A Common Tragedy:
Condemnation and the Anticommons

by Robert L. Scharff[1]

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.' It has been argued 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 Supreme Court decision in *Kelo v. City of New London*, condemnation for economic development is now a valid policy choice. In this paper, 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 promoting efficiency interests.

[1] Robert Scharff has a PhD in Economics from Duke University, a JD from George Mason University, is a fellow of the Center for Interdisciplinary Law and Policy Studies in the Moritz College of Law at Ohio State University, and is an Assistant Professor in the Consumer Sciences Department at Ohio State University.
Thanks are due to Steven J. Eagle for his helpful comments and guidance on early drafts of this paper.

Table of Contents:

Introduction

The takings clause of the 5th Amendment to the United States Constitution has been used to justify government 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 takings that are made solely for the promotion of economic development.[2] In *Kelo*, the city claimed for development a 90-acre section of waterfront consisting of 115 individual parcels.[3] 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 transactions costs are likely to lead to what Michael Heller has termed the "tragedy of the anticommons."[4]

Heller posits that a "tragedy" occurs because too many people have rights of exclusion over the use of a specified piece of property.[5] He views the difficulty involved in coordinating the actions of the multiple owners to reintegrate the property as a prohibitively high transactions cost.[6] Often times, the result is that the costs of coordination exceed the gains from unified action, leading to a failure to implement potentialwelfare -enhancing improvements.[7] 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 state's power to take private property has been greatly expanded, the wisdom of doing so deserves increased scrutiny at the policy level. In this paper I (1) examine the nature of anticommons problems, (2) critique the current economic treatment of condemnation as being overly simplistic and, as a result, biased against legitimate idiosyncratic value, and (3) examine the desirability of alternative mechanisms designed to mitigate or eliminate anticommons problems.

---

[2] Kelo v. City of New London, 125 S. Ct. 2655 (2005).
[3] *Id.* at 2659.
[4] Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). A limited version of the "anticommons" problem was first addressed by Michelman in 1982. Frank Michelman, *Ethics, Economics, and the Law of Property*, 3-40, *in* Property (J. Ronald Pennock and John W. Chapman eds., NOMOS monograph no. 24, 1982).
[5] Heller, *supra* note 3, at 668, 676.
[6] *Id.*
[7] *Id.*

I. The Nature of Anticommons Problems

A. Defined and Studied

The anticommons is defined simply as the inefficient use of a specified piece of property that arises as a result of the fact that multiple parties have the right to exclude all others from using the 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.[8] 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.[9] However, Heller also recognizes spatial anticommons, which occur when the physical subdivision of a piece of property results in the sum of the values of subdivided pieces of property being less that the total assembly value of all pieces of property.[10] In both cases an anticommons tragedy will occur if either (1) the transactions costs of assembling all of the rights/parcels exceeds the expected increase in value from doing so, or (2) 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's seminal work in 1998. Nobel laureate James Buchanan introduced the first formal economic model of the anticommons in 2000.[11] As a result, today the concept of the anticommons is gaining ground among economists as well as legal theorists.

Two economic models of the anticommons have recently emerged. Buchanan and Yoon have utilized a simple profit maximization function in which third parties must pay two or more

---

[8] For a discussion of the symmetry between the tragedy of the commons and the tragedy of the anticommons *see* James M. Buchanan and Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, J.L. & ECON, 1 (2000); *see also* Francesco Parisi, Ben Depoorter, and Norbert Schultz [hereinafter Parisi I], *Dualityin Property: Commons and Anticommons*, George Mason University School of Law Working Paper (2000).

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

[10] *See Id.* at 682-84 (discussing the anticommons created by a giveaway of one square inch parcels of land in cereal boxes by Quaker Oats in 1955).

[11] Buchanan *supra* note 6.

co-owners for the use of a piece of property.[12] Because each co-owner sets a price to maximize profits (and it is assumed that the co-owners are not able to independently coordinate their actions) the resulting aggregate price for entry is inefficiently high, and the property is underutilized.[13]

Alternatively, Parisi, Schultz, and 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.[14] Because neither party fully internalizes the marginal value of their contribution, land will be contributed at an inefficiently low rate and the size of the resulting project will be suboptimal.[15]

Of course, the inefficiencies caused by anticommons are not new. The problems associated with the physical and legal disintegration of property were discussed by Thomas Gray and Thomas Merrill long before Heller popularized the term "anticommons."[16] Similarly, Hernando de Soto has built a career out of exposing the inefficiencies caused by the exclusionary rights of overlapping bureaucracies in Latin America.[17] As Professor 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."[18]

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

Anticommons problems only exist because property has been inefficiently divided among multiple persons. Any search for a solution to such a problem must also identify the cause of the problem. While commentators agree that property has become more disintegrated over time,

