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# A Common Tragedy: Condemnation and the Anticommons

## ABSTRACT

*Economic development of land may be suboptimal where multiple parties have the legal right to exclude use of the property in question. Michael Heller labeled this phenomenon the “anticommons.” Some argue that condemnation of private property for economic development is a potentially efficiency-enhancing solution to the anticommons problem. Until recently, this argument was largely academic; however, with the recent U.S. Supreme Court decision in *Kelo v. City of New London*, condemnation for economic development is now a valid policy choice. In this article, I argue that the economic models used to justify condemnation are fundamentally flawed, and that the use of condemnation for economic development encroaches upon autonomy interests without guaranteeing the promotion of efficiency interests.*

## INTRODUCTION

Federal, state, and local government bodies have used the Takings Clause of the Fifth Amendment to justify the acquisition of land for a growing list of public uses. Most recently, in *Kelo v. City of New London*, the city of New London, Connecticut, succeeded in convincing the Supreme Court to recognize the validity of a taking made solely for the promotion of economic development, without a reasonable certainty of public benefit.<sup>1</sup> In *Kelo*, the city claimed for development a 90-acre section of waterfront consisting of 115 individual parcels.<sup>2</sup> It is presumed that without condemnation a project of this size in an already-developed city would not be possible because holdout problems and other transaction costs are likely to lead to what Michael Heller has termed the “tragedy of the anticommons.”<sup>3</sup>

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1. *Kelo v. City of New London*, 125 S. Ct. 2655, 2666 (2005).

2. *Id.* at 2659.

3. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

Heller posits that a “tragedy” occurs because too many people have rights of exclusion over the use of a specified piece of property.<sup>4</sup> He views the difficulty involved in coordinating the actions of the multiple owners to reintegrate the property as a prohibitively high transaction cost.<sup>5</sup> Oftentimes, the result is that the costs of coordination exceed the gains from unified action, leading to a failure to implement potential welfare-enhancing improvements.<sup>6</sup> The *Kelo* decision opens up new opportunities for cities wishing to use condemnation as a means for overcoming the anticommons problem. At the same time, because the Court greatly expanded the state’s power to take private property, the wisdom of doing so deserves increased scrutiny at the policy level.

I begin this article by examining the nature of anticommons problems. Next, I critique the current economic treatment of condemnation as being overly simplistic and, as a result, biased against legitimate idiosyncratic value. I conclude by examining the desirability of alternative mechanisms designed to mitigate or eliminate anticommons problems.

## I. THE NATURE OF ANTICOMMONS PROBLEMS

The anticommons problem is a simple concept with a number of complicating variations. In this section, I examine the nature of anticommons problems. First, I describe how legal and economic theorists have studied the anticommons. Next, I explain that the basis of all theories regarding the anticommons is the disintegration of property. Finally, I examine the types of anticommons, including a discussion of both spatial and legal anticommons.

### A. Defined and Studied

The anticommons is defined simply as the inefficient use of a specified piece of property that arises when multiple parties have the right to exclude all others from using that property, either in part or in whole. In a sense, the anticommons is the mirror image of the commons, which occurs when multiple owners have an unlimited right to use a limited resource.<sup>7</sup>

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4. *Id.* at 668, 676.

5. *See id.* at 673–74.

6. *See id.* at 669.

7. For a discussion of the symmetry between the tragedy of the commons and the tragedy of the anticommons, see James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 3–4 (2000). *See also* Francesco Parisi et al., *Duality in Property: Commons and Anticommons* 1–2 (George Mason Univ. Sch. of Law, Working Paper No. 00-32, 2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=224844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=224844) [hereinafter Parisi et al., *Duality*].

Whereas a commons typically results in the overutilization of the shared resource, an anticommons generally results in the underutilization of the shared resource.

Anticommons can be manifested in a number of ways. Heller largely focuses on legal anticommons, defined as any instance in which multiple parties have the legal right to exclude others from using any portion of a piece of property.<sup>8</sup> Heller also recognizes spatial anticommons, which occur when the physical subdivision of a piece of property reduces the aggregate value of the property. As an extreme example, Heller describes how Quaker Oats gave away twenty-one million one square inch parcels of land in cereal boxes, rendering the land useless (until failure to pay taxes led to the reversion of the land to the Canadian government).<sup>9</sup> In both cases, an anticommons tragedy will occur if either the transaction costs of assembling all of the rights/parcels exceed the expected increase in value from doing so, or there are holdouts seeking to extract some or all of the rents to be gained from the integration of the property.

The concept of the anticommons has quickly gained a foothold within the economic community since Heller published *The Tragedy of the Anticommons* in 1998. Nobel Laureate James Buchanan introduced the first formal economic model of the anticommons in 2000.<sup>10</sup> As a result, the concept of the anticommons is currently gaining ground among economists as well as legal theorists.

Two economic models of the anticommons have recently emerged. James Buchanan and Yong J. Yoon have utilized a simple profit maximization function in which third parties must pay two or more co-owners for the use of a piece of property.<sup>11</sup> Because each co-owner sets a price to maximize profits (and one assumes that the co-owners cannot independently coordinate their actions), the resulting aggregate price for entry is inefficiently high, and the property is underutilized.<sup>12</sup>

Alternatively, Francesco Parisi, Norbert Schultz, and Ben Depoorter have modeled the anticommons by supposing that two owners of distinct pieces of land choose the extent to which they will devote their land to a joint project.<sup>13</sup> Because neither party fully internalizes the marginal value of their contribution, the parties will contribute land at an inefficiently low rate, thus rendering the size of the resulting project suboptimal.<sup>14</sup>

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8. See Heller, *supra* note 3, at 656.

9. See *id.* at 682-84.

10. See Buchanan & Yoon, *supra* note 7, at 5-10.

11. *Id.* at 8-10.

12. *Id.* at 10.

13. Francesco Parisi et al., *Simultaneous and Sequential Anticommons*, 17 EUR. J.L. & ECON. 175, 178 (2004).

14. *Id.* at 179-80.

Of course, the inefficiencies caused by anticommons are not new. Thomas Grey and Thomas Merrill discussed the problems associated with the physical and legal disintegration of property long before Heller popularized the term "anticommons."<sup>15</sup> Similarly, Hernando de Soto has built a career out of exposing the inefficiencies caused by the exclusionary rights of overlapping bureaucracies in Latin America.<sup>16</sup> As Buchanan notes, what is useful about analyzing these phenomena as "anticommons" is that "the anticommons construction offers an analytical means of isolating a central feature of sometimes disparate institutional structures."<sup>17</sup>

## **B. The Basis for the Anticommons Problem: The Disintegration of Property**

Anticommons problems result from the inefficient division of property among multiple persons. Any search for a solution to such a problem must also identify the cause of the problem. While commentators agree that disintegration of property has increased over time, there is some disagreement over the cause of such disintegration and whether it is inevitable in a capitalist economy.

Thomas Grey claims that the disintegration of property accompanying industrialization has transformed property from a concept best described as "thing-ownership" into something best described as a "bundle of rights."<sup>18</sup> Grey suggests that the disintegration of property is "internal to the development of capitalism itself."<sup>19</sup> Similarly, Francesco Parisi argues that property is subject to a fundamental law of entropy that

15. See Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69, 74-79 (J. Roland Pennock & John W. Chapman eds., 1980) (discussing the effect of industrialization on the disintegration of property); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74 (1986) (proposing that an economic model be used to determine when the use of eminent domain is an appropriate means to aggregate disintegrated properties).

16. See HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* xviii-xix (Basic Books 2002) (1989) (discussing, inter alia, how bureaucratic hurdles involving both legitimate and corrupt exactions kept most persons from operating a legitimate business in Peru).

