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

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

Daniel B. Kelly\*

ABSTRACT

*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, whereas the government often needs the power of eminent domain to avoid the problem of strategic holdout, private parties are usually able to purchase property through the use of secret buying agents. The availability of secret buying agents makes the use of eminent domain for private parties unnecessary (indeed, undesirable), but the government is ordinarily unable to make secret purchases because its plans are subject to democratic deliberation and known in advance. Second, whereas the use of eminent domain for traditional public objectives does not create a danger of corruption, the use of such power for 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 the property and thus have a strong incentive to influence the eminent domain process for their own advantage. In light of the 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, administrable, and constitutional mechanism for distinguishing between public and private uses and reforming the law of eminent domain.*

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## The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence

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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.”*

-UNITED STATES SUPREME COURT (1908)<sup>1</sup>

*“Further efforts at providing a precise definition of ‘public use’ are doomed to fail . . . .”*

-NICHOLS ON EMINENT DOMAIN (2003)<sup>2</sup>

### I. INTRODUCTION

The Public Use Clause<sup>3</sup> of the Fifth Amendment to our Constitution has not been interpreted in a manner that has been regarded as intellectually compelling, despite numerous attempts to discern its meaning by the courts<sup>4</sup> and by legal commentators.<sup>5</sup> 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 private party’s use a *public* use. One view holds that a taking requires either public ownership or public access such as a post office, airport, or highway.<sup>6</sup> A contrasting view argues that eminent domain can be justified for any private use so long as the taking ostensibly produces a general public benefit.<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908).

<sup>2</sup> 2A P. NICHOLS, *EMINENT DOMAIN* (3d ed. rev. 2003, J. Sackman ed.) § 7.02[7] (hereinafter NICHOLS).

<sup>3</sup> U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”). The Fourteenth Amendment incorporates the public use requirement against the states. *See Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). Forty-nine state constitutions have similar public use clauses.

<sup>4</sup> *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 “massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification”).

<sup>5</sup> *See* Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 33 (1986) (indicating that, “as a generation of commentary shows, it is impossible to assemble . . . a systematic and plausible general theory”) (citations omitted); Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 223 (1986) (“[D]espite a mountain of case law and academic theorizing, there remains a giant vacuum in the analysis of the takings clause for a new theory to fill.”).

<sup>6</sup> *See* NICHOLS § 7.02[2] (“[T]o make a use public means that the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property taken.”); *see, e.g., Kohl v. United States*, 91 U.S. 367 (1876) (upholding condemnations for post offices); *Kansas City v. Hon*, 972 S.W.2d 407 (Mo. App. 1998) (upholding condemnations for airport); *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duv. 372 (Ky. 1864) (upholding condemnations for highways).

<sup>7</sup> *See* NICHOLS § 7.02[3] (“Any eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or

Concurring predominantly with this latter view, the U.S. Supreme Court, as well as lower federal and state courts, have found a broad spectrum of private projects consistent with the public use requirement, thereby allowing private developers to benefit from eminent domain.<sup>9</sup> As a result, the number of takings for private parties has increased dramatically in recent years.<sup>10</sup> In Riviera Beach, Florida, for example, a \$1.25 billion redevelopment project displaced 1,700 homes and 5,100 people, as well as 300 businesses.<sup>11</sup> In San Jose, California, one-tenth of the city's total area, which includes one-third of its population, is currently subject to condemnation.<sup>12</sup> And in a smaller (but possibly more extreme) example, 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—would be converted into the golf course manager's new living quarters, which the court upheld as a public necessity.<sup>13</sup>

While many commentators therefore agree that the current takings doctrine can be used to justify “virtually any exercise of the eminent domain power,”<sup>14</sup> two recent cases—the Michigan Supreme Court's overruling of *Poletown Neighborhood Council v. City of Detroit*<sup>15</sup> and the United States Supreme Court's decision in *Kelo v. City of New London*<sup>16</sup>—have necessitated a fundamental reexamination of this issue. In light of these cases, this article analyzes the meaning that ought to be given the public use requirement

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community manifestly contributes to the general welfare and prosperity of the whole community and thus constitutes a valid public use.”).

<sup>8</sup> See, e.g., *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003) (upholding condemnations for casino consortium); *Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982) (upholding condemnation of sports franchise); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnations for General Motors factory); *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 190 N.E.2d 402 (N.Y. 1963) (upholding condemnations for World Trade Center).

<sup>9</sup> See, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (“[W]here the exercise of eminent domain is rationally related to a conceivable public purpose, the Court has *never* held a compensated taking to be proscribed by the Public Use Clause.”) (emphasis added); *Gamble v. Eau Claire County*, 5 F.3d 285 (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.”); see also *Requiem*, *supra* note \_\_, at 613-14 (concluding that “so far as the federal courts are concerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications”).

<sup>10</sup> See DANA BERLINER, *PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN* (2003) (documenting over 10,000 actual or threatened cases of private takings between 1998 and 2003).

<sup>11</sup> See Scott McCabe, *Residents Vow to Fight Riviera Plan*, THE PALM BEACH POST, Dec. 17, 2001, at 1B; Thomas R. Collins, *Many Businesses Feeling Put Out By Riviera Plans*, THE PALM BEACH POST, Jan. 6, 2003, at 1A.

<sup>12</sup> See BERLINER, *supra* note \_\_, at 3; see also *Evans v. City of San Jose*, No. H026802, 2004 WL 2542805, at \*3 (Cal. App. 6 Dist. July 22, 2004).

<sup>13</sup> See *Zamecnik v. Palm Beach County*, 768 So. 2d 1217 (Fla. App. 2000); see also Marc Caputo, *County to Seize Couple's Home So Golf Manager Can Have It*, THE PALM BEACH POST, May 6, 2000, at 1A.

<sup>14</sup> Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 212-13 (2004); see also Jennifer J. Kruckeberg, Note, *Can the Government Buy Everything?: The Takings Clause and the Erosion of the “Public Use” Requirement*, 87 MINN. L. REV. 543, 565-66 (2002) (concluding that “evolution of the public use requirement of the eminent domain power virtually obliterated any limitation on the government”).

<sup>15</sup> 304 N.W.2d 455 (Mich. 1981), *overruled in* *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004).

<sup>16</sup> 545 U.S. \_\_ (2005).

in order 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 but not the government can ordinarily assemble property using *secret buying agents*—meaning that private parties, unlike the government, usually do not need the power of eminent domain to overcome the problem of strategic holdout; and that takings for private projects invite the potential for *inordinate private influence* as private parties seek to exploit the eminent domain process for their own advantage.

The usual justification for allowing private parties to benefit from the use of eminent domain is the same as that for the government: this power may be needed to overcome the “holdout” problem caused by strategically-acting sellers if property had to be purchased.<sup>17</sup> In the absence of eminent domain, a buyer would confront a holdout problem in cases involving the assembly of multiple properties for a single project (e.g., a highway or real estate development). Any potential seller, knowing that her single property is necessary for the entire project, could “hold out” in order to obtain an inflated price.<sup>18</sup> This strategic behavior could prevent the transaction (and consequently, the entire project) from occurring.<sup>19</sup> According to this conventional wisdom, private parties seeking to assemble multiple properties are just as afflicted by the holdout problem 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 usually unnecessary—even if the private project potentially also has a public benefit—because private parties do not in fact face the holdout problem. Specifically, private parties can avoid the holdout problem using secret buying agents, which provide an alternative and (as will be demonstrated) socially superior mechanism for effecting transfers of property. In contrast, the nature of public scrutiny and the transparency of democratic deliberation tend to prevent the state from using secret buying agents to facilitate traditional public takings. As a result, the takings power—while necessary for the state—is ordinarily unnecessary for private parties who can obtain and assemble property through buying agents. Perhaps surprisingly, this fundamental point has not been properly appreciated. Although some commentators and courts have noted in

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<sup>17</sup> See Richard A. Epstein, *Holdouts, Externalities, and The Single Owners: One More Salute to Ronald Coase*, 36 J. L. & E. 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 by overcoming holdouts and free riders”); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 41-42 (2d ed. 1977) (maintaining that eminent domain power is justified in economic terms only in the context of certain holdout situations); see also *infra* note \_\_ (citing cases).

<sup>18</sup> See Steve P. Calandrillo, *Eminent Domain and Economics: Should “Just Compensation” Be Abolished and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 468 (2003) (“The dilemma stems from the fact that the state may need to buy multiple small properties, all of which are essential for full development of a single large scale project. However, public knowledge of this fact puts the government at a severe disadvantage when it steps up to the negotiating table.”); see also EUGENE SILBERBERG, *PRINCIPLES OF MICROECONOMICS* 288 (2d ed. 1999) (describing the classic “hold-up maneuver” if existing homeowners discover the developer’s plan).

<sup>19</sup> See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 124-25 (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.”).

passing that secret buying agents are occasionally employed by private actors,<sup>20</sup> these commentators have not recognized the importance of this stratagem and, significantly, have not noticed that, because government usually cannot employ this technique, secret purchases provide a mechanism for distinguishing between public and private uses.

While the use of secret buying agents may at first seem implausible, private parties can (and indeed, already do) use buying agents frequently to overcome the holdout problem and assemble property. Harvard University, for example, working through a real estate development company, recently purchased fourteen separate parcels of land for \$88 million using secret agents to avoid strategic sellers.<sup>21</sup> Similarly, Disney has used secret agents in Orlando, Florida and Manassas, Virginia to assemble thousands of acres for its theme parks.<sup>22</sup> One circuit court has pointed out that, among shopping center developers and real estate purchasers, the use of buying agents is a “common arms-length business practice.”<sup>23</sup> And 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.”<sup>24</sup>

The use of eminent domain for private parties, however, is not only unnecessary but actually socially undesirable because eminent domain (unlike acquisitions through secret purchases) sometimes leads to inefficient transfers. Because there is no mechanism for determining how much existing owners actually (i.e., subjectively) value their property,<sup>25</sup> courts routinely ignore actual value,<sup>26</sup> and instead rely on the “fair

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<sup>20</sup> See Merrill, *supra* note \_\_, at 81 (pointing 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”); see also POSNER, *supra* note \_\_, at 43-44 (noting that shopping center developers and others can overcome holdout problems without using eminent domain).

<sup>21</sup> See *Harvard Reveals Secret Purchases of 52 Acres Worth \$88 Million 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”).

<sup>22</sup> See *Playing Secret Agent for Mickey Mouse; Lawyers Ran Dummy Corporations, Bought Real Estate for Disney*, LEGAL TIMES (Washington, 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”); Mark Andrews, *Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K2 (explaining how “[w]orking under a strict cloak of secrecy, real estate agents who didn’t know the identity of their client began making offers to landowners”).

<sup>23</sup> *Westgate Village Shopping Center v. Lion Dry Goods Co.*, 21 F.3d 429 (Table), 1994 WL 108959, No. 93-3760, at 7 (6th Cir. 1994) (stating 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”).

<sup>24</sup> *Kelo v. City of New London*, 545 U.S. \_\_, 2005 WL 1469529, at \*10 n.24 (June 23, 2005).

<sup>25</sup> See 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.”); Steven M. Crafton, Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857, 891 (1983) (noting that it is “virtually impossible for a court to ascertain objectively the condemnee’s subjective valuation of the property in order to award just compensation”).

<sup>26</sup> 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.”).

market value” of damages to determine “just compensation” for the condemnee’s loss.<sup>27</sup> However, because market value neither calculates nor compensates a taking’s full costs (i.e., the actual value to the existing owners), a socially undesirable transfer may occur whenever the existing owners’ subjective value deviates from the court-determined objective value.<sup>28</sup> As a result, eminent domain may force a transfer where the existing owners actually value the land more than the private assembler.

Unlike eminent domain, secret buying agents facilitate transfers if *but only if* the transfer is socially desirable and thus eliminate the risk of erroneous condemnations. Voluntary exchange using buying agents allows the existing owners’ subjective value to be taken into account while preventing existing owners from strategically inflating that value. As a result, 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 not only an alternative but also a superior mechanism to eminent domain for private transfers by combining 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 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 only obtain a relatively dispersed benefit. As a result, because they typically obtain a substantial benefit, 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. A private taking thus involves a greater potential for inordinate private influence than a traditional public taking.

Using eminent domain for private parties also tends to encourage two additional types of inordinate influence. First, private parties that directly benefit from the state’s use of eminent domain are usually not required to reimburse the state for the cost of the takings. Because they can use eminent domain to acquire land costlessly for their own objectives, these private actors will have an incentive to overutilize eminent domain and engage in excessive takings. Second, potential private beneficiaries can also exploit

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<sup>27</sup> See, e.g., *Matter of Larsen*, 616 A.2d 529 (Pa. 1992) (“Because value is an inexact, highly subjective concept, the Supreme Court has adopted the relatively objective concept of market value at the time of the taking as the just and equitable guideline for measuring just compensation.”); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 62 (1987) (“Ideally, the state should be required to pay not the market value, but the subjective value that the individual attaches to the property. Because the latter is difficult to determine, courts have moved to the market value standard.”).

<sup>28</sup> See Croson & Johnston, *supra* note \_\_, at 53-54 (“[P]laintiffs with high subjective value (enjoying lots of consumer surplus in a competitive market) will virtually always receive damages which are less than their actual value.”); RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985) (“The central difficulty of the market value formula for explicit compensation, therefore, is that it denies any compensation for real but subjective values.”).

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, casino consortia, and large national or multi-national corporations, the primary victims of these takings tend to be the economically disadvantaged, the elderly, and racial and ethnic minorities.<sup>29</sup> Hence, because of this increased potential for inordinate private influence, as well as the superiority of secret buying agents, eminent domain should generally not be used on behalf of private parties.

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 the parties to a transaction cannot internalize.<sup>30</sup> In certain situations where a significant externality exists, a project's private benefit may not be substantial enough to induce private parties to assemble the 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,<sup>31</sup> a subsidy may not be feasible *ex ante* while maintaining the anonymity of secret buying agents. However, such a subsidy may be feasible *ex post* to provide private parties with the sufficient *ex ante* incentive to undertake the project through secret purchases. This article addresses positive externalities (as well as several other counterarguments) and analyzes under what circumstances (if any) these objections would alter the preceding analysis.

Overall, however, 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 the role of secret purchases and the danger of inordinate private influence. Part II below reviews the constitutional framework, including two recent developments: the overruling of *Poletown* and the holding in *Kelo*. Part III, which contains the heart of the economic analysis, examines secret buying agents and inordinate private influence, as well as several potential counterarguments. Part IV applies this economic analysis to the two most common situations: the assembly of land for economic development, illustrated using *Kelo*, and the elimination of urban blight, illustrated using *Berman v. Parker*. Part V concludes that the theory of public use based on secret purchases and private influence is not only socially desirable, administrable, and constitutional but also superior to the status quo as a mechanism for distinguishing between public and private uses in both legislative and judicial decisionmaking.