---

[12] *Id.* at 8-10.
[13] *Id.* at 10.
[14] Francesco Parisi, Norbert Schultz, and Ben Depoorter [hereinafter Parisi II], *Simultaneous and Sequential Anticommons*, George Mason University School of Law Working Paper, 5-6 (2003).
[15] *Id.* at 6-8
[16] *See* Thomas C. Grey, *The Disintegration of Property*, 69 *in* Property (J. Ronald Pennock and John W. Chapman eds., NOMOS monograph no. 22, 1980) (discussing the effect of industrialization on the disintegration of property). *See also* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (proposing that an economic model be used to determine when use of eminent domain is an appropriate means to aggregate disintegrated properties).
[17] *See* Hernando de Soto, THE OTHER PATH (Harper & Row 1989) (discussing, *inter alia*, how bureaucratic hurdles involving both legitimate and corrupt exactions kept most persons from operating a legitimate business in Peru).
[18] Buchanan, *supra* note 6, at 12-13.

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 that could be best described as "thing-ownership" into something that is best described as a "bundle of rights".[19] Grey suggests that the disintegration of property is caused by and "internal to the development of capitalism itself."[20] Similarly, Francesco Parisi argues that property is subject to a fundamental law of entropy that leads to the increased fragmentation of property.[21] However, Parisi's account largely implicates the legal system facing market participants, rather than the market itself.[22] In both accounts, property is likely to become increasingly disintegrated over time because, in modern industrial economies, economic gains exist from the subdivision of property along both legal and spatial lines.[23] At the same time, these properties are unlikely to be reintegrated when economic conditions suggest that reintegration is optimal because there are significant transactions costs and strategic costs associated with reintegration of property that do not exist with respect to the fragmentation of property.[24] For example, while a single person can decide to subdivide and sell off parcels from a piece of property owned entirely by that person, the reintegration of that piece of property requires the consent of all 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 transactions 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

[19] Grey, *supra* note 14 at 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, 77-83 (Lexis 2001) (1996) (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 paper, where necessary, I employ such an approach because it best illustrates the issues involved in anticommons problems.

[20] *Id.* at 74.

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

[22] *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 horizontal fragmentation has been accepted began early in 20th century. *Id.* at 608.

[23] Grey, *supra* note 14 at 75. Parisi III, *supra* note 19, at 627.

[24] Parisi III, *supra* note 19, at 596.

reunification of the property. This is the much-studied holdout problem that proponents of condemnation for economic development have fixated on.[25]

While there is undoubtedly some truth to the disintegration and entropy theories, Professor Parisi has been careful to note that the legal system can, and often does, include mechanisms to facilitate reunification without condemnation.[26] In the next section, I examine the types of anticommons that are likely to develop and how the common law acts to mitigate the harms from naturally occurring anticommons, though not government imposed anticommons.

C. Types of Anticommons: Spatial and Legal Anticommons

Before solutions to the anticommons problem can be adequately explored, 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.[27] Legal anticommons can be further classified as those that are caused by ownership disintegration, temporal disintegration, or regulatory disintegration.

a. Spatial Anticommons

Spatial anticommons involve the familiar case of land that has been physically subdivided to an extent greater than economic efficiency would dictate.[28] 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

---

[25] *See e.g.* Merrill, *supra* note 14 at 65, 80.
[26] Parisi *supra* note 19, at 613-621. Parisi describes reunification mechanisms in the law as providing a "gravitational force" that acts to reintegrate fragmented property. *Id* at 613-614.
[27] Heller, *supra* note 7, at 656.
[28] *See* Heller, *supra* note 7, at 685-87 (describing the difficulty in solving the spatial anticommons problem the federal government created by converting communal Native American reservations into privately held lands with limited alienability).

discounted streams of rents expected under unified and fragmented property regimes.[29] Only later do the conditions in the community change in such a way to affect the calculus of efficiency.[30] Richard Epstein argues 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.[31] 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 than to remedy a mistaken *ex ante* decision to keep a parcel intact.[32] 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.

In some cases, spatial anticommons may exist by design. For example, conservation-minded local mountain-hiking clubs in Austria have purchased large pieces of land and redistributed parcels that are too small for economic development to their members.[33] In this case, an anticommons was purposely created as a commitment mechanism to prevent future club leaders from selling the land to developers.[34] Whether this is a normatively good strategy is open to question. However, at least one pair of commentators advocates the deliberate creation of anticommons as an effective strategy to combat a perceived anti-conservation bias that exists among government planners.[35]

Finally, as alluded to above, some spatial anticommons may be the result of mistake. It may be that misperceptions or perverse incentives led anticommons to be created where *ex ante* efficiency criteria would have dictated an alternative course of action. Heller presents the

