

# The Wretched of Eminent Domain: Holdouts, Free-Riding and The Overshadowed Problem of Blinded-Riders

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*Back in the sixties, everyone quipped that “Negro removal” – not “urban renewal” – was the driving force for metropolitan gentrification. Behind the joke, there was an underlying truth – witnessed in the developing law of eminent domain. Thus, the same United States Supreme Court that had pondered the racial repercussions of the “separate but equal” doctrine in Brown<sup>1</sup> and demanded that classification based on race be scrutinized with particular care in Bolling,<sup>2</sup> upheld the eviction of thousands of African Americans as a proper exercise of eminent domain only six months later in Berman.<sup>3</sup> Bearing in mind that public purposes are the heart of eminent domain, this article focuses on the takings law’s paradoxical treatment of destitute segments of American society, including racial minorities.*

*The analysis that follows spotlights the “blinding” strategies that powerful partisan players use to keep the political phase in the making of “public goods”<sup>4</sup> under the radar of public consciousness and potential pretext claims.<sup>5</sup> The “blinded rider” dilemma discussed below shifts eminent domain’s*

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1. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. See *Berman v. Parker*, 348 U.S. 16 (1954).

4. Public goods are products and services that are relatively non-rival and non-excludable. No one can be excluded from their use and their usage does not diminish their quality and supply to others. Public goods’ characteristics, however, reduce individuals’ incentive to participate in their making and under conventional economic discourse, hinder the provision of public goods by market forces alone. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 27-28 (Harvard University Press, 1965).

5. According to this line of arguments, the asserted public purpose is a mere pretext covering up hidden motives for private gains that were the actual driving force of eminent domain. On pretext claims see Daniel S. Hafetz, Note, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 *FORDHAM L. REV.* 3095 (2009).

*focus from “holdouts” to the political process that controls the definition, means and limits of public purposes. It therefore exposes the congested nature of all public goods, specifically the existence of a political platform abundant with competing public goods bearing different prospects but also distinct distribution disparities.*

*It is the author’s hope that, by bringing the “blinded rider” phenomenon to the fore, this article will enable courts to capture fully the risks and benefits associated with the use of eminent domain, reduce the distribution disparities imposed by eminent domain, and correspondingly improve the adequacy of the “just compensation” condition. Equipped with this broader understanding of public goods’ theory, judicial advanced supervision would direct the use of eminent domain power for the benefit of all segments of society, including those historically most disadvantaged.*

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## INTRODUCTION

From an economic perspective, probably the main justification for government’s use of eminent domain would be the collective action failures due to the well-known ‘holdout problem’.<sup>6</sup> A collective action—for example, the construction of a private dirt road, crossing private lands and therefore

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6. See Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 *YALE L. J.* 2091, 2112 (1997) (discussing the need to use eminent domain to thwart collective action failures due to holdout problems).

calling for individuals' approval of its design—is unlikely to take place without government's intervention. Understanding that the road cannot be constructed without their approval, individuals would rationally delay their consent in the interest of increasing the payment for their cooperation. This individual strategy, however, would in most cases lead to a cooperation breakdown. An additional market failure that justifies the power of eminent domain is free-riding,<sup>7</sup> that is if we accept Epstein's claim that the exercise of eminent domain should be restricted to the provision of public goods.<sup>8</sup>

Incorporating Epstein's conception of public use while employing a critical modern analysis of public goods, this article unravels a hidden stage within the exercise of eminent domain. In contrast to recent pretext claims,<sup>9</sup> asserting that hidden motives for private gains are covered up by public purpose terminology, a deep understanding of public goods' production unravels an inevitable mixture of private and public interests. In everyday reality, the maintenance and construction of all possible public goods are based on a political process abundant with interest groups and private gains. Contrary to the overreaching conception of public goods' non-excludability, the process, which provides most (if not all) public goods, possesses intrinsic distribution effects. This substantive stage is therefore a political platform of rivalry and exclusion,<sup>10</sup> though it still enjoys the misleading all-benefitting appearance of public goods, thanks to their main uncontested characteristic – non-excludability.

The risk that collective action for the production of public goods would produce radical distribution effects, with a clear set of winners and losers, is most salient in the law of eminent domain. The construction of a park or a university, by the exercise of eminent domain power, may better the lives of surrounding neighbors and even substantially increase the value of their properties. However, it can simultaneously tarnish human dignity, shatter families, and permanently destroy communities and business relations. In this setting of clear losers and winners, public faith in the rule of law can be undermined and the “just compensation” condition does little to rectify the harm and lack of solidarity caused by takings law.

As will be later explained, contrary to pretext claims, hidden interests and private gains are inevitable and blinding strategies in collective decision-

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7. On free-riding see Mancur Olson, *supra note 4*, at 27-28.

8. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 166-169 (1985).

9. Pretext claims are not a new phenomenon. Nevertheless, their role in eminent domain litigation has increased substantially following *Kelo*. See Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 624(2008); Daniel S. Hafetz, Note, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095 (2009).

10. It is the characterization of public goods as non-excludable which rationalizes free-riding and the suboptimal provision of public goods. See Olson, *supra note 4*, at 27-28.

making can actually assume a positive role when they minimize private gains and induce cooperation.<sup>11</sup> However, and this is where a line should be drawn, blinding strategies can also be employed for the less than noble purpose of covering up the continuous disregard of those who are not represented in the collective process. The usage of blinding strategies can produce a misleading appearance of public purpose and overall efficiency even though the extent of the harm inflicted on the less fortunate was purposely or indifferently ignored. When the collective process does not deal with the harm it produces, it cannot develop the proper means to mitigate it, which may include modifying current public purposes. In this scenario, where the harm was purposely or indifferently taken out of the equation, the assertion of public purposes and overall efficiency is a mere façade.

This article begins with an introduction to the law of eminent domain and the role that market failures play to justify government's compelling intervention. It then moves to a deeper analysis of market failures in the provision of public goods, articles that are relatively non-rivalry and non-excludable and therefore available to the use of all, including those who did not contribute to their production, commonly referred to as free-riders and freeloaders. The third part questions common understanding of collective action failures and unravels the *blinded rider* dilemma and its effects on state's intervention in the provision of public goods. The analysis of central cases in the law of eminent domain, as *Berman v. Parker* and *Kelo v. City of New London*,<sup>12</sup> through the lens of modern economic critic, exposes a different set of problems as well as new opportunities.

## I. THE LAW OF EMINENT DOMAIN

### A. *The Takings of Private Property*

It is generally accepted, when a collective project, such as the construction of a central road or highway, demands the taking of pieces of land from multiple bodies, the risk of collective action failures and mainly holdouts is

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11. Pretext challenges to the exercise of eminent domain can be raised even in cases where the public purpose is a publicly owned and used property such as a bypass highway. See *Cnty of Haw v. C & J Coupe family Ltd. P'Ship*, 124 Haw. 281, 297 (Haw. 2010) (the court rejected a landowner's claim that the real motivation underlying the exercise of eminent domain for the construction of a bypass was the developer's private gain. Interestingly, the landowner claimed that the route chosen for the bypass improves the access of the developer, who owned the adjacent land, to public roads and that the proffered public purpose is a mere pretext. The court acknowledged the existence of a substantial private benefit to the developer but asserted that this mixture of private and public interests is a common reality. Accordingly, "[c]ourts have recognized that roads often benefit the owners of adjacent or nearby property and often constructed at the request of individuals; however, such a benefit to adjoining property owners does not render the taking invalid.")

12. *Kelo v. City of New London*, 545 U.S. 469, 483, 488-89 (2005).

acute.<sup>13</sup> Property owners, who hold veto power over the construction of collective projects, would strategically delay their cooperation in order to capture a disproportionate share of the potential collective gain. Under economic analysis, even in Pareto improving transactions, holdout positions would prevent efficient cooperation.<sup>14</sup>

Realizing that voluntary transactions cannot be completed, state intervention becomes necessary, and it assumes the form of takings law. In the famous terminology of *Calabresi and Melamed*, the law transforms the rules protecting private entitlements from property rules into liability rules.<sup>15</sup> Accordingly, under these circumstances, the power of eminent domain is necessary and the government should confiscate the relevant parcels of land in return for just compensation. The requested cooperation of multiple owners would therefore be achieved by the state's compelling power. Though the problem of holdouts, as a traditional market failure, justifies regulatory intervention, it does not bestow upon the state limitless power.

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides the legal framework for the exercise of eminent domain by the federal government.<sup>16</sup> Through the Due Process Clause of the Fourteenth Amendment it also applies to state governments. Placing substantive limits on government's power, the Takings Clause stipulates two primary conditions for the takings of private property. The first condition demands that the condemned property must be acquired for "*public use*", such as the confiscation of pieces of land for the construction of public roads, highways and bridges. The second condition is the requirement to pay "*just compensation*" to the owner of the condemned property, which was held to be its fair market value prior to the expropriation process.<sup>17</sup>

As the primary legal framework directing the state's right to confiscate private property, the Takings Clause sets the basic boundaries between the realm of private property and the government's necessary regulation. More than a mere limitation on the power of eminent domain, the Takings Clause applies to all types of government regulations when they amount to the exercise of eminent domain. Even beyond physical takings, whenever government regulation of private property significantly reduces its value so as to constitute

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13. On holdouts and the use of eminent domain see generally Thomas J. Miceli and Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L & ECON. REV. 160 (2007).

14. On holdouts as the tragedy of anticommons see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx To Markets*, 111 HARV. L. REV. 622 (1998).

15. See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1095 (1972).

16. U.S. Const. amend. V ("No person shall be . . .deprived of life, liberty, or property, without due process of law. . .")

17. See U.S. Const. amend. V.

a *de facto* taking, also known as *regulatory takings*, the government would be required to meet these two conditions. It would therefore have to represent the interests of the public and pay just compensation to the owner of the property.<sup>18</sup>

Despite being a substantial constraint on state power, the boundaries set by the “public use” requirement remain unclear. Extensive research and analysis have been performed on the differences between public actual and non-excludable use of the condemned property and the vicarious advancement of public general purposes resulting from the condemnation of private property.<sup>19</sup> While this legal division drew considerable analysis and critic, the Supreme Court had repeatedly validated the use of eminent domain power for public purposes, even when the confiscated property was given to a private owner.<sup>20</sup> The Supreme Court has left the legal term “public purposes” vague and unclear as the abstract and unverified wish for economic advancement or improved common welfare. This flexible condition raised an acute concern as to the effectiveness and even the meaning of the public use constraint against state power.<sup>21</sup>

Recently, unsuccessful attempts were made to provide substance to the public use condition by challenges the asserted public purpose, claiming it was a mere pretext covering up hidden interests of private gains. While pretextual claims are not a new phenomenon,<sup>22</sup> they have gained momentum in recent years following the references to pretext by Justice John Paul Stevens’ majority opinion in *Kelo*<sup>23</sup> and the extensive concurrence of Justice Anthony Kennedy.<sup>24</sup> However, and despite their appealing logic, pretext challenges to condemnation proceedings cannot provide the proper boundaries to the use of eminent domain. It is a well-known reality that private and public interests in the exercise of eminent domain are inseparable, and private interests of contractors

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18. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

19. On the division between public uses and purposes see Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument For Banning Economic Development Takings*, HARV J. L& POL’Y. 491, 513 (2006).

20. See *Berman v. Parker*, *supra note 3*, at 30; *Poletown Neighborhood Council v. City of Detroit*, 304 N. W. 2d 455, 460 (Mich. 1981)

21. On the problems associated with flexible and broad definitions, as general welfare, for collective purposes see *Kelo*, *supra note 12*, at 509.

22. For an early recognition of the limits of eminent domain in cases where property was taken under the mere pretext of a public purpose see *West River Bridge Co. v. Dix.*, 47 U.S. 507, 548 (1848).

23. Accordingly, the power of eminent domain is not without limits and it would not “be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” See *Kelo*, *supra note 12*, at 478.

24. Justice Kennedy explained that “[a] court applying rational-basis review under the Public Use Clause should strike down a takings that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justification.” (Id. at 491 [Kennedy, J., concurring]).

and entrepreneurs can further public purposes and the well-being of all. Furthermore, the burden of proving that a dominant impermissible agenda controlled the entire decision-making process is insufferable.<sup>25</sup>

In the absence of substantial restrictions, the use of state's power of eminent domain can be easily shifted from solving collective action failures and promoting cooperation to arbitrariness and the abuse of state power. This in turn, would radically undermine property rights, free markets and the rule of law. It would also increase the incentives of private groups to take a hold over the political process, which controls the use of eminent domain. Being the prominent safeguard to state power, an extensive inquiry into the boundaries of public purposes, as was developed in leading cases, should be performed.

### B. Public Uses and Abuses

*Kelo v. City of New London* is one of the most criticized cases in property law and represents to many the epitome of eminent domain abuse, as well as the dissolution of private property rights.<sup>26</sup> Nine homeowners in Fort Trumbull, Connecticut faced condemnation proceedings initiated by the City of New London, in order to force them to sell their properties for the implementation of a comprehensive economic development plan.<sup>27</sup> Facing an ailing economy, New London Development Corporation (NLDC), a private nonprofit legal entity, was assigned by the City of New London to formulate and effectuate the necessary development plan.<sup>28</sup> The purpose of this plan was to rejuvenate the economy by attracting private commercial players, such as the pharmaceutical company Pfizer. The commercial activity, driven by these powerful players, was expected to improve the economy by developing local trade, increasing the city's tax base, creating jobs and promoting urban revitalization.<sup>29</sup>

The targeted area for the development plan, situated on a peninsula that juts into the Thames River, included 115 privately owned properties.<sup>30</sup> Most of them, besides fifteen properties possessed by the nine mentioned homeowners, were sold willingly to the NLDC.<sup>31</sup> Still, and despite the City's compelling power, lurking in the shadow of all negotiations, nine of Fort Trumbull's residents refused to sell. When condemnation proceedings were initiated they brought an action against the city claiming that the "public use" provision

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25. See Lynn E. Blais, *The Problem With Pretext*, 28 FORDHAM URB. L. J. 963, 975 (2010).