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<sup>29</sup> See, e.g., Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, et al. in Support of Petitioners, at 7, available at 2004 WL 2811057, *Kelo v. City of New London*, 545 U.S. \_\_\_ (2005) (No. 04-108) (“[T]he economically disadvantaged and, in particular, racial and ethnic minorities and the elderly . . . have been targeted for the use 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.”); see also *supra* note \_\_\_-\_\_\_ and accompanying text.

<sup>30</sup> On externalities, see generally PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 751 (15th ed. 1995); THE MIT DICTIONARY OF MODERN ECONOMICS 146 (David W. Pearce ed., 4th ed. 1992); Jean-Jacques Laffont, *Externalities*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 263-65 (John Eatwell et al., eds., 1987).

<sup>31</sup> See generally A.C. PIGOU, *THE ECONOMICS OF WELFARE* 172-203 (1932); A.C. PIGOU, *WEALTH AND WELFARE* 148-71 (1912). For a recent analysis, see Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255 (1993).

## II. THE CONSTITUTIONAL FRAMEWORK

Defining the constitutional limitations of the public use requirement has been an issue of longstanding and considerable controversy.<sup>32</sup> As noted above, most courts have acknowledged the difficulty of articulating an administrable standard for defining public use.<sup>33</sup> Notwithstanding this difficulty, two general constitutional paradigms have emerged for interpreting the public use requirement: the “use by the public” test and the “public benefit” test.<sup>34</sup> Under the “use by the public” (or “narrow”) view, public use means either public ownership or public access (and includes government buildings, highways, and railroads).<sup>35</sup> Under the “public benefit” (or “broad”) view, public use means any legitimate public purpose or public advantage (and includes eliminating urban blight, redistributing concentrated land, and promoting economic development).<sup>36</sup> Proponents of the narrow view argue that legislative determinations of public use require heightened judicial scrutiny, while proponents of the broad view advocate deferential judicial scrutiny.<sup>37</sup>

The general trend in the twentieth century among both state and federal courts was a move from the narrow view to the broad view. However, in *County of Wayne v. Hathcock*,<sup>38</sup> the Michigan Supreme Court unanimously overruled its influential *Poletown* decision and held that promoting economic development does not constitute a legitimate

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<sup>32</sup> Compare *Beekman v. The Saratoga and Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831) (“[I]f the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature . . .”) with *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (seriatim opinion) (“[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers . . .”).

<sup>33</sup> See *supra* notes \_\_\_ and accompanying text; see also *United States v. Certain Lands in Louisville*, 78 F.2d 684 (6th Cir.), cert. granted, 296 U.S. 567 (1935), appeal dismissed, 297 U.S. 726 (1936) (“term ‘public use,’ . . . is not susceptible of precise definition under the Supreme Court decisions”); *State ex rel. Tomasic v. The Unified Government of Wyandotte County/Kansas City, Kansas*, 962 P.2d 543, 553 (Kan. 1998) (“no precise definition of what constitutes a valid public use”); *Miller v. City of Tacoma*, 378 P.2d 464, 470 (Wash. 1963) (“words ‘public use’ are neither abstractly nor historically capable of complete definition”); *Smith v. Cameron*, 210 P. 716, 720 (Or. 1922) (“difficult, and probably impossible, to frame such a definition of the term ‘public use’”); *Dayton G. & S. Mining Co. v. Seawell*, 11 Nev. 394, 400-01 (1876) (“No question has ever been submitted to the courts upon which there is greater variety and conflict of reasoning and result than that presented as to the meaning of the words ‘public use.’”).

<sup>34</sup> See NICHOLS § 7.02[2]-[3] (noting two definitions of “public use”—a “broad” and a “narrow” definition—“each of which has its ardent supporters among legal scholars and courts”); *Requiem, supra* note \_\_\_, at 600 (stating that by the end of the nineteenth century “the ‘use by the public’ test and the vaguer notion of public benefit and advantage had crystallized into two well-established lines of authority”).

<sup>35</sup> See *supra* note \_\_\_.

<sup>36</sup> See *supra* note \_\_\_.

<sup>37</sup> Compare *County of Wayne v. Hathcock*, 684 N.W.2d 765, 785 (Mich. 2004) (“[T]his Court has never employed the minimal standard of review in an eminent domain case . . . . Notwithstanding explicit legislative findings, this Court has always made an independent determination of what constitutes a public use for which the power of eminent domain may be utilized.”) (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 475 (Mich. 1981) (Ryan, J., dissenting)) with *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”).

<sup>38</sup> 684 N.W.2d 765 (Mich. 2004).

public use under the state constitution.<sup>39</sup> Then, in *Kelo v. City of New London*,<sup>40</sup> the United States Supreme Court held that promoting economic development does constitute a legitimate public use under the federal constitution. These two cases have sparked a renewed interest in the public use requirement.

#### A. A Short History of “Public Use”

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.<sup>41</sup> In colonial America, government officials invoked this power of eminent domain rather infrequently, due in part to the relatively limited number of uses for eminent domain at the time.<sup>42</sup> James Madison, however, 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.<sup>43</sup> As a result, the drafters of the Bill of Rights adopted Madison’s proposal as part of the Fifth Amendment, which limits the eminent domain power to the taking of “private property . . . for public use.”<sup>44</sup>

Federal courts did not decide a case involving the federal government’s use of eminent domain until 1875.<sup>45</sup> But in several cases in the late nineteenth and early twentieth century, the U.S. Supreme Court held that takings for private parties with incidental public benefits violated the public use requirement.<sup>46</sup> Thomas Cooley, one of the leading constitutional jurists of the nineteenth century, argued that “the 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

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<sup>39</sup> *Id.* at 786-87.

<sup>40</sup> 545 U.S. \_\_\_, 2005 WL 1469529 (June 23, 2005).

<sup>41</sup> See NICHOLS §7.01[3] (“The principle that private party 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.”) (citations omitted).

<sup>42</sup> See *Requiem*, *supra* note \_\_\_, at 600 (“Prior to the adoption of the federal and early state constitutions, governments rarely needed privately owned land. There were vast tracts available in the public domain and governmental activities were limited. And the abundance of unimproved and unoccupied private lands made the few instances of government acquisition relatively painless.”).

<sup>43</sup> 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”).

<sup>44</sup> U.S. Const. amend. V.

<sup>45</sup> See *Kohl v. United States*, 91 U.S. 367 (1875).

<sup>46</sup> See, e.g., *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 606 (1908) (“The courts of the states . . . have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required.”); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (“[W]e do not . . . approv[e] of the broad proposition that private party may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State.”); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (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 . . .”).

from a more profitable use to which the latter will devote it.”<sup>47</sup> Overall, the view of most nineteenth century jurists, as well as early Supreme Court decisions, was that the use of eminent domain for these purposes violated the Public Use Clause.<sup>48</sup>

However, due in part to the 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.<sup>49</sup> As a result, the Supreme Court, led by Justice Holmes, defined public use broadly by repudiating the “use by the public” test.<sup>50</sup> The Court interpreted the Public Use Clause to require only that the legislature posit a conceivable “public purpose.”<sup>51</sup> At the same time, the Court announced that legislative determinations of public use should receive significant deference from the judiciary.<sup>52</sup> Indeed, following 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.<sup>53</sup>

Then, in the seminal case of *Berman v. Parker*,<sup>54</sup> the Court confronted a challenge to the constitutionality of the District of Columbia Redevelopment Act,<sup>55</sup> which targeted blighted areas in the southwest portion of the nation’s Capitol.<sup>56</sup> The appellants owned and operated a department store that was not blighted and that was “not used as a dwelling or place of habitation.”<sup>57</sup> Writing for a unanimous Court, Justice Douglas upheld the condemnation and stated that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>58</sup> The holding of *Berman* confirmed the Court’s expansive definition of public use and its Holmesian deference to legislative determinations.<sup>59</sup>

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<sup>47</sup> THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 654 (1868).

<sup>48</sup> See EPSTEIN, *supra* note \_\_, at 178 (“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.”).

<sup>49</sup> 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, 930 (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 (1992)).

<sup>50</sup> See *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (Holmes, J.) (concluding that “[t]he inadequacy of the use by the general public as a universal test is established”); see also *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (Holmes, J.).

<sup>51</sup> See *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (Holmes, J.) (equating “public use” with “public purpose”); see also *O’Neill v. Leamer*, 239 U.S. 244, 253 (1915); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896).

<sup>52</sup> 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.”); see also *Rindge Co. v. Los Angeles*, 262 U.S. 700, 709 (1923); *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (Holmes, J.).

<sup>53</sup> See *United States ex rel. Tennessee Valley Authority 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”).

<sup>54</sup> 348 U.S. 26 (1954).

<sup>55</sup> 60 Stat. 790, D.C. Code 1951 §§ 5-701 to 5-719 (1945).

<sup>56</sup> *Berman*, 348 U.S. at 28.

<sup>57</sup> *Id.* at 31.

<sup>58</sup> *Id.* at 32.

<sup>59</sup> See Kruckeberg, *supra* note \_\_, at 549-50 (concluding that “*Berman v. Parker* set a broad standard for courts to give deference to any and all conceptions of public use designated by municipalities”); GEORGE

Thirty years later, in *Hawaii Housing Authority v. Midkiff*,<sup>60</sup> the Court considered Hawaii's efforts to remedy the islands' concentrated land ownership by permitting tenants to request governmental condemnations of their landlord's property and then allowing tenants to purchase the property for a nominal fee.<sup>61</sup> Writing for a unanimous Court, Justice 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.'"<sup>62</sup> Concluding that the public use requirement is "coterminous with the scope of a sovereign's police powers,"<sup>63</sup> the Court seemed to imply, as many commentators 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).<sup>64</sup> The Court's deferential approach in *Midkiff* signaled that almost any governmental taking, even those involving private transfers, would qualify as legitimate public uses.<sup>65</sup>

### B. *The Overruling of Poletown*

Most state courts originally favored the narrow definition of public use and prohibited compulsory transfers between private parties even if they potentially included an incidental public benefit.<sup>66</sup> However, certain state courts increasingly began to follow the Supreme Court's approach of defining public use as any public purpose and deferring to legislative determinations of public use.<sup>67</sup> In the wake of *Berman*, for example, many

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SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY 44 (1998) (asserting that in *Berman* the Supreme Court effectively "read this clause out of the Constitution"); 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 unlimited meaning to public use, it also drew a very limited role for courts reviewing whether such actions were taken in the public welfare").

<sup>60</sup> 467 U.S. 229 (1984).

<sup>61</sup> See SULLIVAN & GUNTHER, *supra* note \_\_, at 481 (describing Hawaii Land Reform Act of 1967).

<sup>62</sup> *Id.* at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

<sup>63</sup> *Id.* at 244.

<sup>64</sup> See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 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*."); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION, 190 n. 5 (1977) ("[A]ny state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking.").

<sup>65</sup> See 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 (1985) ("The decision [in *Midkiff*] almost ensures that all government takings will be upheld."); 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.").

<sup>66</sup> See *Kelo*, 545 U.S. at \_\_ (Thomas, J., dissenting) (noting early state court decisions). *But see* *Talbot v. Hudson*, 16 Gray 417, 417 (Mass. 1860) ("In order to constitute a public use which will justify the taking of private property, it is not essential that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the purpose for which the property is appropriated.").

<sup>67</sup> See *Kelo*, 545 U.S. at \_\_ ("[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*

state courts upheld the use of eminent domain for private parties for a variety of urban renewal programs involving the elimination of blight.<sup>68</sup> Subsequently, many state courts expanded the definition of public use to include promoting economic development even in the absence of blight.<sup>69</sup>

As a culmination of these precedents, *Poletown Neighborhood Council v. City of Detroit* came to be the most influential state case defining public use in the modern era.<sup>70</sup> In *Poletown*, the city of Detroit utilized its power of eminent domain to condemn an entire neighborhood for the construction of a new General Motors manufacturing plant.<sup>71</sup> The affected homeowners argued that the takings 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” and “public purpose” could be used interchangeably.<sup>72</sup> 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 constitute two “essential public purposes.”<sup>73</sup>

Relying on *Poletown*, many state courts interpreted their own state constitutions in a similar manner and equated public use with public purpose.<sup>74</sup> As a result, under most state constitutions, as well as the U.S. Constitution,<sup>75</sup> almost any conceivable justification

JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1182 (2002) (“[M]ost state supreme courts have interpreted their state constitutions in a manner consistent with the federal interpretation . . .”).

<sup>68</sup> See, e.g., *Mayor of Baltimore v. Chertkoff*, 441 A.2d 1044, 1055 (Md. 1982) (relying on *Berman* to conclude “urban renewal ordinance may lawfully command the condemnation of private industrial property for public use in pursuance of a genuine urban renewal plan . . . whether or not the City’s primary or secondary objective in enacting the ordinance and targeting a particular industrial property for condemnation is to convey a portion of it to a different industry for expansion purposes”).

<sup>69</sup> See, e.g., *Shreveport v. Chanse Gas Corp.*, 794 So.2d 962, 973 (La. 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 public necessity requirement of [the state constitution]”), *cert. denied*, 805 So.2d 209 (La. 2002); *People ex rel. City of Urban v. Paley*, 368 N.E.2d 915, 920-21 (Ill. 1977) (“[T]oday’s decision denotes that the application of the public purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal.”).

<sup>70</sup> 304 N.W.2d 455 (Mich. 1981).

<sup>71</sup> See NICHOLS § 7.06[7][c][iv] (tabulating that “[o]ver 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”).

<sup>72</sup> See *Poletown*, 304 N.W.2d at 457 (“We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term ‘public use’ has not received a narrow or inelastic definition by this Court in prior cases.”) (citations omitted).

<sup>73</sup> *Id.* at 459.

<sup>74</sup> See, e.g., *Jamestown v. Leever*, 552 N.W.2d 365, 369, 372-74 (N.D. 1996) (relying on *Poletown* to conclude 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”).

<sup>75</sup> See *supra* note \_\_\_ and accompanying text.

seemed to constitute a public use even if a private party received the primary benefit.<sup>76</sup> However, unlike the deferential approach of *Poletown* and its progeny, several state courts recently have posited a less deferential interpretation of public use.<sup>77</sup> Indeed, contrary to *Poletown*, these state courts reaffirmed the distinction between public use and public purpose.<sup>78</sup>

An opportunity arose for the Michigan Supreme Court to reconsider *Poletown* in *County of Wayne v. Hathcock*.<sup>79</sup> Characterizing *Poletown* as a “radical departure from fundamental constitutional principles,” the Court unanimously rejected the notion that “a private entity’s pursuit of profit was a ‘public use’ for constitutional takings purposes simply because one entity’s profit maximization contributed to the health of the general economy.”<sup>80</sup> As a result, the Court held that condemnations for a 1,300-acre business and technology park,<sup>81</sup> which ultimately would be owned and controlled by private parties, were unconstitutional under the Michigan Constitution. The *Hathcock* Court 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 in some way to the commonweal.”<sup>82</sup> Because *Poletown* had provided the rationale for many state court decisions, its overruling signaled a potential shift in eminent domain jurisprudence.<sup>83</sup>

### C. *Kelo v. City of New London*

The opportunity for the U.S. Supreme Court to reexamine the public use requirement came in *Kelo v. City of New London*.<sup>84</sup> In *Kelo*, New London delegated its

<sup>76</sup> See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354 (1982) (“the arguments deployed [in *Poletown*] in support of the publicness of this venture could be deployed in support of virtually any venture imaginable”); see also 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.”).

