REFRAMING EMINENT DOMAIN: UNSUPPORTED ADVOCACY, AMBIGUOUS ECONOMICS, AND THE CASE FOR A NEW PUBLIC USE TEST

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INTRODUCTION

The United States Supreme Court decision in *Kelo v. City of New London*, 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.[1] The two eminent domain reform alternatives

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1. Kelo v. City of New London, 545 U.S. 469, 489–90 (2005). The Fifth Amendment of the U.S. Constitution provides that "nor 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, 32–33 (1954), and later in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243–44 (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. *Berman*, 348 U.S. at 32–33. As a general matter, blight designations and therefore 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*, the Court held that condemnations for economic development, 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. *Kelo*, 545 U.S. at 483–84. 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 484. "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 . . . ." *Id.* 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. *See id.* at 478–79 (noting the past rejection of "any literal requirement that condemned property be put into use for the general public") (quoting *Midkiff*, 467 U.S. at 244). State courts construed the public use requirements of their state constitutions in a similar fashion, although the Michigan Supreme Court had expressed strong hesitations about economic development condemnations even before *Kelo* and the intense political backlash against the decision. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) ("To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."); *see also* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10–11 (Ill. 2002) (holding that Southwestern Illinois Development Authority could not condemn property purely for the purpose of expanding revenue).

currently on the political agenda are a flat ban on condemnations[2] or a ban on economic development condemnations coupled with continued allowance of blight condemnations (the approach in most reforming states).[3] 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

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2. *See* H.R. 1567, 2006 Leg., Reg. Sess. (Fla. 2006) (prohibiting use of eminent domain "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.") (quoting J.B. Ruhl, *Amendment Eight: Slamming the Door on* Kelo, J. OF THE JAMES MADISON INST., Fall 2006, at 35, 37); 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 . . . when the legislature overwhelmingly passed a bill that severely restricts governments' ability to take private property using eminent domain.").

3. *See* H.R. 654, 2006 Leg., Reg. Sess. (Ala. 2006) (prohibiting takings of non-blighted property without consent of property owner); H.R. 1411, 2006 Gen. Assem., Reg. Sess. (Colo. 2006) (stating that "public use" does not include economic development, while reaffirming takings when "necessary for the eradication of blight"); H.R. 1313, 2006 Leg., Reg. Sess. (Ga. 2006) ("The public benefit of economic development shall not constitute a public use."); H.R. 555, 58th Leg., 2d Reg. Sess. (Idaho 2006) (prohibiting a taking of private property and limiting a taking of a deteriorating area without "clear and convincing evidence" that it is a danger as it is); S. 3086, 94th Gen. Assem., Reg. Sess. (Ill. 2006) (amending eminent domain laws to allow for blight condemnation in certain circumstances); H.R. 1010, 2006 Gen. Assem., Reg. Sess. (Ind. 2006) (requiring significantly more than economic development to justify eminent domain takings); S. 323, 2006 Leg., Reg. Sess. (Kan. 2005) ("Whereas, the people of Kansas agree that the use of eminent domain for the taking and transferring of private property from one private party to another should only be allowed in extraordinary and limited situations and with explicit procedural safeguards . . . ."); H.R. 508, 2006 Gen. Assem., Reg. Sess. (Ky. 2006) (declaring that public use includes elimination of blighted areas but not economic development); H.R. 1310, 122d Leg., 2d Reg. Sess. (Me. 2006) (eliminating economic development as justification for eminent domain but allowing exception for blight condemnations); S. 2750, 84th Leg., Reg. Sess. (Minn. 2006) (stating public benefits of economic development alone do not constitute a public use purpose, as well as providing for limited blight condemnation); H.R. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006) (prohibiting acquisition of private property "through the process of eminent domain for solely economic development purposes," while still allowing for condemnation of blighted areas); H.R. 924, 99th Leg., 2d Reg. Sess. (Neb. 2006) (permitting takings based upon a finding of blighted conditions but not for economic development); S. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2006) (establishing a moratorium on takings in unblighted areas as well as creating the Legislative Task Force to Study Eminent Domain and Its Use and Application); S. 881, 2005 Gen. Assem., Reg. Sess. (Pa. 2006) (prohibiting eminent domain for private enterprise but allowing blight condemnations under certain circumstances); S. 3296, 104th Gen. Assem., Reg. Sess. (Tenn. 2006) (allowing blight condemnations but forbidding eminent domain for purpose of economic development); S. 7, 79th Leg., 2d Called Sess. (Tex. 2005) (restricting takings for economic development purposes unless area is blighted); S. 246, 2006 Gen. Assem., Reg. Sess. (Vt. 2006) (preventing governmental and private entities from taking property for economic development); H.R. 657, 2005 Leg., Reg. Sess. (Wis. 2005) (authorizing eminent domain for blighted property but not property conveyed to a private entity); H.R. 4048, 2006 Leg., Reg. Sess. (W.Va. 2006) (amending code to limit use of eminent domain for economic development but allowing blight condemnation exception).

prevent only "bad" development in such areas.[4] Opponents of eminent domain restrictions argue that such restrictions will result in less development, less good development, in poor urban areas.[5] 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 domain 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.[6] 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[7] will result in somewhat less development in urban areas (poor or not poor) and somewhat more development in exurban or rural areas. How much less or more we have no way of predicting, and there is no way to predict whether suburbs will witness a net decline or increase in development. We can also predict that a ban only on economic development condemnations (which allows so-called blight or blight removal condemnations to continue as before) will result in somewhat more development in poor urban areas (but not necessarily in urban areas as a whole) and in exurban or rural ones, but 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

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4. *See, e.g.*, MARK BRNOVICH, GOLDWATER INST. CTR. FOR CONSTITUTIONAL GOV'T, POLICY REPORT NO. 195, CONDEMNING CONDEMNATION: ALTERNATIVES TO EMINENT DOMAIN 7, 13 (2004), *available at* http://www.goldwaterinstitute.org/Common/Files/Multimedia/454.pdf (describing Seattle's use of alternative land-assembly techniques to develop its downtown from a poor area to a thriving retail community).

5. Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain,* N.Y. TIMES, Jan. 18, 2006, at C5.

6. *See* Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. (forthcoming 2007) (stating that "the problem of blight condemnations and its impact on the poor deserves much greater attention" and "post-*Kelo* reform initiatives should do more to address these concerns").

7. By a "complete ban" in this Article, I mean a ban on the use of eminent domain for anything but the taking of a site for actual ownership and use by the public, such as, when the government takes a parcel to establish a public park or build a public courthouse. As far as I know, none of the reform proposals go so far as to abolish the use of eminent domain for the taking of land that will actually be used by the general public.

means to reduce the costs of land assembly for developers, such as infrastructure subsidies and zoning exceptions.[8] If so, the costs of development for developers and 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 a 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 with a ban on economic development condemnations coupled with continued allowance of blight condemnations. One reason for this 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.[9]

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8. *See The* Kelo *Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16 (2005) [hereinafter *Hearing*] (statement of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia University).