17. Buchanan & Yoon, *supra* note 7, at 12.

18. Grey, *supra* note 15, at 69, 73. Steven J. Eagle notes that both of these definitions are ripe for criticism and posits that property interests are most accurately described as those rights that "are 'created' and 'defined' by 'existing rules or understandings that stem from an independent source such as state law....'" STEVEN J. EAGLE, *REGULATORY TAKINGS* 80 (2nd ed. 2001) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Despite valid philosophical arguments against the general use of a bundle of sticks approach to property rights, in this article, where necessary, I employ such an approach because it best illustrates the issues involved in anticommons problems.

19. Grey, *supra* note 15, at 74.

leads to the increased fragmentation of property.<sup>20</sup> Parisi's account, however, largely implicates the legal system facing market participants, rather than the market itself.<sup>21</sup> In both accounts, modern industrial economies will likely see an increased disintegration in property over time because economic gains exist from the subdivision of property along both legal and spatial lines.<sup>22</sup> At the same time, these properties are unlikely to be reintegrated even under optimal economic conditions because there are significant transaction costs and strategic costs associated with reintegration of property that do not exist with respect to the fragmentation of property.<sup>23</sup> For example, while a single person can decide to subdivide and sell off parcels from her own property, the reintegration of that property requires the consent of all the new owners of the subdivided property. The mere fact that multiple persons are involved in making a joint decision guarantees that there will be some increased transaction costs in making the decision. Additionally, obtaining consent involves overcoming the desire of each party to maximize their share of the increased rents expected from reunification of the property. This is the much-studied holdout problem upon which proponents of condemnation for economic development have fixated.<sup>24</sup>

While there is undoubtedly some truth to the disintegration and entropy theories, Parisi has been careful to note that the legal system can, and often does, include mechanisms to facilitate reunification without condemnation.<sup>25</sup> In the next section, I examine the types of anticommons that are likely to develop. I also discuss how the common law acts to mitigate the harms from naturally occurring anticommons, but not government imposed anticommons.

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20. Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 595 (2002) [hereinafter Parisi, *Entropy*].

21. See *id.* at 596. Parisi also examines the historical roots of legal rules that allow a single parcel of land to be fragmented. *Id.* at 596–613. He observes that, over time, Western legal systems have shifted back and forth between legal regimes that treat real property as a unified whole and those that allow for fragmentation of ownership rights. *Id.* The most recent period during which a legal regime accepted horizontal fragmentation began early in the twentieth century. See *id.* at 608.

22. Parisi, *Entropy*, *supra* note 20, at 627. See also Grey, *supra* note 15, at 74–76.

23. See Parisi, *Entropy*, *supra* note 20, at 595–96.

24. See, e.g., Merrill, *supra* note 15, at 80.

25. Parisi, *Entropy*, *supra* note 20, at 613–21. Parisi describes reunification mechanisms in the law as providing a “gravitational force” that acts to reintegrate fragmented property. *Id.* at 613–14.

### C. Types of Anticommons: Spatial and Legal

Before one can adequately explore solutions to the anticommons problem, it is important to look below the surface to determine the true nature of any anticommons problem that may exist. Accordingly, it is first necessary to identify the forms that the disintegration of property might take. Heller groups anticommons property as being property that is either spatially or legally disintegrated.<sup>26</sup> Legal anticommons can be further classified as those caused by ownership disintegration, temporal disintegration, or regulatory disintegration.

#### 1. Spatial Anticommons

Spatial anticommons involve the familiar case of land that has been physically subdivided to an extent greater than economic efficiency would dictate.<sup>27</sup> Inefficiency persists in these cases because the cost of consolidating the exclusionary rights of each individual owner of a parcel of land is greater than the increased rents the unification of the parcels is expected to generate.

In most cases in which an anticommons problem has developed, the contemporary decision to subdivide was an ex ante efficiency-enhancing decision given the alternative discounted streams of rents expected under unified and fragmented property regimes.<sup>28</sup> Only later do the conditions in the community change in such a way as to affect the calculus of efficiency.<sup>29</sup> Richard Epstein suggests that the initial decision to divide a parcel incorporates both the probability that the future fragmented property interests will not be reunified and the resulting potential losses of value from the anticipated anticommons.<sup>30</sup> Consequently, less fragmentation of property occurs ex ante than would otherwise occur. Nevertheless, Parisi reasons that there is likely to be more ex post fragmentation than is socially optimal because the anticommons problem makes it more difficult to remedy a mistaken ex ante decision to subdivide

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26. See Heller, *supra* note 3, at 651, 656.

27. See generally Heller, *supra* note 3, at 685-87 (describing the difficulties that the federal government encountered in solving the spatial anticommons problem when it converted communal Native American reservations into privately held lands with limited alienability).

28. Parisi, *Entropy*, *supra* note 20, at 627.

29. *Id.*

30. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1364-68 (1982) (arguing that, given a legal framework offering the right incentives, sellers of servitudes will structure contracts to take into account future uses of the property, the possibility of changed conditions, and the expected transaction costs involved in reintegrating the property).

than to remedy a mistaken *ex ante* decision to keep a parcel intact.<sup>31</sup> Of course, the expected level of inefficient fragmentation from this process is unlikely to be as high as Parisi suggests if the original seller is a rational actor who factors the possibility of mistake into their calculations.

Spatial anticommons can exist by design. For example, conservation-minded local mountain-hiking clubs in Austria have purchased large pieces of land, divided these large pieces into parcels that are too small for economic development, and redistributed these smaller parcels to their members.<sup>32</sup> In this case, the Austrian clubs purposely created an anticommons as a commitment mechanism to prevent future club leaders from selling the land to developers.<sup>33</sup> Whether this is a normatively good strategy is open to question. However, at least two commentators advocate the deliberate creation of anticommons as an effective strategy to combat a perceived anti-conservation bias that exists among government planners.<sup>34</sup>

Finally, as I alluded to above, some spatial anticommons may be the result of mistake. It may be that a party created an anticommons based on misperceptions or perverse incentives where *ex ante* efficiency criteria would have dictated an alternative course of action. Heller presents the example of *komunalka* apartments in the former Soviet Union.<sup>35</sup> Designers originally intended that these apartments accommodate multiple families, each of which had exclusive rights to their bedrooms, but communal rights to kitchens, bathrooms, and living areas.<sup>36</sup> Under the Soviet system, the efficiency of land use decisions was not a prime concern of the state. After the fall of the Soviet Union, however, the price system became an important determinant of resource allocation. It became more profitable to sell *komunalka* apartments as a whole rather than to sell one's share in the unit.<sup>37</sup> Nevertheless, despite the presence of a well-defined anticommons problem (each family could refuse to sell, thus negating the complementarities from unification), the families reached an agreement and sold off the unified properties at the higher price.<sup>38</sup> Heller concludes that, because spatial

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31. Parisi et al., *Duality*, *supra* note 7, at 13. Parisi notes that, given a normal distribution of errors in decisions to subdivide, the effect will be a cumulative increase in fragmented property. *Id.* This occurs because an erroneous decision to keep a parcel unified is easily correctible, while an erroneous decision to subdivide is subject to the anticommons problem. *Id.*

32. *Id.* at 19–20.

33. *Id.*

34. See Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 39 (2003) (suggesting “the name ‘conservation commons’ for commons whose most efficient use is nonuse”).

35. Heller, *supra* note 3, at 650–58.

36. *Id.* at 650–51.

37. *Id.* at 651–52.

