation*, WASH. POST, Nov. 12, 1993, at A1 (detailing Disney's "stealth approach").

122 Andrews, *supra* note 20.

123 O'Reiley, *supra* note 20, at 2.

undisclosed agents was to overcome potential strategic behavior among sellers.[124]

Moreover, while Harvard and Disney may in some ways be idiosyncratic market participants, their use of buying agents is hardly idiosyncratic. First, as relatively large institutions, Harvard and Disney both have a comparative advantage in bargaining power. But smaller developers have also utilized buying agents effectively. Several courts, for example, have pointed out that the use of undisclosed agents is a "common arms-length business practice" among shopping center developers and other smaller real estate purchasers.[125] Indeed, in overruling *Poletown*, the Michigan Supreme Court noted that "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce" that did not "require[ ] the exercise of eminent domain or any other form of collective public action for their formation."[126] The court described how many shopping centers and other commercial projects "creat[e] various facades behind which they can hide" in order to overcome the holdout problem and assemble land at reasonable acquisition prices.[127]

Second, both Harvard and Disney had a great deal of time to assemble land for their projects.[128] Disney had the additional luxury of assembling land in two undeveloped, rural environments rather than in populated, urban areas.[129] Buying agents are likely to be most effective when they acquire property over longer time spans and in less concentrated areas because the increased time and space minimize the possibility that a project will be detected. But secret buying agents have been successful in aggregating land even in metropolitan areas—usually among the most difficult places to assemble property. In Las Vegas, for example, a real estate group "acquired 2,400 acres of land (consisting mostly of parcels of five acres or less) in order to build a

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124 Indeed, the legal director for Disney noted that "'[i]f people think it is Disney, then the price goes up. Or if people think there is an assemblage of land, that will drive up the price as well.'" *Id.*

125 Westgate Vill. Shopping Ctr. v. Lion Dry Goods Co., No. 93-3760, 1994 WL 108959, at *7 (6th Cir. Mar. 30, 1994) (stating that the use of secret buying agents in development plans for shopping centers is "a common arms-length business practice that has to do with keeping real estate prices from escalating").

126 County of Wayne v. Hathcock, 684 N.W. 2d 765, 783–84 (Mich. 2004).

127 *Id.*

128 *See* Cassidy & Aucoin, *supra* note 19 (stating that Harvard held the land for nearly a decade before revealing its identity to the community residents); O'Reiley, *supra* note 20, at 2 (stating that Disney bought up 28,000 acres for the Walt Disney World complex between 1965 and 1967).

129 *See* Andrews, *supra* note 20 (noting that Disney's first purchases in Orlando "included one for 8,380 acres of swamp and brush"). *Cf.* Cassidy & Aucoin, *supra* note 19 ("Unlike the more crowded and pricey Cambridge, the land in Allston [which Harvard purchased] was both available and relatively inexpensive.").

master-planned community."[130] In Providence, a development group "assembled 21 separate parcels of land . . . to construct a 1.4 million-square-foot mall with space for 160 shops."[131] Furthermore, buying agents have been successful in assembling land in downtown areas even within relatively short time periods. For example, in West Palm Beach, two developers, using twenty different brokers, needed only nine months to "purchase over 300 separate parcels from 240 different landowners" to assemble twenty-six contiguous downtown blocks.[132] Overall, buying agents effectively assemble land of various sizes and in various circumstances.[133]

Secret buying agents therefore provide an effective mechanism for distinguishing between those owners who are refusing to sell for opportunistic reasons and those owners who are refusing to sell because the price is too low. The feasibility of undisclosed agents thus fulfills one commentator's prediction that, as in other areas of the law, "there is no *a priori* reason to believe that the marketplace is incapable of crafting private-order solutions to the problem of holdouts."[134]

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130 Brief for John Norquist, President, Congress for New Urbanism as Amicus Curiae Supporting Petitioners, at 5, Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655 (2005) (No. 04-108).

131 *Id.* at 5–6.

132 *Id.* at 6.

133 Another problem that buyers sometimes face is the possibility of an existing owner who is unwilling to sell at any price. *Cf.* SHAVELL, *supra* note 16, ch. 6, § 2.3, at 125 (pointing out that, under certain circumstances, "no mutually agreeable price may exist" because "a person might hold a sentimental attachment to his land, have sufficient wealth to meet his needs, and be unwilling to sell the land for any price that the state is willing to offer"). The possibility of these unwilling sellers, however, should not be confused with the problem of strategic sellers. Strategic sellers act opportunistically and refuse to sell even when a buyer's offer price exceeds the seller's actual valuation of the land. On the other hand, unwilling sellers are not willing to sell at any price or are only willing to sell at a seemingly "irrational" price.

The problem of unwilling sellers is less problematic than might be imagined for the simple reason that most people have asking prices that are not infinite or even "irrational." That is, while the utility from money, no matter how much paid, could be less than the utility from property, *see id.* at 125 n.24, and this possibility could lead to owners whose unwillingness to sell is socially undesirable, this situation appears to be very rare. In any event, even if sellers who are unwilling to sell at any price prevent a few socially desirable projects, the opportunity costs from not enabling these projects would most likely be negligible when compared with the potential costs of allowing private parties to use eminent domain in all situations, regardless of whether or not this type of unwilling seller exists. *See infra* Part II.A.2.

134 Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 88 (1998). In corporate law, for example, private purchasers use tender offers to overcome the holdout problem without governmental intervention. *See id.* (citing J. Gregory Sidack & Susan E. Woodward, *Takeover Premiums, Appraisal Rights and the Price Elasticity of a Firm's Publicly Traded Stock*, 25 GA. L. REV. 783, 801–05 (1991)); *cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 14.9, at 390 (3d ed. 1986) (describing corporate squeeze-outs as a form of private eminent domain).

In the property law context, several other approaches for overcoming the holdout problem without using eminent domain have recently been suggested. *See* Michael A. Hel-

2. *Enabling Socially Desirable Transfers*

While both eminent domain and secret buying agents are capable of circumventing the holdout problem, eminent domain, unlike secret buying agents, sometimes causes socially undesirable transfers.[135] Because existing owners sometimes value their land more than the private assembler, eminent domain may force a socially undesirable transfer. The government, for example, may believe (albeit mistakenly) that the private assembler values the land more than the existing owners. As a result, the government may use eminent domain to force a transfer even though the existing owners value the land more than the assembler. Buying agents, by contrast, eliminate this risk of erroneous condemnation. Indeed, by engaging in voluntary transactions, buying agents ensure that every transfer is mutually beneficial and thus socially desirable.

The U.S. Supreme Court has long recognized that there is no practicable mechanism for determining how much existing owners actually value their property.[136] The actual, or subjective, value of an owner's property includes the personal values that an owner attaches to the land, including sentimental and idiosyncratic value.[137] These

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ler & Roderick M. Hills Jr., The Art of Land Assembly 1–4 (Jan. 28, 2004), *available at* http://www.law.uchicago.edu/Lawecon/workshop-papers/Heller.pdf (proposing "land assembly districts"); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, SUP. CT. ECON. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=874865 (suggesting the use of various precommitment strategies). While these alternative strategies may be useful for overcoming the holdout problem under certain circumstances, the strategies do not appear to facilitate socially desirable transfers to the same extent as secret buying agents because, unlike buying agents, *see infra* Part II.A.2, they may not adequately take into account subjective value, *see* Heller & Hills, *supra*, at 20 fig.1 (noting that private land assembly is more effective than land assembly districts at taking into account subjective value); Somin, *supra* ("[P]recommitment may be a more difficult strategy to implement effectively because it requires that the buyer predetermine a set price for each lot to be purchased in advance of beginning the assembly process.").

135 A socially desirable transfer is a transfer in which property moves from *A* to *B* and *B* actually values the property more than *A*. A socially desirable transfer will occur, for example, if a buyer's offer price (say, $50,000) is bigher than a seller's asking price (say, $40,000) because, at any price between the offer and asking price (that is, $40,000 ≤ P ≤ $50,000), a trade would be mutually beneficial for both parties. A socially undesirable transfer, by contrast, is a transfer in which property moves from *A* to *B* but *A* actually values the property more than *B*.

136 *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (noting the "serious practical difficulties in assessing the worth an individual places on particular property at a given time"); Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949) (stating that "since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess").

137 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 19.1, at 531 (6th ed. 2003) ("Many people place a value on their homes that exceeds its market price."); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 569 (2005) ("[E]ven where the object has close substitutes, the development of habit and familiarity, or sentimental connection, may create rational idiosyncratic value.").

personal values are difficult to quantify.[138] Moreover, self-valuations are impracticable because, in response to the government's offer to purchase or a just-compensation determination, existing owners have an incentive to inflate their selling prices opportunistically to augment their own compensation.[139] Because personal values are difficult to quantify and because self-valuations would lead to overstatements, actual value in the context of a threatened condemnation is difficult if not impossible to calculate.

As a result, in calculating just compensation for any taking, courts ignore the actual valuations of existing landowners.[140] Instead, courts rely on the "fair market value," an "objective" measure of damages.[141] Under the fair market standard, a property's value is not determined in the market. Rather, the existing owner is "entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[142] That is, the government calculates fair market value by es-

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138 *See* Donald L. Beschle, *The Supreme Court's IOLTA Decision: Of Dogs, Mangers, and the Ghost of Mrs. Frothingham*, 30 SETON HALL L. REV. 846, 891 (2000) (pointing out "the enormous difficulties that would flow from allowing compensation for subjective or 'personhood' losses"); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1233 n.67 (1991) (noting the difficulties in "ascertaining and fairly compensating idiosyncratic and subjective valuations of property in the context of eminent domain"); Note, *Valuation of* Conrail *Under the Fifth Amendment*, 90 HARV. L. REV. 596, 598 (1977) (pointing out the "evidentiary problems involved in establishing idiosyncratic value").

139 *See* Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1419 (2005) ("[S]uppose that your house has just been taken through eminent domain . . . , and that the government asks you to state the subjective value of your house for compensation purposes. While some people might state honest valuations under these circumstances, the fact that 'shading' in one particular direction is both costless and unambiguously profitable would encourage significant overstatements of value." (footnote omitted)); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 789 (1982) ("To be sure, if the taking is easy to predict, then property owners may inflate their self-assessments and wait for the government's project to come along."); Tung Yin, *Reviving Fallen Copyrights: A Constitutional Analysis of Section 514 of the Uruguay Round Agreements Act of 1994*, 17 LOY. L.A. ENT. L.J. 383, 407 (1997) ("[T]he use of subjective value is subject to moral hazard: Property owners have an incentive to present an inflated subjective value.").

140 *See* Rachel Croson & Jason Scott Johnston, *Experimental Results on Bargaining Under Alternative Property Rights Regimes*, 16 J.L. ECON. & ORG. 50, 53–54 (2000) ("Courts typically do not even attempt to discern and compensate for subjective losses above market values."); Note, *supra* note 138, at 598 (noting that courts "exclude[ ] from consideration what may be termed idiosyncratic value to the condemnee"); *see also* Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1994 (2002) ("By assumption, subjective value has no reliably objective measure, which is the conventional justification for excluding it from eminent domain compensation.").

141 *See 564.54 Acres of Land*, 441 U.S. at 511 (stating that the Court has "employed the concept of fair market value to determine the condemnee's loss" because of the "need for a relatively objective working rule" (citations omitted)); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 62 n.167 (1987) ("Because [subjective value] is difficult to determine, courts have moved to the market value standard.").

142 *564.54 Acres of Land*, 441 U.S. at 511 (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

timating the price upon which a marginal buyer and a marginal seller would agree in a hypothetical market.[143] This judicially determined market value, however, neither calculates nor compensates a taking's full costs,[144] including demoralization costs.[145] Courts thus systemically underestimate the value of land to existing owners.[146]

Consequently, whenever the state appropriates land through eminent domain instead of through voluntary exchange, a socially undesirable transaction is possible. If the state underestimates the actual value of the property to the current owner, the state may erroneously appropriate the property from its highest-valued user.[147] For example, suppose that the actual value of several parcels of land to the ex-

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143 *See* Steven M. Crafton, Symposium, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857, 889 (1983) ("In economic terms, market price . . . represents what the marginal buyer is willing to give up to obtain the good and what a marginal seller is willing to take in order to give up the good.").

144 *See id.* at 890 ("Because a condemnee, by definition, is an unwilling seller, payment of market value will not compensate the person for the loss."); Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 915 (1999) ("[G]iven that the destruction of subjective value almost always occurs in eminent domain proceedings, 'just compensation' is hardly ever 'full compensation.'"); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678–79 (2005) ("Despite courts' admonition that just compensation should place an owner in the position she would have occupied but for the governmental action, current compensation rules exclude whole categories of damages caused by government takings of private property.").

145 *See* Fischel, *supra* note 37, at 932 ("Unlike impersonal forces such as markets and the weather, governmental actions that take or devalue private property impose on owners and their sympathizers a special disutility, which Frank Michelman identified as 'demoralization cost.'" (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1214 (1967)); Heller & Krier, *supra* note 4, at 1001 ("Demoralization has to figure into the calculation of final costs and benefits, and thus into the question whether a government program enhances or diminishes net welfare."); *cf.* Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 249 (2001) ("Suboptimally low compensation can also be due to the existence of a stronger endowment effect when entitlements are forcibly taken under liability rules than when entitlements are voluntarily transferred under property rules.").

