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THE ECONOMICS OF PUBLIC USE

Thomas W. Merrill †

The fifth amendment to the United States Constitution, as well as most state constitutions, provides that private property shall not be taken "for public use" unless just compensation is paid.¹ American courts have long construed this to mean that some showing of "publicness" is a condition precedent to a legitimate exercise of the power of eminent domain. Thus, when a proposed condemnation of property lacks the appropriate public quality, the taking is deemed to be unconstitutional and can be enjoined.² In practice, however, most observers today think the public use limitation is a dead letter. Three recent decisions, upholding takings that courts would very likely have found impermissible in the past, support this view.

In the first case, *Poletown Neighborhood Council v. City of Detroit*,³ the Michigan Supreme Court approved the city of Detroit's plan to condemn a 465-acre tract of land and reconvey it on favorable terms to the General Motors Corporation (GM) for construction of an automobile assembly plant.⁴ GM had previously announced its intention to relocate certain Detroit-based manufacturing operations if the city did not provide a new plant site. The purported public benefits of the condemnation (the "public use") included retaining over 6,000 jobs, preserving tax revenues, and avoiding the social deterio-

† Professor of Law, Northwestern University. This paper originated as a senior research project during the 1983-84 academic year at Northwestern University School of Law with Jeffrey P. Gray, whose contributions are gratefully acknowledged. The author would also like to thank the participants in a Law and Economics Workshop at the University of Chicago, as well as Charlotte Crane, Mark Grady, Richard Helmholz, Carol Rose, and especially Victor Goldberg for many stimulating discussions and helpful comments on earlier drafts. Finally, a special note of appreciation goes to Steven Drickey for his research assistance. Financial support was provided by the Stanford Clinton, Sr. Research Professorship at Northwestern.

¹ U.S. CONST. amend. V; see *infra* note 24 and accompanying text.

² The general rule, to which the public use limitation provides an exception, is that a government taking may proceed so long as a citizen possesses an adequate remedy for ex post compensation. See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). The other major exception is where the taking is without statutory authorization. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510-11 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

³ 410 Mich. 616, 304 N.W.2d 455 (1981).

⁴ Although the projected cost of the condemnation to Detroit exceeded \$200 million, GM subsequently purchased the property from the city for slightly more than \$8 million. *Id.* at 656, 304 N.W.2d at 469 (Ryan, J., dissenting).

ration caused by a declining industrial and population base.⁵ The Poletown Neighborhood Council, representing approximately 3,400 area residents whose homes, shops, and churches were to be bulldozed to make way for the plant, opposed the project, claiming it did not satisfy the public use requirement. Over two vigorous dissents,⁶ the Michigan Supreme Court held the proposed taking a legitimate public use.

The second case, *City of Oakland v. Oakland Raiders*,⁷ sustained an even more unconventional exercise of eminent domain. The Oakland Raiders professional football team, after failing to renew its stadium lease with the city of Oakland, announced that it intended to move to Los Angeles. The city responded by seeking to condemn the intangible contractual rights associated with the Raiders' franchise, including player contracts. The city apparently contemplated operating the team for a brief period while seeking a private owner willing to keep the team in Oakland. Although not deciding conclusively that the proposed taking served a public use, the California Supreme Court held that neither the plan's exotic object—the intangible contractual rights of a professional sports team—nor the possibility of a resale to a private party precluded an exercise of eminent domain.⁸

Finally, *Hawaii Housing Authority v. Midkiff*⁹ is probably the most important of the three cases, because it is the United States Supreme Court's first pronouncement on the meaning of "public

⁵ *Id.* at 650-51, 304 N.W.2d at 467. Note, however, that the cities of Detroit and Hamtramck apparently granted GM a 12 year tax abatement. *Id.* at 657, 304 N.W.2d at 470. This abatement undercuts the argument for preservation of the tax base.

⁶ Judge Ryan wrote in dissent: "With this case the Court has subordinated a constitutional right to private corporate interests. As demolition of existing structures on the future plant site goes forward, the best that can be hoped for, jurisprudentially, is that the precedential value of this case will be lost in the accumulating rubble." *Id.* at 684, 304 N.W.2d at 482.

⁷ 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

⁸ The court remanded the case for a full evidentiary hearing on the public use question. The trial court subsequently dismissed the condemnation action on other grounds, failing to reach the public use issue. The court of appeal in turn reversed this decision and remanded the case for further hearings on several issues, including whether the taking served a public use. *City of Oakland v. Superior Court*, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983). After more proceedings, the court of appeal ultimately held the proposed taking violated the commerce clause. *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 106 S. Ct. 3300 (1986). As of this writing, the Raiders are still playing in Los Angeles. In a similar action, the city of Baltimore unsuccessfully sought to condemn its NFL franchise, the Colts, after the team slipped out of town under cover of darkness and headed for Indianapolis. See *Indianapolis Colts v. Mayor & City Council of Baltimore*, 741 F.2d 954 (7th Cir. 1984) (dismissing interpleader action), *cert. denied*, 470 U.S. 1052 (1985); *Mayor & City Council of Baltimore v. Baltimore Football Club Inc.*, 624 F. Supp. 278 (D. Md. 1985) (as amended 1986) (finding no right under Maryland law to condemn Colts).

