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Re-Framing Eminent Domain

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I. INTRODUCTION

The United States Supreme Court decision in *Kelo v. City of New London*,\(^1\) in which the Court rejected a constitutional challenge to the use of eminent domain, has invigorated the movement for eminent domain reform throughout this country.\(^2\) The two eminent domain reform alternatives currently on the political agenda are a flat ban on condemnations\(^3\) or a ban on only economic development condemnations coupled with

\(^1\) 125 S.Ct. 2655 (2005).

\(^2\) The Fifth Amendment of the U.S. Constitution provides that “[n]or shall private property be taken for public use without just compensation.” U.S. Const. Amend. V. This clause has been read to limit the use of eminent domain to cases in which the government’s condemnation is intended to serve a public use. In *Berman v. Parker*, 348 U.S. 26 (1954), and later *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the U.S. Supreme Court made clear that actual use by members of the public is not necessary: if the government is acting for a public purpose – or at least certain kinds of public purposes – the Public Use Requirement is satisfied and the condemnation is lawful. *Berman* established that the removal of blight from a poor urban area is a public purpose that satisfies the Public Use Requirement. As a general matter, blight designations and hence blight condemnations have been confined to poor or working class areas, so condemnations in middle-class and wealthy areas generally cannot be justified as blight removal condemnations. In *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the Court in essence held that economic development condemnations, like blight condemnations, are lawful because the economic development of a non-poor, non-blighted area is also a public purpose that satisfies the Public Use Requirement. The Court rejected the notion that economic development of middle-class areas could be meaningfully distinguished from blight removal followed by new development in poor areas. *See id.* at 2665 (“There is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized. . . . [O]ur cases . . . endorse[] the purpose of transforming a blighted area . . . through redevelopment.”). Taken together, *Berman* and *Kelo* mean that condemnations for the purpose of blight removal in (usually) poor areas and condemnations for the purpose of economic development (in usually non-poor areas) are lawful even if the new development will not be open to or literally used by the general public at all. The state courts have construed the public use requirements of their state constitutions in similar fashion, although the Michigan Supreme Court had expressed strong hesitations about economic development condemnations even before *Kelo* and the intense political backlash against that decision. *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *See also* Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002) (limiting the scope of permissible economic development condemnations).

\(^3\) *See H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006)* (“[O]wnership or control of property acquired pursuant to [eminent domain] may not be conveyed by the condemning authority or any other entity to a natural person or private entity” except for public infrastructure projects, and “the power of eminent domain . . . may [be] not exercise[d] . . . to take private property for the purpose of preventing or eliminating slum or blight conditions”); *see also* J. Robert McClure, *Amendment 8 Adds Property Protection*, PENSACOLA NEWS J., Nov. 4, 2006, at 7A (“The combined effect of House Bill 1567 and adoption of [a similar state constitutional amendment] would be to slam the door on any attempt at Kelo-style use of eminent domain in Florida.”); Alan Gomez et al., *Legislature OKs Limits to Use of Eminent Domain*, PALM BEACH POST, May 5, 2006, at 1A (“The fates of future redevelopment efforts in [Florida] were sealed Thursday when the legislature overwhelmingly passed a bill that severely restricts governments’ ability to take private property using eminent domain.”).
continued allowance of blight condemnations (the approach in most reforming states).4 Much of the debate regarding these reforms has centered on what their effects will be on patterns of development and redevelopment in urban cores. Advocates of restricting the use of eminent domain argue that restrictions will not deter “good” development in poor urban areas, and will prevent only “bad” development in such areas. Opponents of eminent domain restrictions argue that such restrictions will result in less development, less “good” development, in poor urban areas. The claims about the likely effects of eminent domain reform are thus a mix of quantitative claims about the level of development activity before and after eminent restrictions are imposed and qualitative, essentially normative, claims about the social value of the development that will take place before and after the restrictions are imposed.

Although the possible effects of reform are central to the current debate, scholars have not carefully addressed those effects. With regard to the quantitative effects of reform, this Article demonstrates that we can make some predictions, albeit decidedly modest ones, regarding the effects of reforms on the quantity of new development. As a purely theoretical matter, we can predict that a flat ban on all exercises of eminent domain will result in some less development in urban areas (poor or not poor) and some more development in exurban or rural areas. How much less and how much more we

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have no way of predicting, and there is no way to predict whether suburbs would witness a net decline or increase in development. We can also predict that a ban on only economic development condemnations (which allows so-called blight or blight removal condemnations to continue as before) will result in some more development in poor urban areas (but not necessarily in urban areas as a whole) and in exurban or rural ones, and less development in suburban areas (at least non-poor suburbs). Again, we cannot say how much less or how much more.

Moreover, even these modest predictions must be qualified. One possible consequence of eminent domain reform is almost entirely ignored in the public policy debate: restrictions on eminent domain may lead states and localities in fragmented land markets to rely more heavily on alternative means to reduce the costs of land assembly for developers, such as infrastructure subsidies and zoning exceptions. If so, the costs of development for developers/investors in different types of jurisdictions may be the same (or close to the same) before and after eminent domain restrictions are imposed. As explained in Part II, the extent to which alternative means of subsidizing new development will offset the loss of eminent domain depends on the level of competition among localities for new development prior to ban or restrictions on the use of eminent domain.

We can say less about the quality of the development after eminent domain reforms than we can about the quantity of development after eminent domain reforms. The qualitative claims about the nature of the development that will be encouraged or discouraged as a result of eminent domain “reforms” lack both theoretical and empirical support. Stated simply, there is no defensible way to categorize as good or bad,
economically viable or non-viable, efficient or inefficient, socially beneficial or socially harmful, the development in urban areas that will be lost as a result of a flat ban on eminent domain or (in poor urban areas at least) that will be gained as a result of a ban on economic development condemnations coupled with continued allowance of blight condemnations. One reason this is so is that the two legal tests for the kinds of “public use” that are sufficient for the exercise of eminent domain – the economic development as public use test and blight removal as public use test – do not necessarily select for “good” new development according to any intelligible criteria of goodness.\(^5\)

In sum, we are left with a rather unsatisfying situation: a lack of any assurance as to whether there will be any net benefits, in terms of more “good” development and less “bad” development, as a result of the eminent domain reforms that states have adopted or are now considering adopting. Given that, and assuming we do care about poor urban areas, we need to ask, we should ask: is there a different kind of eminent domain reform

\(^5\) Nor is there any reason to expect that more, “better” development will result from the two main reform proposals that have garnered academic, but not political, attention. These are (1) the proposal to allow for strict means-end judicial review of condemnation projects, so that the courts in effect would limit condemnations to cases where the courts believed that the condemnations would assuredly deliver the benefits touted by public officials, see Brief Amicus Curiae of Professor[] David L. Callies et al. in Support of Petitioners, Kelo v. City of New London, 125 S.Ct. 2655 (2005) (No. 04-108), 2004 WL 2803192; Nicole Stelle Garnett, The Public Use Question as a Takings Problem, 71 GEO. WASH. L. REV. 934 (2003); and (2) the proposal to substantially increase the compensation provided in condemnations, to take account of subjective losses and transitioning losses and/or give condemnees some of the gain from successful assembly, see, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain, 182-86 (1985); Richard A. Epstein, The Public Use, Public Trust & Public Benefit: Could Both Cooley & Kelo Be Wrong?, 9 GREEN BAG 2d 125, 128 (2006); Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61 (1986). Strict mean-end review presumably would mean less use of eminent domain, and hence perhaps less development in both suburban and urban areas, where land markets are fragmented and assembly is difficult, and more development in the exurbs. Such review therefore would worsen sprawl. Moreover, mean-ends review is by definition agnostic as to the nature of the ends, so while means-ends review might succeed in making public officials more disciplined and hence more effective in pursuing their stated goals, it would do nothing to ensure that those goals are normatively attractive. Greater compensation for condemnations also would increase the costs of eminent domain and bargaining in the shadow of eminent domain, and thus also would favor exurban development over urban or suburban development. Greater compensation also would be a neutral reform as to the purpose or ends of condemnations, and hence also would do nothing to select for normatively attractive development goals.
for which we would have more assurance that it will produce more good development
and less bad development in poor urban areas?

In other words, the debate over eminent domain needs to be re-framed.

II. THE QUANTITATIVE EFFECTS OF EMINENT DOMAIN REFORM

A. Claims of Advocates and Opponents of Eminent Domain Reform

Advocates and opponents of eminent domain reform both rely on selected examples to bolster their predictions about how much or how not much the amount of development in poor urban areas will be affected by the implementation of the reforms. As explained below, the evidence the reform advocates cite (selected examples of urban redevelopment projects that succeeded without the use of eminent domain) and reform opponents cite (selected examples of projects that succeeded with the use of eminent domain) does not support their claims. Reform advocates also put forward several arguments as to how developers could eliminate the holdout problems in land assembly that eminent domain currently mitigates, but these arguments too are unpersuasive.

(i) The Reform Advocates

The proponents of restrictions on eminent domain point to the fact that eminent domain is not used in many large urban development projects, even most large urban renewal developments that require assembly of many parcels and property interests. The Goldwater Institute’s amicus brief in the *Kelo* litigation, for example, argues:

condemning private property for economic development is unnecessary and reasonable alternatives to government resort to eminent domain exists. . . . An example of redevelopment and revitalization occurring without resort to eminent domain involves downtown Seattle, Washington [in the 1990s] . . . . Crime was on the rise and the sidewalks emptied at dusk. . . . One of the private developers acknowledged that acquiring the property for the three-block redevelopment
effort was difficult without being able to call on the power of eminent domain. However, developers instead used [other] techniques [and] . . . [t]oday the intersection of Sixth Avenue and Pine Street is at the heart of a resurgent downtown Seattle.  