38. See *id.* at 654.



boundaries are well defined, spatial anticommons may be easier to overcome than are legal anticommons problems, where the division of rights is less certain.<sup>39</sup>

## 2. *Legal Anticommons*

The disintegration of property typically brings to mind the concept of spatial anticommons. Legal anticommons, however, are perhaps more important as an impediment to development, even where the issue has been framed as a spatial anticommons problem. Legal anticommons emerge when the legal rights to a particular parcel have been distributed among too many parties.<sup>40</sup> In essence, the ownership of the bundle of rights that gives individuals use of a piece of property becomes so fragmented that the value of the property to its principal owner is severely diminished, perhaps to the point of rendering the property valueless. What makes these forms of disintegration particularly pernicious is the tendency for these rights to be uncertain or poorly defined. Consequently, a developer hoping to acquire land for a large project may acquire title to multiple properties, but still be uncertain whether the rights she purchased include the right to develop the project. The extent to which legal disintegration hampers use of property depends on whether one further characterizes the resulting legal disintegration as ownership, temporal, or regulatory.

### a. *Ownership Disintegration*

Ownership disintegration can occur when more than one person holds the title to a piece of land.<sup>41</sup> For example, ownership disintegration may arise when a parent conveys an estate to several of his or her children in a will. If the children disagree about how their joint property is to be used, an anticommons may develop. Fortunately, the common law handles this prospect well. Courts have the ability to resolve these disputes by either selling off the estate as a whole or subdividing the estate into pro rata shares.<sup>42</sup> The latitude given to courts in these cases allows for a balancing of autonomy interests, which are advanced by keeping land within the family, and efficiency interests, which may dictate the preservation of the

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39. *Id.* at 656.

40. *Id.*

41. *See id.* at 635-40 (discussing how Moscow storefronts emptied after the fall of the Soviet Union because multiple persons and organizations had ownership interests with rights of exclusion).

42. *See, e.g.,* *Delfino v. Vealencis*, 436 A.2d 27, 30 (Conn. 1980) (holding that courts prefer partition in kind, but a court will order partition by sale if it is in the best interests of the parties); *Johnson v. Hendrickson*, 24 N.W.2d 914, 916 (S.D. 1946) (holding that a court will order a partition sale when the "value of the share of each cotenant, in case of partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole").

estate in its unified form. Furthermore, the uncertainty inherently attached to a court resolution limits each party's expected gain from being a holdout, thereby increasing the co-owners' incentive to come to a voluntary private agreement.

Ownership disintegration may also occur when property owners voluntarily or involuntarily convey limited rights for others to use or preclude use of their property. For example, the creation of an easement across an individual's land by express grant, reservation, prescription, or implication not only gives the easement holder the right to use part of the individual's land, it also implicitly gives the holder the right to block development that terminates the easement.<sup>43</sup> To mitigate the potential anticommons problems that may develop from this situation, the *Restatement of Property* allows for the relocation of an easement to allow for development of the servient estate if the change in the easement does not unreasonably interfere with the use of the easement holder.<sup>44</sup> In addition, courts may terminate easements upon abandonment of the easement or discontinuation of the original purpose of the easement.<sup>45</sup> Richard Epstein has argued that, even in the absence of these common law unification mechanisms, most parties will efficiently convey servitudes because those parties will incorporate future considerations into the servitude's original sales contract.<sup>46</sup>

Another form of ownership disintegration occurs when the law gives an individual rights over her neighbors. For example, if an outdoor music pavilion is built in a residential neighborhood, the residents of the neighborhood may have the right to sue under nuisance law for an

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43. See, e.g., *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 988 (Cal. 1972) (holding that an easement may be created either by express grant or by reservation of the easement at the time the servient property is sold); *Van Sandt v. Royster*, 83 P.2d 698, 702-03 (Kan. 1938) (finding an easement by implication where the easement affecting the dominant estate was "apparent" even if not "visible"); *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646, 652 (Pa. 1938) (discussing the assignability of a validly granted easement); *Crnty. Feed Store v. Ne. Culvert Corp.*, 559 A.2d 1068, 1070 (Vt. 1989) (noting that an easement by prescription is created by "an adverse use or possession which is open, notorious, hostile and continuous..., and acquiescence in the use or possession by the person against whom the claim is asserted").

44. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000); see also *Huggins v. Wright*, 774 So. 2d 408, 411-12 (Miss. 2000) (stating that a servient owner has the right to relocate an easement by necessity); *Lewis v. Young*, 705 N.E.2d 649, 661-62 (N.Y. 1998) (following the RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (Tentative Draft No. 4, 1994)).

45. See, e.g., *Presault v. United States*, 100 F.3d 1525, 1545-46 (Fed. Cir. 1996) (finding, on the facts of the case, that the discontinued use of an easement for over ten years constituted abandonment of the easement); *Hopkins the Florist, Inc. v. Fleming*, 26 A.2d 96, 98-99 (Vt. 1942) (terminating an easement that gave a dominant estate a view from its windows when the dominant estate's structure was replaced with one without windows facing the easement).

46. Epstein, *supra* note 30, at 1364-68.

injunction or damages if the volume of the music is unreasonable.<sup>47</sup> To the extent that an injunction is a possibility, the resulting anticommons problem may prevent the construction of an efficiency-enhancing music pavilion. However, a court could remedy this problem if it allowed for a damages remedy in those cases in which economic development is efficiency enhancing.<sup>48</sup> Also, courts define nuisances, in part, based on whether or not the activity at issue is efficiency enhancing.<sup>49</sup> As a result, nuisance law is unlikely to be a significant source of anticommons problems.

*b. Temporal Disintegration*

Property may also be subject to temporal disintegration. O may convey Blackacre to A for life and give the remainder to B. In this case, the decision to sell Blackacre in fee simple would require that both A and B agree to the sale if it occurs during A's lifetime.<sup>50</sup> The problem is compounded when the remainder of a life estate is given to an individual not yet born. For example, O can convey a piece of property to A for life with the remainder going to A's children alive at A's death. Because "A's children alive at A's death" cannot be defined until A dies, there is no way to agree to a substantive change in the property until A dies. In this event, the authority to agree to an efficiency-enhancing sale of the property will not exist until A dies. Note, however, that the Rule Against Perpetuities at least somewhat limits the extent to which temporal disintegration may occur.<sup>51</sup> In any event, these types of arrangements are rare enough that temporally disintegrated property is unlikely to halt most major projects.

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47. See, e.g., *Rose v. Chaikin*, 453 A.2d 1378, 1381-82 (N.J. Super. Ct. Ch. Div. 1982) (holding that noise alone can constitute a nuisance).

48. Although injunction is still the preferred remedy in nuisance suits, courts will sometimes use damages when an injunction will lead to significant economic losses. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 874-75 (N.Y. 1970) (holding that damages are available when the economic losses from an injunction are substantial).

49. The *Restatement (Second) of Torts* states that an intentional invasion is only unreasonable if "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." *RESTATEMENT (SECOND) OF TORTS* § 826 (1979). See *Rose*, 453 A.2d at 1383 (enjoining the use of a personal windmill because the social utility of the windmill did not outweigh the harm it created).

50. See, e.g., *Riley v. Norfleet*, 148 So. 777, 781 (Miss. 1933) (denying specific performance for the sale of a piece of property when the underage remaindermen were not in direct privity with the purchaser of the property).