---

[29] Parisi III, *supra* note 19, at 627.
[30] *Id.*
[31] *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353-1368 (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 transactions costs involved in reintegrating the property).
[32] Parisi I, *supra* note 6, 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.*
[33] *Id.* at 19-20.
[34] *Id.*
[35] Abraham Bell and Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 39 (2003).

example of Komunalka apartments in Moscow.[36] These apartments were originally designed for multiple families, each of which had exclusive rights to their bedrooms, but communal rights to kitchens, bathrooms, and living areas.[37] 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 than to sell one's share in the unit.[38] Nevertheless, despite the presence of a well-defined anticommons problem (each family could refuse to sell, thus negating the complementarities from unification), the properties were quickly unified and sold off at the higher price.[39] From this Heller concludes that spatial anticommons are easier to overcome than are legal anticommons problems.[40]

b. Legal Anticommons

The disintegration of property typically brings to mind the concept of spatial anticommons. However, legal anticommons 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 legal rights to a particular parcel of land are distributed among too many parties.[41] 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 lands for a large project may acquire title for the lands but still be uncertain whether his rights include the right to develop the project.

i. Ownership Disintegration

[36] Heller, *supra* note 7, at 650-58.
[37] *Id.* at 650-51.
[38] *Id.* at 651-52.
[39] *Id.* at 654.
[40] *Id.* at 656.
[41] *Id.*

One form of legal disintegration occurs when more than one person holds the title to a piece of land.[42] For example, ownership disintegration may arise when an estate is conveyed to several children in a will. When these co-owners disagree about how their joint property is to be used an anticommons may develop. Fortunately, this prospect is handled well by the common law in the United States. 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.[43] The latitude given 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 estate in its unified form. Furthermore, the uncertainty attached to a court resolution of such a dispute 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 another the right to use part of the land, but also, impliedly, gives the other the right to block development that would have the effect of terminating the easement.[44] To mitigate the potential anticommons problems that may develop from this situation, the Restatement (Third) of Property (Servitudes) §4.8 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.[45] In addition, easements may be terminated upon abandonment of the easement or discontinuation of the

---

[42] *See e.g.* Heller, *supra* note 7 at 635-40 (discussing how Moscow storefronts emptied after the fall of the Soviet Union because multiple persons and organizations were given ownership interests with rights of exclusion).

[43] *See e.g.* Delfino v. Vealencis, 436 A.2d 27 (Conn. 1980) (holding that partition in kind is preferred, but partition by sale will be ordered if it is in the best interests of the parties). *See also* Johnson v. Hendrickson, 24 N.W.2d 914 (S.D. 1946) (holding that a partition sale will be ordered 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").

[44] *See e.g.* Miller v. Lutheran Conf. & Camp Assn. 200 A. 646 (1938) (discussing the assignability of a validly granted easement); Willard v. First Church of Christ, Scientist, 498 P.2d 987 (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); Community Feed Store, Inc. v. Northeastern 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"); and Van Sandt v. Royster. 83 P.2d 698 (Kan 1938) (finding an easement by implication where the easement affecting the dominant estate had notice that an unrecorded easement existed).

[45] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §4.8 (2000).

original purpose of the easement.[46] Richard Epstein has argued that, even in the absence of these common law unification mechanisms, servitudes will be efficiently conveyed because future considerations will be incorporated into the servitude's original sales contract.[47]

Another form of disintegration occurs when the law gives an individual rights over their 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 injunction or damages if the volume of the music is unreasonable.[48] To the extent an injunction is a possibility, the resulting anticommons problem may prevent the construction of an efficiency-enhancing project. However, if courts predictably allow for a liability remedy in those cases in which economic development is efficiency enhancing, the anticommons problem will be avoided.[49] Also, courts define nuisances, in part, based on whether or not the activity at issue is efficiency-enhancing.[50] As a result, nuisance law is unlikely to be a significant source of anticommons problems.

ii. Temporal Disintegration

Property may also be disintegrated temporally. O may convey Blackacre to A for life and give the remainder to B. In this case, both A and B would have to agree on any major change in the status of Blackacre that occurs during A's lifetime. 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" cannot be defined until A dies, there is no way to agree to a substantive

---

[46] *See e.g.* Presault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (finding that discontinued use of an easement for over 10 years constituted abandonment of the easement); Hopkins the Florist Inc. v. Fleming, 26 A.2d 96 (Vt. 1942) (terminating an easement that give the dominant estate a view from their windows when the dominant estate's structure was replaced with one without windows facing the easement).

[47] Epstein, *supra* note 29.

[48] *See e.g.* Rose v. Chaikin, 453 A.2d 1378 (N.J. Sup. Ct. Ch. Div.1982) (holding that noise alone can constitute a nuisance).

[49] 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. Atlantic Cement Co. 257 N.E.2d 870 (N.Y. 1970) (holding that damages can be used when the economic losses from an injunction are substantial).

