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Public Rights of First Refusal

ABSTRACT. Public authorities, at all levels of government, have been using a little-known land-use power to acquire property. This power, known as a right of first refusal, enables the government to acquire private property as long as it matches the price of any third-party offer. In this Note, I show how governments use rights of first refusal in areas as diverse as transportation, conservation, and affordable housing. I argue that public rights of first refusal can, under certain conditions, provide a means of balancing individual and collective needs that is superior to both eminent domain and regular purchasing.

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INTRODUCTION

In October 2017, the California State Legislature passed Senate Bill (SB) 50, which voids any sale of federal land in California unless the State Lands Commission has first been provided with an opportunity to purchase the property.¹ Because the federal government owns nearly forty-six percent of the land in California, SB 50 affects a significant portion of the state.² The law was a reaction to legislation proposed by Republican members of Congress that would divest the federal government of millions of acres of public lands.³ To prevent the privatization of public lands, California enacted SB 50, which makes it the official policy of the state to “discourage conveyances that transfer ownership of federal public lands in California from the federal government.”⁴ If conveyances cannot be discouraged, SB 50 ensures that they can at least be redirected. The law gives California a right of first refusal to purchase any property the federal government offers for sale, as long as the state matches the price the federal government would have otherwise received.

According to the U.S. Department of Justice (DOJ), California’s right of first refusal has already had far-reaching consequences. On April 2, 2018, DOJ filed a complaint in the Eastern District of California, alleging that California’s right of first refusal has disrupted the market for federal lands, created a cloud on title, increased the risk of litigation, and deterred potential buyers from bidding on federal property.⁵ DOJ is seeking a declaratory order that California’s right of first refusal violates both the Supremacy and Property clauses of the U.S. Constitution by preventing the federal government from disposing of its property as it sees fit.⁶

1. CAL. PUB. RES. CODE § 8560 (West 2018).

2. See CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2017).

3. Disposal of Excess Federal Lands Act of 2017, H.R. 621, 115th Cong.; see also Caty Enders, *Republicans Move to Sell Off 3.3M Acres of National Land, Sparking Rallies*, GUARDIAN (Jan. 31, 2017, 8:43 AM), <https://www.theguardian.com/environment/2017/jan/31/public-lands-sell-congress-bureau-management-chaffetz> [<https://perma.cc/559D-VTRZ>] (“The new piece of legislation would direct the interior secretary to immediately sell off an area of public land the size of Connecticut.”).

4. CAL. PUB. RES. CODE § 8560(b)(1).

5. Complaint for Declaratory and Injunctive Relief ¶¶ 54-60, *United States v. California*, No. 2:18-cv-00721-WBS-DB (E.D. Cal. Nov. 1, 2018), 2018 WL 1602817.

6. *Id.* ¶¶ 17-18, 81. The Property Clause reads: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2.

While several features of California's law may be unique, including the scope of the law and its explicit targeting of the federal government, California is far from the only public authority to claim a special right to purchase property. The power that California gave itself—a right of first refusal to buy land—is a power that appears at every level of government and in service to a wide array of public programs.

Massachusetts, for example, has a right of first refusal to purchase apartment buildings in order to preserve affordable housing, as do the cities of Denver and San Francisco.⁷ Maine has a right of first refusal to buy “working waterfront property,” which it employs in economic development plans for coastal towns.⁸ In Michigan, cities and towns can exercise a right of first refusal to buy tax-foreclosed properties.⁹ The Federal Department of the Interior has a right of first refusal to buy land surrounding a number of national parks.¹⁰ Every state in the Northeast, along with the federal government, has a right of first refusal to purchase railroad corridors, which they use to preserve valuable rights-of-way when a railroad wishes to sell a rail line.¹¹ And while this Note focuses on domestic cases, rights of first refusal are certainly not unique to the United States. France invokes its *droit de préemption* to expand green space and build public housing,¹² while city planners in the Netherlands utilize rights of first refusal to develop new commercial areas.¹³ First-refusal rights even feature in international treaties and agreements.¹⁴

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7. MASS. GEN. LAWS ch. 40T, § 4 (2019); DENVER, COLO., REV. MUN. CODE ch. 27, art. III, § 27-47(g) (2019); S.F., CAL., ADMIN. CODE ch. 60, § 60.8 (2019).
 8. ME. REV. STAT. ANN. tit. 12, § 6042 (2019).
 9. MICH. COMP. LAWS ANN. § 211.78m (West 2019).
 10. See, e.g., 16 U.S.C. § 460aaa-3(a) (2018) (Grand Island National Recreation Area); *id.* § 460x-11(e)(3) (Sleeping Bear Dunes National Lakeshore).
 11. Table A2 in the Appendix provides a list of rights of first refusal for railroad properties.
 12. See Feargus O'Sullivan, *Paris Wants to Keep Central Neighborhoods from Becoming 'Ghettos for the Rich'*, CITYLAB (Dec. 19, 2014), <https://www.citylab.com/equity/2014/12/paris-wants-to-keep-central-neighborhoods-from-becoming-ghettos-for-the-rich/383936> [https://perma.cc/3HFG-FF8F].
 13. Erik Louw, *The Production of Business Sites in the Netherlands*, 91 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE [J. ECON. & SOC. GEOGRAPHY] 85, 89-90 (2000) (Neth.).
 14. Article X of the Treaty of Utrecht of 1713 grants Spain a right of first refusal to reclaim Gibraltar if the United Kingdom ever alienates the territory. See Jamie Trinidad, *An Evaluation of Morocco's Claims to Spain's Remaining Territories in Africa*, 61 INT'L & COMP. L.Q. 961, 969 n.55 (2012) (discussing the possibility that Spain would invoke its right of first refusal if the United Kingdom granted Gibraltar independence). The United States has a right to purchase the UN headquarters in New York if the UN ever sells it. Agreement Between the United Nations and

Scholars of property law and of local government have largely overlooked the ability of governments to use rights of first refusal to acquire property. The scholarly literature frames the discussion in terms of only two options: either the government can buy property on the open market like any other private party, or it can use eminent domain to compel an unwilling owner to sell.¹⁵ Both options have their defects. Critics argue that eminent domain is used inequitably against disadvantaged communities,¹⁶ that it fails to compensate owners for the true value of their property,¹⁷ and that it leads to political backlash and high administrative costs.¹⁸ Supporters defend the power as a necessary, albeit flawed, means of ensuring that the government has the land it needs to build everything from parks to infrastructure.¹⁹ A right of first refusal (ROFR) represents a third option between these two poles. It gives the government the power to purchase a piece of property as long as it matches the price the owner would otherwise have received.

While a small, but valuable, body of work has examined rights of first refusal in the context of private parties,²⁰ the rights of first refusal that governments use—what I call public rights of first refusal—have never been the focus of serious scholarly attention. They appear in the literature primarily in one of two forms. First, researchers occasionally note the existence of rights of first refusal during discussions of other legal or policy issues.²¹ For example, in a longer article on mixed-income housing, Robert Ellickson mentions that Montgomery

the United States of America Regarding the Headquarters of the United Nations art. IX, § 22, June 26, 1947, 61 Stat. 3416, 3432–33.

15. See, e.g., Daniel B. Kelly, *Acquiring Land Through Eminent Domain: Justifications, Limitations, and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 344, 344 (Kenneth Ayotte & Henry E. Smith eds., 2011) (describing the two ways governments acquire property).
16. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (describing the history of eminent domain in low-income communities and communities of color).
17. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 164–65 (1985).
18. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1474–78 (2008).
19. See, e.g., MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 117 (2008).
20. See, e.g., Bernard Daskal, Note, *Rights of First Refusal and the Package Deal*, 22 FORDHAM URB. L.J. 461 (1995) (examining situations where sellers combine in one sale properties subject to a right of first refusal along with unencumbered properties); Jonathan F. Mitchell, Comment, *Can a Right of First Refusal Be Assigned?*, 68 U. CHI. L. REV. 985 (2001) (documenting the challenges that arise when private parties assign rights of first refusal to third-party actors).
21. See, e.g., Craig S. Donais, *Department of Justice's Transportation and Construction Bureau: Trains, Planes and Automobiles*, 45 N.H.B.J. 78, 79 (2004) (telling the history of New Hampshire's

County, Maryland possesses a right of first refusal to buy multifamily apartment buildings, but he does not elaborate further on how the right operates.²²

Second, commentators at times propose the creation of a right of first refusal to solve a discrete policy challenge, such as increasing the supply of affordable housing²³ or conserving open spaces.²⁴ For example, in an article on food security and agricultural preservation, Neil Hamilton recommends that the United States create an institution akin to France's *Société d'aménagement foncier et d'établissement rural*, a nonprofit organization that possesses a statutory right of first refusal to buy and preserve farmland.²⁵ Maria Cristiano Anderson and Paula A. Franzese provide one of the more robust examinations of a public right of first refusal in a study of New York City's right to purchase certain subsidized housing developments.²⁶ These proposals, however, do not compare public rights of first refusal across subject areas and thus present only a glimpse of a much larger subject. Moreover, they generally omit any discussion of the drawbacks of public rights of first refusal.²⁷

This Note contributes to the fields of property law and local government in two ways. First, using a collection of 120 statutes, I document the diverse forms and uses of public rights of first refusal and provide case studies of how these rights operate in practice. Second, I situate public rights of first refusal within

ROFR over railroad corridors); Nathan Jacobsen, *Sand or Concrete at the Beach? Private Property Rights on Eroding Oceanfront Land*, 31 ENVIRONS 217, 244 n.198 (2008) (describing Solana Beach, California's ROFR to buy properties atop the town's eroding coastal bluff); Carrie A. Scrufari, *Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution*, 42 COLUM. J. ENVTL. L. 497, 511 (2017) (mentioning Massachusetts's ROFR for agricultural land).

22. Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1006 n.114 (2010).

23. See, e.g., Maria Cristiano Anderson & Paula A. Franzese, *Solutions to the Crisis in Affordable Housing: A Proposed Model for New York City*, 3 RUTGERS J.L. & URB. POL'Y 84 (2006); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 555 (1995).

24. See, e.g., Lawrence D. Spears & Karen Paige Hunt, *Protecting Rural Lands: A Market-Based, Efficient and Culturally Appropriate Strategy Using Rights of First Refusal and the Nonprofit Sector*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 235, 236-37 (2002); Elizabeth Evensen, Note, *Open Space Preservation in Utah: Techniques, Tools, and First "Quality Growth" Steps*, 19 J. LAND RES. & ENVTL. L. 267, 273 (1999).

25. Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. ILL. U. L. REV. 657, 664 (1999).

26. Anderson & Franzese, *supra* note 23.

27. One notable exception is Anika Singh Lemar who discusses the practical hurdles of overcoming limited budgets and administrative costs in order to exercise a ROFR. See Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151, 156 (2005).

the suite of options that governments have to acquire property, comparing rights of first refusal to both eminent domain and regular purchasing.

I argue that in many cases, public rights of first refusal strike a better balance between individual and collective needs than do either regular purchasing or eminent domain. Unlike regular purchasing, a right of first refusal gives the government a guaranteed ability to acquire properties that are critical to public programs. At the same time, these rights leave substantial decision-making power in the hands of property owners, who decide whether to sell their property and at what price. This balancing of individual autonomy and collective flourishing yields several benefits. By avoiding the displacement and unpredictable compensation of eminent domain, public rights of first refusal alleviate some of the opposition that public agencies face when using eminent domain. At the same time, the guaranteed ability to acquire property, when coupled with thoughtful long-term planning, can enable the realization of meaningful social goals. In a case study of the Agua Caliente Tribe of Cahuilla Indians, I show how one tribe has used its right of first refusal to assemble thousands of acres of land, in the process preserving sacred areas and spurring economic development.

I advocate that public rights of first refusal should be used, but used prudently. These rights are most effective when the characteristics of a piece of property—such as location or history—give it unique social value. Conversely, public rights of first refusal are least useful when the government must act quickly or has many suitable alternatives for purchasing property. In these cases, rights of refusal provide little value, and yet the burdens on buyers and sellers (in the form of increased delays, uncertainty, and attorneys' fees) remain.

This Note proceeds as follows. Part I catalogues the different forms of public right of first refusal.²⁸ Part II compares public rights of first refusal to the two other primary tools for acquiring property—regular purchasing and eminent domain—and examines how a right of first refusal provides advantages that neither affords. Part III makes the affirmative case for when public agencies should consider using a right of first refusal. Part IV presents the downsides of rights of first refusal and explains when public agencies should avoid using them. I end with a brief conclusion.

I. PUBLIC RIGHTS OF FIRST REFUSAL

While public rights of first refusal generally share a core structure, the uses and forms of rights of first refusal vary considerably across different governments. This Part first describes how a basic right of first refusal works, then traces the different branches of this family tree.

²⁸. The Appendix includes a list of public rights of first refusal.

A. *The Basic Right*

Public rights of first refusal share many features with private rights of first refusal, and so it is instructive to begin with the standard private right. A private right of first refusal gives its holder the option to buy property by matching the terms of a third-party offer. The right is usually triggered when a property owner receives a bona fide offer from a prospective buyer. Before accepting the offer, the owner must notify the holder of the right of first refusal and include information on the terms and conditions of the sale. The holder of the right can then choose whether or not to exercise her right and buy the property instead.

Private parties utilize rights of first refusal in a variety of contexts, including stock offerings, oil and gas contracts, and television broadcasting rights.²⁹ But rights of first refusal appear most commonly in real-estate transactions.³⁰ A quintessential example is when a tenant negotiates a right of first refusal with a landlord to buy a home in case it later comes up for sale.

While individuals ordinarily acquire rights of first refusal through negotiations with landowners, legislators also occasionally grant such rights to private parties in a statute or ordinance. The example that is probably most well known is the Tenant Opportunity to Purchase Act in Washington, D.C., which gives tenant associations a right of first refusal to buy the apartment buildings in which they live.³¹ Additional examples include statutory rights of first refusal for tenants in mobile home parks³² and for farmers who have lost land in mortgage foreclosures.³³

Public agencies, like private parties, can benefit from rights of first refusal. Federal, state, and local authorities all make use of rights of first refusal,³⁴ which appear in areas such as conservation,³⁵ economic development,³⁶ and historic

29. See Mitchell, *supra* note 20, at 985 (cataloguing the uses of private rights of first refusal).

30. See 3 ARTHUR LINCOLN CORBIN & ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.3 (Joseph M. Perillo ed., rev. ed. 1993) (noting that a right of first refusal “customarily, but not exclusively, arises in real property transactions”).