51. For a discussion of the Rule Against Perpetuities, see *JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY*, 302-04 (5th ed. 2002) (describing how the Rule Against Perpetuities extinguishes interests that are created more than 21 years after the death of a life in being at the time the interest is created).

c. *Regulatory Disintegration*

The final form of disintegration that may produce an anticommons problem is regulatory disintegration. Government limitations on the development of a piece of property effectively give legal interests in that property to government agencies with the authority to block development of that property. The government's interests are defined, in part, by zoning laws, health and safety regulations, and environmental regulations.<sup>52</sup>

In a sense, the government's interests are much like any other interest in property that I have mentioned up to this point. Like the owner of an easement, the government has the right to exclude any development that encroaches upon its interest. The government may force a property owner that constructs a building exceeding municipal height limitations by nine feet to reduce the offending structure to meet existing standards.<sup>53</sup> Like the neighbors who must bargain for joint use of a given piece of property, the government may take exactions in exchange for ignoring technical violations of its property right.<sup>54</sup> The government may allow a property owner to build a house on a coastal highway that exceeds the dimensions authorized under environmental regulations, so long as the property owner, in exchange, provides amenities with a sufficient nexus that are roughly proportional to the property right given up by the government.<sup>55</sup>

Three key features of regulatory disintegration distinguish it from privately created forms of disintegration. First, those who enforce regulations have different motivations than most private individuals do. While private actors generally want to maximize the value of their assets to themselves, regulators often have mixed motives ranging from idealistic to political. As Heller notes, where the interests of rights holders diverge, reunification of fragmented property will be more difficult.<sup>56</sup> Second, within

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52. For example, "[h]ousing permits require the approval of several separate overlapping agencies." Buchanan & Yoon, *supra* note 7, at 11.

53. See *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1319-20 (Haw. 1998) (upholding a local administrative body's order to reduce the height of a Buddhist temple that exceeded zoning limitations by approximately seven feet and exceeded authorization given by building permits by nine feet).

54. See Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 3-4 (1991) (discussing how local governments leverage exactions from developers through "incentive zoning").

55. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (limiting extortionary exactions by requiring that there be an "essential nexus" between the exaction and the harm caused by the violation necessitating the exaction). See also *Dolan v. City of Tigard*, 512 U.S. 374, 388-91 (1994) (holding that an exaction under *Nollan* must exhibit "rough proportionality" to the harm the exaction is designed to offset).

56. See *Heller*, *supra* note 3, at 655.

a given community there is a defined set of regulations that a developer must satisfy before she can begin development. The developer cannot ignore a particularly intransigent regulator. Conversely, in dealing with private landowners, the developer can choose between different sites in the community, ultimately settling on a site where landowners are most amenable to the developer's plans. Finally, while undisclosed agents can assist in agreements between developers and private landowners,<sup>57</sup> sunshine laws<sup>58</sup> and due process<sup>59</sup> generally require that the government make public all applications for permits and zoning changes. As a result, a regulator that understands the rents that the unification of properties will create can demand rent-dissipating exactions from the developer, while a landowner confronted with an undisclosed agent will be likely to demand a value closer to their reservation value for the property. Together, these factors suggest that regulatory disintegration is a more serious problem than spatial disintegration in the development of anticommons.

## II. CONDEMNATION AS A SOLUTION TO THE ANTICOMMONS PROBLEM

Understanding the nature of anticommons is the first step toward finding a remedy for these problems. As a second step, it is important to understand how strategic action and difficulties in employing analytical techniques complicate the search for a solution to potential anticommons problems. In this section, I examine these issues. First, I consider the institutional barriers that developers face in trying to integrate disintegrated properties. Next, I warn against using artificial concepts of efficiency in formulating a response to the identified problems. Finally, I discuss how a purported solution that relies on condemnation through the invocation of eminent domain powers is, at best, a crude and inefficient solution to the anticommons problem.

### A. The Developer's Problem

A developer wishing to embark on a large project requiring the integration of multiple parcels of land must structure a strategy for development that both maximizes the chances for success and minimizes the costs. Because regulatory agencies typically approve development

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57. See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 1029-38 (2nd ed. 2000) (discussing how some states have enacted legislation requiring public agencies to carry out deliberations in meetings open to the public).

58. *Id.* at 414-15.

59. See *Hyson v. Montgomery County Council*, 217 A.2d 578, 586-87 (Md. 1966) (stating that "interested person[s]" have a right to take part in zoning or reclassification decisions).

projects over time in a public manner, developers cannot simultaneously and instantaneously purchase land and seek regulatory approvals.<sup>60</sup> Consequently, in the absence of condemnation, a developer may employ two basic strategies.

One strategy is to use undisclosed agents to purchase contiguous plots of land from private landowners before attempting to obtain the necessary approvals from the various regulatory agencies.<sup>61</sup> The advantage of this strategy is that the surreptitious purchase of property minimizes the chance that holdouts will act strategically to extract the rents of the project.<sup>62</sup> To the extent that property owners are unwilling to sell or demand a price above market value, these preferences reflect the true value of the property to the owners. The problem with this strategy is that regulators understand that the transaction costs incurred by the developer in acquiring the subject properties are sunk costs. As a result, these regulators are able to command a high price in exactions and may ultimately deny approval for the project.<sup>63</sup>

An alternative strategy is to obtain regulatory approvals before acquiring the land needed. The results of this strategy are symmetric with the results of the first strategy. In this case, assuming the regulators see development as a net gain for their community, the developer can avoid large exactions from the regulator by making a credible threat to take the proposed development to a different municipality. However, because the regulatory process is public and regulatory costs are sunk, the owners of the targeted properties will rationally try to extract the assembly value of the property from the developer.

In each of the aforementioned cases, the anticommons problem facing the developer is a significant hurdle to overcome. Nevertheless, where expected rents are sufficiently high, development occurs.<sup>64</sup> Many commentators believe that in cases where development does not occur, government action, in the form of condemnation, is needed to allow

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60. This leads to an anticommons problem that Parisi has termed "sequential anticommons." Parisi et al., *supra* note 13, at 181–82.

61. In 1974, Peter Hellman penned a behind-the-scenes account of how a private firm, acting as an undisclosed agent, assembled a city block in New York City. ELLICKSON & BEEN, *supra* note 57, at 1029–38.

62. *See id.* at 1030.

63. For example, despite the strictures placed on localities by *Nollan* and *Dolan*, the California Supreme Court allowed Culver City to enforce exactions of \$280,000 (as a "recreation fee" to make up for the loss of private tennis courts that had previously been on the site), \$33,200 (as an "in lieu art fee" to make up for the lack of art on the proposed property), and \$30,000 (as an "in lieu 'parkland' fee") on a proposed townhouse development. The total impact of these fees amounted to \$11,440 per townhouse. Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 215 (1997).

64. *See* Ellickson & Been, *supra* note 57, at 1029–38.

efficiency-enhancing projects to move forward. I argue below that this claim is unavailing because it is based on an imprecise understanding of efficiency, does not respect autonomy interests, and is prone to misuse.

## B. Autonomy Versus Efficiency Criteria

Many commentators suggest that the solution to an identified anticommons problem is to create legal institutions that facilitate the reintegration of anticommons property.<sup>65</sup> Some have even suggested that it may be preferable to transform anticommons property into commons property.<sup>66</sup> While these commentators may be correct in their identification of the problem, the unmistakable conclusion that one draws from their analyses is that there is a *need* to solve the problem. The trouble with fixating on a need to solve the problem is that it naturally leads to justifications for solutions under which one sacrifices autonomy interests in the name of so-called efficiency interests. This is particularly troublesome given the erosion of the concept of efficiency in law and economics literature.

### 1. Posnerian Law and Economics

The Chicago School of Law and Economics is especially culpable in this respect. When Judge Richard Posner discarded utility theory in favor of “wealth maximization” because of the impossibility of measuring utility,<sup>67</sup> he set the stage for the elimination of autonomy-based theories in law and economics. Because of the impossibility of comparing utility across individuals, the only legal changes possible under a utility-based framework are those in which the change will lead to a Pareto superior regime.<sup>68</sup> Therefore, Posner was undoubtedly correct in determining that it is difficult, if not impossible, to use utility to determine efficiency-enhancing changes in laws.