<sup>77</sup> 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 Illinois Development Authority v. National City Environmental, LLC, 768 N.E.2d 1 (Ill. 2002) (“[T]o constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement.”) (citations and internal quotation marks omitted); Mfg. Housing Comm. 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.”).

<sup>78</sup> See Ga. Dep’t of Transp., 586 S.E.2d at 856 (“‘public purpose’ discussed in [tax] cases is not the same as a ‘public use’”); Southwestern Ill. Dev. Auth., 768 N.E.2d at 8 (“a distinction still exists and is essential to this case.”); Piedmont Triad Airport Auth. v. Urbine, 554 S.E.2d 331, 332 (N.C. 2001) (“There remains a distinction between the terms ‘public purpose’ and ‘public use.’”); Mfg. Housing Comm., 13 P.3d at 189 (“Case law demonstrates these terms are not synonymous.”).

<sup>79</sup> 684 N.W. 2d 765 (Mich. 2004).

<sup>80</sup> *Id.* at 786-87.

<sup>81</sup> See *id.* at 769-70.

<sup>82</sup> *Id.*; see also *id.* (noting that considering private economic development a public use would “render impotent our constitutional limitations on the government’s power of eminent domain.”).

<sup>83</sup> See NICHOLS § 7.06[28] (noting that “the reversal of the *Poletown* decision may signal a trend towards heightened scrutiny of what constitutes a ‘public use’”).

<sup>84</sup> *Kelo v. City of New London*, 545 U.S. \_\_\_, 2005 WL 1469529 (June 23, 2005).

eminent domain authority to a private economic development corporation charged with revitalizing the downtown and waterfront areas of the city. The development corporation decided to remove over ninety existing homes and small businesses in order to replace them with privately-owned office buildings and a riverfront hotel that would complement a new Pfizer global research facility. After seven property owners refused to sell, the development corporation took title to the land through eminent domain. City authorities argued that the condemnations were justified because the city had endured three decades of economic decline, including the recent loss of 1,900 government jobs, and had no other viable options for increasing its tax base to help pay for schools and services.<sup>85</sup>

Writing for the Court in a five-to-four decision, Justice 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 under the Fifth Amendment.<sup>86</sup> The Court based its conclusion on two lines of cases. First, relying on *Fallbrook Irrigation Dist. v. Bradley*,<sup>87</sup> the Court continued to define public use broadly by equating public use with public purpose.<sup>88</sup> Second, relying on *Berman* and *Midkiff*, the Court continued to defer to legislative determinations of public use.<sup>89</sup> 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.”<sup>90</sup> As a result, the Court concluded that the potential for increased jobs and tax revenue incidental to private economic development satisfied the public use requirement.<sup>91</sup>

In a concurring opinion, Justice 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.”<sup>92</sup> However, because he found the primary motivation of these takings was not for the private benefit of Pfizer and because the condemnations were part of a “comprehensive development plan,” Justice Kennedy concluded that this case survived the “meaningful rational basis review that in my view is required under the Public Use Clause.”<sup>93</sup>

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<sup>85</sup> *See id.* at \_\_.

<sup>86</sup> *See id.* at \_\_, (concluding that that “[p]romoting economic development is a traditional and long accepted function of government.”).

<sup>87</sup> 164 U.S. 112 (1896).

<sup>88</sup> *See Kelo*, 545 U.S. at \_\_ (concluding that “[w]ithout exception, our cases have defined that concept broadly”).

<sup>89</sup> *See id.* (describing the Court’s “longstanding policy of deference to legislative judgments in this field.”).

<sup>90</sup> *Id.* (quoting *Midkiff*, 467 U.S. at 242).

<sup>91</sup> *See id.* at \_\_ (concluding that “an economic development plan that [the City] believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue . . . unquestionably serves a public purpose”).

<sup>92</sup> *Id.* at \_\_ (Kennedy, J., concurring).

<sup>93</sup> *See id.* at \_\_; *see also id.* at \_\_ (noting that “deferential standard of review” for the Public Use Clause “echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses”) (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) and *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)).

In contrast, in two dissenting opinions, Justice O'Connor and Justice Thomas argued that, under the majority's interpretation of the Public Use Clause, almost any private property is now vulnerable to the government's use of eminent domain for a more productive private use.<sup>94</sup> Justice O'Connor (on behalf of all four dissenters) contended that, while previous decisions (such as *Berman*) had focused on some "harmful property use," the majority had significantly expanded the meaning of public use by holding that the state may 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."<sup>95</sup> Likewise, Justice Thomas argued that the majority provided no principled line for judicial decisionmaking.<sup>96</sup> Overall, while the majority defended its holding by asserting that under its interpretation the Public Use Clause retained meaning,<sup>97</sup> the Court failed to provide any standard for defining public use or distinguishing between public and private uses.<sup>98</sup>

### III. A RATIONALE FOR THE PUBLIC USE REQUIREMENT

In light of *Hathcock* and *Kelo*, this section reexamines the conventional wisdom regarding the public use requirement and presents a new theory for distinguishing between public and private uses. As noted in the introduction, the theory rests on two important yet previously overlooked factors: the availability of secret buying agents and the potential for inordinate private influence. First, the section explains that private parties, unlike the government, have the capability of avoiding strategic holdout among sellers by using secret buying agents. The availability of secret buying agents makes the use of eminent domain for private transfers unnecessary (and indeed, socially undesirable). Second, the section explains that the use of eminent domain for private parties heightens the potential for corruption because private parties that directly benefit from takings have a strong incentive to influence the eminent domain process for their own advantage. Indeed, unlike traditional public takings (which have dispersed beneficiaries), private parties can use inordinate influence to exploit bargaining and free rider problems among existing owners to obtain a concentrated benefit.

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<sup>94</sup> See *Kelo*, 545 U.S. at \_\_ (O'Connor, J., dissenting) ("Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owners, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process."); *id.* at \_\_ (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 . . .").

<sup>95</sup> *Id.* at \_\_ (O'Connor, J., dissenting)

<sup>96</sup> See *id.* at \_\_ (Thomas, J., dissenting) (arguing that the majority's application of *Berman* and *Midkiff* is "further proof that the 'public purpose' standard is not susceptible of principled application").

<sup>97</sup> See *id.* at \_\_ & n.17 (noting 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") (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)).

<sup>98</sup> See *id.* at \_\_ (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"); see also *id.* at \_\_ n.19 (noting that "[a] parade of horrors is especially unpersuasive in this context, since the Takings Clause largely 'operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge'" (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part))).

### A. *Secret Buying Agents*

Secret buying agents perform two functions in the context of transferring property from one private owner to another private owner. First, secret buying agents, like eminent domain, circumvent the problem of strategic holdout among sellers. That is, secret agents prevent opportunistic sellers from inflating prices to prevent the assembly of land for socially desirable projects. However, second, and unlike eminent domain, secret agents facilitate private transfers *if but only if* a transfer is indeed socially desirable. That is, because negotiations between secret buying agents and existing owners capture the owners' actual valuations of their property—instead of relying on the “fair market value” of damages—secret agents prevent the socially undesirable transfers that eminent domain sometimes allows.

#### 1. *Circumventing the Holdout Problem*

According to the conventional justification, private parties, as well as the government, need the power of eminent domain to overcome the holdout problem among strategically-acting sellers.<sup>99</sup> This insight regarding the holdout problem was widely recognized even prior to the modern law-and-economics movement.<sup>100</sup> Likewise, contemporary courts have identified the holdout problem as the primary justification for the state's use of eminent domain.<sup>101</sup>

In cases involving the assembly of multiple properties for a single project, the holdout problem may occur because of the strategic behavior of potential sellers. Any potential condemnee, knowing that his single property is necessary for the entire project, could “hold out” in order to obtain an inflated price.<sup>102</sup> According to one commentator:

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

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<sup>99</sup> See *supra* note \_\_\_\_.

<sup>100</sup> See, e.g., *Kohl v. United States*, 91 U.S. 367, 371 (1876) (“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 . . . that of a private citizen.”); *Everett W. Cox Co. v. State Highway Commission*, 133 A. 419, 513 (N.J. 1926) (“In order to effect the purpose of the act for the building of state highways, the exercise of the power of eminent domain is absolutely necessary. If this were not the law, then a single individual could hold up a state project.”).

<sup>101</sup> See, e.g., *Dignet, Inc. v. City of Chicago*, 958 F.2d 1388, 1400 (7th Cir. 1992) (stating that “hold-up potential is the principal argument for investing right of way companies with the power of eminent domain”); *Aaron v. Target Corp.*, 269 F.Supp.2d 1162, 1177 (E.D. Mo. 2003) (“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 . . . .”); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) (same).

<sup>102</sup> See Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 474 (1976) (“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.”).

parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.<sup>103</sup>

Indeed, strategic behavior among sellers could prevent the entire assembly project from occurring.<sup>104</sup> The primary advantage of eminent domain is therefore the ability to avoid these holdout problems and simply appropriate property.<sup>105</sup>

Although most commentators and courts have assumed that this holdout rationale applies equally to both takings for the government and takings for private parties,<sup>106</sup> takings for private parties are usually unnecessary because private parties do not in fact face the holdout problem. Specifically, private parties can avoid the holdout problem by employing secret buying agents, which provide not only an alternative but also a superior mechanism for enabling socially desirable transfers.<sup>107</sup> As a result, private parties do not need the state's power of eminent domain.<sup>108</sup>

This use of secret buying agents is neither infeasible nor impractical because private parties actually utilize buying agents on a regular basis for overcoming the holdout problem and assembling multiple parcels. Harvard University, for example, working through a real estate development company, recently used secret buying agents to purchase 14 separate parcels for \$88 million.<sup>109</sup> One Harvard official, arguing that it is normal for nonprofit organizations to conceal their role in the purchase of properties to prevent excessively high prices, stated that “[w]e were really driven by the need to get these properties at fair market value’ and avoid ‘overly inflated acquisition costs.’”<sup>110</sup> Indeed, the University pointed out that “the use of an intermediary is a common practice in real estate deals.”<sup>111</sup>

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<sup>103</sup> Merrill, *supra* note \_\_, at 74-75.

<sup>104</sup> See *supra* note \_\_.

<sup>105</sup> See SHAVELL, *supra* note \_\_, 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 over acquisition by purchase.”).

<sup>106</sup> See Richard Posner, “The Kelo Case, Public Use, and Eminent Domain,” The Becker-Posner Blog, available at <http://becker-posner-blog.com/> (June 26, 2005) (“[T]he rationale for eminent domain is unrelated to whether the party exercising the eminent domain power is the government or a private firm.”); see also Donald N. McCloskey, *The Enclosure of Open Fields: Preface to a Study of Its Impact on the Agricultural Efficiency of Eighteenth-Century England*, 32 J. ECON. HIST. 15 (1972); Kenneth Arrow, *Political and Economic Evaluation of Social Effects and Externalities*, in THE ANALYSIS OF PUBLIC OUTPUT (ed. Julius Margolis, 1970).

<sup>107</sup> See 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 . . . include[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”).

<sup>108</sup> 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.”).

<sup>109</sup> See Marcella Bombardieri, *Summers Boost Allston Plan; Harvard President Says Growth is Key*, BOSTON GLOBE, October 22, 2003, at A1; Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth \$88 Million in Allston*, BOSTON GLOBE, June 10, 1997, at A1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Likewise, Disney used secret agents in Orlando, Florida and Manassas, Virginia to avoid the holdout problem and assemble thousands of acres for its theme parks.<sup>112</sup> 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.”<sup>113</sup> Similarly, in Manassas, Disney “amassed about 3,000 acres for a proposed theme park in Northern Virginia” by “[c]reating a network of dummy companies that included agents from two other law firms, one in New York and one in Virginia” and “conclud[ing] as secretly as possible 11 separate deals, ranging in size from one acre to 1,800 acres.”<sup>114</sup> Disney’s overriding concern in using secret agents in both Orlando and Manassas was to overcome potential strategic behavior among sellers.<sup>115</sup>

Moreover, several courts have pointed out that the use of secret buying agents is a “common arms-length business practice” among shopping center developers and other real estate purchasers.<sup>116</sup> 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” which did not “require[] the exercise of eminent domain or any other form of collective public action for their formation.”<sup>117</sup> The Court described how shopping centers and other large-scale commercial projects “creat[e] various facades behind which they can hide” in order to overcome the holdout problem and assemble multiple parcels of land at reasonable acquisition prices.<sup>118</sup>

Secret buying agents also have been successful in assembling land in metropolitan and urban areas. In Las Vegas, for example, a property group “acquired 2,400 acres of land (consisting mostly of parcels of five acres or less) in order to build a master-planned community.”<sup>119</sup> In Providence, a development group “assembled 21 separate parcels of

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<sup>112</sup> See Alvin A. Arnold, *Development: How the Site Assembler Operates, Mortgage and Real Estate Executives Report*, Feb. 15, 1995, at 6 (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”).

<sup>113</sup> Mark Andrews, *Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K2.

<sup>114</sup> Tim O’Reiley, *Playing Secret Agent for Mickey Mouse; Lawyers Ran Dummy Corporations, Bought Real Estate for Disney*, LEGAL TIMES (Washington, D.C.), Jan. 10, 1994, at 2.

<sup>115</sup> Indeed, the legal director for Walt Disney Co. noted that “[i]f people think it is Disney, then price goes up. Or if people think there is an assemblage of land, that will drive up the price as well.” *Id.*

<sup>116</sup> *Westgate Village Shopping Center v. Lion Dry Goods Co.*, 21 F.3d 429 (Table), 1994 WL 108959, No. 93-3760, at 7 (6th Cir. 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”).

<sup>117</sup> 684 N.W. 2d 765, 783-84 (Mich. 2004).

<sup>118</sup> *Id.*; see also *id.* (“Rather than disclose their large commercial construction plans and negotiate with all the landowners openly, they hire many different individuals or property management companies to approach each landowner separately. The property owners never become suspicious that a large scale project is in the works, and therefore, do not attempt to exact an artificially inflated price from the buyers.”).

<sup>119</sup> Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners, at 5, *Kelo v. City of New London*, 545 U.S. \_\_\_ (2005) (No. 04-108); see also *id.* (noting that secret agents “took over five years to assemble the land,” but the project, which is now under construction, ultimately will consist of “10,000 single family residences, 3,000 multi-family units 150 acres of commercial development, parks, trails, and several schools.”).

land . . . to construct a 1.4 million-square-foot mall with space for 160 shops,” a project estimated at \$460 million.<sup>120</sup> And in West Palm Beach, two developers, using twenty different brokers, secretly “purchas[ed] over 300 separate parcels from 240 different landowners in nine months” to assemble twenty-six contiguous downtown blocks.<sup>121</sup> Secret buying agents thus fulfill the 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.”<sup>122</sup>

## 2. *Enabling Socially Desirable Transfers*

Using secret purchases for private transfers, however, is actually superior to relying on eminent domain. 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. Eminent domain may force a transfer where the existing owners actually value the land more than the private assembler. The use of secret buying agents, by contrast, eliminates the risk of erroneous condemnations through voluntary transactions, which ensure that every transfer is mutually beneficial (and thus socially desirable).