26. See Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, HARV J. L. & POL'Y. 491, 513 (2006).

27. See *Kelo*, supra note 12, at 473-474.

28. See *Kelo*, *id.*, *id.*

29. See *Kelo*, *id.*, *id.*

30. See *Kelo*, *id.*, *id.*

31. It should be emphasized that in the shadow of all seemingly "free" negotiations stood the City's power of eminent domain.

stated in the Federal Constitution's Fifth Amendment was violated.<sup>32</sup> When eviction notices were sent, the home owners dug in and did not vacate. In court, the owners claimed that "public use" does not include the disposition of their property to private developers, even if this disposition has as a result the economic development of a city.

A closer look at some of the plaintiffs in the group reveals a portion of the immense damages inflicted by eminent domain abuse, as well as the inadequacy of the fair market value standard of just compensation.<sup>33</sup> As an example, one of the Fort Trumbull property owners was Wilhelmina Dery. She was born and lived in a house that has been part of her family for more than 100 years. For 61 years, along with her husband Charles, she raised her own healthy family. When the U.S. Supreme Court issued the sentence, Wilhelmina was 87 years old. She died about a year afterwards. A stone's throw away from Charles and Wilhelmina's home, lived their son Matthew Dery, also a petitioner, in a house received as a wedding gift. Matthew chose to raise his son Andrew, with his wife Sue, in an intimate vicinity to his parents. Nearby lived Susette Kelo, a divorced nurse who loved her house due to its waterfront view and affordability. She was not rich but she dedicated her time and heart to renovate her pink house and nurture her garden.

Far more than the fair market price, Dery and Kelo attributed both special and sentimental value to their homes.<sup>34</sup> Wilhelmina may have found comfort in the isolation of the Fort Trumbull peninsula. Being close to her family was undoubtedly a source of security, community and love.<sup>35</sup> Simply put, living in a house that was part of her family for so many years may have brought special memories and a priceless sense of belonging. Susette Kelo, who invested her heart and labor to renovate her waterfront house, had probably attached to her modest home the priceless values of independence, stability, and the free choice. Dery and Kelo placed a higher price than the fair market value on their homes, because the homes allowed them to meet their unique needs.<sup>36</sup>

Market price represents the transactions made by people who are willing to sell their homes for a specific price in the market. It therefore cannot represent people, like Dery and Kelo, who chose not to sell their private

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32. See Kelo, *supra* note 12, at 473-474.

33. The fair market value standard is "what a willing buyer would pay in cash to a willing seller." See *United States v. Miller*, 317 U.S. 369, 374 (1943).

34. Thomas Merrill and Henry E. Smith explain that the fair market criterion does not provide recovery for subjective values. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES & POLICIES* 1254 (2007).

35. On the systematic failure of fair market value, based on individual perspective, to provide full recovery for the damage caused to close-knit communities see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 108 (2006).

36. Thomas Merrill terms it subjective premium, see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986); See also, Lee Anne Fennell, *Taking Eminent Domain Apart*, MICH. ST. L. REV. 957, 958 (2004).



properties in the open market. For many, homes are much more than their fair market price. In the terminology of Hegel, a home is the primary building brick in the individual's identity. Homes usually form individuals' basic sense of independence as well as the security and stability needed to develop social ties and community. The prices placed on houses by those who were willing to sell their properties do not reflect the value attached to homes by those who were not willing to sell. Moreover, market price does not include relocation costs and other nontangible factors such as the difficulty of finding parallel conditions, especially at the age of 87 and at the end of a bad marriage. Both of which may have been insurmountable.<sup>37</sup>

In *Kelo v. City of New London*, in a 5-4 decision, the U.S. Supreme Court held that the disposition of the private properties in Fort Trumbull peninsula qualifies as "public use"; meeting therefore the conditions of the takings clause of the Federal Constitution's Fifth Amendment.<sup>38</sup> This ruling followed the traditional deference to the legislative branch decisions pertaining to the use of eminent domain. It also relied heavily on previous "public use" cases, in which unsubstantiated public purposes justified the disposition of privately owned property to other private entities.<sup>39</sup> One of those cases, upon which the *Kelo*'s court relied on, and probably the most influential one, is *Berman v. Parker*.

Dozens of years earlier, the case of *Berman v. Parker* was centered on the takings of a commercially profitable non-blighted department and a hardware store, owned by Max Morris and Goldie Schneider respectively.<sup>40</sup> Both stores were located in southwest Washington, D.C., which was then a cultural hub for the many African American residents and Jewish immigrants.<sup>41</sup> Due to the growing need to confront the city's slum crisis, The District of Columbia Redevelopment Land Agency decided to acquire their businesses, demolish them, and transfer their lands to the Bush Construction Company for the general public purpose of slum clearance and urban renewal.<sup>42</sup> Refusing to sell their lands, Schneider and Morris filed a suit alleging that taking their properties and transferring them to another private owner violates the takings clause of the Fifth Amendment to the United States Constitution.

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37. Richard Posner termed these values as personal values and the owners with high subjective values, particular needs and sentimental attachment to their property as 'intramarginal', see *Coniston Corp. v. Village of Hoffman Estates*, 844 F. 2d 461, 464 (7th Cir. 1988).

38. Justice Stevens who delivered the opinion of the court relied on past precedents and afforded the legislature broad latitude in determining what the public needs are and in configuring the amount and character of the particular lands necessary for their provision. See *Kelo*, *supra* note 12, at 488-89.

39. The central cases were *Berman v. Parker*, *supra* note 3, and *Hawaii Hous. Aust. V. Midkiff*, 467 U.S. 229 (1984).

40. See Wendell E. Pritchett, *The Public Menace of blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL. REV 1 (2003).

41. See Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 THE URBAN LAWYER, 423, 444 (2010).

42. See Wendell E. Pritchett, *supra* note 40.

As in *Kelo*, the expropriation of their properties involved a fair market value's offer. However, most people attach to their property sentimental values, which is probably why they value their property at a higher price than its market's estimate. In the *Berman*'s case, much like in *Kelo*'s, property owners experienced familiar and personal attachment to their homes and businesses. These subjective attachments also comprehend financial stability, business and community relations, reputation and a sense of belonging. As an example, *Schneider*'s hardware store had been in her family's possession for decades.<sup>43</sup> It is therefore reasonable to assume that *Schneider* was heavily invested, both personally and financially, in her socio-economic surroundings. A fair market price could never equal idiosyncratic relations that were nurtured for so many years. Apart from the difficulties associated with fulfilling the "just compensation" condition, a deeper account to the historic process, leading to the exercise of eminent domain, challenges its manifested purpose.

In the early twentieth century, American cities became gradually aware of the socio-economic repercussions of deteriorated buildings and slums.<sup>44</sup> The warrens of the poor in American cities were generally comprised of decrepit tenements unfit for human habitation, which also had a direct impact on the real estate prices of adjacent neighborhoods. Attempts to confront urban decline through housing reform and regulation had small impact on the expansion of slum areas.<sup>45</sup> The coercive power of the government, by the use of eminent domain, was perceived as an effective legal tool for the clearance of deteriorate buildings and for the encouragement of urban development. However, the takings clause and the conventional conception of property rights stood as a safeguard against the taking of a person's private property and its transfer to another private entity. However, there were growing pressures challenging eminent domain law and eventually the basic conception of private property.

Along with the existences of slum areas and deteriorated structures, the expansion of the suburbs drew strong communities out of the city. With a radical decline in the number of middle-class residents, American cities' crisis was imminent. An attempt to confront the pending downfall of American cities brought a convergence of forces to support urban revitalization plans. A coalition of interest groups encompassing a divergent set of motivations and goals were collectively promoting cities' redevelopment plans throughout the 1920s.<sup>46</sup> This impressive and powerful coalition included housing reformers, developers, realtors, mortgage bankers and politicians. Prominent engines in the thrust towards urban revitalization were the perceptions of "blight" and "slums". Renewal advocates worked hard to convince the public that much as

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43. *Id.*, *id.*

44. See JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (1904).

45. Wendell E. Pritchett, *supra* note 40, at 7.

46. *Id.*, at 14.

the spread of plants contagious diseases,<sup>47</sup> cities' blighted areas would ultimately infect the entire city with deteriorated building, poverty and crime.<sup>48</sup>

Blight and slum areas drained urban resources through the loss of tax revenues, depression of property values as well as a rapid junking process.<sup>49</sup> As clearance of slums areas became acute, urban renewal advocates realized that an important stage in their struggle was the reconceptualization of the takings clause. Therefore, they direct their efforts towards a legal recognition of urban development as a "public use" and in other words a public good demanding state's intervention.<sup>50</sup> According to this new concept, the District of Columbia, through Redevelopment Act of 1945 (DCRA), declared as a "public use" the clearance of slums through their acquisition and sale to private entities for redevelopment.<sup>51</sup> Furthermore, and similar to the economic terminology of public goods, the DCRA determined that market forces and private enterprises could not achieve the goal of urban redevelopment by themselves.<sup>52</sup>

In this socio-economic turmoil where the clearing of downtrodden areas was believed to be imperative for the prevention of urban decline, and the political discourse on blight demanded state intervention, combined with the law itself stating that the clearance of slums is a public use that cannot be provided by market forces alone. Courts were inevitably pressured into favoring an expansive definition of the term "public use." Once the necessity of urban renewal programs had been acknowledged, the courts were afraid to risk cities' redevelopment plans by a narrow interpretation of the "public use" requirement.<sup>53</sup> It was therefore common for courts to approve slum clearance projects based on their declarative general purpose while marginalizing any other aspect of the project, including structure and form.<sup>54</sup>

When the general purpose of the project was clearing slums, everything else was secondary.<sup>55</sup> In this regard, the Berman case was no different. It also represents a blind approval of redevelopment plans based solely on their

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47. The introduction of the term "blight", originally used to describe the death of plant tissues, to cities' revitalization discourse was based upon an ecological perceptiveness to social behavior. See *id.*, at 16-17.

48. *Id.*, *id.*

49. While the description of slums was tightly connected to concerns of public safety and health, the definition of blight was looser and mainly related to stagnant property, poverty and the potential risk of becoming a slum. On the loose definition of blight, as opposed to slums, and its contribution to planners' wide discretion in shaping urban renewal projects. *Id.*, at 18.

50. *Id.*, at 22.

51. District of Columbia Redevelopment Act of 1945, ch. 376, section 2, 60 Stat. 790 (1946).

52. *Id.*, *id.*

53. See *Belovsky v. Redevelopment Auth.*, 54 A. 2d 277, 282 (Pa. 1947).

54. However, there were courts that felt that an over-encompassing interpretation of "public use" would cut the very foundation of property rights, see *Housing Auth. V. Johnson*, 74 S. E. 2d 891, 894 (Ga. 1953).

55. See *Papadinis v. City of Somerville*, 121 N.E.2d 714, 717 (Mass. 1954); *Belovsky v. Redevelopment*, 54 A. 2d at 282.

declared purpose while neglecting any possible detriments. Years after Berman, and in a different socio-economic context, The United States Supreme Court in *Kelo v. City of New London* adopted a similar broad and flexible interpretation of the “public use” condition. It therefore found no special difficulties in approving the condemnation of private property and its transfer to private entities for the general purpose of economic development. Despite being legally sound, public awareness and involvement in the *Kelo* proceedings was much different from Berman.

The blindness to the socio-economic context, which stood at the heart of Berman’s proceedings, could not be replicated in *Kelo*. In the public eye, the exercise of eminent domain in *Kelo* represented a clear abuse of government power against ordinary homeowners. Being a well-publicized controversy it aroused public and legislative discomfort, leading more than 40 states to adopt eminent domain reforms restricting the takings of private lands for economic development purposes.<sup>56</sup> As it will be shown in the following sections, a shift in legal analysis towards the political process, which shapes our public goods, exposes a plain reality. The feasibility of eminent domain abuse, which induced this massive legislative reform, is not confined to takings for abstract public purposes as economic development or the disposition of confiscated property to private commercial players. Substantial eminent domain abuses, quite similar to *Kelo* and Berman, can easily infiltrate takings’ procedures for concrete public uses as open highways.<sup>57</sup>

### C. Non-Excludable Uses

Prior to *Kelo v. City of New London* and its corresponding massive legal reform, legal scholars, worried by the inordinate use of eminent domain were trying to develop a profound substance to the all-encompassing requirement of “public use”. Consequently, *Richard Epstein* proposed a novel idea seeking for the reconceptualization of the public use standard according to the classic economic analysis of public goods.<sup>58</sup> Besides the etymological resemblance,<sup>59</sup> classic public goods as highways and roads were always a prominent feature in the history of eminent domain.<sup>60</sup> By their own definition, public goods cannot

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56. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102(2009) (stating that forty-three states adopted eminent domain reforms as a response to *Kelo*).

57. On the ineffectiveness of the legislative reform post *Kelo* see *id.*, at 2114.

58. See Epstein, *supra* note 8, at 166-169.

59. “At least in that the resemblance between the two invites a theoretical analysis of public use based on the rich and well established theory of public goods” see Epstein, *id.*, at 166.

60. The construction, maintenance and widening of facilities for travel and transportation, such as the public roads, bridges, ordinary highway, were always a prominent reason for the use of eminent domain. (*Droneberger v. Reed*, 11 Ind. 340, 341-343 (1859); *Spafford v. Brevord County*, 92 Fla. 617, 621-22 (Fla. 1926); *Glendenning v. Stahley*, 173 Ind.

be sufficiently provided just by market forces, justifying therefore the state's intervention. Moreover, by employing the rich economic literature on public goods, Epstein aimed to incorporate into takings law the necessary safeguards against the unrestrained exercise of the eminent domain power. The primary safeguard, drawn from the economic scholarship on public goods, is the non-excludability of the collective good and the corresponding free-riding and market failures in its provision.<sup>61</sup>

When takings are restricted for public use, and viewed through the theory of public goods, the public at large should equally enjoy the surplus produced by the exercise of eminent domain.<sup>62</sup> Therefore, according to this model, only when property is taken for the purpose of providing a public good, and therefore held and controlled by the public on equal terms, should courts deem the takings constitutional. By contrast, eminent law should not be employed for the purpose of transferring private property from one private owner to another private owner. The state can still transfer property or revenues to private parties but it must do so while providing a classic public good.<sup>63</sup> Thus, in simple terms, the disposition of private lands from one owner to another, justified by the purpose of economic advancement, cannot be congruent with the concept of non-excludable collective goods.