Posner’s solution, the adoption of Kaldor-Hicks efficiency for policy decisions, nominally respects autonomy interests because it allows for

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65. See, e.g., Thomas J. Miceli & C.F. Sirmans, *Partition of Real Estate; Or, Breaking Up Is (Not) Hard to Do*, 29 J. LEGAL STUD. 783, 783 (2000) (discussing how courts can solve anticommons problems created by disagreements by joint owners of real property).

66. Sven Vanneste et al., *From “Tragedy” to “Disaster”: Welfare Effects of Commons and Anticommons Dilemmas*, 13 (George Mason Univ. Sch. of Law, Working Paper No. 04-23, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=556160](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556160) (giving the example of a condominium complex creating a garden that is owned by all, but over which none have the right of exclusion).

67. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10–16 (6th ed. 2003).

68. See *id.* at 12–14.

measurement of consumer surplus.<sup>69</sup> However, there are two weaknesses in Posner's approach. One is based on his definition of Kaldor-Hicks efficiency, while the other is based on his attitude toward measurement problems.

First, Kaldor-Hicks efficiency, as defined by Posner, suggests that a change in legal rights is efficient when the sum of willingness to pay measures for those who gain from the change exceeds the sum of the willingness to pay measures for those who lose.<sup>70</sup> However, the economics community accepts that an individual who has a right taken from her suffers a loss in value greater than her willingness to pay for that right. At a minimum, the constraints placed on that person by her limited ability to pay creates an income (or wealth) effect that leads to a measurement for her willingness to pay for acquisition of the right below her willingness to accept compensation for loss of the right.<sup>71</sup> Behavioral economics literature identifies a number of other psychological factors that suggest the difference between willingness to pay and willingness to accept values can be very large, possibly exceeding an order of magnitude for rights over unique goods.<sup>72</sup> Thus, an economist following Posner's prescription would systematically exclude the excess value that a current property owner has over other potential property owners.

A second problem with Posner's approach is that Posner counsels analysts to avoid what he calls "complicationism."<sup>73</sup> Posner suggests that it may be better to err on the side of excessive reductionism rather than excessive "complicationism" because it is impossible to include all relevant factors in an economic analysis.<sup>74</sup> Posner suggests that this is not a problem because the completeness of the theory can be validated based on its explanatory power.<sup>75</sup> If empirical analysis supports the theory, the theory must be good. The problem with this approach is that, when applied to condemnation, the omission of idiosyncratic value from an economic model is justified because empirical evidence demonstrates that people do actually sell at market value. Thus, one can equate the value of the property to the individual to the market value of the piece of property. Of course, under

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69. *Id.* at 13, 16.

70. *Id.*

71. See Robert D. Willig, *Consumer's Surplus Without Apology*, 66 AM. ECON. REV. 589, 591-92 (1976) (describing the effect of income on willingness-to-pay measures).

72. See, e.g., W. Kip Viscusi et al., *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. ECON. 465, 477-78 (1987) (discussing survey results showing that the amount individuals would require in compensation for a risk increase of 1/10,000 from poisoning was nine times greater than the amount the individuals would be willing to pay for a similar decrease in risk).

73. POSNER, *supra* note 67, at 17.

74. See *id.*

75. *Id.* at 17-18.



basic economic theory, those that do not sell presumably have a subjective value for their property that exceeds its market value.

Essentially, Posnerian analysis discards examination of the subjective aspects of utility in favor of an analysis based only upon those values that one can objectively measure. Posnerian analysis shunts aside idiosyncratic values (the cornerstone of a free society) in favor of uniform, market-based values. Once Posner removes the subjective nature of utility from the equation, it is easy to calculate the costs and benefits associated with alternative legal regimes and choose the one that maximizes social welfare. Of course, by defining social welfare in that way, Posner strips the term of any real meaning.

## 2. Hayekian Skepticism of Government

Posner's normative prescriptions differ markedly from those of Friedrich Hayek, a renowned economist who also studied legal institutions.<sup>76</sup> Whereas Posner calls for activism based on the strength of economic analysis, Hayek calls for restraint due to the limits of economic analysis.<sup>77</sup> Hayek believes that the purpose of law should be limited to facilitating "a spontaneous order of actions."<sup>78</sup>

History suggests that we should not organize the fundamental institutions of society around current notions of what is efficient. In 1944, when Hayek published *The Road to Serfdom*, the educated elite were convinced that capitalism was a wasteful and inefficient means of organizing society.<sup>79</sup> After all, why should industrialists be able to fritter away potential gains from trade through wasteful competition or monopolistic practices? The same could be said of disintegrated property. Why should owners of small fragments of property be able to deny society the potential rents that it could realize by integrating that property? The answer, according to Hayek, is that central planning will fail because the planners will never be able to collect and process the information the market uses in its decentralized operation.<sup>80</sup> Hayek was, at least outwardly, vindicated by the collapse of the Soviet Union and the lip service paid to free markets in the United States by Republicans and Democrats alike. It is far from clear whether our leaders will fritter away Hayek's legacy, as these supposed defenders of capitalism continue to use Orwellian doublespeak

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76. FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME I: RULES AND ORDER* 11-17 (1973).

77. Hayek recognizes that humans are necessarily limited in what they can know, regardless of the increasing power of analytic tools. *Id.*

78. *Id.* at 112.

79. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 43-55 (1944).

80. *Id.*

to promote “capitalism” through the heavy hand of government planning, especially in the realm of land use regulation.

Hayek essentially exposed the problems associated with measuring efficiency. Given these problems, any acceptable legal solution should first protect autonomy interests before pursuing efficiency interests.

### C. The False Promise of Condemnation

In the last few decades, a number of courts have read the public use requirement of the Fifth Amendment to allow the government to condemn land for private development.<sup>81</sup> The Supreme Court first opened the door to these types of condemnations in *Berman v. Parker*, which effectively allowed the government to use eminent domain to remedy any social ill within the scope of its police power.<sup>82</sup> The Court affirmed *Berman* in *Hawaii Housing Authority v. Midkiff*.<sup>83</sup> In that case, the Court allowed for the redistribution of lands from landowners to their tenants because of the perceived harms resulting from a land oligopoly that existed at the time.<sup>84</sup> In the interim, the Supreme Court of Michigan, in *Poletown Neighborhood Council v. City of Detroit*, stretched the public use clause to its farthest extent yet by finding that condemnation for economic development alone was a permissible exercise of eminent domain power.<sup>85</sup> Although the Supreme Court of Michigan recently overturned *Poletown* on state constitutional grounds,<sup>86</sup> the U.S. Supreme Court, in *Kelo v. City of New London*, validated *Poletown*'s expansive definition of public use under the U.S. Constitution by a 5-4 vote.<sup>87</sup> Nevertheless, in his concurring opinion, Justice Anthony M. Kennedy suggests that courts should take rational basis review seriously in takings cases and should not hesitate to strike down takings that use the economic development rationale as a pretext for other illicit purposes.<sup>88</sup> Of course, this presumes that courts will be able to determine whether a particular project is beneficial for economic development.

The problem with condemnation for development is that neither courts nor legislatures have the ability to determine what course of action

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81. The Fifth Amendment states, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. Legal commentators hotly debate the exact meaning of the public use clause, but no consensus has emerged. See EAGLE, *supra* note 18, at 170-71.

82. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

83. 467 U.S. 229 (1984).

84. *Id.* at 239-42.

85. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

86. *Hathcock*, 684 N.W.2d at 787.

87. *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

88. *Id.* at 2669 (Kennedy, J., concurring).

is likely to be economically efficient. Land use experts cite Thomas Merrill's article on the economics of public use as a leading authority on the economics of condemnation for public use.<sup>89</sup> Merrill's work is also valuable as an illustration of the futility of using economic analysis to micromanage condemnation decisions.

Laudably, Merrill does not accept the proposition that courts should give local legislatures complete deference in condemning land for economic development.<sup>90</sup> Instead, he attempts to develop a framework for determining when courts should allow condemnation solely for economic development.<sup>91</sup> In his basic model, Merrill suggests that condemnation should be available when the costs from market exchange (including transaction costs and the expected private loss from the failure of exchange) exceed the administrative costs of eminent domain proceedings.<sup>92</sup> To his credit, Merrill recognizes that his basic model is incomplete and may lead to greater inefficiencies than were present in the absence of condemnation.<sup>93</sup> In particular, Merrill notes that (1) "just compensation"<sup>94</sup> does not include subjective value; (2) where the market could solve the assembly problem on its own, developers may engage in rent seeking to get the locality to use the condemnation process on their behalf; and (3) developers may purposely create a situation where condemnation is efficient by strategically passing up the opportunity to use market mechanisms to acquire the land at an earlier point in time.<sup>95</sup> Merrill's solution for situations with these types of issues is heightened judicial scrutiny.<sup>96</sup>

The real weakness in Merrill's argument becomes apparent when examining his definitions of heightened scrutiny. In the context of subjective value, heightened scrutiny involves weighing the loss of subjective value for those who will lose their properties against the expected gains from condemnation.<sup>97</sup> Merrill expects judges to conduct a cost-benefit analysis while, at the same time, recognizing that there is no way of obtaining the information necessary to do a cost-benefit analysis!<sup>98</sup> Basically, Merrill expects judges to second-guess the conclusions of

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89. ELLICKSON & BEEN, *supra* note 57, at 1018-19 (citing Merrill, *supra* note 15).

90. Merrill, *supra* note 15, at 64.

91. *Id.* at 74-93.

92. *Id.* at 81.

93. *Id.* at 81-89.

94. The Fifth Amendment requires that governments give "just compensation" as restitution for a taking. U.S. CONST. amend. V. Nevertheless, as Steven Eagle notes, just compensation is rarely full compensation. EAGLE, *supra* note 18, at 193.

95. Merrill, *supra* note 15, at 82-90.

96. *Id.* at 90. The Court explicitly rejected heightened scrutiny in *Kelo v. City of New London*, 125 S. Ct. 2655, 2667-68 (2005).

97. Merrill, *supra* note 15, at 84-85, 90.

98. *Id.*

councilmen based on information that neither the councilmen nor the judges have access to. This is the easy part. Merrill observes that the other cases for heightened scrutiny (secondary rent seeking and intentional or negligent thick market bypass) "require a more complex analysis."<sup>99</sup>

Despite Merrill's noble attempt to incorporate objections to condemnation into his analysis, there are a number of important issues Merrill did not address. First, what is the baseline used to analyze efficiency? Cities and their corporate sponsors will argue that the gain from condemnation is the difference between the value of the land at issue before and after condemnation. However, it is equally plausible to assume that if the project cannot go forward in the neighborhood at issue, the project (or some other project utilizing the capital earmarked for the project) will go forward somewhere else in the city, county, or country. Does a project that would have generated \$1 million in market value if it had been completed in Denver, but instead generates \$990,000 when it is actually completed in San Antonio, really cost society \$1 million because it was blocked in Denver? What if the respective localities are the neighborhoods of Adams Morgan and Anacostia, both located within the city of Washington D.C.? If the owners of land have no right to the assembly value of their land, it does not matter where the project is located. In that case, what matters is the opportunity cost of the capital available for investment. In the above example, the project will only be justifiable if the current landowner's loss of subjective value is less than \$10,000.

Next, when condemnation is readily available there is no incentive for a speculator to maintain control over a large piece of land in anticipation that the land may increase in value as an integrated whole. The potential developer can avoid the inherent risks of speculation merely by waiting until she is ready to develop a site and, at that time, using the machinery of the government to assemble the land for her at reduced cost. Consequently, where condemnation is readily available, the state will often have to use its eminent domain power simply to maintain the same level of property integration that would have existed in the absence of easy condemnation. Theoretically, the net result could be large losses of idiosyncratic value with no increase in land value.

Condemnation may also affect efficiency in a more subtle way. A landowner faced with a regime that regularly uses condemnation for economic development will rationally choose to forgo marginal projects designed to increase the idiosyncratic aspects of consumer surplus.<sup>100</sup>

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99. *Id.* at 90.

100. For example, ready condemnation reduces a homeowner's incentive to install a swimming pool on his or her property because pools do not increase property value; however, a swimming pool would unquestionably increase the homeowner's subjective value for the property.

Oftentimes, the improvements a landowner makes will have some aesthetic appeal to passers by, though these improvements will have little effect on market value. To the extent that most people find the resulting aesthetics pleasing, there will be a loss of social welfare from the chilling effect caused by the threat of condemnation. These distortionary effects are impossible to measure, though they do lead to real losses of welfare for the individual and the community.

Finally, condemnation, in effect, eliminates spatial disintegration by increasing legal disintegration. If condemnation is readily available, the government will have a *de facto* option on every piece of property subject to its authority. While the anticommons problem (if there was one to begin with) may be solved, and one form of market failure is theoretically eliminated, the door is opened for much more destructive forms of government failure. Autonomy is sacrificed for a drive toward efficiency that is unlikely to be achieved.

From a Hayekian perspective, one might view condemnation for economic development as a milestone on the road to central planning.<sup>101</sup> Posnerians, on the other hand, might simply find a way to dismiss subjective value and would empower judges to determine which projects satisfy a simplified cost-benefit analysis. The truth is that judges will rarely be able to sufficiently determine whether a project will enhance or detract from social welfare.

Condemnation does not respect autonomy and is unlikely to lead to real enhancements in social welfare. Therefore, courts should not see condemnation as the preferred method for overcoming the anticommons problem.

### III. OTHER SOLUTIONS TO THE ANTICOMMONS PROBLEM

If condemnation is not a feasible way of overcoming the anticommons problem, it stands to reason that other potential solutions should be examined. Below, I consider a number of practices that have the potential to reduce the anticommons problem. While none of these solutions is likely to be a panacea and each involves tradeoffs affecting other social goals, the following strategies may be useful in limited applications.

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101. See Hayek, *supra* note 76, at 40–41 (discussing how suppression of competition through the government empowerment of syndicalist organizations is the first step toward complete centralization).

### A. Deregulation

One solution to anticommons problems is to deregulate land use. As noted above, regulatory disintegration may be the most significant impediment to economic development of lands. This is true for two reasons. First, in the modern regulatory state, numerous governmental bodies have de facto exclusionary rights over land use. Accordingly, developers need a large number of government approvals to complete a major development project. One housing development on Staten Island, New York, took twelve and a half years to complete because permits and approvals were required from 28 different government agencies.<sup>102</sup> As a result, one can attribute up to 35 percent of the cost of a new house to regulatory requirements.<sup>103</sup> Second, regulators have motives that are different from landowners. Whereas landowners are likely to be most interested in maximizing the return from their property, regulators have mixed, and often conflicting, motives. For instance, a zoning board regulator may be interested in minimizing neighborhood dissent while shoring up the community's tax base, while an environmental protection agency regulator may be most interested in minimizing the effect of new development on environmental amenities. In either case, both legal rules and the disparate incentives of the regulators make it more difficult for a developer to purchase the approval of the regulators. This creates a significant hurdle for developers to overcome.