This paragraph illustrates some of the characteristic flaws in the arguments of advocates of eminent domain reform. For one thing, an example of two or three or even ten successful urban redevelopment projects does not prove any general point in the absence of some evidence that the example or examples are typical. As in the above quoted paragraph, the reform advocates do not tackle the question of the typicality of their examples. There is no effort to quantify and compare the number or dollar value of redevelopment projects in urban areas that have not employed eminent domain to the number and dollar value of such projects that did. Nor is there any effort to establish that the economic conditions and other relevant conditions in the cited examples are similar to conditions that generally prevail elsewhere.  

Washington state, and Seattle in particular, enjoyed an extraordinary economic boom driven by the computer/internet industry in the 1990s; the Pine Street site was right in the heart of a downtown that was rapidly gentrifying. For these reasons, the potential

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7 For example, the Castle Coalition’s recent report – CASTLE ISLAND COALITION, REDEVELOPMENT WRECKS: 20 FAILED PROJECTS INVOLVING EMINENT DOMAIN ABUSE (2006), available at http://www.castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf – focuses on one or at most two projects within a city or state without any effort to characterize the overall success of projects facilitated by eminent domain in the city or state. For example, although eminent domain has been used very widely in New York City in redevelopment, the report addresses only a single apartment building in lower Manhattan.

8 See Phuong Cat Le & D. Parvoz, Seattle’s rich areas get richer, SEATTLE POST INTELLIGENCER, Sept. 17, 2002 at A1 (explaining that “[g]entrification spread through Seattle in the 1990s”); Michael Lindblom, We’re Wealthier But . . . -- Average Wage $41,275 -- But Try to Buy a House With It, SEATTLE TIMES, Sept. 10, 1999 at A1 (“There's been a tremendous amount of gentrification of neighborhoods in Seattle”); Jim Lynch, Historic Downtown Seattle Overwhelmed by Dot-Coms, THE OREGONIAN, June 1, 2000 at D01
gain from redevelopment in the Pine Street area may have been so great – atypically
great, compared to possible urban redevelopment elsewhere – that it may have made
developers willing to slog through holdout and other bargaining problems associated with
land assembly. In a less robust, more typical economic environment, developers might
have given up or not tried in the first place if they knew they could not avail themselves
of the tool of eminent domain to address possible holdout problems.

At least the Seattle example involved a jurisdiction – Washington state – in which
the availability of eminent domain for land assembly for the purpose of economic
development was at a minimum highly questionable due to state court rulings, and where,
therefore, land assembly negotiations presumably were not made in the shadow of the
possible exercise of eminent domain by interested government authorities in the event
bargaining broke down. But advocates of eminent domain often cite examples of
development projects that did not entail the use of eminent domain as proof of the non-
necessity of eminent domain even though the developments at issue were located in
jurisdictions in which state or local authorities lawfully could have used eminent domain
to facilitate the land assembly needed for the development. For example, in his amicus
brief on behalf of the petitioners in *Kelo*, John Norquist of the Congress for New
Urbanism cites examples of successful land assembly projects in Las Vegas and West
Palm Beach that were achieved without the use of eminent domain, but at the time of

(“Seattle has endured gentrification spurts before but never one like this where so many neighborhoods
undergo simultaneous face-lifts”).

9 See In re Petition of Seattle, 638 P.2d 549, 556-57 (Wash. 1981); Hogue v. Port of Seattle, 341 P.2d 171,
181-91 (Wash. 1959).
10 See Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of
the cited projects, both Florida and Nevada allowed the use of eminent domain for land assembly projects.\textsuperscript{11}

In cases of land assembly in the shadow of a plausible threat that eminent domain will be employed by government officials to facilitate land assembly for development purposes, it is reasonable to assume that – indeed, developers confirm as much – land acquisition negotiations are affected, and facilitated, by that threat.\textsuperscript{12} Because all the property owners know that the state or local government might be convinced to use eminent domain in the event of a bargaining breakdown, they have a strong incentive to strike a deal, even if after much posturing. In this way, the threat of the exercise of eminent domain in land assembly negotiations is like the threat of the imposition of punitive damages in civil suit settlement negotiations. That few jury verdicts include punitive damages does not establish that punitive damages have little or no effect on civil litigation, just as the fact that eminent domain may be used infrequently in urban

\textsuperscript{11}Indeed, property rights groups have been particularly critical of the liberal use of eminent domain in Florida prior to Kelo. \textit{See} INSTITUTE FOR JUSTICE, LITIGATION BACKGROUNDER, PROTECTING Kelo’s VICTIMS IN RIVIERA BEACH, FLORIDA,\textit{http://www.ij.org/private_property/riviera_beach/backgrounder.html} (“Even before Kelo, Florida cities were some of the worst abusers of eminent domain in the nation.”). Property rights groups expressed similar concerns about Nevada. \textit{See} DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 129 (2003) (“Nevada is teetering on a precipice. [In 2001], the Nevada Supreme Court allowed the condemnation of private businesses for casino development.”) available at http://www.castlecoalition.org/pdf/report/states/nevada.pdf.

\textsuperscript{12} \textit{See, e.g.}, Marc Hequet, \textit{Life After Kelo}, RETAIL TRAFFIC, June 1, 2006, at 33 (“In the past, developers assembling sites used the threat of eminent domain as leverage in negotiations with holdout residents or small-business owners. The threat alone was enough to force landowners to the bargaining table and save developers from having to pay exorbitant prices to get the last piece of the puzzle.”); Kate Miller Morton, \textit{City’s Palace Amid Poverty – Area Awaits Renewal, But Will It Get It?}, COMMERCIAL APPEAL, Aug. 29, 2004, at A1 (explaining how the Mayor of Indianapolis partnered with developers and used the threat of eminent domain in 27 projects that required land assembly); David Nicklaus, \textit{Eminent Domain Seizes Short Term Advantage}, ST. LOUIS POST-DISPATCH, Jan. 10, 2007, at D1 (“Practically speaking, developers say, eminent domain prevents a holdout property owner from stopping an important project. Richard Ward, a principal at Development Strategies in St. Louis, has compiled a list of more than 40 local projects that wouldn’t have happened without the threat, and often the use, of eminent domain.”); Terry Pristin, \textit{Developers Can’t Imagine a World without Eminent Domain}, N.Y. TIMES, Jan. 18, 2006, at C5 (reporting developer accounts of how the threat of eminent domain brought owners into negotiations).
redevelopment (here too we lack reliable statistics) does not establish that eminent domain has little or no effect on urban redevelopment. It is the plausible threat that matters.

Advocates of eminent domain reform also offer several theoretical – or at least, decidedly not empirical arguments – as to why eminent domain reforms will not change the amount and distribution of development and redevelopment. The main two arguments might be dubbed “more secrecy” and “more strategy.” Neither establishes what in fact will happen after the implementation of any eminent domain reform.

Reform advocates argue that land assembly can be achieved without the use of eminent domain if the assembly is done in secret.13 Greater reliance on covert land assembly, according to this argument, will offset any effects from eminent domain reform.

This argument is problematic, both descriptively and normatively. Descriptively, covert assembly is not possible under current laws in the great bulk of urban redevelopment cases where a state or local agency is helping to fund the redevelopment effort and/or where a parcel of public property is a significant part of the assembly site. Where the government is involved in redevelopment through funding or land ownership, it must follow political processes and disclosure requirements that are inconsistent with

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covert assembly. Even in its capacity as a regulator, government agencies arguably are required to disclose patterns of assembly they observe in deciding upon variance requests and zoning permissions because they typically must justify their decisions in terms of the public interest, and any meaningful public interest analysis must take into account the larger land development context. Purely private land assembly of solely privately-owned land is the only context in which, as a descriptive matter, fully covert assembly can be used, and perhaps could be used more than it is in current practice.

As a normative matter, covert assembly with the participation (in one way or another) of government is troubling, for what one would think are obvious reasons. Good governance under a democratic conception (even a “thin” democratic conception) presumably requires public understanding of what government is doing, and hence reserves covert operations for exceptional circumstances of pressing necessity. The exceptional circumstances category covers some aspects of national security and intra-executive debates, but it seems quite a stretch to include land assembly to facilitate new development or redevelopment. Indeed, in the arena of local land use law and regulation, the state courts have often treated the possibility of backroom, covert dealings as the biggest problem, the greatest source of distortion and corruption.15

14 This point has been made by many commentators, and perhaps first by Merrill, whose 1986 article on public use remains highly influential in the debate in the legal literature. See Thomas Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 82 (1986) (“[A]lthough buying agents, option agreements, and straw transactions may work well for private developers, it is unclear whether government can use these devices effectively.”); see also Daniel B. Kelly, The “Public Use” Requirement in Eminent Domain: A Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1 (2006); Benjamin M Gerber, Urban Height Restrictions, 38 URB. LAW. 111 (2006); 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, 950 (2004) (“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.”).

15 See Alejandro Camacho, Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, 24 STAN. ENVT'L L.J. 3, 43 (2005);
Even purely private covert assembly is troubling because it denies to owners of the land to be assembled any of the surplus value or gain that would result from successful assembly. Advocates of restrictions on eminent domain argue that one of the unfair aspects of eminent domain is that it denies landowners adequate compensation: in the formula that is used for eminent domain compensation, the value of the condemned property is the fair market value of the property apart from or separate from any value that may attach as a result of successful assembly and hence the possibility for higher-market-value development. But in the case of covert assembly, landowners are also denied any of the value that may result from successful assembly because they are unaware of the ongoing assembly efforts and hence not in a position to ask for (let alone demand) some of that value as a precondition to agreeing to sell. If it is normatively troubling that landowners are denied any of the value from successful assembly by virtue


of government coercion in the form of condemnations, then it is far from clear why it is not also normatively troubling that they are denied that same value as a result of intentional efforts to withhold from them the information that would allow them to accurately assess the real economic value of their property.