146 *See* Crafton, *supra* note 143, at 891 n.186 (noting that, "[i]n the case of an unwilling seller, the market price will undercompensate the seller by the amount of the difference between his subjective reservation price and the condemnation price"); Croson & Johnston, *supra* note 140, at 68 (noting "the assumption that the court does not attempt to discern or compensate for subjective value, and therefore both overcompensates and undercompensates systematically"); *see also* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation [for takings] in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property.").

147 *Cf.* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1143–44 (2005) ("If courts underestimate the private value of entitlements when awarding damages, they would encourage too much taking . . . . [E]ntitlements would not wind up with their highest value user, so the outcome would not be efficient.").

isting owners is $2 million and the value of the property to the assembler is $1.8 million. In this case, the use of eminent domain to transfer the property from the existing owners to the assembler would be socially undesirable because the value to the existing owners ($2 million) is greater than the value to the assembler ($1.8 million). The government, however, may mistakenly estimate that the value of the property to the existing owners is $1.5 million. If so, the government might use eminent domain to transfer the property from the existing owners to the assembler because the government calculates that the value to the assembler ($1.8 million) outweighs the just compensation ($1.5 million) due to the existing owners. Thus, whenever the government mistakenly believes that the value to the assembler is greater than the value to the existing owners, the use of eminent domain may cause a socially undesirable transfer.[148]

Using eminent domain for private transfers may also cause socially undesirable transactions for another reason. In addition to underestimating the *costs* of the taking to existing owners, private parties (and the government) sometimes overestimate a project's expected *benefits.*[149] Private parties may overestimate expected benefits because such determinations are often speculative and difficult to predict. Private parties may also intentionally exaggerate the expected benefits of a taking for the purpose of obtaining the state's condemnation authority.[150] And these private parties may do so in situations in which they would not have exaggerated the benefits were they attempting to buy the property through voluntary exchange. In *Poletown,* for example, the City of Detroit and General Motors dramatically overestimated the number of jobs that the new plant would create.[151] Whether overestimating occurs because expected benefits are difficult

148 *See* SHAVELL, *supra* note 16, ch. 6, § 2.4, at 126 ("The possibility of undesirable state acquisition of property arises when it has eminent domain powers but not when it must acquire property through purchase. The state migbt underestimate the private value of property and take it when its true private value exceeds its value to the public.").

149 *See* Durham, *supra* note 48, at 1300 ("A government may pursue an inefficient eminent domain action because it underestimates the costs or overestimates the benefits of the taking.").

150 *See* Somin, *supra* note 134, at 14 ("In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefits to justify condemnations and then failing to monitor or provide any such benefits once courts approve the takings and the properties are transferred to their new owners.").

151 *See* Brief for Non-Party Institute for Justice et al. as Amici Curiae, at 22–23, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–124078) (explaining that the City of Detroit and GM claimed the new plant would create 6,150 new jobs but that the plant employed only 2,500 workers seven years later); *see also* Gideon Kanner, *The New Robber Barons,* NAT'L L.J., May 21, 2002, at A19 (describing condemnations for a Daimler Chrysler Jeep manufacturing plant in Toledo, Ohio, in which the state condemned eighty-three homes but the plant produced only 2,100 of the 4,900 jobs that it had promised).

to predict or because of intentional exaggeration, erroneous valuations of expected benefits also cause socially undesirable transfers.

In contrast, using secret buying agents eliminates the risk that the state will condemn property mistakenly. Because an existing owner will sell only if the buyer's offer price exceeds the actual value of the property to the seller, voluntary transactions ensure that only mutually beneficial transfers occur.[152] Unlike the use of eminent domain, voluntary exchange using buying agents allows the existing owners' subjective value to be taken into account. Requiring voluntary exchange also prevents assemblers from intentionally exaggerating their expected benefits from an assembly because an assembler will make an offer through a buying agent only if the assembler believes that the property is worth more than the seller's asking price. Assemblers will weigh the expected costs and benefits of potential projects and will act accordingly in the real estate market.

At the same time, using buying agents prevents existing owners from strategically inflating their valuations.[153] Harvard and Disney, for example, both used buying agents to prevent overly inflated acquisition costs caused by strategic sellers.[154] Unaware of the larger project, existing owners will weigh the expected costs and benefits of the transaction and, like the assembler, will act accordingly in the real estate market.

Because both the assembler and the existing owners bear the expected costs and benefits of the transaction, their private incentives will be consistent with the optimal social incentives. Specifically, an existing owner will sell to a buying agent if the assembler places a higher value on the property (and thus makes an offer through a buying agent at this higher value). An existing owner will not sell to a buying agent if the owner places a higher value on the property. In this way, the availability of buying agents provides a mechanism for distinguishing between sellers who are strategically holding out and sellers who value their property more than the assemblers' offers.[155]

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152 *See* SHAVELL, *supra* note 16, ch. 6, § 2.4, at 126 ("This type of socially undesirable outcome could not occur if the state must acquire property by purchasing it, because a private owner will not accept an offer that is less than the value he places on the property."); Merrill, *supra* note 18, at 64 ("Consensual exchange is almost always beneficial to both parties in a transaction, while coerced exchange may or may not be, depending on whether the compensation is sufficient to make the coerced party indifferent to the loss.").

153 *See* Crafton, *supra* note 143, at 880 (explaining that "private developers who utilize middlemen are able to assemble large parcels of land at prices that reflect market competition (opportunity costs) rather than the higher prices postulated for the monopoly situation" (citing Munch, *supra* note 18)).

154 *See supra* text accompanying notes 118–24.

155 *Cf.* Somin, *supra* note 134 (noting that the "ideally efficient policy" would "enable developers to prevent strategic holdouts, but not allow them to override the wishes of sincere dissenters").

Undisclosed agents are effective at overcoming the holdout problem and assembling land because of their ability to purchase property without revealing the identity of the assembler or the nature of the project. Admittedly, secret acquisition may not always facilitate a transfer between private parties. As an initial matter, the use of buying agents might not work because a transaction itself may be socially undesirable. In this way, buying agents promote economic development even when a transfer does not occur because, unlike eminent domain, they provide a market test that prevents the occurrence of potentially socially undesirable projects.[156]

However, buying agents also might not facilitate a transfer between private parties because there is some risk of the agents being detected.[157] This risk likely varies depending on such factors as the size and location of a project and whether a project is time-sensitive.[158] Assembling land by purchasing existing homes in an urban area, for example, is likely to be more difficult, all other things being equal, than assembling property in areas of farmland or abandoned factories.

Nevertheless, the possibility of detection should not be overstated.[159] The several examples mentioned above illustrate how buying agents have been effective even in circumstances where the risk of detection appears to be relatively high. The Harvard and Disney projects involved relatively large land-assembly projects.[160] Moreover, the real estate developers at Harvard, as well as in downtown Las Vegas, Providence, and West Palm Beach, were able to assemble land through buying agents in relatively populous areas.[161] And while Harvard utilized more than a decade to assemble its land in order to reduce the risk of detection, the developers in West Palm Beach were able to assemble twenty-six contiguous blocks in only nine months.[162]

Moreover, even if detection does occur, a buyer attempting to assemble land can almost always resell the newly acquired land at or

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156 *Cf.* Gary S. Becker, *On Eminent Domain*, BECKER-POSNER BLOG, June 27, 2005, http://becker-posner-blog.com/archives/2005/06/on_eminent_doma.html ("[Eminent domain] allows governments to avoid the market test of whether a proposed project adds value in the sense that a project is worthwhile even after owners of property are bought out through regular market proceedings.").

157 *See id.* ("The major drawback of secret assembly is the possibility of detection.").

158 *Cf.* Merrill, *supra* note 18, at 81–82 (suggesting that the effectiveness of market mechanisms in assembling land might vary depending on the "amount[ ] of land" being assembled, whether the project is "strictly site-dependent," and whether the project would "generate very high gains from trade").

159 *See* Somin, *supra* note 134 ("[E]mpirical evidence suggests that [the possibility of detection] is not as serious a problem as might be thought.").

160 *See supra* text accompanying notes 118, 121–24.

161 *See supra* text accompanying notes 118, 128–32 and accompanying text.

162 *See supra* note 132 and accompanying text.

near its purchase price.[163] While a detected buyer would likely incur at least some costs (e.g., the risk that the real estate has decreased in value), these transactions costs are likely to be minimal, especially when compared with the relatively high administrative costs of eminent domain.[164] Overall, therefore, even with the possibility of detection, buying agents, both by overcoming the holdout problem and by eliminating the risk of erroneous condemnations, provide a superior mechanism than eminent domain for assembling land.

3. *Distinguishing Governmental Takings*

Secret buying agents also provide a reason for distinguishing between public uses and private uses. The government cannot use buying agents to acquire property for its own projects because, unlike private projects, government projects are almost always subject to the transparency of democratic deliberations. That is, while private parties can choose not to disclose the nature or location of their projects, government projects are subject to public accountability and thus publicly known in advance.[165] As a result, the government, unlike pri-

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163 If detection does occur, a rule allowing the use of eminent domain after the fact would be problematic even if assembly appears socially desirable. Developers, knowing ex ante that they could obtain eminent domain if their assembly projects were discovered, would have an incentive to reveal (or, at least, not to conceal) their projects in order to obtain the eminent domain power. Theoretically, a rule could be designed that would allow detected developers to use eminent domain if they acted in good faith. However, such a rule would be nearly impossible to enforce because of tbe myriad ways of disseminating information about a project and the costs of monitoring such dissemination. Thus, even taking into account the possibility of detection, the optimal rule for promoting economic development is to disallow the use of eminent domain even if a project is discovered. Such a rule would provide developers with the appropriate incentive to keep tbeir projects secret while assembling the land.

164 *See The Supreme Court, 2004 Term: Leading Cases*, 119 HARV. L. REV. 169, 291, 296–97 (2005) [hereinafter *Leading Cases*] ("Eminent domain is much more costly than market exchange: it incurs the transaction costs that accompany all legislative action; it involves procedural burdles such as filing a judicial complaint, serving process, and undertaking a professional appraisal of the property in question; it involves a hearing on both 'the condemnation's legality and the amount of compensation due'; and it may involve protracted litigation." (quoting Merrill, *supra* note 18, at 77)); Fischel, *supra* note 37, at 934 ("[C]ompared to incremental, consensual transactions, eminent domain is quite costly for the government. Hiring attorneys and appraisers, hearing appeals, and conducting trials adds [sic] to the cost of a given transaction. When ordinary market transactions are available, they are normally cheaper for tbe government to use than eminent domain."); *see also* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH L. REV. 936, 969 (noting the "higb 'due process costs' that attend an exercise of eminent domain" (quoting Merrill, *supra* note 18, at 77–80)).

165 *See* SHAVELL, *supra* note 16, ch. 6, § 2.3, at 125 n.23 ("[G]overnment is often unable to keep its plans quiet (indeed, the plans may have come about through a public decision-making process), and if so, the secret purchase option is not feasible."); Fischel, *supra* note 37, at 950 ("Unlike private developers of such activities, who can use straw-buyers and other subterfuges, community planning must take place in the open, and holdouts will be far more problematic."); Merrill, *supra* note 18, at 82 ("[A]lthough buying agents, option

vate parties, needs eminent domain to overcome the holdout problem for its own projects.

For example, suppose that a city wishes to construct a new public airport to improve transportation. If the city seeks to build the airport near a major metropolitan area, the project will require the assembly of multiple parcels. However, the state would be unable to acquire these parcels using secret buying agents. The consideration, approval, and construction of an airport (like most government projects) requires public scrutiny and various regulatory approvals. In selecting a site, for instance, the state and city officials would have to consult with the various airlines, the affected neighborhoods, and regulatory agencies such as the Federal Aviation Administration. Because maintaining the secrecy of the new airport would be virtually impossible for the government, eminent domain is necessary for assembly.

In certain limited situations, the government might be able to acquire property through buying agents.[166] For example, if the government seeks to assemble property for a military base, the implementation of the project or the location of the land might remain classified. Other factors, however, provide countervailing reasons for why eminent domain is necessary for the government. For example, even when the government is able to keep its projects secret, the combination of secret land acquisitions and the need to buy off holdouts raises a significant danger of corruption between government officials and existing owners.[167] As one commentator has explained:

> One can easily imagine government officials charged with engaging in secret land assembly tipping off potential sellers about a project, or buying off sellers at exorbitant prices in return for kickbacks. It is one thing for private developers to decide when to buy off a holdout and at what price. It is quite another when a government purchasing agent, spending taxpayers' money, makes these decisions without public oversight. To avoid this specter of corruption, government may have to use eminent domain under circumstances where a private developer, with his own money and guile, could use the market.[168]

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agreements, and straw transactions may work well for private developers, it is unclear whether government can use these devices effectively.").

166 *See* SHAVELL, *supra* note 16, ch. 6, § 2.3, at 125 n.23 ("In some cases, such problems could be alleviated by secret purchases by the government agency, in much the way that private parties manage to assemble large parcels (such as for a shopping center) through purchases made by agents who do not reveal the identity or purpose of the buyer of the parcels.").

167 *See id.*

168 Merrill, *supra* note 18, at 82.

Indeed, a "distinct harm to political accountability" may occur when the government uses undisclosed agents to acquire land in secret.[169] Overall, therefore, the clear benefits of democratic deliberation, as well as the justified skepticism toward secret government acquisitions, suggest that the government, unlike private parties, often needs eminent domain.[170]

Secret buying agents thus provide a reason for distinguishing between public uses—those situations in which buying agents are ineffective and thus eminent domain is necessary—and private uses—those situations in which buying agents are effective and thus eminent domain is unnecessary. While other commentators, as well as a few courts, have noted that buying agents sometimes allow private parties to assemble property,[171] this idea has remained relatively undeveloped. Yet the availability of undisclosed agents allows private parties, but not the government, to overcome the holdout problem and assemble property. As a result, secret purchases distinguish between those circumstances in which eminent domain is necessary and beneficial, and thus provides a "public use," and those circumstances in which eminent domain is unnecessary or detrimental, and thus provides no "public use."[172]

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169 Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1020 (2005).