31. D.C. CODE §§ 42-3404.01 to .12 (2018).

32. See, e.g., MASS. GEN. LAWS ch. 140, § 32R (2019); N.Y. REAL PROP. LAW § 233-a (McKinney 2019).

33. 12 U.S.C. § 2219a (2018).

34. The Appendix includes a breakdown of ROFR by level of government.

35. See, e.g., 16 U.S.C. § 460x-11(e)(3) (2018) (national park); MASS. GEN. LAWS ch. 61A, § 14 (2019) (agricultural land).

36. See, e.g., ME. REV. STAT. ANN. tit. 12, § 6042 (2019); MD. CODE ANN., ECON. DEV. § 10-128 (West 2017).

preservation.³⁷ Affordable housing is the subject of many rights of first refusal, enabling housing authorities to buy and preserve apartment buildings.³⁸ Infrastructure is another common focus, with states possessing rights to purchase private airports, railroads, and utility properties.³⁹ The Appendix provides a longer list of public rights of first refusal, breaking them out by purpose and level of government.

B. Methods of Acquisition

Public agencies acquire rights of first refusal through a variety of means. Figure 1 presents these different methods and highlights two important considerations: whether property owners voluntarily agree to give the government a right of first refusal and whether the government’s right narrowly targets individual properties or covers a broader class of property.

FIGURE 1.
METHODS OF ACQUIRING RIGHTS OF FIRST REFUSAL

	Targeted	Broad
Voluntary	Negotiations with property owners	Tax incentives Condition to receive public aid Public-public rights of first refusal ⁴⁰
Involuntary	Statutes targeting individual properties	Statutes covering broad classes of property

Like any private party, the government can negotiate with landowners to purchase a right of first refusal on a property-by-property basis. However, this method is resource intensive and requires the government to identify in advance

37. See, e.g., 16 U.S.C. § 460bbbb-1 (2018) (Martin Luther King, Jr. National Historic Park); MD. CODE ANN., STATE FIN. & PROC. § 5A-319 (West 2019) (Maryland Historic Trust).

38. See, e.g., MASS. GEN. LAWS ch. 40T, § 3 (2019).

39. See, e.g., CONN. GEN. STAT. ANN. § 13b-50a (West 2019) (airports); ME. STAT. tit. 35-A, § 6109 (2018) (utility properties); N.H. REV. STAT. ANN. § 422:19 (2019) (airports); N.J. STAT. ANN. § 48:12-125.1 (West 2019) (railroad properties).

40. Public-public rights of first refusal are rights that public agencies acquire from other governmental authorities. A typical example is when a state statute gives local governments a right to buy property that a state agency is selling. Table A8 in the Appendix includes additional examples of this kind of public-public right.

the specific properties it wishes to purchase. In lieu of individual negotiations, governments can also acquire rights of first refusal by offering tax incentives or other forms of public aid. For example, Massachusetts offers tax incentives to owners of agricultural land as part of a state preservation program. In exchange for lower property taxes, owners grant local municipalities a right of first refusal to buy the land if the owner ever wishes to sell or redevelop it.⁴¹

Rather than using negotiations or tax incentives, the government can also claim a right of first refusal in a statute or ordinance.⁴² Outside of the United States, land-use laws often provide the state with a right of first refusal over all property located within a designated geographic area.⁴³ The Charter of the City of Montreal, for example, empowers the City to pass bylaws designating certain districts where the City's right of preemption will apply.⁴⁴ However, in the

41. MASS. GEN. LAWS ch. 61A, § 14 (2019).

42. Statutes claiming rights of first refusal over private property raise the question whether a right of first refusal can constitute a taking for which the government must pay compensation. Landowners have brought challenges to these statutes under both federal and state constitutional protections of private property. In evaluating these challenges, most courts have found that a right of first refusal does not constitute a taking because property owners retain the use and enjoyment of their property, as well as the main economic value of selling their property. See *Minn. United Snowmobilers Ass'n v. Block*, 660 F.2d 1240, 1254 (8th Cir. 1981) (upholding the federal government's right of first refusal over private lands located within the Boundary Waters Canoe Area Wilderness); *Greenfield Country Estates Tenants Ass'n v. Deep*, 666 N.E.2d 988, 992 (Mass. 1996) (finding that a statutory right of first refusal only "minimally limits an owner's freedom to transfer property"). In select cases, property owners have prevailed, generally when a state court has focused not on the economic impact of a right of first refusal, but on the infringement of what the court views as a fundamental aspect of ownership. See *Sanderson v. City of Willmar*, 282 Minn. 1, 6 (1968); *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wash. 2d 347, 364 (2000) (describing "the right to possess, to exclude others, or to dispose of property" as "fundamental attributes of property ownership"). While a full treatment of these regulatory takings issues is beyond the scope of this Note, I will note that under prevailing federal jurisprudence, the government should generally have the better case. Legislatures can impose much more stringent restrictions on alienation without running afoul of the Takings Clause. See *Andrus v. Allard*, 444 U.S. 51, 65-68 (1979) (upholding a ban on the sale of artifacts containing endangered eagle feathers). By comparison, the burdens involved with a typical right of first refusal, although not irrelevant, are much less substantial.

43. See *Barcelona's Town Hall Declares the Whole City an Area of First Refusal for Land & Property Purchases*, AURA REAL ESTATE EXPERTS (Oct. 2, 2018), <https://www.auraree.com/real-estate-news/barcelonas-town-hall-declares-the-whole-city-an-area-of-first-refusal-for-land-property-purchases> [https://perma.cc/53ER-ADFA] (describing Barcelona's designation of the entire city as encompassed within its ROFR).

44. See Charter of Ville de Montréal, Metropolis of Québec, C.Q.L.R., c C-11.4, s 151.1 (Can.). Even within those areas, the City's right only becomes effective after the City notifies property owners that their specific buildings have become subject to the City's preemptive right to purchase. See *Pre-Emptive Right*, VILLE DE MONTRÉAL, <https://ville.montreal.qc.ca/portal/page?>

United States, it is more common for legislatures to include additional criteria besides geography. Frequently, statutes define the scope of the government's right in terms of the identity of the current property owner (such as all properties owned by utilities)⁴⁵ or characteristics of the property (such as all rental buildings with four or more units).⁴⁶

Statutes can also target individual properties.⁴⁷ For example, Maryland has a statutory right of first refusal to buy the Preakness Stakes, the home of one of the Triple Crown horse races.⁴⁸ The Maryland legislature gave itself this right shortly after the owner of the Baltimore Colts relocated the NFL team to Indianapolis, a loss that the state did not want to repeat.⁴⁹ Maryland is not alone in taking its sports teams seriously. Minnesota, Washington, and Oakland have all conditioned the use of public funds for baseball stadiums on the requirement that the state have a right of first refusal to buy the baseball team if the owner ever wishes to relocate.⁵⁰

C. Pricing Mechanisms

To exercise its right, the government must ordinarily match the price and terms of any third-party offer. However, some jurisdictions use other methods to set the price the government must pay. Figure 2 summarizes the three principal pricing mechanisms that governments use.

_pageid=5977,143161430&_dad=portal&_schema=PORTAL [https://perma.cc/3VMR-H8FZ].

45. See, e.g., CONN. GEN. STAT. § 16-50d (2018); IND. CODE ANN. § 8-3-1.5-11 (West 2019).

46. See, e.g., MONTGOMERY, MD., COUNTY CODE § 53A-5(a)(1)(C) (2018).

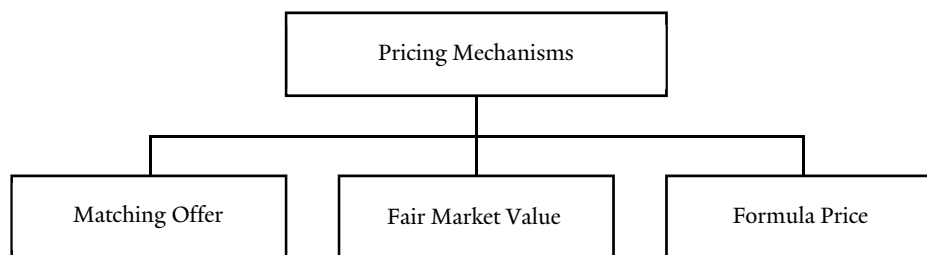
47. See, e.g., 16 U.S.C. § 460bbb-1 (2018) (applying a ROFR to specific properties owned by the Center for Social Change).

48. MD. CODE ANN., BUS. REG. § 11-520 (West 2019).

49. See Nancy Kercheval, *Preakness in Maryland Forever Eases Hurt of Colts Midnight Exit*, BLOOMBERG (May 15, 2010, 12:00 AM), <https://www.bloomberg.com/news/articles/2010-05-14/keeping-preakness-in-maryland-forever-eases-hurt-of-colts-midnight-exit> [https://perma.cc/P6PU-4K7J].

50. See WASH. REV. CODE § 67.28.180(3)(I) (2019); Martin J. Greenberg & Bryan W. Ward, *Non-Relocation Agreements in Major League Baseball: Comparison, Analysis, and Best Practice Clauses*, 21 MARQ. SPORTS L. REV. 7, 27 (2010) (describing how cities use ROFRs to deter franchises from relocating).

FIGURE 2.
PRICING MECHANISMS



To match a third-party offer, the government must make an offer that has “substantially the same terms and conditions.”⁵¹ The requirement for substantial similarity—as opposed to exactly matching the third-party offer—is meant to prevent buyers and sellers from defeating the government’s right by including unique or esoteric terms.⁵²

In lieu of matching a third-party offer, a number of statutes employ approximations of fair market value to set the price the government must pay.⁵³ These statutes are a hybrid between traditional rights of first refusal and eminent domain proceedings, where real-estate appraisals are typically used to determine just compensation. Finally, legislatures can also define a preset formula for how much the government will pay.⁵⁴ These formulas can include considerations such as ensuring that the original developer of a piece of property receives a fair return on her investment.⁵⁵

D. Notification Procedures

Rights of first refusal generally share a basic procedural template. However, there can be significant variations in, for example, the conditions that trigger a right of first refusal, or the number of agencies that can exercise the right. Figure

51. *Greenfield Country Estates Tenants Ass’n v. Deep*, 666 N.E.2d 988, 991 (Mass. 1996).

52. The substantial-similarity requirement is one of a number of doctrines developed by courts and legislatures to prevent owners from making an end run around the government’s right. For example, offers must usually be both commercially reasonable and made in good faith. See Daskal, *supra* note 20, at 466 & n.33 (collecting cases related to good-faith negotiations and commercial reasonability).

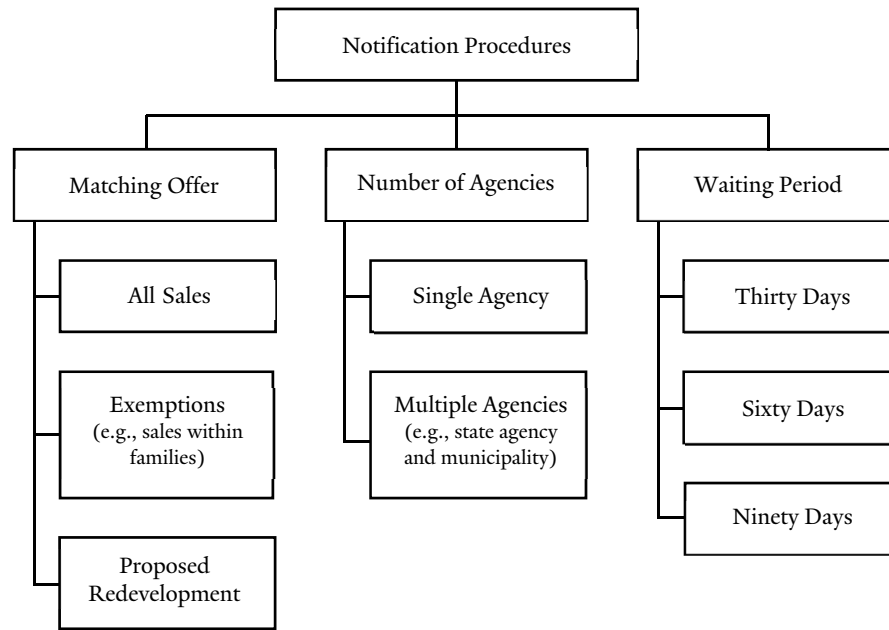
53. See, e.g., CONN. GEN. STAT. ANN. § 13b-50a (West 2019); LA. STAT. ANN. § 17:3982 (2019).

54. See, e.g., LA. STAT. ANN. § 17:3982 (2014).

55. See, e.g., Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 895-97 (1993) (describing the preset formula used in rights of first refusal for certain affordable-housing developments).

3 summarizes the major differences in the notification procedures that a property owner must follow.

FIGURE 3.
DIFFERENCES IN NOTIFICATION PROCEDURES



Ordinarily, only an actual sale of land will trigger the government's right. Gifts, bequests, or donations do not trigger the right.⁵⁶ When the right is triggered, the owner must notify the relevant agency and include both the terms of the sale and additional information about the property. The agency then has a limited period of time to decide whether to buy the property. If the agency fails to respond within the statutory period, it automatically waives its right and the owner can then proceed with the sale to the original buyer.⁵⁷

In an added layer of complexity, public rights of first refusal often involve more than one governmental agency. For example, many statutes give a state

56. See *Bergman v. Commerce Tr. Co.*, 129 P.3d 624, 629 (Kan. Ct. App. 2006) (holding that conveyances to settle a contested will do not trigger a right of first refusal); *Schroeder v. Duenke*, 265 S.W.3d 843, 847 (Mo. Ct. App. 2008) (holding that gifts do not trigger a right of first refusal).

57. See *Penn Cent. Transp. Co. v. Lake Placid Branch Track* (*In re Dismantling of Lake Placid Branch Track*), 366 F. Supp. 62, 65 (E.D. Pa. 1973) (finding that a state agency waived its right by failing to act after being notified of a proposed railroad sale).

agency a right of first refusal, and then provide local governments with a right of second refusal if the state decides not to buy the property.⁵⁸ As discussed in Part IV, these complex, multitiered notification procedures can exacerbate the risk that a real-estate transaction will be voided, even years after the fact, if a property owner failed to notify the government of a proposed sale.

E. Involving the Private Sector

Exercising a right of first refusal can be an expensive prospect. As a result, agencies often assign their rights to private organizations.⁵⁹ The ability to assign a right of first refusal allows public agencies to leverage the resources and expertise of private organizations such as nonprofit land trusts and housing developers.