Advocates of eminent domain reform have also suggested that developers can overcome assembly problems without the threat or use of eminent domain by altering their strategies in negotiating with landowners. Ilya Somin, a leading academic proponent of eminent domain reform, and Robert Getman, write that:

Developers can prevent holdout problems without recourse to eminent domain by means of “precommitment” strategies or most favored contract clauses. The developers can sign contracts with all the owners in an area in which they hope to build, under which they commit to paying the same price to all. By this means, the developer successfully “ties its hands” in a way that precludes it from paying inordinately high prices to the last few holdouts, because it would be legally required to pay the same high price to all previous sellers.17

One problem with this strategy is that in the context of land, particularly land with structures, economic value cannot be reduced to a simple, uncontroversial metric such as acres or square feet, and fair market values are often a matter of much debate.18 Hence, a

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holdout landowner may believe that a developer could justify paying him a great deal more than was paid to the other landowners. Moreover, the-tying-the-hands mechanism might encourage some early sellers/signers to pay side payments to non-signers to encourage them to hold-out for a higher price precisely because that would benefit the early signers. Finally, one has to ask if the tying-the-hands mechanism works so well, given that eminent domain is not legally available everywhere and is a slow and cumbersome process even when it is legally available, how is that developers have not eliminated all or almost all holdout problems before now by using this mechanism?

(ii) Reform Opponents

Reform opponents—those who want to keep eminent domain readily available—argue that restrictions on eminent domain reform will reduce development in urban areas, especially very poor urban areas. They point to widely-applauded projects in urban areas in which eminent domain was employed, such as the redevelopment of the Baltimore harbor area, and they quote government officials and some developers’ opinions that landowners can be brought to the bargaining table only if they face the threat of eminent domain.19 Anthony William, President of the League of Cities, states this view succinctly: “eminent domain is the only way cities can keep property owners from holding out and blocking developers from assembling enough land to build . . . .”20 “Without condemnation powers, many development projects would never get done,”

and even standardization in appraisal techniques, appraisers valuing property’s fair market value can reach wildly different results.”).


Michael Parker of the Florida Redevelopment Association explains, “[i]ts going to be the difference whether an important project gets done or not.”

Without eminent domain, we are told by the government officials and agencies who nurtured major redevelopment projects in cities such as San Francisco, New York City, and Boston, the redevelopment simply would not have been achieved.

The reform advocates may be correct but it is very hard to know. Simply because a project was accomplished with the use (or plausible threat) of eminent domain does not necessarily mean that it could never have been accomplished without it; land assembly costs presumably would have been higher but perhaps not so much higher as to stop the project. There are many ways to cajole holdouts, and development projects sometimes can be configured around holdouts: there is a reason one sometimes sees a single family house smack in the middle of an area that had undergone a major commercial redevelopment. And even if landowners at the bargaining table say or suggest they

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21 See Todd Wright & Evan S. Benn, Eminent Domain: Legislature 2006, Miami Herald, April 30, 2006, at BR.

22 See generally Marc. B. Mihaly, Public-Private Redevelopment Partnerships and the Supreme Court, 7 VT. J. ENVTL. L. 411 (2006); Michael Corkery & Ryan Chittum, Eminent domain backlash threatens some projects, Rich Ehisen, CHI. TRIB., Aug. 14, 2005, at C39 (“To do any kind of urban redevelopment without eminent domain is to eliminate half of the potential sites for redevelopment,” says . . . a New York developer); Changes imminent for eminent domain, STATE NET CAPITOL J., July 18, 2005 (if[M]any city leaders around the nation . . . contend that without eminent domain power, cities will often be unable to develop prime land for good public use, leaving them with . . . "blighted, unsightly, underused and undeveloped properties.”); Terry Pristin, Developers Can't Imagine a World Without Eminent Domain, N.Y. Times, Jan. 18, 2006, at C5 (“[A]round the country, developers and city officials say weakening or destroying the power to condemn property will seriously undermine efforts to rehabilitate decaying cities ”)


24 See ANDREW ALPERN & SEYMOUR DURST, HOLDOUTS (1984); MARK BRNOVICH, GOLDWATER INSTITUTE, CONDEMNING CONDEMNATION: ALTERNATIVES TO EMINENT DOMAIN (2004) ("Local
would never have even agreed to negotiate absent the threat of condemnation, that does not mean that that really would not have negotiated absent that threat. It is always to the advantage of a seller to seem reluctant to sell, even if he is eager to sell, and one way to communicate reluctance is for the seller to indicate he is willing to talk only because of the possibility of being subject to government coercion.

B. Modeling the Quantitative Effects

Since we lack a ready empirical way to test the quantitative effects of bans or restrictions on eminent domain, we must do what we can with deductive reasoning, deriving the most likely results from what we think are the most plausible assumptions. So the first questions is, what are plausible assumptions?

(i) Assumptions

My first assumption is that, on average, land ownership is more fragmented in urban areas (areas within major city boundaries, the core areas of recognized metropolitan regions) than in suburban areas (areas just outside city boundaries), and more fragmented in suburban areas than exurban or rural areas (areas on the outskirts of established metropolitan regions). Homes are generally closer together in urban areas than in other sorts of areas, so even in urban residential areas dominated by single family

governments and developers can . . . use creative land assembly methods that do not require the use of eminent domain.”) available at http://www.goldwaterinstitute.org/Common/Files/Multimedia/454.pdf. In the Kelo situation in Connecticut, officials have gone to great lengths to accommodate the two last holdouts, including moving Susan Kelo’s pink house to a new location. See Susan Haigh, Final two holdouts agree to leave homes: The eminent domain case led to a landmark Supreme Court ruling, INTELLIGENCER, July 1, 2006, 2006 WLNR 11801221. See also Charles E. Cohen, Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings, 29 HARV. J.L. & PUB. POL’Y 491, 568 (2006) (explaining how developers can modify projects to work around holdouts); Nicole Garnett, The Neglected Political Economy of Eminent Domain, 105 MICH. L. R. 101, 114 (2006) (explaining how condemnations were tailored in Chicago to avoid certain buildings with high subjective value, such as churches); Joanne Lipman, The Holdouts: Owners Who Stay Put Play a Part in Shaping The American Skyline, WALL. ST. J., May 22, 1984, at 1 (“Whatever their motives, holdouts may have shaped the nation's skylines almost as much as architects.”).
dwellings, there are likely to be more separate property owners per acre. Large tracts of
land held by a single owner are much more common in rural areas than suburban or urban
areas.25

The second assumption builds on the large literature regarding transactions costs
and bargaining, which tells us that holdout problems grow as the number of parties who
must assent to a deal grows.26 The second assumption is: holding all other (non-
fragmentation) variables constant, the more fragmented the land ownership is in a given
area, and hence (at least on average) the greater the number of separate property interest
holders with a stake in a any possible development site, the greater will be the
transactions cost of assembling all the interests into a single unified ownership at a
proposed development site. If the first assumption is correct, then, all else being equal,
land assembly will be more expensive in urban areas than in suburban areas, and more
expensive in suburban areas than in exurban/rural areas.

The third assumption follows directly from the second: because eminent domain,
both when actually employed and (even more so perhaps) when it is the shadow of
bargaining, as a threat, reduces the costs of land assembly due to holding out, and
because that cost is (again all else equal) greatest in urban areas and smallest in

25 I am invoking a model of an urban core surrounded by suburbs surrounded by exurbs as in concentric
circles, which is reasonably descriptive of many metropolitan regions but by no means all. Small urbanized
areas may be interspersed with less densely populated suburbs, as in parts of New Jersey and Connecticut,
but as long as urban, suburban and exurban areas are reasonably close to one another, the analysis would be
the same.

26 See, e.g., Richard A. Epstein, A Clear View of the Cathedral: The Dominance of Property Rules, 106
YALE L.J. 2091, 2112 (1997); Lee Anne Fennell, Common Interest Tragedies, 98 NW. U. L. REV. 907, 928-
29 (2004); Carol Rose, The Comedy of the Commons: Custom, Commerce, and inherently Public Property,
53 U. CHI. L. REV. 711, 749-752 (1986); Stewart E. Sterk, Neighbors in American Land Law, 87 COLUM. L.
REV. 55, 72 (1987); but see Elizabeth Hoffman & M. Spitzer, Experimental Tests of the Coase Theorem
with Large Bargaining Groups, 15 J. LEGAL STUD. 149, 151 (1986) (arguing that bargaining efficiency
improves with larger groups).
rural/exurban ones, the existence of eminent domain as an actuality and as a threat translates into the greatest reductions in land assembly costs in urban areas and the least reduction, and plausibly no reduction, in land assembly costs in rural/exurban areas. Eminent domain, in other words, closes the land assembly cost advantage rural areas enjoy vis-à-vis suburban and that urban areas, and suburban areas enjoy vis-à-vis urban areas.27

The fourth assumption relates to the question of the socio-economic character of urban, suburban and exurban areas. I assume that urban areas are more likely than suburban areas to have areas of concentrated poverty characterized by apparently dilapidated, arguably blighted structures and neighborhoods. Of course there are poor suburbs and rich cities, and many cities have wealthy sections but my focus here is on the average or prototypical case. One implication of this assumption is that condemnations justified on the basis of blight removal are more feasible (again, on average) in urban areas than in suburban areas.