170 Because the government can use eminent domain for its own projects, limiting private parties' use of eminent domain could conceivably lead the government itself to acquire and operate various private industries. *See* Eugene Volokh, *Takings and Privatization*, VOLOKH CONSPIRACY, June 23, 2005, http://volokh.com/archives/archive_2005_06_19-2005_06_25.shtml#1119547001 ("[I]n *Kelo v. City of New London*, . . . it is the conservative dissenters' test that would give the government a strong incentive to own and operate various enterprises itself . . . ."). However, this scenario seems relatively unlikely. The political check would be more effective in preventing permanent government ownership and control of industries that traditionally have been privately operated than in preventing the government from using eminent domain on behalf of a private party. Many more consumers and taxpayers would be affected by such government ownership. Similarly, consumers and taxpayers might be better able to observe that the government was running a new factory than to notice that a private party had acquired a factory through eminent domain. Finally, inefficiencies in state-operated industries might themselves deter the government from attempting to do internally what it would be prohibited from doing on behalf of private parties except in extraordinary circumstances.

171 *See supra* note 18 and text accompanying note 22.

172 Obviously, the fact that the government needs the power of eminent domain because it generally cannot use buying agents does not indicate the precise circumstances in which the government *should* use eminent domain to accomplish its objectives. The government will often be able to buy land it needs for its own projects. *See* SHAVELL, *supra* note 16, ch. 6, § 2.3, at 124 ("When property is socially desirable for the state to acquire, one would usually expect the state to be able to purchase it."). In many other circumstances, however, the government's use of eminent domain is necessary for overcoming bargaining problems and achieving important public projects. For example, if the government needs to assemble multiple parcels for a federal courthouse or a municipal airport, or if the government needs to assemble land for a highway, the government's condemnation authority will often be both necessary and socially desirable. *Cf. id.* at § 2.3, at 124, § 2.5, at

B. Inordinate Private Influence

The use of eminent domain to transfer property from one private owner to another should also be disfavored because it increases the potential that inordinate private influence will distort the eminent domain process. First, because a taking for a private party produces a concentrated benefit for one party, the beneficiary will have a socially excessive incentive to attempt to capture eminent domain for its own benefit. Second, because a private beneficiary often pays little or nothing to acquire property through eminent domain, this party will have an incentive to engage in an excessive number of takings. Third, disparities in legal and financial resources between existing owners and assemblers may also lead to socially undesirable takings.

1. *The Concentrated Benefit Problem*

Private parties that would directly benefit from takings have a strong incentive to influence the eminent domain process for their own advantage. Indeed, because private parties can use eminent domain to obtain a relatively concentrated benefit, these parties have an incentive to use inordinate influence to achieve their private objectives through condemnations.[173] Thus, not only is the right to take property unnecessary for private developers (who can use buying agents to circumvent the holdout problem), but giving private parties access to eminent domain leads to manipulation of the process and, consequently, socially undesirable takings.

In a taking primarily for a private benefit (e.g., the assembly of land for a real estate development), the single beneficiary (e.g., a corporation, casino, or developer) has a powerful incentive to capture a concentrated benefit. By contrast, in a taking primarily for the general public (e.g., the acquisition of land for a new highway), the taking involves multiple beneficiaries (e.g., all of the future commuters). Because these multiple beneficiaries are more numerous and more dispersed, they have less of an incentive and less of an ability to subvert the eminent domain process through inordinate influence. In con-

127 (noting that, in certain circumstances, "problems in bargaining may stymie or at least delay purchase of property by the state when its acquisition is socially desirable," and concluding that "[e]minent domain may be warranted by the advantage of avoiding the bargaining problems associated with purchase").

173 *See* Garnett, *supra* note 164, at 977 ("[T]he available evidence strongly suggests that private parties standing to benefit from an exercise of eminent domain frequently exert political pressure on the condemning government."); Kochan, *supra* note 134, at 80–81 ("Because the interest group receives a concentrated benefit, they [sic] will have an incentive to obtain the legislation by granting special favors to legislators so long as the cost of the investment does not exceed the benefit they [sic] will obtain. When these groups enjoy lower information and transaction costs than others, they will succeed in obtaining wealth transfers to themselves at the expense of other groups." (quotation omitted)).

trast, a single beneficiary who can capture a concentrated benefit has both a greater incentive and a greater ability to capture the eminent domain process. The potential for corruption is thus higher in a taking for a private party, which usually involves a single concentrated beneficiary, than a taking for the government, which involves multiple, dispersed beneficiaries.[174]

While a private party can use inordinate influence to obtain a concentrated benefit, the costs of the taking will be dispersed among each of the affected property owners. For example, while a private party may stand to make $1 million by assembling twenty parcels through eminent domain, each of the condemnees may lose only $50,000 or less. While these existing owners would still appear to have a relatively concentrated interest in opposing the taking,[175] several factors may undercut the incentive for existing owners to oppose the taking.

Initially, many owners will sell under the threat of condemnation because "property owners frequently lack the resources, political clout, or sophistication to contest an attempt to take their property by eminent domain."[176] An assembly project that involves multiple owners also creates a coordination problem because individual owners have an incentive to free ride off the other affected owners.[177] Finally, while condemnees do not receive full compensation, even partial compensation decreases their individual incentives to oppose a tak-

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174 *See* Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 289 (1992) ("If public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process."); Kochan, *supra* note 134, at 80 ("Because the interest group receives a concentrated benefit, they will have an incentive to obtain the legislation by granting special favors to legislators so long as the cost of the investment does not exceed the benefit they will obtain."); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 376 (2000) ("Interest groups or mobilized majorities will lobby for takings that generate benefits for themselves at the expense of individuals or small, unorganized groups lacking any other political bonds."); Jonathan R. Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229 (1996) ("Pre-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves.").

175 *See* Levinson, *supra* note 174, at 375 ("A first cut at interest group analysis in the takings context might point to the concentrated costs and relatively dispersed benefits characteristic of most takings, and hypothesize that interest groups would be more likely to form in opposition than in support.").

176 Cohen, *supra* note 56, at 557; *cf.* Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 58 n.56 (2005) ("The most common avenue for 'taking' land is when the government practically forces a property owner to sell their [sic] lands with the threat of condemnation.").

177 *See* SHAVELL, *supra* note 16, ch. 5, § 4.1(b), at 88 ("If the number of involved parties is large, then their ability to all come together for the purpose of bargaining may be small, for difficulties of coordination tend to rise with the number of parties.").

ing.[178] As a result, the existing owners' incentives to oppose the taking will be relatively attenuated.

Furthermore, the broader political check against the private use of eminent domain is relatively ineffective for several reasons. First, as Justice Thurgood Marshall noted, the time lag between the time of the condemnation and the time at which the consequences of the condemnation will be known—a period often lasting several years—may undermine political accountability.[179] Second, because the costs of the just compensation associated with the taking are widely dispersed among all taxpayers,[180] taxpayers have neither the relevant information nor a sufficient incentive to oppose particular condemnations for private parties.[181] Third, as repeat players within the legislature, private parties such as corporations and developers enjoy a substantial advantage in the political process over dispersed landowners.[182] Fourth, private development agencies—rather than the legislature—often retain the actual authority to use eminent domain,

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178 *See* Kochan, *supra* note 134, at 82 ("[T]he existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation." (citing Farber, *supra* note 174, at 289–91)).

179 *See* Vance v. Bradley, 440 U.S. 93, 114 n.1 (1979) (Marshall, J., dissenting) (noting that "the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard"); *cf.* Levinson, *supra* note 174, at 347 ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.").

180 *See* Garnett, *supra* note 164, at 944 (noting that the "government's decision to condemn property has little direct effect on any individual taxpayer").

181 *See* Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 194 (2003) ("Indeed, a compensation requirement might result in more takings because, once compensation is required, costs are dispersed broadly among taxpayers so political opposition might be diffused."); Kochan, *supra* note 134, at 81 (explaining that, because "costs are widely dispersed," "[i]t is not cost-efficient . . . for a taxpayer to fight a particular piece of special-interest legislation" in the context of eminent domain); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916, 968–71 (2005) (pointing out that just compensation may deter political opposition to takings by transferring costs from a "geographically concentrated, intensely interested, politically powerful constituency" to "dispersed taxpayers").

182 *See* Farber, *supra* note 174, at 289–90 (recognizing that "potential victims of takings lack the advantages of being repeat players in the political 'game'" and are "disadvantaged by the one-shot nature of their involvement"); Kochan, *supra* note 134, at 82 (pointing out that "the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators"); *cf.* Robin Paul Malloy, *The Political Economy of Co-financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 97–98 (1987) ("Under current practices for facilitating urban revitalization . . . , special interest groups are using the political means to reallocate resources to their own uses. This results in a distortion of market allocations because allocations are made on the basis of pure political power rather than according to competitive criteria.").

but such agencies are not democratically accountable.[183] As a result, the political process will often be unable to provide a safeguard against the inordinate influence that private parties exert in seeking the condemnation authority for their own advantage.[184]

In this way, private parties seeking to utilize eminent domain to obtain a concentrated benefit may subvert the process for their own advantage. The substantial potential benefit creates a socially perverse incentive for these parties to pursue profit-maximizing opportunities even though the opportunities may not be in the public interest. On the other hand, when the government uses the power of eminent domain for a project that benefits dispersed members of the public, private entities are less likely to influence or capture the political process. In order to reduce this potential for inordinate private influence, the government generally should not use eminent domain on behalf of private parties seeking the takings power for their own objectives.

2. *The Costless Acquisition Problem*

Inordinate private influence also occurs when eminent domain is used on behalf of private parties because these parties are usually not required to pay any compensation to either the condemnees or the state. In *Kelo*, for example, the private beneficiary of the state's use of eminent domain negotiated a ninety-nine year lease with the redevelopment corporation for one dollar per year.[185] In *Poletown*, the city of Detroit transferred the land to General Motors for $8 million, even though the estimated cost of the project to the public was $200 million.[186] Similarly, in Cousins Island, Maine, the state seized a parking lot near a ferry landing from one private owner and leased the lot to the ferry owner for the same use for one dollar per year.[187] Finally, in Corona, California, the city promised to acquire and sell four parcels

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183 *See* Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 52 (2005) ("The isolation of these agencies makes them unusually susceptible to coercion and influence, especially by wealthy developers and influential citizens."). *See generally* Garnett, *supra* note 164, at 974–78 (describing how "government agencies sometimes choose to expedite the acquisition of property by empowering a private party to condemn the land for itself").

184 *See* Durham, *supra* note 48, at 1309 n.187 (noting the "inefficient takings that result from the weakness of the political check on the use of eminent domain: the corruption, unfairness, or mistakes of elected officials and the electorate's failure to effectively or fairly review the actions of its representatives").

185 *See supra* note 82.

186 *See* Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 220 (2005).

187 *See* Blanchard v. Dep't of Transp., 798 A.2d 1119, 1128 (Me. 2002); *see also* BERLINER, PUBLIC POWER, *supra* note 8, at 91.

of land for one dollar to a developer, who would also receive $1 million in tax rebates.[188]

Under basic principles of supply and demand, when a private party is not required to pay the full costs of a good, the party will demand the good (in this case, land) to a socially excessive degree.[189] Because private developers can benefit from the state's use of eminent domain without bearing any of the attendant costs, developers will rely too much on the takings power in pursuing their objectives.[190] Private developers will thus have a socially perverse incentive to capture the eminent domain process for their own advantage. Additionally, these developers may have this incentive even while they may not have sought or acquired the same land if they had been required to pay the property's actual value through consensual transactions (or even the "market value" through just compensation).

The ability of private developers to acquire property costlessly also causes an additional problem. Costless acquisitions give developers an incentive to back out of transactions after condemnations have already occurred if circumstances have changed.[191] Unlike conventional purchasers, private developers who benefit from eminent domain are usually not required to commit to a project until after the existing properties have been condemned and demolished. If a private developer initially overestimates expected benefits, or if a more attractive opportunity later arises, the developer can decide to forego the project because the state rather than the developer has expended the resources necessary to acquire the property. Thus, a developer

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188 *See* Claire Vitucci, *Corona Agrees to Office Project*, PRESS-ENTERPRISE (Riverside, CA), Apr. 20, 2000, at B1; *see also* BERLINER, PUBLIC POWER, *supra* note 8, at 26–27. Under tax-increment-financing schemes, developers can avoid paying taxes, as well as paying for the newly acquired land. *See generally* Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213, 216–29 (2005) (outlining the history and expansion of tax increment financing).

189 *See* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 40 (4th ed. 2000) (noting that "excess demand" occurs when "price lies below its equilibrium value").

190 *See* Kochan, *supra* note 134, at 53 ("Rather than discovering innovative bargaining measures to overcome the high transaction costs associated with some land acquisitions in the marketplace, including the costs associated with holdout behavior, interest groups would rather access the cheaper alternative of eminent domain that allows the coercive acquisition of land.").