Even when a right is technically not assignable,⁶⁰ private parties can become the de facto beneficiary of a right of first refusal when the government buys a property, and then immediately turns around and sells it to a private organization. Montgomery County, Maryland, for example, almost exclusively uses its right of first refusal over rental housing in cases where the Housing Opportunities Commission has already identified a nonprofit housing organization that will buy and manage the property.⁶¹

Public rights of first refusal are a multifaceted land-use power with significant differences in how governments acquire, design, and use them. The following sections explore public rights of first refusal further by comparing them to the more well-known methods that governments use to acquire property.

58. See, e.g., N.J. STAT. ANN. § 48:12-125.1 (West 2019).

59. See, e.g., *Kunelius v. Town of Stow*, 588 F.3d 1, 2 (1st Cir. 2009) (describing the assignment of a right of first refusal to a nonprofit conservation organization); *Costello v. Town of Medway*, No. 03-P-1387, 2005 WL 955064, at *1-2 (Mass. App. Ct. 2005) (same).

60. In the context of private rights of first refusal, Jonathan F. Mitchell has provided an extensive discussion of the assignability of rights of first refusal, arguing that courts should develop a default rule that rights of first refusal cannot be assigned unless a given contract specifies otherwise. See Mitchell, *supra* note 20, at 986. For statutory rights of first refusal, some laws explicitly state that public rights of first refusal are assignable. See, e.g., MASS. GEN. LAWS ch. 121F, § 4 (2019); WIS. STAT. § 165.40 (2019). Others do not explicitly state whether a right is assignable or not, and at least one public agency – the Housing Opportunities Commission of Montgomery County, Maryland – has interpreted its statutory right of first refusal as granting the County a nonassignable right. Telephone Interview with Stephanie Killian, Acting Dir., Hous. Div., Montgomery Cty., Md. (Aug. 13, 2018).

61. Telephone Interview with Stephanie Killian, *supra* note 60.

II. THE GOVERNMENT'S SUITE OF OPTIONS FOR ACQUIRING PROPERTY

Despite their prevalence, public rights of first refusal have not been the focus of serious scholarly attention. Instead, the robust debates concerning how governments should acquire land have focused primarily on the tradeoffs between regular purchasing and eminent domain. In this Part, I compare the full trio of options available to the government and argue that public rights of first refusal can, under certain conditions, provide a superior means of balancing individual and collective needs than either eminent domain or regular purchasing do.

A. Regular Purchasing and Eminent Domain

For public agencies, purchasing land like any other buyer is usually the simplest and easiest way to acquire property.⁶² Regular purchasing, however, provides no guarantee that the government will be able to acquire a particular piece of property. Property owners may prefer another purchaser, be unwilling to sell, or complete a transaction before the government is aware of a possible sale. These challenges are particularly acute for projects that require assembling several parcels of land. Negotiating with multiple owners is costly and time-consuming, and the problem of strategic holdouts can frustrate attempts to combine parcels of land.⁶³

While governments generally prefer to purchase property, public agencies sometimes resort to eminent domain when they need to acquire specific properties. Though at times necessary, eminent domain has been the subject of repeated criticism. Most prominently, the evictions caused by eminent domain hurt individuals and can fracture communities.⁶⁴ Moreover, the burdens of evictions are not shared equally. As the history of urban renewal demonstrates, condemnation

62. See *Heller & Hills*, *supra* note 18, at 1472 (describing regular purchasing as the “ideal method” of acquiring property).

63. Private parties occasionally overcome strategic holdouts through the use of secret land-buying agents, who purchase property on behalf of undisclosed buyers. Disney famously used this stratagem to buy the land for Disney World in Florida. This method, however, is not available to public agencies, which must act transparently when acquiring land. See Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 6 (2006).

64. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 108 (2006).

notices often appear much more frequently on the doors of homeowners in historically disadvantaged communities.⁶⁵

The problem of displacement is made worse by compensation that is often perceived as arbitrary and insufficient. The Supreme Court has described the process of calculating fair market value as suffering from “serious practical difficulties”⁶⁶ and “determined only by a guess.”⁶⁷ A recent study of condemnation proceedings in New York City supports the Court’s characterization of fair market value as rough guesswork. Using a dataset of eighty thousand open-market sales, Yun-chien Chang evaluated the price that New York City paid for condemned properties against a model of what fair market value should have been, based on characteristics such as location, amenities, and the number of bedrooms.⁶⁸ Chang found that 53 percent of owners received less than fair market value, while 40 percent received more than fair market value.⁶⁹ More starkly, 40 percent of owners received extreme compensation payments that either exceeded 150 percent of fair market value or fell below 50 percent of fair market value.⁷⁰

Even removing guesswork from the equation would not solve all of eminent domain’s compensation problems, according to its critics. Scholars such as Lee Anne Fennell have argued that eminent domain fails to compensate owners for a range of implicit costs, such as the subjective value that owners place on their home, as well as the full costs of relocation.⁷¹

While this view of eminent domain’s compensation problem is itself contested,⁷² valid or not, the perception that eminent domain undercompensates

65. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (describing the impact of urban renewal on communities of color); Garnett, *supra* note 64, at 110-19 (describing how the politically connected Catholic community in Chicago influenced the siting of highways to avoid splitting Catholic parishes).

66. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

67. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949).

68. Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002*, 39 J. LEGAL STUD. 201 (2010).

69. *Id.* at 204.

70. *Id.*

71. See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-66; see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108 (1972) (contending that eminent domain may “grossly undervalue” properties when owners are sentimentally attached to their land); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986).

72. For example, Nicole Stelle Garnett has noted that public authorities have strong incentives to avoid using eminent domain when property owners place a high subjective value on their homes, thus reducing concerns that eminent domain will undercompensate owners. See Garnett, *supra* note 64, at 111. Katrina M. Wyman has argued that a robust conception of just

owners fuels political backlash and makes it harder for governments to invoke eminent domain. As noted by both government officials and scholars, “landowners bitterly fight condemnation” by pressuring politicians and initiating litigation that can delay projects or stop them altogether.⁷³ In recent years, public backlash against eminent domain has led to new restrictions on how it can be used. Following the Supreme Court’s 2005 decision in *Kelo v. New London*,⁷⁴ which upheld the use of eminent domain to transfer property from one private party to another for the purposes of economic development, forty-four states enacted reforms to eminent domain.⁷⁵ Among other changes, these reforms limited when public agencies can use eminent domain for economic development and provided additional protections for property owners.⁷⁶ Of relevance to this Note, eleven states gave owners of condemned land a statutory right of first refusal to buy their land back if the government later sells it.⁷⁷

Acquiring property can introduce tensions between public and private needs. Regular purchasing can leave the government unable to acquire properties that serve essential public functions, but eminent domain may harm individuals and provoke opposition to otherwise beneficial projects. The next Section explores how rights of first refusal resolve this tension in a unique manner.

B. Public Rights of First Refusal as a Third Path

Public rights of first refusal provide a third and underappreciated option to acquire property. They give the government a guaranteed opportunity to acquire property, without mandating that it necessarily do so. And yet compared with eminent domain, the imposition on property owners is minimal. Property owners retain the use and enjoyment of their property, and they control the decision of when to sell and at what price.

This method of balancing individual autonomy and collective flourishing can yield a fair treatment for property owners while still enabling the government to advance important social programs. The case of the Martin Luther King,

compensation should not seek to reimburse owners for the full subjective value of their property, as doing so can reinforce existing inequalities and compensate landowners for reprehensible subjective viewpoints. See Katrina M. Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007).

73. *Heller & Hills*, *supra* note 18, at 1468; see also Merrill, *supra* note 71, at 80 (“Government officials frequently complain about the costs and delays of eminent domain.”).

74. 545 U.S. 469 (2005).

75. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J.F. 82, 84 (2015).

76. *Id.* at 85-87.

77. *Id.* at 86-87.

Jr. National Historic Park and Preservation District demonstrates the benefits of this approach. Coretta Scott King founded the Martin Luther King, Jr. Center for Nonviolent Social Change after her husband's assassination.⁷⁸ For fifty years, the King Center has offered programs related to King's teachings, while also maintaining two of his former homes.⁷⁹ In recognition of the importance of King's legacy, Congress in 1980 established a historic preservation district in Atlanta, Georgia. As part of the preservation efforts, Congress gave the National Parks Service a right of first refusal to purchase properties from the King Center.⁸⁰ The right of first refusal respects the interests of King's family, while also recognizing the national significance of the King Center.

After owning and managing the properties for fifty years, King's family made the decision this past year to sell the homes to the National Parks Service, ensuring that the properties will be maintained as public museums.⁸¹ While this result could have been achieved even in the absence of a right of first refusal, in this case, the right both signaled the government's interest in the property and provided a backstop to ensure that the government could acquire the property through its statutory right if it needed to.

This form of balancing individual decision-making with collective needs for property is not always feasible. But where it is, public rights of first refusal provide a number of advantages over the more contentious power of eminent domain. Perhaps most significantly, a right of first refusal avoids the displacement of families and businesses that accompanies eminent domain. Indeed, a number of agencies have employed public rights of first refusal specifically to combat displacement by enabling tenants and homeowners to remain where they live.

A recent antieviction program from the City of Detroit provides one example. In 2011, the Treasurer of Wayne County, Michigan, adopted an aggressive new tax-collection strategy, stepping up enforcement of tax liens and foreclosures.⁸² This strategy, coupled with property assessments that had not been revised downwards in years (even after property values had fallen dramatically),

78. *About the King Center*, KING CTR., <https://thekingcenter.org/about-king-center> [<https://perma.cc/5YSE-ESTT>].

79. *Sustaining the Legacy of Dr. King's Homes*, KING CTR. (Feb. 22, 2019), <https://thekingcenter.org/2019/02/22/martin-luther-king-jr-s-homes-to-be-preserved-2> [<https://perma.cc/3HMC-3KG8>].

80. Act of Oct. 10, 1980, Pub. L. No. 96-428, § 2(b)(2)(B), 94 Stat. 1839, 1839 (codified at 16 U.S.C. § 410www-1 (2018)).

81. See *Sustaining the Legacy of Dr. King's Homes*, *supra* note 79.

82. See Sarah Alvarez, *Foreclosed for the Cost of an iPhone. That's Life in Wayne County*, BRIDGE (May 17, 2018), <https://www.bridgemi.com/detroit-journalism-cooperative/foreclosed-cost-iphone-thats-life-wayne-county> [<https://perma.cc/HMW8-CAN7>].

resulted in the foreclosure of over one hundred thousand properties in Detroit, or one in every four properties in the city.⁸³ While many of these properties were unoccupied, others were home to families who faced eviction as a result of outstanding tax bills.⁸⁴

In an effort to avoid the severe consequences of eviction, the City of Detroit recently partnered with a nonprofit housing organization to create a new buy-back program.⁸⁵ As part of the program, the City purchases homes from Wayne County and then transfers the properties to local nonprofits, which work with residents to establish repayment plans.⁸⁶ The program aims to keep residents in their homes while working towards the goal of paying down back property taxes.

The buyback program depends upon Detroit's right of first refusal. Under Michigan law, municipalities have a right to buy tax-foreclosed properties from the counties in which they are located.⁸⁷ The statute guarantees that a city like Detroit can purchase specific homes without losing them to outside investors.⁸⁸ Using its right of first refusal, Detroit bought eighty homes in the first year of the program and is expanding the program to cover three hundred homes for the second year.⁸⁹

In addition to counteracting the harms of displacement, rights of first refusal also address a central problem in eminent-domain proceedings: the difficulty in determining just compensation. While, in theory, the requirement to pay just compensation is meant to approximate "what a willing buyer would pay in cash to a willing seller,"⁹⁰ as discussed above, the process of calculating fair market

83. Bernadette Atuahene & Timothy R. Hodge, *Statecraft*, 91 S. CAL. L. REV. 263, 264-67 (2018).

84. Violet Ikonomova, *Nearly 36,000 Detroit Properties Facing Foreclosure Ahead of 2018 Tax Auction*, DETROIT METRO TIMES (Dec. 15, 2017), <https://www.metrotimes.com/news-hits/archives/2017/12/14/nearly-36000-detroit-properties-foreclosed-ahead-of-2018-tax-auction> [<https://perma.cc/798L-LBD2>].

85. Sarah Cwiek, *515 Detroit Families Will Get to Stay in Their Homes, Thanks to Tax Foreclosure Buy-Back Program*, MICH. RADIO (Sept. 1, 2018), <https://www.michiganradio.org/post/515-detroit-families-will-get-stay-their-homes-thanks-tax-foreclosure-buy-back-program> [<https://perma.cc/WQ84-LSNA>].

86. *Id.*

87. MICH. COMP. LAWS § 211.78m (2019).

88. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1169-73 (2014) (describing the role of investors in Wayne County's public foreclosure auctions).

89. *City Partners to Expand Tax Foreclosure Prevention Program to Keep Detroiters in Homes*, CITY OF DETROIT (July 13, 2018), <https://detroitmi.gov/news/city-partners-expand-tax-foreclosure-prevention-program-keep-detroiters-homes> [<https://perma.cc/R7KA-BDHW>].

90. *Messer v. United States*, 157 F.2d 793, 795 (5th Cir. 1946).

valuation can produce wildly diverging figures, either over- or undercompensating property owners by significant amounts. By contrast, rights of first refusal utilize real market prices that owners are actually willing to accept.

Avoiding displacement and paying fair prices can assist governments in pursuing ambitious public programs, as shown by the Agua Caliente Band of Cahuilla Indians. Under federal law, Native American tribes possess a right of first refusal to purchase property held in trust by the federal government.⁹¹ Congress created this right in the Indian Land Consolidation Act Amendments of 2000 (ILCA).⁹² The ILCA recognized the devastation caused by allotment, the federal government's program of seizing and redistributing tribal lands in the late nineteenth and early twentieth centuries.⁹³ In the 2000 amendments, Congress made it the official policy of the United States "to promote tribal self-sufficiency and self-determination" and to "reverse the effects of the allotment policy on Indian tribes."⁹⁴

Rights of first refusal provide one method of counteracting the legacy of tribal dispossession.⁹⁵ As part of the process, individuals who wish to sell land held in trust by the federal government must first notify the Bureau of Indian Affairs. Before the Bureau can approve a sale and remove land from the federal trust, the ILCA mandates that the governing tribe must be offered a right of first refusal.⁹⁶

The Agua Caliente Band of Cahuilla Indians uses its right of first refusal to purchase properties in and around Palm Springs, California.⁹⁷ In recent years,

91. 25 U.S.C. § 2216(f) (2018).