The United States Supreme Court has long-recognized that there is no practicable mechanism for determining how much existing owners actually (i.e., subjectively) value their property.<sup>123</sup> 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.<sup>124</sup> These personal values, however, are difficult to quantify.<sup>125</sup>

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<sup>120</sup> *Id.* at 5-6.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> Donald J. Kochan, “*Public Use*” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 88 (1998); *see, e.g., 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)) (noting that the tender offer is “an innovation in corporate law designed to overcome the holdout problem associated with control transactions.”); *id.* at 89 (concluding that “corporate law is empirical proof that the holdout problem can be overcome without governmental intervention.”); *see also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 14.9, at 390 (3d ed. 1986) (describing tender offers as a type of “private eminent domain”).

<sup>123</sup> *See* United States v. 546.54 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) (“[S]ince a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess . . .”); *see also* *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878) (“So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisal in all cases.”).

<sup>124</sup> 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.”).

<sup>125</sup> Donald L. Beschle, *The Supreme Court’s IOLTA Decision*, 30 SETON HALL L. REV. 846, 891 (2000) (pointing out “the enormous difficulties that would flow from allowing compensation for subjective or ‘personhood’ losses.”); Lawrence V. Berkovich, *To Pay or to Convey?: A Theory of Remedies for Breach of Real Estate Contracts*, 1995 ANN. SURV. AM. L. 319, 357 (1995) (pointing out that the “idiosyncratic value that individuals attach to their land . . . is not quantifiable.”); 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”).

Moreover, self-valuations are also 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 price opportunistically in order to augment their own compensation.<sup>126</sup>

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.<sup>127</sup> As a result, in calculating just compensation, courts ignore the subjective values of existing landowners.<sup>128</sup> Instead, courts rely on the "fair market value," an "objective" measure of damages.<sup>129</sup> But under the fair market value standard, price 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."<sup>130</sup> This judicially-determined market value, however, neither calculates nor compensates a taking's full costs.<sup>131</sup> As a result, courts systemically underestimate the value of the land to existing owners.<sup>132</sup>

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<sup>126</sup> See Tung Yin, *Reviving Fallen Copyrights*, 17 LOY. L.A. ENT. L.J. 383, 406-07 (1997) ("[T]he use of subjective value is subject to moral hazard: Property owners have an incentive to present an inflated subjective value."); see also *Chicago and North Western Trans. Co. v. United States*, 678 F.2d 665, 669 (7th Cir. 1982) ("[T]he condemnee who asks for more than what the property would have been worth to him if the government had not wanted the property is trying to engross 'hold out' values—the very thing, one might have thought, that the eminent-domain power was intended to excuse the government from having to pay.").

<sup>127</sup> See *supra* note \_\_\_\_.

<sup>128</sup> See Croson & Johnston, *supra* note \_\_\_, at 54 ("Courts typically do not even attempt to discern and compensate for subjective losses above market values."); Donald L. Beschle, *The Supreme Court's IOLTA Decision*, 30 SETON HALL L. REV. 846, 891 (2000) ("[T]he valuation of just compensation is solely a function of market value, with no enhancement for subjective loss."); see also Note, *Valuation of Conrail Under the Fifth Amendment*, 90 HARV. L. REV. 596, 598 (1977) (noting that courts "exclude[] from consideration what may be termed idiosyncratic value to the condemnee—for example, the sentimental value of one's home which is not generally shared by other members of society and thus not reflected in the price that a willing buyer would pay").

<sup>129</sup> See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (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); *Matter of Larsen*, 616 A.2d 529, 598 (Pa. 1992) ("Because value is an inexact, highly subjective concept, the Supreme Court has adopted the relatively objective concept of market value at the time of the taking as the just and equitable guideline for measuring just compensation.") (quoting Comment, *United States v. 50 Acres of Land*, 15 U. BALT. L. R. 400, 401-03 (1986)) (emphasis deleted); Note, *Valuation of Conrail Under the Fifth Amendment*, 90 HARV. L. REV. 596, 598 (1977) ("In determining what the condemnee has lost—and what compensation is due him under the fifth amendment—the courts generally look to the market value of the property which has been taken.").

<sup>130</sup> *564.54 Acres of Land*, 441 U.S. at 511 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

<sup>131</sup> 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.'"); Durham, *supra* note \_\_\_, at 1279-80 ("Market value . . . often does not adequately measure all the costs that the property owners and others bear because of the taking."); see also Crafton, *supra* note \_\_\_, at 890 ("Because a condemnee, by definition, is an unwilling seller, payment of market value will not compensate the person for the loss.").

<sup>132</sup> See Croson & Johnston, *supra* note \_\_\_, 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"); Crafton, *supra* note \_\_\_, 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."); 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

Consequently, whenever the state appropriates land through eminent domain instead of through voluntary exchange, a socially undesirable transaction is possible.<sup>133</sup> A socially undesirable taking may occur whenever the actual value deviates from the “market” value because the state may underestimate the private value of the property to the current owner and erroneously appropriate the property from its highest-valued user. That is, whenever the private value to the existing owners is greater than the private value of the property to the assembler but the government mistakenly believes that the value to the assembler is greater than the value to the existing owners, the use of eminent domain could cause a socially undesirable transfer.<sup>134</sup>

The use of 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.<sup>135</sup> Private parties may overestimate expected benefits because such determinations are speculative and difficult to predict. But private parties also may intentionally exaggerate the benefits of a taking for the purpose of obtaining the state’s condemnation authority. 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.<sup>136</sup> Whether overestimating occurs because expected benefits are difficult to predict or because of intentional exaggeration, these erroneous valuations of the expected benefits also cause socially undesirable transfers.

In contrast, the use of secret buying agents eliminates the risk that the state will condemn property mistakenly because voluntary transactions ensure that only mutually

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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.”)

<sup>133</sup> Courts also ignore a taking’s “demoralization costs.” See Fischel, *supra* note \_\_, 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)). But demoralization costs—like sentimental value—must also be taken into account in determining whether a transfer is socially desirable. See Heller & Krier, *supra* note \_\_, 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.”).

<sup>134</sup> See SHAVELL, *supra* note \_\_, 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 might underestimate the private value of property and take it when its true private value exceeds its value to the public.”)

<sup>135</sup> See Durham, *supra* note \_\_, at 1300 (“A government may pursue an inefficient eminent domain action because it underestimates the costs or overestimates the benefits of the taking.”).

<sup>136</sup> See Brief of Non-Party Institute for Justice and Mackinac Center for Public Policy as Amicus Curiae, at 22-23, *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004) (Nos. 124070-124078) (explaining how the City of Detroit and GM claimed the new plant would create 6,150 new jobs but the plant only employed 2,500 workers seven years later) (internal quotation marks and citations omitted); see also Gideon Kanner, *The New Robber Barons*, THE NATIONAL LAW JOURNAL, May 21, 2002, at A19 (describing the use of eminent domain for a Daimler Chrysler Jeep manufacturing plant in Toledo, Ohio, which condemned eighty-three homes but only produced 2,100 of the 4,900 jobs developers had promised).

beneficial transfers occur.<sup>137</sup> Unlike the use of eminent domain, voluntary exchange using secret buying agents allows the existing owners' subjective value to be taken into account while preventing existing owners from strategically inflating their valuations.<sup>138</sup> Because both parties to the transaction will bear their expected costs and expected benefits themselves, their private incentives will be consistent with the optimal social incentives. By both overcoming the holdout problem and eliminating the risk of erroneous condemnations, secret buying agents provide a superior—not only alternative—mechanism to eminent domain.

### 3. *Distinguishing Governmental Takings*

Secret buying agents also provide a reason for distinguishing between constitutional public uses and unconstitutional private uses because in most circumstances the government is unable to make secret purchases. The government cannot use secret buying agents to acquire property for its own projects (e.g., governmental buildings or public highways) because governmental projects are usually subject to the transparency of democratic deliberations and the scrutiny of the general public. Whereas private parties can choose not to reveal their projects, governmental projects are subject to public accountability and thus publicly known in advance.<sup>139</sup> As a result, the government needs eminent domain to overcome the holdout problem for its own publicly-known projects.

For example, suppose that a city wishes to construct a new public airport to facilitate transportation. If the city seeks to build the airport near a major metropolitan area, the project will require the assembly of multiple parcels from existing owners. But the state would be unable to acquire these parcels using secret buying agents because the consideration, approval, and construction of an airport (like most other governmental projects) requires democratic deliberation, public scrutiny, and various regulatory approvals. In selecting a site, for example, the state and city officials would likely have to consult with the airlines, the neighborhoods, and the Federal Aviation Administration. As a result, maintaining the secrecy the new airport (like most governmental projects) would be virtually impossible.

In certain limited situations, the government may be able to acquire property through secret buying agents. For example, if the government seeks to assemble property

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<sup>137</sup> See SHAVELL, *supra* note \_\_, 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 \_\_, 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.”).

<sup>138</sup> See Crafton, *supra* note \_\_, 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 \_\_).

<sup>139</sup> See SHAVELL, *supra* note \_\_, at 125, n. 23 (noting that “government is often unable to keep its plans quiet (indeed, the plans may have come about through a public decisionmaking process), and if so, the secret purchase option is not feasible”); Fischel, *supra* note \_\_, 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 \_\_, at 82 (“although buying agents, option agreements and straw transactions may work well for private developers, it is unclear whether government can use these devices effectively.”).

for a military base, the implementation of the project or the location of the land might remain classified. Other factors, however, provide additional countervailing reasons for why eminent domain is necessary for the government but unnecessary for private parties. For example, even if the government was able to keep secrets, the combination of secret land acquisitions and the need to buy off holdouts raises a significant danger of corruption between governmental officials and existing owners.<sup>140</sup> Overall, therefore, the clear benefits of democratic deliberation (as well as the justified skepticism of secret governmental projects) militate strongly in favor of the government's using eminent domain rather than secret purchases.

However, while eminent domain is usually necessary for the government, eminent domain is unnecessary for private parties who can employ secret buying agents to overcome the holdout problem and assemble land. Secret buying agents thus provide a reason for distinguishing between constitutional public uses (where secret buying agents are ineffective and thus eminent domain is necessary) and unconstitutional private uses (where secret buying agents are effective and thus eminent domain is unnecessary). As a result, this article's primary contribution is in developing the idea that private parties can use secret buying agents to overcome the holdout problem, whereas the government is generally unable to use secret buying agents for this purpose because of its inability to maintain the secrecy of its projects.

While other commentators, as well as a few courts, have noted that secret buying agents sometimes allow private parties to assemble property,<sup>141</sup> this idea has remained relatively undeveloped. Consequently, the idea that secret buying agents are relevant for analyzing the distinction between public use and private use has received little attention. Yet because secret buying agents allow private parties—but not the government—to overcome the holdout problem and assemble property, secret purchases distinguish those circumstances in which eminent domain is actually necessary and beneficial (and thus provides a “public use”) from those circumstances in which eminent domain is unnecessary or detrimental (and thus provides no “public use”). In this way, the feasibility of secret purchases provides a rationale for the public use requirement and helps solve the long-standing debate over the Public Use Clause.

### 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 for inordinate private influence and corruption within the eminent domain process. First, inordinate private

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<sup>140</sup> See Merrill, *supra* note \_\_:

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.

*Id.* at 82.

<sup>141</sup> See *supra* note \_\_-\_\_ and accompanying text.

influence distorts the use of eminent domain because private parties that would directly benefit from takings have a strong (but often socially undesirable) incentive to influence the process for their own private advantage. Second, private developers have an incentive to engage in an excessive use of the takings power because these parties often acquire property through the state without bearing any of the condemnation's costs. Third, private influence also leads to the exploitation of existing property owners because corporations or developers can exploit disparities in financial resources and legal sophistication.

### 1. *Concentrated Benefits*

Private parties that would directly benefit from takings have a strong incentive to influence the eminent domain process for their own private 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. Thus, not only is the right to take property unnecessary for private developers (who can use secret buying agents to circumvent the holdout problem), but giving private parties access to eminent domain leads to manipulation of the process and 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 (i.e., 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. The potential for corruption is thus higher in a taking for a private party (which involves a single concentrated beneficiary) than a taking for the government (which involves multiple, dispersed beneficiaries).<sup>142</sup>

Moreover, while the private party can use inordinate influence to obtain a concentrated benefit, the costs of the taking will be relatively dispersed among affected property owners. As a result, the incentives to oppose the taking will be relatively attenuated. While condemnees do not receive full compensation, even partial compensation decreases their individual incentives to oppose a taking.<sup>143</sup> An assembly project that involves multiple owners also creates a coordination problem because

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<sup>142</sup> See Kochan, *supra* note \_\_, 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.”); Jonathan R. Macey, *Promoting Public Regard for 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.”); Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 289 (1992) (explaining that “[i]f public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process”).

<sup>143</sup> See Kochan, *supra* note \_\_, at 82 (1998) (“[T]he existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affect owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation.”) (citing Farber, *supra* note \_\_, at 289-91 (1992)).

individual owners will free ride off of the other affected owners. Overall, therefore, private parties seeking a concentrated benefit are capable of using eminent domain to exploit these bargaining and free rider problems among the dispersed existing owners.

Furthermore, the political check against the subversive use of eminent is relatively ineffective for several reasons. First, as Justice Marshall noted, the time lag, which often entails several years, between the time of the condemnation and the time at which the consequences of the condemnation will be known may diminish political accountability.<sup>144</sup> Second, because the costs of the just compensation associated with the taking are dispersed among all taxpayers,<sup>145</sup> taxpayers have neither a sufficient incentive nor the relevant information to oppose particular condemnations for private parties.<sup>146</sup> Third, as a repeat player within the legislature, private parties, unlike dispersed landowners, enjoy a substantial advantage in the political process.<sup>147</sup> As a result, the political process usually will be unable to compensate for the inordinate influence private parties exert in seeking the condemnation authority for their own advantage.<sup>148</sup>

The case of *City of Las Vegas Downtown Redevelopment Agency v. Crockett*<sup>149</sup> illustrates this heightened potential for inordinate private influence. In *Crockett*, a consortium of eight casinos persuaded the Las Vegas Downtown Redevelopment Agency to condemn existing homes and businesses to assemble property in downtown Las Vegas for constructing a joint parking garage to facilitate the flow of traffic to their casinos.<sup>150</sup> When Crockett later challenged the taking as an unconstitutional private use, one judge recused himself because he had invested in one of the casinos.<sup>151</sup> Subsequently, when several additional judges recused themselves; the Nevada Supreme Court ruled that accepting campaign contributions from casino interests did not disqualify otherwise

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<sup>144</sup> 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”).