[50] The Restatement (Second) of Torts §826 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 v. Chaikin, 453 A.2d 1378 (N.J. Sup. Ct. Ch. Div.1982) (enjoining the use of a personal windmill because the social utility of the windmill did not outweigh the harm it created).

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.[51] In any event, these types of arrangements are rare enough that few major projects are likely to be stopped because of the existence of temporally disintegrated property in the planning area.

iii. Regulatory Disintegration

A 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 government agencies with the authority to block development legal interests in that property. The government's interests are defined (in part) by zoning laws, health and safety regulations, and environmental regulations.[52]

In a sense, these interests are much like any other interest in property mentioned to this point. Like the owner of an easement, the government has the right to exclude any development that encroaches upon its interest. A property owner that constructs a building exceeding municipal height limitations by 9 feet may be forced to reduce the offending structure to meet existing standards.[53] Like the neighbors who must bargain for joint use of the property, the government may take exactions in exchange for ignoring technical violations of its property right.[54] A property owner may be allowed 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.[55]

---

[51] For a discussion of the Rule against Perpetuities see Jesse Dukeminier and James E. Krier, PROPERTY, 302-04 (Aspen 2002).

[52] As an example, Buchanan notes that housing permits require the approval of several separate overlapping agencies. Buchanan, *supra* note 6, at 11.

[53] See Korean Buddhist Dae Wan Su Temple of Haw. V. Sullivan, 953 P.2d 1315 (Haw. 1998) (upholding a local administrative body's order to reduce the height of a Buddhist temple that exceeded zoning limitations by 7 feet and exceeded authorization given by building permits by 9 feet).

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

[55] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (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*

Three key features of regulatory disintegration distinguish it from privately created forms of disintegration, however. First, the enforcers of 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.[56] Second, within a given community there is a defined set of regulations that must be satisfied before development can begin. The developer cannot choose to 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, sunshine laws[57] and due process[58] generally require that applications for permits and zoning changes be made public while agreements between the developer and private landowners can be made through undisclosed agents.[59] As a result, the regulator, with an understanding of the rents that the unification of properties will create, can demand rent-dissipating exactions from the developer, while the landowner, if 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 is 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 towards 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

---

Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that an exaction under Nollan must be roughly proportional to the harm the exaction is designed to offset).

[56] Heller, *supra* note 7, at 655.

[57] *See* Robert C. Ellickson and Vicki L. Been, LAND USE CONTROLS, 414-15 (Aspen 2000) (discussing sunshine laws).

[58] *See* Hyson v. Montgomery County Counsil, 217 A2d. 578 (Md. 1966) (holding that neighbors have the right to take part in zoning decisions that affect parcels in a piecemeal manner).

[59] *See* Peter Hellman's account of how a private firm, acting as an undisclosed agent, assembled a city block in New York City. Ellickson, *supra* note 55, at 1029-38.

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 Under the Current Legal Regime

A developer that wishes to embark on a large project requiring the integration of multiple parcels of land must structure a strategy for development that maximizes the chance for success at minimum cost. Because development projects are typically approved by regulatory agencies over time in a public manner, developers cannot simultaneously and instantaneously purchase land and seek regulatory approvals.[60] Consequently, in the absence of condemnation there are two basic strategies a developer may employ.

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.[61] 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.[62] 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 disadvantage of this strategy is that the regulators, understanding that the transactions costs incurred by the developer to acquire the necessary properties for the project are sunk costs, will be able to command a high price in exactions and may ultimately deny approval for the project.

An alternative strategy is to obtain regulatory approvals before obtaining 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

---

[60] This leads to an anticommons problem that Parisi has termed sequential anticommons. Francesco Parisi, Norbert Schultz, and Ben Depoorter [hereinafter Parisi II], *Simultaneous and Sequential Anticommons*, George Mason University School of Law Working Paper (2003).

[61] *See* Peter Hellman's account of how a private firm, acting as an undisclosed agent, assembled a city block in New York City. Ellickson, *supra* note 55, at 1029-38.

[62] *Id.*

regulatory costs are sunk, the landowners will rationally try to extract all rents due to property complementarities from the developer.

In each of the above cases the anticommons problem facing the developer is a significant hurdle to overcome. Nevertheless, where expected rents are sufficiently high, development does occur.[63] In those cases where development does not occur, it is believed that government action, in the form of condemnation, is needed to allow efficiency enhancing projects to move forward. I argue below that this claim is unavailing because it is based on an imprecise understanding of efficiency and the preferred solution does not respect autonomy interests and is prone to misuse.