> [I]f local governments really want to do something to rearrange property rights, there is a good chance that they are going to find some way to do it. And if they can't use eminent domain to do it, they will be tempted to use other powers like the zoning power or the power of taxation to achieve their objective.

Id.

9. 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 of Professors David L. Callies et al. as Amici Curiae Supporting Petitioners at 18, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803192, at *18 (stating that judicial inquiry in public use cases would serve to draw a line between "two permissible means of achieving the broad set of government ends authorized by the police power") (emphasis omitted); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 982 (2003) (arguing that "means-ends scrutiny in public-use cases is as justified (or more justified) than the scrutiny now required of exactions"); 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

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, and we should ask: is there a different kind of eminent domain reform 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.

The Article is organized as follows: Part I explores the unsupported quantitative claims of both proponents and opponents of eminent domain reform and then uses a simple model and arithmetic example to demonstrate the likely effects of those reforms. It further addresses the question of whether or to what extent increases in other forms of local subsidies may negate what would otherwise be the effects of eminent domain reform on urban, suburban, and exurban development. Part II argues that the qualitative claims of reform proponents and opponents are analytically vague and factually unsupported. Finally, the article concludes by discussing implications of the previous analysis for a new, different kind of eminent domain reform.

I. 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

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assembly, *see, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 182–84 (1985) (discussing the issue of market value and alternative compensations in relation to eminent domain); Richard A. Epstein, *The Public Use, Public Trust & Public Benefit: Could Both* Cooley *&* Kelo *Be Wrong?*, 9 GREEN BAG 2d 125, 128 (2006) ("Some third person has to make an assessment of the terms of the transaction, which will go forward only if the aggregate benefits for the public entity exceed its costs."); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83–85 (1986) (suggesting an alternative approach that considers other benefits accruing to the public from the use of eminent domain). Strict means-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, means-end review is by definition agnostic as to the nature of the ends, so while such 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 would increase the costs of eminent domain and bargaining in its threatening shadow, and thus would favor exurban development over urban or suburban development. Greater compensation would also be a neutral reform as to the purpose or ends of condemnations, therefore doing nothing to select for normatively attractive development goals.

selected examples to bolster their predictions about how much or how little the amount of development in poor urban areas will be affected by the implementation of the reforms. As explained below, the evidence that the reform advocates cite (selected examples of urban redevelopment projects that succeeded without the use of eminent domain) and that the 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 are also unpersuasive.[10]

1. 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:

> [C]ondemning private property for economic development is unnecessary and reasonable alternatives to governmental resort to eminent domain exist. . . . 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.[11]

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

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10. BRNOVICH, *supra* note 4, at 9–13.

11. Brief of the Goldwater Institute et al. as Amici Curiae Supporting Petitioners at 5–6, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803193, at *5–6.

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.[12]

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.[13] For these reasons, the potential 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.[14] In a less robust, more typical economic environment, developers might have given up or never tried in the first place if they knew they could not avail themselves of eminent domain to address possible holdout problems.[15]

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. Therefore, land assembly negotiations presumably were not made in the shadow of the possible exercise of eminent domain by interested government authorities in the

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12. For example, the Castle Coalition's recent report—CASTLE COALITION, REDEVELOPMENT WRECKS: 20 FAILED PROJECTS INVOLVING EMINENT DOMAIN ABUSE 5, 8–9, 12–16 (2006), http://www.castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf [hereinafter CASTLE COALITION]—focused on, 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 area. 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. *Id.* at 12.

13. *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, *Report: 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 ("Seattle has endured gentrification spurts before but never one like this where so many neighborhoods undergo simultaneous face-lifts . . . .").

14. *See* Lynch, *supra* note 13, at D01 (quoting a Seattle councilwoman's description of the city's economic transformation as "the biggest boom ever").

15. *See* Marc Hequet, *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.

Id.

event bargaining broke down.[16] 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,[17] but at the time of the cited projects, both Florida and Nevada allowed the use of eminent domain for land assembly projects.[18]

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.[19] 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

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16. *See In re* Petition of Seattle, 638 P.2d 549, 556–57 (Wash. 1981) (rejecting the City's use of eminent domain for a lease-project with minimal public use and distinguishing *Hogue v. Port of Seattle*, 341 P.2d 171, 181–91 (Wash. 1959) where the City leased air-cargo storage to private parties, a public use authorized by statute).

17. *See* Brief of John Norquist, President, Congress for New Urbanism, as Amicus Curiae Supporting Petitioners at 5–7, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811055, at *5–7 [hereinafter Brief of Norquist for Petitioners] (describing land assembly projects in Nevada and Florida not employing the use of eminent domain).

18. Indeed, property rights groups had been particularly critical of the liberal use of eminent domain in Florida prior to *Kelo*. *See* Institute for Justice, Protecting Kelo's Victims in Riviera Beach, Florida: City Seeks to Use Eminent Domain to Replace Lower-Income & Minority Residents with Wealthier Ones, 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. *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 129 (2003), *available at* http://www.castlecoalition.org/pdf/report/states/nevada.pdf. "Nevada is teetering on a precipice. [In 2001], the Nevada Supreme Court allowed the condemnation of private businesses for casino development." *Id.*

19. *See, e.g.*, Hequet, *supra* note 15, at 33 (discussing how developers leverage land-assembly negotiations with holdouts by threatening the use of eminent domain, saving themselves substantial amounts of money); Kate Miller Morton, *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, *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, . . . 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." *Id.* *See also* Pristin, *supra* note 5, at C5 (reporting developer accounts of how the threat of eminent domain brought owners into negotiations).

incentive to strike a deal, even if after much posturing.[20] 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 redevelopment (here too we lack reliable statistics) does not establish that eminent domain has little or no effect on urban redevelopment.[21] It is the plausible threat that matters.

Advocates of eminent domain reform also offer several theoretical—or at least, decidedly nonempirical 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.[22] 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

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20. Pristin, *supra* note 5, at C5.

21. *See, e.g.*, Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 MARQ. L. REV. 921, 948–57 (discussing how Wisconsin law provides for punitive damages in certain contract cases as a threat and deterrent for false inducement, although punitive damages are generally unavailable as contract remedies).

22. *See, e.g.*, Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1026–27 (arguing that developers can secretly negotiate with individual owners). That developers do sometimes secretly assemble land seems to be widely acknowledged. *See, e.g.*, Robert J. Aalberts, *Take from the Poor and Give to the Rich: Eminent Domain Law and the Reverse "Robin Hood" Effect*, 33 REAL EST. L.J. i, iii (2004) (explaining that Disney used secret agents to assemble land in Florida); Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 692 (1991) ("Without the public power of eminent domain, a developer who does not, or cannot, proceed in secret faces the potentially severe consequences of a holdout problem.") (footnote omitted); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 1 (2006) ("[T]he theory of public use based on secret purchases and private influences provides a socially desirable, judicially administrable, and constitutionally legitimate mechanism for distinguishing between public and private uses and promoting economic development."); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 96 (2005) ("Another point that Justice O'Connor failed to make [in *Kelo*] is that private developers who want to assemble a large contiguous parcel of land seem generally able to do so by employing 'straw man' purchasers.").