<sup>145</sup> See Kochan, *supra* note \_\_, 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).

<sup>146</sup> See MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 69-70 (1981) (“Members of the mass public will generally find it irrational to obtain the information necessary to identify their interests on any given issue and moreover will be ill equipped to interpret any information they do obtain.”).

<sup>147</sup> See Kochan, *supra* note \_\_, at 82 (1998) (“[T]he 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.”); Farber, *supra* note \_\_, at 289 (recognizing that “potential victims of takings lack the advantages of being repeat players in the political ‘game’”); *id.* at 290 (“All things being equal, it probably is still more true that the dispossessed [property owners] are disadvantaged by the one-shot nature of their involvement.”).

<sup>148</sup> Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 358 (2001) (“A]ny homeowner or small business owner who lacks the political clout to dissuade the government from taking his home or business is at risk.”); Durham, *supra* note \_\_, 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”).

<sup>149</sup> 76 P.3d 1 (Nev. 2003).

<sup>150</sup> See *id.* at 7-8.

<sup>151</sup> See BERLINER, *supra* note \_\_, at 130.

impartial judges.<sup>152</sup> The ultimate justification proffered for the taking was blight, even though Crocket's block had never been surveyed.<sup>153</sup>

The *Crocket* case illustrates the inordinate influence that a private party may exercise in seeking the state's power of eminent domain for its own private objective. The casino consortium, in maximizing its profits, had a substantial incentive to pursue the concentrated benefit that the parking garage would provide for its business. In contrast, because of the number of existing owners, the condemnees faced significant obstacles in organizing their political and legal opposition to the condemnations. Moreover, multiple judges had to recuse themselves for financial and political involvement with the potential beneficiaries—the casinos; indeed, the casino consortium has a large degree of influence among local Las Vegas officials. As a result, Crocket lost title to her property even though it is unclear whether the transfer was socially desirable.

In this way, private parties seeking to utilize the power to obtain a concentrated benefit may subvert the eminent domain process for their own advantage. Because of the substantial potential benefit, these private parties have a socially perverse incentive to pursue profit-maximizing opportunities that may not be in the public interest. In contrast, private entities are less likely to capture the political process when the government uses the power of eminent domain for a project that benefits dispersed members of the public. Therefore, because of this greater potential for inordinate private influence, the use of eminent domain should be disfavored for private objectives.

## 2. *Costless Acquisitions*

A second problem with private influence occurs because private parties usually are not required to pay any compensation to either the condemnees or the state when eminent domain is used on their behalf. 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.<sup>154</sup> Likewise, 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.<sup>155</sup> In *Corona*, California, the city promised to acquire and sell four parcels of land for one dollar to a developer, who would also receive one million dollars in tax rebates.<sup>156</sup> Indeed, under

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<sup>152</sup> City of Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Court, 5 P.3d 1059 (Nev. 2000).

<sup>153</sup> City of Las Vegas Downtown Redev. Agency, 76 P.3d at 13, 14 (concluding that “[i]f an agency's finding of blight is supported by substantial evidence, it is not subject to judicial review” even though in this case “the surveys and investigation may not have been as intensive as in some of the reported cases”).

<sup>154</sup> See *Kelo*, 545 U.S. at \_\_ n.4 (“While this litigation was pending before the Superior Court, . . . the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of \$1 per year . . . .”) (citing *Kelo v. City of New London*, 843 A.2d 500, 509-10, 540 (Conn. 2004)).

<sup>155</sup> See BERLINER, *supra* note \_\_, at 91; see also *Blanchard v. Dep't of Transportation*, 798 A.2d 1119, 1128 (Me. 2002).

<sup>156</sup> See BERLINER, *supra* note \_\_, at 26-27; see also Claire Vitucci, *Corona Agrees to Office Project: The Deal Calls for the City to Acquire Four Parcels Surrounding the Site on South Main Street*, THE PRESS-ENTERPRISE (Riverside, CA), at B1 (Apr. 20, 2000).

tax-increment-financing schemes, developers can avoid paying taxes, as well as paying for the newly-acquired land.<sup>157</sup>

Because private developers can benefit from the state's use of eminent domain without bearing any of the costs, developers will engage in the excessive use of the takings power. When a private party is not required to pay the full costs of a good, the party will consume too high a quantity of the good (in this case, land). Here, private developers have the potential for a windfall gain without paying any of the attendant costs. As a result, these entities have a socially perverse incentive to capture the eminent domain process for their own advantage. And these developers may have this incentive even while they may not have sought or acquired the land if they were required to pay the actual value through consensual transactions or the "market" value through just compensation.

The problem of costless acquisition also causes an additional problem. The ability of private developers to acquire property costlessly gives developers an incentive to "back out" of transactions after condemnations have already occurred if the circumstances have changed.<sup>158</sup> Unlike normal purchasers, private developers benefiting from eminent domain do not need to commit to a project until after the existing properties have been condemned and demolished. If a private developer initially overestimates expected benefits, the private developer can later decide to forego the project since the state—rather than the developer—has expended the necessary resources to take the property through eminent domain. Thus, if the property owner does not make the initial investment in buying the property or in using secret agents to buy the property, it is more likely that he will abandon an ongoing assembly project before completion.<sup>159</sup>

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<sup>157</sup> See BERLINER, *supra* note \_\_, at 26 ("A favorite method of subsidized redevelopment is the use of tax-increment-financing (TIF), whereby redevelopment agencies pay to development land, then keep any additional tax revenues in the project area. . . . The developer, for its part, can avoid property taxes and sometimes even paying for the land, simply by agreeing to operate the development for a set period of time.").

<sup>158</sup> See, e.g., Andrew Rice, *NYSE's Chairman Unplugs His Plans for a New Exchange*, N.Y. OBSERVER, Dec. 3, 2001, at 1, and Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3 (describing how New York City lost over \$109 million after the New York Stock Exchange backed out of plans to move to a new site that the City had acquired through eminent domain); Amy S. Rosenberg, *Stunned Atlantic City Officials Put up a Good Front*, PHILADELPHIA INQUIRER, Mar. 8, 2000, at C1 (describing Mirage Resort's abrupt pull-out of a planned casino, thus leaving a newly-constructed tunnel to nowhere); Robert Robb, *Count on City-Driven Project to Fail*, THE ARIZONA REPUBLIC, Sept. 21, 2001 (describing Mesa's condemnation and purchase of 63 homes at a cost of \$6 million so that a developer could construct an entertainment village, the financing of which eventually fell through leaving a vacant lot).

<sup>159</sup> 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 consequences from withdrawing, the developer withdraws from the project because \$1.5 million < \$2 million. The state thus spends \$1 million transforming viable homes and business into vacant lots.

In contrast, the secret-agent mechanism forces the developer (like other normal buyers) to commit to a project *ex ante* rather than shifting 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

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 to the possibility that a developer will “back out” of the project after it has already been commenced. The costless acquisition of property for a developer through the state’s use of eminent domain thus leads to another form of corruption. Because private developers can use eminent domain to achieve a concentrated benefit and because they can do so without incurring any costs, they will have a strong 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. *Disparities in Resources*

The third form of inordinate influence involves private manipulation of the eminent domain process by exploiting disparities in legal and financial resources. Powerful private entities often use their superior legal sophistication and financial resources to co-opt the eminent domain process—an authority intended for the public interest—for their own private advantage. Because of their influence, these private parties also may engage in *quid pro quo* corruption with state and local officials. Thus, the benefits of eminent domain most frequently accrue to affluent corporations and developers, while the burden usually falls on those with the fewest legal and financial resources.<sup>160</sup>

Allowing private parties to use the state’s power of eminent domain systematically advantages affluent private developers over existing owners with fewer financial and legal resources.<sup>161</sup> Private parties often prefer to overcome the holdout problem and aggregate property through eminent domain rather than engaging in private bargaining using buying agents.<sup>162</sup> Moreover, local government is especially susceptible

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necessary land, the developer will continue with the project (even though \$1.5 million < \$2 million) because \$1 million has already been sunk and \$1.5 million (the benefits of continuing the project) > \$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 society—to bear the risk of the project.

<sup>160</sup> See *Kelo*, 545 U.S. at \_\_ (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 \_\_ (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.”).

<sup>161</sup> See, e.g., John Warren Kindt, “*The Insiders*” for *Gambling Lawsuits*, 55 *MERCER L. REV.* 529, 579 (2004) (noting that “[i]n 1993 the Las Vegas Downtown Redevelopment Agency, essentially the city council of Las Vegas, used eminent domain to take the Pappas’s land allegedly in less than 50 seconds in a summary proceeding . . . at which they were not even present nor previously properly served”) (citation and internal quotation marks omitted). Disparities in legal sophistication might be particularly problematic in the context of eminent domain because an individual homeowner or business owner must overcome two adversaries with superior resources: the private developer and the government.

<sup>162</sup> See Kochan, *supra* note \_\_, at 52-53 (“Rather than discovering innovative bargaining measures to overcome the high transaction costs associated with some land acquisition 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.”); *cf.* Croson & Johnston, *supra* note \_\_, at 67

to the resources of affluent private developers who promise more jobs and tax revenue.<sup>163</sup> As a result, the primary beneficiaries of the use of eminent domain for private objectives tend to be large market players including real estate and condominium developers, corporations, and large entertainments facilities such as casinos and sports stadiums. The primary victims of the use of eminent domain for private parties tend to be low-income and working class homeowners, the elderly, local stores and small businesses, houses of worship, and racial and ethnic minorities in urban areas.

Disparities in legal and financial resources also may cause *quid pro quo* corruption, which occurs between local government officials and private developers. In such an arrangement, the benefit to the private developer is the ability to obtain and assemble land without purchasing the property for the full price.<sup>164</sup> On the other hand, the motivations of the local authorities for engaging in *quid pro quo* corruption may be either benevolent or malevolent: benevolent if the authorities subjectively believe the taking will improve the local community; 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.<sup>165</sup>

For example, in constructing the Cross-Bronx Expressway in New York City, local officials considered two possible routes. The first route consisted primarily of government land and would require displacing nineteen families, while the second route required demolishing over 140 buildings and displacing 1,530 families, as well as sixty businesses.<sup>166</sup> Nevertheless, Robert Moses, a powerful planning Commissioner in New York City after World War II, selected the second route for reasons that his biographer suggests may have had more to do with political corruption, familial favoritism, and private influence than promoting the general welfare.<sup>167</sup>

The history of eminent domain also shows a pattern of invidious discrimination against racial and ethnic minorities.<sup>168</sup> According to one commentator, “the displacement

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(“[W]here the legal contest was such that the parties could count on the higher-valuing party getting the entitlement—the law supplanted private bargaining, inducing an immediate unconsented taking. When error was introduced into the legal contest—such that the higher-valuing party had a high chance of in fact losing the contest and not getting the entitlement—the uniformed party bargained under a credible threat to take.”).

<sup>163</sup> See Adam Helleger, *Eminent Domain as an Economic Development Tool*, 2001 L. REV. M.S.U.-D.C.L. 901, 903 (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”).

<sup>164</sup> See *supra* note \_\_ and accompanying text.

<sup>165</sup> 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 . . .”).

<sup>166</sup> See generally Durham, *supra* note \_\_, at 1297-1300.

<sup>167</sup> See Durham, *supra* note \_\_, at 1299 n. 147 (“Caro suggests that Moses may have chosen the first route because the second would have required condemnation of property owned by a relative of Bronx Borough President James Lyons.”) (citing ROBERT CARO, *THE POWER BROKER* 877 (1974); *id.* (“In addition, the Third Avenue Bus Company, whose terminal was also slated to be condemned for the first route, may have applied pressure or used influence to convince Moses to adopt the second route.”)).

<sup>168</sup> See 12 THOMPSON ON REAL PROPERTY 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin) (“The history of eminent domain is rife with abuse specifically targeting minority neighborhoods.”); see, e.g., *Garrett v. Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971).

of African-Americans and urban renewal projects were so intertwined that ‘urban renewal’ was often referred to as ‘Negro removal.’”<sup>169</sup> Moreover, eminent domain imposes a disproportionate impact on racial and ethnic minorities, as well as the economically disadvantaged and elderly.<sup>170</sup> Indeed, in their brief supporting the petitioners in *Kelo*, several civil rights organizations pointed out that “the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly . . . have been targeted for the use 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.”<sup>171</sup>

Disparities in legal and financial resources thus create the opportunity for the private exploitation of the economically disadvantaged and politically disfavored. These disparities in resources, coupled with the perverse incentives of private developers for seeking a concentrated benefit with minimal acquisition costs, indicate that the use of the takings power for private parties often leads to the misuse of eminent domain. Thus, for two reasons—the superiority of secret buying agents and the increased potential for corruption—the eminent domain power should generally not be used on behalf of private parties. In contrast, the state’s inability to use secret buying agents and the diminished possibility of inordinate private influence indicate that eminent domain is both necessary and appropriate for the government. The new theory based on secret purchases and private influence thus provides a principle for interpreting the public use requirement and distinguishing between public and private uses.

### C. Counterarguments

The primary objection to the foregoing economic analysis involves the possibility that secret buying agents may not enable certain socially desirable transfers if the assembly of property provides a large positive externality. Other potential counterarguments concern problems of timing (such as the necessity of acquiring land quickly in certain situations), the possibility of collusion (such as secret agents colluding with existing owners to inflate prices), and a potential increase in societal distrust and resentment (including the anger among former owners and within the local community). These counterarguments are explored in turn.

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<sup>169</sup> 12 THOMPSON ON REAL PROPERTY 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin).

<sup>170</sup> See, e.g., B. FRIEDEN & L. 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 those 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.”); *Kelo*, 545 U.S. at \_\_ (Thomas, 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*, 348 U.S. 26, 30 (1954)); see also Charles Toutant, *Alleging Race-Based Discrimination: Suits Claim Municipal Redevelopment Plans Fall Disproportionately on Low-Income, Minority Neighborhoods, Raising Equal Protection Issues*, Vol. CLXXVII No. 5, N.J.L.J. (Aug. 2, 2004) (“Challengers claim in court that the wrecking ball is hitting hardest in low-income, minority neighborhoods with high concentrations of African-Americans and Hispanics.”).

<sup>171</sup> See Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, et al. in Support of Petitioners, at 7, *Kelo v. City of New London*, 545 U.S. \_\_ (2005) (No. 04-108).

### 1. *The Possibility of 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 properties to the existing owners.<sup>172</sup> 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. 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 society 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 secret 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 prevents a socially desirable assembly from occurring even with secret buying agents.

Historically, the Mill Acts, which allowed private parties to condemn and flood riparian lands to provide for grist-mills,<sup>173</sup> 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.<sup>174</sup> But the Mill Acts provided all members of society with a vital public benefit—if not a “necessity”<sup>175</sup>—that otherwise

<sup>172</sup> See *supra* note \_\_-\_\_ and accompanying text.