B. Autonomy vs. Efficiency Criteria

Most commentators suggest that the solution to an identified anticommons problem is to create institutions that facilitate the reintegration of the property.[64] Some have even suggested that it may be preferable to transform anticommons property into commons property.[65] 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 autonomy interests are sacrificed in the name of so-called efficiency interests. This is particularly troublesome given the erosion of the concept of efficiency in the law and economics literature.

a. Posnerian Law and Economics

The Chicago school of law and economics is especially culpable in this respect. When Judge Posner discarded utility theory in favor of "wealth maximization" because of the impossibility of measuring utility he set the stage for the elimination of autonomy-based theories

---

[63] *Id.*

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

[65] S. Vanneste, et. al., *From "Tragedy" to "Disaster": Welfare Effects of Commons and Anticommons Dilemmas*, George Mason University School of Law Working Paper, 13 (2004).

in law and economics.[66] 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.[67] Therefore, Posner was undoubtedly correct in determining that it is difficult, if not impossible, to use utility to determine efficiency-enhancing changes in laws.[68]

Posner's solution, adoption of Kaldor-Hicks efficiency for policy decisions, nominally respects autonomy interests because it allows for measurement of consumer's surplus.[69] However, there are two weaknesses in Posner's approach. One based on his definition of Kaldor-Hicks efficiency. One based on Posner's attitude towards 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.[70] However, it is well accepted in the economics community that an individual who has a right taken from them suffers a loss in value greater than their willingness to pay for the right. At a minimum, the constraints placed on the person by their limited ability to pay creates an income (or wealth) effect that leads to a measurement for their willingness to pay for acquisition of the right below their willingness to accept compensation for loss of the right.[71] The behavioral economics literature has identified 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.[72] Thus, an economist following Posner's prescription would systematically exclude the excess value that a current property owner has over other potential property owners.

---

[66] Richard A. Posner, ECONOMIC ANALYSIS OF LAW, pp. 10-16 (Aspen 2003).
[67] *Id.* at 12-14.
[68] *Id.*
[69] *Id.* at 16.
[70] *Id.*
[71] See Robert D. Willig, *Consumer's Surplus Without Apology*, 66 AMERICAN ECONOMIC REVIEW 589 (describing the income effect 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,* RAND JOURNAL OF ECONOMICS (discussing survey results showing that the amount individuals would require in compensation for a risk increase of 1/10,000 from insecticide poisoning was a full order of magnitude greater than the amount the individuals would be willing to pay for a similar decrease in risk).

A second problem with Posner's approach is that he counsels analysts to avoid what he calls "complicationism."[73] Basically, because it is impossible to include all relevant factors in an economic analysis, Posner suggests that it is better to err on the side of excessive reductionism than excessive "complicationism."[74] Posner suggests this is not a problem because the completeness of the theory can be validated based on its explanatory power.[75] 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, the value of the property to the individual can be equated to the market value of the piece of property. Of course, 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 on only those values that can be objectively measured. Appreciation of idiosyncratic values (the cornerstone of a free society) is shunted aside in favor of uniform market-based values. Once the subjective nature of utility is removed 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, social welfare, defined in that way, is stripped of any real meaning.

b. Hayekian Skepticism of Government

Posner's normative prescriptions differ markedly from those of Friedrich Hayek, a renowned economist who has also studied legal institutions.[76] Whereas Posner calls for activism based on the strength of economic analysis, Hayek calls for restraint because of the limits of

[73] Posner, supra note 64, at 17.
[74] *Id.*
[75] *Id*. at 17-18.
[76] Friedrich Hayek, LAW, LEGISLATION, AND LIBERTY, VOLUME I: RULES AND ORDER, 11-17 (University of Chicago Press 1973).

economic analysis.[77] Hayek believes that the purpose of law should be limited to facilitating "a spontaneous order of actions."[78]

History suggests that the fundamental institutions of society should not be organized around current notions of what is efficient. In 1944, when Friedrich Hayek published "The Road to Serfdom," the educated elite was convinced that capitalism was a wasteful and inefficient means of organizing society.[79] 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 would be realized from the integration of 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.[80] 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 that Hayek's legacy will not be frittered away as supposed defenders of capitalism continue to use Orwellian doublespeak to promote "capitalism" through the heavy hand of government planning, especially in the realm of land use regulation.

Given the problems associated with measuring efficiency, any acceptable legal solution should first ensure that autonomy interests will be protected, before efficiency interests are pursued.