Despite its appeal, the classical theory of public goods does not seem to provide any pragmatic guidance to the "public use" restriction. As *Fischel* eloquently clarified a narrow conception of public goods, aiming at pure non-exclusion, would prevent governments from undertaking most of its necessary duties. It would also contradict governments' common and historical practice of providing public goods by the use of eminent domain. By contrast, a broad understanding of public goods can approve any sort of takings and therefore render the public use requirement toothless.<sup>64</sup> These shortcomings may result from the focus of traditional theories, dealing with the provision of public goods, on their ends rather than the spectrum of possible means necessary for their provision. As *Merrill* thoroughly elaborated, the concept of public goods distract our attention away from examining whether the means are necessary

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674, 676-80(1910); *In re Town of Whitestown*, 24 Misc. 150, 151 (1898); *Shaver v. Starrett*, 4 Ohio St. 494, 498-99 (1855).

61. See generally Mancur Olson, *supra note 4*, at 27-28.

62. See Epstein, *supra note 8*, at 167.

63. *Id.*, at 167.

64. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, MICH. ST. L. REV. 929, 934-5 (2004).

for achieving public purposes,<sup>65</sup> and it than vein, whether the costs associated with the means chosen outweigh the benefits of the takings.<sup>66</sup>

Despite its apparent shortcomings, the essence of Epstein's critical analysis can be found in Kelo's dissent. Writing for the dissent in *Kelo v. City of New London*, Justice O'Connor's opinion portrays a regressive pattern in the historical employment of eminent domain law. Analyzing the practice of takings law, Justice O'Connor claimed that the ability to transfer property from one person to another would not produce random losers and beneficiaries. The political process, underlying the use of eminent domain, would produce systematic benefits to those who are politically powerful at the expense of those with fewer resources.<sup>67</sup> Justice Thomas added to this account by making clear that current law places the loss on poor powerless communities and encourages the politically powerful to victimize the weak.<sup>68</sup> Furthermore, the history of the use of eminent domain, according to Justice O'Connor, proves that the losers are predominately blacks and minority communities.<sup>69</sup>

Both Justices, O'Connor and Thomas, trace the regressive aspect of eminent domain to the distinction between public use and public purpose. Under eminent domain law, they connect this distinction to the ability, to take property from one person and give it to another. Their focus on the seemingly non-excludability characteristic of public goods, as an open highway, strengthens Epstein reconceptualization of the public use requirement as a necessary safeguard against eminent domain abuse. It therefore limits government power of eminent domain to the provision of quintessential public goods as railroads, canals and public parks.<sup>70</sup> This restriction seems to promise that eminent domain abuse cannot be achieved, or at least significantly reduced, when the purpose of the takings is the provision of public goods.

Classic definition of public goods, however, is mainly based on the end-product, an open highway, and not the process that shapes and determines its path, entries and junctures. This terminology, however, can be manipulatively used as a mere cover up to the advancement of private interests at the expense of the public. By focusing instead on the collective process, modern theory of public goods, acknowledges the congested nature of public goods and in

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65. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74 (1986).

66. To a cost benefit model of the use of eminent domain see Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "just compensation" Law*, 80 HARV. L. REV. 1165, 1241 (1967).

67. See Kelo, *supra note 12*, at 505.

68. See *id.*, at 521-22.

69. Accordingly "[u]rban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as 'Negro removal.' . . . Over 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black.'" See *id.*, at 522.

70. See *id.*, at 512.

particular the myriad ways in which public purposes can be modified and adapt to fit socio-economic standards, as the protection of powerless.<sup>71</sup> Despite the mentioned risks, modern theory of public goods is willing to harness private interests in the making of public goods while protecting the rights of those who are not represented. Not bound by classic definitions of non-excludability, modern theory is not too narrow or too broad and can dialogue with existing terminology of public use and pretext defenses.<sup>72</sup> It can therefore assume the role Epstein intended it to take, that is to provide substantial and pragmatic restrictions to the exercise of eminent domain.

## II. MODERN ECONOMIC THEORY OF PUBLIC GOODS

Limiting the use of eminent domain to the provision of pure public goods, such as railroads and public highways, seems to ensure that the public equally enjoy the surplus collective projects produce. This result most likely explains *Epstein* and Justice Thomas' reasoning for employing the terminology of public goods. At least on its surface, a non-excludability requirement can provide a solid safeguard against possible abuses of the power of eminent domain by politically powerful players at the expense of ordinary property owners or even weak communities.<sup>73</sup> However, a deeper account into the modern economic theory of public goods, as the one developed in this article, would stress otherwise. As the following passage shows, even in the provision of quintessential public goods, political players can extract disproportionate benefits to the detriment of the less politically empowered. The same exact abusive exercises of eminent domain, as the ones claimed in *Berman* and *Kelo*,<sup>74</sup> can take place even when the most stringent version of the "public use" requirement is satisfied.

### A. *Collective Actions for Non-Excludable Goods*

Public goods are products and services that are relatively non-rivalry and non-excludable. By their definition they are open for the enjoyment of all, regardless of individuals' initial investment in their production. Public goods' characteristics, however, may reduce individuals' incentive to participate in their making and, under conventional economic discourse, may hinder the provision of public goods by market forces alone. The frequently used example for a public good is a lighthouse. No ship can be excluded from its services and all ships indiscriminately benefit from it without reducing the quality and

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71. On the congested nature of public goods, see the discussion in chapter B.1.

72. On pretext defenses see generally, Daniel S. Hafetz, *supra* note 5.

73. See *Kelo*, *supra* note 12, at 512.

74. See generally *Berman v. Parker*, *supra* note 3, at 30.

supply for others.<sup>75</sup> In the context of collective bargaining, a frequently used scenario is that of a polluting factory with multiple surrounding inhabitants.<sup>76</sup> Neighbors' would press against the factory to reduce its pollution by installing Insulation Walls that may improve the lives of everyone in the vicinity of the factory. Blocking the factory's dust and noise can clear the air for all of the surrounding inhabitants. Clearer air is, by definition, a non-excludable good. Everyone benefits from it, and once the air is clear, no one can be excluded from breathing it. It is also non-rivalry, since its consumption by one does not reduce its supply for others. Clearer air or the removal of pollution is therefore used as a primary example of a classic public good.<sup>77</sup>

Classic economic analysis of collective actions emphasizes what seems to be a logical truism. Wealth maximizing individuals do not have the proper incentives to contribute their share in the production of collective goods that are essentially non-excludable.<sup>78</sup> This problem, known as free-riding,<sup>79</sup> is commonly perceived as a transaction cost leading to lower levels of production and consumption of public goods,<sup>80</sup> and one that places tremendous obstacles in the path of efficient voluntary transactions.<sup>81</sup> There is a strong and appealing

75. See JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 128 (2d ed. 2000). PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 37-38 (18th ed. 2005).

76. See Ronald H. Coase, *The Problem of Social Cost*, *J.L. & ECON.* 59, 60 (1960) (starting with this scenario as a standard example of the harmful effects business firms have on others); Calabresi & Melamed, *supra* note 15 (proposing a shift in legal entitlements in circumstances of high transaction costs as the freeloader problem using as an example a polluting factory). See also James E. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 *UCLA L. REV.* 429, 446 (1970).

77. Todd Sandler explains that a public good "provides benefits that are nonexcludable and nonrival or indivisible between users. The removal of pollution is a pure public good." See TODD SANDLER, *COLLECTIVE ACTION: THEORY AND APPLICATION* 6 (Ann Arbor, University of Michigan Press, 1992).

78. For an analysis of the conflict between individuals and groups' interests in the creation of collective goods, see RUSSELL HARDIN, *COLLECTIVE ACTION* 25-27 (Resources for the future, 1982).

79. Daphna Lewinsohn-Zamir refers to the free-rider problem as the general source for the prisoner dilemma and the tragedy of commons: "the Prisoner's Dilemma or Tragedy of the Commons explanation highlights consumers' motivation to free-ride on the efforts of others." See Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 *YALE L. J.* 377, 386 (1998).

80. Todd Sandler clarifies that "collective action fails when the pursuit of individual gains results in suboptimal or inefficient outcome, based on the Pareto criterion. The Prisoner's Dilemma is an apt example. . . because it may yield a payoff structure identical to some important market failures, including pure public goods, the exploitation of common property resources, and externalities. In each of these cases, an individual pursuit of his or her well-being results in a Pareto-inferior equilibrium, from which all participants could increase their well-being if better coordination of efforts were achieved." See Todd Sandler, *supra* note 77, at 22-23.

81. Calabresi & Melamed, *supra* note 15, at 1095; MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 1 (Cambridge University Press, 1987). For a general analysis of the conflicting interests between individuals and the collective in the context of public goods see Garrett Hardin, *the tragedy of the commons*, 162 *SCI.* 1243(1968). See also RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 16 (Oxford Press, 1999) (examining how coordination costs can prevent collective goods even when they are in everyone's interests); KENNETH A.



logical explanation for the reluctance of people to invest their time and efforts in collective actions that produce non-excludable goods.<sup>82</sup> One reason is that that free-riders are able to conserve their monetary contributions by “reap[ing] without sowing” and “get[ting] something for nothing”.<sup>83</sup> Free-riding inhibits collective efforts for the production of public goods, and therefore presents a market failure that demands regulatory intervention.<sup>84</sup>

Classic economic emphasis on market failures due to the problem of free-riding, is only a preliminary and even superficial analysis of the complexities involved in collective actions for the production of public goods. A major part in the literature of public goods is a growing discourse against the overreaching influence of the free-rider problem. This extensive socioeconomic discourse includes Olson’s analysis of small groups,<sup>85</sup> the role of by-product activities of existing organizations,<sup>86</sup> groups with a sense of solidarity or trust,<sup>87</sup> groups

SHEPSON AND MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 220-260 (1997)(analyzing politics through the prism of the collective action problem).

82. Mancur Olson stresses that, in the context of collective goods, individuals would not share the burden of providing the public good and that “Normally, the provision of the collective good will be strikingly suboptimal and the distribution of the burden will be highly arbitrary”. He then unveils the appealing logic which derives its strength from the definition of collective goods: “This is because the amount of the collective good that the individual obtain for himself will automatically also go to others. It follows from the very definition of a collective good that an individual cannot exclude the others in the group from the benefits of that amount of the public good he provides for himself. This means that no one in the group will have an incentive independently to provide any of the collective good that he provides for himself.” See Mancur Olson, *supra* note 4, at 27-28. This logic is dominant in intellectual property. See Mark A. Lemley, Property, *Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

83. On free-riding in intellectual property right of publicity, see Michal Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 196-201 (1993)

84. Exemplifying the need of regulation in the context of pollution, the free-rider problem is defined as a market failure. Consequently “the regulatory agency is designed to correct market failures by altering the behavior of regulated actors in order, for example, to reduce pollution. Because such benefits are collective goods, “free-rider” effects prevent the market. . .from producing them.” See Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1236-1237 (1981).

85. Olson explains that in these small unequal groups “each of the members, or at least one of them, will find that his personal gain from having the collective good exceeds the total cost of providing some amount of the collective good.” See Mancur Olson, *supra* note 4, at 33-34.

86. *Id.* at 132-134.

87. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, And Law*, 102 MICH. L. REV. 71 (2003) (explaining that individual can overcome the free-rider problem and produce public goods when they trust one another); Pamela Oliver, *If You Don’t Do It, Nobody Else Will: Active and Token Contributors to Local Collective Action*, 49 AM. SOC. REV. 601, 602 (1984) (categorizing levels of involvements in collective action based among other things on, the extent of the group social ties); Gideon Parhomovsky and Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75 (2004)(analyzing the buyout of Cheshire residents by a American Electric Power Company, a coal-fired power plant, as a successful collective transaction which overcame market failures due to, among other things, strong community ties); Daphna Lewinsohn-Zamir, *The “Conservation Game”: The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J. L. & PUB.

whose members have indefinite interdependence,<sup>88</sup> and the assurance model of conditional cooperators.<sup>89</sup>

Notwithstanding growing criticism and substantive limitations, modern theory of public goods is still in search for better ways to understand and deal with the conflicting interests existing in the production of all public goods.<sup>90</sup> It is a well-known reality that not all individuals share the same tastes and affinities to a specific public good – be it a lighthouse or a public park. However, despite its non-excludability, not all individuals equally enjoy its benefits. Exploring the proper ways for confronting individuals' conflicting preferences,<sup>91</sup> and analyzing the agency problem they produce,<sup>92</sup> have been major dilemmas in law and economics. An innovative approach for addressing these dilemmas may result from a better understanding of public goods and especially the choices taken in the process of their provision.

### B. *The Congested Nature of Public Goods*

It is both misleading and unrealistic to present the production of public goods as an effort to create a pre-set outcome that can be easily ordained to fit the collective needs or desires, as well as those of its constituency. Even prior

POL'Y 733 (1997)(examining the possibility of voluntary cooperation for the preservation of cultural building, in light of the difficulties of producing public goods, and the influence of social norms and community pressures); MICHAL TAYLOR, *COMMUNITY ANARCHY & LIBERTY* (Cambridge University Press, 1982)(exploring the ways in which communities, comprised with common values and beliefs, can produce collective goods).

88. See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 173 (New York: Basic Books, 1984); EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES* 38-39 (Cambridge University Press, 2002) (analyzing riparian successful cooperation in the management of transboundary resources in indefinite iterated games); Anne E. Sartori, *The Might of the Pen: A Reputational Theory of Communication in International Disputes*, 56 INT. L. ORG. 121 (2002).

89. Michal Taylor examines the possibility of cooperation based upon conditional cooperators. Accordingly, cooperation “by every player. . .sustained by the use of the tit-for tat strategy. . .is an equilibrium. . .even when some of the players insist on unconditional Defection. . .Cooperation may still be rational for the rest – provided that there are some players who Cooperate conditionally on the Cooperation of all the other Cooperators. . .and that all the Cooperators' discount rates are not too great.” See Taylor, *supra* note 81, at 104. Similarly, Robert Axelrod stated that the “two key requisites for cooperation to thrive are that the cooperation be based on reciprocity, and that the shadow of the future is important enough to make this reciprocity stable.” See Axelrod, *Id.* at 173.