<sup>173</sup> See NICHOLS § 7.07[4][f][i] (“The Mills Acts can trace their origin to colonial America. Mass. Stats. 1713-14, Ch. 12, referred to ‘mills serviceable to the public good and the benefit of the town.’ It 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.”).

<sup>174</sup> See John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation 1719-1859*, 27 J. LEGAL STUD. 455, 455 (1998) (“An adjacent landowner, realizing that his land was uniquely valuable to the owner of the mill site, might opportunistically try to hold out for such a high share of the potential surplus that the transaction would not take place. . . . An even greater obstacle to private bargaining would exist if the additional land needed for a mill site were in the hands of more than one owner. The need for coordination in bargaining would increase transaction costs and multiply the chances of opportunistic behavior, further lessening the likelihood that a private transaction would occur.”); see also John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 5-6; Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 271 (1990); Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 17-21 (1982).

<sup>175</sup> *Kelo*, 843 A.2d at 586 (Zarella J., concurring in part and dissenting in part) (quoting *Olmstead v. Camp*, 33 Conn. 532 (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

could not have been obtained. As a result, the United States Supreme Court upheld condemnations under the Mill Acts as legitimate public uses.<sup>176</sup> Thus, certain activities, like the maintenance of functioning grist-mills in colonial America, may produce a positive externality so significant that eminent domain may be necessary to supplement private incentives to ensure that these transactions occur.<sup>177</sup>

However, the exception for positive externalities should be limited for several reasons. First, if the private benefits of a project are insufficient to induce private parties to assemble the land, a public subsidy may be possible to provide these parties with a sufficient incentive to assemble the property. The government may subsidize any project (including the assembly of land through secret agents) if the government determines that the project involves a distinct positive externality. While a public subsidy is a common solution to this type of externality,<sup>178</sup> such a subsidy may not be feasible *ext ante* while maintaining the anonymity of secret buying agents. However, such a subsidy could be given *ex post* without affecting the ability of secret agents to overcome the holdout problem. In this way, secret purchases remain possible even with the subsidies that may be necessary to supplement private incentives if an externality exists.

Second, even without the possibility of an *ex post* subsidy, eminent domain should not be used 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. If there is not a substantial externality associated with the private transaction, then private bargaining (using secret buying agents) would produce the optimal result. While negotiations between secret buying agents and existing owners may fail, these types of bargaining problems exist with any open-market transaction.<sup>179</sup> Courts, as well as legislatures, generally do not have enough information to interfere with such bargaining. As a result, they should not permit the private use of eminent domain unless the transaction involves a significant positive externality.

Third, the exception for externalities should also be limited because the definition of externality is relatively amorphous.<sup>180</sup> Virtually any development might be said to be

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been not merely a convenience, but almost a necessity in the community.”); *see also* Hart, *supra* note \_\_, at 455 (“Gristmills and other water-powered mills played a central part in American economic development . . . .”); *Requiem*, *supra* note \_\_, at 604-05 (noting that, at least during the colonial period, mills were “essential to community existence”).

<sup>176</sup> *See, e.g.*, *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 26 (1885) (upholding 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”).

<sup>177</sup> Hart, *supra* note \_\_, 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”).

<sup>178</sup> *See supra* note \_\_.

<sup>179</sup> *See* SHAVELL, *supra* note \_\_, 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.”)

<sup>180</sup> *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”).

able to benefit the community.<sup>181</sup> However, a private company providing jobs or tax revenue does not constitute a positive externality (properly understood), unless the jobs have some incidental effect on social welfare.<sup>182</sup> A positive externality can only justify the private use of eminent domain if it is a benefit that the assembler could not have internalized. 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 otherwise be solved through a public subsidy.<sup>183</sup>

## 2. *Timing Problems and Collusion*

Two additional objections involve the possibility of timing problems and the potential for collusion. First, one of eminent domain's advantages as a mechanism for acquiring and aggregating land is that property may be obtained almost immediately. That is, the use of eminent domain avoids the time and resources involved in bargaining. By contrast, under the new theory, private developers must use secret buying agents to bargain individually with each of the existing owners. The use of buying agents could be inefficient in situations in which the buyer needs to assemble land quickly in order to exploit its highest and best use. Indeed, some states actually have "quick take" procedures in which the government (on behalf of a private developer) can acquire and demolish a person's home or business before the opportunity for a hearing.<sup>184</sup> 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 in order to preserve anonymity.

However, the use of eminent domain is not always a faster mechanism than buying agents for assembling land, and even when it may be quicker, it is not necessarily socially desirable. Because they do not require a hearing or any due process, takings that utilize "quick take" mechanisms obviously have a significant potential for abuse and thus should be disfavored. For all other takings, the aggregate number of years spent litigating

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<sup>181</sup> See Fischel, *supra* note \_\_, 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.").

<sup>182</sup> See Crafton, *supra* note \_\_, at 894-95 ("These externalities, however, are really no different than the benefits that a community gets from any productive business. One of the key characteristics of the free market is consumer surplus—that is, at least some of the benefits generated by enterprises accrue not to the enterprise but to those who interact with it. Professor (now Judge) Posner has put it succinctly: 'Productive people put more into society than they take out of it.' But surely this fact alone could not stand as the justification for declaring all productive individuals and businesses public and thereby allowing them to be 'taken' for public use. A theory of 'public' that myopically concentrates on externalities, however, could lead to such an absurd conclusion.") (quoting Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 128-29 (1979)).

<sup>183</sup> Cf. Crafton, *supra* note \_\_, 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.").

<sup>184</sup> See BERLINER, *supra* note \_\_, at 220-21 ("In many states, there is a specific procedure that allows the government to deposit with the court the amount it thinks the property is worth and then take possession of it very quickly. Sometimes there is no opportunity for a hearing before the government takes possession. . . . Once the government takes possession of a property through quick take, it can (and often does) demolish the buildings in question.").

the condemnation in general and the issue of public use in particular is usually greater than the number of years necessary for buying agents to aggregate property through voluntary transactions. Moreover, even if secret buying agents would take longer than litigating a condemnation in certain instances, this trade-off might still be socially desirable if the benefits from preventing the socially undesirable transfers that eminent domain sometimes causes outweigh the costs associated with delaying the acquisition.<sup>185</sup> 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.

Second, because private developers must employ third parties as buying agents, this mechanism raises the possibility of collusion between buying agents and existing owners. For example, secret agents might tip off sellers or agree to a higher price in exchange for a kickback. However, this collusion problem exists in every other agency relationship in which a principal monitors its agents (albeit while incurring some agency costs). Moreover, in practice, secret agents themselves often do not even know that they are buying property for an assembly project.<sup>186</sup> Developers using secret purchases 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. Because of this type of double-blind acquisition system in which each buying agent acts independently and anonymously, the likelihood of corruption is relatively attenuated.

### 3. *Distrust and Resentment*

Finally, secret purchases may increase societal distrust and resentment. Because most transactions occur between two parties negotiating with full disclosure and without buying agents, the use of such agents generally is viewed as a form of deception. Existing 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 to the current institutional arrangement.

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<sup>185</sup> Three other potential "timing" problems may exist with secret agents. First, certain owners (e.g., owners who previously did not have their properties for sale), may not want to sell at any price that the secret agents offer. These owners may become suspicious that an assembly is occurring if a buyer approaches unexpectedly, especially if secret buying agents continue to become an increasingly common practice. Second, acquiring land through secret agents also requires private developers to bear high initial costs. A private party is required to have a significant amount of investment capital before the commencement of an assembly project. Third, a private developer might receive a lower return on this land while the other parcels are being purchased because the developer cannot commence the project until secret agents have purchased all of the parcels. However, most existing owners do sell to secret buying agents at some price when the offer price exceeds their actual value; most private parties (such as corporations, real-estate developers, and casinos) usually have sufficient funding for initial costs, and most private developers can receive property's rental value by leasing the land for its existing use until all parcels have been assembled. Thus, these objections, while theoretically plausible, are relatively insignificant in practice.

<sup>186</sup> See, e.g., O'Reiley, *supra* note \_\_, at 2 ("[G]reat care was taken [by Disney] to make sure that none of the buyers knew about each other, even if they worked in the same firm.").

Upon discovering that secret buying agents have discreetly assembled land, individual sellers, as well as the affected community, may resent the buyer's use of secret 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.<sup>187</sup> 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.'"<sup>188</sup> Likewise, members of the community were outraged at the University for its secret land acquisitions.<sup>189</sup> In response, Harvard officials spent a significant amount of time and money, including voluntary payments to the government in lieu of property taxes,<sup>190</sup> reviving Harvard's relationships and public image within the community.<sup>191</sup>

Secret buying agents also may have the effect of creating distrust between normal buyers and sellers because sellers may be suspicious that a buyer is actually a secret agent. Normally, buyers and sellers negotiate freely knowing that the other party is acting in good faith and with full disclosure. However, if some percentage of buyers are buying 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 create incidental monitoring costs. Sellers, for example, might take socially wasteful precautions, such as spending time and money investigating whether buyers are independent buyers or actually secret agents.

However, while secret buying agents may create some level of distrust and resentment, the use of eminent domain (especially for private parties) causes similar problems.<sup>192</sup> Indeed, the level of resentment caused by a taking due to eminent domain may even be greater because of the government's imprimatur and because compensation usually will be undercompensatory.<sup>193</sup> Moreover, the use of secret buying agents may

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<sup>187</sup> See *supra* note \_\_\_-\_\_\_ and accompanying text.

<sup>188</sup> See, e.g., *Harvard Reveals Secret Purchases of 52 Acres Worth \$88 Million in Allston*, BOSTON GLOBE, June 10, 1997, at A1; see also *id.* ("The mayor also warned that unless Harvard gives the city a better indication as to how the university wants to use the land, the Boston Redevelopment Authority could make it difficult for the school to proceed with any current redevelopment plans it has for its other property.").

<sup>189</sup> 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 B1 ("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.").

<sup>190</sup> See *id.* ("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. (Other schools have similar arrangements.)").

<sup>191</sup> See Kate Zernike, Marcella Bombardieri, *Town Tensions Thawing as Harvard Earns Allston's Trust; University Wins Plaudits with Housing Support*, BOSTON GLOBE, Dec. 4, 2003, at B3 (describing the "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"); *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.'").

<sup>192</sup> See Crabtree, *supra* note \_\_\_, at 107 (1983) ("Frustration and despair resulting from a sense of powerlessness against governmental action cannot help but create social and economic problems of its own."); see also *Kelo*, 545 U.S. at \_\_\_ ("[W]e do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.").

<sup>193</sup> See *supra* notes \_\_\_-\_\_\_ and accompanying text.

become less shocking as the number of developers using buying agents continues to increase. Finally, while excessive monitoring may occur in certain circumstances, administrative costs are generally higher for using eminent domain than secret agents.<sup>194</sup> 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 only in certain limited circumstances or do not impose greater costs than the comparative institutional arrangement under eminent domain. Overall, therefore, the availability of secret buying agents and the potential for inordinate private influence generally makes eminent domain unnecessary for private parties.

#### IV. APPLICATIONS OF THE NEW THEORY

The two most prevalent uses of eminent domain for private parties include facilitating economic development and eliminating urban blight. Applying the theoretical analysis from Part III, this section analyzes economic development using *Kelo v. City of New London* and urban blight using *Berman v. Parker*. Finally, the section explores two situations (involving the instrumentalities of commerce and private utility companies) that traditionally have been considered public uses even though they involved private transfers for private objectives. The section concludes that, rather than undermining the secret-agent theory, these exceptions ultimately provide further evidence that the feasibility of secret purchases provides a useful mechanism for distinguishing between public and private uses.

##### A. *Kelo* and Economic Development

Promoting economic development can be defined broadly as any situation in which the state transfers non-blighted property from one private owner to another in order to increase the effective utilization of property. Because the use of eminent domain for economic development often destroys existing homes or businesses, the asserted public interest in private economic development is usually based on the potential for incidental public benefits such as increasing jobs or augmenting tax revenue. In *Kelo*, for example, city officials argued that condemning over ninety homes and business to construct new office buildings and a hotel was essential for increasing the city's tax base and paying for schools and services.<sup>195</sup> However, applying the foregoing economic analysis to *Kelo*, secret purchases (rather than eminent domain) should probably have been used in attempting to acquire these properties.

*Kelo* represents the classic holdout situation because only seven property owners refused to sell at the redevelopment corporation's price. Secret agents could have overcome this holdout problem through consensual transactions with all of the existing owners. Initially, the dozens of existing owners who sold their land under the threat of

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<sup>194</sup> See Fischel, *supra* note \_\_, 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 to the cost of a given transaction. When ordinary market transactions are available, they are normally cheaper for the government to use than eminent domain.”).

<sup>195</sup> See *supra* at \_\_.

eminent domain almost certainly would have sold to buying agents as well, although these owners would have been more likely to receive full compensation for their loss.<sup>196</sup> Similarly, the seven existing owners who held out even under the threat of eminent domain most likely would have sold to secret buying agents at some price above their actual valuation of their homes. If these existing owners refused to sell (even without being aware of the assembly project), then these owners presumably valued the property more highly than the developer. Finally, the anonymity of secret agents would have eliminated any possibility of the existing owners' opportunistically inflating their selling prices. Thus, secret buying agents, like eminent domain, could have prevented any strategic holdout among existing owners.

However, unlike eminent domain, secret buying agents would have eliminated the possibility of an erroneous taking. By ignoring the actual value of the property to the homeowners, the redevelopment corporation's use of eminent domain may have compelled a property transfer that is socially undesirable if the owners' subjective values deviated from the market value. In this case, the evidence that the existing owners attached a great deal of sentimental value to their properties,<sup>197</sup> coupled with the relatively speculative nature of future benefits,<sup>198</sup> suggested that the wisdom of using eminent domain to assemble the property was questionable. The use of secret purchases would have forced the developer to take into account the actual costs of the project and make an accurate estimation of the expected benefits.

Furthermore, the possibility in *Kelo* of an erroneous taking was also relatively high because of the existence of substantial private influence. New London delegated its power of eminent domain to a private economic development organization.<sup>199</sup> In turn, the economic development corporation negotiated with a developer for a ninety-nine year lease for the rent of one dollar per year.<sup>200</sup> The influence of the Pfizer Corporation (featured on the development corporation's own web site) also affected the New London project.<sup>201</sup> Indeed, the stated purpose of the redevelopment project was to complement

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<sup>196</sup> Eminent domain—unlike secret buying agents—sometimes compels transactions of otherwise unwilling sellers who only choose to sell only because they are in the shadow of a potential condemnation. See Berliner, *supra* note \_\_, 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.’”); see also Victor P. Goldberg, Thomas W. Merrill, & Daniel Unumb, *Bargaining in the Shadow Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083 (1987).

<sup>197</sup> See, e.g., *Kelo*, 545 U.S. at \_\_ (“Petitioner Susette Kelo . . . has made extensive improvements to her house, which she prizes for its water view. 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.”).