92. Pub. L. No. 106-462, 114 Stat. 1991.

93. *Id.* § 101.

94. *Id.* § 102(4)-(5).

95. In addition to the right of first refusal discussed below, there have also been calls for more expansive uses of rights of first refusal. *See, e.g.*, Affiliated Tribes of Northwest Indians of the United States, Res. No. 09-23 (2009), <http://www.atntribes.org/sites/default/files/Res-09-23.pdf> [<https://perma.cc/CRT4-4QGV>] (calling for a right of first refusal for Native American tribes for state and federal surplus lands); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 83 (1999) (proposing a general statutory right of first refusal for any fee-simple transfer within reservations).

96. 25 U.S.C. § 2216(f).

97. *See* Rosalie Murphy, *Buyers, Sellers and a Clever Investor: What Happens When Reservation Land Is Sold*, DESERT SUN (Sept. 22, 2016), <https://www.desertsun.com/story/money/real-estate/2016/09/22/agua-caliente-land-sales/88320432> [<https://perma.cc/3K6T-YS8G>] (describing the tribe's use of its ROFR).

the tribe has purchased eight thousand acres of land from individual landowners.⁹⁸ The tribe thereby advances a number of goals, including preserving sacred land in the region's canyons, constructing housing, and spurring economic development in downtown Palm Springs.⁹⁹ Revenues from the tribe's commercial investments, including its two casinos and resorts, have helped fund the acquisitions. As Tom Davis, the Agua Caliente's chief urban planner, has explained, "The tribe is an entrepreneurial organization, so if there's a good investment out there, we'll follow it up."¹⁰⁰ Even with these revenues, the tribe often forgoes buying properties when private offers exceed what the tribe is able to pay.¹⁰¹

The right of first refusal over lands held in trust by the federal government is only one example of a tribal right of first refusal. A number of Native American tribes have created public rights of first refusal for private properties on reservation land that have gone through foreclosure proceedings.¹⁰² Similarly, as part of the Indian Home Loan Guarantee Program, the federal government underwrites private-sector mortgages on the condition that lenders provide a right of first refusal to tribes in the event of a foreclosure.¹⁰³ Finally, several tribes have organized in recent years to press state and federal governments to create rights of first refusal for tribes over surplus public lands. In 2009, the Affiliated Tribes of Northwest Indians, an organization that represents fifty-seven tribes across six states, passed a resolution calling for the creation of tribal rights of first refusal over state and federal surplus lands located within traditional tribal territories.¹⁰⁴ The campaign appears to be producing results. The California Public Utilities Commission, acting pursuant to an executive order from the Governor of California, seems close to finalizing a new Tribal Land Transfer Policy which would require the state's privately owned utilities to give tribal governments a right of first refusal before disposing of surplus property.¹⁰⁵

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See, e.g., CONFEDERATED TRIBES OF WARM SPRINGS TRIBAL CODE ch. 206, § 340 (2016); SUQUAMISH TRIBAL CODE ch 5.7, § 50. (2002).

103. 12 U.S.C. § 1715z-13a(h)(2) (2018).

104. Res. No. 09-23 ("Right of First Refusal"), AFFILIATED TRIBES OF NW. INDIANS (2009), <http://www.atnitribes.org/sites/default/files/Res-09-23.pdf> [https://perma.cc/ZG3K-QB4N].

105. See *Proposed Tribal Land Transfer Policy*, CAL. PUB. UTIL. COMM'N (2019), [https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20\(003\)%20clean.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20(003)%20clean.pdf) [https://perma.cc/5YVA-DDSC].

Public rights of first refusal give the government many of the advantages that private parties seek when acquiring rights of first refusal: they provide a guaranteed ability to acquire property, serving as a backstop in case negotiations break down and ensuring that sellers notify the government before completing a transaction. This last point can have particular importance. Because property owners must notify the government before finalizing a sale, public rights of first refusal can make the government aware of purchase opportunities that it might otherwise have never known about or could only have discovered at great expense.¹⁰⁶ As discussed in Part III, this notification function may be particularly important when a specific property plays an essential role within a broader scheme, such as when individual railroad corridors come up for sale.¹⁰⁷

In this Part, I've argued that an essential feature of public rights of first refusal is the ability to arrive at a balanced compromise between individual autonomy and communal needs. However, a right of first refusal is not an effective tool in all situations. The following Parts are devoted to the question of when the government should or should not consider using a right of first refusal.

III. WHEN SHOULD THE GOVERNMENT USE A RIGHT OF FIRST REFUSAL?

The three principal methods for acquiring land—regular purchasing, eminent domain, and public rights of first refusal—each have their own advantages. Regular purchasing is the simplest approach and works well for most projects, and eminent domain may be the only feasible way to acquire specific properties in a short amount of time. Given these two other options, when might the government instead want to use a right of first refusal? This Section discusses the conditions under which a right of first refusal may be useful to preserve or transform unique parcels of land.¹⁰⁸

¹⁰⁶. As an alternative to a full right of first refusal, a number of statutes only require private parties to notify the government of a proposed sale, but do not give the government a privileged right to buy the property. In light of the costs of rights of first refusal (discussed in Section IV.A), there may be times when a simple notification requirement is a better choice than a right of first refusal.

¹⁰⁷. See *infra* Section III.A (discussing the role of rights of first refusal in preserving infrastructure networks).

¹⁰⁸. This list of conditions favorable to the use of a public right of first refusal is not meant to be exhaustive. Rather, it describes several common use cases where a right of first refusal can be valuable to a public agency. Other factors exist that can make a right of first refusal more or less useful, but limited time and space require a more focused discussion in the following sections.

A. *Properties with Unique Social Value*

Much of the value of a right of first refusal comes from the guaranteed opportunity to purchase a piece of property. For both private and public actors, this guarantee is most needed when a particular property has qualities that would be difficult to replicate elsewhere. The characteristics that make a property rare or unique vary depending on the program in question. At times, the value of a property is derived from its historic, cultural, or architectural value, as in the case of the Martin Luther King, Jr. National Historic Park and Preservation District. But oftentimes, the quality that makes a property unique is not its history, but its location.

One of the clearest illustrations of the locational value of property is the right that many states have to purchase railroad corridors.¹⁰⁹ These corridors often provide unique pathways between cities that are difficult to replace with other routes. In the United States, private railroad companies own over 175,000 miles of rail.¹¹⁰ Railroads regularly sell lines in response to changing demographics or competition from other industries. Once sold, a railroad corridor tends to fragment quickly into individualized parcels, unless it is bought by the government or another railroad.¹¹¹

States are often interested in purchasing rights-of-way, for both transportation and nontransportation reasons. States can use existing rights-of-way to improve passenger and freight rail service, as well as to convert corridors to other uses such as recreational parks or corridors for other infrastructures. Historically, telegraph and telephone companies benefited from installing their wires alongside railroads.¹¹² More recently, the internet, like its predecessors in telecommunications, developed rapidly in part by burying tens of thousands of miles of fiber optic cables along existing railroad rights-of-way.¹¹³ The value of a right-of-way is thus not just in its current use, but in its potential for reuse.

109. Table A2 in the Appendix provides a list of these rights.

110. Kevin M. Sheys, *Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers*, TRANSIT COOP. RES. PROGRAM 3 (1994), http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_lrd_01.pdf [<https://perma.cc/R76C-TWE8>].

111. See Charles H. Montange, *Fixing the Unbroken in the Federal Railbanking and Trail Use Statute: A Rejoinder to "Unhappy Trails"*, 6 J. LAND USE & ENVT'L. L. 53, 56 (1990) ("Rail corridors are prone to rapid disintegration after authorized abandonment.").

112. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 359 (2000).

113. See SAFT: *Protecting Our Lines—and Yours—for 30 Years*, 29 UNION PAC. FIBER OPTIC FOCUS 1, https://www.up.com/cs/groups/public/@uprr/documents/up_pdf_nativedocs/pdf_up

The creation of the Farmington Canal Trail, an eighty-mile recreational trail that runs the length of Connecticut, demonstrates the potential of rights of first refusal to preserve and repurpose old railroad corridors. This example also illustrates how a right of first refusal can have important indirect effects, including serving as a rallying point for advocacy groups and encouraging the kind of robust planning and public engagement that can produce a shared vision of how to redevelop a rare piece of land.

In 1987, the Boston & Maine Railroad sought to abandon a long stretch of track that followed the route of the historic Farmington Canal from the southern coast of Connecticut up to Massachusetts.¹¹⁴ State officials initially had little interest in acquiring the corridor, until a group of residents formed an advocacy organization—the Farmington Canal Rail to Trail Association (FCRTA)—and started pressing for the corridor’s preservation.¹¹⁵ The FCRTA began its campaign by filing a lawsuit to delay the abandonment of the corridor,¹¹⁶ and then proceeded to build support for purchasing the right-of-way by conducting letter-writing campaigns, placing op-eds in local newspapers, and meeting with businesses and community groups.¹¹⁷ At the heart of the FCRTA’s advocacy was

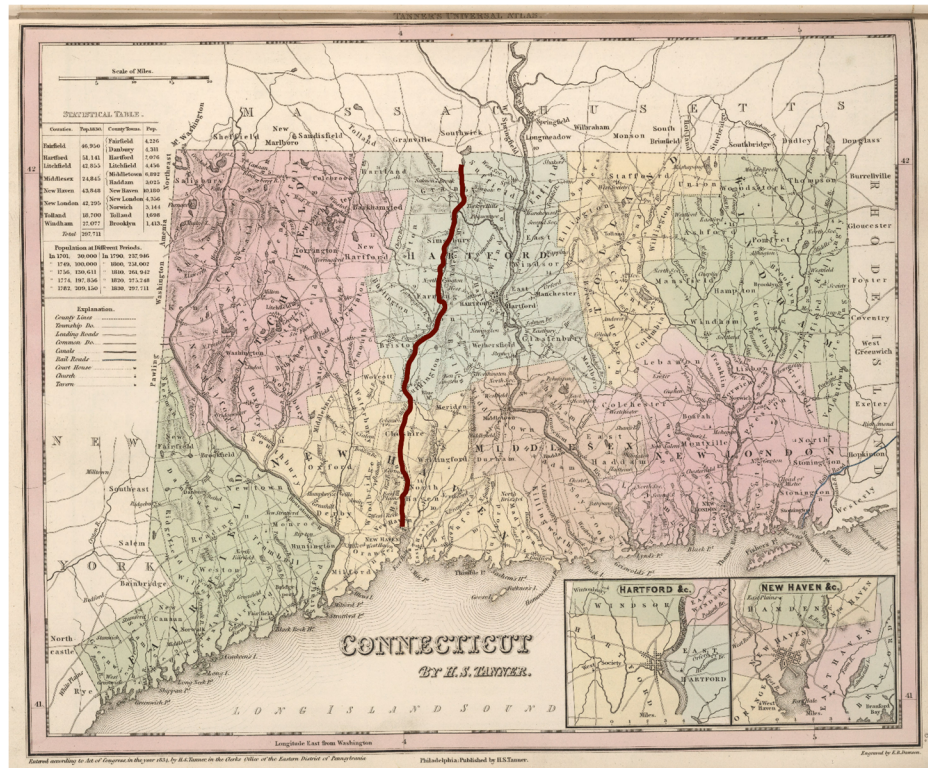
_fiber-optic_29-2.pdf [https://perma.cc/2YRU-MYF5] (referencing the 34,000 miles of fiber optic cables buried alongside Union Pacific’s rights-of-way).

114. See Eric E. Feldman, *From Linear Spaces to Linear Places: Recycling Rail Corridors in Urban Areas* 63–64 (June 2002) (unpublished M.C.P. thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/handle/1721.1/65992> [https://perma.cc/2W3D-XWAV].
115. See Minutes of the Citizens for the Preservation of the Farmington Canal Corridor (June 5, 1987) (describing the state’s intention to waive its right of first refusal) (on file with author). The FCRTA initially called itself the Citizens to Preserve the Farmington Canal Corridor before changing its name to the Farmington Canal Rail to Trail Association. Much of the research for this case study comes from the FCRTA’s papers, housed at the Whitney Library at the New Haven Museum. I would like to thank Edward Surato for his help locating and using the FCRTA archive.
116. *Conn. Tr. for Historic Pres. v. Interstate Commerce Comm’n*, 841 F.2d 479 (2d Cir. 1988). Railroads can only sell or abandon a right-of-way with permission from the Surface Transportation Board. 49 U.S.C. § 10903(d) (2018).
117. See Robin W. Winks, Opinion, *Businesses, Conservationists Can Both Win on Canal Line Plan*, NEW HAVEN REG., Jan. 24, 1988 (advocating for the creation of the trail); Letter from Evelyn Lee to the Citizens for the Pres. of the Farmington Canal Corridor (June 16, 1987) (on file with author) (noting the group’s letter-writing campaign to the City of New Haven and state agencies); Minutes of the Citizens for the Pres. of the Farmington Canal Corridor (July 29, 1987) (on file with author) (describing outreach to Yale University and local developers); Minutes of the Citizens for the Pres. of the Farmington Canal Corridor (July 8, 1987) (on file with author) (describing outreach efforts to the City of New Haven and New Haven community groups).

a statutory right of first refusal, which gave both the state and local municipalities a right to buy railroad properties, if they chose to do so.¹¹⁸

FIGURE 4.

MAP OF THE FARMINGTON CANAL ROUTE¹¹⁹



118. CONN. GEN. STAT. § 13b-36 (2019); see, e.g., *Hearing Before the Conn. Gen. Assembly Joint Comm. on Transp.*, 1988 Leg. (Conn. 1988) (testimony of Jeremy D. Rosner, Deputy Director of Economic Development, New Haven, Connecticut) [hereinafter Rosner] (on file with author) (describing the state's ability to purchase the corridor using its statutory right of first refusal); Michael Dell, *The Farmington Canal: Save it or Pave it?* NEW HAVEN LAND TR. INC., Fall 1987 (on file with author) (describing the advocates' goal of convincing the state to purchase the corridor); Letter from the Coal. to Pres. the Farmington Canal Corridor to William A. O'Neill, Governor of Conn. (Jan. 8, 1988) (on file with author) (noting the state's limited opportunity to acquire the corridor).