90. It can be argued that more than law of eminent domain, the problem of conflicting interests between the individual and the collective/community or even legal association, such as in the famous agency dilemma, is central in most legal fields.

91. Insurmountable information costs make it practically impossible to expose individuals' true preferences. These costs include the strategic assessments of both their subjective and objective values. For a limited attempt to reveal private players preferences see Theodore Groves & John Ledyard, *Optimal Allocation of Public Goods: A Solution to the “Free Rider” Problem*, 45 *ECONOMETRICA* 783 (1977) (attempting to reveal private players preferences for the provision of public goods).

92. When individuals' preferences to public goods are not fully exposed the agents of the collective decision-making process has to deal with political pressures, conflicting interests of the class and in certain cases their own separate individual preference.

to the production process, a collective decision-making apparatus for determining what should be considered as a “collective good” is much more complex than an individual one. First and foremost, the existence of conflicting interests and realities within the collective group should be taken into consideration. In this collective process, common grounds, average or reasonable tastes and desires should all be examined as an essential step in the course of defining collective goods. This, however, is easier said than done. Given the information barriers and the strategic behavior of individuals that conceal their true preferences, the costs associated with the exposure and confrontation of individuals’ conflicting interests and preferences are insurmountable.<sup>93</sup>

Even upon overcoming the preliminary question of what constitutes the collective goods, the question of how the collective goal should be brought into fruition remains. Every collective good can be materialized in multiple ways and forms, each of them bearing different characteristics, advantages and weaknesses. When the focus of our analysis is set on the political process, which controls the shape and character of public goods, exclusion is an inevitable part in the making of all public goods.<sup>94</sup> With the common reality of a limited budget, as well as the frequent pressures of time and place pertaining to the allocation of collective resources, the decision to move forward in one direction, such as the construction of a central highway, necessarily implies the rejection of the another direction, such as the construction of a railway. Though the aim of the collective good may be agreed upon, the manner upon which it should be implemented can create strong controversies among the collective members. A highway, which could improve communities’ socio-economic mobility, is only one of the many ways of communications between different geographic parts of the State.<sup>95</sup>

Even if the mechanism chosen for bridging economic barriers between separate geographic parts is a highway and not a subway, railway, airfield and so forth, there are still dozens of ways in which the collective good can be constructed. Some questions to consider may be: What would be the route of the highway? Which villages, cities, industries, or factories is it going to connect directly, and which is it going to by-pass? Would the route chosen demand the takings of private homes? Who would bear the burden of contributing parts of their private property? Would the houses taken be relocated or destroyed? The congested reality of public goods provides the collective process with multiple possibilities and therefore, substantial

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93. Theodore Groves & John Ledyard, *Optimal Allocation of Public Goods: A Solution to the “Free Rider” Problem*, 45 *ECONOMETRICA* 783 (1977) (attempting to reveal private players preferences for the provision of public goods). See also the discussion in fn 175.

94. By contrast, a focus on the end-result, such as the open highway, supports the characterization of public goods in non-excludable terms.

95. Other alternatives are railways, subways, airports, seaports, etc.

discretion as to the means and forms in which collective goals could be brought into fruition. Each and every decision, however, excludes competing alternatives and may easily redistribute wealth and power from one category of people to another.

### C. Dealing with Multiple Choices and Preferences

Deconstructing the collective action problem and focusing on the collective process, along with the overlooked, though meaningful, stage of dealing with competing collective goods, deeply challenge the rationale of free-riding. When faced with competing alternatives, individuals' preferences and interests are valuable resources for defining and shaping collective purposes and common goods. This congested nature of collective goods negates the technical vision of a collective process with a pre-ordained outcome and a narrow set of mechanisms for achieving it. It exposes the intricate incentives and strategies that the collective process accommodates and the essential role that distributive justice plays within it.<sup>96</sup> By encompassing multiple possibilities with differing distribution patterns, the main dilemma that the collective action should confront is why distribution pattern  $x$  should be promoted at the expense of distribution pattern  $y$ .

The prevailing reality of bargaining processes, in which competing alternatives with varied distribution effects are examined, casts a shadow on the convention of public rationality, passivity, and indifference.<sup>97</sup> A bargain over the choice between highway route  $x$ , which increases  $a'$  by \$60 and  $b'$  by \$90 dollars, and highway route  $y$ , which increases  $a'$  by \$90 and  $b'$  by \$60, motivates active participation. It is clear that in this imaginary private bargaining process, where the highway cost is \$100 and both players have to pay \$50 for its construction, the profit of \$30 is *exclusively* distributed to  $a'$  or  $b'$ . In this intermediary phase, where competing alternatives for the attainment of collective purposes are selected, it is plainly clear that in collective actions that bear distributive consequences, the collective process is at least *partially excludable*. Only when limiting our analysis of collective actions to the end-result, that is a specific route, the claim for non-excludability can "hold

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96. The term distributive justice as a moral standard is used here in two closely linked levels. The first concentrates on the *ex post* effects of a particular distribution resulting from a specific collective good. The second is the *ex ante* pressures of hidden distributive outcomes on the morality of the collective action procedure.

97. There are several alternative features that should be open in most collective processes, such as the possibility of supervising the production of the collective goods, their effects on the environment and social gaps and solidarity. Participating parties also examine the necessity of future re-negotiation and whether differential payment terms should be adopted due to the collective process distributive effects. This is of course limited to the contextual importance of the collective action.

water.”<sup>98</sup> Simply put, in the absence of competing alternatives, bearing different distribution patterns, collective goods as well as the process that shaped them are truly non-excludable.

When facing competing collective goods, along with competing distributive outcomes, people have to choose between “having lunch” and “being the meal”. “Having lunch” is the notion that people have the opportunity to protect their own interests and preferences by sitting at the negotiation table and learning about potential collective products and services, including those they favor. “Being the meal,” on the other hand, is the idea that people stay outside of the negotiation table only to find out that the distributive outcome of the collective bargain does not favor them.<sup>99</sup> In most circumstances, people are not situated in the same position and hence cannot free-ride on the work of their friends. In other words, collective goods are non-rival, but are usually also non-homogenous in their distribution effects. This means that avoiding the negotiation table has its costs and that the so-called “free-riding” is all but free. This, however, calls for a better understanding of the wide range of strategies used by individuals and groups in response to the distributive dilemma that the collective bargaining process accommodates.<sup>100</sup>

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98. This simple case of two highway route alternatives exemplifies the excludability feature of the collective process. Assuming that the cost of both players is 50, the increment of 30 dollars from the 10 dollars profit in one route and the 40 dollars profit in the other is exclusively given to a' or b'.

99. While the distributive effects of collective goods were neglected, it was claimed that the free-rider creates distributive effects since she is not paying her share in the collective action. Free-riding, “always entails distributive effects: the free-rider pays less than her proportionate share in the collective endeavor.” See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 131 (Cambridge University Press, 2004).

100. This theory resembles Olson’s *by product* theory and David Haddock analysis of irrelevant externalities, where it also acknowledges the existence of distribution effects in the production of public goods. However, the theory at hand focuses on the ways distribution concerns affect the structure of the collective process. It is therefore an internal analysis of the collective process and its implications are wider. Individuals’ behavior in Olson’s *by product* theory is motivated by a tied sale of collective and non-collective goods. However, when distributive effects are taken into consideration the motivation to participate derives from an understanding that the pie can be distributed in several ways. Participation is an attempt to increase ones share or influence the distribution to others. For the Olson by product theory see Mancur Olson, *supra note 4*, at 131-4; David D. Haddock, *Irrelevant Externality Angst*, 19 J. INTERDISC. ECON. 3 (2007). Similar to Olson’s *By product* theory, Buchanan and Stubblebine separated relevant externalities, which generate a desire to modify the behavior of others, from those who do not. See Buchanan, James M. & William Craig Stubblebine. *Externality*, *ECONOMICA* 371, 373 (1962). By employing this differentiation, David Haddock further limits the negative impact of free-riders on the production of public goods by private markets. Accordingly, “[t]he crux is not whether the number of *imaginable* coalition pairs is large, but whether the number of *relevant* pair of coalition pairs is large . . . . If . . . the subset of relevant pairs is small and the members can readily identify each other, transaction cost is but an inconvenience even if the free-riders who populate irrelevant coalitions number in millions. . . . In brief. . . if the number of relevant impacts is small, those externalities should. . . indicate that the relevant transaction costs are low.” See David D. Haddock, *id.*, at 5.

In the same vein, *George Stigler* and *Harold Demsetz*,<sup>101</sup> acknowledged that by not participating in the collective process, one reduces the chances and the magnitude of her favored outcome. According to their perception, collective goods are not free, and those who decide not to participate in the collective action bear a minimal cost, which is a higher probability of not getting the best outcome. This explains why Stigler preferred the term “cheap rider” to “free-rider,” as if to say that the “ride” on the efforts of others, while cheap, does not come for free.<sup>102</sup> However, this is just a mild expression of the radical distribution effects that can take place in a collective action. After all, and as *Hirschman* succinctly articulated, what may seem as a public good for some may be seen as a public evil by others.<sup>103</sup> Similarly, *David Haddock* clarified that public goods or “public bads” are simply two perspectives of the same collective tasks.<sup>104</sup> Contrary to the narrow perception of free-riding, by not participating, one may not only receive the small portion of the pie, she may actually find that the pie’s ingredients were taken from her own kitchen.

The *Cheap Rider* perspective, like the free-rider perspective, both focus on an the decision-making of an individual based on a pre-ordained and specific public good. They therefore fail to grasp the meaningful process that collective action should take, at least, when radical distribution effects are at stake. Comparing non-participation to a minimal reduction in the probability and magnitude of one’s favored outcome marginalizes the collective process, as well as the basic rights that are at stake. Once the congested nature of collective goods is unveiled, who can promise that the public share the same particular interest? A collective action for non-excludable goods may affect one’s surroundings. It may change her industry, education, and even result in losing her private home.<sup>105</sup> Not having a voice in the process that produces communities’ public goods is more than buying something at a cheap price. It is, in *Hirschman’s* vocabulary, loyalty with no voice.<sup>106</sup> In fact, it is forced loyalty and blindness to the interests at stake, which ultimately amounts to the absence of a real exit option.

Furthermore, when there are profound distributive interests and competing collective goods, the *political stage*, in which competing alternatives are selected, should not be separated from the *financial stage*, in which collective

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101. Though I am referring to an article written by George Stigler, the basic argument was developed by both of them. See George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. MGMT. SCI. 359, 360 (1974).

102. *Id.* at 359 fl.

103. In the words of Hirschman: “. . . what is a public good for some – say, a plentiful supply of police dogs and atomic bombs – may well be judged a public evil by others in the same community.” See ALBERT O. HIRSCHMAN, EXIT VOICE, AND LOYALTY, RESPONSES TO DECLINE IN FIRMS ORGANIZATIONS, AND STATES 101 (Harvard university press, 1970).

104. See David D. Haddock, *supra note* 100, at 4.

105. This is especially true when the power of eminent domain is exercised.

106. See Albert O. Hirschman, *supra note* 103, at 198-205.

members are being asked to pay the necessary costs. Considering that the participation in the political process is a cost itself that individuals must bear, we could say that the political stage is part of the financial stage and vice versa. The political stage in which legal rights and entitlements are allocated is a platform upon which material wealth is distributed. Separating the political stage it from the financial stage, as if currency has greater value than legal rights and entitlements, is neglecting the fact that money is itself a political phenomenon based on rights and entitlements prescribed by legal authorities.<sup>107</sup> Thus, one can “pay” or bear certain costs in the political side as well as in the “financial” side, and the payment in both can be substantial.

### III. THE PROBLEM OF BLIND RIDERS

#### A. *Conceptualizing Blind Riders*

Curbing the free-riding rationale and thereby exposing individuals’ interests in participation requires a deeper understanding of individuals’ incentives and strategies. In a typical collective action, aside from the common depiction of free-riders and holdout positions, there are two distinctive types of bargaining players.

The first type of bargaining players are the active players, known as *leaders or planners*, who frame and direct the collective process.<sup>108</sup> Employing *David Haddock’s* terminology, they may possess abnormal preference to a specific public good while the preferences of others for the same good are marginal and irrelevant.<sup>109</sup> It may also be that due to their unique psychology and personality features, the players’ benefits exceed their costs despite the added burdens.<sup>110</sup> Whether it is a sense of civic duty, social responsibility,

107. See Christine Desan, *Coin Reconsidered: The Political Alchemy of Commodity Money* 11 TIL 361 (2010).

108. The writing on entrepreneurs includes a thorough account of their incentives to bear the costs of leading the collective action. Thus, it was asserted that “For a price, whether in votes. . . or a percentage of the dividend, or the nonmaterial glory and other perks enjoyed by leaders, the entrepreneur bears the costs of organizing, expends efforts to monitor individuals for slackers behavior, and sometimes even imposes punishment on slackers.” See Shepsle and Bonchek, *supra* note 81, at 245.

109. Explaining that private markets can produce public goods, David Haddock asserts that: “[w]hen the free-rider dilemma foils contribution from others, a person with an abnormal demand for a public good may shoulder the entire burden, or share it with one or a few others with similarly strong demands.” See David D. Haddock, *supra* note 90, at 5. On the definition of irrelevant externality see Buchanan & Stubblebine, *supra* note 100, at 373.