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 covert assembly.[23] 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 appear to be 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.[24]

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23. This point has been made by many commentators, perhaps first by Professor Merrill, whose 1986 article on public use remains highly influential in the debate among legal scholars. *See* Merrill, *supra* note 9, at 82 ("[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* 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 ("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."); Benjamin M. Gerber, *"No-Law" Urban Height Restrictions: A Philadelphia Story*, 38 URB. LAW. 111, 135 (2006) (arguing that Philadelphia's height tradition would prevent the city's covert land-assembly operations); Kelly, *supra* note 22, at 31 ("The government cannot use buying agents to acquire property for its own projects because, unlike private projects, government projects are almost always subject to the transparency of democratic deliberations.").

24. *See* Ruppert v. Washington, 366 F. Supp. 686, 690 (D.D.C. 1973) ("Numerous decisions . . . reflect the constant caution of the courts to preserve administrative fair play when ex parte influence is responsibly suggested.") (italics omitted); Blaker v. Planning & Zoning Comm'n, 562 A.2d 1093, 1097 (Conn. 1989) ("[O]nce it has been demonstrated that an improper ex parte communication has occurred, a presumption of prejudice arises."); Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 29–30 (Or. 1973) (prohibiting ex parte contacts in adjudicative zoning processes); Jennings v. Dade County, 589 So. 2d 1337, 1345 (Fla. Dist. Ct. App. 1991) (Ferguson, J., concurring) ("Ex parte lobbying of an administrative body acting quasi-judicially denies the parties a fair, open, and impartial hearing."); Pozzi v. Zoning Bd. of Appeals, 1993 WL 818645, at *8 (Mass. Super. 1993) ("An ex parte contact between a

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 its success. 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 or separate from any value that may attach as a result of successful assembly: hence the possibility for higher-market-value development.[25] 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. They are, therefore, 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

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zoning board and an interested party which is neither revealed to other interested parties nor made a part of the public record is a ground for reversing a decision of a zoning board."); SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 170 (1978) (explaining that local government officials can extort bribes from developers because they control the onerous and fragmented application process for land-use proposals); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 69 (1995) (discussing how critics opposed Los Angeles's acquisition of the Owens Valley water rights without using eminent domain, and thus, without opportunity for public scrutiny); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 43 (2005) ("[B]ilaterally negotiated regulation exacerbates the strong potential for unfair dealing . . . ."); Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 208 (1989) ("Ex parte communications between zoning decisionmakers and private parties present a particularly difficult issue for courts."); Jennie L. Pettit, Comment, *Ex Parte Communications in Local Land Use Decisions*, 15 B.C. ENVTL. AFF. L. REV. 181, 216 (1987) ("Th[e] application of traditional legislative and administrative standards of ex parte review is essential to restore integrity and clarity to the land use decisionmaking process."). This concern gave rise to the adoption by some courts of legal limits on ex parte contacts and meetings in the course of local land use decisionmaking. For a thoughtful treatment of judicial distrust of covert dealings in local land-use regulation, see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 912 (1983) ("[T]his local influence requires some safeguards beyond legislative coalition building . . . .").

25. *See, e.g.*, Gideon Kanner, Making Just Compensation Just, http://www.vapropertyrights.org/articles/99justcomp.html (discussing the disparity between the fair market value of a landowner's property and actual court awards for just compensation after the government takes the land) (last visited Nov. 26, 2007). For a discussion of this "uncompensated increment" in just compensation, see Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 1003 ("A taking is not for a public use unless the entire taking, including the uncompensated increment, is susceptible of being justly compensated—where justice in compensation is understood to encompass values of autonomy as well as dollar amounts.").

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.[26] Ilya Somin, a leading academic proponent of eminent domain reform, and Robert Getman, write that:

> [D]evelopers can prevent holdout problems without recourse to eminent domain . . . by means of "precommitment" strategies or "most favored nation" contract clauses. [Developers] can sign contracts with all the owners in the area where [they] hope[] to build, under which they commit themselves 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 the previous sellers.[27]

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.[28] Hence, a 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

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26. *See* Brief of Jane Jacobs as Amica Curiae Supporting Petitioners at 14, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803191, at *14 [hereinafter Brief of Jacobs in Support of Petitioners] ("[P]rivate developers have a variety of tools for dealing with holdout problems without recourse to government coercion."); *see also* Kelly, *supra* note 22, at 24 n.134, 30 n.156 (discussing ways to overcome the holdout issue and fact that eminent domain circumvents the market test for governments); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, HARV. J.L. & PUB. POL'Y 491, 568 (2006) (explaining that "precommitment" contracts are a common practice for developers wishing to avoid holdout problems); *cf.* Clayton P. Gillette, *Voting With Your Hands: Direct Democracy in Annexation*, 78 S. CAL. L. REV. 835, 865 (2005) (explaining how precommitment can create a credible threat against overcompensation during municipal annexations).

27. Somin, *supra* note 22, at 1027.

28. *See*, James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1291 (1985) ("The process of determining market value contains uncertainties and complexities similar to those in determining the comparative value and superiority of a substitute facility."); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 683 (2005) ("Despite a general agreement about [appraisal] approaches, and even standardization in appraisal techniques, appraisers valuing the same property's fair market value can reach wildly different results.").

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 it that developers have not eliminated all or almost all holdout problems before now by using this mechanism?

2. The 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.[29] 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 . . . ."[30] "Without condemnation powers, many redevelopment projects would never get done," Michael Parker of the Florida Redevelopment Association explained; "[i]t's going to be the difference whether an important project gets done or not."[31] 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.[32]

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29. *See* Brief for Mayor and City Council of Baltimore as Amicus Curiae Supporting Respondents at 4–5, 7–8, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166940, at *4–5, *7–8 (describing Baltimore's extended use of eminent domain to revitalize its Inner Harbor).

30. Charlie Savage, *Limit Urged on Eminent Domain, Property Owners Ask High Court to Block Forced Sale*, BOSTON GLOBE, Feb. 23, 2005, at A3.

31. Todd Wright & Evan S. Benn, *Eminent Domain Legislature 2006: Property-Seizure Rules Could be Tightened*, MIAMI HERALD, Apr. 30, 2006, at BR10.

32. *See generally* Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, *in* THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41, 45–47 (VT. J. ENVTL. L. 2006), *available at* http://www.vjel.org/books/pdf/PUBS10003.pdf (discussing the use of eminent domain by the San Francisco Port and Redevelopment Agency); Michael Corkery & Ryan Chittum, *Eminent domain backlash threatens some projects*, 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."); Rich Ehisen, *Changes Imminent for Eminent Domain*, STATE NET CAPITOL J., July 18, 2005, at 1, 5 ("[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.")