191 *See, e.g.*, Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3 (reporting that New York City lost $109 million when the New York Stock Exchange backed out of plans to move to a new site that the city had acquired through eminent domain); Andrew Rice, *NYSE's Chairman Unplugs His Plans for a New Exchange*, N.Y. OBSERVER, Dec. 3, 2001, at 1; Robert Robb, Editorial, *Count on City-Driven Project to Fail*, ARIZ. REPUBLIC, Sept. 21, 2001, at 9B (reporting that Mesa condemned and purchased 63 homes for $6 million to build an entertainment park before the financing of the project eventually fell through leaving a vacant lot); Amy S. Rosenberg, *Stunned Atlantic City Officials Put up a Good Front*, PHILA. INQUIRER, Mar. 8, 2000, at C1 (reporting that Mirage Resort's sudden pull-out of a planned casino left a newly constructed tunnel to nowhere).

who is not required to make the initial investment (either in buying the property or in using buying agents to buy the property) is more likely to abandon an ongoing project.[192]

Thus, the ability of a private developer to acquire and assemble land without incurring any costs leads to both an excessive number of takings and the possibility that a developer will back out after a project has already commenced. A developer's costless acquisition of property through eminent domain thus leads to an additional form of corruption. Because private developers can use eminent domain to achieve concentrated benefits and because they can do so without incurring any costs, they will have a powerful incentive to use almost any means—including intensive lobbying, political contributions, expensive lawyers, threats to relocate, and sometimes even bribery—to obtain the takings power for their own private objectives.

3. *The Resource Disparity Problem*

Private parties also manipulate the eminent domain process by exploiting disparities in legal and financial resources. Local governments are especially susceptible to the resources of affluent private developers who promise more jobs and tax revenue.[193] As a result, private entities can use their superior legal sophistication and finan-

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192 For example, suppose an assembly project is initially worth $2.5 million to a developer, and the state can acquire the land (for the developer) through eminent domain for $2 million. Suppose, however, that after the state expends $1 million buying properties, the value of the project to the developer decreases from $2.5 million to $1.5 million. Because the private developer knows there are no legal or economic consequences from withdrawing, the developer withdraws from the project because $1.5 million is less than $2 million. The state thus spends $1 million transforming existing homes and business into vacant properties.

In contrast, the secret-agent mechanism forces the developer (like other normal buyers) to commit to a project ex ante rather than shift a project's risk to the state. Suppose again that an assembly project is initially worth $2.5 million to a developer, and now the developer can acquire the land through secret agents for $2 million. Suppose that after the developer's buying agents expend $1 million secretly purchasing properties, the value of the project to the developer decreases from $2.5 million to $1.5 million. Because the developer knows that it must pay a total of $2 million for the secret agents to buy all the necessary land, the developer will continue with the project (even though $1.5 million is less than $2 million) because $1 million has already been sunk and $1.5 million (the benefits of continuing the project) is greater than $1 million (the costs of continuing with the project). Requiring the developer to use buying agents rather than eminent domain forces the private beneficiary—rather than the State—to bear the risk of the project.

193 *See* Boudreaux, *supra* note 183, at 4 ("[M]any local governments, especially the cash-poor central cities, are trying ever harder to raise revenue by attracting businesses and wealthy residents—and discouraging the poor—thus making an [sic] eminent domain an irresistible tool."); Adam Helleger, *Eminent Domain as an Economic Development Tool*, 2001 L. REV. M.S.U.-D.C.L. 901, 905 (2001) ("[L]ocal government is extremely susceptible to corporate influence when making its economic development decisions" because of the "greater involvement of business in setting local public policy, the increasing competition for jobs between localities, and a concomitant rise in the amount of state and local government subsidy of corporate activity.").

cial resources to co-opt the eminent domain process—an authority intended for the public interest—for their own private advantage. Disparities between large market players and existing owners with fewer financial and legal resources will result in socially undesirable transactions. Moreover, allowing private parties to use the state's power of eminent domain systematically advantages large market players (including real estate and condominium developers, corporations, and large entertainment facilities such as casinos and sports stadiums) over existing owners with fewer financial and legal resources (including low-income and working-class homeowners, the elderly, small businesses, houses of worship, and racial and ethnic minorities).[194]

Indeed, the history of eminent domain shows a pattern of invidious discrimination against racial and ethnic minorities.[195] Urban renewal projects and the displacement of African-Americans were so intertwined that one commentator referred to "urban renewal" as "negro removal."[196] Eminent domain traditionally has imposed a disproportionate impact on racial and ethnic minorities, as well as the economically disadvantaged and elderly.[197] Several civil rights organizations, in their brief supporting the petitioners in *Kelo*, pointed out that "the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly . . . have been targeted for the use

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194 *See* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting) ("[T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."); *id.* at 2686–87 (Thomas, J., dissenting) ("[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.").

195 *See, e.g.*, Garrett v. Hamtramck, 335 F. Supp. 16, 22 (E.D. Mich. 1971) ("Having displaced the larger proportion of Black citizens in prior construction projects the City has at the same time reduced the supply of housing available for Blacks or permittted discriminatory housing practices to prevent relocation of Blacks in the community."), *rev'd*, 503 F.2d 1236 (6th Cir. 1974); *The* Kelo *Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Judiciary Comm.*, 109th Cong. 12 (2005) (statement of Hilary O. Shelton, Director, Washington Bureau, National Association for the Advancement of Colored People) ("The history of eminent domain is rife with abuses specifically targeting racial and ethnic minority and poor neighborhoods.").

196 12 THOMPSON ON REAL PROPERTY 98.02(e), at 194 (David A. Thomas ed., 1994) (quoting novelist James Baldwin).

197 *See Kelo*, 125 S. Ct. at 2687 (Tbomas, J., dissenting) (noting that "[o]ver 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black") (citing Berman v. Parker, 348 U.S. 26, 30 (1954)); *see also* BERNARD J. FRIEDEN & LYNNE B. SAGALAYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28 (1989) ("Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them.").

and abuse of the eminent domain power in the past and there is evidence that . . . these groups will be both disproportionately and specially harmed by the exercise of that expanded power."[198]

Disparities in legal and financial resources also may cause quid pro quo corruption between local officials and private developers.[199] In such an arrangement, the private developer benefits from assembling land without purchasing the property for the full price. Local authorities may have either benevolent or malevolent motives for engaging in quid pro quo corruption—benevolent if the authorities subjectively believe the taking will improve the local community, and malevolent if the authorities are pursuing their own self-interest (e.g., with side payments, bribes, kickbacks, or campaign contributions) rather than the public interest.[200]

Disparities in legal and financial resources thus create the opportunity for the private exploitation of the economically disadvantaged and politically disfavored. This exploitation, coupled with the perverse incentives of private developers who are seeking concentrated benefits with minimal acquisition costs, indicates that the use of eminent domain for private parties often leads to socially undesirable projects. Thus, because of the superiority of secret buying agents and the increased potential for inordinate influence, the government generally should not use the eminent domain power on behalf of private parties. In contrast, because of the government's inability to use buying agents and the diminished possibility of inordinate private influence, eminent domain is both necessary and appropriate for the state. The new theory based on secret purchases and private influence thus provides a mechanism for promoting economic development and a principle for distinguishing between public and private uses, as well as a rationale for interpreting the public use requirement.

C. Counterarguments

1. *Positive Externalities*

As discussed above, secret buying agents facilitate consensual purchases of land if a transfer is socially desirable—i.e., if the value of the properties to the private assembler is greater than the value of the

198 Brief for NAACP, et al. as Amici Curiae, Supporting of Petitioners, at 7, Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655 (2005) (No. 04-108).

199 *See, e.g.*, Durham, *supra* note 48, at 1297–1300 (explaining that the selection of the route for the Cross-Bronx Expressway may have had more to do with political corruption, familial favoritism, and private influence than promoting the general welfare because the route selected affected over eighty times the number of families as the alternative (citing ROBERT CARO, THE POWER BROKER 877 (1974)).

200 *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 92 (1957) ("Favor-buying is usually nothing so crude as bribery; it is the subtler device of making campaign contributions in return for a favorable disposition of attitudes by a party . . . .").

properties to the existing owners.[201] Conversely, if the value of the project to the assembler is less than the value of the properties to the existing owners, no transaction will occur.[202] However, a situation could arise in which the *private* benefit of the taking is lower than the actual value of the properties to all of the existing owners, but the *social* benefit of the taking is greater than the actual value to the existing owners. That is, in certain situations, a private benefit may not be large enough to induce a private party to assemble property even though a positive externality makes the project socially desirable.

Suppose, for example, that a private party wanted to assemble ten parcels of land that had a total value to the party of $15 million when assembled. Suppose also that the value to the ten existing owners of the ten parcels was $1 million per parcel or $10 million overall. With secret buying agents, the private party would purchase the property because the value to the assembler ($15 million) is greater than the value to the existing owners ($10 million). However, suppose that the assembly contains a positive externality such that the private value that the assembler could internalize is only $9 million while the overall social value is $15 million. In this situation, the private benefit would not be large enough to induce the assembler to purchase the property—even using buying agents—because the benefit to the assembler ($9 million) is less than the value to the existing owners ($10 million). That is, the existence of a substantial positive externality would prevent a socially desirable assembly from occurring even with secret buying agents.[203]

Historically, the Mill Acts, which allowed private parties to condemn and flood riparian lands to provide for grist-mills,[204] illustrate the advantage of using eminent domain where a substantial externality exists. The justification for the condemnation authority of the Mill Acts—like the justification for eminent domain generally—was to provide a mechanism for overcoming the holdout problem.[205] But the Mill Acts provided all members of society with a vital public benefit—

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201 *See supra* note 152 and accompanying text.

202 *See id.*

203 The positive externality here would be determined by aggregating the change in the subjective valuations of all third parties affected by the assembly project. Thus, the social desirability of the project, even when the project includes an externality, is measured using actual value rather than fair market value.

204 *See* 2A NICHOLS, *supra* note 2, § 7.07[4][g][i], at 7-297 n.61 ("The Mills Acts . . . gave mill owners liberty to continue and improve mill ponds, paying damages for raising the water. The acts were revised in 1795 and the mill owner was allowed to flood any lands necessary to erect a mill.").

205 *See* John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation 1719–1859*, 27 J. LEGAL STUD. 455, 457–59 (1998) (describing opportunistic holdouts that often prevented private bargaining around mill sites).

indeed, a "necessity"[206]—that otherwise could not have been obtained. As a result, the U.S. Supreme Court upheld condemnations under the Mill Acts as legitimate public uses.[207] Thus, certain activities, such as the maintenance of functioning grist-mills in colonial America, may produce a positive externality of such significance that eminent domain may be necessary to supplement private incentives and ensure that these transactions occur.[208]

However, any exception based on the possibility of positive externalities should be limited for several reasons. Governments should not use eminent domain on behalf of private parties without a positive externality of a magnitude that is likely to create a significant difference in the private and social incentives for assembling the property. Specifically, if a party's private incentive would already be substantial enough (i.e., if the private value of assembly is greater than the value to existing owners), then the use of eminent domain would be unnecessary even if a significant externality exists. Likewise, if the social value of the project is too low (i.e., if the social value of assembly is less than the value to existing owners), then the use of eminent domain would be undesirable because the transfer would be socially undesirable even with the externality. Most cases probably fall into one of these two categories. The only situation in which a positive externality is determinative is if the assembly is desirable from a social perspective but the private incentive to assemble is insufficient (i.e., if the social value of assembly is greater than the value to existing owners but the value to existing owners is greater than the private value to the assembler).

If there is not a substantial externality associated with the private transaction that would create a significant difference in the private and social incentives for assembling property, then private bargaining

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206 Olmstead v. Camp, 33 Conn. 532, 552 (1866) ("From the first settlement of the country grist-mills of this description have been in some sense peculiar institutions, invested with a general interest. . . . In many instances they have been not merely a convenience, but almost a necessity in the community."), *quoted in* Kelo v. City of New London, 843 A.2d 500, 586 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part); Hart, *supra* note 205, at 455 (pointing out that "[g]ristmills and other water-powered mills played a central part in American economic development"); *Requiem*, *supra* note 4, at 604–05 (noting that, at least during the colonial period, mills were "essential to community existence").

207 *See, e.g.*, Head v. Amoskeag Mfg. Co, 113 U.S. 9, 26 (1885) (upholding the New Hampshire Mill Acts because "maintaining the validity of general mill acts as taking private property for public use, in the strict constitutional meaning of that phrase . . . is clearly valid as a just and reasonable exercise of the power of the legislature").

208 *See* Hart, *supra* note 205, at 461–69 (discussing "externalities among mills" and concluding that the Mill Acts "substantially expanded the incentives of entrepreneurs to invest in and maximize the value of mill property, increasing societal welfare as well as the welfare of owners of existing mills"); *cf.* Clark v. Nash, 198 U.S. 361, 369–70 (1905) (holding that a taking of land for an irrigation ditch that was "absolutely necessary" to service a lot of land did not violate the public use requirement).

(using undisclosed agents) would produce the optimal result. While negotiations between buying agents and existing owners may fail, such bargaining problems exist with any market transaction.[209] Courts, as well as legislatures, generally do not have enough information to interfere with such bargaining. Consequently, a significant positive externality is a necessary, although not sufficient, condition for permitting the state to use eminent domain on behalf of private parties.

The exception for externalities should also be limited because the definition of "externality" is relatively amorphous.[210] Virtually any development might be said to be able to benefit the community.[211] However, additional jobs or tax revenue provided by a private party do not constitute positive externalities unless the jobs or tax revenue have some incidental effect on social welfare.[212] A positive externality can justify the private use of eminent domain only if the assembler could not have internalized the benefit. Moreover, as an empirical matter, we generally do not observe concerted efforts (e.g., national programs) attempting to take into account these types of externalities. Firms may also use the externality argument as a pretext (essentially a costless signal) for acquiring eminent domain for their own private objectives.