110. Dan M. Kahan defined them as “dedicated cooperators” who would contribute their share regardless of the surrounding circumstances. See Kahan, *supra* note 87, at 78. It was explained that “not everyone is always a possessive individualist (Homo economicus, or rational man).” There are also “contractarians, that is, people who play fair, who try to cooperate if others do.” See Russell Hardin, *supra* note 78, at 90. Criticizing the centrality of the self-interested individuals and in light of the appearance of cooperation in the establishment of property regimes, Carol Rose asks to extend the understanding of individuals’ rationality so as to include a wider

reputation,<sup>111</sup> rent seeking, or high moral standards,<sup>112</sup> the leaders gain more from being active than sitting idly waiting for the job to be fulfilled by others.<sup>113</sup>

The second type of bargaining players describes those who can potentially participate in collective bargaining for non-excludable goods, but are blinded to its distributive consequences. This group is termed here as *blind[ed]-riders*. If the common description of a *free-rider* is one who uses public transportation without paying the fare, *blind-riders* are those who use public transportation, and may even pay the fare, but are oblivious to where they are heading. In many ways, this group symbolizes the average person who regularly pays her taxes but does not know how and where her money is being invested. As opposed to free-riders, who rationally decide to enjoy the work of others, *blind-riders* are unaware of procedural or substantive competing alternatives and their corresponding distributive outcomes.<sup>114</sup> While the legal writing on leaders and free-riders is extensive, the incentives and legal implications of those who blindly tag along not knowing the stakes at hand, distinct from the common phenomenon of following the herd, is relatively scant.<sup>115</sup>

Incorporating *Haddock's* analysis, the members of a particular collective are not identical. Despite common neglect of this plain reality, members' preferences to a particular collective endeavor vary considerably.<sup>116</sup> The congested nature of the collective good, as well as the intricacies of individuals' incentives and strategies, which the collective process accommodates, cannot be easily confronted by ordinary laymen. Moreover, in many circumstances, a rational extrapolation of the costs and benefits associated with taking an active part in a specific collective process cannot be attained *ex ante*, prior to the participation in what may be a meaningful and

range of individuals' order preferences, e.g. one that includes the value cooperation. See Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37 (1990).

111. See Shepsle and Bonchek *supra* note 81, at 220-260.

112. For the problems of rent seeking in state and local governments see Carol M. Rose, *Takings, Federalism, Norms Regulatory Takings: Law, Economics, and Politics*, 105 YALE L.J. 1121, 1138 (1996) (Book Review).

113. It was suggested that they have "read too much Kantian moral philosophy." See Kahan *supra* note 87, at 78.

114. They are blind to their relative share in the collective action possibilities. If we understand the collective process as a mechanism that examines competing alternatives, blind-riders are completely restrained in it. How can one choose the best possible alternative when only options A and B are examined, while options C to Z are kept hidden?

115. It may be so since this behavior, conducted by competent, rational individuals, that it does not seem to be causing any harm.

116. In the words of David Haddock: "[p]eople are not identical, a fact that is as factually obvious as it is neglected in scholarly work. Even if everyone else could somehow overcome their free-rider problem and obtain the proper amount of a public good for their purposes, anyone with an abnormally strong preference for it would remain dissatisfied. Such supernormal preferences cannot be met without arranging privately for the excess." See David D. Haddock, *supra* note 100, at 4.



even empowering experience. This is especially true when the existence of competing alternatives, with potentially different distribution pattern, is marginalized and the creation of the asserted collective good is dressed either in the “neutral” and “vague” terminology of economic advancement, overall efficiency or utility.<sup>117</sup>

In many instances, it is participation in a meaningful collective structure, one that exposes conflicting alternatives, that confers the necessary data for one’s reasonable assessment of her private interests in the collective action.<sup>118</sup> When the distribution effects are low, this blindness may be seen as a blessing in disguise since it promotes cooperation as was thoroughly analyzed by *Henry Smith*.<sup>119</sup> However, in the cases where the collective action can lead to radical distributive effects and considerable losses, this blindness leads to alienation and not cooperation. Simply put, a highway route connecting a remote village to the city center may increase the value of lands and the market share of retailer stores, which would then have a wider target audience. However, if the location of the route has profound distribution effects, such that adjacent stores’ market share is increased at the expense of distant stores, it may lead to the loss and even insolvency of competing businesses. This is especially true when the construction of the route entails the expropriation of competing stores’ lands. In this setting, a quintessential public good, like a public highway, may render some of the stores with a considerable profit and others with a loss.

It is simply reductive to compare a collective process that examines different alternatives and chooses one, based among other things on their distributive outcomes, to the non-excludable lighthouse.<sup>120</sup> Moreover, even the

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117. See the criticism of Justice Thomas on the vagueness and broadness of terms as “general welfare”, *Kelo*, *supra note* 12, at 509.

118. In circumstances where there are multiple competing alternatives, both the interest and importance of participating increase. While it is not likely that participating players would be able to extract their most favored outcome, their participation might reduce the likelihood of the one they consider as the worst option. A similar analysis was presented in Maxwell’s description of the motivations to vote. See MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW, READINGS AND COMMENTARY 68 (Anderson Publishing Co., 1997).

119. Imprinting the term of semicommons, Henry Smith explains that under a semicommons regime “a resource is owned and used in common for one major purpose, but, with respect to some other major purpose, individual economic units . . . have property rights to separate pieces of the commons.” The collective action, much like a semicommon regime, is a resource owned and used in common, which is aimed for the purpose of the collective good. The distributive aspect of the collective process is a different purpose, according to which individuals hold private property rights in separate units of the common. In a semicommon property regime, the incentives of individuals are “not only to overuse the commons but also to spread that use (in particular its harmful effects) to other pieces of the commons.” See Henry E. Smith, *Semicommon property rights and scattering in the open fields*, 29 J. LEGAL. STUD. 131, 137-40 (2000).

120. The frequently used example for a non-excludable and non-rivalrous collective good is of a lighthouse. No ship can be excluded from its services and all ships indiscriminately benefit from it without reducing the quality and supply of which to others. See JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 128 (2d ed. 2000). PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 37-38 (18<sup>th</sup> ed. 2005).

celebrated example of the non-excludable lighthouse, frequently used by market failure classical scholars, as Mill,<sup>121</sup> Samuelson,<sup>122</sup> Pigou and Sidgwick do,<sup>123</sup> was highly criticized for its lack of empirical grounds. In the words of Ronald Coase, the lighthouse in Economics “is simply plucked out of the air to serve as an illustration. . .to provide ‘corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.’”<sup>124</sup> Contrary to market failure analysis,<sup>125</sup> and according to Coase’s empirical examination of the history of lighthouses in 19<sup>th</sup> century’s Britain, private enterprise was responsible for building and operating most of the lighthouses.<sup>126</sup>

The history of lighthouses in 19<sup>th</sup> century Britain does not represent a competitive free market. State intervention was evident as lighthouse owners received patent rights from the Crown,<sup>127</sup> empowering them to levy tolls from ships.<sup>128</sup> Nevertheless, private individuals, ship-owners, merchants and shippers petitioned to pay the tolls and drove the Crown into levying them.<sup>129</sup> In direct contradiction to market failure analysis, Coase’s empirical records present successful collective actions for the production of the classical quintessential public good, the lighthouse.<sup>130</sup> Moreover, Coase’s historical account exposes conflicting interests within the process that produces public goods.<sup>131</sup> It, therefore, opens the door to modern economic emphasis on the intricate nature of the collective process that produces public goods.

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121. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, in *The Collected Works of John Stuart Mill* 968 (ed. J. M. Robson, 1965).

122. PAUL A. SAMUELSON, ECONOMICS: AN INTRODUCTORY ANALYSIS 159 (6<sup>th</sup> ed., 1964).

123. HENRY SIDGWICK, THE PRINCIPLES OF POLITICAL ECONOMY 406 (3<sup>rd</sup> ed., 1901); A. C. PIGOU, ECONOMICS OF WELFARE 183-84 (4<sup>th</sup> ed., 1938).

124. Ronald H. Coase, *The Lighthouse in Economics*, J. L. & ECON. 357, 374-75 (1974).

125. See Richard O. Zerbe & Hoard McCurdy, *The End of Market Failure*, 23 REGULATION 10, 12 (2000).

126. Ronald H. Coase, *supra note* 124, at 366-67.

127. *Id.*, at 364; David E. Van Aandt, *The Lessons of the Lighthouse: “Government” or “Private” Provision of Goods*, 22 *J. Legal Stud.* 47, 54-57 (1993); Elodie Bertrand, *The Co(a)sean Analysis of Lighthouse Financing: Myths and Realities*, 30 *CAMBRIDGE J. ECON.* 389, 396-97 (2006).

128. See Lawrence W. C. Lai et al, *The Political Economy of Coase’s Lighthouse in History* (Part I) 79 *TPR*, 395, 406-8 (2008). Government intervention included granting a monopoly to the lighthouse owner at a particular location. See David E. Van Aandt, *The Lessons of the Lighthouse: “Government” or “Private” Provision of Goods*, 22 *J. Legal Stud.* 47, 56 (1993).

129. According to Coase “The way this was done was to present a petition from ship owners and shippers in which they said that they would greatly benefit from the lighthouse and were willing to pay the toll.” See Ronald H. Coase, *supra note* 124, at 364.

130. On the active role taken by private merchants and ship owners see also, Taylor, J. *private property, public interest, and the role of the state in nineteenth-century Britain: the case of the lighthouse*, *HISTORICAL JOURNAL*, 44, 749-71 (2001).

131. Especially Coase’s empirical analysis exposes the existence of a myriad of private interests underneath a seemingly straightforward discourse of public benefit. He therefore cites

Competing collective outcomes have strong distributive effects, though the added value may outweigh prior resource collection.<sup>132</sup> The collective resolution may embody some of the members' preferences while remaining indifferent to others. It is probably true that the resolution reached at the end of the negotiation represents a non-excludable collective good; however, the bargaining process, in which competing alternatives are examined, may cause severe distributive effects and acute inequalities. It is, therefore, not clear whether the common focus on the collective action end-result and its anticipated cooperation failures is justified or whether it is better to direct legal and socio-economic attention on the collective process' structure and implications.

### B. Confronting Blinding Strategies

The existence of distribution disparities and conflicting preferences is likely to induce individuals' strategic concealment of true preferences and consequently increase collective bargaining costs. In the interest of minimizing these potential costs, leaders or planners may choose to conceal the distributive angle in an attempt to promote cooperation — a move which I term here as a *blinding strategy*.<sup>133</sup> Meir Dan Cohen's analysis of the criminal law separation between decision rules and rules of conduct, which he terms *acoustic separation*, can serve as an illustration for this strategy.<sup>134</sup> In the context of collective bargaining, the reduction of cooperation costs can be reached via a

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Harris words that: "A characteristic element in Elizabethan society were the promoters of projects advanced ostensibly for the public benefit but in reality intended for private gain. Lighthouses did not escape their attention. . . The lighthouse projectors were typical of the speculators of the period: they were not primarily motivated by considerations of public service." See Ronald H. Coase, *supra note 124*, at 363-4.

132. This means that the collective action results in a non-excludable collective good, which is the reason for the collective action problem. However, this is only one aspect from a variety of conflicting alternatives. On the prisoner's dilemma in the collective production of public goods, see Russell Hardin, *supra note 78*, at 25-27.

133. It is not clear that cooperation costs are part of the transaction costs. They are not part of the costs "necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations. . ." See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960). It seems that the cooperation costs are closer to Cooter's strategic behavior, such as the individual claimed price/preferences for insulation walls instead of waste disposal pipes or compensation packages. Formulating the polar-opposite theorem to that of Coase, Cooter explains "Externalities will not be cured by private bargains unless someone coerces the parties to agree about the priceFalse the final obstacle to private noncompetitive bargains is the absence of a rule for dividing the surplus. See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD 1, 28 (1982). Favoring their individual interests, prior to the use of blinding strategies, the strategic behavior of the parties, might lead to a breakdown of cooperation.

134. Meir Dan-Cohen developed the idea of acoustic separation by explaining the need in criminal law for separating between decision rules, which guide judges, and conduct rules, which guide citizens. See generally, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 635 (1984).

similar pattern of informative separation between the data held by *blind[ed]-riders* and the data held by *leaders* regarding the distributive aspects of the competing alternatives.<sup>135</sup>

Deliberate blinding strategy, as a mechanism aimed to increase cooperation in collective actions, was thoroughly analyzed in *Henry Smith's* analysis of semicommons property regimes.<sup>136</sup> Simply put, blinding community members to the distribution aspects of collective decision-making may reduce inner conflict of interests and promote cooperation. While Blinding strategies can serve a positive role in collective actions, the politically powerful group can also exercise these strategies for the less than noble purpose of hiding the exploitation of the collective action. As it was critically stated in *Coase's* empirical analysis of the history of lighthouses, “A characteristic element in Elizabethan society were the promoters of projects advanced ostensibly for the public benefit but in reality intended for private gain.”<sup>137</sup> The law itself can assume a prominent role in the solidification of a blinding strategy when the courts adopt the terminology of non-excludability in collective actions for the production of public goods. To that, one may add the reductive depiction of the individuals' interests to mere *free-riders* or persons who assume holdout positions. If we accept the power of law in directing individuals' behaviors, knowledge, and moral standards, this legal discourse on public goods is one of the main mechanisms that discourage individuals' active participation in the production of public goods.

More than the law and public authorities, private political players are accustomed to employing a diversified portfolio of blinding strategies. These strategies can include *overburdening with irrelevant information*, which is to say, overburdening people with a considerable amount of un-processed

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135. *Id.* This pattern of screening information was also observed by *Gary Libecap* in the federal policy for promoting unitization of oil fields. Gary Libecap explains that differential information regarding pre-unitization lease values caused a negotiation breakdown. Contracting firms were concentrated on their private gains and could not reach a collective resolution aimed at avoiding common pools overuse. Confronting the information barrier, the federal policy encouraged negotiation during exploration — a stage in which little is known about leases productivity. Libecap analyzes the concealment feature of the federal policy as “the most effective in promoting unitization because it encourages agreement during exploration, rather than after field development. . . During exploration, there is little asymmetric information across bargaining parties regarding relative lease values to block agreement.” See GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 107-108 (Cambridge University Press, 1989).

136. Analyzing the role of scattering in the open fields, Henry Smith claims that scattering is a blinding strategy which can improve collective decision making: “the strategic behavior of dumping the costs of trampling requires the activity of distinguishing whose parcel is whose while the animals are roaming. By making this picking and choosing prohibitively costly. . . the scattering acts as a sanction. . . One might even view scattering as working somewhat like the denial of access to a complementary attribute: clarity of holdings. . . and this attribute is highly complementary to the attributes that someone engaged in strategic behavior is trying to exploit.” See Henry E. Smith, *supra* note 119, at 164.