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.[33] 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.[34] And even if landowners at the bargaining table say or suggest they would never have even agreed to negotiate absent the threat of condemnation, that does not mean that they 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

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(quotation omitted); Pristin, *supra* note 5, 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 . . . .").

33. *See* CASTLE COALITION, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE 9–10 (2006), *available at* http://www.castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf. (listing major redevelopment projects that happened without eminent domain); SARA HINKLEY ET AL., MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 37 (2000), *available at* http://www.goodjobsfirst.org/pdf/stateaudits.pdf (reporting that 13 of 122 audits "opine or conclude that development projects would have occurred without subsidies").

34. *See* ANDREW ALPERN & SEYMOUR DURST, HOLDOUTS! 7-11 (1984) (depicting large commercial developments surrounding holdouts); BRNOVICH, *supra* note 4, at 13 ("Local governments and developers can . . . use creative land assembly methods that do not require the use of eminent domain."). In the *Kelo* situation in Connecticut, officials have gone to great lengths to accommodate the two last holdouts, including moving Susette 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, at A6, July 1, 2006, *available at* 2006 WLNR 11801221 (stating how Pasquale Cristofaro, the other holdout, retained the option to build or purchase in the neighborhood); *see also* Cohen, *supra* note 26, at 568 (explaining how developers can modify projects to work around holdouts); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 114 (2006) (noting 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.").

the most plausible assumptions. So the first question is, what are plausible assumptions?

1. 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 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.[35]

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.[36] The second assumption is that 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 any possible development site, the greater will be the transaction cost of assembling all the interests into a single

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35. 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. Indeed, as long as there are variable levels of fragmentation within a certain region and sites within the region can sometimes serve as substitutes for one another, the analysis in this Article holds even if the different parts of the region do not track the urban core model and even if all the different parts of the region are part of a single governmental entity for zoning and other land use regulation purposes. The City of Houston, which is a massive political jurisdiction encompassing areas of very different levels of density of development, is arguably one example of such a region.

36. *See, e.g.*, Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2111–12 (1997) (discussing how the holdout risk often arises with street improvements); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 928–29 (2004) (discussing how holdout behavior generates extra costs and precludes other parties from benefiting from the deal); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749–52 (1986) (explaining that if projects had to rely on voluntary sales, holdouts could block entire projects); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 72 (1987) (discussing economic theories of land transactions). *But see* Elizabeth Hoffman & Matthew L. 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).

unified ownership at a proposed development site. If the first assumption is correct, that urban land ownership is more fragmented, 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 or rural areas.

The third assumption directly follows the second: because eminent domain, both when actually employed and (even more so perhaps) when it is in 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 being equal) greatest in urban areas and smallest in rural and exurban ones, the existence of eminent domain as both an actuality and 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 and exurban areas. Eminent domain, in other words, closes the land assembly cost advantage that rural areas enjoy vis-à-vis suburban and urban areas, and that suburban areas enjoy vis-à-vis urban areas.

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 be 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, 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 whom the developer hopes to attract (for example, residents or mall shoppers).

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 preferred 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, 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, post-graduate singles who want access to nightlife 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 preferred 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, a massive parking lot, and is planned for a suburb is more likely to identify a suitable substitute 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.

It bears noting that sometimes there may be no substitute at all within the given metropolitan region for a given proposed development. If the developer specializes in harbor redevelopments, and there is only one harbor in a metropolitan region, then the only possible substitutes might be in an entirely different region. For the purposes of my analysis, all that is assumed is that sometimes, close substitutes within the metropolitan region at issue are available. With these assumptions, we can now trace the likely effects of the two principal *Kelo* reforms under debate.

2. A Complete Ban on Eminent Domain

A complete ban on eminent domain (that is, in the terms of the reform debate, a complete ban on eminent domain for anything but actual ownership and use by the public as a whole) would raise land assembly costs the highest in urban areas, next highest 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. The developer might not find any attractive substitutes in the metropolitan area and might invest in development elsewhere or not at all. A complete ban thus could translate into less overall development within a metropolitan region. Theoretically, it could only have that effect 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 assembly costs in urban areas, a 5% increase 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 in 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 being 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 costs 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.[37]

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37. 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) (offering an example of a city taking private property "in an effort to curb the sprawl"); Thomas W. Merrill, *The Goods, The Bads, and the Ugly*, LEGAL AFF., Jan./Feb. 2005, at 16, 18 (arguing that restrictions on eminent domain will lead to "ever more sprawl"); Elizabeth F. 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

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.[38] Figure 1 summarizes these effects.

	Change in Development After Total Ban Assuming No Intraregion Substitutes	Change in Development After Total Ban Assuming Intraregion Substitutes
Urban	Decline	Decline
Suburban	Decline	Ambiguous
Exurb	No change	Increase

Figure 1. Effects of a Ban on Eminent Domain

development in certain areas need to be able to use eminent domain to assemble land for the projects."); *The Supreme Court, 2004 Term—Leading Cases, Public Use—Economic Development*, 119 HARV. L. REV. 169, 297 (2005) ("[C]ombating urban sprawl and inner-city decay depends on a locality's ability to use eminent domain for economic development.").

38. 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 capital 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. PEISER & ANNE B. FREJ, PROFESSIONAL REAL ESTATE DEVELOPMENT: THE ULI GUIDE TO THE BUSINESS 63, 133, 139, 217 (2d ed. 2003). For developers, "[m]arket analysis should precede site selection because the choice of sites depends on the market that 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 cost differences driven by such factors as state-by-state variations in labor laws, prevailing wage levels, and state taxation rates. *Cf.* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271, 322 (1997) ("[T]he 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 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, ("[T]he 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.

3. 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-removal 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 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 and suburban areas 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 urban areas than in suburban areas due to 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.

Additionally, some development projects slated for non-poor urban and suburban areas would be cancelled because of the increase of development costs. 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. Thus, if there is no redistribution of development capital within the metropolitan region, we would expect to witness a decline in development in non-poor urban and suburban areas and no change elsewhere.

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 well shift to poor urban areas, as they may provide the closest substitutes for the non-poor urban sites. 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 closest substitutes for planned suburban developments.[39] Overall then, we would expect a net increase in development in poor urban areas, a net decrease in non-poor urban areas, a net decrease in suburban areas, and a net increase in exurban areas.[40]

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39. On the national or regional level, one might also speculate that a bar on economic development condemnations could only shift development capital from states with few poor urban areas to ones with more of them, although for the reasons stated above in footnote 38, it is questionable whether changes in eminent domain law would have much effect across state borders.

40. The possibility that eminent domain reform directed only at economic development

Figure 2 summarizes the predicted effects of restrictions on the use of economic development (but not blight) condemnations.