Even if a significant positive externality exists and even if the private benefits of a project are insufficient to induce a private party to assemble the land, the government could provide a public subsidy to supplement the private incentive to assemble the property. The government may subsidize any project, including the assembly of land through buying agents, if the government determines that the project involves a significant positive externality. The use of a public subsidy

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209 *See* SHAVELL, *supra* note 16, ch. 6, § 2.3, at 124 ("The possibility of such breakdowns in bargaining is not special to transactions involving the state, however—it is an aspect of virtually all trade—so this alone does not furnish a justification for the state to enjoy the power to take.").

210 *Compare* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 751 (15th ed. 1995) (defining externalities as "activities that affect others for better or worse, without those others paying or being compensated for the activity"), *with* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 24 (1988) (defining an externality as "the effect of one person's decision on someone who is not a party to that decision").

211 *See* Fischel, *supra* note 37, at 934 ("Only in the broadest sense of public goods, which allows that such activities have 'spillover effects' that are difficult for providers to profit from, can most traditional uses of eminent domain be justified."); *cf.* Crafton, *supra* note 143, at 865 n.45 ("Since all economic activity generates externalities of one sort or another, a public use definition that is based solely on the concept of externalities would provide no limitation on eminent domain.").

212 *See* Crafton, *supra* note 143, at 895–96 (noting that such externalities are "really no different than the benefits that a community gets from any productive business" and eschewing "[a] theory of 'public' that myopically concentrates on externalities" (citing Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 128–29 (1979)).

is a common solution to this type of externality.[213] But an ex ante subsidy may not be feasible while maintaining the anonymity of secret buying agents. Any public discussion of the project or official precommitment by the government risks disclosure and the possibility of holdouts. However, such a subsidy could be given ex post without affecting the ability of buying agents to overcome the holdout problem.

At first glance, providing a subsidy in a way that allows the necessary flexibility to meet the exigencies of a project while preventing too much ex post discretion in government decisionmaking seems problematic. But those local governments who would otherwise be willing to use eminent domain on behalf of a private party will normally be willing to grant an ex post subsidy even if it is not legally enforceable from any ex ante agreement. These governments usually receive significant political and economic benefits, as well as significant exactions, from the developer. Moreover, local governments, as repeat players in the economic development game, may be willing to grant an ex post subsidy because of a concern for their reputation among future assemblers. Finally, local governments have an incentive to pay ex post subsidies because, without such subsidies, private parties have a credible threat to sell the assembled properties and move elsewhere. Secret purchases thus remain possible even if an externality exists because ex post subsidies may be used to supplement private incentives. Thus, the existence of a positive externality may necessitate the use of eminent domain, rather than secret buying agents, in certain limited situations, but only if a clear externality of a substantial magnitude exists and cannot be solved through a subsidy.

2. *Timing Problems and Collusion*

The possibility of timing problems and the potential for collusion raise two additional objections. First, one of eminent domain's advantages as a mechanism for acquiring and aggregating land is that property may be obtained almost immediately.[214] That is, the use of eminent domain avoids the time and resources involved in bargaining. By contrast, under the theory based on secret purchases, private developers must use buying agents to bargain with each existing owner individually. This individualized bargaining, however, may be less effective if a buyer needs to assemble land quickly to exploit its best use. Indeed, the federal government and most states actually utilize "quick take" procedures in which the government can acquire and demolish a person's home or business before the opportunity for a

213 *See supra* note 27.

214 *See supra* note 104.

hearing.[215] If the value of the project depends on the quick acquisition of property, secret agents may be inadequate because they often require several years to aggregate property while preserving anonymity.

However, the use of eminent domain is not necessarily a faster mechanism than the use of buying agents to assemble land. The number of years spent executing redevelopment projects, and sometimes litigating the validity of condemnations, is often greater than the number of years necessary for buying agents to aggregate property through voluntary transactions.[216] Indeed, as noted above, two developers in West Palm Beach, using twenty different brokers, successfully assembled twenty-six contiguous blocks in only nine months.[217]

Moreover, even when the use of eminent domain may be quicker, it is not necessarily socially desirable. Specifically, while eminent domain provides a preemptive mechanism for immediate assemblage, it does so at the cost of foregoing more information about a project's social desirability.[218] By making a series of offers, which the existing owner either accepts or rejects, buying agents reveal information about a project's social desirability. Thus, even if undisclosed agents sometimes take longer than eminent domain to acquire property, this trade-off might still be socially desirable if the benefits from preventing the socially undesirable transfers that eminent domain sometimes allows outweigh the costs associated with delaying the acquisition.[219]

Second, because private developers must employ third parties as buying agents, the possibility of collusion arises between buying agents and existing owners. For example, secret agents might tip off sellers

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215 *See* Garnett, *supra* note 164, at 970 ("The federal government and most states have adopted 'quick-take' eminent-domain statutes which permit the government to obtain title and possession to property prior to a final judgment in an eminent-domain action.").

216 *See id.* at 954 (noting that urban renewal projects "tended to proceed at an excruciatingly slow pace" and that "[o]n average, it took three years for the local government even to sell the condemned land to a private developer").

217 *See supra* note 132 and accompanying text.

218 *Cf.* Eric A. Posner & Alan O. Sykes, *Optimal War and* Jus Ad Bellum, 93 GEO. L.J. 993, 1004 (2005) (noting that "delay in the use of force has value as a real option" because "information becomes better over time").

219 A related timing problem is that buyers sometimes need certain ex ante regulatory and zoning approvals (e.g., an environmental impact statement) for their projects that may not be compatible with maintaining the secrecy of the project. One possibility is to allow only ex post approvals because these buyers would be capable of selling their acquired properties and recouping their costs even if they did not obtain such approvals. This approach, however, does not seem entirely satisfactory. In theory, because regulatory and zoning approvals and eminent domain are both government tools, the optimal solution might be to decrease land use regulation rather than increase the state's use of eminent domain. Yet regulatory and zoning approvals serve many important functions. Fortunately, in practice, the problem of ex ante approvals is unlikely to be significant. The very municipalities that are willing to use eminent domain on behalf of private parties are also likely to be amenable to granting the necessary approvals and exemptions.

or agree to a higher price in exchange for a kickback. Notably, this collusion problem exists in every other agency relationship in which a principal monitors its agents (albeit while incurring some agency costs). In this particular agency relationship, buying agents would have a legal duty to negotiate the best price on behalf of their principals, so engaging in collusion to increase the price would violate a legal duty.[220] Perhaps more importantly, the buying agents themselves often do not even know that they are buying property for an assembly project.[221] As discussed above, developers using undisclosed agents not only hide the identity of buying agents from existing owners and the public but also hide the identity of buying agents from each other.[222] Because of this double-blind acquisition system in which each buying agent acts independently and anonymously, corruption is unlikely.

3. *Distrust and Resentment*

Finally, secret purchases may increase societal distrust and resentment. Because transactions normally occur between two parties negotiating with full disclosure, existing owners generally view the use of buying agents as deceptive. Owners who discover that they have sold to developers through secret buying agents may resent such buyers and distrust future buyers (even those not employing secret agents). The possibility of creating such a trading environment, as well as its implications for a market economy, must therefore be explored and compared with the current institutional arrangement.

Upon discovering that undisclosed agents have discreetly assembled land, individual sellers, as well as the affected community, may resent the buyer's use of such agents. The citizens of Allston and the mayor of Boston, for example, were outraged that Harvard University secretly purchased fourteen parcels of land for $88 million.[223] The Boston mayor was "so incensed that he adopted a mocking sing-song tone to mimic his view of Harvard's attitude, saying, 'We're from Harvard, and we're going to do what we want.'"[224] Likewise, members of the community were outraged at the University for its secret land

220 *See, e.g.*, Spence v. Spaulding & Perkins, Ltd., 347 S.E.2d 864, 865 (N.C. Ct. App. 1986) (holding that a real estate broker's "good faith duty includes a legal, ethical and moral responsibility to secure for the principal the best bargain and terms that his skill, judgment and diligence can obtain"); *see also* James A. Bryant & Donald R. Epley, *The Conditions and Perils of Agency, Dual Agency, and Undisclosed Agency*, 21 REAL EST. L.J. 117, 123 (1992) ("The broker's obligation is to negotiate the best price possible for his or her principal." (emphasis omitted)).

221 *See supra* note 113 and accompanying text.

222 *See supra* notes 110–13 and accompanying text.

223 *See* Cassidy & Aucoin, *supra* note 19.

224 *Id.*

acquisitions.[225] In response, Harvard officials spent a significant amount of time and money, including voluntary payments to the government in lieu of property taxes,[226] reviving Harvard's relationships and image within the community.[227]

Undisclosed agents also may create distrust between normal buyers and sellers because sellers may be suspicious that a buyer is actually a secret agent. Normally, buyers and sellers negotiate in reliance on the belief that the other party is acting in good faith and with full disclosure. However, if some percentage of buyers are undisclosed agents, sellers might become more suspicious and less willing to sell without verification of a buyer's identity or disclosure of a buyer's objective. As a result, the use of buying agents may lead to incidental monitoring costs. Sellers, for example, might take socially wasteful precautions, such as spending time and money investigating whether buyers are actually secret agents rather than independent buyers.

However, while secret buying agents may create some level of resentment and distrust, the use of eminent domain, especially for private parties, causes similar problems.[228] Indeed, the level of resentment caused by eminent domain may be even greater for two reasons. First, eminent domain, unlike secret purchases, involves the government's imprimatur. When the government condemns the property of one of its citizens, the citizen may feel a deeper sense of frustration with, as well as alienation from, the government.[229] Sec-

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225 *See* Tina Cassidy & Don Aucoin, *Harvard Says Its Purchases Violated Trust: Menino Demands Scholarships in Return for Allston Land Buys*, BOSTON GLOBE, June 11, 1997, at A1 ("Clearly, Harvard has a lot of ground to make up with some community residents who were incensed to learn that the university concealed its role in major land purchases for nearly a decade.").

226 *See* Marcella Bombardieri, *Town Tensions Thawing as Harvard Earns Allston's Trust: University Wins Plaudits with Housing Support*, BOSTON GLOBE, Dec. 4, 2003, at B3 ("As a nonprofit, Harvard has no legal obligation to pay taxes on much of its land. The school agreed in 1999 to boost its payments in lieu of taxes to Boston, offering $40 million over 20 years, which is $12 million more than under its previous agreement.").

227 *See id.* (describing "example[s] of the work Harvard has done over the last few years—partly by opening its checkbook, but also with other forms of help—to overcome the mistrust engendered by the secret land buys"); Kate Zernike, *Harvard Starts Mending Fences; Looking to Grow, School Cultivates Its 'Host Cities,'* BOSTON GLOBE, October 12, 1999, at B1 ("By their own account, Harvard's top administrators have embarked on an aggressive campaign to prove that the university is a good neighbor to what it now deferentially refers to as its 'host cites.'").

228 *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1961) ("Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be heard and seen to be believed . . . .").

229 *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 579 (2001) ("While people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration."); Boudreaux, *supra* note 183, at 49 ("Being evicted from one's home, by no fault of one's own, is likely to alienate one further from one's government and community. This is especially true when the locality is admittedly

ond, unlike a consensual transaction with a buying agent in which an existing owner cannot complain about the final selling price, eminent domain relies on just compensation, which often will be undercompensatory.[230] Presumably, existing owners would prefer full compensation for their actual value rather than partial compensation based on fair market value.

The concern over distrust and resentment engendered by buying agents may be overstated. The use of undisclosed agents may become less shocking as the number of developers employing buying agents continues to increase. While monitoring may occur in certain circumstances, such monitoring costs are unlikely to be substantial. The double-blind acquisition system severely undercuts any incentive to monitor because existing owners would be unable to determine the nature or extent of a project from any of the buying agents. Moreover, any monitoring costs that do occur are likely to be negligible in comparison with a reduction in administrative costs, which are significantly higher for using eminent domain than for buying agents.[231] Finally, concerns that the existence of buying agents will cause the entire real estate market to unravel are misplaced because the vast majority of market purchases will still be for non-assembly projects, thus preventing any strategic behavior by existing owners.[232]

Thus, while the distrust and resentment associated with secret purchases are potential concerns, these considerations—like the possibility of positive externalities, timing problems, and collusion—either apply in limited circumstances or do not impose greater costs than the institutional arrangement under eminent domain. Overall, therefore, the availability of secret buying agents and the potential for inordinate private influence generally render the use of eminent domain for private parties both unnecessary and undesirable.

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trying to replace certain housing stock—and perhaps even categories of people—with others."); *see also supra* Part II.A.3.

230 *See supra* notes 143–46 and accompanying text.

231 *See supra* note 164 and accompanying text.

232 The buying-agent strategy will be ineffective only if existing owners realize that the purchase is for an assembly project. Because most purchases (even if the state prohibited private takings) would not involve assembly projects, existing owners would be unable to decipher the specific instances in which private parties are utilizing buying agents. Moreover, even if the use of buying agents did become more common, the real estate market itself would likely evolve in response to this development. For example, property owners—even those property owners not selling their homes or businesses—might receive an increased number of offers, including offers whose sole purpose is to disguise other unsolicited offers in the marketplace. As a result, existing owners would still be unable to distinguish buying-agent offers from non-buying-agent offers.