137. See Ronald H. Coase, *supra* note 124, at 363.

secondary relevant information that hides the relevant and important information within data that is overloaded, marginal, and unnecessary. Another strategy aimed at increasing the transaction costs of the next in-line participators is using a *squeezed timetable*, pressuring for hasty resolutions and unsuitable for a meaningful assessment of potential alternatives along with their corresponding distributive effects. It is practically impossible to develop a reasonable understanding and opinion in a short timeline dealing with excessive and incoherent pieces of data. Similar blinding strategies are frequently employed by service providers, in the interest of increasing consumers' measurement costs.<sup>138</sup>

One of the most sophisticated blinding strategies is the conventional separation between distributive concerns and overall wealth maximization. This strategy divert public attention away from the distributive angle of collective projects and, in particular, their short and long-term repercussions on weak communities, as racial minorities and the poor. The comprehensive success of this strategy is based upon the premise that separating the efforts of increasing the collective pie from the complex question of how it should be divided would increase social welfare. According to this seemingly objective and proficient socio-economic argumentation, collective decisions should be based on their efficiency regardless on their distributive pattern. As Kaplow and Shavell thoroughly elaborated in their scholarship, it is more economically efficient and morally desirable to achieve the preferred distribution pattern through tax law and policy.<sup>139</sup> By contrast, the attempt to advance a desired redistribution pattern through legal rules, as eminent domain law, is inefficient since it produces a double distortion effect.<sup>140</sup>

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138. Since costly measurement reduces efficient resource allocation, Barzel explains that: "within the framework of competitive markets. . . information on the quality of goods that inspection would have generated is deliberately suppressed. . . The advantages of suppressing information may explain some of the practices associated with the selection of physicians by patients. . . Sellers of medical services, through the AMA, ADA, etc., spend a large amount of resources to persuade buyers to choose among physicians as if the choice were random. . . Comparison among physicians also is discouraged. Physicians are constrained from criticizing one another. . . Additionally; price information is kept in low profile. Thus, a patient can compare physicians only by expedients such as word of mouth. See Yoram Barzel, *A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE*, 38-9 (Cambridge, 2002).

139. See generally, Louis kaplow and Steven Shavell, *Why the legal system is less efficient than the income tax in redistributing income*, 23 J. LEGAL STUD. 667 (1994). Similar arguments concerning collective decision making were raised in Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264 (1979).

140. According to Kaplow and Shavell double distortion effect. "If legal rules disadvantage high-income individuals and help low-income individuals, that will tend to discourage work effort in the same manner and to the same extent as making the income tax system more redistributive. . . However, when inefficient legal rules are employed to redistribute income, there is not only a distortion of work effort; there is also the cost directly associated with the inefficiency of the legal rule (such as insufficient or excessive precaution to avoid accidents"

It is highly unlikely, however, that a collective process abundant with interests groups and private gains could be sterilized from distribution concerns. The central problem is that human beings are suited within a socio-economic context that inevitably affects, even unconsciously, their definition of collective goods and the extent and degree of their associated benefits and harms.<sup>141</sup> A collective process that separates distribution concerns from overall efficiency can easily assume the appearance of objectivity while advancing the interests of the few at the expense of the rest. Furthermore, distribution concerns are part of many individuals' well-being and therefore, affect individuals and collective efficiency.<sup>142</sup> In other words, a project that produces a radical distribution pattern has a different impact on society's well-being than a project with mild distribution effects.<sup>143</sup> It is therefore more economically efficient and morally desirable to deal openly with distribution concerns than leaving them festering in the shadows.

There are additional ways for reaching an acoustic separation that blinds participators from the data held by leaders or planners. Prominent additional ways can be found in the discussions on behavioral economics and, especially, in the scholarship of *Tversky & Kahneman*. Based on their research, leaders and planners have psychological influences on many individuals' decision-making simply by the way in which they frame the collective problem that ultimately calls for individuals' collective resolution.<sup>144</sup> By building on the misleading presumptions of objectivity and proficiency, planners can frame the collective question in a way that fits only one or a minimal set of solutions while maintaining the illusion of choice.<sup>145</sup> Being presented with a minimized set of options, individuals are intellectually incapable of questioning leaders' proposals and suggesting competing alternatives.<sup>146</sup> In other words, a pre-ordained limited framework of options increases individuals' costs of thinking

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See Louis Kaplow and Steven Shavell, *Should Legal Rules Favor The Poor? Clarifying The Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 823-4 (2000).

141. In other words, a public socially valuable purpose for some may be perceived as a socio-economic burden for others. See Albert O. Hirschman, *supra note* 103, at 101.

142. Simply stated, collective decisions' overall efficiency cannot be measured without a serious endeavor to their distribution effects and in particular their impact on the less fortunate.

143. Interestingly, Kaplow and Shavel acknowledged that distribution concerns may be part of individuals' well-being, and therefore efficiency. This approach is shared by welfare economics that incorporate distributive concerns. See Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 968 (2001).

144. See Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, (2) 11 SCIENCE 453 (1981).

145. The free-rider threat is based on the social pressure to favor the collective effort above private interests. It is therefore about cutting down the complexities involved with collective bargaining. On the social pressure, resulting from a simplistic description of reality, see Russell Hardin, *supra note* 78, at 114.

146. See Herbert. A. Simon, *A Behavioral Model of Rational Choice*, Q. J. ECON. 69, 99 (1955).

outside the box and examining by themselves the risks and potential benefits of potential alternatives.<sup>147</sup> In this setting, individuals' decision-making processes, including their preferences,<sup>148</sup> are strongly influenced by their *bounded rationality*.<sup>149</sup>

While preserving the illusion of free choice, blinding strategies can be employed by leaders to limit and direct people's access to information and their corresponding self-resolutions. Similarly, *Richard Thaler* and *Cass Sunstein* brought to the fore the mechanisms by which individuals' seemingly free choices can be directed by private and public planners.<sup>150</sup> However, by claiming that this "choice architecture" is inevitable, they suggested that it should be employed, though minimally, as a nudge to steer people into the right directions, which increase their welfare.<sup>151</sup> The paper at hand, along with the focus on blinding strategies and blind[ed]-riders, exposes the direction that the law of eminent domain embraced when dealing with collective action problems.

### C. *Blinding Strategies and Blind[ed]-Riders In the Law of Eminent domain*

*Berman v. Parker* and *Kelo v. City of New London* are seminal cases in the law of eminent domain that has gained, throughout the years, extensive research and critique. Building upon this, a careful analysis of their socio-economic context and reasoning using the lens of modern economic critique, can serve as an excellent starting point for a novel approach to eminent domain law. Prominent in this approach is a critical comparison between the conventional fear of collective action failures, mainly *holdouts* or *free-riders*,

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147. Examining the studies of the influence of individual ignorance and misunderstanding on collective actions, Hardin points out that "It may also be that having to make a choice in the presence of others tends to lead people to act morally, especially when the choice is carefully defined as a conflict between personal and group interests." See Russell Hardin, *supra* note 78, at 114.

148. It was therefore asserted that: "... observed preferences are not simply read off from some master list; they are actually constructed in the elicitation process. Furthermore, choice is contingent or context sensitive: It depends on the framing of the problem and on the method of elicitation. . . Different elicitation procedures highlights different aspects of options and suggest alternative heuristics, which may give rise to inconsistent responses. An adequate account of choice, therefore, requires a psychological analysis of the elicitation process and its effect on the observed response." See Amos Tversky et al., *Contingent Weighting in Judgment and Choice in PREFERENCE, BELIEF, AND SIMILARITY*, 846 (Eldar Shafir ed., MIT, 2004).

149. *Id.*

150. See RICHARD H. THALER AND CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 11-13 (Yale 2008).

151. Accordingly, they claim that: "... if people lack information, a great deal of attention needs to be paid to information processing, and that without such attention, information disclosure might well prove futile or counterproductive. And to the extent that those who design informational directions, their efforts will inevitably have a paternalistic dimension." *Id.*, at 1183.

and the more elusive phenomena of blinding strategies and *blind[ed]-riders*.<sup>152</sup> Exposing and examining latent strategies in leading cases, is now feasible in view of the fact that a long time has passed since their occurrence. Most importantly, the re-examination of leading eminent domain cases through critical and modern economic analysis will shift legal attention away from the end-product, which is the collective purpose of economic advancement, into the structure and long-term implications of the political process that shapes our public goods.

Blinding strategies, as was previously observed, limit and control people's access to collective decision-making processes. This end can be achieved by marginalizing the significance of the collective process itself, and therefore reducing the incentive to assume an active role in it. Most collective actions entail a myriad set of competing alternatives regarding the shape and content of practically any imaginable public good.<sup>153</sup> Blinding strategies work on overshadowing the congested nature of public goods and the existence of competing alternatives, as well as the possibility that a meaningful process could produce new ones.<sup>154</sup> People's rationality and choice, absent necessary information, is bounded to the collective goods' shape and character that was proposed by the collective process leaders/planners. Relying on planners' appearance of objectivity, *blind[ed]-riders*' adopt a misguided perception of the collective action process. Instead of a mechanism shaped by conflicting preferences and interests, the collective action is being transformed into a shallow and technical phase in the provision of pre-ordained collective goods.

By draining the collective action process of substance and complexity, *blinding strategies* may conceal the existence of conflicting interests and competing alternative goods. These strategies are most successful when the collective action process is perceived to be objective and even scientific. In Berman, the terminology of *blight* gave to the redevelopment projects this perception of proficiency and objectivity.<sup>155</sup> Originally used to describe ecological phenomenon concerning plants' infections, blight came to represent urban pending crisis due to a natural process of physical deterioration of property.<sup>156</sup> More than poor housing conditions, high population densities, loss of tax revenues and increased costs in social services, the terminology of blight gave rise to a disturbing vision of urban epidemic.<sup>157</sup> The seemingly neutral perception of blight allowed urban renewal advocates to call for the drastic

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152. It is rational to assume that the strategies taken for concealing private benefits and interests are themselves covert.

153. The existence of competing alternatives with a multiplicity of shapes and forms constitutes the congested nature of public goods. On the congested nature of public goods see the discussion in chapter B.1.

154. On the congested nature of public goods see the discussion in chapter B.1.

155. Wendell E. Pritchett, *supra* note 40, at 16-17.

156. *Id.*, *id.*

157. *Id.*, at 16-18.



measures of slams' removal while neglecting the pervasive socio-economic context of ethnic and racial prejudice.<sup>158</sup> Employing a "scientific" analysis of urban decline planners concealed the political sphere in which renewal projects relocated racial minorities and entrenched racial segregation.<sup>159</sup>

Less than half a year after *Brown v. Board of Education*,<sup>160</sup> the same panel of judges upheld the eviction of thousands of property owners. 97.5% of them were African Americans.<sup>161</sup> In the face of urban pending crisis, the Berman's court declined to dwell on the specifics of the program despite its alarming disproportionate impact on racial minorities. Surprisingly, the same court who vividly wrote the *Brown*'s ruling, and apparently while writing it, dedicated only one sentence on the racial aspect of this drastic redevelopment plan. Rather than confronting the reasons leading to this racial inequality along with its socio-economic repercussions, the United States Supreme Court clenched to the "scientific" terminology of blight. Justice Douglas' opinion for the court made it clear that much like an open sewer can ruin a river, blight can despoil a community; reduce people to the status of cattle, and spread disease crime and immorality.<sup>162</sup> This seemingly objective analysis served as a sweeping justification for any type of program purportedly addressing the problem of blight, regardless of its substance and expected long or short-term effects.

Similar blinding mechanisms, that hide the role taken by private political players and employ a misleading appearance of objectivity and expertise, can be found in the factual background of *Kelo*'s case. In the first paragraph of the judgment, Justice Stevens presents a chronological description of the facts that had led the City of New London to take the properties of Fort Trumbull residents. This storyline progression begins with decades of economic decline and the actions taken to confront it. Most important in this chronological presentation is the decision to revitalize New London and, in particular, its Fort Trumbull area. According to the facts presented in *Kelo*'s case, the decision was made by the state and by local officials, and most importantly, prior to the introduction of the pharmaceutical company Pfizer in February 1998.<sup>163</sup> Consequently, private interests, and especially those of Pfizer, did not taint the objectivity and proficiency of the planning process.<sup>164</sup>

However, and contrary to the chronological presentation of the facts made by Justice Stevens, the data received after the Supreme Court made its ruling suggested that Pfizer Company may have had a decisive role in the planning

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158. *Id.*, at 17.

159. *Id.*, at 6, 38.

160. *Brown v. Board of Education*, *supra* note 1, at 494.

161. See *Kelo*, *supra* note 5, at 522.

162. See *Berman v. Parker*, *supra* note 3, at 32-33.

163. See Justice Stevens opinion.

164. To Pfizer influence and involvement in the planning process see Corinne Calfee, *Kelo v. City of New London: The More Things Stay the Same, the More They Change*, 33 *Ecology L. Q.* 545, 550-551 (2006).

process, beginning as early as the fall of 1997.<sup>165</sup> What courts were apparently unaware of is that Pfizer, and not the state or local officials, promoted the eviction of Fort Trumbull residents.<sup>166</sup> Private initiatives are not necessarily a proof of eminent domain abuse. They are, however, extremely worrisome when they are kept out of public and judicial scrutiny, and when they replace the necessary objective decision-making process of the state and local officials.<sup>167</sup> In *Berman* it was the objective and neutral terminology of blight the one that served as the primary reason for the eviction of minorities from their homes. In *Kelo*'s case it was the seemingly unbiased and proficient decision-making process by local officials, based on impartial planning principles, which justified the condemnation of private lands in the Fort Trumbull neighborhood.