	Change in Development After Ban on Only Economic Development Condemnations Assuming Intraregion Substitutes	Change in Development After Ban on Only Economic Development Condemnations Assuming No Intraregion Substitutes
Urban	Decline (in non-poor areas)	Ambiguous (increase in poor areas, decrease in non-poor areas)
Suburban	Decline	Decline
Exurban	No change	Increase

Figure 2. Effects of Restrictions on Use of Economic Development Condemnations

4. 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 there is an untapped market for mid-market townhouses in a certain metropolitan area. Developer assesses the possible costs and

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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 American Planning Association et al. as Amici Curiae in Support of Respondents at 17, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166929, at *17.

> [L]imit[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.

Id. (footnote omitted). 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 wealthy 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. *See, e.g.*, Pristin, *supra* note 5, at C5 (statement of Prof. Echeverria) ("Justifying eminent domain on a finding of blight invariably targets low-income communities . . . .").

benefits from proceeding with an urban, suburban or exurban site for the new development. 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. Developer assumes that multiple-parcel assembly will be unnecessary in the exurban area. Developer thus assesses the costs and benefits as follows, selecting the urban site as the highest net-profit opportunity and the suburban site as the next best.

	Costs Before Reform	Benefits Before Reform	Expected Net Profits
Urban	$1 million	$2 million	$1 million
Suburban	$1.5 million	$2 million	$500,000
Exurban	$1 million	$1,250,000	$250,000

Figure 3. Costs and Benefits Before Flat Ban on Eminent Domain

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 cost increase is $1 million in the urban area (for a new total cost 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). However, 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.

	Costs Before Reform	Benefits Before Reform	Expected Net Profits
Urban	$1 million	$1.5 million	$500,000
Suburban	$1.5 million	$2.5 million	$1 million
Exurban	$1 million	$1,250,000	$250,000

Figure 4. Costs and Benefits Before Ban on Only Economic Development Condemnations

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 exurban area would remain the same. If the land-assembly costs in the suburban area increases to more than $2 million, Developer presumably would shift to the urban site, which at that point would promise the greatest net profit.[41]

C. Increases in Other Subsidies

Eminent domain, the threat of it and the actuality of it, lowers the land-assembly costs developers otherwise would face, and in that sense the threat of eminent domain can be conceived of as a kind of subsidy to developers.[42] But localities have other means of lowering the costs 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 would otherwise need to finance to make the development successful.[43] Localities can also offer, and often do offer, preferential tax treatment to new developments.[44] Finally, localities can exempt

41. 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.

42. 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.

43. 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 they are also providing other, non-eminent domain subsidies valued at between half a million and one billion dollars. *See* JUNG KIM & GUSTAV PEEBLES, ESTIMATED FISCAL IMPACT OF FOREST CITY RATNER'S BROOKLYN ARENA AND 17 HIGH RISE DEVELOPMENT ON NYC AND NYS TREASURIES iv (2004), http://dddb.net/documents/economics/KimPeebles.pdf; *see also* Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI BUS. L. REV. 483, 494 (2002) (explaining how land acquisition is a small part of the overall subsidy for sports stadiums).

44. *See generally* PEISER & FREJ, *supra* note 38, at 270–71 (offering examples of various development incentives through preferential tax treatment). 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 property." Amy F. Cerciello, *The Use of Pilot Financing to Develop Manhattan's Far West Side*, 32 FORDHAM URB. L. J. 795, 797 (2005); s*ee also* Lisa Renze-Rhodes, *Lebanon Snares Parts Facilities; $8 Million in State, City Incentives Lures Case New Holland and up to 700 New Jobs*,

developments from zoning and other regulatory requirements that would represent a significant cost to the developer.[45]

From the perspective of developers, eminent domain as well as cash subsidies, infrastructure guarantees, tax relief, and zoning exceptions compose altogether 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 questions are therefore: Will localities that lose the power to contribute to developers by means of offering them the threat 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?

The answer to those questions, 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 those subsidies will increase by enough to offset the loss to developers of eminent domain.

1. Economic and Political Costs

One need not subscribe fully to the public choice vision of politicians

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INDIANAPOLIS STAR, Mar. 11, 2003, at C9 ("A state and local tax incentive package totaling more than $8 million was enough to lure Case New Holland, and as many as 700 jobs over several years, to Boone County.").

45. 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 of Norquist for Petitioners, *supra* note 17, at 10; *see also Hearing*, *supra* note 8, at 16 (arguing that local governments can use tax and zoning powers, in place of eminent domain, to achieve their objectives).

as re-election maximizers to believe that politicians often will be more concerned with the political costs of subsidies rather than the actual dollar, or economic, costs of subsidies.[46] 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 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 cost: the greater the economic cost 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.[47] 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.[48]

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

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46. For a thoughtful account of the public choice account of political behavior and its limitations, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21–33 (1991). *See generally* Garnett, *supra* note 34, at 141 (arguing that local officials gravitate toward development programs with low political costs); Harold Wolman, *Local Economic Development Policy: What Explains the Divergence Between Policy Analysis and Political Behavior?*, 10 J. URB. AFF. 25 (1988) (arguing that politicians may reason that even if the economic impact of incentives will be low, offering such incentives may still increase their political capital); Steven R. Little, Comment, *Corporate Welfare Wars: The Insufficiency of Current Constraints on State Action and the Desirability of a Federal Legislative Response*, 22 HAMLINE L. REV. 849, 861 (1999) (explaining how politicians try to avoid responsibility for job losses by providing corporations location incentives).

47. Little, *supra* note 46, at 849–50 ("State and local governments also engage in providing incentives and compete with each other to lure corporations to locate in their jurisdictions.").

48. Wolman, *supra* note 46, at 25 (explaining that while fiscal incentives may not play a major role in the firm location, the political cost gained if incentives did work is worth it).

economic costs to local officials.[49] Second, 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—we will call it City A—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 subsidy in infrastructure spending or tax relief. This is because, without the threat of eminent domain the developers understand that they may have to pay a much greater-than-market value premium to buy out the holdouts and perhaps would have 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 he or she values at $100,000, then the least costly 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 cost is most likely to translate into relatively low political cost where the use of eminent domain is not generally regarded within the locality as ideologically offensive to property rights or for other reasons, where the proposed development is widely regarded in the locality as highly beneficial, and where the political power of the most likely holdouts is relatively modest.

2. Subsidies and Intralocal Competition

It is a commonplace that bordering localities (but 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, the localities' leaders will already offer prospective developers the maximum contribution, or close to it, that the locality's leaders would be willing to make, given their

49. 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.

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 close to it, that its leaders would be willing to pay. 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 that Developer 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 completely ban the use of eminent domain to facilitate land assembly. Prior to the abolition of eminent domain, as noted above, the leaders of City A have three possible subsidies they could use to attract Developer: building infrastructure Developer would otherwise have to build himself, tax relief, and/or eminent domain. For the reasons described above, City A leaders expect that eminent domain would deliver the greatest benefit to 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.