III
APPLICATIONS OF THE NEW THEORY

A. *Kelo* and Economic Development

Promoting economic development through eminent domain can be defined broadly as any situation in which the state transfers nonblighted property from one private owner to another in order to increase the number of jobs, the size of the tax base, or the effective utilization of property.[233] Because the use of eminent domain for economic development often destroys existing homes or businesses, public officials commonly assert that the public interest lies in the potential for incidental public benefits such as increasing jobs or tax revenue. In *Kelo*, for example, city officials argued that condemning over ninety acres of real estate to construct new office buildings and a hotel was essential for augmenting the city's tax base.[234] However, applying the foregoing economic analysis to *Kelo*, buying agents, rather than eminent domain, should most likely have been used in attempting to acquire these properties.[235]

Kelo represents the classic holdout situation because only nine property owners refused to sell at the development corporation's price.[236] The problem, however, as noted above, is that there was no way of knowing whether the nine owners who refused to sell were strategically holding out or were refusing to sell because they actually valued their properties more than the development corporation's offer price.[237] Buying agents most likely could have overcome this holdout problem through consensual transactions. The dozens of existing

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233 *See* Rachel A. Lewis, Note, *Strike That, Reverse It:* County of Wayne v. Hathcock: *Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341, 342–43 (2005) ("The use of eminent domain as a means of spurring economic development generally refers to situations where property is taken by governmental authority and then transferred to a private party under the premise that subsequent development will benefit the public in ways such as increasing tax revenue and generating employment."). Some states' legislatures have even proposed statutory definitions of economic development.

234 *See* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2659–60, 2665.

235 For the purposes of this application, I assume that the development corporation, the New London Development Corporation (NLDC), *see supra* note 79 and accompanying text, is acting as a quasi-governmental entity. On the one hand, the City of New London delegated its eminent domain authority to the NLDC. Thus, the NLDC is acting as an extension of the government insofar as it possesses the power of eminent domain. *See id.* On the other hand, the NLDC is technically a private nonprofit corporation and possessed funds to purchase real estate from property owners who were willing to sell. *See id.* Thus, the NLDC is acting as a private developer insofar as it could have purchased property, like other private parties, using buying agents. Of course, Corcoran Jennison, one of the primary developers that was negotiating with the NLDC to lease the land at a nominal rent, *see supra* note 82, also could have entered the market, as a private party, and attempted to purchase the property using buying agents.

236 *See* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2660 (2005).

237 See *supra* note 133 for the distinction between strategic and unwilling sellers.

owners who sold under the threat of eminent domain almost certainly would have sold to buying agents as well, and the private parties employing the buying agents would have been more likely to provide the owners with full compensation.[238] Similarly, the nine existing owners who held out even under the threat of eminent domain most likely would have sold to buying agents at some price above their actual valuations of their homes. If these existing owners had refused to sell (even without knowing of the assembly project), then these owners may have valued the property more than the developer. The anonymity of the undisclosed agents would have eliminated the possibility that the existing owners were opportunistically inflating their selling prices. Thus, secret buying agents, like eminent domain, may have prevented any strategic holdout among existing owners.

However, unlike eminent domain, secret huying agents would have eliminated the possihility of an erroneous taking. By ignoring the actual value of the property to the homeowners, the development corporation's use of eminent domain in *Kelo* may have compelled a socially undesirable property transfer if the owners' actual valuations were greater than the market valuations. In *Kelo*, the evidence seems to indicate that the existing owners attached a great deal of sentimental value to their properties.[239] This sentimental value, coupled with the relatively speculative nature of the project's future benefits,[240] suggests that the wisdom of New London's decision to use eminent domain to assemble the property was questionable. The use of secret purchases, hy contrast, would have given the developer the proper incentive to weigh the expected costs and benefits of the project.

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238 Eminent domain—unlike secret buying agents—sometimes compels transactions of otherwise unwilling sellers who only choose to sell because they are in the shadow of a potential condemnation. *See* BERLINER, PUBLIC POWER, *supra* note 8, at 6 ("A deal struck voluntarily is quite different than a deal struck with someone who says, 'hand it over, or we'll take it by force.'").

239 *See, e.g., Kelo*, 125 S. Ct. at 2660 ("Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they were married some 60 years ago . . . . Petitioner Susette Kelo . . . has made extensive improvements to her house, which she prizes for its water view."); *see also* Warren Richey, *A Fight To Keep Their Homes*, CHRISTIAN SCI. MONITOR, Feb. 16, 2005, at 11 ("I am a 93-year-old homeowner of Fort Trumbull [and] have lived here all my life. This is our home. My wife and I do not want to leave here." (alteration in original) (quoting homeowner Walter Pasqualini)).

240 *See* Kelo v. City of New London, No. 557299, 2002 WL 500238, at *76 (Conn. Super. Ct. Mar. 13, 2002) (finding that development corporation's hope of attracting Coast Guard Museum was "too speculative to justify these condemnations"); *see also* Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002: Project Became Unrealistic Without Pfizer Commitment*, DAY (New London, Conn.), June 12, 2004, at C4 ("By July 2002 . . . Pfizer had been open in New London for a year, and it had found other hotels in the area . . . . With that demand met, and with the corporate landscape altered, the company [explained to] Corcoran Jennison that the justification for the hotel was 'no longer apparent.'").

Furthermore, the possibility in *Kelo* of an erroneous taking was also relatively high because of the substantial private interests at stake. New London delegated its power of eminent domain to a private development corporation.[241] In turn, the development corporation negotiated with a developer for a ninety-nine year lease for the rent of one dollar per year—essentially a costless acquisition.[242] The influence of the Pfizer Corporation (featured on the development corporation's own Web site) also affected the New London project.[243] Indeed, the stated purpose of the redevelopment project was to complement Pfizer's new facility.[244] Finally, the development corporation exempted an Italian Dramatic Club, a politically well-connected organization, while condemning every adjacent home.[245]

The favorable lease terms and the political exemptions likely resulted because the project's beneficiaries, the real estate developer and Pfizer, were both well-organized, well-financed private entities that faced a substantial profit-making opportunity. Unlike a highway through New London, which would have had multiple, dispersed beneficiaries, the development project in *Kelo* had the potential to provide a concentrated benefit for both the developer and Pfizer. These private actors thus had an extremely high incentive to capture the eminent domain process for their own advantage. In contrast, the condemnees, namely, homeowners and business owners with few financial resources and little legal sophistication, were relatively dispersed. As a result, the owners faced a much more difficult coordination problem than the development corporation. Not surprisingly, most of the property owners sold their property to the development corpora-

241 *See supra* note 79 and accompanying text.

242 *See supra* note 185 and accompanying text.

243 *See Kelo*, 125 S. Ct. at 2659 ("The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract."); *see also id.* at 2678 (Thomas, J., dissenting) (characterizing the plan as "suspiciously agreeable to the Pfizer Corporation").

244 *See* Kelo v. City of New London, 843 A.2d 500, 509 (Conn. 2004) ("In its preface to the development plan, the development corporation stated that its goals were to create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues . . . ."); *id.* at 537 ("With respect to Pfizer, the plaintiffs point out that it is, in the words of James Hicks, the executive vice president of RKG Associates, the firm that assisted the development corporation in the preparation of the development plan, the '10,000 pound gorilla' and 'a big driving point' behind the development project.").

245 *See Kelo*, 125 S. Ct. at 2671–72 (O'Connor, J., dissenting) (noting that the redevelopment plan "will also retain the existing Italian Dramatic Club (a private cultural organization) though the homes of three plaintiffs in that parcel are to be demolished").

tion[246] rather than expending their own limited legal and financial resources to challenge the condemnations.[247]

The only remaining determination is whether private parties lacked a sufficient incentive to purchase the New London properties because of a substantial positive externality that could have prevented an otherwise socially desirable transaction. Here, the project's proponents argued that the development plan was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city."[248] However, as noted above, more jobs and higher tax revenue do not in themselves constitute positive externalities. Private developers could have contributed these same benefits if they had acquired the land through secret purchases rather than by eminent domain. Additionally, if a significant externality existed, the city could have granted the developer an ex post subsidy. But even if other externalities had existed, and even assuming that a public subsidy would have been impossible, it is unclear whether any such externality would have been great enough to create a significant difference in the private and social incentives for assembling the property.

Other potential counterarguments are also unpersuasive in the *Kelo* context. Timing does not seem to be a problem given that the economic development corporation took several years in attempting

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246 *See Kelo*, 125 S. Ct. at 2660 ("The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed.").

247 The fact that the proposed deal in *Kelo* between the development corporation and the developer involved a lease, rather than a transfer in fee simple, may mitigate, but does not eliminate, the negative implications of private influence. One concern with using eminent domain for private parties is that a private party may not use the condemned land in a manner consistent with the original public purpose. *See* Garnett, *supra* note 164, at 981 (noting "the traditional presumption that public uses may be abandoned"). A lease may help to mitigate this problem if the lease includes an enforceable lease term that grants the government a right to take back any land that the private beneficiary of the taking does not devote to its intended public purpose. *Cf. id.* at 978 ("A number of states have considered or adopted 'clawback' legislation penalizing the recipient of development incentives for failing to follow through on promised investment or job creation."). *See generally* GREG LEROY, NO MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE 43–71 (1997) (providing a comprehensive account of "clawback" legislation).

Relying on leases or other similar mechanisms, however, has several disadvantages. First, these approaches may require the government to incur high monitoring costs to ensure that private entities are implementing a project's public purpose. Second, in the event of a dispute over compliance with a lease term, these approaches may require courts to answer the difficult question of whether a private entity's use has satisfied a public purpose. Third, even if such arrangements did not entail these disadvantages, they would address only the problem of potential benefits and not the problem of social costs. That is, even if the government was able to force a private party to continue devoting its property to a certain public purpose, this arrangement would ignore the costs of the condemnations to the existing owners and would thus fail to answer the threshold question of whether using eminent domain was socially desirable in the first place.

248 *Kelo*, 125 S. Ct. at 2658 (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004)).

to redevelop this area of New London.[249] Indeed, the nearly five years spent litigating the case[250] would have been more than enough time for buying agents to acquire the land through consensual transactions. The danger of collusion would also have been relatively low. Other firms have successfully employed undisclosed agents successfully in aggregating land in similar situations, and a developer could have utilized the double-blind acquisition system to prevent its own buying agents from discovering the larger assembly project.[251] Finally, while using buying agents might have caused resentment, it is clear that substantial resentment already existed among the owners who challenged the city's condemnations to the U.S. Supreme Court and have now been forced from their homes.[252] Thus, secret purchases might have been superior to eminent domain for assembling property and promoting economic development within the city of New London.[253]

B. *Berman* and Urban Blight

While the use of eminent domain for economic development allows the taking of property with an existing productive use, the use of eminent domain for eliminating blight involves taking property that is deleterious to the surrounding community. The traditional definition of blight included such characteristics as abandoned and physically deteriorating buildings, as well as health concerns over the spread of

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249 *See id.* at 2659 (noting that Connecticut provided the development corporation with $5.35 million for planning in 1998 and that New London approved the development plan in 2000—years before the Supreme Court's 2005 decision in *Kelo*).

250 *See* Kelo v. City of New London, 843 A.2d 500, 511 (2004) (noting that development corporation filed condemnation proceedings in November 2000 and plaintiffs challenged the condemnations in December 2000).

251 *See supra* notes 110–13 and accompanying text.

252 *See* Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20 ("'I am sick,' said [plaintiff] Susette Kelo . . . . 'Do they have any idea what they've done?' . . . 'It's desperately hard to believe that in this country you can lose your home to private developers,' [plaintiff Bill] Von Winkle said. 'It's basically corporate theft.'").

253 In addition to assembly projects as in *Kelo*, municipalities and private developers also use eminent domain for the purpose of redeveloping single parcels of land. For example, a city or town may want to replace an existing business (such as a mom-and-pop store) with a new business (such as a national chain) that could potentially bring in more tax revenue or create more jobs. Applying the foregoing economic analysis, private parties actually confront fewer bargaining problems for acquiring single properties than assembling multiple properties because the holdout problem disappears. The counterarguments against secret buying agents are also less convincing for a single property. In particular, timing is not an issue because there is no need to space secret purchases and a buying agent is used only once. Consequently, the possibility of detection is much lower, collusion is easier to monitor, and resentment and excessive precautions are less likely. Thus, using eminent domain for economic development appears even less justified in this single-property situation than in the assembly situation.

disease.[254] Modern definitions of blight, by contrast, also include such characteristics as "too-small side yards, 'diverse ownership' (different people own properties next to each other), 'inadequate planning,' and lack of a two-car attached garage."[255] Furthermore, blight designations, like the designation at issue in *Berman v. Parker*,[256] often include both blighted and nonblighted properties.[257] Most courts generally view eliminating blight as an adequate justification for eminent domain, even when the government eventually transfers the condemned property to another private party for a private objective.[258] Courts and commentators, however, often fail to address the important initial question of what constitutes blight.

A determination of blight, properly understood, should be based on the existence of a negative externality stemming from the property itself. A blighted area may impose negative externalities on neighboring homes and businesses.[259] Abandoned buildings, for example, might cause negative externalities by deterring new owners from investing in the community, increasing the likelihood of criminal activ-

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254 *See* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV 1005, 1034 (2005) ("Early blight cases in the 1940s and 1950s upheld condemnations in areas that closely fit the layperson's intuitive notion of 'blight': dilapidated, dangerous, disease-ridden neighborhoods."); Note, *Public Use as a Limitation on Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422, 1424 (1955) ("[I]ncidental use of eminent domain to acquire private property will also be necessary to eliminate blight by removing nonconforming buildings, dilapidated houses which discourage neighbors from maintaining adjoining property, and perhaps even sound buildings which are crowded too closely together.").