The second blinding mechanism, and closely linked to the first, is the thorough concealment of the long and short-term distributive aspects of the collective project. In *Brown v. Board of Education*, The United States Supreme Court criticized states' education system for not providing public education to all on equal terms. It was further determined that separate educational facilities, based on racial characteristics, were inherently unequal.<sup>168</sup> This determination was predicated upon the socio-psychological repercussions of racial segregation on African-American children's sense of inferiority.<sup>169</sup> However, and contrary to the United States Supreme Court's reasoning in *Brown*, the racial separation in states' urban planning did not receive any analysis at all. This neglect is even more surprising in light of the demand of the same court, on the same day of *Brown*, that "*classification based on race be scrutinized with particular care*".<sup>170</sup>

The reality of urban renewal projects, however, demanded such analysis. In *Berman*'s case, communities, predominantly racial minorities, were uprooted from their homes for the sake of protecting cities from the contagious disease of blight. Both, the justification for the eviction and the dominancy of racial characteristics, exacerbated the indignity inflicted in losing ones' home. Despite these alarming consequences, Justice Douglas simply and shortly

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165. As to Pfizer involvement it was claimed "state documents chronicle Pfizer's involvement in planning for New London's economic development as early as the fall of 1997." Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, *The Day* (New London), Oct. 16, 2005.

166. Based on state Freedom of Information Act, New London newspaper, *The Day*, requested state documents which "yielded information about Pfizer communicating with state economic development planners. The paper emphasized an early architectural "vision statement" sketch illustrating the Fort Trumbull neighborhood in question "replaced" with a "high end residential district." See Corinne Calfee, *Kelo v. City of New London: The More Things Stay the Same, the More They Change*, 33 *ECOLOGY L. Q.* 545, 550-551 (2006).

167. In the *Kelo* case, Pfizer vision of the Fort Trumbull area was completely adopted by local official without any change. See *id.*, *id.*

168. *Brown v. Board of Education*, *supra* note 1.

169. The court explicitly stated that: "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn." *Id.*, *id.*

170. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

mentioned that “[t]he population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes”.<sup>171</sup> Not a single word was written on the project’s social and psychological impacts, including racial relations, in general, and African-American’s sense of belonging, in particular. However, it can be convincingly argued that the racial separation in urban planning equals, if not outweighs, the harm inflicted by the segregated schools in Brown. This lack of attention to the distributive aspect of eminent domain law is especially disturbing when people across the country used to term urban renewal projects as “Negro removal”.<sup>172</sup>

Much like in Berman, the distributive aspect in Kelo had been largely kept hidden from judicial scrutiny. Acknowledging the discrepancy between public purposes and interest group pressures, Justice Thomas, dissenting in Kelo, referred to Berman and emphasized the systematic neglect of distribution questions in eminent domain law.<sup>173</sup> Nevertheless, criticism based on distribution concerns should not be perceived as an all-encompassing call for exposing all possible distribution effects of any given collective action. Even prominent players in a specific collective action, as Pfizer Pharmaceuticals Company in Kelo, should not be obligated to expose their expected private benefits, and costs. Despite public immense investment in it, and even though Fort Trumbull facilities were eventually closed a few years afterwards,<sup>174</sup> business entrepreneurs’ private evaluations, including expected risks, costs and benefits, should be kept out of judicial scrutiny.

Nonetheless, what should be open for public and judicial review are the contractual agreements with public authorities, which lead to the condemnation of private properties. This is especially true when they include tax attributes and planning law agreements that have a direct impact on eminent domain decision-making process. When facing regressive distribution patterns that leave the collective burden at the shoulder of the politically powerless, as poor minority communities, these agreements should not receive deferential treatment by courts.<sup>175</sup> In the words of Justice Thomas, “if ever there were

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171. Berman v. Parker, *supra note 3*, at 31.

172. Wendell E. Pritchett, *supra note 40*, at 47.

173. He eloquently stressed that “[p]ublic works projects in the 1950’s and 1960’s destroyed predominantly minority communities. . . urban planners in Detroit, Michigan, uprooted the largely lower-income and elderly Poletown neighborhood for the benefit of the General Motors Corporation. . . Urban renewal projects have long been associated with the displacement of blacks. . . Over 97 percent of the individuals forcibly removed from their homes by the ‘slum-clearance’ project upheld by this Court in Berman were black.” See Kelo, *supra note 12*, at 522.

174. This made local residents see “Pfizer as a corporate carpetbagger that took public money, in the form of big tax breaks, and now wants to run.” See Patrick McGeehan, *Pfizer To Leave City that Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

175. This is contrary to the deferential treatment stated by Justice Douglas in Berman: “the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.” See Berman v. Parker, *supra note 3*, at 33.

justification for intrusive judicial review of constitutional provision that protect ‘discrete and insular minorities’. . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.”<sup>176</sup> In the *Kelo* case, however, the distribution pattern, especially Pfizer contractual duties and rights, was not fully available for public and judicial scrutiny.

Moreover, in *Kelo v. City of New London*, the choice architecture itself, or in other words, the manner in which the collective problem had been presented and confronted, was tilted to the disadvantage of the politically powerless.<sup>177</sup> Familial and personal characteristics of the Fort Trumbull residents were essential for a thorough understanding of the relevant costs associated with the eviction process. Their examination should have had a significant impact on the decision-making process in regards to the location of the project. However, those familial and personal concerns were not included in the planning process.<sup>178</sup> Thus, and in contrast to Michelman’s cost and benefit analysis of eminent domain, pertinent factors in the evaluation of the costs associated with plausible competing alternatives did not take part in the planning decision-making process.<sup>179</sup>

Furthermore, and perhaps more crucial in *Kelo*, the potential benefits of each alternative, within a multitude set of competing collective goods, were also kept under the radar of public scrutiny. Apparently, and despite the interests and involvement of Pfizer in the planning process,<sup>180</sup> the obligations of Pfizer, or any other business entrepreneur, were not set, or at least exposed, in clear terms.<sup>181</sup> Apparently, there was a general hope that Pfizer would draw new businesses and serve as a catalyst to the area’s rejuvenation.<sup>182</sup> However, and despite the millions invested in the project, including the harm inflicted to people and families due to the eviction process, it seems that Pfizer had the option of leaving the project whenever it wanted, as it actually did.<sup>183</sup> In *Kelo*, the decision-making framework seems to have neglect pertinent factors to the evaluation of relevant costs and benefits. In this setting, the pretense of

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176. See *Kelo*, *supra* note 12, at 521-522.

177. On the ways framing of collective action problems direct individuals, as well as judges’ decision making, see Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, (2)11 *Science* 453 (1981).

178. General neighborhood meetings were held only after the initial approval of the city council and for the narrow purpose of educating the public about the process. See *Kelo*, *supra* note 12, at 473.

179. On the cost benefit analysis of eminent domain see Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “just compensation” Law*, 80 *HARV. L. REV.* 1165, 1241 (1967).

180. See Corinne Calfee, *Kelo v. City of New London: The More Things Stay the Same, the More They Change*, 33 *ECOLOGICAL L. Q.* 545, 550-551 (2006).

181. This is especially true if, as was claimed, Pfizer Inc. interests or pressures did not affect the planning process.

182. See *Kelo*, *supra* note 12, at 473.

183. See Patrick McGeehan, *supra* note 174.

proficiency and the illusion of choice are likely to serve as blinding strategies for the concealment of regressive distribution patterns.<sup>184</sup>

#### IV. MORE THAN HOLDOUTS: BLING RIDING AND THE CHALLENGE OF CONSCIOUS COLLABORATION

Despite their various shapes and forms, most if not all blinding strategies rely on the same disparaging perception of the collective action process. Instead of simplifying the risks and challenges associated with the collective process, blinding strategies aim at reducing its accessibility. They build upon and magnify the complexity involved anyway in most collective processes. Instead of concise terms and lucidity, blinding strategies would support overburdening participants with irrelevant information, ambiguous goals and possibilities, as well as imprecision and unnecessary sophistication. Instead of focusing on public rational ignorance, the law should endeavor more to the strategies that suppress public understanding and active participation in their political surroundings.<sup>185</sup> When the collective process is too complex, the ability to take an active role in it, to participate in its design, or to express ones criticism, may seem far-fetched.

While complexity is central in most blinding strategies, it alone cannot suffice for appeasing public and legal scrutiny. The overreaching notions of non-excludability and collective action failures, as free-riding and holdouts, assure that the option of individuals' active participation will be both, unnecessary and futile. Under classic economic analysis, all equally benefit from collective actions that produce public goods. This is the reason why rational individuals should not voluntarily invest their time and efforts in their making. Blinding strategies embrace collective actions' complexities and public goods' sense of non-excludability, which in turn strengthen perceptions of objectivity and neutrality. When successful, blinding strategies conceal the existence of a myriad set of competing alternatives with varying interests and risks, as well as individuals' rational incentive to overcome classic collective action failures and assume an active role in collective processes that ultimately shape their communities' lives.<sup>186</sup>

In the law of eminent domain, collective actions have, by nature, a considerable impact on individuals and communities' lives. The risks and opportunities which this collective process accommodates, should have induced

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184. On individuals' bounded rationality see Amos Tversky et al., *Contingent Weighting in Judgment and Choice* in PREFERENCE, BELIEF, AND SIMILARITY, 846 (Eldar Shafir ed., MIT, 2004).

185. On public rational ignorance as the central reason for the ineffectiveness of the legislation reform post Kelo see Ilya Somin, *The Limits of Backlash*, *supra note 56*, at 2154-55.

186. In this vein, one should think of the effects Kelo and Berman's case had on individuals and communities development. To communities' cultural characteristics in Bemran, see Amy Lavine, *supra note 41*, at 444.

individuals to overcome collective action failures and make sure their interests are protected and not omitted.<sup>187</sup> The conventional differentiation between public uses and public purposes leads legal scholarship, however, astray.<sup>188</sup> Whenever a collective action is narrowly concentrated on the non-excludable end-result, it would inevitably miss the existence of competing and sometimes conflicting values, subjective as well as objective. It does not really matter whether a persons' land is taken for the construction of a classic public good as an open highway or the vast complex of private businesses. It also does not make much difference if planners/leaders intentionally exploit the collective process at the expense of the rest or if they truly believe that they follow collective interests, but are oblivious to the harm inflicted on the less fortunate. In a world abundant with infinite competing possibilities, the collective process is ultimately about how to choose and shape collective goods, along with their distribution patterns.

It is hard to imagine an eminent domain proceeding devoid of critical junctures of choice in which critical interests and competing distribution effects are not at stake. Even when attempting to construct a quintessential public good as an open highway, a considerable amount of dilemmas need to be resolved. Decisions are being made in every crossroad and wealth is likely to be distributed in an uneven manner. These collective questions include the highway route, location, size, businesses and communities that are going to develop as oppose to those that are going to shrivel, the parcels of land that are going to be taken fully or partially, the integration of the highway with existing communities or perhaps their removal. In every decision making process, the choice of one option is necessarily the exclusion of a competing alternative, with possibly opposite set of winners and losers.

The challenging task collective actions present is ultimately the recognition and development of collective interests in the face of substantial conflicts in individual's preferences. Contrary to classic notions of free-riding and holdouts, most individuals are rarely situated in the same position. Many individuals have idiosyncratic preferences, due to unique socio-economic conditions, and therefore cannot fully benefit from the work of others. In a perfect world, collective processes would take all individual's values and preferences into consideration and try to balance them all. In real lives, however, exposing individuals' preferences is an overwhelming burden due to transaction costs and strategic behavior.<sup>189</sup> This problem, however, may be

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187. After all what may be defined as a public good for some may actually be a public evil for others. See In the words of Hirschman: “. . .what is a public good for some – say, a plentiful supply of police dogs and atomic bombs – may well be judged a public evil by others in the same community.” See Albert O. Hirschman, *supra note* 103, at 101.

188. Due to Kelo, this differentiation affected a considerable amount of legal ramification. See Ilya Somin, *The Limits of Backlash*, *supra note* 56, at 2102.

189. Law and economics scholarship, and especially game theory, has been developing new mechanisms for exposing individuals' truthful preferences. Prominent work in this line of

manipulatively used for promoting a seemingly professional and objective resolution that leaves individuals' voices outside the collective decision-making process. There are not however objective persons, we are all consciously or unconsciously affected by our socio-economic background and life experiences and even when an honest attempt to represent as many voices as possible is made, the collective process may leave some values and preferences untended. The major legal challenge is therefore to differentiate between honest and random mistakes to systematic neglect as well as exploitation.

The preliminary response this article offers is that judicial heighten intervention is necessary in cases where the employment of blinding strategies leads to radical distribution patterns. Being a primary response for collective action failures, eminent domain law should not serve as an effective means for securing coveted property, avoiding private market negotiations and subsidizing private interest groups' initiatives.<sup>190</sup> The power of the state to confiscate private property and facilitate collective efforts is based upon the state's commitment of transparency and equality. Harnessing state power, as well as obligations, the collective process should not be covertly manipulated for advancing private development projects and producing a radical set of winners and losers. The employment of state power binds those who lead and direct collective actions' processes with the burden of proof that reasonable efforts were made to discover and cope with potential distribution effects.

It is upon leaders/planners, who direct and shape the collective process, to confront and expose the distribution interests of the politically powerful, as well as minimize their impact on the exercise of eminent domain. The existence of radical distribution effects negates economic analysis of collective action failures and their corresponding call for state power of eminent domain. In cases where collective processes lead to radical distribution patterns, state power is unnecessary and therefore unjustified. Furthermore, while market collective actions may attract the use of blinding strategies,<sup>191</sup> public authorities should not lend their hands to this socio-economic phenomenon.<sup>192</sup> It is

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research is Groves mechanism (suggested using evolved Vickery auctions for exposing individuals truthful preferences to a specific public good. In these auctions, the winner has to pay the total cost imposed on others). See Theodore Groves & John Ledyard, *Optimal Allocation of Public Goods: A Solution to the "Free Rider" Problem*, 45 *ECONOMETRICA* 783, 807-808 (1977). For preliminary use of second-price auctions for reducing individuals' strategic behavior see Edward H. Clarke, *Multipart Pricing of Public Goods*, 11 *PUB CHOICE* 17 (1971); William Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 *J FIN* 8 (1961). This scholarship, however, has yet to confront the problem of blinding strategies, and in particular, the innovative mechanisms in which individuals' bounded rationality is formed and the ways in which competing alternatives are being strategically excluded from collective decision-making process.