If land use were deregulated, the number of governmental entities having a de facto right to exclude uses on private property would fall significantly. This reduction or elimination of legal anticommons would result in improved developer understanding of the development rights they hold. Additionally, unencumbered by legal anticommons problems, developers will have more resources available to devote to overcoming the spatial anticommons problem. Furthermore, the cost of overcoming the spatial anticommons problem will fall because developers will be able to employ undisclosed agents to acquire lands with little risk that the regulatory process will disclose their efforts.

From the foregoing analysis, it is clear that deregulation is a promising method of overcoming the anticommons problem that also preserves autonomy interests. Nevertheless, this approach begs the question of what mechanisms can be used to pursue the social goals addressed by the current regulatory system. One possibility, as Robert Ellickson has noted, is that governments could beneficially replace zoning

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102. ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, HUD-5806, "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 2-13 (1991).

103. *Id.* at 5.

law with an upgraded system of nuisance law, covenants, fees, and standards designed to internalize the externalities created by development.<sup>104</sup> Ellickson's minimal regulatory system would preclude legal anticommons through the use of ministerial (emphatically not discretionary!) enforcement. Ministerial enforcement of environmental regulations and building codes would also yield a reduction in anticommons problems. Environmental goals could be pursued through a nondiscretionary and nondiscriminatory fee system, while technical building codes could be left in place. The creation of norms, enforceable through social sanctions, would effectively mitigate the harms from the small nuisances that this type of system is not likely to address.<sup>105</sup>

Despite the academic appeal of a deregulated system, such a system is unrealistic in modern America. Such sweeping changes would require both the penalization of powerful, entrenched interests and a sea change in public opinion. Given that these impediments are not likely to be overcome any time soon, we must look elsewhere for solutions to the anticommons problem.

## B. Empowering Neighborhood Associations

Another possible solution to the anticommons problem is to replace public government with private government, existing under the guise of neighborhood associations. This solution would satisfy some people's need to operate under a restrictive system of social control while still conferring to them the advantages of the market. Under this scheme, recently proposed by Robert Nelson, public zoning would be abolished and current associations, such as residential community associations, would be empowered to make their own zoning rules for their members.<sup>106</sup> The use of community associations has a number of advantages that would likely mitigate the legal and spatial anticommons problems currently inhibiting development.

One advantage of neighborhood associations is that, because their members have contractually agreed to abide by the rules of the association, those members have voluntarily accepted the risks of that association's land use rules. At the extreme, an association could retain an option on the land within its borders to preserve the right to reintegrate the land at a later date if and when it is efficient to do so. A person buying into such an agreement

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104. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682-83 (1973).

105. See, e.g., ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 280-86 (1991).

106. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 829 (1999).

could not later complain that the association deprived her of her autonomy rights when the association exercises its option and acquires the land from the landowner because the individual has explicitly agreed to abide by the association's rules.<sup>107</sup> This private solution to the anticommons problem would preserve autonomy rights, though it is functionally equivalent to condemnation.

Of course, not all persons would choose to be part of such a community. As the Tiebout hypothesis suggests, people likely to have high values for idiosyncratic preferences would choose communities that have rules that more vigilantly protect an individual's right to use and keep their property.<sup>108</sup> The net effect is a sorting of persons into different private communities that reflect their preferences. The price system will efficiently divert large projects that require the integration of lands to communities in which the market price for land is closer to the residents' value for their land.

Another advantage of private associations is that they are not legally constrained from making community-enhancing decisions to the same extent that government is. Thus, if a community decides to do so, it may sell zoning rights on the open market. This would have the effect of harmonizing the goals of developers and communities. Where an association is structured in such a way, maximizing wealth will be a common metric for both the developer and the community. Anticommons attributable to disparate motivations of the actors involved will not be a problem in such a case.

Despite the advantages of private associations, a number of disadvantages still linger. Lee Anne Fennell suggests a number of factors that may undermine the efficiency and autonomy advantages of Nelson's scheme.<sup>109</sup> While many of her concerns are valid, such as her concern over homeowner ignorance,<sup>110</sup> others reflect a misunderstanding of the economics of risk, such as her concern that homeowner preferences may change.<sup>111</sup>

Perhaps the biggest problem with Nelson's argument is one that Fennell did not address. Nelson suggests that current homeowners' associations or residential groups should be able to secede from local

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107. Courts will likely uphold any reasonable association rule. See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181–82 (Fla. Dist. Ct. App. 1975) (holding that a condominium association's alcohol restriction was reasonable, in part because alcohol restrictions "are widespread throughout both governmental and private sectors").

108. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

109. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 829–33.

110. See *id.* at 876–82.

111. See *id.* at 860–64.



government zoning rules by some kind of supermajority vote. The problem with this approach is that it effectively creates the same problem it purports to remedy. In this case, the perceived well-being of the supermajority trumps the autonomy rights of those who vote against secession. In addition, the minority dissenters will have only limited protection from the courts against the supermajority secessionists.<sup>112</sup>

Empowering neighborhood associations to perform traditional municipal functions is a promising advance that could, if properly applied, advance both efficiency and autonomy interests. However, because these private organizations will have more flexibility to both help and harm their members, such associations should only be able to wield power over those who explicitly consent to be part of such a scheme. Thus, to preserve autonomy interests, only new neighborhoods and older neighborhoods that unanimously approve such a governing body should be able to wield traditionally municipal powers.

### C. Regulatory Reform

Although completely replacing the current system of land use regulation is not a plausible near-term solution, it is probably possible to reform this system. Two types of regulatory reform are likely to diminish the anticommons problem. First, the centralization of regulatory functions in one agency would reduce the regulatory anticommons problem by decreasing the number of persons with whom the developer would have to negotiate. Second, the minimization of regulatory discretion would reduce the power of the regulators to make decisions with exclusionary consequences.

#### 1. Centralization of Regulatory Functions

Typically, many distinct governmental agencies handle the enforcement of land use regulations. For example, the approval of a major subdivision in Mercer County, New Jersey requires 11 different agency reviews.<sup>113</sup> While many of these agencies are ultimately accountable to the local governing body of the community, there is often little overt coordination between the agencies.<sup>114</sup> Additionally, both state and local

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112. See *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1324 (N.Y. 1990) (adopting the business judgment rule for actions of the board of directors of a residential cooperative).

113. ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 102.

114. See Kayden, *supra* note 54, at 8–12 (discussing how New York unsuccessfully tried to overcome the effects of coordination problems between different agencies by offering to reimburse a developer for incentive bonuses not granted).

regulatory agencies may have a role in regulating land use.<sup>115</sup> Finally, citizens may have either an implied or explicit right of action to enforce regulations.<sup>116</sup> If a single regulatory body were in charge of each of these regulatory functions, a developer would only have to negotiate with one agency. This would reduce transaction costs. More importantly, because the local regulatory body would presumably like to maintain a reputation of being fair to developers to encourage development, centralization of authority in an agency directly accountable to this body is likely to lead to more predictable outcomes in navigating the regulatory maze. Consequently, the centralization of regulatory functions would help to overcome the legal anticommons caused by the need to obtain development authorization from many sources.

Nevertheless, this option is probably not workable, and even if it were it is probably not desirable. There is little chance that local governments could convince state and federal regulators to delegate the enforcement power over their land use regulations to a local governmental agency. Even if the local governments could do this, the concentration of power in a single agency is likely to lead to corruption of the disparate goals of the unified agency.