255 BERLINER, PUBLIC POWER, *supra* note 8, at 5; *see, e.g.*, PA. STAT. ANN. § 1702(a) (2003) (defining blight as resulting from, among other things, "inadequate planning," "excessive land coverage by buildings," "lack of proper light and air and open space," "defective design and arrangement of . . . buildings," and "economically or socially undesirable land uses").

256 348 U.S. 26 (1954), discussed *supra* text accompanying notes 43–48.

257 *See* 2A NICHOLS, *supra* note 2, § 7.06[7][c][iv], at 7-182 ("Urban renewal projects seek to clear enough unsafe and unsanitary blight by condemning an entire area even though some buildings within the designated area may not be blighted."). *But cf.* Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178, 1184 (Conn. 2002) (holding condemnation of non-blighted property unconstitutional because "property that is not substandard and that is the subject of a taking within a redevelopment area must be essential to the redevelopment plan in order for the agency to justify its taking").

258 *See, e.g.*, City of Phoenix v. Superior Court, 671 P.2d 387, 389 (Ariz. 1983) ("It is generally accepted . . . that the taking of property in a so-called slum or blighted area for the purpose of clearing and 'redevelopment,' including sale before or after reconstruction to a private person or entity for operation of a public or private business, is 'public use.' "); Sinas v. City of Lansing, 170 N.W.2d 23, 26 (Mich. 1969) ("The elimination of urban blight is an adequate justification for the exercise of the power of eminent domain, even where the acquisition is followed by sale to private individuals.").

259 *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 79 (2000) (characterizing situations of "aesthetic blight" as "negative externalities imposed on existing homes").

ity, or facilitating the transmission of infectious diseases.[260] Blight may thus be understood as a nuisance—a condition imposing a negative externality on one's neighbors—without the corresponding benefit characteristic of some nuisances (e.g., practicing a musical instrument in an apartment or barbecuing a meal in a backyard).[261]

There are several possibilities for dealing with negative externalities through legal rules including liability regimes, corrective taxes, and direct subsidies.[262] Yet none of these initiatives would be a practicable mechanism for eliminating blight. Imposing liability would allow affected homeowners to bring suit against the owners of the blighted property, thereby providing owners with a financial incentive to reduce harmful externalities. In the eminent domain context, however, such a proposal seems problematic because the dispersed victims of blight, who may be difficult to identify in the first place, will seldom have a financial incentive to bring suit against the property owner responsible for creating the externality, who may also be judgment-proof. Similarly, corrective taxes—fines paid to the state in the amount of expected harm—would be infeasible because owners of blighted property may not have enough money to pay for the damage inflicted by the blight. Subsidies, while potentially useful for positive externalities,[263] would be problematic for negative externalities because of the moral hazard problem. Specifically, existing owners could opportunistically impose blight externalities on their neighbors in order to receive government subsidies.[264]

A negative externality, however, could also be resolved through private bargaining.[265] If a blighted property is imposing negative externalities on surrounding areas, the affected owners could bargain

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260 *See* William T. Nachbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 How. L.J. 3, 10–11 (1971) (pointing out that abandoned buildings drive away residents and owners); *see also Berman*, 348 U.S. at 32 (noting that "[m]iserable and disreputable housing conditions . . . spread disease and crime").

261 *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 984–85 ("The case for clearing blighted land is essentially a nuisance-control rationale that hinges on the negative externalities generated by the land in its present condition."); *cf. Kelo*, 545 U.S. __, 125 S. Ct. at 2685 (Thomas, J., dissenting) ("In *Berman*, for example, if the slums at issue were truly 'blighted,' then state nuisance law, not the power of eminent domain, would provide the appropriate remedy." (citations omitted)).

262 For a discussion and comparison of different types of legal rules for controlling externalities, see Shavell, *supra* note 16, ch. 5, § 5, at 92–101.

263 *See supra* note 213 and accompanying text.

264 *See* Fennell, *supra* note 261, at 985 ("If the use is inflicting costs on the surrounding area, then the owner under ordinary market conditions might well be able to hold out for a large share of the surplus that will be delivered from the discontinuance of the use. But . . . [t]he incentives for extortionate behavior are clear enough if people are allowed to create bad situations and then glean some of the surplus associated with relieving the negative condition.").

265 For a discussion of the possibility of resolving externalities through bargaining, see generally Shavell, *supra* note 16, at 83–92, 101–09.

with the owner of the blighted property to eliminate the blight-causing condition or to purchase the blighted property. But bargaining with the existing owner to eliminate blight is unlikely to succeed. The transaction costs of organizing all affected property owners are likely to be prohibitive, especially because existing owners would have an incentive to free ride off their neighbors.[266] Moreover, convincing the owner to sell his property may also be difficult. If a private developer seeks to assemble several blighted parcels for a new project, the holdout problem would once again inhibit the assembly. As a result, secret buying agents might be necessary to overcome the negative externalities caused by blight.

Applying the foregoing economic analysis to *Berman v. Parker*, the theory seems to cut in two different directions. On the one hand, the main drawback of eminent domain—mistakenly taking land from its highest-valued user—is less problematic because the blighted land, by definition, is vacant or unproductive. Existing owners are thus less likely to attach sentimental or idiosyncratic value to these properties.[267] On the other hand, the counterarguments against buying agents seem weaker than in the case of economic development. The problem of unwilling sellers is less likely to occur with blighted properties than with properties with an existing use. Furthermore, distrust and resentment appear less likely because, as noted above, owners of blighted properties usually do not have sentimental or idiosyncratic attachment to their property. Thus, while eminent domain is unlikely to cause socially undesirable transactions in the context of actual blight, undisclosed agents are, once again, just as effective for overcoming the holdout problem.

An unusual type of corruption exists, however, in the context of blight that makes the use of buying agents preferable to eminent domain. Specifically, if a state law prohibits economic development as a public use, a city may use a blight designation as a *pretext* for using eminent domain for economic development. In such situations, the blight designation often includes productive businesses and inhabited homes with no obvious characteristics of blight. For example, in *Gamble v. City of Norwood*,[268] the city council designed a $125 million project for upscale retail and luxury condominiums that would require ousting seventy-seven families.[269] The council labeled the neighbor-

266 *See supra* note 177 and accompanying text.

267 *See* Fennell, *supra* note 261, at 985 ("[T]he owners of blighted land are unlikely to enjoy any significant (legitimate) subjective premium. To the extent the land is worth more to these owners than fair market value, we might say that the surplus arises from a willingness to offload costs onto neighbors and tenants, rather than from any affirmative, site-specific investments in the community.").

268 No. C-040019, 2004 WL 1948690 (Ohio Ct. App. Sept. 3, 2004).

269 *See* BERLINER, PUBLIC POWER, *supra* note 8, at 167.

hood as "deteriorating" and threatened a blight designation, even though the neighborhood's middle-class homes were well-kept and typically sold for more than $100,000.[270] Similarly, in Lakewood, Ohio, a real estate developer planned to assemble land for two hundred condominiums.[271] Sixty-six existing colonial homes were deemed blighted,[272] even though, under the relevant criteria (which included the lack of a two-car attached garage), the homes of the mayor and entire city council would also have been blighted.[273] Overall, using "blight" as a pretext for economic development has become increasingly common.[274]

In such cases, the use of a particular doctrinal label in a statute or an ordinance should not alter the underlying functional analysis.[275] Unlike actual blight, pretextual blight does not involve a negative externality. As a result, in cases involving pretextual blight, buying agents can purchase non-blighted property just as they can in cases involving the assembly of multiple properties for economic development. In contrast, the use of eminent domain in cases involving pretextual blight could cause a socially undesirable transfer. If properties in a purportedly blighted neighborhood are valued more highly by the existing owners than by the assembler, then the use of eminent domain to transfer the property would be socially undesirable. Furthermore, all instances of pretextual blight are essentially instances of corruption insofar as the municipality or corporation attempts to condemn property on the basis of blight, even though it

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270 *See* Susan Vela, *Threatened Homeowners Ask: What Is Blight?*, CINCINNATI ENQUIRER, Dec. 23, 2002, at 1A.

271 *See* BERLINER, PUBLIC POWER, *supra* note 8, at 165.

272 *Id.* at 166.

273 *See 60 Minutes: Eminent Domain* (CBS television broadcast Sept. 28, 2003) ("[U]sing the [statutory] criteria that are in place, more than 90 percent of the houses in Lakewood could be deemed blighted—including the houses of the mayor and of every one of the city council members.").

274 *See, e.g.*, BERLINER, PUBLIC POWER, *supra* note 8, at 82 ("In Kentucky, a neighborhood with $200,000 homes is blighted. Englewood, New Jersey, termed an industrial park blighted that had one unoccupied building out of 37 and generated $1.2 million per year in property taxes. . . . And various California cities have tried to label neighborhoods blighted for peeling paint and uncut lawns."); *see also* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 307 (2004) (pointing out that the concept of blight has become mere "legal pretext").

275 *See* Fennell, *supra* note 261, at 986 ("If government is given unlimited power to decide what counts as 'blight' or what sorts of uses are subnormal, then it can characterize any failure to confer a benefit in these terms. . . . [A] simple assertion of 'blight' or the casting of an exercise of eminent domain in harm-preventing rhetoric cannot be sufficient to bring it within this nuisance-prevention rule.").

could not have condemned the property for the purpose of economic development.[276]

Overall, secret buying agents work just as well as eminent domain in eliminating the negative externalities of actual blight and work even better than eminent domain in cases involving pretextual blight. But distinguishing actual blight from asserted blight is a relatively difficult task. The use of eminent domain should therefore be disfavored in all cases of asserted blight.[277]

C. Instrumentalities and Utilities

Finally, while secret purchases are an effective mechanism for assembling land for promoting economic development and eliminating urban blight, secret buying agents are actually ineffective in certain other circumstances. Specifically, buying agents cannot effectively assemble land for the instrumentalities of commerce (e.g., railroads, canals, or private highways) or for private utility operations (e.g., telephone lines, oil pipes, or electric wires). However, because eminent domain has been allowed in precisely these two categories of cases where buying agents are ineffective, these cases further illustrate the relevance of buying agents for distinguishing between public and private uses.

Projects involving the instrumentalities of commerce or private utility operations require long, thin, and continuous pieces of land that are difficult to assemble without detection. If, for example, Amtrak attempts to lay railroad track or Commonwealth Edison attempts to lay utility lines, the secrecy of such a project is difficult (if not impossible) to maintain even with undisclosed agents. Traditionally, courts have concluded that the use of eminent domain for aggregating thin, continuous pieces of land is a public use even for the prima-

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276 *Cf.* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2661 (2005) ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

277 Justice O'Connor, in her dissenting opinion in *Kelo*, compared the harm caused by the blight in *Berman* to the harm caused by the oligopoly in *Midkiff*. *See id.* at 2674 (O'Connor, J., dissenting). However, in *Midkiff*, unlike *Berman*, the harm did not arise from the property itself but from a problem with Hawaii's unusual real estate market. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232, 242 (1984). As a result, it could be argued that *Midkiff*, which involved a market failure, is actually more similar to *Kelo*, which some assert involved a market failure. But the purported market failure in *Kelo* is different than the alleged market failure in *Midkiff*. Specifically, *Kelo* involved the holdout problem—that is, a problem in assembling land. In contrast, *Midkiff* involved an oligopoly problem—that is, only a handful of owners owned all of the islands' land (essentially, a reverse assembly problem). *See id.* at 232. The key to solving the problem in *Midkiff*, therefore, was not in finding a way to circumvent the holdout problem but in finding a mechanism to redistribute land to create a more equitable division of land ownership. Market solutions to the oligopoly problem in *Midkiff*, however, were problematic because the oligopolistic owners had artificially inflated real estate prices. *See id.* at 242.

rily private objectives of private parties. For example, the U.S. Supreme Court and courts in every state have upheld the use of eminent domain for acquiring property for laying railroad track.[278] Likewise, courts accept the use of eminent domain for digging irrigation ditches and canals, piping oil, distributing artificial light and power, laying telephone wires, and laying coaxial cable and fiber optic lines.[279]

Courts have upheld such uses of eminent domain because the "very existence" of these projects depends on government coordination.[280] Indeed, as early as 1876, one state supreme court noted that "[a] railroad, to be successfully operated, must be constructed upon the most feasible and direct route; it cannot run around the land of every individual who refuses to dispose of his private property upon reasonable terms."[281] Similarly, the Michigan Supreme Court stated in *Hathcock*:

> A corporation constructing a railroad . . . must lay track so that it forms a more or less straight path from point A to point B. If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's windfall, they too will refuse to sell.[282]

Indeed, once a railroad begins constructing its route, the probability that the project will become public knowledge is very high. The existing owners along the route know that there is a specific piece of land that the railroad must purchase next (assuming that the railroad wishes to go directly from one point to another). Because the railroad cannot deviate from its path, the existing owners can strategically inflate their selling prices.

The almost inevitable dissemination of information about the path of such a project, coupled with the lack of available alternatives,

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278 *See, e.g.*, Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Hairston v. Danville & W. Ry. Co., 208 U.S. 598 (1908); Balt. & S. R.R. Co. v. Nesbit, 51 U.S. (10 How.) 395 (1850); *see also* 2A NICHOLS, *supra* note 2, *passim* (citing cases from all fifty states upholding use of eminent domain to lay railroad track).