The final assumption relates to the question of substitutes. A site for the development of residential housing or a shopping mall or any other intended use can be conceived of as a good like any other. Some goods are close substitutes for others and some are not: for prospective buyers of a BMW, a Lexus may a close substitute but a Ford Focus may not be. Within a given metropolitan region and its exurban outskirts, a developer may or may not regard a development site in one sort of area (for example,

27 The relationship between distance from the urban core and the extent (in percentage terms) to which eminent domain (on average) reduces what would otherwise be the land acquisition costs is represented graphically below. The x axis represents distance from the urban core, and the y axis represents the extent to which eminent domain represents the extent to which eminent domain reduces what would otherwise be the land acquisition costs. We know that even in the most urban, fragmented land markets, eminent domain does not account for a 100 percent reduction in land acquisitions costs, and we know that at some distance from the urban core, any reduction in land acquisitions costs would be de minimis and hence for representational purposes, can be treated as a zero reduction in land acquisition costs.
urban) as having a close substitute in another sort of area (for example, suburban). The question of whether another kind of area provides a close substitute would depend in large part on the perceived preferences of the intended end consumers (for example, residents, mall shoppers) the developer hopes to attract.

Although it is very difficult to make generalizations about substitutes, it does seem reasonable to assume that, all else being equal and on average, a developer who views an urban site as his preferred site is likely to view the suburbs as providing a closer substitute than the exurbs because the suburbs are more like the urban area than the rural area, and physically closer to the attractions offered by the urban areas, and thus more apt to be attractive to the intended end consumers for the planned urban development. For example, the developer of a large condominium project designed to tap a market of young singles in their first post-college jobs who want access to night life is more likely to have as a close substitute a site in the near-in suburbs than in the exurbs.

Similarly, a developer who views a rural site as its preferred site is on average more likely to view the suburbs as offering closer substitutes than urban areas because, again, the suburbs are more like exurban areas than urban areas. For example, the developer of an office park site that requires direct highway exit access and a massive parking lot and that is planned for a suburb is more likely to identify a suitable substitute a site in an exurb than in a densely-developed urban area. Hence this assumption: suburban sites are likely the closest substitutes for both urban sites and exurban sites.

It would also follow that urban and rural areas are equally likely to provide the closest substitutes for suburban sites. Some suburban developments may rely (for market appeal) on the characteristics suburbs share to a greater extent with urban areas, such as
access to public transportation, and others may rely on the characteristics suburbs share to a greater extent with the exurbs, such as the availability of large spaces for open parking areas.

With these assumptions, we can now trace the likely effects of the two principal Kelo reforms under debate.

**(ii) A Complete Ban on Eminent Domain**

A complete ban on eminent domain would raise land assembly costs most in urban areas, next most in suburban areas, and least, if at all, in exurban or rural areas, where land markets are unfragmented and eminent domain is unimportant.

The increase in the costs of land assembly in urban and suburban areas might mean that some projects that otherwise would have been pursued there simply will be cancelled and not pursued at all in the metropolitan area. The developer might not find any attractive substitutes in the metropolitan area, and invest in development elsewhere or in non-development investments. A complete ban thus could translate into less overall development within a metropolitan region and, in theory, could have that effect only and have no effect on the distribution of development among the urban, suburban, and exurban parts of the metropolitan region.

However, in practice, we would expect to see some shifts in development investment within the metropolitan area. As a result of the total ban, urban development becomes more expensive relative to suburban development, and even more expensive relative to exurban development, because the ban on eminent domain raises urban assembly costs the most, suburban costs less, and exurban costs not at all. For example, we might expect the elimination of eminent domain to result in a 10% increase in urban
areas, a 5% in suburban areas, and no increase in rural areas. We might therefore expect
to observe a greater capital flow from urban to rural areas than to suburban areas, as
developers seek to avoid both the relatively large price increases in urban areas and the
relatively moderate increases suburban areas. But since (by assumption) the suburbs
provide closer substitutes for planned urban developments than rural areas, some and
perhaps even most of the capital that otherwise would be invested in urban development
would now flow to the suburbs.

The complete ban on eminent domain would increase the costs of suburban land
assembly and development relative to the costs of exurban development. In some cases,
the increase in suburban costs might lead to a project to be cancelled altogether, but in
other instances, the developer might find an adequate and (now) less costly alternative in
the exurbs. Development capital from the suburbs would not flow to urban areas because
suburban cost have fallen relative to urban costs.

In the exurbs, of course, where the eminent domain ban would result in no
increase in development costs, we would expect to observe no cancellations of exurban
projects and no outflow of development capital.

In sum, a flat ban on eminent domain would result in some reduction in
development in the urban areas and some increase in development in the exurban areas.28

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28 A number of commentators have suggested that restricting eminent domain may foster sprawl. See, e.g.,
Paul Boudreaux, Eminent Domain, Property Rights and the Solution of Representation Reinforcement, 83
DENV. U. L. REV. 1, 26 (2005); Thomas W. Merrill, The Goods, The Bads, and the Ugly, LEGAL AFF.,
(Jan./Feb. 2005), 2005-FEB Legal Aff. 16 (arguing that restrictions on eminent domain will lead to “ever
more sprawl”); Elizabeth Gallagher, Note, Breaking New Ground: Using Eminent Domain for Economic
Development, 73 FORDHAM L. REV. 1837, 1872 (2005) (“Given the increase in suburban sprawl and the
scarcity of land in more dense areas, governments seeking to encourage economic development in certain
areas need to be able to use eminent domain to assemble land for the projects.”); The Supreme Court, 2004
(“combating urban sprawl and inner-city decay depends on a locality's ability to use eminent domain for
economic development”).
Because the suburbs would gain some development capital from urban areas and lose some development capital to exurban areas, it is not possible to predict whether development in the suburbs, on net, would decline, remain the same, or increase.\(^{29}\)

(iii) *A Ban on Economic Development But Not Blight Condemnations*

The effects of a ban on economic condemnations coupled with continued allowance of blight condemnations would raise costs of land assembly in non-poor urban areas, where blight condemnations are difficult to pursue. This sort of reform would not raise costs in poorer urban areas where condemnations can readily be justified on blight grounds. The reform would raise costs in suburban areas (which again we are assuming to be non-poor) because blight would not work as a condemnation justification there. The

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\(^{29}\) One might extend this argument to the siting of new development within the nation or within a multi-state region. Some “older” states such as New Jersey have denser population patterns and less undeveloped land suitable for development than “newer” states such as Arizona or Idaho. Overall, the land market in New Jersey arguably is more fragmented than the land market in Arizona, and hence, one could argue, eminent domain is more valuable to developers in New Jersey than Arizona. If that were true, then a ban on eminent domain in both states would raise the costs of development in New Jersey relative to the costs of development in Arizona, and in theory the ban might result in the shifting of some development capita; and projects from New Jersey to Arizona. However, in many instances, especially in the case of residential and retail development, the development is a response to a local market demand, so development projects in New Jersey and Arizona are not meaningful substitutes for each other. *See* Richard B. Preiser et al., Professional Real Estate Development: The ULI Guide to the Business 63, 133, 139, 217 (2d ed. 2003) (“ULI Guide”). For developers, “[m]arket analysis should precede site selection because the choice of sites depends on the market the developer wants to target.” *Id.* at 133. Moreover, even where development sites in different states are plausible substitutes, as may be true in the case of a factory or other industrial facility or new corporate headquarters, the availability of eminent domain, while relevant to assembly costs, may be a much less important factor than costs differences driven by such factors as state-by-state variations in labor laws, prevailing wage levels, and state taxation rates. *C.f.* Kirsten H. Engel, State Environmental Standard-Setting: Is There A “Race” And Is It “To the Bottom”? 48 Hastings L.J. 271 (1997) (“the most important indicators of firm location are the percentage of unionized workers, proximity to markets and raw materials, access to transportation networks, quality of schools, and the costs of housing and energy”); Andrew L. Kolesar, Note, Can State and Local Tax Incentives and Other Contributions Stimulate Economic Development, 44 Tax Law. 285, 290-91 (1990) (explaining how transportation was the single largest factor when General Motors selected a new site for a factory); Tim Venable, The New Business Location Process: Who’s Driving and What’s Steering?, Site Selection, Apr. 1996, (“the top three [site selection] location factors are labor quality and availability, overall operating costs and state and local business climate”) available at http://www.developmentalliance.com/docu/pdf/43361.pdf.
reform would have no or minimal effect in exurban areas where the non-fragmented land market makes the availability of eminent domain irrelevant.

As a result of these changes, development costs in the non-poor urban areas suburbs would rise relative to the costs in poor urban areas and the exurbs. Because eminent domain may be more important to land assembly in non-poor areas urban areas than in suburban areas because of the greater land market fragmentation in non-poor areas, we would expect to see the greatest relative rise in land assembly costs in non-poor urban areas.

We would expect to see some development projects slated for non-poor urban and suburban areas to be cancelled because of the increase of development costs there. We would not expect any cancellation of projects in poor urban areas or exurban areas because those areas would not experience an increase in costs.