119. This map, which includes the route of the historic Farmington Canal, was originally created by Henry S. Tanner in 1834. I have traced the route of the Farmington Canal in red marker to

Among the largest obstacles the FCRTA faced were the lack of funding and the absence of a coherent vision for what the corridor should become. Different groups sought to convert portions of the railroad into, among other ideas, a shopping mall, a business park, a corridor for utilities, a light-rail line, a hiking trail, a highway, a fishing canal, and a parking lot.¹²⁰ As the FCRTA advocated for its preferred vision—a multiuse linear park that would run the length of the state from New Haven, Connecticut to Northampton, Massachusetts—it worked to persuade developers and local politicians that economic development and recreation could coexist, for instance by designing the trail to accommodate new commercial buildings in the southern municipalities of Hamden and New Haven.¹²¹

The FCRTA’s vision of an eighty-mile linear park could only be advanced piecemeal, as the Boston & Maine Railroad began selling off sections of the line.¹²² After three years of advocacy, the plan for a linear park took a large step forward when the Connecticut Department of Environmental Protection bought a three-mile segment for \$600,000.¹²³ Over the following years multiple parties, including the state and the municipalities of Cheshire, Hamden, and New Haven, bought additional segments, each acquisition adding to the plan to construct a unified linear park.¹²⁴

According to Nancy Alderman, one of the leaders of the FCRTA, the right of first refusal was indispensable to their work.¹²⁵ It provided both a focal point for advocacy and the means of acquiring successive parcels of land. The right of first

highlight the route. I am grateful to the David Rumsey Map Collection for providing the underlying image of Henry S. Tanner’s map. More information on the map is available at *Connecticut by H.S. Tanner*, DAVID RUMSEY MAP COLLECTION, <https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~266112~90040640> (2020) [<https://perma.cc/N7XJ-CUD4>].

120. See Carole Bass, *Canal Trail Planners Seek Unity*, NEW HAVEN INDEP., Apr. 20, 1989, at 3 (describing the competing visions for the corridor to be used for parking, a rail line, and office space); Carole Bass, *Grand Canal—or Grand Illusion?*, NEW HAVEN INDEP., Apr. 23, 1987, at 3 (describing a local architect’s proposal to refill the canal and use it for “fishing, row-boating, [and] daydreaming”); Mark Brackenbury, *Developer Confident of Buying Rail Line for Proposed Mall*, NEW HAVEN REG., June 8, 1987 (shopping mall); Nathanael B. Greene, Letter to the Editor, *Canal Line Could Serve as Utility Corridor for 21st Century*, NEW HAVEN REG., Jan. 20, 1988 (utility corridor); Charles B. Gunn, Letter to the Editor, *Commuters Can Use Hiking Boots*, NEW HAVEN REG., Jan. 19, 1988 (new highway).

121. See Winks, *supra* note 117 (arguing that economic development and recreation could coexist along the proposed rail trail).

122. See Rosner, *supra* note 118 (describing the piece-by-piece acquisitions of the railroad corridor).

123. See Feldman, *supra* note 114, at 63.

124. *Id.* at 62–63.

125. Telephone Interview with Nancy Alderman, Former President of the FCRTA (Aug. 30, 2019).

refusal may also have played a secondary, but important, role in encouraging advocates and public officials to engage in a robust process of public outreach and planning. The existence of the public right of first refusal greatly increased the chance that the trail could be successfully constructed. If the FCRTA and its allies could build enough public support for the eighty-mile linear park, public officials would have the guaranteed ability to buy the properties. The right thus provided an incentive for advocates and public officials to engage in the kind of multiyear advocacy necessary to build a shared vision for the railroad corridor.

The Farmington Canal Trail is an example of the role that a right of first refusal can play in acquiring land that is uniquely valuable. Lee Anne Fennell has referred to these kinds of situations as “thin” markets—where suitable replacements are rare—as opposed to “thick” markets, where there are many interchangeable properties.¹²⁶ In thin markets, a right of first refusal may be beneficial. However, in thick markets, rights of first refusal provide little value. In a thick market, if a public agency were to miss out on a sale, it can always return to the market and buy another property. Special rights to buy particular properties are not needed, and yet the right still imposes burdens on property owners, as described further in Section IV.A.

Whether a market is “thick” or “thin” depends upon the goals of a public program and the available alternatives. In the case of the Farmington Canal Trail, there would likely have been no alternative combination of properties that could serve the aims of a multiuse linear park of that scale. Other rights of first refusal may be much less useful. For example, in Massachusetts, municipalities have a right of first refusal to buy forest and agricultural land that is enrolled in a pair of state conservation programs, known as Chapter 61 and Chapter 61A.¹²⁷ In 2007, the two programs covered 6,907 parcels in total.¹²⁸ Figure 5 displays the location of these properties, as well as additional open spaces in Massachusetts that are not enrolled in the program.

126. Fennell, *supra* note 71, at 971.

127. MASS. GEN. LAWS ch. 61, § 8 (2019); *id.* ch. 61A, § 14. There is also a third and related conservation program, Chapter 61B, which deals with recreational properties more broadly. *See generally id.* ch. 61B. Because of the lack of available data on Chapter 61B properties, this Section focuses on Chapter 61 and Chapter 61A.

128. The geographic data for this map comes from the Massachusetts Bureau of Geographic Information Systems (on file with author).

FIGURE 5.
PROPERTIES ENROLLED IN CHAPTERS 61 AND 61A¹²⁹



129. The map shows properties enrolled in Chapters 61 and 61A as of 2007, when the Massachusetts Bureau of Geographic Information Systems (MassGIS) stopped collecting data on the program. The dataset includes forest land (Chapter 61) and agricultural land (Chapter 61A) that are subject to public rights of first refusal. For comparison, the light grey shows addi-

The map shows a scattered distribution of properties across the state that are subject to the public right of first refusal (highlighting a sample area in the center of the state). This piecemeal distribution is a product of the voluntary nature of the program — property owners can choose whether to enroll their land in one of the state's conservation programs.

In this kind of scenario, it is questionable whether a right of first refusal adds significant value. The unplanned nature of the program makes it unlikely that the properties covered by the program align with the state's conservation priorities. Moreover, with 6,907 properties enrolled in the program, and many more similar parcels not enrolled, it seems likely that the public would have alternative options to purchase similar properties if it missed out on any given sale.¹³⁰

Private parties almost always use a right of first refusal when the prospective buyer has a special connection to the property in question.¹³¹ Like private parties, public agencies should refrain from using a right of first refusal when properties are not in fact scarce, relative to the government's priorities, funding, and alternative opportunities to purchase.

B. Transformation, Preservation, and the Ability to Wait

A right of first refusal, unlike eminent domain, removes the government's control over the timing of a sale. Therefore, rights of first refusal are only effective when public authorities are able to act over a long-term horizon. This often, though not always, means that rights of first refusal are most useful as a tool for preservation.

The potential for rights of first refusal to preserve existing uses of land is one reason these rights feature so heavily in affordable housing.¹³² In recent years, many cities have seen a precipitous decline in the number of affordable housing

tional open spaces in Massachusetts, a category that includes habitat conservation areas, outdoor camps, and state forests. For more information on the OpenSpaces datalayer, see *MassGIS Data: Protected and Recreational OpenSpace*, MASSGIS (August 2019), https://docs.digital.mass.gov/dataset/massgis-data-protected-and-recreational-openspace?_ga=2.134262257.1665824890.1554147174-504385179.1554147174MASSDOCS [<https://perma.cc/5JWY-CFNW>].

130. Of course it is possible that, by casting a wide net, the legislature can ensure that it is able to act when a property it does wish to purchase appears on the market. But, as discussed *infra* Section IV.A, rights of first refusal impose both visible and invisible burdens on buyers and sellers of property, which counsels against creating sweeping programs.

131. For example, tenants who have a longtime connection to a home often acquire rights of first refusal, or a business might acquire one to expand into a property next door. See Mitchell, *supra* note 20, at 987-88.

132. Table A1 in the Appendix provides a list of rights of first refusal in affordable housing.

units, a product of rising rents, expiring affordability restrictions, and upscale redevelopments. By exercising a right of first refusal over existing affordable housing, the government can preserve the total supply while also enabling current tenants to stay in their homes and avoid the severe consequences of eviction.¹³³ Preserving affordable housing also has a fiscal logic. Constructing new affordable housing is twenty-five to forty percent more expensive than buying and rehabilitating existing apartment buildings.¹³⁴ And even when state and local governments do have the resources to fund the construction of new affordable housing, opposition to multifamily housing developments in general, and to affordable housing in particular, can make it difficult to site new projects, thus increasing the need to preserve existing buildings.¹³⁵

Montgomery County, Maryland shows how this kind of preservationist program can operate in practice. The County's Housing Opportunities Commission possesses a statutory right of first refusal to buy properties with four or more rental units.¹³⁶ In exercising this right, the County has incorporated a number of best practices. For example, the County engages in long-term planning and has access to dedicated funding sources that it can use to make speedy purchases.¹³⁷ Moreover, the Housing Opportunities Commission is organized as a local independent agency, which insulates political representatives from needing to pick sides in what are often contentious fights over affordable housing developments.¹³⁸ Using its right of first refusal, the County has purchased eight apartment buildings, preserving a total of 1,244 units.¹³⁹ In addition to direct purchasing, the right of first refusal also gives the County leverage in negotiations

133. See generally Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295 (2015) (finding higher rates of depression, poverty, and stress for mothers who experience eviction).

134. Charles Wilkins et al., *Comparing the Life-Cycle Costs of New Construction and Acquisition-Rehab of Affordable Multifamily Rental Housing*, 25 HOUSING POL'Y DEBATE 684, 684 (2015).

135. See Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 91 (2015).

136. MONTGOMERY COUNTY, MD., CODE § 53A-4 (2018).

137. Telephone Interview with Stephanie Killian, *supra* note 60.

138. *Id.*

139. Isiah Leggett & Richard Y. Nelson, Jr., *DHCA—Moving Forward*, MONTGOMERY COUNTY DEP'T OF HOUSING & COMMUNITY AFF. 8 (Dec. 2014), https://www.montgomerycountymd.gov/DHCA/Resources/Files/director/DHCA_Moving_Forward.pdf [<https://perma.cc/24NM-GSML>]. One concern with the County's program is its low utilization rate. While the County has preserved a significant number of units—1,244 apartments in total—it has only exercised its right eight times in thirty years, *id.*, despite the fact that the County receives hundreds of offers each year. Telephone Interview with Stephanie Killian, *supra* note 60. As discussed in Part IV, low utilization rates can impose burdens on property owners without

with developers. For example, Montgomery County will automatically waive its right of first refusal if the new buyer agrees to a three-year moratorium on rent increases.¹⁴⁰

Negotiations between developers and public agencies, such as the ones that occur in Montgomery County, are a common feature of public rights of first refusal. A recurring theme in interviews conducted for this Note was that developers and public officials would reach agreements whereby an agency would waive a right of first refusal in exchange for some form of public benefit.¹⁴¹ While Montgomery County uses its leverage to secure additional protections for renters, other jurisdictions have used this leverage to influence the design of new developments.

For example, the City of Montreal recently passed a bylaw granting itself a right of first refusal over the Molson-Coors brewery, a large industrial site slated for redevelopment.¹⁴² The City was concerned that previous redevelopments in the neighborhood had produced a series of luxury condominium buildings, without additional features that the neighborhood needed, such as a school, grocery store, or affordable housing.¹⁴³ By claiming a right of first refusal over the property, the City gave itself the option of purchasing the site, though the high cost of the parcel—which ultimately sold for \$126 million—would have made it expensive for the City to do so.¹⁴⁴ Instead, the right of first refusal became a tool

yielding benefits. It is likely that the County's right of first refusal casts too large a net over properties that the County is not in fact interested in purchasing. Tailoring the right more narrowly may help target the properties, such as large apartment buildings, that the County is actually interested in purchasing.

140. MONTGOMERY COUNTY, MD., CODE § 53A-5(a)(1)(C) (2018).

141. The Massachusetts Department of Transportation, for example, will often waive its right to buy railroad properties if developers build in such a way as to preserve the future use of railroad corridors. Email from Jamey Tesler, former Chief Operating Officer for the Mass. Dep't of Transp., to author (Aug. 7, 2018) (on file with author).

142. Marian Scott, *Molson Irked as City Claims First Dibs on Sale of Brewery Site*, MONTREAL GAZETTE (Nov. 26, 2018), <https://montrealgazette.com/news/local-news/molson-irked-as-city-claims-first-dibs-on-sale-of-brewery-site> [https://perma.cc/9CW2-HH6L].

143. Tracey Lindeman, *Montreal Gets a 'Remarkable' Chance to Build a New Neighborhood*, CITYLAB (Aug. 29, 2019), <https://www.citylab.com/design/2019/08/molson-coors-brewery-redevelopment-montreal-housing-market/596956> [https://perma.cc/EXZ8-V3D5].

144. Daniel Sucar, *Molson Brewery Land Sold for \$126 Million Amid Preservation Concerns*, MONTREAL GAZETTE (June 28, 2019), <https://montrealgazette.com/news/local-news/molson-brewery-land-sold-for-126-million-amid-preservation-concerns> [https://perma.cc/72KU-B3RJ]. In these situations, jurisdictions will at times purchase a larger parcel than they need and then sell off the excess land to help pay for the acquisition. See, e.g., *Hughes v. N.H. Div. of Aeronautics*, 871 A.2d 18, 23 (N.H. 2005) (describing how New Hampshire bought a private airport with its right of first refusal and sold the excess land to help finance the deal).

to use in negotiations with prospective developers.¹⁴⁵ In the end, a consortium of private developers bought the large Molson-Coors site, but in exchange for waiving its right, the City received land for a school, public park, waterfront promenade, and 200 units of social housing.¹⁴⁶

The Montreal example illustrates that while rights of first refusal are often used for preservation, they can also feature in more transformative plans, in this case the plan to redevelop an industrial waterfront into a mixed-use residential and commercial area. These kinds of transformative plans, while possible, require public agencies to engage in thoughtful long-range planning in order to have the resources and plans needed to take advantage of redevelopment opportunities when they arise.

In practice, this kind of planning can be difficult to pull off, even when the desire is simply to preserve an existing land use. Statutes often impose a quick turnaround for the government to invoke its right of first refusal. In periods as brief as thirty days, agencies must investigate a property and then reach a final decision about whether to buy it. Frequently, the most difficult challenge is accessing financing to match third-party offers. In Massachusetts, for example, the failure to provide dedicated funding for purchasing railroad corridors has stymied the state's ability to use its right of first refusal.¹⁴⁷ The Department of Transportation's funding is set through annual appropriations, and the budget cycle rarely aligns with the short timeframe needed to exercise a right of first refusal.¹⁴⁸ As a result, the state has to pass on properties that it might otherwise wish to purchase. In the absence of dedicated funding, local officials sometimes try to get creative, for instance by appealing directly to voters for financing.¹⁴⁹ But a better practice is to give state and local agencies access to standing funds

¹⁴⁵. Telephone interview with Anthony Arquin, Attorney (Aug. 27, 2019) (on file with author).