190. Wendell E. Pritchett, *supra* note 40, at 48.

191. See generally Henry E. Smith, *supra* note 119.

192. In short-term or discrete transactions, blinding individuals to their private interests may encourage cooperation. Gary Libecap examined this type of strategy in the federal policy for promoting unitization of oil fields during exploration. See GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 107-108 (Cambridge University Press, 1989). However, the risk of systematic

therefore upon local authorities that direct urban renewal projects to prove in court how the decision-making process took distribution concerns seriously and kept distribution disparities among collective members to a reasonable minimum. In leading cases as *Berman* and *Kelo*, this legal burden would have probably changed the condemnation process even prior to judicial proceedings.

Due to the congested nature of public goods, this burden can be met, when planners take it upon themselves to shape and modify the collective project in the interest of minimizing the harm inflicted on the powerless. Instead of relying on the free-rider concept, planners should call for individuals' active participation by using simple and accessible framework. For example, much like the decisions we are making on a daily basis when applying for a job or when choosing a school for our children, individuals should be allowed to choose between selling their homes and staying in the same geographic location, though in a different apartment. Similarly, planners should try their best to shape the collective good, the newly developed project, in the interest of absorbing existing communities, instead of dismantling them.

#### V. REGRESSIVE DISTRIBUTION PATTERNS IN KELO AND BERMAN

Massive redevelopment projects in the 1950s, similar to the urban renewal project in *Berman*, resulted in the dislocation of more than a million individuals from their private properties.<sup>193</sup> It is extremely worrisome when the exercise of eminent domain leads to the eviction of thousands of people from their private homes and socio-economic surroundings. There are always plenty of competing alternatives suitable for addressing the problem of blight without the tearing of entire communities from their socio-economic habitat.<sup>194</sup>

A prominent example for a less offensive alternative is allowing individuals to replace their condemned property with reasonably equivalent property rights in the redevelopment project. Since subjective values are hard to discern, this option allows individuals to decide for themselves whether the fair market value fully compensates them. In cases where subjective values are high individuals can choose to retain their geographic/socio-economic surroundings while absorbing the potential risks and benefits associated with the redevelopment plan.<sup>195</sup> This option allows individuals to replace their current home with a reasonably similar apartment in the same geographic location, including social and cultural habitat. With this option in hand redevelopment

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abuse and the harm inflicted by state power as in the exercise of eminent domain demands a different approach.

193. Wendell E. Pritchett, *supra* note 40, at 47.

194. A possible alternative, presented by the district court in *Berman*, has been focused on dealing with buildings poor conditions without condemning the property titles to the land itself. See *Schneider v. District of Columbia*, 117 F. Supp. 705, 717-8 (D.D.C. 1953).

195. On the difficulties to compensate for subjective values see Merrill and Smith, *supra* note 34 at 1254.



plans absorb, instead of eliminate, existing cultural, familial as well as economic environment.

This option also addresses the problems of under evaluation of community ties and subjective values. In that vein, the district court in *Berman* accepted the need to deal with slums by removing substandard buildings, due to health and safety risks, but questioned the reasonableness and necessity of condemning property titles to the land itself.<sup>196</sup> The district court also criticized the need to vacate properties that were not slums, as were the properties of the plaintiffs, considering the general purpose of the program was the clearance of slums.<sup>197</sup> However, the Supreme Court in *Berman* decided that the means for executing the purpose of this project are for the congress alone to determine.<sup>198</sup> It therefore excused redevelopment planners from any responsibility to the distribution patterns they produce.

Indeed, the fact that 97.5% of the people being evicted were racial minorities, made the existence of radically regressive distribution pattern plainly visible. Having black neighborhoods turned into majority white, redevelopment projects were inevitably based on more than sound planning principles.<sup>199</sup> Devoid of any logical explanation, racial preferences seem to have taken a prominent role in the overall design of renewal plans including the specific decision of not integrating existing communities in newly developed areas.<sup>200</sup> As a matter of fact, the program's design made sure that only a small fraction of the people being evicted would have a reasonable opportunity to reside in the newly developed neighborhoods. First, the program reduced the number of designated residents in its area from 5,000 to 3,600.<sup>201</sup> Second, no buildings erected were over three stories high and only a third of the new units were required to be affordable to low income families.<sup>202</sup> It was therefore highly unlikely, under these conditions, to have a considerable percentage of the old community back to its original habitat.

Ultimately, redevelopment programs reshaped cities' racial and economic geography,<sup>203</sup> which led individuals across the country understand them as

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196. The court held that: "Ordinarily the seizure of the fee title to land would seem to be neither necessary nor reasonably incidental to the clearance of a slum." See *Schneider v. District of Columbia*, 117 F. Supp. 705, 717-8 (D.D.C. 1953).

197. *Schneider*, *id.*, at 719.

198. See *Berman v. Parker*, *supra* note 3, at 33.

199. For the liberal claim that urban redevelopment plans exacerbated racial discrimination see urban renewal: the record and the controversy referred to at Wendell E. Pritchett, *supra* note 40, at 48.

200. Urban renewal projects could have advanced racial integration or be designed in a way which entrenched racial segregation. See Robert Weaver, *Habitation with Segregation, OPPORTUNITY*, June-July 1952.

201. Amy Lavine, *supra* note 34, at 448.

202. *Id.*, *id.*

203. Wendell E. Pritchett, *supra* note 40, at 46.

“Negro removal” mechanisms.<sup>204</sup> Contrary to public feelings, the district and Supreme Courts in Berman, failed to recognize the racial implications, and presumably motivations of Southwest Washington urban renewal programs.<sup>205</sup> Under the terminology of this article, the rhetoric of blight and the sense of urgency served as successful blinding strategies for removing racial effects away from judicial review.<sup>206</sup> Blight and the perception of emergency blurred the motivations and influences of private interests in the configuration of renewal plans.<sup>207</sup> Thus, instead of being openly guided by considerations of public safety and health risks, eminent domain law could have been used to inwardly advance private interest groups’ racial preferences and developers’ economic profitability.<sup>208</sup>

There were multiple potential redevelopment programs for overcoming the problem of blight. The displacement of thousands and the entrenchment of racial segregation was only one option and an unnecessary one.<sup>209</sup> Other alternatives could have spread the program’s costs evenly instead of laying the entire financial and social burden on the weakest links in American society, while at the same time exacerbating existing racial segregation. Even the seemingly progressive requirement for affordable units could have been designed differently to reduce the socio-economic repercussions of the eviction by being narrowly restricted to low-income families within those who were actually evicted.<sup>210</sup> Nevertheless, absent a thorough understanding of the collective goods’ congested nature and the distributive dilemma, the United State Supreme Court was unwilling to challenge urban renewal planners’ decision-making process. Due to the employment of successful blinding strategies, racial radical discrimination in urban planning went unnoticed in Berman by the same panel of judges who fought, only a few months earlier, against racial segregation in public education.<sup>211</sup>

Kelo relied heavily on Berman’s deference to the legislature branch but without unraveling its socio-economic context and racial implications. Interestingly, Justice Stevens emphasized the thorough review of the “economics, environmental and social ramification” of six alternative plans by a team of consultants. This factual unraveling was apparently one of the complementary justifications for approving the redevelopment plan under the

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204. *Id.*, at 47.

205. *Id.*, *id.*

206. Much like a spreading disease that may afflict its surroundings the terminology of blight in urban planning produced a sense of urgency. See *id.*, at 51.

207. In that sense, they provided a flexible platform for the advancement of urban renewal projects.

208. Wendell E. Pritchett, *supra* note 40, at 32.

209. On the connection between renewal programs and the entrenchment of racial segregation, see ROBERT WEAVER, THE NEGRO GHETTO 322 (1948).

210. Amy Lavine, *supra* note 41, at 448-9.

211. *Brown v. Board of Education*, *supra* note 1, was decided on May 17, 1954. *Berman v. Parker*, *supra* note 3, was decided on November 22, 1954.

requirements of the takings clause of the Federal Constitution's Fifth Amendment. However, six alternatives is only a small fraction of the endless possibilities this project entailed. Besides, the number of options itself does not provide courts with any meaningful tool for reasonable supervision, and in the absence of the socio-economic costs relevant to those who were about to be evicted, even these alternatives could not have been properly produced.<sup>212</sup> In the absence of real accountability to the distribution pattern they produced this limited number of options may have bounded individuals' rationality while maintaining the illusion of choice.<sup>213</sup>

Acknowledging the multiplicity of decision-making junctions, the Supreme Court should have placed more attention on the distribution implications of Kelo's condemnation. In her dissent, Justice O'Connor emphasized the peculiar decision to retain the *Italian Dramatic Club*, owned by a private organization, while demolishing three private homes in the same parcel.<sup>214</sup> This of course is only a fraction of the intricate ways in which competing alternatives can shape redevelopment plans. This alternative exposes the possibility to reduce distribution disparities by integrating old communities into newly developed projects. Justice O'Connor illuminating example also exposes the necessity of planners' accountability to the radical distribution pattern of the program they produce, for courts effective guidance.<sup>215</sup> Much like the Italian Dramatic Club, planners could have shaped the newly developed project in a way which allow existing communities to reasonably maintain, if they choose to, their social and cultural surroundings, though in adjacent building or apartment.

Instead of focusing on a specific number of options and the seemingly objectivity and proficiency of the decision-making process, courts should acknowledge the congested nature of public goods, along with the conflicting interests they accommodate. Whenever collective actions, controlled by interest groups pressures, produce a clear set of winners and losers, such as the ones produced in Kelo and Berman, the central economic justification for state intervention is severely offended. In these instances, individuals have sufficient incentives to take an active part in the collective process and overcome free-

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212. When designing the necessary plans, which includes the possible eviction of property owners from their homes, state and local officials needs the full picture of the socio-economic conditions of the potential residents, for their effective cost-benefit analysis.

213. See Russell Hardin, *supra note 78*, at 114.

214. See Kelo, *supra note 9*, at 495.

215. There are always distribution disparities, especially when considering the subjective value of property. Blindness to the existence of mild distribution effects can promote cooperation and reduce strategic behavior. See Henry E. Smith, *supra note 119*, at 137-40. Nevertheless, in the presence of radical distribution effects, courts should unveil the appearance of collectivity and scrutinize the collective decision-making process.

riding or holdouts.<sup>216</sup> Blinding strategies, however, produce a misleading perception of collective goods non-excludability and therefore the corresponding need for state intervention. Courts should therefore take it upon themselves to overcome planners' tempting use of blinding strategies, as notions of urgency, perceptions of objectivity and proficiency, and examine planners' reasonable efforts to reduce renewal projects' distribution disparities.

#### CONCLUSION

Collective actions and purposes are more than the mere aggregation of individuals' interests and desires. Individuals' solidification into a collective purpose is usually a gradual process in which reciprocal compromises, adaptations and the recognition of common goals supersede individuals' conflicting interests. When the collective has solidified, limiting individuals' attempts to increase their private gains at the expense of the collective, via free-riding and holdouts, is rightfully confronted by state power of eminent domain.

There are, however, cases in which the configuration of collective needs and purposes does not represent the gradual evolution of common objectives or compromises. Instead, the categories of public goods and purposes are being privately designed and therefore omit the existence of overwhelmingly deep conflicting interests within the collective. In this type of cases, blinding strategies can play a crucial role in maintaining a misleading perception of collectivity, as well as the corresponding non-excludable characteristic of public goods. In these settings, collective action for the production of public goods may be distortedly shaped in a way that neglects individuals conflicting interests and produces a clear set of winners and losers.

By employing a modern economic critique on the theory of public goods into Epstein perception of "public use", this paper tries to provide courts with a better understanding of the bargaining mechanisms that lead to eminent domain abuse. Instead of the common focus on the public purpose, this paper advocates the focus on the problems associated with the existence of multiple means for achieving the same end-result. A full understanding of the congested nature of all public goods exposes the plain reality that eminent domain abuse cannot be constrained by the non-excludability trait of the end-result, be it a highway or a public park. A house can be taken, unnecessarily or due to hidden motivations, as part of a collective action that construct a public park as much as it can be taken for the private use of commercial developers. The classic analysis of collective actions and public goods is limited in its understanding of collectivity and in its ability to constrain possible abuses of government power of eminent domain.

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216. In the presence of multiple competing options, an individual who tries to delay her approval or free-ride on the work of her friends assumes the risk that a competing option, with a less favorable distribution pattern, would be consummated.

Instead of the common focus on free-riders or holdouts, a modern economic theory of public goods shifts our attention to the existence of multiple avenues, encompassing conflicting interests, in the political process that controls the production of all public goods. It also exposes the risk of blinding strategies through which politically powerful players are able to advance collective projects, which calls for state power of eminent domain, while extracting disproportionate private gains in the process. More than free-riding and holdouts, this focus exposes the damages inflicted on *blinded-riders*, those who pay their share, due to state power, but may actually receive a public evil instead of a collective good.<sup>217</sup> With a refined understanding of the congested nature of public goods and the political economy which accompanies it, the theory at hand allows courts to develop the necessary legal tools for a surgical supervision of the use of eminent domain.

An essential component in this supervision package is planners' accountability to short and long-term distribution patterns of collective projects, which employ state power of eminent domain. Courts should demand planners' reasonable efforts for minimizing distribution disparities even at the face of times of urgency, substantial complexities and planners' apparent proficiency. Planners cannot justify a collective action that leaves the financial and social burden on poor communities, as the one approved in *Berman*. The displacement of functioning communities, as the ones in *Kelo*, cannot pass judicial scrutiny without a reasonable explanation to its necessity, as well as the incapability of absorbing existing communities into newly developed projects. Confronting distribution concerns and recognizing individuals' conflicting interest, instead of hiding them, are essential parts in the process that shapes a common ground, solidifies the collective and therefore justifies state use of eminent domain.

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217. Contrary to cities' underlying goals, and despite the billions invested in redevelopment plans throughout the 1950 and 1960s, most of them did not lead to cities' revitalization and even did not reduce the conditions of slums, see Wendell E. Pritchett, *supra* note 40, at 47.