To the extent that development capital would flow out of non-poor urban areas and suburban areas, an important question is where it would go. Development projects that face higher costs in non-poor urban areas might shift to poor urban areas or exurban areas, but poor urban areas might well provide closer substitutes for the non-poor urban sites and catch a larger share of the displaced capital. Development projects that face higher costs in the suburbs might be relocated to either poor urban areas or exurban areas, perhaps in equal proportion, if we assume that the exurbs and poor urban areas are equally likely to provide the closes substitutes for planned suburban developments.30 Overall then, we would expect a net increase in development in poor urban areas, a net

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30 On the national or regional level, one might also speculate that a bar on only economic development condemnations only could shift development capital from states with few poor urban areas to ones with more of them, although for the reasons stated above in note 26, it is questionable whether changes in eminent domain law would have much effect across state borders.
decrease in non-poor urban areas, a net decrease in suburban areas, and a net increase in exurban areas.31

Figure One summarizes the predicted effects of restrictions on the availability of eminent domain (assuming, again, that the changes result not only in the cancellation of projects but also some redistribution of them within a metropolitan region).32

### Figure One

<table>
<thead>
<tr>
<th>Change in Development</th>
<th>Change in Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>After Total Ban</td>
<td>After Ban on Only Economic Development Condemnations</td>
</tr>
<tr>
<td>Urban</td>
<td>Decline</td>
</tr>
<tr>
<td>Suburban</td>
<td>Ambiguous</td>
</tr>
<tr>
<td>Ex Urban</td>
<td>Increase</td>
</tr>
</tbody>
</table>

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31 The possibility that eminent domain reform directed only at economic development condemnations would channel more development – and more condemnations – to poor urban areas was argued by one of the amici in Kelo, *see* Brief of the Am. Planning Ass'n et al., *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) (No. 04-108), 2005 WL 166929, which was co-authored by Professors Merrill and Echeverria. *See id.* at 17 (“limit[ing] the use of eminent domain for economic development to cases where property is "blighted" would generate undesirable consequences. Such a limitation could work to the disadvantage of poor and minority communities, which could be more readily subject to condemnation based on a finding of blight than middle class communities. More broadly, it would seriously distort the process of development planning, by skewing economic development projects toward locations most plausibly characterized as blighted.”) According to Echeverria, “[j]ustifying eminent domain on a finding of blight invariably targets low-income communities.” Terry Pristin, *Developers Can’t Imagine a World without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (quoting Echeverria). The view that restrictions on only economic development condemnations “work to the disadvantage” or “target” poor and minority communities implicitly assumes eminent domain facilitated development in such communities would not be beneficial for them, but that assumption needs to be defended. Projects displaced from the suburbs or wealth urban areas to poor urban areas may or may not be on net beneficial for poor urban areas, depending on the particular factual context and the normative criteria for what is or is not suitable. Indeed, there is a tension in arguing, as the American Planning Association brief seems to do, that restrictions on eminent domain are bad both because they can displace development from urban areas to exurbs and hence increase sprawl and because restrictions on eminent domain can channel development from the suburbs to urban areas.

32 Figure One is based on the assumption that in practice the reforms will lead not only to cancellation of projects but also redistribution of them within metropolitan regions.
(iv) *A Simple Arithmetic Example*

A simple numerical example may be helpful in illustrating how a ban on all condemnations or a ban on only economic development condemnation might impact poor urban areas. Imagine that Developer believes that there is an untapped market for mid-market townhomes in a certain metropolitan area. Developer thinks that it might make sense to site the development in an urban, suburban or exurban area, and Developer assesses the possible costs and benefits from proceeding with an urban, suburban or exurban site. In assessing the costs of development, including the costs of acquiring a large enough site, Developer assumes that the local government authorities in the urban or suburban areas might support development by threatening condemnations of apparent holdouts in the case of multiple-parcel assembly, and Developer assumes that multiple-parcel assembly will be unnecessary in the exurban area. Developer thus assesses the cost and benefits as follows, and selects the urban site as the highest net profit opportunity, and the suburban site as the next best.

<table>
<thead>
<tr>
<th></th>
<th>Costs Before Reform</th>
<th>Benefits Before Reform</th>
<th>Expected Net Profits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban</td>
<td>$1 million</td>
<td>$2 million</td>
<td>$1 million</td>
</tr>
<tr>
<td>Suburban</td>
<td>$1.5 million</td>
<td>$2 million</td>
<td>$500,000</td>
</tr>
<tr>
<td>Rural</td>
<td>$1 million</td>
<td>$1,250,000</td>
<td>$250,000</td>
</tr>
</tbody>
</table>
Now imagine that there is a flat ban on eminent domain, such that the costs of development in the urban and suburban sites increase but the increase is bigger in the urban areas. If the costs increase is $1 million in the urban area (for a new total costs of $2 million, and zero expected profits), then the development will shift to the suburbs if the cost increase in the suburbs due to the change in law is less than $250,000 (for a new total cost of less than $1,750,000 and expected profits of more than $250,000), and the development will shift to exurbs if the cost increase in the suburbs exceeds $250,000 (for a new suburban cost total of more than $1,750,000 and expected profits of less than $250,000).

To illustrate the possible effect of a ban on only economic development condemnations but not blight condemnations, we will change the figures, such that the suburban site, before any restrictions on eminent domain, is the most profitable and the urban site is the next most profitable, as shown below.

**Figure Three**

<table>
<thead>
<tr>
<th></th>
<th>Costs Before Reform</th>
<th>Benefits Before Reform</th>
<th>Expected Net Profits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban</td>
<td>$1 million</td>
<td>1.5 million</td>
<td>$500,000</td>
</tr>
<tr>
<td>Suburban</td>
<td>$1.5 million</td>
<td>$2.5 million</td>
<td>$1 million</td>
</tr>
<tr>
<td>Rural</td>
<td>$1 million</td>
<td>$1,250,000</td>
<td>$250,000</td>
</tr>
</tbody>
</table>
What would happen if a ban on only economic development condemnations is enacted? The cost of land assembly in the suburban area would then rise, but, at least if we assume for now that the urban site is in a poor urban area, the costs of land assembly for the urban and suburban area would remain the same. If the land assembly costs in the suburban area increases to more than $2 million, the developer presumably would shift to the urban site, which at that point would promise the greatest net profit.  

C. Increases in Other Subsidies

Eminent domain, the threat of it and the actuality of it, lower the land assembly costs developers otherwise would face, and in that sense the threat and actuality of eminent domain can be conceived as a kind of subsidy to developers. But localities have other means of lowering the costs of – of subsidizing – new development. The most naked form of a subsidy – a direct cash outlay or donation of public property to the project – is not unknown. Localities can also agree to build infrastructure – roads, parks, sidewalks – that the developer otherwise would need to finance to make the development successful. Localities can also offer, and often do offer, preferential tax treatment to

33 In a more dynamic model, the relative increase in suburban assembly costs due to the loss of eminent domain would be mitigated to some degree by the fact that increased demand for urban sites would tend to push up land prices in the urban areas and push down land prices in suburban areas. In equilibrium, we might expect both an increase in suburban overall costs and in urban overall costs, although suburban development still would be more expensive relative to urban development than before the restrictions on eminent domain.

34 I do not mean subsidy in a pejorative or normatively-laden way; by subsidy I mean only support, in money or worth the equivalent of money that would not routinely be available to all citizens or property owners as a matter of right within the political jurisdiction in question.

35 In dollar terms, eminent domain in some projects actually may seem like a very minor portion of the total effective subsidy provided by the locality. For example, in the massive Atlantic Yards development project, the City and State are supporting the exercise of eminent domain to facilitate the plan of the lead developer, but the City and State are providing other, non-eminent domain subsidies valued at between one and two billion dollars. See JUNG KIM & GUSTAV PEEBLES, ESTIMATED FISCAL IMPACT OF FOREST CITY
new developments. Finally, localities can exempt developments from zoning and other regulatory requirements that would represent a significant cost to the developer.

From the perspective of developers, eminent domain as well as cash subsidies, infrastructure guarantees, tax relief, and zoning exceptions altogether comprise a locality’s contribution to a reduction in total development costs. From the developers’ perspective, eminent domain may not constitute a uniquely valuable part of the total contribution so that, in theory, an increase in other components of the contribution could “cancel” any effect from the loss of the eminent domain contribution component. The relevant question therefore is, will localities that lose the power to contribute to developers by means of offering them the threat and/or actual use of eminent domain increase the other components of their contribution and, if so, will that increase be big enough to fully offset the loss of the eminent domain contribution?


36 See generally ULI Guide at 270-71. One of the most important subsidy mechanisms is Tax-Increment-Financing (TIF), which is authorized by statute in every state and which “allows local governments to finance redevelopment projects with the increased tax revenue generated by the redeveloped properties.” Amy F. Cerciello, The Use of Pilot Financing to Develop Manhattan’s Far West Side, 32 FORDHAM URB. L. J. 795, 797 (2005).

37 The Amicus Brief of John Norquist, President, Congress for New Urbanism, argues that localities should increase their other subsidies to offset any development-depressing effect of eminent domain reform, and in particular they should subsidize new development in the form of regulatory relief. Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners at 10, Kelo v. City of New London, 125 S.Ct. 2655 (2005) (No. 04-108), 2004 WL 2811055. See also Review of Kelo V. New London Court Case on Eminent Domain Before the S. Comm. on the Judiciary, 109th Cong. (Sept. 20, 2005 (statement of Thomas A. Merrill, Charles Keller Beekman Professor of Law, Columbia University), 2005 WL 2289585 (F.D.C.H.) (“If a local government really wants to do something to rearrange property rights, there’s a good chance that they’re going to find some way to do it. And if you can’t use eminent domain to do that, they’ll be tempted to use other powers, like the zoning power or the power of taxation, to achieve their objectives.”).
The answer to that question, in turn, depends on the answer to two other questions: is the market among localities for new development highly or even perfectly competitive? And would the adoption of eminent domain reforms reduce the political cost to local officials of other sorts of development subsidies? As explored below, if (as I believe) the market for new development is often highly competitive, and if (as I also believe) the political costs of non-eminent-domain development subsidies will not significantly change after the adoption of eminent domain reforms, then we can predict that non-eminent-domain subsidies will not increase by enough to offset the loss to developers of eminent domain. If the market for new development is not highly competitive, and/or the political costs of non-eminent-domain subsidies will drop significantly with the abolition of eminent domain, then it is possible, although not at all assured as a general matter, that non-eminent-domain subsidies will increase by enough to offset the loss to developers of eminent domain.

i. Economic and Political Costs

One need not subscribe fully to the public choice vision of politicians as re-election maximizers to believe that politicians often will be more concerned with the political costs of subsidies rather the actual dollar, or economic, costs of subsidies. A subsidy can have a political cost in that it alienates possible supporters who believe the subsidy is per se offensive in some way, and/or in that payments of the subsidy will mean

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that the leaders will have fewer resources to expend to maintain or increase political support. Political cost is thus not the same thing as economic cost but it is not unrelated to economic costs: the greater the economic costs the more leaders are open to criticism of “giveaways,” and the more they will have to raid other programs or budget items or refuse requests for new funding or even raise taxes. All else being equal, therefore, the greater the net dollar or economic cost of a subsidy to a locality, the greater will be the political cost of the subsidy to local officials.