¹⁴⁶. *Montreal's Molson Brewery to Make Way for New Residential Neighborhood*, CBC NEWS (June 5, 2019, 4:00PM ET), <https://www.cbc.ca/news/canada/montreal/molson-site-consortium-montreal-agreement-1.5163306> [<https://perma.cc/DS44-XAQW>].

¹⁴⁷. Email from Fred Salvucci, former Sec'y of Transp. for Mass. (Aug. 20, 2018) (on file with author).

¹⁴⁸. *Id.*

¹⁴⁹. When one railroad came up for sale in 1985, Maine voters approved a bond issue to enable the Department of Transportation to exercise its right of first refusal and purchase the railroad. See *Dale Henderson Logging, Inc. v. Dep't of Transp.*, 48 A.3d 233, 238 (Me. 2012); see also *Town of Stow v. Landwest Dev., LLC*, No. 06-P-850, 2007 WL 517725, at *1 (Mass. App. Ct. 2007) ("A special town meeting was convened to vote on the appropriation of the funds necessary to accomplish the purpose; the vote was favorable, and the meeting voted to issue a bond to pay for the acquisition.").

to pay for acquisitions¹⁵⁰ or to grant these rights to agencies (such as quasi-public agencies) that have the authority to independently issue bonds.¹⁵¹

For both preservation and transformation, the principal consideration is whether the government is able to act deliberately over a long span of time. For cases where speed is imperative, rights of first refusal are usually not effective.

IV. WHEN SHOULD THE GOVERNMENT AVOID A RIGHT OF FIRST REFUSAL?

While public rights of first refusal can be a helpful tool, they also have their own downsides. This Part describes in greater detail the limitations and drawbacks of public rights of first refusal and discusses when these rights should not be used.

A. A Cautionary Note: The Hidden Costs of Rights of First Refusal

To my knowledge, no empirical research exists documenting the effects of rights of first refusal (public or private) on the marketability of land. Nonetheless, economic theory and interviews with practitioners suggest that public rights of first refusal can, under certain circumstances, drive up costs for property owners and deter potential buyers from bidding on land.¹⁵²

Most immediately, rights of first refusal require owners to spend time and money navigating an additional layer of bureaucracy. To comply with a right of first refusal, property owners frequently hire land-use attorneys and must wait for the government to decide whether to exercise or waive its option to buy the property. Like delays associated with other land use regulations, the waiting periods imposed by rights of first refusal can create uncertainty and drive up the cost of developing real estate,¹⁵³ although depending on the project, developers

150. See, e.g., N.J. STAT. ANN. § 13:18A-55 (West 2019) (dedicated fund to purchase land in the Pinelands National Reserve); UTAH CODE ANN. § 72-2-117 (West 2018) (fund to preserve highway and railroad corridors).

151. My thanks to Sam Marullo for this suggestion.

152. See David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1, 5 (1999) (arguing that rights of first refusal deter potential buyers).

153. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 697 (1973); Paul Emrath & Caitlin Walter, *Regulation: Over 30 Percent of the Cost of a Multifamily Development*, NAT'L MULTIFAMILY HOUSING COUNCIL, 4 (June 2018), <https://www.nmhc.org/contentassets/60365effa073432a8a168619>

may also continue to work on parallel tasks – such as drafting construction plans and applying for permits – while waiting for the government to decide whether to exercise its right.

A less obvious impact is the effect that a right of first refusal can have on a seller's ability to attract buyers. At the heart of the problem are the investments that a buyer must make before even bidding on a piece of property, known in the economic literature as search and negotiation costs.¹⁵⁴ A right of first refusal increases the probability that a buyer will invest time and money investigating a property, only to have the government come in and scoop the deal at the last moment.¹⁵⁵ Because it reduces the chances of a successful purchase, a right of first refusal may deter prospective buyers from ever bidding on a piece of property in the first place. A seller can offset this effect by lowering the initial asking price, thereby inducing buyers to once again bid on the property. This strategy, however, attracts offers at the expense of diminished profits for the seller.¹⁵⁶

Without empirical research, it is difficult to estimate how large this effect is in practice. Nonetheless, we can make a few plausible inferences. The first is that when there is a high probability of the government invoking its right, the right itself may be a meaningful deterrent to prospective buyers. Take, for example, Maryland's right of first refusal to buy the Preakness Stakes.¹⁵⁷ Maryland has openly signaled its desire to keep the Preakness Stakes in the state, even going so far as to intervene in a recent bankruptcy proceeding to ensure that the proceeding did not disturb the state's right of first refusal.¹⁵⁸ In this case, Maryland's right of first refusal may be a strong deterrent to prospective buyers.

In other cases, the effect may be much smaller. For example, in Detroit's anti-eviction program, described above, the City has only exercised its right of first refusal to buy three hundred houses a year, out of a pool of approximately five

eof30895/nmhc-nahb-cost-of-regulations.pdf [https://perma.cc/29EC-MNKX] (estimating that regulatory delay, by itself, adds 0.7 percent on average to the total cost of building multifamily housing).

154. See Walker, *supra* note 152, at 16–17 (explaining search and negotiation costs).

155. See Marcel Kahan et al., *First-Purchase Rights: Rights of First Refusal and Rights of First Offer*, 14 AM. L. & ECON. REV. 331, 333–34 (2012) (noting that the buyer's probability of successfully acquiring property is lower when another party holds a right of first refusal); Walker, *supra* note 152, at 23 (explaining that a right of first refusal reduces a buyer's expected payoff from bidding on property).

156. See Kahan et al., *supra* note 155, at 334.

157. MD. CODE ANN., BUS. REG. § 11-520 (West 2018).

158. *Baltimore Sues to Block Move of Preakness Stakes*, NBC SPORTS (Mar. 20, 2019, 12:05 PM), <https://sports.nbcsports.com/2019/03/20/baltimore-sues-to-block-move-of-prekness-stakes> [https://perma.cc/3RGR-F2LC].

thousand.¹⁵⁹ In this case, the probability of the government buying any given property is substantially lower, akin to the normal competition developers face when bidding on any other kind of property.

In either case, the challenge of deterring prospective buyers can be met head-on. In Montreal, the City will reimburse unsuccessful buyers for reasonable costs incurred while preparing a bid.¹⁶⁰ This guaranteed reimbursement operates as a form of insurance in case the City does in fact use its right of first refusal. In theory, this reimbursement mechanism should entice buyers to once again bid on properties.¹⁶¹

A separate problem arises when property owners fail to notify the government of a proposed sale. Because the government can only exercise its right if it learns of a sale, courts will unwind real-estate transactions, even years after the fact, if the seller failed to properly notify the government of a proposed sale.¹⁶²

The risk of voided real-estate transactions is amplified by statutes that contain complex notification procedures, such as those that require owners to inform multiple governmental agencies, each of which possesses a separate right of first refusal. The case of *City of Jersey City v. Consolidated Rail Corp.* illustrates

159. Sarah Cwiek, *Detroit Tax Foreclosures Fall for Third Straight Year*, MICH. RADIO (July 13, 2018), <https://www.michiganradio.org/post/detroit-tax-foreclosures-fall-third-straight-year> [<https://perma.cc/2FGL-UQSL>].

160. See Anthony Arquin & Agnès Pignoly, *City of Montréal's Right of First Refusal: Designation of Affected Sectors*, MONDAQ (Oct. 28, 2018), <http://www.mondaq.com/canada/x/763774/real+estate/City+Of+Montreal+Right+Of+First+Refusal+Designation+Of+Affected+Sectors> [<https://perma.cc/F964-9Y64>] (describing Montreal's reimbursement process).

161. The theoretical benefits of a reimbursement mechanism still run into various practical challenges. For example, while the City of Montreal will reimburse unsuccessful buyers for "reasonable" costs incurred in preparing a bid, the City reserves the right to determine whether or not costs are reasonable. This feature is necessary to protect the government against reimbursing buyers for artificial and inflated costs. Nonetheless, it also introduces additional uncertainty into deals involving rights of first refusal as developers and vendors make upfront expenditures without knowing if they will be reimbursed if the government uses its right of first refusal. See Anne Gagnon et al., *The City of Montreal Adopts a By-Law on Pre-Emptive Rights*, MONDAQ (Nov. 8, 2018), <http://www.mondaq.com/canada/x/752642/real+estate/The+City+Of+Montreal+Adopts+A+ByLaw+On+PreEmptive+Rights> [<https://perma.cc/BP4V-NQHR>] (noting the uncertainty surrounding what costs the city will actually reimburse).

162. *E.g.*, *Town of Brimfield v. Caron*, No. 06 MISC 331899(KCL), 2010 WL 94280, at *11 (Mass. Land Ct. Jan. 12, 2010) (voiding sale that occurred without notice to a municipality); *cf.* N.J. STAT. ANN. § 13:18A-22(c) (West 2019) ("Any contract made in violation of subsection a. of this section is voidable.").

the problems that can arise under this kind of statutory scheme.¹⁶³ In 2005, Consolidated Rail (Conrail) sold a stretch of railroad in New Jersey, which included a mile-long series of elevated structures known as the Sixth Street Embankment. The Embankment had previously been designated a “historic landmark” by the Jersey City Council, which had also expressed an interest in buying the property.¹⁶⁴ However, Conrail ultimately sold the property to a consortium of private real-estate developers. But New Jersey law gives a right of first refusal over railroad properties not only to the State, but also to county and municipal governments.¹⁶⁵ In this case, Conrail confirmed that the State would waive its right of first refusal, but it failed to give Jersey City an opportunity to exercise its statutory right.¹⁶⁶ To enforce its right, Jersey City took Conrail to court. In the end, Conrail lost in the D.C. Circuit,¹⁶⁷ and then turned around and sued its title insurers after the original sale was voided.¹⁶⁸

The triple burdens of rights of first refusal—direct impacts in the form of delays and increased attorneys’ fees, indirect impacts in the form of deterring potential buyers, and costly mistakes if the notification procedures are not properly followed—provide reasons why governments should avoid indiscriminately using rights of first refusal. While these burdens can be reduced through careful design of rights of first refusal, they cannot be eliminated entirely.¹⁶⁹

B. Misuse and Abuse

The examples above assume relatively benign intentions. But like many land-use powers, rights of first refusal can also be intentionally misused. An episode from Massachusetts in 2016 provides one particularly egregious example. In 2016, the Islamic Society of Greater Worcester bought a vacant fifty-five-acre parcel of land in the town of Dudley, Massachusetts, seeking to redevelop it as a

^{163.} 668 F.3d 741 (D.C. Cir. 2012).

^{164.} *City of Jersey City v. Consol. Rail Corp.*, 741 F. Supp. 2d 131, 135 (D.D.C. 2010), *rev’d*, 668 F.3d 741.

^{165.} N.J. STAT. ANN. § 48:12-125.1 (West 2019).

^{166.} *See* 212 Marin Blvd., LLC v. Chi. Title Ins. Co., No. A-0774-17T2, 2019 WL 287215, at *2 (N.J. Super. Ct. App. Div. Jan. 23, 2019).

^{167.} *City of Jersey City*, 668 F.3d at 742.

^{168.} 212 *Marin Blvd.*, 2019 WL 287215, at *2.

^{169.} Public agencies should, for example, regularly review the scope of their rights of first refusal to ensure that they are targeting the properties that the public is actually interested in. *See supra* note 139 (describing the problems with Montgomery County’s low utilization rate of its right of first refusal over rental buildings).

cemetery.¹⁷⁰ This proposal faced significant opposition from local residents and elected officials. Many of the objections voiced by members of the town were laced with thinly veiled expressions of Islamophobia. At one public meeting a resident objected to the proposal, saying: “You want a Muslim cemetery? Fine. Put it in your backyard [and] not mine.”¹⁷¹ Another resident responded to concerns about how long the current drive was to the nearest Muslim cemetery in Enfield, Connecticut by saying: “You say the ride to Enfield is too long, well the ride from Afghanistan for a dead soldier is about 14 hours, so . . .”¹⁷² Other town residents expressed worries about Muslim burial practices. As one resident said: “I believe the way they bury people will cause more contamination” of the town’s water supply.¹⁷³

A public right of first refusal featured in the town’s opposition. Because the property had previously been enrolled in a Massachusetts agricultural preservation program, the town possessed a right of first refusal to buy the property before it could be converted to a nonagricultural use.¹⁷⁴ The town claimed that it had not been given an opportunity to exercise its right of first refusal and thus asserted that it could void the Society’s original purchase and buy the property itself.¹⁷⁵ This threat carried into the zoning and permitting process. When the Islamic Society was denied a special permit it needed to construct the cemetery, the town’s Zoning Board of Appeals ruled that the Society lacked the legal standing to challenge the permit denial. The Board’s reasoning was that the prior owner’s failure to properly follow the right of first refusal procedures meant that the Islamic Society’s “interest in the property [was] clouded,” thereby preventing the Society from appealing the denial of the permit.¹⁷⁶

170. See Christopher Cataldo, Note, *Discriminating Against the Dead: How to Protect Muslim Cemeteries from Exclusionary Land Use Mechanisms*, 58 B.C. L. REV. 1391, 1391 (2017).

171. David Boeri, *Proposal for Muslim Cemetery in Dudley Meets Opposition from Residents*, WBUR: ALL THINGS CONSIDERED (Feb. 5, 2016), <https://www.wbur.org/all-things-considered/2016/02/05/muslim-cemetery-proposal> [<https://perma.cc/R788-AH64>].

172. *Id.*

173. Debbie LaPlaca, *Islamic Cemetery Plan Meets Opposition in Dudley*, TELEGRAM (Jan. 20, 2016), <https://www.telegram.com/article/20160120/NEWS/160129887> [<https://perma.cc/5XC8-2ZP9>].

174. MASS. GEN. LAWS ch. 61A, § 14 (2019).

175. See David Boeri, *Town of Dudley Zoning Board Denies Permit for Proposed Muslim Cemetery*, WBUR: MORNING EDITION (June 10, 2016), <https://www.wbur.org/morningedition/2016/06/10/dudley-denies-muslim-cemetery-permit> [<http://perma.cc/FH2P-UGYD>].

176. See Debbie LaPlaca, *Dudley Zoning Board Rejects Muslim Cemetery Application*, TELEGRAM (June 11, 2016, 6:24 AM), <https://www.telegram.com/news/20160609/dudley-zoning-board-rejects-muslim-cemetery-application> [<https://perma.cc/CCD3-SGR8>].