Now imagine that City A has two competitors for the new development—City B and City C. For simplicity, also assume that the only possible relevant difference among the cities from Developer's standpoint is the amount of economic benefit in subsidies each city is willing to offer. The leaders of City A know that the leaders of Cities B and C also greatly want to attract the development and might even value it more than they do (that is, enough to warrant $200,000 in political costs). In fact, the leaders of Cities B and C would absorb political costs of $180,000 in order to attract the new development.

In this highly competitive market, City A leaders would feel they need to bid their absolute maximum, which means a bid consisting of subsidies with political costs equivalent to $200,000. Because City A 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 for the development, they would offer an eminent domain subsidy valued at $100,000 by the developer (political cost $20,000) plus infrastructure valued at $100,000 by the developer (political cost $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 A leaders can thus provide the developer $280,000 in economic benefit. If the eminent domain subsidy has equal political costs and economic value for each of the cities, and given that leaders of Cities B and C are unwilling to absorb as great political costs to attract development as the leaders of City A, Cities B and C will not be able to put together a subsidy package with as much economic value to Developer as the City A package. If Developer is willing to go forward with development with $280,000 in economic value from subsidies, then Developer will accept City A's bid.[50]

Once eminent domain is outlawed, leaders in City A will still be willing to offer subsidies with political costs equivalent to $200,000, but now those political costs will translate into less expected economic benefit for the developer. Whether the leaders of City A now offer infrastructure with political costs equivalent to $200,000, or tax relief with political costs equivalent to $200,000, or some mix of tax relief and infrastructure that have political costs equivalent of $200,000, Developer's expected economic benefit would be $200,000. The leaders of City B and C presumably will be able to put together a package with economic value to Developer of only $180,000 because they too no longer can use eminent domain and are willing to absorb not more than $180,000 in political costs to attract the development.

If Developer requires a subsidy with economic value of more than $200,000 to proceed with development, Developer will reject City A's post-eminent-domain-reform bid, as well as City B's and city C's bids. As a result of the abolition of eminent domain, Developer simply will not build the contemplated project in the relevant marketplace of competing localities.[51] Figures 5 and 6 below illustrate how eminent domain reform changes the value of the bid of City A, as well as those of Cities B and C, such that City A would win the development if Developer requires $280,000 in economic value before the eminent domain reform, and none of the cities will win the development after the eminent domain reform.

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50. If we relaxed that assumption, then the highest-bidding city would not necessarily attract the development even before the abolition of eminent domain because lower-bidding cities might offer advantages that, in economic terms, more than make up for the fact that they are not offering the highest economic value from subsidies.

51. If we assume that the economics of development are different for the competing cities, yet both offer the same subsidies as mentioned, then it is possible a ban on eminent domain will result in a development shift. Therefore, rather than a ban cancelling development in the relevant marketplace, the development will shift from the city offering greater subsidies pre-ban to another city within the same competitive marketplace.

	Political Costs to Leaders (pre-reform)	Economic Value to Developer (pre-reform)	Political Cost and Economic Value (post-reform)
Eminent Domain	$20,000	$100,000	N/A
Tax Relief/Infrastructure	$180,000	$180,000	$200,000
Total	$200,000	$280,000	$200,000

Figure 5. City A's Bid

	Political Costs to Leaders (pre-reform)	Economic Value to Developer (pre-reform)	Political Cost and Economic Value to Developer (post-reform)
Eminent Domain	$20,000	$100,000	N/A
Tax Relief/Infrastructure	$160,000	$160,000	$180,000
Total	$180,000	$260,000	$180,000

Figure 6. City B or C's Bid

The analysis is 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 have bid their maximum. For example, in a non-competitive market, suppose that City A leaders would be willing to incur political costs equivalent to much more than $200,000—$280,000 in fact—to attract development. There are no other possible bidding cities in the relevant area, so the only question is how much must be bid to make the development worthwhile to Developer. In this environment, City A leaders may be convinced that they need only incur political costs equivalent to $200,000 in order to attract the development to the city, which (as the package would include the eminent domain subsidy) translates into $280,000 in economic benefit to Developer. They believe that $280,000 in economic benefit is enough to convince Developer to proceed, and they do not need to bid more to outbid a competitor.

After eminent domain is outlawed, City A leaders could make a bid that has the same economic value to 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 Developer. And the city

leaders would make such a bid, if need be, because (as stated) 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 of $280,000 in tax relief or infrastructure spending. City A would therefore provide subsidies worth the same to Developer after eminent domain reform as before, and the reform itself would not affect his or her development decision: Developer would accept City A's bid.

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 Developer of the eminent domain subsidy. Consider the case where city leaders believe that attracting the development justifies incurring up to $250,000 in dollar-equivalent political costs, but also believe that Developer can be attracted with a subsidy package, including eminent domain, that has dollar-equivalent political costs of $200,000 but economic benefit for Developer of $280,000. Once eminent domain is banned, city leaders would be willing to offer Developer $250,000 in tax relief or infrastructure spending or some combination worth $250,000 to the developer. If Developer requires a total subsidy it values at $250,000 or less in order to proceed with development in the city, then Developer still would proceed with development, but if Developer requires a subsidy with an expected economic benefit of $260,000 or $270,000 or $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 for the full loss in economic 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. However, there is 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 by the abolition of eminent domain.

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 and across geographic areas perceive themselves to be in stiff competition with one another to attract

development, especially commercial development. In addition, these perceptions influence the dealings of officials with developers. Indeed, as one commentator summarizes the prevailing view, "The 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."[52]

3. Changes in the Cost of Subsidies

The preceding analysis assumed that the costs 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 cost of tax relief is reduced by eighty percent as a result of the elimination

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52. DOUGLAS J. WATSON, THE NEW CIVIL WAR: GOVERNMENT COMPETITION FOR ECONOMIC DEVELOPMENT 7 (1995); *see also* Ann O'M. Bowman, *Competition for Economic Development Among Southeastern Cities*, 23 URB. AFF. Q., 511, 511 (June 1988) ("[T]he interaction of federalism and capitalism makes the pursuit of economic development a competitive process."). For discussions of this competition in the legal academic literature, see also Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 J.L. & POL. 397, 409–11 (2005) (describing how interlocal competition for economic development hurts communities by focusing too much on the present, which "creates a disposable landscape . . . neglecting the value of the past, and mortgaging the interests of future generations"); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 21 (2000) (arguing that competition among localities for industrial and commercial taxpayers can have negative effects on residents of other areas who are unable to participate in the local decision-making process); Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 477 (2005) ("Fragmentation causes sprawl when intermunicipal competition leads local governments to adopt policies that encourage development on the urban fringe."); Little, *supra* note 46, at 850 (observing that the degree of this competition amounts to "self-destructive bidding wars"). 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 states have adopted statutes requiring disclosure regarding at least intrastate business relocation subsidies. *See* Greg LeRoy, Development Subsidies and Labor Unions Belong in the Sprawl Debate 4 (2000) (published working paper, available for download from Lincoln Inst. of Land Policy), http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=629 (listing two states that have enacted comprehensive disclosure laws). One of these states—Minnesota—has recently adopted a restrictive law regarding eminent domain; therefore Minnesota may be the most promising state in which to attempt to assess the effect of restricting eminent domain on other subsidies.

of eminent domain, so that City A leaders can provide 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 Developer a package it valued at $280,000, at a dollar equivalent political cost of $200,000, by combining tax relief Developer values at $100,000 (political cost $20,000) with infrastructure spending Developer values at $180,000 (political cost $180,000). Because the city leaders could offer 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 the development decisions.