Developers presumably are not concerned about the political cost of a given subsidy to local officials, but rather are focused on the economic benefit to them of the subsidy; they want to know how much the subsidy would reduce the dollar costs of the development project. Local officials have to be concerned with developers’ perceptions of the economic benefits provided by a subsidy because the goal of the subsidy, any subsidy, is to attract developers to the locality. Therefore, from the perspective of local officials, the best subsidy is the one that provides the greatest economic benefit to a developer at the least political costs to the local officials.

From the vantage of local officials, eminent domain can be an unusually appealing form of subsidy because it can offer high economic benefit to the developer at low political costs. First, because eminent domain allows the acquisition of land at a lower cost than what developers otherwise would have to pay, the economic benefit it provides developers is greater than its economic costs to the local officials; other forms of subsidy, by contrast, have equivalent economic benefits to developers and economic
costs to local officials. The relatively low economic costs of the eminent domain subsidy can (although need not) translate into relatively low political cost. For example, imagine that a locality wants to attract developers to a particular project. There are three possible subsidies: the use of eminent domain, the provision of infrastructure, and tax relief. The economic benefit to developers of a city expenditure of $100,000 on roads that the developers otherwise would have had to finance is $100,000; the economic benefit of $100,000 in tax relief is $100,000. But the city’s willingness to threaten and if need be condemn any possible holdouts for an expected total cost of $20,000 to the city may have as much expected economic benefit for developers as a $100,000 in infrastructure spending or tax relief because, without eminent domain threatened or exercised, the developers would understand that they likely would have to pay a much-greater-than-market value premium to buy out the holdouts and perhaps would have had to reconfigure or relocate the project at great costs. If the local officials think that a developer can be brought to the city if they provide the developer with a subsidy it values at $100,000, then the lowest economic cost way for the locality to attract development is eminent domain. If the relatively low economic cost of the eminent domain subsidy translates into a relatively low political cost, then the local officials will favor the eminent domain subsidy. Relatively low economic costs is most likely to translate into relatively low political costs where the use of eminent domain is not generally regarded within the locality as ideologically offensive on property rights or other grounds, where the proposed development is widely regarded in the locality as

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39 One caveat is that where prospective holdouts are thought likely to refuse to negotiate and to engage in protracted litigation in response to threats of condemnation and actual condemnation, the transaction costs of the condemnation process may increase the expected economic costs to the locality to the point where there is not as great an expected divergence between the economic costs to the locality and the economic benefits of the developer.
highly beneficial, and where the political power of the most likely holdouts is relatively modest.

ii. Subsidies and Intralocal Competition

It is a commonplace that bordering localities (and not just bordering localities) compete to some extent for at least some forms of new development. If the market for new development is highly competitive, we would expect that, before any eminent domain reform, localities’ leaders already will offer prospective developers the maximum or close to maximum contribution that the locality’s leaders would be willing to make, given their assessment of the costs of that contribution and the expected benefits of new development. If the market for new development is not highly competitive, the highest bidding locality prior to eminent domain reform probably will not have offered the maximum or even possibly close to the maximum its leaders would be willing to pay. Ex post, after eminent domain reform, non-eminent domain subsidies are likely to increase more in non-competitive markets for development than in competitive ones.

To illustrate, consider a developer that wants to build luxury townhouses, which is the sort of development that local officials in a city seek to foster. For simplicity, assume that the eminent domain reform at issue would ban completely the use of eminent domain to facilitate land assembly. Prior to the abolition of eminent domain, city leaders have three possible subsidies they could use to attract the developer: building infrastructure the developer would otherwise have to build itself, tax relief, and eminent domain. For the reasons described above, city leaders expect that eminent domain would deliver the greatest benefit to the developer at the lowest political cost: for a political cost with a dollar equivalent of $20,000, the city would confer on the developer an economic benefit
that the developer values at $100,000. By contrast, infrastructure or tax relief with a political cost dollar equivalent of $100,000 would be valued at $100,000 by the developer. Assume also that city leaders believe that they would benefit from the new development as long as the total political costs of subsidies can be limited to a dollar equivalent of $200,000.

In a highly competitive market, city leaders feel they need to bid their absolute maximum, which means a bid consisting of subsidies with political costs equivalent to $200,000. Because city leaders would want to maximize the value the developer would derive from the bid in order to improve the city’s chances of winning the competition, city leaders would offer an eminent domain subsidy valued at $100,000 by the developer ($20,000 political costs) plus infrastructure valued at $100,000 by the developer (political costs $100,000) and tax relief valued at $80,000 by the developer (political cost $80,000), so that the total value of subsidies to the developer, as valued by the developer, would be $280,000. For $200,000 in political costs, city leaders can thus provide the developer $280,000 in economic benefit. If the Developer requires less than $280,000 in subsidies in order to choose to site its development in the city, then the developer will accept the city’s bid.

Once eminent domain is outlawed, city leaders still will be willing to offer subsidies with political costs equivalent to $200,000, but now that amount of political costs will translate into less expected economic benefit for the developer. Whether the city leaders now offer infrastructure with political costs equivalent to $200,000, or infrastructure with political costs equivalent to $200,000, or some mix of tax relief and infrastructure that have a dollar equivalent of $200,000, the developer’s expected
economic benefit would be $200,000. If the developer requires a subsidy of more than $200,000, then the developer will reject the city’s bid. Thus, the unavailability of eminent domain as a subsidy will make the difference – that is, will result in the city not attracting development it otherwise would have developed -- if the total subsidy developer requires in order to build in the city is more than $200,000 but less than $280,000.

The analysis is somewhat different if we assume that the market for new development among localities is not highly competitive. In that case, the leaders of the highest bidding locality before the legal change probably would not bid as much as they would if they faced stiff competition from other localities. For example, in a non-competitive market, suppose that the city leaders would be willing to incur political costs equivalent to $280,000, but they are convinced that, because of the non-competitive environment, they need only incur political costs equivalent to $200,000, which (as the package would include the eminent domain subsidy) translates into $280,000 in economic benefit for the developer, in order to attract the development to the city. They believe that $280,000 in economic benefit is enough for the developer, no other locality will offer more.

After eminent domain is outlawed, city leaders could make a bid that has the same economic value to the developer as before eminent domain is outlawed by offering $280,000 in tax relief or infrastructure spending or some combination of the two worth $280,000 to the developer. And the city leaders would make such a bid because they believe the benefits of the development justify incurring political costs equivalent to $280,000, and that is the amount of political costs associated with the bid. The City
would therefore provide subsidies worth the same to the developer after eminent domain reform as before, and the reform itself would not affect the development decision of the developer.

Note, however, that even in a non-competitive market for new development, the potential increase in non-eminent domain subsidies might not fully make up for the loss in economic benefit to the developer of the eminent domain subsidy. Consider the case where the city leaders believe that attracting the development justifies incurring up to $250,000 in dollar equivalent political costs, but also believe that the developer can be attracted with a subsidy package including eminent domain that has dollar equivalent political costs of $200,000 but economic benefit for the developer of $280,000. Once eminent domain is banned, city leaders would be willing to offer the developer $250,000 in tax relief or infrastructure spending or some combination worth $250,000 to the developer. If the developer requires a total subsidy it values at $250,000 or less in order to proceed with development in the city, then the Developer still would proceed with development, but if the developer requires a subsidy with an expected economic benefit greater than $250,000 but equal to or less than $280,000 in order to proceed with development, the city will fail to attract development that it would have attracted were eminent domain an available form of subsidy.

To summarize: when the market for development is highly competitive we should not expect to see non-eminent domain subsidies increase to make up the full loss in value to developers of the eminent domain subsidy. When the market is not competitive, and the highest-bidding locality bids much less than its full valuation of the development when eminent domain is an available subsidy, it is possible that the locality will fully
make up the difference to the developer, but there are a range of non-competitive market scenarios in which the locality would not make up the full difference to the developer and in which development decisions therefore might be changed.