<sup>198</sup> See *Kelo v. City of New London*, No. 557299., 2002 WL 500238, at \*76 (Conn. Super. Mar. 13, 2002) (finding that development corporation's hope of attracting Coast Guard Museum was “too speculative to justify these condemnations”).

<sup>199</sup> See *Kelo*, 545 U.S. at \_\_ (noting that the city council authorized the “New London Development Corporation (NLDC), a private nonprofit entity” to “purchase property or to acquire property by exercising eminent domain in the City’s name”).

<sup>200</sup> See *supra* note \_\_.

<sup>201</sup> See *Kelo*, 545 U.S. at \_\_ (“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 *Kelo*, 545 U.S. at \_\_ (Thomas, J., dissenting) (characterizing the plan as “suspiciously agreeable to the Pfizer Corporation”).

Pfizer's new facility.<sup>202</sup> Finally, the development corporation also exempted an Italian Dramatic Club, a politically well-connected organization, while condemning every adjacent home.<sup>203</sup>

The favorable lease terms and the political exemptions likely resulted because the beneficiaries of the project, the real-estate developer and Pfizer, were both well-organized, well-financed private entities that saw a substantial profit-making opportunity. Thus, unlike a highway through New London that would have had multiple, dispersed beneficiaries, the New London project provided a concentrated benefit for both the developer and Pfizer. These private actors thus had an extremely high incentive to capture and utilize the state's power of eminent domain for their own advantage. In contrast, the condemnees (homeowners with few financial resources and little legal sophistication) were relatively dispersed. The ninety existing homes and small businesses thus faced a much more difficult coordination problems than the development corporation, which was led by a former Admiral of the United States Navy and whose Board included attorneys, accountants, the former Mayor of the City, and a Yale law professor.<sup>204</sup> Not surprisingly, more than ninety percent of property owners sold their property instead of expending their own limited legal and financial resources to challenge the condemnations.<sup>205</sup>

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."<sup>206</sup> However, more jobs and higher tax revenue in themselves do not constitute positive externalities. Private developers could have contributed these same benefits if they acquired the land through secret purchases rather than by eminent domain. But even if other externalities existed and even assuming that a public subsidy would not have been possible, it is unclear that any such externality would have been of a magnitude that was likely to create a significant difference in the private and social incentives for assembling the property.

Moreover, other potential counterarguments are also unpersuasive in this case. Timing does not seem to be a problem since the economic development corporation has

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<sup>202</sup> 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 . . . ."); see also *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.").

<sup>203</sup> See *id.* at \_\_\_ (O'Connor, J., dissenting) (noting that the redevelopment plan "will also retain the existing Italian Dramatic Club (a private cultural organization) through the homes of three plaintiffs in that parcel are to be demolished").

<sup>204</sup> [CITATION]

<sup>205</sup> See *id.* at \_\_\_ ("The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed.").

<sup>206</sup> See *id.* at \_\_\_ (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (2004)).

been trying to redevelop this area for several years.<sup>207</sup> Furthermore, the litigation surrounding the case has already taken several years—more than enough time for buying agents to acquire the land through consensual transactions.<sup>208</sup> The danger of collusion is also probably low since other firms have used secret agents successfully in aggregating land in similar situations and a developer could have prevented its own buying agents from learning of the larger assembly project.<sup>209</sup> Finally, while resentment may have occurred if secret agents had been used, it is clear that substantial resentment already exists among those owners who challenged the city’s condemnations all the way to the U.S. Supreme Court and are now being forced from their homes.<sup>210</sup> Because secret buying agents would have solved the holdout problem without risking an erroneous taking, because the potential for corruption was relatively high, and because these counterarguments are not particularly compelling, secret purchases would have been superior to eminent domain for assembling property and promoting economic development within the city of New London.<sup>211</sup>

### B. *Berman and Blight*

While the use of eminent domain for economic development allows the taking of property for private benefit even with an existing productive use, the use of eminent domain for eliminating blight usually involves property that is affirmatively deleterious to the surrounding community.<sup>212</sup> Traditional characteristics of blight include abandoned and physically-deteriorating buildings, as well as health concerns over the spread of disease.<sup>213</sup> Modern definitions of blight, by contrast, include such characteristics as “too-

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<sup>207</sup> See *id.* at \_\_\_ (noting that Connecticut authorized a \$5.35 million bond issue to support the development corporation’s planning activities in 1998); *id.* at \_\_\_ (noting that New London approved the development plan in 2000).

<sup>208</sup> See *Kelo v. City of New London*, 843 A.2d 500, 511 (2004) (noting that the development corporation filed condemnation proceedings in November 2000 and the plaintiffs challenged the condemnations in December 2000).

<sup>209</sup> See *supra* note \_\_-\_\_ and accompanying text.

<sup>210</sup> See Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, at A20 (June 24, 2005) (quoting plaintiff Susette Kelo) (“I am sick. Do they have any idea what they’ve done?”); *id.* (quoting plaintiff Bill Von Winkle) (“It’s desperately hard to believe that in this country you can lose your home to private developers. It’s basically corporate theft.”).

<sup>211</sup> In addition to assembly projects as in *Kelo*, municipalities and private developers also use eminent domain for the purpose of redeveloping a single parcel 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 will bring in more tax revenue or create more jobs. Applying the foregoing economic analysis, it appears that 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 publicity is much lower, collusion is easier to monitor, and resentment and excessive precautions are less likely. Thus, the use of eminent domain for economic development of a single property is even less justified than in the assembly situation.

<sup>212</sup> See NICHOLS § 7.06[26] (“The controlling motive for condemnation is to clear a specific area of moral and physical blight which slum conditions have produced. It is this rationale which creates the dominant public use justification for the employment of eminent domain.”).

<sup>213</sup> 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

small side yards, ‘diverse ownership’ (different people own properties next to each other), ‘inadequate planning,’ and lack of a two-car attached garage.”<sup>214</sup> Furthermore, blight designations often include both blighted and non-blighted properties.<sup>215</sup> 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.<sup>216</sup> However, courts and commentators 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.<sup>217</sup> A blighted area may impose negative externalities on neighboring homes and businesses.<sup>218</sup> Abandoned buildings, for example, might cause negative externalities by deterring new owners from investing in the community, increasing criminal activity, or facilitating the transmission of infectious diseases.<sup>219</sup> Blight thus may 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).<sup>220</sup>

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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.”).

<sup>214</sup> BERLINER, *supra* note \_\_, at 5; *see, e.g.*, Penn. Stat. § 1702 (2002) (defining blight as “inadequate planning,” “excessive land coverage by buildings,” “lack of adequate air and light,” “defective design and arrangement of buildings,” or “economically or socially undesirable land uses”).

<sup>215</sup> *See* NICHOLS § 7.06[7][c][iv] (“In general, 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.”).

<sup>216</sup> *See, e.g.*, *City of Phoenix v. Superior Court, County of Maricopa*, 671 P.2d 387, 389 (Ariz. 1983) (stating that it is “generally accepted” that “the taking of property in a so-called slum or blighted area for the purpose of clearing and ‘redevelopment,’” constitutes a “public use” even when “sale [occurs] before or after reconstruction to a private person or entity for operation of a public or private business”); *Sinas v. City of Lansing*, 170 N.W.2d 23, 26 (Mich. 1969) (classifying the “elimination of urban blight [a]s an adequate justification for the exercise of the power of eminent domain . . . even where the acquisition is followed by sale to private individuals”).

<sup>217</sup> *See generally* James Buchanan & Craig Stubblebine, *Externalities*, 29 *ECONOMICA* 371 (1962).

<sup>218</sup> 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”).

<sup>219</sup> Richard K. Green & Michelle J. White, *Urban Abandonments: A Possible Cause and Consequences* 15 (1998) (working paper on file with the New York University Law Review) (concluding that “abandonments are good predictors of negative externalities”); William T. Nachbaur, *Empty Houses: Abandoned Buildings in the Inner City*, 17 *HOW. L.J.* 3, 10-11 (1971) (describing how abandoned buildings drive away residents and owners) [RW].

<sup>220</sup> *See* Fennell, *supra* note \_\_, at 984-85 (“The case for clearing blight 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. at \_\_ (Thomas, J., dissenting) (“In *Berman*, for example, if the slums at issue were truly

Traditional economic analysis suggests several possibilities for dealing with negative externalities through legal rules including liability, corrective taxes, and subsidies.<sup>221</sup> Yet all of these possible solutions are inadequate for eliminating blight. The imposition of liability would allow affected homeowners to bring suit against the owners of the blighted property in order to provide a financial incentive to reduce the harmful externalities. In the context of eminent domain, however, such a solution seems problematic because the dispersed victims of blight (who may be difficult to identify in the first place) usually will not have a financial incentive to bring suit against the property owner 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 since the owners of the blighted property may not have enough money to pay for the damage inflicted by the blight. A subsidy, while potentially useful for positive externalities,<sup>222</sup> would be problematic for negative externalities because a subsidy would create a moral hazard problem. Specifically, existing owners could opportunistically impose blight externalities on their neighbors in order to receive a government subsidy.<sup>223</sup>

A negative externality, however, also could be resolved through private bargaining.<sup>224</sup> Thus, if a blighted property is imposing negative externalities on surrounding areas, the affected owners could bargain 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 be successful because the transactions costs of organizing all affected property owners are likely to be prohibitive, especially since existing owners would have an incentive to free ride off of their neighbors. Moreover, convincing the owner to sell his property may also be difficult because, if a private developer seeks to assemble several blighted parcels for a new project, the hold-out problem may once again inhibit bargaining. As a result, secret purchases might be necessary to overcome the negative externalities caused by blight.

Consider once again the classic case of *Berman v. Parker*<sup>225</sup> in which a planning Commission undertook an eminent domain project to remove blight from an area encompassing the southwest portion of the District of Columbia.<sup>226</sup> Applying the foregoing economic analysis to *Berman*, the theory seems to cut in two different directions. On the one hand, the main drawback of eminent domain—i.e., mistakenly taking land from its highest-valued user—is less problematic because the blighted land is vacant or unproductive and thus existing property owners are less likely to attach

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‘blighted,’ then state nuisance law, not the power of eminent domain, would provide the appropriate remedy.”).

<sup>221</sup> For a discussion and comparison of types of legal rules for controlling externalities, see SHAVELL, *supra* note \_\_, at 92-101.

<sup>222</sup> See *supra* notes \_\_-\_\_ and accompanying text.

<sup>223</sup> See Fennell, *supra* note \_\_, 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.”).

<sup>224</sup> For a discussion of bargaining as a possibility for resolving externalities through bargaining, see SHAVELL, *supra* note \_\_, at 101-09.

<sup>225</sup> 348 U.S. 26 (1954).

<sup>226</sup> See *Schneider v. District of Columbia*, 117 F. Supp. 705, 710 (D.D.C. 1953).

sentimental or idiosyncratic value to these properties.<sup>227</sup> On the other hand, the counterarguments against secret buying agents seem weaker than in the case of economic development. The problem of unwilling sellers is also less likely to occur with blighted properties than with properties with an existing use. Furthermore, distrust and resentment seem less likely because blighted properties usually do not have sentimental or idiosyncratic value for their owners. Thus, while eminent domain is unlikely to cause socially undesirable transactions in the context of blight, secret buying agents are equally effective for overcoming the holdout problem.

However, an unusual type of corruption exists in the context of blight that make secret purchases preferable to eminent domain. If state law prohibits economic development as a public use, a city may use a blight designation as a pretext for using eminent domain for the purpose of economic development. In these situations, the blight designation often includes productive businesses and inhabited homes that have no obvious characteristics of blight. For example, in *Gamble v. City of Norwood*,<sup>228</sup> the City council planned a \$125-million project for upscale retail and luxury condominiums that would require ousting seventy-seven families.<sup>229</sup> The City labeled the neighborhood 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.<sup>230</sup> Similarly, in Lakewood, Ohio, a real estate developer planned to assemble land for 200 condominiums.<sup>231</sup> Sixty-six existing colonial homes were deemed blighted,<sup>232</sup> 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 be blighted.<sup>233</sup> Overall, using blight as a pretext for economic development has become increasingly common.<sup>234</sup>

In these cases, a pretextual doctrinal label in a municipal ordinance or statute should not alter the underlying functional analysis.<sup>235</sup> Unlike cases involving actual

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<sup>227</sup> See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 985 (2004) (“[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.”).

<sup>228</sup> No. C-040019, 2004 WL 1948690 (Ohio App. 1 Dist. Sept. 3, 2004).

<sup>229</sup> See BERLINER, *supra* note \_\_, at 167.

<sup>230</sup> See Susan Vela, *Threatened Homeowners Ask: What is Blight?*, THE CINCINNATI ENQUIRER, at 1A (Dec. 23, 2002).

<sup>231</sup> See BERLINER, *supra* note \_\_, at 165.

<sup>232</sup> *Id.* at 166.

<sup>233</sup> See 60 Minutes Story, *Eminent Domain* (Sept. 28, 2003) (“Using the [statutory] criteria means that more than 90 percent of the houses in Lakewood could be deemed blighted—including the mayor’s house and every one of the city council members.”).

<sup>234</sup> See BERLINER, *supra* note \_\_, at 82-83 (“[C]ities will find a way to label anything blighted . . . . 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.”).

<sup>235</sup> See Fennell, *supra* note \_\_, 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. . . . Given the inherent malleability of the line between stopping a landowner from harming others and forcing a landowner to provide a benefit to others, 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.”).

blight, cases involving pretextual blight do not involve a negative externality. As a result, secret buying agents can purchase property just as they can in the cases involving the assembly of multiple properties for economic development, while the use of eminent domain could cause a socially undesirable transfer. Furthermore, all instances of pretextual blight are essentially instances of corruption because the municipality or private corporation attempts to condemn property on the basis of blight even though it could not have condemned the property for the purpose of economic development.<sup>236</sup> Overall, secret buying agents work just as well as eminent domain for eliminating the negative externalities of actual blight and are a better mechanism for cases involving pretextual blight. The use of eminent domain should therefore be disfavored in all cases of asserted blight.

### 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, secret agents are ineffective for assembling land for either the instrumentalities of commerce (e.g., railroads, canals, or private highways) or private utility operations (e.g., telephone lines, oil pipes, or electric wires). Both of these uses require long, thin, and continuous pieces of land that are difficult to assemble without being detected. 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 through secret buying agents. However, because these situations have long been considered public uses (even while including private transfers), these exceptions further illustrate the relevance of secret agents for distinguishing between public and private uses.

The use of eminent domain traditionally has been allowed for aggregating thin, continuous pieces of land even for private parties for primarily private objectives. Courts traditionally have upheld the transfer of property for both the instrumentalities of commerce and private utility companies. 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.<sup>237</sup> Likewise, the use of eminent has been upheld for distributing artificial light and power,<sup>238</sup> piping oil,<sup>239</sup> laying telephone wires,<sup>240</sup> digging irrigation ditches and canals,<sup>241</sup> and laying coaxial cable and fiber optic lines.<sup>242</sup>

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<sup>236</sup> Cf. *Kelo*, 545 U.S. at \_\_ (“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.”).