The Islamic Society responded by filing a lawsuit in state court, alleging that the town's denial was biased and prejudicial.¹⁷⁷ The U.S. Attorney's Office subsequently opened an investigation into whether the town's actions violated civil-rights laws.¹⁷⁸ Eventually, the town backed down and granted the Society the permits it needed. However, the Society ultimately decided to withdraw its proposal and build the cemetery elsewhere.¹⁷⁹

In the case of the Islamic Society's fight against Dudley, the context and religious language used by the opposition triggered legal protections under federal civil-rights law and the Fourteenth Amendment. In other cases, it can be more difficult to police abusive uses of rights of first refusal. In one such case involving the same Massachusetts law, the Town of Winchester invoked its right of first refusal to buy a farm after a developer proposed constructing a large-scale development that would include apartments set aside for low-income families.¹⁸⁰ Rather than accept the new development, the town paid \$14 million to match the developer's offer and buy the parcel.¹⁸¹

In the Winchester case, the debate over whether the town should exercise its right of first refusal was accompanied by concerns and political rifts that typically go along with attempts to build affordable housing in wealthy suburbs. On the one hand, some town residents argued that the farm in question had important environmental and historic value that merited using a right of first refusal to stop the proposed redevelopment.¹⁸² But these parcel-specific concerns were also supplemented by broader neighborhood- and town-level issues involving the people who would move into the town if the development were built. Some res-

177. *Islamic Center Sues Town of Dudley over Rejection of Proposed Cemetery*, WBUR NEWS (July 1, 2016), <http://www.wbur.org/news/2016/07/01/islamic-center-sues-town-of-dudley-over-rejection-of-proposed-cemetery> [<https://perma.cc/FWZ3-9KF5>].

178. See David Boeri, *With Civil Rights Probe, Town of Dudley is in the Spotlight for Muslim Cemetery Controversy*, WBUR: MORNING EDITION (Aug. 18, 2016), <http://www.wbur.org/Morningedition/2016/08/19/dudley-cemetery-civil-rights-investigation> [<https://perma.cc/C2NR-W92E>].

179. See Brian MacQuarrie, *After Bitter Fight for Approval, Islamic Society Abruptly Drops Plan for Cemetery in Town of Dudley*, BOS. GLOBE (Apr. 13, 2017), <https://www.bostonglobe.com/metro/2017/04/13/after-bitter-fight-for-approval-islamic-society-abruptly-drops-plan-for-cemetery-town-dudley/JZ7H61XR2fxMc88AcZp6ZN/story.html> [<https://perma.cc/FZD7-TT97>].

180. Kara L. Dardeno, *Chapter 40B Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129, 132 (2008).

181. *Id.*

182. *Id.* at 149.

idents expressed concerns about the need to preserve “social community cohesion.”¹⁸³ The fiscal impact of admitting more low-income residents was also extensively studied.¹⁸⁴ In an area where the median home value is over \$1 million,¹⁸⁵ and only 1.8 percent of housing units are affordable,¹⁸⁶ the town unsurprisingly concluded that continuing to exclude low-income residents would allow it to keep property taxes low.¹⁸⁷ The incentives to engage in this sort of exclusionary “fiscal zoning” are well documented.¹⁸⁸

Rights of first refusal can thus provide towns with another means of excluding outsiders. This is not an easy problem to solve. Advocates, legislatures, and courts have made numerous attempts to counteract the use of local land-use regulations for exclusionary purposes, including requiring jurisdictions to affirmatively further fair housing,¹⁸⁹ and equalizing school funding across localities.¹⁹⁰ Local governments, however, often put up a protracted fight to resist state commands to increase affordable housing,¹⁹¹ and rights of first refusal may provide yet another exclusionary tool in a municipality’s arsenal.

Unlike other methods of exclusion, such as restrictive zoning, a right of first refusal does at least require local governments to proactively pay money to exclude. But, as shown in the case of Winchester, this requirement may not be a sufficiently strong check to prevent a wealthy municipality from using its right of first refusal to exclude low-income residents. The best countermeasure may be a preventative one. By writing first-refusal statutes narrowly to cover only properties that are especially important to public programs, legislatures can reduce, although not eliminate, the potential for abuse.

183. *Id.* at 130 n.17.

184. *Id.* at 149 (describing the town’s Fiscal Impact Report).

185. See *Winchester Home Prices & Values*, ZILLOW, <https://www.zillow.com/winchester-ma/home-values> [<https://perma.cc/R9WJ-SLWN>].

186. See Dardeno, *supra* note 180, at 132.

187. *Id.* at 139.

188. See J. M. Pogodzinski, *The Effects of Fiscal and Exclusionary Zoning on Household Location: A Critical Review*, 2 J. HOUSING RES. 145, 145-46 (1991).

189. 42 U.S.C. § 3608 (2018).

190. See Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1850-53 (2017) (describing the history of litigation for equal funding in schools).

191. See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One’s Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. L. 519 (2013) (identifying the myriad ways that local governments in California have resisted state legislation aimed at making it easier to build accessory dwelling units).

CONCLUSION

Governments at all levels use public rights of first refusal to acquire property in areas as diverse as housing, transportation, historic preservation, economic development, and conservation. Despite their prevalence, public rights of first refusal have gone relatively unnoticed by scholars of property law and local government. As an initial step in remedying this omission, this Note has documented the many forms and uses of public rights of first refusal and described the advantages that these rights provide relative to regular purchasing and eminent domain. Public rights of first refusal have the direct appeal of enabling the government to acquire specific parcels that are socially important without invoking eminent domain. Less directly, these rights can encourage governments to engage in long-range planning and robust public participation by increasing the chances that public projects—particularly those that involve purchasing many parcels of land—will be successful. But case law, economic theory, and interviews with practitioners also highlight many of the limitations of public rights of first refusal. These rights require considerable planning and funding to be used effectively and can burden property owners in ways that are both visible and hidden, suggesting that public agencies should limit their use of public rights of first refusal to properties with rare social value. However, when public rights of first refusal are thoughtfully designed, they can strike a unique balance between private and public needs, helping to advance projects that are remarkable in scope.

APPENDIX

TABLE A1.
AFFORDABLE HOUSING

Jurisdiction	Description of Right	Statutory Provision
<i>Federal</i>		
Federal	Lets government agencies and nonprofits, among others, acquire a ROFR from owners of federally subsidized affordable housing; uses a formula price	26 U.S.C. § 42(i)(7) (2018)
Federal	ROFR for state and local governments when the Department of Housing and Urban Development sells certain housing developments	12 U.S.C. § 1701z-11(i)(2) (2018)

<i>State</i>		
California	ROFR for qualified entities to purchase housing developments at risk of losing affordability restrictions	CAL. GOV'T CODE § 65863.11 (West 2018)
Maine	ROFR for state housing authority over federally subsidized housing; fair market value	ME. REV. STAT. ANN. tit. 30-A, § 4973 (2019)
Maryland	ROFR for rental housing that is subject to affordability restrictions; fair market value	MD. CODE ANN., HOUS. & CMTY. DEV. § 7-204 (West 2019)
Massachusetts	ROFR for state housing agencies to purchase publicly assisted housing	MASS. GEN. LAWS ch. 40T, § 4 (2019)
Massachusetts	ROFR for tenant associations in manufactured housing communities to buy the land on which the community is located; tenant association can assign its ROFR to a city, town, housing authority, or state agency	MASS. GEN. LAWS ch. 140, § 32R (2019)
New Jersey	ROFR for municipalities, nonprofits, and state agencies to buy certain rental housing that is subject to affordability restrictions	N.J. ADMIN. CODE § 5:80- 26.20 (2018)
Oregon	ROFR to purchase federally subsidized housing for qualified purchasers	OR. REV. STAT. § 456.263 (2018)
Rhode Island	ROFR to preserve federally assisted housing for qualified entities, including tenant associations, housing authorities, and municipal governments	34 R.I. GEN. LAWS § 34-45- 8 (2018)
Texas	Allocates subsidies for developers of affordable housing in part based on whether the developer provides a ROFR to qualified entities	TEX. GOV'T CODE ANN. § 2306.6725(b) (West 2019)
Texas	ROFR for qualified organizations to purchase properties from a land bank in order to build affordable housing	TEX. LOC. GOV'T CODE ANN. § 379E.011 (West 2019)

PUBLIC RIGHTS OF FIRST REFUSAL

Washington	ROFR for municipalities to purchase tax-foreclosed properties from the county for the purpose of developing affordable housing	WASH. REV. CODE § 36.35.150 (2018)
Washington, D.C.	ROFR for rental housing with five or more units, where at least one-fourth of the units are currently affordable	D.C. CODE §§ 42-3404.31 to .37 (2018)
<i>Local</i>		
Baltimore, MD	ROFR for affordable housing built with public funds	BALT., MD., CITY CODE art. 13 § 2B-52 (2016)
Denver, CO	ROFR for rental housing with five or more units that are currently subject to federal affordability restrictions	DENVER, COLO., REV. MUN. CODE §§ 27-46 to -47 (2018)
Montgomery County, MD	ROFR for rental housing with four or more units	MONTGOMERY COUNTY, MD., CODE §§ 53A-4 to -5 (2018).
New York, NY	ROFR for tenant associations and qualified entities to purchase assisted rental housing	N.Y.C., N.Y., CITY ADMIN. CODE § 26-805 (2005)
Palo Alto, CA	ROFR for affordable housing built as part of the city's Below Market Rate Housing Purchase Program	PALO ALTO, CAL., MUN. CODE § 16.65.075(c)(1) (2008) ¹⁹²
Portland, ME	ROFR for rental housing at risk of losing affordability restrictions	PORTLAND, ME., CITY CODE § 30.01.080 (2006)
Prince George's County, MD	ROFR for rental housing with twenty or more units	PRINCE GEORGE'S COUNTY, MD., COUNTY CODE § 13-1113 (2018)
Sacramento, CA	ROFR for qualified entities to purchase housing at risk of losing affordability restrictions	SACRAMENTO, CAL., CITY CODE tit. 5, § 5.148.070 (2019)
San Francisco, CA	ROFR for qualified entities, namely non-profits and governmental entities, to purchase subsidized housing	S.F., CAL., ADMIN. CODE § 60.8 (2018)

¹⁹². Deed restriction agreement on file with author.

TABLE A2.
TRANSPORTATION

Jurisdiction	Description of Right	Statutory Provision
<i>State</i>		
Arkansas	Municipalities have a ROFR to purchase abandoned railroad rights-of-way if there is a municipally owned natural gas pipeline buried in the right-of-way	ARK. CODE ANN. § 23-12-205 (2019)
Colorado	ROFR to repurchase rail properties sold from the state's rail bank	COLO. REV. STAT. § 43-1-1306 (2019)
Connecticut	ROFR to purchase railroad properties and facilities	CONN. GEN. STAT. § 13b-36 (2019)
Indiana	All railroad properties must be offered for sale to the state in the first instance	IND. CODE § 8-3-1.5-11 (2019)
Maine	ROFR to lease or purchase railroad lines "on just and reasonable terms"	ME. REV. STAT. ANN. tit. 23, § 7105(3)(A) (2019)
Massachusetts	ROFR to purchase railroad rights-of-way and related facilities	MASS. GEN. LAWS ch. 161C, § 7 (2019)
New Hampshire	ROFR to purchase rail properties	N.H. REV. STAT. ANN. § 228:60-b (2019)
New Jersey	ROFR for the state, counties, and municipalities to purchase railroad rights-of-way	N.J. STAT. ANN. § 48:12-125.1 (West 2019)
New York	ROFR for state agencies, metropolitan and regional transportation authorities, counties, and municipalities to purchase railroad properties	N.Y. TRANSP. LAW § 18 (McKinney 2019)
Rhode Island	ROFR for the state to purchase railroad properties	39 R.I. GEN. LAWS § 39-6.1-9 (2019)
Vermont	ROFR for the state to purchase railroad properties	VT. STAT. ANN. tit. 5, § 3404 (2019)

PUBLIC RIGHTS OF FIRST REFUSAL

Washington	ROFR to abutting landowners, former owners of the land, counties, municipalities, and other state agencies when the state Department of Transportation sells a railroad property	WASH. REV. CODE § 47.76.290 (2019)
Wisconsin	State DOT or assignee has first right to acquire railroad properties at fair market value	WIS. STAT. § 85.09 (2019)

TABLE A3.
TRIBAL RIGHTS OF FIRST REFUSAL

Jurisdiction	Description of Right	Statutory Provision
<i>Tribal</i>		
Tribal	ROFR for tribe over foreclosed properties	CONFEDERATED TRIBES OF WARM SPRINGS TRIBAL CODE ch. 206, § 340 (2016)
Tribal	ROFR for tribe over foreclosed properties	SUQUAMISH TRIBAL CODE tit. 5, ch 5.7, § 50 (2016)
Tribal	ROFR for tribes over land held in trust by the federal government	25 U.S.C. § 2216(f) (2018)
Tribal	ROFR for tribes over certain property acquired by the Secretary of Agriculture	7 U.S.C. § 1985(e) (2018)
Tribal	ROFR for tribes over certain lands with mortgages backed by federal loans	12 U.S.C. § 1715z-13a (2018)
<i>Federal</i>		
Federal	Federal government has a preferential right to purchase certain restricted Indian lands on behalf of individual Indians or tribes	25 U.S.C. § 5202 (2018)

TABLE A4.
CONSERVATION

Jurisdiction	Description of Right	Statutory Provision
<i>Federal</i>		
Federal	ROFR to purchase property located near Cuyahoga Valley National Park	16 U.S.C. § 460ff-1 (2018)
Federal	ROFR to purchase property located near Sleeping Bear Dunes National Lakeshore	16 U.S.C. § 460x-11 (2018)
Federal	ROFR to purchase property located near Grand Island National Recreation Area	16 U.S.C. § 460aaa-3 (2018)
Federal	ROFR for property located within the Boundary Waters Canoe Area	Pub. L. No. 95-495, 92 Stat. 1649 (1978)
Federal	ROFR for certain lands located in the National Wildlife Refuge System	43 U.S.C. § 1621(g) (2018)
Federal	Ninety-day exclusive purchase period for government agencies to buy and conserve certain properties in the Coastal Barrier Resource System	12 U.S.C. § 1441a-3(b) (2018)
<i>State</i>		
California	ROFR over all federal land in California	CAL. PUB. RES. CODE § 8560(b) (West 2019)
Maryland	State can require a ROFR as a condition of granting a permit for a landfill	MD. CODE ANN., ENVIR. § 9-212(b) (West 2019)
Massachusetts	ROFR for forest, agricultural, and recreational land enrolled in a state preservation program	MASS. GEN. LAWS ch. 61, § 8 (2019)
Michigan	ROFR for lands located with areas designated as State Land Reserves	MICH. COMP. LAWS § 324.502a(5) (2019)
Michigan	State authorized to give property tax exemptions for owners of wetlands who provide the state an option to purchase land	MICH. COMP. LAWS. § 324.60904(2) (2019)