The preceding analysis suggests that the magnitude of the mitigating effect of increases in non-eminent-domain subsidies after eminent domain is restricted depends very much on the degree of competition among localities for new development. Although the degree of competition almost certainly varies based on context, as a general matter it does appear that officials in urban, suburban, and exurban localities within a geographic area and across geographic areas perceive themselves to be in stiff competition with one another to attract development, especially commercial development, and these perceptions influence the dealings of officials with developers. Indeed, as one commentator summarizes the prevailing view, “[t]he competition for economic development has become so intense, and the stakes politically so important, there has been little rational discussion about alternative approaches to growth and recovery.”

iii. Changes in the Cost of Subsidies

Empirically testing whether non-eminent domain subsidies increase (and by how much) after the imposition of restrictions on eminent domain would be feasible in theory, but made more difficult by the fact that non-disclosure of subsidies by localities is the rule, rather than the exception. However, several state have adopted statutes requiring disclosure regarding at least intrastate business relocation subsidies, See GREG LE ROY, LINCOLN LAND INSTITUTE, DEVELOPMENT SUBSIDIES AND LABOR UNIONS BELONG IN THE SPRAWL DEBATE (WORKING PAPER), (2000), available at http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=629. One of these states – Minnesota – also has recently adopted a restrictive law regarding eminent domain, so that state is likely the most promising one in which to attempt to assess the effect of restricting eminent domain on other subsidies.
The preceding analysis assumed that the cost of non-eminent domain subsidies would be the same before the ban on eminent domain as afterward. In theory, however, it is possible that the political costs to local officials of non-eminent domain subsidies may drop with the elimination of eminent domain as a possible form of subsidy. If that is the case, local officials may be able to increase non-eminent domain subsidies by enough to make the developer as well off – as heavily subsidized – after the elimination of eminent domain as before even where there is a highly competitive market for new development.

To illustrate: in the same example as above, assume that the political costs of tax relief is reduced 80% as a result of the elimination of eminent domain, so that the city leaders can provide the developer with $100,000 in tax relief at a political cost dollar equivalent of $20,000. If that were so, after the eminent domain ban, the city leaders could offer the developer a package it valued at $280,000 at dollar equivalent political costs of $200,000 by combining tax relief the developer values at $100,000 (political cost of $20,000) with infrastructure spending the developer values at $180,000 (political cost of $180,000). Because the city leaders could offer the developer as much value before and after the legal change at the same political cost to them, the legal change itself would not alter the economic value of the offered subsidy and hence would not alter development decisions.

An important question therefore is: would the cost of non-eminent domain subsidies drop as a result of new legal restrictions on eminent domain? One possible theory for why this might be so is that the voters that would absorb the costs of tax relief used to attract development – those who would bear the costs of lost programs they value or offsetting tax hikes to fund the tax relief -- would blame their officials less than they
would before the legal change because they would understand that eminent domain was no longer available to attract beneficial new development, and hence their officials had to rely on tax relief or forego development altogether. Local officials could explain, and would have incentives to explain, that more tax relief (or more infrastructure or some other non- eminent domain subsidy) was the only option in the wake of the new legal constraints.

This theory, however, is problematic for several reasons. First, local officials may not be heard or be credible: citizens facing a large rise in property taxes or a cut in the funding of a social service they value may not listen to or (if they do listen) credit the claim that the elimination of eminent domain as a legal option necessitated the tax increase or funding reduction. Many citizens who receive a tax hike notice may not invest time in listening to local leaders at all, and may instead simply react to what they perceive the local government as taking from them, in part because they are busy and in part because they may well dismiss any politician’s explanations as mere excuses.

Second, even if citizens hear, understand and credit the local officials’ explanation, that may not reduce their displeasure at their local officials: some portion of the citizenry may not expect to reap any or any meaningful share of the promised benefits of new development, and hence may not care that tax increases were needed to secure new development. If I am a long-time resident and do not expect to get a job or commercial sales or other direct economic benefit from new development, and my favorite local library branch is closed to provide more funds for development subsidies, or I am faced with a tax hike to finance the new development that I must pay out of a fixed pension, I may not penalize my elected officials any less because they resorted to the library closing
and other measures only because they were now constrained from facilitating new
development by means of eminent domain.

II. Qualitative Effects of Eminent Domain Reform

As we have seen, the quantitative effects of eminent domain reform are uncertain,
so much so that neither reform proponents’ nor opponents’ claims can be given any
credence. The claims regarding the effects of eminent domain, as previously noted, are
qualitative as well as quantitative. In particular, proponents of reform argue that eminent
domain only or largely promotes qualitatively “bad” development in poor urban areas, so
even if such communities lose some development they otherwise would have attracted as
a result of eminent domain reform, that is a good thing. In this view, the lost
development would have been “bad” development anyway.

The reform proponents appear to be implicitly using a range of criteria as to what
constitutes the bad aspect of the development facilitated by eminent domain. At times
the claim seems to be that such development is bad because the newly-constructed
buildings are not being used as intended: the newly-built apartments built are unoccupied,
or rented at lower prices than expected, the commercial retail space cannot be leased and
remains vacant, at an extreme, the new buildings are just boarded up.\(^{41}\) At other times
the claim is that the new buildings are being used but that the benefits to the local
community, in terms of tax revenue or jobs or some other element, have not been met.\(^{42}\)

\(^{41}\)See, e.g., Brief Amici Curiae of the American Farm Bureau Federation et al, at 20, Kelo v. City of New
London, 125 S.Ct. 2655 (2005) (No. 04-108), 2004 WL 2787138 (use of eminent domain has left a “littered
landscape” of “destroyed” or “locked up” buildings).

\(^{42}\) See, e.g., Brief of Jane Jacobs as Amica Curiae in Support of Petitioners at 7-8, Kelo, 2004 WL
2803191 (“the promised economic benefits of condemnations often fail top materialize, and are outweighed
by the massive costs. Not only did the new GM plant [at issue on the Poletown case] create far fewer jobs
than promised, but the limited economic benefits that the plant did create were likely overwhelmed by the
economic harm it caused to the city.”); Brief of Amici Curiae Better Government Association et al. in
Still other times, the claim is that even though the new development is functional and producing the benefits such as tax revenue that were promised, the costs to the community, and especially the costs to the most vulnerable populations within the community, have been so great that the development must be regarded as “bad.”

Inconsistency as to the normative criteria for “badness” is not the only problem with the proponents’ arguments. For one thing, the proponents argue solely on the basis of selected examples: they point to unsuccessful (however defined) projects in which eminent domain was employed but do not establish that these projects are typical of projects in which eminent domain was employed. Clearly, there are projects in which eminent domain was used that are successful in many ways, and others that are not, and the same is true of projects in which eminent domain was not used. To say anything more, one would need some proof that, holding all other variables constant, projects in which eminent domain was used are more likely to be unsuccessful than projects in which eminent domain was not used. Proponents of reform offer no such proof. Nor do they address the question of successful (however defined) developments for which land

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43 See Brief Amici Curiae et al of the National Ass’n for the Advancement of Colored People et al. in Support of Petitioners, at 7, *Kelo*, 2004 WL 2811057 (condemnations “disproportionately harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly”); Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, at 11-12, *Kelo*, 2004 WL 2803191 (explaining how condemnations of poor neighborhoods lead to gentrification, hurt the interests of the poor, and primarily benefit affluent corporate and developer interests); Wendell E. Pritchett, *The “Public Menace of Blight: Urban Renewal and the Private Use of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 47 (2003) (arguing that despite urban renewal efforts that utilized eminent domain, “cities had not been revitalized” and that the ensuing dislocation of minorities “resulted in the creation of more slums).
assembly was negotiated in the shadow of a plausible threat of the exercise of eminent domain.

The proponents of reform do have a response to the charge of lack of proof, which is that the “badness” of eminent-domain-facilitated development can be deduced from the fact that eminent domain represents an intrusion into, and hence distortion of, the free market in land, and market distortions are by definition inefficient. Proponents concede that land assembly can be impeded by the market imperfection of bargaining breakdown due to one or more landowners “holding out” for a payment in excess of the value he or she actually places on the property. But they argue that strategic holding out is a minimal problem, and that eminent domain is much more often used to deny property owners of their full subjective valuation of their property (for example, the grandmother in the house she was born in who doesn’t want to sell at all or only for a price much, much higher than market value) and/or to deny property owners a reasonable share of the additional market value their properties collectively will have once they have been assembled and hence are ready for large-scale development. In the view of reform proponents, eminent domain operates to ensure that developers need to pay and do pay less than they would in a free market in which developers would have to take account of both property owners’ high subjective valuations of their properties and their entitlement to bargain for some of boost in value their properties will have once they have been consolidated for new development. Because eminent domain allows developers to pay less than the free market would require them to pay, land-assembly-based development is

See, e.g., Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 20-25, in Kelo, 2004 WL 2802972..
under-priced, and hence an inefficiently great amount of societal resources are devoted to
land-assembly-based development.

Even if one accepts the “free market” as an efficient allocation mechanism for
societal resources, and one accepts efficient allocation of resources as an overriding
objective, the reform proponents’ argument is problematic for several reasons. First, we
simply have no way of knowing the magnitude or pervasiveness of the hold-out problem
in land assembly and hence we have no way of knowing the strength of the hold out,
market imperfection rationale for eminent domain. After all, even the reform proponents
accept the proposition that strategic holding out can lead to inefficiencies in the land
market.

Second, to the extent land market are “distorted” by government interference,
eminent domain is only one kind of interference, and, arguably, most of the non-eminent-
domain kinds of interference operate to skew resources away from development in
fragmented urban and suburban markets and toward development in non-fragmented
exurban and rural land markets. Eminent domain thus can be understood as offsetting or
cancelling these other governmental sources of distortion, and hence as operating as a
means of achieving a market free of net government distortion -- in other words, an
efficient, free market.