C. The False Promise of Condemnation

In the last few decades a number of courts have read the public use requirement of the 5th Amendment to allow condemnation of land for private development. The Supreme Court first opened the door to these types of condemnations in *Berman v. Parker*, which effectively allowed eminent domain to be used to remedy any social ill that is within the scope of the police power.[81] *Berman* was affirmed by the Court in *Hawaii Housing Authority v. Midkiff*, which allowed for

[77] Hayek recognizes that humans are necessarily limited in what they can know, regardless of the increasing power of analytic tools. Friedrich Hayek, LAW, LEGISLATION, AND LIBERTY, VOLUME I: RULES AND ORDER, 11-17 (University of Chicago Press 1973).
[78] *Id.* at 112.
[79] Friedrich Hayek, THE ROAD TO SERFDOM, 43-55 (University of Chicago Press 1944).
[80] *Id.*
[81] Berman v. Parker, 348 U.S. 26 (1954).

the redistribution of lands from landowners to their tenants because of the perceived harms from a land oligopoly that existed at the time.[82] 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.[83] Although *Poletown* was recently overturned by *County of Wayne v. Hathcock* on state constitutional grounds,[84] *Poletown's* expansive definition of public use has been found valid under the United States Constitution by a 5-4 vote in *Kelo v. City of New London*.[85] Nevertheless, in his concurring opinion Kennedy suggests that courts should take rational basis review seriously in cases like this one and strike down takings that use the economic development rationale as a pretext for other illicit purposes.[86] 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 is likely to be economically efficient. Thomas Merrill's article on the economics of public use[87] has been cited as a leading authority on the economics of condemnation for public use.[88] 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 local legislatures should be given complete deference in condemning land for economic development.[89] Instead, he attempts to develop a framework for determining when condemnation solely for economic development should be allowed.[90] In his basic model, Merrill suggests that condemnation should be available when the costs from market exchange (including transactions costs and the expected private loss from the failure of exchange) exceed the administrative costs of eminent domain proceedings.[91] Merrill (to his credit) recognizes that the basic model is incomplete and may lead to greater

---

[82] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
[83] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
[84] County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).
[85] Kelo v. City of New London, 125 S. Ct. 2655 (2005).
[86] *Id. At 2669.*
[87] Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).
[88] Robert C. Ellickson and Vicki L. Been, LAND USE CONTROLS, 1018-19 (Aspen 2000).
[89] Merrill, *supra* note 85 at 64.
[90] Id. at 74-93.
[91] *Id.* at. 81.

inefficiencies than were present in the absence of condemnation. In particular, Merrill notes (1) that just compensation does not include subjective, or idiosyncratic, value, (2) that 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.[92] Merrill's solution for situations with these types of issues is heightened judicialscrutiny. [93]

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.[94] He 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![95] Basically, Merrill expects judges to second-guess the conclusions of 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 "require a more complex analysis."[96]

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 in the value of the land at issue before and after condemnation. It is equally plausible, however, 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 has been blocked in Denver? What if the respective localities are the neighborhoods of Adams Morgan and Anacostia 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.

---

[92] *Id.* at 82-90.
[93] *Id.* at 90.
[94] *Id.* at 84-85, 90.
[95] *Id.*
[96] *Id.* at 90.

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 the anticipation that the land may increase in value as an integrated whole. The potential developer can avoid the risks involved in speculation merely by waiting until she is ready to develop a site and, at that time, use the machinery of the government to assemble the land at reduced cost for her. Consequently, where condemnation is readily available, the eminent domain power of the state will have to be used often 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 who is 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. Often times, the improvements an idiosyncratic landowner will make will have some aesthetic appeal to passers by, though it will have little effect on market value. To the extent that most people find the resulting aesthetics pleasing, at least at a distance, there will 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, de facto, have an option on every landowner 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 towards efficiency that is unlikely to be achieved.

From a Hayekian perspective, condemnation for economic development may be seen as a milestone on the road to central planning.[97] Posnerians, on the other hand, might simply find a

[97] See Hayek, *supra* note 77 at 40-41 (discussing how suppression of competition through the government empowerment of syndicalist organizations is the first step towards complete centralization).

way to dismiss subjective value and empower judges to determine which projects satisfy a simplified cost benefit analysis. The truth is that it will rarely be possible 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, condemnation should not be seen as a 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 are likely to be a panacea, and each involves tradeoffs affecting other social goals, the strategies described below may be useful in limited applications.

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, there are numerous governmental bodies that have de facto exclusionary rights over land use. Accordingly, a large number of government approvals are needed to complete a major development project. As a result, a significant portion of the cost of major projects can be attributed to environmental analyses, studies, permits, and administrative costs. Second, regulators have motives that are different from landowners. Whereas landowners are most likely to be interested in maximizing their return from their property, regulators have mixed and often conflicting motives. While a regulator on a zoning board may be interested in minimizing neighborhood dissent while shoring up the tax base of the community, a regulator working for an environmental protection agency

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 persons who have a de facto right to exclude uses on property would fall significantly. Once the legal anticommons fostered by the regulatory system have been reduced or eliminated, the uncertainty of what development rights a developer actually has would also be reduced or eliminated. Unencumbered by legal anticommons problems, developers will have more resources available to devote to overcoming the spatial anticommons problem. At the same time, the cost of overcoming the spatial anticommons problem will fall because developers will be able to employ the use of undisclosed agents to acquire lands with little risk that their efforts will be disclosed through the regulatory process.