An important question therefore is whether the cost of non-eminent domain subsidies would 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 closing the library 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 so uncertain 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 as the main development device only 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 to determine 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 are unoccupied or rented at lower prices than expected, the commercial retail space cannot be leased and remains vacant, or, at an extreme, the new buildings are just boarded up.[53] 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.[54] Still other times, the claim is that even

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53. *See, e.g.*, Brief of the American Farm Bureau Federation et al. as Amici Curiae Supporting Petitioners at 20, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2787138, at *20 (using eminent domain has left a "littered landscape" of "destroyed" or "locked up" buildings).

54. *See, e.g.*, Brief of Jacobs in Support of Petitioners, *supra* note 26, at 7–8.

> [T]he promised economic benefits of condemnations often fail to materialize, and are outweighed by the massive costs. Not only did the new GM plant [at issue in 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.

Id.; *see also* Brief of the Better Government Association et al. as Amici Curiae Supporting Petitioners at 12, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787142, at *12 ("[T]he corporation or developer given the property for its private profit often fails to deliver on its promises."); CASTLE COALITION, *supra* note 12, at 1, 4–5, 7–8, 10, 14–15 (detailing twenty examples of prominent, private development failures involving eminent domain takings); Nicole Gelinas, *"They're Taking Away Your Property for What?"*, 15 CITY J. 54, 59 (2005) ("[N]early a dozen economists have studied stadium projects across the country for decades and have found that they almost always fail to deliver their promised benefits.").

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."[55]

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 they do not establish that these projects are typical of projects in which eminent domain was employed.[56] 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 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 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.[57] But they argue that strategic hold outs are a minimal problem, and that eminent

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55. *See* Brief of Amici Curiae National Association for the Advancement of Colored People et al. Supporting Petitioners at 7, *Kelo*, 545 U.S. 469 (No. 04-108) 2004 WL 2811057, at *7 (noting that condemnations "disproportionately . . . harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly"); Brief of Jacobs in Support of Petitioners, *supra* note 26, at 11–12 (explaining how condemnations of poor neighborhoods leads to gentrification, hurts the interests of the poor, and primarily benefits affluent corporate and developer interests); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003) (explaining how critics of urban renewal showed 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").

56. *See generally* CASTLE COALITION, *supra* note 12, at 1 (detailing twenty failed projects involving eminent domain).

57. Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 12, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802972, at *12 [hereinafter Brief of Cato in Support of Petitioners].

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 are ready for large-scale development.[58] 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 the property owners' entitlement to bargain for some of the 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 under-priced, and hence an inefficiently great amount of societal resources are devoted to land-assembly-based development.[59]

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 holdout problem in land assembly and, hence, we have no way of knowing the strength of the holdout, the market-imperfection rationale for eminent domain. After all, even the reform proponents accept the proposition that strategic holdouts can lead to inefficiencies in the land market.[60]

Second, to the extent land markets 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 can be understood, thus, as (1) offsetting or cancelling these other governmental sources of distortion and (2) operating as a means of achieving a market free of net government distortion. In other words, it brings about an efficient free market.

What are the possible governmental sources of distortion favoring

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58. *Id.* at 20–25 (arguing that compensation for takings should be increased to reflect the subjective value owners place on their homes and the increased value their property will have once it becomes part of a development).

59. BRNOVICH, *supra* note 4, at 13.

60. Brief of Cato in Support of Petitioners, *supra* note 57, at *20 (acknowledging that holdout problems "are inherit in all projects of this sort").

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.[61] Second, federal tax law in effect subsidizes home ownership, including the ownership of land attached to houses themselves. 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.[62] Third, federal and other gas taxes do not capture the full social

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61. *See* JOHN J. HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS 28–29 (2d ed. 1997) (explaining the link between the interstate highway system and population movement); JANE HOLTZ KAY, ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA, AND HOW WE CAN TAKE IT BACK 271–73 (1997) (describing how new road construction led to sprawl); SURFACE TRANSPORTATION POLICY PROJECT, GETTING A FAIR SHARE: AN ANALYSIS OF FEDERAL TRANSPORTATION SPENDING 6 (1996) (finding that non-urbanized areas received $115.11 per capita of federal transportation funds in 1995, compared with $54.25 per capita for the urban core); G. SCOTT THOMAS, THE UNITED STATES OF SUBURBIA: HOW THE SUBURBS TOOK CONTROL OF AMERICA AND WHAT THEY PLAN TO DO WITH IT 38 (1998) (explaining that the Interstate Highway Act was "the final ingredient required for the suburbanization of America"); *see also* Robert P. Inman, *How To Have a Fiscal Crisis: Lessons from Philadelphia*, 85 AM. ECON. REV. 378, 380 (1995) (finding that for every dollar of state aid received by the average Pennsylvanian, a resident of Philadelphia received only 61 cents). *But see* TED BALAKER & SAM STALEY, THE ROAD MORE TRAVELED: WHY THE CONGESTION CRISIS MATTERS MORE THAN YOU THINK AND WHAT WE CAN DO ABOUT IT 5 (2006) (arguing that motor vehicle use and demand has increased far more than highway capacity); MARCY BURCHFIELD ET AL., CAUSES OF SPRAWL: A PORTRAIT FROM SPACE 1–2 (2005), *available at* http://diegopuga.org/papers/sprawl.pdf. (finding that the extent of sprawl remained unchanged from 1976 to 1992).