What are the possible governmental sources of distortion favoring development in
non-or less-fragmented exurban or rural land markets? As the scholars who have
explored the history of “sprawl” development in the United States emphasize,
government policy, and especially federal policy, has been one important force behind
this sort of development. For one thing, the federal government heavily funds highway
construction in the states, and, without highways, outer suburbs or exurbs would not be able to attract new residents.\textsuperscript{45} Second, federal tax law in effect subsidizes home ownership, including the ownership of land attached to houses themselves, and this subsidy probably results in higher levels of ownership of single family homes and larger single family homes on larger lots, and the outer suburbs and exurbs are particularly well-suited for the development of such homes.\textsuperscript{46} Third, federal and other gas taxes do not capture the full social costs associated with gasoline use, and this (arguably) artificially low level of gasoline taxation favors areas in which automobiles are used most often for


the longest drives, the outer suburbs and the exurbs. Fourth, at the state level in many
states, property taxes are the main source of funding for local services, including police
and school, and exurban residents can thus enjoy relatively low property taxes by
removing themselves from urban jurisdictions with greater needs for tax revenue, even
though these same exurban residents can enjoy, essentially for free, the benefits provided
by the urban areas, such as cultural offerings, financial centers, and transportation hubs.
In a tax regime that did not favor the exurbs relative to the urban center, new
development in the exurbs would be less attractive. In sum, although there are
noteworthy theoretical and empirical objections to the argument that federal and state law
are skewed in favor of exurban development, there are grounds for believing what

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47 See Neal R. Peirce, Citistates 28 (1993) (explaining that the “environmental costs” of automobile-
driven suburban development are “serious air pollution” and “loss of greenbelts and open spaces.”); Robert Burchell et al., Sprawl Costs 92 (2006) (calculating the costs of driving not paid by the driver
at 0.473 cent per mile); Donald O. Mayer, Corporate Governance in the Cause of Peace: An
covers only 60 percent of U.S. road costs); Babak A. Rastgoufard, Too Much Smoke And Not Enough
(“by keeping gasoline taxes relatively unchanged, states have failed to adjust for the fact that a gallon of
gasoline imposes a greater cost on society today than it did forty years ago”); Ian W.H. Parry & Kenneth
A. Small, Resources for the Future, Does Britain or the United States Have the Right
Gasoline Tax 30 (2002) (explaining that the optimal U.S. tax would be double its current rate), available

48 See Subhrajit Guhathakurta & Michele L. Wichert, Who Pays for Growth in the City of Phoenix? An
Equity-Based Perspective on Suburbanization, 33 URB. AFF. REV. 813, 826 (1998) (finding that residents
located in the inner areas of Phoenix were assessed significantly higher property taxes than were suburban
residents who lived within the sprawled Phoenix city limits).

49 See U.S. Gen. Accounting Office, Community Development: Extent of Federal Influence on
“Urban Sprawl” Is Unclear 2, 3 (1999) (“[R]esearchers have generally been unable to assign a cost or
level of influence to individual factors, including particular federal programs or policies .... [However, the]
shortage of quantitative evidence does not mean that federal programs and
policies do not have an impact on urban sprawl; it simply means that the level of the federal influence is
difficult to determine.”).
Sheryll Cashin calls “the favored quarter” – the largely white, fast-growing outer suburb or exurb – “is not a pure market phenomenon.”

Of course, I have no basis for claiming that the governmental interference in favor of exurban, non-fragmented-land-markets is *exactly* offset by the availability of eminent domain, which (as already discussed) makes urban development more attractive relative to exurban development. In theory, eminent domain could over-correct for the distortions on favor of exurban development. But in theory the opposite could be true, and given the massive dimensions of the subsidies in favor of exurban development, perhaps it is likely true. In any case, proponents of eminent domain reform have not made the case that on net, taking account of all government policies operating at all levels of government, eminent domain distorts the market in land development and hence is a source of allocative inefficiency.

Yet another problem with the reform advocates’ argument is that it does not take account of the distorting non-eminent-domain subsidies that might increase in the wake of eminent domain. As argued above, we might expect non-eminent domain subsidies to increase after restrictions on eminent domain are imposed, and these subsidies also would skew development, and there is no reason to believe that eminent domain subsidies to developers are any more distorting than cash or regulatory relief subsidies that have the same dollar cost equivalent value for developers. Quite the contrary, classic public

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choice theory -- which reform advocates invoke\(^5\) -- suggests that government measures that impose concentrated costs (such as the exercise of eminent domain) are *more* likely to be subject to scrutiny and challenge in the political marketplace than government measures that impose diffused costs (such as taxpayer-financed cash subsidies).\(^2\)

\(^{51}\) See, e.g., Brief Amicus Curiae of James M. Buchanan and Gordon Tullock and the Pacific Legal Foundation in Support of Petitioners at 8-10, Kelo v. City of New London, 125 S.Ct. 2655 (2005) (No. 04-108), 2004 WL 1882158 (arguing that Berman and Midkiff and other precedents broadly interpreting “Public Use” should be overruled in order to curb rent seeking); Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchasers and Private Influence*, 92 *Cornell L. Rev.* 1, 34 (2006) (“Private parties that would directly benefit from takings have a strong incentive to influence the eminent domain process for their own advantage. Indeed, because private parties can use eminent domain to obtain a relatively concentrated benefit, these parties have an incentive to use inordinate influence to achieve their private objectives through condemnations. Thus, not only is the right to take property unnecessary for private developers (who can use buying agents to circumvent the holdout problem), but giving private parties access to eminent domain leads to manipulation of the process and, consequently, socially undesirable takings.”)

IV. CONCLUSION: IMPLICATIONS

As the preceding analysis shows, the eminent domain reforms states have adopted and are considering adopting may cause either decreases in urban development (in the case of flat bans) or increases in development in poor urban areas (in the case of bans on only economic development condemnations). Other forms of subsidies are likely to increase as a result of eminent domain reform, but that increase is unlikely to fully make up the loss to developers of eminent domain. We cannot say much about the magnitude of these quantitative effects but much more importantly, we can say nothing about the quality of the development that will be gained or lost as a result of the in urban areas as a result of the reforms that are part of current political discourse. Given that, it would seem reasonable to ask, is there some other kind of eminent domain reform that might predictably produce desirable results?

The permissive “public use” test that existed in most states before *Kelo* and that *Kelo* reaffirmed as the federal constitutional law approach does nothing to select for some development and not others based on any reasonably coherent normative criteria. As the *Kelo* dissenters emphasized, development for “economic development” can be almost any development that promises more tax revenue than existing land uses, and unless increases in tax revenue alone are a good proxy for a normative standard of goodness,” allowing an economic development purpose to satisfy the “public use” requirement does not screen development based on any normatively defensible criteria.

The other purpose that meets the public use requirement under pre-*Kelo* law (and post-*Kelo* law in almost every state) – the blight removal purpose – also does not select for good development. Despite the pejorative sound of “blight,” so-called “blighted”

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land uses are not necessarily bad, or (given the vagueness of “blight”) necessarily any particular kind of use or another, except perhaps uses associated with lower-income and minority communities.54

It is true that some of the states that have recently limited condemnations to blight removal condemnations have also tightened of the statutory criteria for blight.55 However, even if we assume blight condemnations only reach “true” blight and such blight is indeed “bad” and thus it is good to remove it, there is nothing in the approach that allows condemnations to remove blight that does anything to select for good (however measured) development to replace the blight. The blight removal test, even with a well-defined, highly restrictive definition of blight and consistent enforcement, focuses solely on what is currently on the sites at the time of the condemnations. It does not address – and does nothing to affect -- the kinds of development that eminent domain (or the threat of eminent domain) will be used to facilitate to take the place of the blighted structures or areas.

If we want eminent domain to select for good development, we should consider eminent domain reform that ties the availability of eminent domain to the characteristics

54 See David A. Dana, The Law and Expressive Meaning of Condemning the Poor after Kelo, 101 NW. U. L. REV. ----- (2006); Colin Gordon, Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight, 31 FORDHAM URB. L. J. 305 (2004); Ilya Somin, Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings and the Future of Public Use Law, 2004 MICH. ST. L. REV. 1005, 1034-39 (2004) (describing “creative” and “abusive” examples of blight designation for condemnation); Benjamin B. Quinones, Redevelopment Redefined: Revitalizing The Central City With Resident Control, 27 U. MICH. J.L. REFORM 689, 731-32 (1994) (“Blight often can be found in a low-income neighborhood. However, blight does not necessarily indicate the need for redevelopment or for clearance. Nor does the finding of blight in any way indicate a particular solicitude for the residents of that area on the part of decision makers. Indeed, more often than not, animosity is likely the emotion that fuels the process.”).

55 In particular, two states, Minnesota and Wisconsin, no longer permit a blight designation to encompass both blighted and non-blighted structures in the same neighborhood or area. See S.B. 2750, 84th. Leg., Reg. Sess. (Minn. 2006); Assemb. B. 657, 2005 Leg., Reg. Sess. (Wis. 2006).
of the development that will replace current land uses. One such reform would be an eminent domain test that would make eminent domain available when the anticipated new development would have features that are likely to contribute to reductions in the concentration in poverty. Such reductions arguably are a social good in itself, as the thesis that it is the concentration of urban poverty, even more than the existence of poverty per se, that has harmful social effects “has received almost universal empirical confirmation.” There are numerous studies that “demonstrate a consistent relationship between social and spatial isolation on the one hand, and high rates of teenage childbearing, school dropouts, and welfare dependency on the other.” Or perhaps some other forward-looking criteria – something other than whether the new development would reduce concentrated poverty – should be folded into the criteria for the permissible use of eminent domain. What is important is that the debate over eminent domain focus not on flat eminent domain bans or restrictions on economic-development (that is, non-


blight-removal) condemnations. What is important is that we focus instead on what kinds of development, what kinds of communities we, as a society, as state and national polities,\textsuperscript{58} believe will best advance the public welfare. The debate over eminent domain reform – and in turn the law of eminent domain – needs to be re-framed.

\textsuperscript{58} Most exercises of eminent domain are by localities, but localities exercise the eminent domain power only pursuant to a delegation of power by the state, and both the state and the federal constitutions govern the scope of permissible exercises of the eminent domain power. Thus, it is the polity at the state and federal level – and not at the local level – that should debate and shape the reform of eminent domain.