PUBLIC RIGHTS OF FIRST REFUSAL

Minnesota	Department of Natural Resources authorized to acquire ROFR; caps payments at \$5,000 per landowner	MINN. STAT. § 84.0274(10) (2019)
Mississippi	Voluntary ROFR program for owners of property who wish to register their land as part of a state preservation program	MISS. CODE ANN. § 49-5-153(1) (2019)
New Jersey	ROFR to buy land enrolled in a farmland preservation program	N.J. STAT. ANN. § 4:1C-39(a) (West 2019)
<i>Local</i>		
Lancaster County, PA	County acquires ROFR through voluntary negotiations to preserve agricultural land and open spaces	Lancaster County, Pa., Agricultural Conservation Easement Program Guidelines (Jan. 2010) ¹⁹³

TABLE A5.
HISTORIC AND CULTURAL PRESERVATION

Jurisdiction	Description of Right	Statutory Provision
<i>Federal</i>		
Federal	ROFR for property located within the Saratoga National Historical Park	16 U.S.C. § 159g(b)(2) (2018)
Federal	ROFR to purchase certain properties located within the Martin Luther King, Jr. National Historical Park and Preservation District	16 U.S.C. § 410www-1(b)(2)(B) (2018)
<i>State</i>		
Maine	State historic commission can require ROFR as a condition of receiving grant aid for restoring historic buildings	ME. REV. STAT. ANN. tit. 27, § 505(D)(7) (2019)

¹⁹³. Agric. Pres. Bd., *Agricultural Conservation Easement Program Guidelines*, AGRIC. PRESERVE BOARD LANCASTER COUNTY, PA. 55-57 (Jan. 2010), <https://www.farmlandinfo.org/sites/default/files/Lancaster%20Program%20Guidelines.pdf> [https://perma.cc/R4S9-9F9C].

Maryland	Maryland Historical Trust must give preference to local governments and nonprofits to purchase and preserve historic buildings	MD. CODE ANN., STATE FIN. & PROC. § 5A-319(c)(2)(i) (West 2019)
Maryland	ROFR for the State to purchase the Preakness Stakes	MD. CODE ANN., BUS. REG. § 11-520(d)(1) (West 2019)
Minnesota	Use of public funds to build a Major League Baseball stadium conditioned on State receiving a ROFR to purchase the team	MINN. STAT. § 473.759(8) (2019)
Washington	Use of public funds for stadium conditioned on the local government receiving a ROFR to purchase the sports franchise	WASH. REV. CODE § 67.28.180(3)(l) (2019)

TABLE A6.
COMMUNITY AND ECONOMIC DEVELOPMENT

Jurisdiction	Description of Right	Statutory Provision
<i>State</i>		
Maine	ROFR to acquire working waterfront property at fair market value	ME. REV. STAT. ANN. tit. 12, § 6042(5) (2018)
Maryland	Board of Public Works has a first option to purchase property next to certain vacant or underutilized sites that the state receives	MD. CODE ANN., ECON. DEV. § 10-128(b) (West 2019)
Michigan	State and municipalities have a ROFR to purchase tax-foreclosed properties from the county	MICH. COMP. LAWS § 211.78m(1) (2019)
Washington	ROFR for municipalities to purchase tax-foreclosed properties from the county for the purpose of developing affordable housing	WASH. REV. CODE § 36.35.150(2) (2019)
West Virginia	ROFR for land banks to purchase tax-foreclosed properties	W. VA. CODE § 31-18E-9(g)(2) (2019)

PUBLIC RIGHTS OF FIRST REFUSAL

TABLE A7.
UTILITIES AND INFRASTRUCTURE

Jurisdiction	Description of Right	Statutory Provision
<i>State</i>		
Connecticut	ROFR for State and municipalities to purchase land owned by water companies and utilities	CONN. GEN. STAT. § 16-50d(a) (2019)
Connecticut	ROFR for the State to purchase private airports at fair market value	CONN. GEN. STAT. § 13b-50a(1) (2019)
Indiana	ROFR for counties and municipalities to purchase ferry systems from state agency	IND. CODE § 8-2-16-1 (2019)
Maine	ROFR for municipalities to purchase land from water utilities	ME. REV. STAT. ANN. tit. 35-A, § 6109 (2019)
New Hampshire	ROFR for the State to purchase private airports	N.H. REV. STAT. ANN. § 422:19 (2019)

TABLE A8.
PUBLIC-TO-PUBLIC

Jurisdiction	Description of Right	Statutory Provision
<i>State</i>		
Illinois	ROFR for Chicago to buy property from the Metropolitan Pier and Exposition Authority	70 ILL. COMP. STAT. ANN. 210/5 (West 2017)
Louisiana	ROFR for parishes to purchase surplus lands from levee districts	LA. STAT. ANN. § 38:330.12 (2018)
Louisiana	ROFR for parishes to purchase land from the Lake Charles Harbor and Terminal District	LA. STAT. ANN. § 34:218 (2018)
Louisiana	ROFR for local school boards to reacquire property taken by the Recovery School District	LA. STAT. ANN. § 41:902 (2019)

Maine	ROFR for the Maine Housing Authority to purchase surplus properties from other state agencies at or below current market value	ME. REV. STAT. ANN. tit. 30-A, § 4754-A (2019)
Maryland	ROFR for counties and municipalities to buy surplus lands from the state Department of Transportation for transportation purposes	MD. CODE ANN., TRANSP. § 8-309 (West 2019)
Maryland	ROFR for counties and municipalities to purchase certain lands from the state Department of Natural Resources	MD. CODE ANN., NAT. RES. § 5-904 (West 2019)
Maryland	ROFR for counties and municipalities to purchase decommissioned armories	MD. CODE ANN., PUB. SAFETY § 13-217 (West 2019)
Maryland	ROFR for counties to purchase land originally acquired by electric utilities through condemnation	MD. CODE ANN., NAT. RES. § 3-305 (West 2019)
Massachusetts	ROFR for municipalities to acquire property used in hazardous waste sites	MASS. GEN. LAWS ch. 21D, § 17 (2019)
Massachusetts	ROFR for municipalities to purchase property used in solid waste sites	MASS. GEN. LAWS ch. 16, § 19 (2019)
Montana	ROFR for local governments to repurchase land that they sold or gave to the State	MONT. CODE ANN. § 77-2-306 (2019)
New Hampshire	ROFR for municipalities and counties to purchase surplus land used in transportation	N.H. REV. STAT. ANN. § 4:39-c (2019)
New Hampshire	ROFR for municipalities and counties to purchase surplus real estate from the State	N.H. REV. STAT. ANN. § 4:40 (2019)
New Jersey	ROFR for municipalities and counties to purchase excess land created in the course of constructing highways through parks	N.J. STAT. ANN. § 40:37-146.2 (West 2019)
New York	ROFR for municipalities to purchase surplus personal property from the State	N.Y. STATE FIN. LAW § 167 (McKinney 2019)

PUBLIC RIGHTS OF FIRST REFUSAL

North Carolina	ROFR for the Town of Butner to purchase state land within the extraterritorial limits of the town	N.C. GEN. STAT. ANN. § 122C-410 (2018)
Rhode Island	ROFR for cities and towns to purchase state land	37 R.I. GEN. LAWS § 37-7-5 (2019)
Rhode Island	Right of Second Refusal for cities and towns, after former owners, to buy land that the State originally acquired through condemnation	37 R.I. GEN. LAWS § 37-7-3 (2019)
South Carolina	ROFR for municipalities to purchase roads that the State plans to abandon	S.C. CODE ANN. § 57-5-80 (2019)
Texas	ROFR for the School Land Board to purchase state land	TEX. NAT. RES. CODE ANN. § 31.158 (West 2019)

TABLE A9.
BUYBACK PROVISIONS

Jurisdiction	Description of Right	Statutory Provision
<i>State</i>		
Colorado	ROFR for the State Department of Transportation to buy back any rail line or railroad right-of-way that it sells from the State's rail bank	COLO. REV. STAT. § 43-1-1306 (2018)
Hawaii	ROFR for the state to reacquire properties from public charter schools, if no other public charter school wants the property and the facilities are owned by the State	HAW. REV. STAT. § 302D-19 (2019)
Kansas	ROFR for the state to repurchase any unimproved land after the State sells land to a railroad company	KAN. STAT. ANN. § 76-2133 (2018)
Louisiana	ROFR for the Orleans Parish School to buy school buildings back from charter schools	LA. STAT. ANN. § 17:3982 (2018)

Maine	ROFR for counties to buy back surplus property that the jail authority no longer needs	ME. REV. STAT. ANN. tit. 30-A, § 1852 (2019)
Montana	ROFR for local governments to repurchase land that they sold or gave to the State if the State subsequently sells the land	MONT. CODE ANN. § 77-2-306 (2001)
New Hampshire	The Board of Trustees for the New Hampshire community college system is authorized to sell land as long as it retains a ROFR to buy it back	N.H. REV. STAT. ANN. § 188-F:6 (2018)
New Jersey	Board of Education is authorized to include a ROFR as a condition of selling property to a nonprofit private school for students with disabilities	N.J. STAT. ANN. § 18A:20-9.2 (West 2019)
New York	State must include a ROFR before it can sell property to the Roswell Park Cancer Institute; ROFR is triggered if the property is not used for research, education, and health care	N.Y. PUB. AUTH. LAW § 3559 (McKinney 2019)
Ohio	ROFR for school district to buy property back from community schools	OHIO REV. CODE ANN. § 3314.051 (West 2019)
Oregon	Port of Hood River must retain a ROFR before it can sell a bridge	OR. REV. STAT. ANN. § 381.314 (West 2018)
Rhode Island	Housing authority must retain a ROFR if it sells property that was originally bought with certain public funds	45 R.I. GEN. LAWS § 45-60-4 (2019)
South Carolina	Board of Trustees for the Medical University of South Carolina can only sell or transfer hospital property if it retains a ROFR to buy it back	S.C. CODE ANN. § 44-7-3110 (2019)

PUBLIC RIGHTS OF FIRST REFUSAL

TABLE A10.
CHATTEL

Jurisdiction	Description of Right	Statutory Provision
<i>Federal</i>		
Federal	ROFR to purchase minerals mined in the outer Continental Shelf in times of war	43 U.S.C. § 1341(b) (2018)
Federal	ROFR to purchase natural resources beneath navigable waters in times of war or when necessary for national defense	43 U.S.C. § 1314(b) (2018)
<i>State</i>		
Louisiana	ROFR for the state to purchase refined oil	LA. STAT. ANN. § 30:144 (2018)
Massachusetts	The state and museums have an option to purchase underwater archaeological items as a condition to receive a permit	MASS. GEN. LAWS ch. 91, § 63 (2019)

TABLE A11.
FOREIGN RIGHTS OF FIRST REFUSAL¹⁹⁴

Jurisdiction	Description of Right
Spain: Barcelona	ROFR over properties located within designated districts ¹⁹⁵

¹⁹⁴. Because the focus of this Note is on domestic examples, this table provides a very limited sampling of rights of first refusal from other countries. Further international comparative research on public rights of first refusal, including how these rights vary across different legal systems (e.g. civil versus common-law), would be immensely valuable.

¹⁹⁵. See *Barcelona declara toda la ciudad como zona de tanteo y retracto para adquirir solares de manera preferente* [Barcelona Claims Rights of First Refusal Throughout Entire City for Acquiring Land Preferentially], INMODIARIO (Oct. 2, 2018), <https://www.inmodiario.com/169/26864/barcelona-declara-toda-ciudad-como-zona-tanteo-retracto-para-adquirir-solares-manera-preferente.html> [https://perma.cc/S48Q-7CDY] (describing Barcelona's designation of the entire city as encompassed within its ROFR); *City Council Looks to Extend its Right of First Refusal in the Sant Ramon i Robador Area*, INFO BARCELONA (Dec. 2, 2015, 13:17), https://www.barcelona.cat/infobarcelona/en/districte/ciutat-vella/city-council-looks-to-extend-its-right-of-first-refusal-in-the-sant-ramon-i-robador-area_274028.html [https://perma.cc/KVX3-KLKE].

France	<i>Société d'aménagement foncier et d'établissement rural</i> (SAFER), a private financing institution, has a ROFR over most farmland in France, which it uses to meet its national mandate of preserving agricultural land ¹⁹⁶
France: Paris	ROFR over designated apartment buildings ¹⁹⁷
Canada: Montréal	ROFR over properties located within designated districts ¹⁹⁸
Netherlands	ROFR for municipalities to engage in commercial development ¹⁹⁹
Russia	ROFR for local governments to buy agricultural land ²⁰⁰
United Kingdom: Scotland	ROFR for community bodies with an interest in land; community interest is demonstrated through a local ballot initiative; must be approved by Scottish Ministers ²⁰¹

TABLE A12.
INTERNATIONAL AGREEMENTS

Jurisdiction	Description of Right	Statutory Provision
Agreement Between the United States and the United Nations	ROFR for the United States to buy the United Nation's headquarters in New York City	Agreement Regarding the Headquarters of the United Nations, art. 9 § 22, June 26, 1947, 11 U.N.T.S. 11
Agreement Between Spain and the United Kingdom	ROFR for Spain to reclaim Gibraltar if the United Kingdom ever alienates the territory	Treaty of Utrecht art. X, 1713 ²⁰²

¹⁹⁶. See Hamilton, *supra* note 25, at 664-65.

¹⁹⁷. O'Sullivan, *supra* note 12.

¹⁹⁸. See Arquin & Pignoly, *supra* note 160.

¹⁹⁹. Louw, *supra* note 13, at 91 (describing the Dutch Act on Municipal Right of First Refusal).

²⁰⁰. See Ira Lindsay, *A Troubled Path to Private Property: Agricultural Land Law in Russia*, 16 COLUM. J. EUR. L. 261, 275 (2010).

²⁰¹. See Land Reform (Scotland) Act 2003, (ASP 2), pt. 2.

²⁰². See Trinidad, *supra* note 14, at 969 n.55.