<sup>237</sup> See, e.g., *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (upholding condemnation of railroad track at Amtrak’s request as a valid public use); see also *Hairston v. Danville and Western Railroad Co.*, 208 U.S. 598 (1908); *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395 (1850); *NICHOLS* (citing cases from all fifty states upholding use of eminent domain to lay railroad track).

<sup>238</sup> See, e.g., *City of Stillwell v. Ozark Rural Electric Cooperative Corporation*, 79 F.3d 1038 (10th Cir. 1996); *Alabama Electric Cooperative, Inc. v. Jones*, 674 So. 2d 734 (Ala. 1990); *Opinion of the Justices*, 24 N.E. 1084 (Mass. 1890).

<sup>239</sup> See, e.g., *Etalook v. Exxon Pipeline, Co.*, 831 F.2d 1440 (D. Alaska 1987); *Producers Pipe Line Co. v. Martin*, 22 F. Supp. 44 (W.D. Ky. 1944); *Walker v. Gateway Pipeline Company*, 601 So. 2d 970 (Ala. 1992); *Mississippi: Ohio Oil Co. v. Fowler*, 100 So. 2d 128 (Miss. 1958); *Lakehead Pipe Line Co., Inc. v. Dehn*, 64 N.W.2d 903 (Mich. 1954).

Courts have upheld these uses of eminent domain because the “very existence” of these projects depends on government coordination.<sup>243</sup> In these circumstances the probability of public knowledge of the project is likely to be so high that even secret buying agents could not prevent the holdout problem. As 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.<sup>244</sup>

The almost inevitable dissemination of information about the path of the project thus causes a holdout problem for the developer, for whom it will then be economically infeasible to abandon its existing route.<sup>245</sup> Because maintaining the secrecy of these projects would be virtually impossible, secret purchases would be unable to overcome the holdout problem.<sup>246</sup> As a result, these transactions require the state’s use of eminent domain.<sup>247</sup>

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<sup>240</sup> See, e.g., *Doelle v. Mountain States Tel. & Tel.*, 872 F.2d 942 (10th Cir. 1989); *Mellon v. Southern Pacific Transp. Co.*, 750 F. Supp. 226 (W.D. Tex. 1990); *Buncombe Metallic Tel. Co. v. McGinnis*, 109 N.E. 257 (Ill. 1915); *Northwestern Tel. Exch. v. Chicago R.R. Co.*, 79 N.W. 315 (Minn. 1899); *Rodgers v. Bradshaw*, 20 Johns. 735 (N.Y. Sup. Ct. 1823). But see *Diginet Inc. v. Western Union ATS, Inc.* 759 F. Supp. 1285 (N.D. Ill. 1991).

<sup>241</sup> See, e.g., *Albert Hanson Lumber Co., Ltd. v. U.S.*, 261 U.S. 581 (1923); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *Clark v. Nash*, 198 U.S. 361 (1905).

<sup>242</sup> See, e.g., *Cablevision of the Midwest v. Gross*, 639 N.E.2d 1154 (Ohio St. 3d 1994); *Lake Louise Imp. Assoc. v. Multimedia Cablevision of Oak Lawn, Inc.*, 510 N.E.2d 982 (Ill. App. 3d 1987).

<sup>243</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting).

<sup>244</sup> *County of Wayne v. Hathcock*, 684 N.W. 2d 765, 781-82 (Mich. 2004); see also *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 411 (1876) (“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.”).

<sup>245</sup> See *Crafton*, *supra* note \_\_, 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 alternate value of the land. Such a position is possible because the cost of the railroad of abandoning the line and switching to an alternative route becomes prohibitive once construction has commenced.”).

<sup>246</sup> Cf. *Crafton*, *supra* note \_\_, at 872 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.”).

<sup>247</sup> 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*,

However, these types of takings have long been considered to be constitutionally legitimate public uses even though they involved the transfer of property from one private owner to another.<sup>248</sup> That is, the use of secret agents is infeasible in precisely the areas where eminent domain traditionally has been used in private transfers. Thus, rather than undermining the secret-agent theory, these exceptions ultimately provide further evidence that the feasibility (or infeasibility) of secret buying agents provides a useful mechanism for distinguishing between public and private uses.<sup>249</sup>

## V. CONCLUSION: THE NEW THEORY AND ITS ADVANTAGES

The foregoing economic analysis and case applications demonstrate the feasibility (and indeed, necessity) of a new legal standard for the public use requirement. The theory based on secret purchases and private influence provides this standard. Secret agents provide a superior mechanism to eminent domain because, like eminent domain, the use of buying agents overcomes the holdout problem among strategic sellers, but unlike eminent domain, the use of buying agents ensures that all transfers are socially desirable.<sup>250</sup> The use of eminent domain for private parties should also be disfavored because private parties, unlike the dispersed beneficiaries of governmental takings, have an incentive to use inordinate influence to obtain a concentrated benefit.<sup>251</sup> Consequently, a developer who wishes to utilize the state's condemnation authority must demonstrate either that buying agents would be impracticable or that a significant positive externality would go unrealized.<sup>252</sup> In all other situations, the use of secret buying agents provides a superior mechanism for assembling property.

The theory of public use based on secret purchases and private influence also provides an administrable standard for legislative and judicial decisionmaking. Courts

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*supra* note \_\_, 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.”). *But see* Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230-31 (1920).

<sup>248</sup> *See supra* notes \_\_-\_\_.

<sup>249</sup> Private parties regularly attempt to use eminent domain in several other situations. In a working paper, I apply the foregoing analysis of secret buying agents and the potential for corruption in four additional circumstances: (i) the dilemma of landlocked property; (ii) the utilization of unique property; (iii) the expansion of existing facilities; (iv) and the redistribution of land. The dilemma of landlocked property involves a landlocked property owner who seeks to use eminent domain to take an easement through his neighbor's land for his private benefit. *See, e.g., Tolksdorf v. Griffith*, 626 N.W. 2d 163 (Mich. 2001) (condemnation for private road). The utilization of unique property involves the use of eminent domain to acquire property that is unique because of its location or idiosyncratic topographical characteristics. *See, e.g., Williams v. Hyrum Gibbons & Sons Co.*, 602 P.2d 684 (1979) (condemnation for mobile telephone transmitter station). The expansion of existing facilities involves the use of eminent domain against one's neighbors to acquire more property for an existing use. *See, e.g., 99 Cents Only v. Lancaster Redevelopment Agency*, No. 01-56338, 2003 WL 932421 (9th Cir. Mar. 7, 2003) (condemnation for expanding Costco warehouse). Finally, the redistribution of land involves the use of eminent domain to create more equitable land ownership or to prevent an oligopoly. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (condemnations for transferring property from landlords to tenants). These variations, which remain relatively unexplored, suggest further extensions of the secret-agent theory for future inquiry.

<sup>250</sup> *See supra* \_\_.

<sup>251</sup> *See supra* \_\_.

<sup>252</sup> *See supra* \_\_.

have been reluctant to review public use determinations because of their wariness about making cost-benefit calculations under significant informational uncertainty.<sup>253</sup> As a result, most courts, assuming that the legislature is the more appropriate branch for these judgments,<sup>254</sup> have deferred to almost all legislative determinations of public use.<sup>255</sup> In contrast, the new theory provides an intelligible principle for both legislative and judicial decisionmaking because the limitations on public use are determined through voluntary exchanges. Neither legislatures nor courts must project anticipated benefits, calculate sentimental losses, or rely on uncertain cost-benefit determinations.<sup>256</sup> Requiring voluntary transactions through buying agents thus avoids a reliance on excessive centralized planning by government officials who not only lack perfect information but also are subject to private influence.<sup>257</sup>

Moreover, the new theory is consistent with the constitutional text—“nor shall private property be taken for public use, without just compensation”<sup>258</sup>—because, as explained above, the use of eminent domain for private parties actually provides no additional “public benefit” and, in fact, may result in socially undesirable takings.<sup>259</sup> In many instances the use of eminent domain for private transfers actually decreases overall social welfare by allowing transactions in which the existing owners value the property more highly than the private assembler.<sup>260</sup> In contrast, the secret-agent mechanism enables a transaction if *but only if* the transaction is mutually beneficial and therefore in the public interest (i.e., for a “public use”).<sup>261</sup>

Finally, the new theory is also consistent with actual practice. The theory is consistent with the traditional exceptions to the rule prohibiting condemnations for

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<sup>253</sup> See *General Motors v. Tracy*, 519 U.S. 278, 308 (1997) (characterizing the Court as “institutionally unsuited to gather the facts upon which economic predictions can be made,” “professionally untrained to make them,” an consequently “reticent to engage in elaborate analysis of real-world economic effects”); *United States ex rel. TVA 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 NICHOLS § 7.08[3] (“How one can assess the relative weights of public need versus private rights is quite subjective . . . . It would simply lead to judges second guessing legislative cost/benefit calculations (through a return to heightened scrutiny) and [there is] no reason why the latter’s judgments should prevail.”).

<sup>254</sup> See *Kelo v. City of New London*, 545 U.S. \_\_\_ (2005) (declining to “second-guess the City’s considered judgments about the efficacy of its development plan” and declining “to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project”); *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 Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 179, 193 (2003) (“Courts are directed to defer to the legislative judgment because the legislature is the body of government charged with protecting the public welfare. The legislature has the resources to make evidentiary findings and to pass laws with the goal of providing for the people. A court that is removed from the public arena may not be aware of the needs of a specified community.”).

<sup>255</sup> See *supra* note \_\_.

<sup>256</sup> Cf. *Loyne*, *supra* note \_\_, at 402 (“Judges are not public policy analysts and it is not the province of the courts to determine whether the legislature has miscalculated its economic figures. But courts need not conduct such an economic inquiry to uphold the protections of the public use clause.”).

<sup>257</sup> See *supra* at \_\_.

<sup>258</sup> U.S. Const. amend. V.

<sup>259</sup> See *supra* at \_\_.

<sup>260</sup> See *supra* at \_\_.

<sup>261</sup> See *supra* at \_\_.

private objectives because it allows eminent domain precisely where secret buying agents would be impracticable for aggregating land (e.g., for railroad or utilities).<sup>262</sup> The theory is also consistent with current practices because developers frequently utilize secret agents to avoid the holdout problem and assemble property.<sup>263</sup> And the theory is applicable to a wide variety of situations—including promoting economic development (as in *Kelo*) and eliminating urban blight (as in *Berman*).<sup>264</sup>

The new theory is thus socially desirable (since it overcomes the holdout problem while preventing inefficient transactions), easily administrable (since no judicial calculus of the costs and benefits is necessary), consistent with the constitutional text (since eminent domain provides no additional public benefit or “public use”), consistent with the historical exceptions (since secret agents would be impracticable for assembling land for railroads and utilities), consistent with actual practice (since buying agents are frequently used for avoiding the holdout problem), and widely applicable (since the theory applies to economic development, blight, and potentially several extensions).

Because of its superiority over the status quo, the theory of public use based on secret purchases and private influence also serves as a 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.<sup>265</sup> As the majority in *Kelo* states, arguments that the need for eminent domain has been exaggerated because private developers can use “secret negotiations” are “certainly matters of legitimate public debate.”<sup>266</sup> Second, in the wake of *Kelo*, litigation over the scope of the public use requirement will increasingly move to state courts.<sup>267</sup> Currently, more states disallow the use of eminent domain for private economic development than explicitly allow this use, but many other state courts are likely to consider this same issue over the next several years.<sup>268</sup> And third, the possibility of *Kelo* being reconsidered (and possibly overruled) is neither implausible nor unlikely

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<sup>262</sup> See *supra* at \_\_\_\_.

<sup>263</sup> See *supra* at \_\_\_\_.

<sup>264</sup> See *supra* at \_\_\_\_.

<sup>265</sup> 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 *They Paved Paradise*, WALL. ST. J., at A12 (June 30, 2005) (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.”); *id.* (noting Connecticut legislation “to forbid the taking of private homes for private economic development except in the case of blight.”).

<sup>266</sup> *Kelo*, 545 U.S. at \_\_\_\_.

<sup>267</sup> See *id.* at \_\_\_\_ (“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 see *id.* at \_\_\_\_ (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.”).

<sup>268</sup> See *They Paved Paradise*, WALL. ST. J., at A12 (June 30, 2005) (“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.”).

(especially in light of the Court’s five-to-four decision). Indeed, the unanimous overruling of *Poletown* in *Hathcock* signaled the possibility of judicial reconsideration of whether private economic development constitutes a legitimate public use.

Finally, even after *Kelo*, the limitations of the Public Use Clause of the U.S. Constitution are still relatively indeterminate because the Court did not enunciate a test for interpreting the public use requirement.<sup>269</sup> The Court did maintain that a city would violate the Public Use Clause by taking land for a private party or for a private benefit.<sup>270</sup> Likewise, Justice Kennedy’s concurring opinion proposed heightened scrutiny for a taking involving private favoritism—a suggestion that seems to acknowledge the concern for inordinate private influence. But both the majority and Justice Kennedy left unanswered the question of how courts determine when a taking becomes too private and thus when a taking can no longer be considered a public use.<sup>271</sup>

By contrast, the theory based on secret purchases and private influence indicates those circumstances in which eminent domain provides no public benefit. The feasibility of secret buying agents in most circumstances makes the use of eminent domain for private parties not only unnecessary but also socially undesirable. Takings for private parties also create the potential for inordinate private influence as private actors have a socially perverse incentive to acquire eminent domain to obtain a concentrated benefit without bearing a project’s costs. But because of the nature of democratic deliberation and the fact that most public projects are known in advance, the state cannot use buying agents and instead must rely on eminent domain for public takings. These takings for the general public are also less subject to private influence. The theory thus provides a way of distinguishing between public and private uses.

Overall, therefore, the theory of “public use” based on the role of secret buying agents and the potential for inordinate private influence provides a superior mechanism for both legislative and judicial decisionmaking. The theory offers a coherent and administrable approach for interpreting the public use requirement—an issue about which courts have often lamented that there is “no agreement, either in reasoning or conclusion.”<sup>272</sup> Future empirical work is necessary to confirm the feasibility of secret buying agents in various applications.<sup>273</sup> This empirical work will become ever more relevant as private parties increasingly recognize the effectiveness of (and thus increasingly utilize) secret buying agents. At the very least, however, the foregoing analysis hopefully has demonstrated that further efforts at providing a definition of public use are not necessarily “doomed to fail.”<sup>274</sup>

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<sup>269</sup> See *id.* at \_\_\_ (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*).

<sup>270</sup> See *id.* at \_\_\_ (asserting that “the City would not doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.”).

<sup>271</sup> See *id.* at \_\_\_ (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”).

<sup>272</sup> *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908); see also *supra* note \_\_\_.

<sup>273</sup> See, e.g., Munch, *supra* note \_\_\_, at 473 (concluding in an empirical study 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”).

<sup>274</sup> NICHOLS § 7.02[7].