62. *See* Paul Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 184–85 (2000). "One of the most commonly cited 'incentives' to sprawl is the government's subsidy of home ownership through the mortgage interest and property tax deductions. Through these deductions, along with support of the mortgage markets, government actively encourages single-family houses and the exchange of small houses for large ones." *Id.*; *see also* Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 345, 355 (1997) ("Everything from support for home mortgages; single family mortgages insurable in a government-backed securities market; accelerated depreciation; five-year amortization; and deductibility of 'passive' real estate losses, represent federal tax policies that have served as a subsidy to sprawl."); Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 648 (2004) ("[E]conomists generally agree that the home mortgage interest deduction has created a false market signal for home buyers, encouraging them to over-invest in housing, and artificially inflating the price of homes."); *cf.* SIERRA CLUB, SPRAWL COSTS US ALL: HOW YOUR TAXES FUEL SUBURBAN SPRAWL (2000), *available at* http://www.sierraclub.org/sprawl/report00/sprawl.pdf (explaining the various state and federal policies and programs that lead to sprawl); Daniel J. Hutch, *The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Development Framework*, 20 YALE L. & POL'Y REV. 353, 359 (2002) (explaining how $60 billion in federal wastewater subsidies "influence[d] private real-estate markets toward ex-urban development").

costs associated with gasoline use, and this (arguably) artificially low amount of gasoline taxation favors areas in which automobiles are used most often for the longest drives, the outer suburbs and the exurbs.[63] Fourth, 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.[64] 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,[65] there are grounds for believing what Sheryll Cashin calls "the favored quarter"—the largely white, fast-growing outer suburb or exurb—"is not a pure market phenomenon."[66]

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63. *See* ROBERT W. BURCHELL ET AL., SPRAWL COSTS: ECONOMIC IMPACTS OF UNCHECKED DEVELOPMENT 92 (2005) (calculating the total costs of driving to society at 0.473 cents per mile); IAN W. H. PARRY & KENNETH A. SMALL, RESOURCES FOR THE FUTURE, DOES BRITAIN OR THE UNITED STATES HAVE THE RIGHT GASOLINE TAX? 30 (2002), http://www.rff.org/documents/RFF-DP-02-12.pdf (explaining that the optimal U.S. gasoline tax would be double its current rate); NEAL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 28 (1993) (explaining that the "environmental costs" of automobile-driven suburban development are "serious air pollution" and "loss of greenbelts and open spaces"); Donald O. Mayer, *Corporate Governance in the Cause of Peace: An Environmental Perspective*, 35 VAND. J. TRANSNAT'L L. 585, 628 n.232 (2002) (explaining that the gas tax covers only 60 percent of U.S. road costs); Babak A. Rastgoufard, *Too Much Smoke and Not Enough Mirrors: The Case Against Cigarette Excise Taxes and for Gasoline Taxes*, 36 URB. LAW. 411, 440 (2004) ("[B]y 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 . . . .").

64. *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).

65. *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. . . .
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> . . . [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.

Id.

66. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2005 (2000); *see also* MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 5 (1997) (observing that the favored quarter "dominates regional economic growth and garners a disproportionate share of the region's new roads and other developmental infrastructure"); Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733, 741 (1997).

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 in favor of exurban development. 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 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. 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 choice theory—which reform advocates invoke[67]—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).[68]

> [B]y allowing wealth to accumulate in the hands of a few prosperous suburbs, local government law leaves both large cities and poor suburbs with inadequate tax bases from which to raise revenues and simultaneously relieves wealthy suburbs of a financial burden by enabling them to exclude the poor from their jurisdictions.

Id.

67. *See, e.g.*, Brief of James M. Buchanan et al. as Amicus Curiae Supporting Petitioners at 8–10, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 1882158, at *8–10 (arguing that *Berman*, *Midkiff*, and other precedents broadly interpreting the "Public Use" doctrine should be overruled in order to curb rent seeking); *see also* Kelly, *supra* note 22, at 34.

> 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.

Id.

68. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 162–67 (1971) (discussing the "ideologically oriented behavior" of political

CONCLUSION: IMPLICATIONS

As the preceding analysis shows, the eminent domain reforms that states have adopted or 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 in urban areas as a result of the reforms that are part of current political discourse. Given that, it would seem reasonable to ask whether there is 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 which *Kelo* reaffirmed as the federal constitutional law approach, does nothing to select for only specific types of development based on any reasonably coherent normative criteria.[69] 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.[70]

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 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.[71]

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parties). *See generally* FARBER & FRICKEY, *supra* note 46, at 12–37 (discussing interest groups in relation to the economic theory of legislation and the effects on the political process).

69. *See* Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (arguing that the majority's decision destroys the distinction between public and private use within the meaning of the Constitution).

70. *See id.* at 501 (noting that *Kelo* greatly expands the meaning of public use).

71. *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 365 (2007) (noting that while some states have redefined "blight" to accentuate the link between blight and poverty, the definition of "blight" remains vague); Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM

It is true that some of the states that have recently limited condemnations to blight removal condemnations have also tightened the statutory criteria for blight.[72] 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 site at the time of the condemnation. 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 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 themselves. 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."[73] 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

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URB. L.J. 305, 305–15 (2004) (discussing the history of "blight" and the vagueness of its definition); 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.

Id.; *see also* Somin, *supra* note 22, at 1034–39 (describing "creative" and "abusive" examples of blight designation for condemnation).

72. 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. 2750, 84th. Leg., Reg. Sess. (Minn. 2006) (mandating that when taking blighted property, condemning authorities "must not take buildings that are not structurally substandard"); H.R. 657, 2005 Leg., Reg. Sess. (Wis. 2005) ("Property that includes one or more dwelling units is not blighted property unless . . . [it] has been abandoned. . . . [or it has a] crime rate in, on, or adjacent to the property [] higher than in the remainder of the municipality . . . .").

73. Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner-City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE, 753, 759 (1997).

dropouts, and welfare dependency on the other."[74] 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 (rather than blight removal) condemnations. What is important is that we focus instead on what kinds of development and what kinds of communities we, as a society, as state and national polities,[75] believe will best advance the public welfare. The debate over eminent domain reform—and in turn the law of eminent domain—needs to be reframed.

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74. *Id.*; *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 170 (1993) ("By concentrating poverty, segregation simultaneously concentrates male joblessness, teenage motherhood, single parenthood, alcoholism, and drug abuse, thus creating an entirely black social world in which these oppositional states are normative."); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 61 (1987) (explaining the effects of "social isolation"); Rod K. Brunson & Jody Miller, *Young Black Men and Urban Policing in the United States*, 46 BRIT. J. CRIMINOLOGY 613, 619 (2006) (explaining that poverty leads to social isolation and high crime rates); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1201 (2004) ("The *social effects* of suburban sprawl include concentration of urban core poverty, closed opportunity, limited mobility, economic disinvestment, social isolation, and urban/suburban disparities that closely mirror racial inequities."); John A. Powell, *Sprawl, Fragmentation and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space*, *in* URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES 73, 92 (Gregory Squires ed., 2002) (explaining that gentrification of dilapidated neighborhoods does not eliminate concentrated poverty, but rather reconfigures concentrated poverty by moving it to another location); Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1101 (2005) ("Several major studies of post-war skid rows all presented the same picture of dire conditions—extreme poverty, disability, alcoholism, mental illness, and social isolation."); Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 883 (2006) (arguing that concentrated poverty and isolation limits employment opportunities and correlates with high crimes rates, poor health care, and educational difficulties).

75. 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 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.