## 2. *Minimization of Discretion*

One may also be able to mitigate the anticommons problem by minimizing the discretion that regulatory agencies have in enforcing land use regulations such as permitting requirements and zoning restrictions. While the agency would still have exclusionary power, the application of that power would be determined in a legislative, rather than quasi-judicial, manner. An extreme example of this type of system is traditional Euclidian zoning.<sup>117</sup> In traditional Euclidian zoning, a zoning map is designed to take into account future growth and will rarely be changed.<sup>118</sup> Landowners know that they have a right to develop to the limit of their zoning classification and no further.<sup>119</sup> Exactions, incentives, and impact fees have no place in such a system. Instead of leaving land underzoned in "wait-and-see" status, traditional Euclidian zoning leaves land zoned according to its optimal future use. The elimination of discretion in such a manner would combat strategic action by a regulatory agency and lead to more predictable regulatory decisions. This would allow developers to acquire lands quietly,

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115. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987) (discussing the role of the California Coastal Commission, a state agency, in approving land uses).

116. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-88 (2000) (holding that citizens may file claims for violations of certain EPA regulations).

117. See generally *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-81 (1926).

118. See ELLICKSON & BEEN, *supra* note 57, at 104-05.

119. See *id.*

confident that the necessary agency would approve their planned development. Consequently, the cost of overcoming the legal anticommons problem will be reduced.

On the other hand, the elimination of discretion is not without costs. Because the regulatory authority is unlikely to have the information to determine what optimal future use will be, many developments that would have otherwise increased social welfare will not be pursued in the first place. Furthermore, it is impossible and impractical to try to foresee all potential circumstances in advance. It may be very costly to society to eliminate discretionary devices such as variances. Nevertheless, where discretion is not likely to have a large effect on welfare, its elimination may be beneficial due to the expected reduction in the cost of overcoming the anticommons problem.

#### D. Nonstationary Development Rights

A final set of options open to localities seeking to minimize anticommons problems is to engage in the use of nonstationary development rights. These include the use of floating zones and transferable development rights. Localities can design these mechanisms for allocating development rights to introduce flexibility into the land use decision process without increasing the discretionary power of regulatory agencies. Because the development rights created by these systems are not fixed to any piece of land, a developer can acquire land and development rights separately, thereby decoupling the legal and spatial anticommons that so often work together to prevent development from occurring.

##### 1. Floating Zones

One nonstationary development right is the "floating zone."<sup>120</sup> A zoning commission wanting to permit a certain level of commercial activity, but not wanting to mandate where that activity must occur, may create zones that are not tied to any one piece of land, but instead float over the entire zoning area until a developer makes a valid application for the right.<sup>121</sup> These are typically set up as special use districts for the specified uses.<sup>122</sup> The advantage of this approach is that it minimizes the risk to a developer who surreptitiously tries to assemble land using undisclosed agents. Because zoning ordinances and the comprehensive plan spell out the conditions for obtaining a special use permit, the developer has a good

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120. See Russell R. Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105, 107-10 (1963) (describing the use and legality of floating zones).

121. *Id.* at 107.

122. *Id.*

idea whether the zoning board will approve her application for a special use permit. Of course, if the regulator has great discretion in issuing such a permit, the value of this mechanism as a tool to combat anticommons problems will be minimal. To have a real effect on the anticommons problem, governments must design floating zones in such a way that the developer knows whether an attempt to procure a permit will be successful. Thus, the regulators' decision to grant the application would largely be a ministerial task, consisting of verifying that the applicant has met certain objective planning criteria.

## 2. *Transferable Development Rights*

A similar and perhaps more promising solution to the anticommons problem is to base development on transferable development rights (TDRs). As with cluster zoning, regulatory agencies can use TDRs to satisfy planning goals without requiring that development follow restrictive zoning criteria. The chief advantage of TDRs over other forms of planning is that they restrict overall growth in an area without restricting where that growth will occur. For example, suppose a planner decided that a community with 100 landowners each owning four-acre parcels of land would be overbuilt if more than 1,000 units of housing were built. Under Euclidian zoning, the planner might attempt to achieve her goals by zoning the land to prohibit more than one house per 0.4 acres. Under cluster zoning, the planner would allow a landowner to build ten townhouse units on two acres of land and use the other two acres for a neighborhood park. With TDRs, the planner can fix the total number of development units at 1,000 units with rights initially allocated to landowners on a pro rata basis. Each landowner may then sell their rights on the open market. In an extreme example, 99 of the landowners may choose to sell their rights to the one-hundredth landowner, who uses her land to build a 1,000-unit high-rise condominium complex, while the other 99 owners are restricted to use their land for agricultural purposes.

In the recent case of *Barancik v. County of Marin*, the Ninth Circuit upheld a scheme of this sort.<sup>123</sup> In *Barancik*, the court upheld a TDR plan that distributed development rights on a pro rata basis to the current landowners.<sup>124</sup> The plaintiff challenged the rule because he was unwilling to pay market price for these rights. Instead, he insisted that the zoning board give him a rezoning to allow his development to move forward.<sup>125</sup>

The facts in *Barancik* illustrate the value of TDRs. Whereas traditional zoning awards development rights to the first to apply or the

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123. *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1989).

124. *Id.* at 835-37.

125. *Id.* at 835-36.

politically connected, the TDRs at issue in *Barancik* were subject to market forces. Because individuals can trade TDRs on the open market, TDRs are likely to move toward their highest valued use. Also, owners of property who prefer to wait to develop or are not politically connected will not have their property values diminished because someone else has decided to overdevelop in such a way that the zoning board will be unlikely to approve similar development in the future. These persons may either hold onto their rights for speculative purposes or sell them to others who wish to develop.

The implication for the developer of a large project is clear. If the developer can acquire enough development rights on the open market, the developer's project is guaranteed zoning approval. If the developer does not believe the project is worth paying the market price for, the development will not go forward and the land will be put to a better use. If the developer acquires the necessary development rights for the project, the project will move forward as long as the land needed for the development is acquired within the area covered by TDRs.

TDR programs are likely to significantly mitigate anticommons problems. First, because TDRs are fungible, there are no anticommons problems involved in their acquisition. Second, because a zoning board has no discretionary power under a TDR system, the regulatory anticommons resulting from the threat of an exercise of the board's power will be eliminated. Finally, although the spatial anticommons problem still exists, the likelihood that holdouts will be successful in extorting excess rents will be reduced because the developer is not tied to development on a particular set of parcels. On top of these benefits for developers, landowners are guaranteed both their autonomy rights and the right to pursue the development value of their lands.

### **E. Reducing the Anticommons Problem**

In this section, I have suggested a number of innovations that promise to reduce the anticommons problems facing the developers of large commercial projects. While no single solution may be appropriate in all cases, a particular community may employ a combination of these mechanisms to maximize efficiency while simultaneously preserving the autonomy rights of landowners. In any event, each of the planning tools examined above is superior to the use of condemnation to overcome the anticommons problem.

## **CONCLUSION**

In this article, I examined anticommons problems and the methods available to mitigate the harms from the development of anticommons. I

have shown that the increasing use of condemnation for economic development is a misguided attempt to solve the anticommons problem. While it may be convenient for local politicians to see anticommons in subdivided middle class neighborhoods that are coveted by developers with big dreams and even bigger checkbooks, the use of condemnation as a remedy is not likely to result in the furtherance of autonomy interests or broadly defined efficiency interests. Alternatively, efficiency-enhancing economic development may be encouraged by the mitigation of legal anticommons inherent in the land use regulatory system. An appropriate combination of deregulation, private community empowerment, regulatory reform, and the use of nonstationary development rights can lead to improved efficiency and a heightened respect for autonomy interests.