From the foregoing analysis it is clear that deregulation is a promising method of overcoming the anticommons problem and is a means 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 Ellickson has noted, is that zoning could be beneficially replaced by an upgraded system of nuisance law, covenants, fees, and standards designed to internalize the externalities created by the development.[98] To the extent that the minimal regulatory system proposed by Ellickson is enforced in a ministerial (emphatically not discretionary!) manner, legal anticommons would not arise from this system. Environmental regulations and building codes could also be addressed by this system. Environmental goals could be pursued through a nondiscretionary and nondiscriminatory fee system, while building codes could be left in place. The small nuisances that this type of system is not likely to address can be dealt with, as they always have been, through the creation of norms enforceable through social sanctions.[99]

Despite the academic appeal of such a system, it 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.

---

[98] Robert Ellickson, *Alternatives to Zoning*, 40 U. CHI. L. REV. 681.

[99] *See e.g.* Robert Ellickson, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (Harvard University Press 1991).

B. Empowering Neighborhood Associations

Another possible solution to the anticommons problem is to replace public government with private government in the guise of neighborhood associations. This would satisfy some people's need to operate under a restrictive system of social control while conferring 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.[100] There are 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 members of neighborhood associations have contractually agreed to abide by the rules of the association, they have voluntarily accepted the risks from that association's land use rules. As an extreme example, an association may 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 would not be deprived of her autonomy rights when the association later exercised its option and acquired the land from the landowner because the individual has explicitly agreed to abide by the rules of the association.[101] This would be a private solution to the anticommons problem that preserves 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[102] suggests, persons 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. The net effect is a sorting of persons into different private communities that reflect their preferences. Large projects that require the integration of lands will be efficiently

[100] 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.
[101] Any reasonable association rule is likely to be upheld by courts. *See* Hidden Harbour Estates, Inc. v. Norman, 309 S.2d. 180 (Fla. Dist. Ct. App. 1975)(holding that an alcohol restriction is reasonable because alcohol restrictions are found in other settings).
[102] Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416.

diverted, by the price system, 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 the 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, there are a number of disadvantages as well. Lee Anne Fennell suggests a number of factors that may undermine the efficiency and autonomy advantages of Nelson's scheme.[103] While many of her concerns are valid, such as her concern over homeowner ignorance,[104] others reflect a misunderstanding of the economics of risk, such as her concern that homeowner preferences may change.[105]

Perhaps the biggest problem with Nelson's argument is one that Fennell did not address. Professor Nelson suggests that current homeowner's associations or group of residents should be able to secede from local 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. The autonomy rights of those who vote against secession are sacrificed for the well being of the majority. In this case, the minority dissenters will have only limited protection from the courts against the majority secessionists.[106] If the secessionist majority and loyalist minority are geographically segregated, the majority may use its newfound power in ways that benefit itself at the expense of the minority.

The empowerment of 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 their power over those who have explicitly consented to be part of such a scheme. Thus, to preserve

---

[103] Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829.
[104] *Id* at 876-82.
[105] *Id.* at 860-64.
[106] *See* Levandusky v. One Fifth Ave. Apt. Corp., 553 N.E. 2d. 1317 (N.Y. 1990)(adopting the business judgment rule for actions of the board of directors of a residential cooperative).

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 the complete replacement of the current system of regulating land use is not a plausible near-term solution, reform of the current system probably is possible. Two types of regulatory reforms are likely to diminish the anticommons problem. First, the centralization of regulatory functions in one agency would reduce the regulatory anticommons problem by reducing the number of persons that the developer would have to negotiate with. Second, the minimization of regulatory discretion would reduce the power of the regulators to make decisions with exclusionary consequences.

a. Centralization of Regulatory Functions

Typically, the enforcement of land use regulations is spread across many distinct agencies. 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.[107] Additionally, both state and local regulatory agencies may have a role in regulating land use.[108] Finally, citizens may have either an implied or explicit right of action to enforce regulations.[109] If each of these regulatory functions were centralized in a single regulatory body, the developer would only have to negotiate with one agency. This would reduce transactions 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

[107] *See* Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Arts Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (discussing how New York unsuccessfully tried to overcome the effects of coordination problems between different agencies by offering a to reimburse a developer for incentive bonuses not granted).
[108] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (discussing the role of the California Coastal Commission, a state agency, in approving land uses).
[109] *See e.g.* Friends of the Earth v. Laidlaw Env. Services (holding that citizens may file claims for violations of certain EPA regulations).