279 *See* Albert Hanson Lumber Co. v. United States, 261 U.S. 581 (1923) (digging irrigation ditches and canals); Walker v. Gateway Pipeline Co., 601 So. 2d 970 (Ala. 1992) (piping oil); Ala. Elec. Coop. v. Jones, 674 So. 2d 734 (Ala. 1990) (distributing artificial light and power); Buncombe Metallic Tel. Co. v. McGinnis, 109 N.E. 257 (Ill. 1915) (laying telephone wires); Cablevision of the Midwest v. Gross, 639 N.E.2d 1154 (Ohio 1994) (laying coaxial cable and fiber optic lines).

280 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting) (emphasis omitted).

281 Dayton Mining Co. v. Seawell, 11 Nev. 394, 411 (1876).

282 County of Wayne v. Hathcock, 684 N.W.2d 765, 781–82 (Mich. 2004).

causes a holdout problem for the developer, for whom it will be economically infeasible to abandon the existing route.[283] Because maintaining the secrecy of these projects would be virtually impossible, secret purchasers would be unable to overcome the holdout problem.[284] As a result, these transactions require the use of eminent domain.[285] Thus, the use of eminent domain for instrumentalities and utilities is a public use because, otherwise, the holdout problem would prevent these socially desirable projects.[286]

However, courts have long considered these types of takings to be constitutionally legitimate public uses even though they involve the transfer of property from one private owner to another.[287] The use of secret agents is therefore infeasible in precisely those areas where eminent domain has traditionally been allowed for private transfers. Thus, rather than undermining the secret-agent theory, these exceptions ultimately bolster the proposition that the feasibility (or infeasibility) of buying agents provides a useful mechanism for distinguishing between public and private uses.

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283 *See* Crafton, *supra* note 143, at 872–73 ("[A]s soon as information that a railroad has begun to build its line becomes available to individuals who lie in the proposed railroad's path, these individuals have the ability to hold out for a price that exceeds the alternative value of the land. Such a position is possible because the cost to the railroad of abandoning the line and switching to an alternative route becomes prohibitive once construction has commenced.").

284 *Cf. id.* at 872–73 n. 86 (noting but "ignor[ing] the possibility that the railroad may keep the proposed route secret or engage in other strategic behavior to avoid site monopoly problems").

285 *See Hathcock*, 684 N.W.2d at 782 ("The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such 'instrumentalities of commerce' a logistical and practical nightmare. Accordingly, this Court has held that the exercise of eminent domain in such cases—in which collective action is needed to acquire land for vital instrumentalities of commerce—is consistent with the constitutional 'public use' requirement."); *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting) ("With regard to highways, railroads, canals, and other instrumentalities of commerce, it takes little imagination to recognize that without eminent domain these essential improvements, all of which require particular configurations of property narrow and generally straight ribbons of land would be 'otherwise impracticable'; they would not exist at all."); *see also* Crafton, *supra* note 143, at 872–73 ("The ability of sellers to 'hold up' buyers and charge right of way based monopoly rents seems to play an important role in the instrumentality of commerce cases, and explains why courts have upheld condemnation for private roads, irrigation ditches, and sanitation purposes.").

286 *Cf.* Richard A. Epstein, *In and Out of Public Solution: The Hidden Perils of Forced and Unforced Property Transfer*, *in* PROPERTY RIGHTS 307, 324 (Terry L. Anderson & Fred S. McChesney eds., 2003) ("[W]e should try to limit the incidence of forced exchanges to those holdout situations that justify its application."); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1734 (2004) ("Eminent domain is at its least controversial in situations in which the ability of the owner to hold out is thought to be problematic.").

287 *See supra* notes 278–79 and accompanying text.

CONCLUSION

The foregoing analysis and applications suggest the need for a new rationale for understanding and interpreting the public use requirement. The theory based on secret purchases and private influence provides this standard. Like eminent domain, the use of buying agents overcomes the holdout problem posed by strategic sellers. But unlike eminent domain, the use of buying agents ensures that all transfers are socially desirable. The use of eminent domain for private parties also increases the potential for inordinate private influence. Consequently, the state's use of the takings power for a private party is not a public use unless either a significant positive externality would go unrealized or buying agents would be impracticable. In all other situations, the use of buying agents provides a superior mechanism for assembling land and promoting economic development.

The new theory of public use based on secret purchases and private influence also provides an administrable standard for legislative and judicial decisionmaking. Most courts, understandably wary about making difficult cost-benefit calculations under informational uncertainty, have been reluctant to review public use determinations.[288] These courts have assumed that the legislature is the more appropriate branch for these judgments[289] and have consequently deferred to almost all legislative determinations of public use. Indeed, many courts and commentators would suggest that the use of eminent domain should simply be a prudential determination for the legislature because of the difficulty in drawing a principled line between public and private uses.[290]

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288 *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 308–09 (1997) (characterizing the Court as "institutionally unsuited to gather the facts upon which economic predictions can be made," "professionally untrained to make them," and consequently "reticent . . . to engage in elaborate analysis of real-world economic effects"); United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) (stating that "courts deciding on what is and is not a governmental function" is "a practice which has proved impracticable in other fields"); *see also* 2A NICHOLS, *supra* note 2, § 7.08[3], at 7-318 (noting that replacing legislative determinations with judicial decisions "would simply lead to judges second guessing legislative cost/benefit calculations (through a return to heightened scrutiny)" and postulating that there is "no reason why the latter's judgments should prevail").

289 *See* Kelo v. City of New London, 545 U.S. __, 125 S. Ct. 2655, 2668 (2005) (declining to "second-guess the City's considered judgments about the efficacy of its development plan"); Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (characterizing the legislature as "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems"); *see also* Garnett, *supra* note 164, at 962 ("Judicial deference to a decision to exercise eminent-domain power is predicated on the assumption that the elected branches of government are in a better position than the courts to determine what uses of land are in the 'public interest,' and, moreover, that the elected branches are more accountable than the judiciary regardless of whether their decisions are substantively good or bad.").

290 *See, e.g.*, *Kelo*, 125 S. Ct. at 2664 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legis-

The new theory, however, provides an intelligible principle for both legislative and judicial decisionmaking. The theory does so without relying on the imperfect information of either legislatures or courts because voluntary exchanges determine the limitations on public use. Neither legislatures nor courts must project anticipated benefits, calculate sentimental losses, or rely on uncertain cost-benefit determinations. Requiring voluntary transactions through buying agents thus avoids an unnecessary reliance on legislative officials who not only lack perfect information but also are subject to private influence. These voluntary transactions promote economic development by preventing existing owners from inflating their actual value (and thus, holding up the project) while also taking into account the owners' actual valuation of the property.

Moreover, the theory based on secret purchases and private influence is consistent with the constitutional text—"nor shall private property be taken for public use, without just compensation"[291]—because, as explained above, the use of eminent domain for private parties actually provides no additional public benefit (indeed, serves no additional "public purpose"). That is, using eminent domain provides the public with no marginal benefit over using buying agents. In many instances, the use of eminent domain for private transfers actually decreases overall social welfare by transferring property even though the existing owners value the property more highly than the assembler. In contrast, the secret-agent mechanism enables a transaction if and only if the transaction is mutually beneficial and therefore in the public interest (i.e., for a "public use").

Furthermore, the new theory is consistent with actual practice. The theory is consistent with the traditional exceptions to the rule prohibiting condemnations for private objectives. It allows eminent domain precisely where secret buying agents would be impracticable for aggregating land (e.g., for railroad or utilities). The theory is also consistent with current practices. Developers frequently utilize secret agents to avoid the holdout problem and assemble property. The theory is also applicable to a wide variety of situations, including promoting economic development (as in *Kelo*) and eliminating urban blight (as in *Berman*).

Because of its superiority over the status quo, the theory of public use based on secret purchases and private influence also serves as a

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latures broad latitude in determining what public needs justify the use of the takings power."); 2A NICHOLS, *supra* note 2, § 7.08[1], at 7-311, [3], at 7-318 ("The meaning of 'public use' is broad and elastic and the judiciary has given wide discretion to legislatures to take land for a variety of public uses. . . . [T]he concept of public use is so tied to local conditions that it is difficult to come up with one rule to include all possible cases of public use that one would want while excluding those one would not want.").

291 U.S. CONST. amend. V.

mechanism for reforming eminent domain law. First, the theory is useful for legislative decisionmaking with regard to both drafting statutory language and determining whether to use eminent domain for specific private projects.[292] As the majority in *Kelo* noted, there is a "legitimate public debate" over whether the need for eminent domain has been exaggerated because private developers can use other mechanisms such as "secret negotiations."[293] Second, in the wake of *Kelo*, litigation over the scope of the public use requirement will increasingly move to state courts.[294] At the time of the *Kelo* decision, more states disallowed the use of eminent domain for private economic development than explicitly permitted it,[295] but many other state courts will likely consider this same issue over the next several years.[296] Third, the possibility that the Court will reconsider *Kelo* is neither implausible nor unlikely, especially given the Court's five-to-four decision. Indeed, the unanimous overruling of *Poletown* in *Hathcock*

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292 Indeed, immediately following the *Kelo* decision, bills were introduced in both the U.S. Congress and Connecticut state legislature that would prohibit the use of eminent domain for the purpose of private economic development. *See* Editorial, *They Paved Paradise*, WALL ST. J., June 30, 2005, at A12 (noting bipartisan Congressional legislation that would prohibit the federal government from "using the power of eminent domain for private economic development as well as prohibit states from using federal money for that purpose," as well as Connecticut legislation "to forbid the taking of private homes for private economic development except in the case of blight").

In addition to various legislative proposals aimed at limiting the use of eminent domain for private parties, certain private developers and lenders have rejected this use of eminent domain. For example, BB&T, one of the nation's largest financial holdings company with over $100 billion in assets, announced that it "will not lend to commercial developers that plan to build condominiums, shopping malls and other private projects on land taken from private citizens by government entities using eminent domain." Press Release, BB&T Corp., BB&T Announces Eminent Domain Policy, Jan. 25, 2006, http://www.bbt.com/about/media/newsreleasedetail.asp?date=1%2F25%2F2006+9%3A48%3A52+AM.

293 *Kelo*, 545 U.S. __, 125 S. Ct. at 2668 & n.24 (2005).

294 *See Kelo*, 125 S. Ct. at 2668 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."). *But cf. id.* at 2677 (O'Connor, J., dissenting) ("States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.").

295 *See* Editorial, *supra* note 292 ("At least 10 states—Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, South Carolina, Utah and Washington—already forbid the use of eminent domain for economic development (while permitting it for legitimate 'public use,' such as building a highway). Six states—Connecticut, Kansas, Maryland, Minnesota, New York and North Dakota—expressly allow private property to be taken for private economic purposes. The rest haven't spoken on the issue.").

296 *See* Bruce Moyer, *Court's Decision Provokes Property Rights Backlash*, FED. LAW., Sept. 2005, at 10, 10 (noting that "[s]tate and federal legislators have introduced an array of bills, resolutions, and constitutional amendments to counter the Court's 5-4 ruling in *Kelo*"); Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L.J. 157, 171–74 (2005) (collecting state and federal legislation proposed in the wake of *Kelo*).

signaled the possibility of judicial reconsideration of the nature of the puhlic use requirement.

Finally, even after *Kelo,* the limitations of the Public Use Clause remain unclear because the Supreme Court did not enunciate a test for interpreting the public use requirement.[297] The Court did maintain that a municipality would violate the Public Use Clause by taking land for the private benefit of a private party.[298] Likewise, Justice Kennedy's concurring opinion proposed heightened scrutiny for a taking involving private favoritism—a suggestion that acknowledges the concern for inordinate private influence.[299] But both the majority and Justice Kennedy left unanswered the question of how courts should determine when a taking becomes too private to constitute a public use.[300]

By contrast, the theory based on secret purchases and private influence provides a means of distinguishing between public and private uses. The new theory demarcates those circumstances in which eminent domain is unnecessary for private parties and thus provides no public benefit. The theory offers a coherent and administrable approach for interpreting the public use requirement—an issue about which courts frequently lament that there is "no agreement, either in reasoning or conclusion."[301] Future empirical work is necessary to confirm the feasibility of buying agents in various applications.[302] This empirical work will become ever more relevant as private parties increasingly recognize the effectiveness of, and thus increasingly utilize, these agents. At the very least, however, the foregoing analysis suggests that further efforts at providing a coherent definition of public use are not necessarily "doomed to fail."[303]

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297 *See Kelo,* 125 S. Ct. at 2666–67 (acknowledging that the use of eminent domain for "transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes . . . would certainly raise a suspicion that a private purpose was afoot" but declining to address such a case or offer a principle for distinguishing such a case from *Kelo*).

298 *See id.* at 2661 (asserting that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party").

299 *See id.* at 2669 (Kennedy, J., concurring) (noting that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause").

300 *Cf. Leading Cases, supra* note 164, at 291, 293–94 (pointing out that "[t]he majority's holding is best understood as a decision to underenforce the Public Use Clause" in light of the "difficulties in devising a rule that predictably distinguishes purely private takings from constitutionally permissible private takings").

301 Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606 (1908).

302 *See, e.g.,* Munch, *supra* note 18, at 473 (finding empirically that, "contrary to traditional assumptions, eminent domain is not necessarily a more efficient institution than the free market for consolidating many contiguous but separately owned parcels into a single ownership unit").

303 2A NICHOLS, *supra* note 2, § 7.02[5], at 7-46.