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 workable, is probably not desirable. First, there is little chance that local governments would be able to convince state and federal regulators to delegate the enforcement power over their land use regulations to a local government's agency. Even if this could be done, the concentration of power in a single agency is likely to lead to corruption of the disparate goals of the unified agency.

b. Minimization of Discretion

The anticommons problem may also be mitigated 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 manner, rather than in a quasi-judicial manner. An extreme example of this type of system is traditional Euclidian zoning.[110] In traditional Euclidian zoning, a zoning map is designed to take into account future growth and will rarely be changed.[111] Landowners know that they have a right to develop to the limit of their zoning classification and no further.[112] Exactions, incentives, and impact fees have no place in such a system. Instead of leaving land underzoned in "wait-and-see" status, land will be zoned according to it optimal future use. Therefore, 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, confident that their planned development would be approved. The cost of overcoming the legal anticommons problem will, as a consequence, be reduced.

On the other hand, the elimination of discretion is not without costs of its own. 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

[110] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[111] *See* Robert C. Ellickson and Vicki L. Been, LAND USE CONTROLS, 104-105 (Aspen 2000).
[112] *Id.*

potential circumstances in advance. It may be very costly to society to eliminate discretionary devices such as variances. Nevertheless, where discretion is not likely have a large effect on welfare, its elimination may be beneficial due to the resulting expected reduction in the cost of overcoming the anticommons problem.

D. Nonstationary Development Rights

A final set of options that localities seeking to minimize anticommons problems have is to engage in the use of nonstationary development rights. These include the use of floating zones and transferable development rights. These mechanisms for allocating development rights can be designed 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.

a. Floating Zones

One nonstationary development right is the "floating zone".[113] A zoning commission that wants to permit a certain level of commercial activity, but does not want 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.[114] These are typically set up as special use districts for the specified uses.[115] The advantage of this approach is that it minimizes the risk to a developer who surreptitiously tries to assemble land using undisclosed agents. Because the conditions for obtain a special use permit are spelled out in the zoning ordinances and the comprehensive plan, the developer has a pretty good idea whether the zoning board will approve the 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

[113] See Russell R. Reno, Non-Euclidean Zoning: The Use of the Floating Zone, 23 Md. L. Rev. 105 (describing the use and legality of floating zones).
[114] *Id* at 107.
[115] *Id.*

anticommons problems will be minimal. To have a real effect on the anticommons problem, a floating zone would have to be designed in such a way that the regulators decision to grant the application would be largely a ministerial task of verifying that certain objective criteria are met.

b. Transferable Development Rights

A similar and perhaps more promising solution is to base development on transferable development rights (TDRs). Like cluster zoning, TDRs can be used to satisfy planning goals without requiring that restrictive zoning criteria be followed. 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 has decided that a community with 100 landowners each owning four-acre parcels of land would be overbuilt if more than 1000 units of housing are built. Under Euclidian zoning, the planner might attempt to achieve his 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 10 townhouse units on two acres of land and use the other two acres for a neighborhood park. With TDRs, the total number of development units is fixed at 1,000 units with rights initially allocated to landowners on a pro rata basis. Each landowner may then sells their rights on the open market. In an extreme example, 99 of the landowners may choose to sell their rights to the 100th landowner who uses his land to build a 1000 unit high-rise condominium complex, while the other are restricted to use their land for agricultural purposes.

A scheme of this sort was recently upheld by the 9th Circuit in *Barancik v. County of Marin*.[116] In *Barancik*, the court, on substantive due process grounds, upheld a TDR plan that distributed development rights on a pro rata basis to the current landowners.[117] Barancik challenged the rule because he was unwilling to pay the market price for these rights but, instead, insisted that the zoning board give him a rezoning to allow his development to move forward.[118]

The facts in *Barancik* illustrate the value of TDRs. Whereas traditional zoning awards development rights to the first to apply or to the politically connected, the TDRs at issue in *Barancik* were subject to market forces. Because TDRs are able to be traded openly in a market, they are likely to move towards their highest valued use. Also, owners of property who prefer to

[116] Barancik v. County of Marin, 872 F.2d. 834 (9th Cir. 1989).
[117] *Id.* at 835.
[118] *Id.*

wait to develop or are not politically connected will not have the value of their property 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 is guaranteed zoning approval for their project. 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 better use. If the developer does acquire the needed development rights for the project, the project will move forward as long as the land necessary for the development is acquired somewhere within the area covered by TDRs.

Anticommons problems are likely to be significantly mitigated by TDR programs. First, because TDRs are fungible, there are no anticommons problems involved in the acquisition of TDRs. Second, because the zoning board is denied discretionary power under such a 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 exits, holdouts will be less likely to be successful in extorting excess rents 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

This section has suggested a number of innovations that promise to reduce the anticommons problem facing developers of large commercial projects. While no one solution may be appropriate in all cases, in a particular community a combination of one or more of these mechanisms may be employed to maximize efficiency while preserving the autonomy rights of landowners. In any event, each of the planning tools suggested here is superior to the use of condemnation to overcome the anticommons problem.

Conclusion

In this paper I have examined anticommons problems and the methods that can be and have been used 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 either autonomy 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.