⁹ 467 U.S. 229 (1984).

use" since *Berman v. Parker*¹⁰ was decided in 1954. At issue in *Midkiff* was the constitutionality of the Hawaii Land Reform Act of 1967, which allows persons renting homes in development tracts of five or more acres to condemn their landlord's interest and thereby acquire an estate in fee simple.¹¹ A unanimous Court, citing figures suggesting that land ownership in Hawaii is highly concentrated, sustained the Act as a constitutional means of "[r]egulating oligopoly and the evils associated with it,"¹² in particular the inability of renters to purchase homes at a "fair" price.¹³ Although declaring that courts play a role in enforcing the public use clause, and that a "purely private taking" would be unconstitutional,¹⁴ the Court nonetheless characterized the historical judicial posture as one of extreme deference: "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."¹⁵

These three decisions suggest several common themes. First, and most clearly, they suggest that modern courts will tolerate very wide-ranging uses of eminent domain. Legislatures may use eminent domain to promote the construction of a privately owned factory (*Poletown*), to force a favored tenant to remain in a government-owned facility (*Oakland Raiders*), or to engage in "land reform" (*Midkiff*). Second, the cases suggest that modern courts are exceedingly deferential to legislative definitions of a permissible public use. Indeed, *Midkiff* hints that the public use analysis parallels the "minimum rationality" standard applied to equal protection and substantive due process challenges to economic legislation.¹⁶ Third, and perhaps most important, the cases suggest that courts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate. Instead, the cases are filled with clichés regarding the "breadth" and

¹⁰ 348 U.S. 26 (1954).

¹¹ HAW. REV. STAT. §§ 516-22 to -23 (1976).

¹² *Midkiff*, 467 U.S. at 242. The Court termed such regulation "a classic exercise of a State's police powers." *Id.*

¹³ *Id.* There is cause for skepticism about the reported rationale. The data on concentration cited by the Court, apparently taken from an amicus brief, *see id.* at 232, showed that the state or federal government owned 49% of Hawaii's land, while 72 private landowners held another 47%, of which just 18 landowners held 40%. Although this is probably a higher degree of concentration than is found in other states, it would not seem enough to trigger antitrust scrutiny. *See Souza v. Estate of Bishop*, 799 F.2d 1327 (9th Cir. 1986) (rejecting claims brought against largest landowner in Hawaii under §§ 1, 2 of Sherman Act). For an alternative explanation of the Hawaii statute, *see* Part IV *infra*.

¹⁴ *Midkiff*, 467 U.S. at 245.

¹⁵ *Id.* at 241.

¹⁶ *Id.*

"elasticity" of the "evolving" concept of public use,¹⁷ language indicating a dearth of theory—or perhaps a lack of any desire to develop one.

From an economic perspective, the extreme deference to legislative eminent domain decisions reflected in these cases is puzzling. After all, eminent domain entails coerced appropriation of private property by the state, and there is an important difference between coerced and consensual exchange. Consensual exchange is almost always beneficial to both parties in a transaction, while coerced exchange may or may not be, depending on whether the compensation is sufficient to make the coerced party indifferent to the loss.¹⁸ The distinction is equivalent to that drawn by Guido Calabresi and Douglas Melamed¹⁹ between property rules, which allow an owner to protect a right or entitlement from an unconsented taking by securing injunctive relief, and liability rules, which afford protection only through an ex post award of damages.²⁰ It seems peculiar that in the eminent domain area, which so often parallels private law doctrine,²¹ courts have effectively declared that liability rules alone shall protect all private property rights.

In Part I of this article, I propose an explanation for the extreme judicial deference we see in public use cases. The underlying source of this deference, I suggest, is a historical focus on ends rather than means. Public use analysis has traditionally examined the ends of a government taking—the purpose or use to which property will be put once acquired. With the transition from the minimalist state to the activist state, however, courts have become increasingly uncomfortable in defining the correct or "natural" ends of government. Not surprisingly, therefore, courts have adopted a hands-off posture regarding questions of public use. In contrast, the property rule/liability rule distinction familiar to economists regards eminent domain as a *means* of achieving governmental ends.

¹⁷ See, e.g., *id.* at 239 (Public use is a matter of "what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.") (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)); *Oakland Raiders*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 681 (noting "evolving nature" of public use); *Poletown*, 410 Mich. at 630, 304 N.W.2d at 457 ("The term 'public use' has not received a narrow or inelastic definition by this Court in prior cases.").

¹⁸ Consent may also serve as an ethical justification beyond its importance for welfare or utility. See Coleman, *The Foundations of Constitutional Economics*, in *CONSTITUTIONAL ECONOMICS* 141 (R. McKenzie ed. 1984).

¹⁹ See generally Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²⁰ *Id.* at 1092.

²¹ See generally R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (discussion of many of similarities between private and public law in eminent domain context).

From this perspective, eminent domain offers just one of several possible means of acquiring resources, ranging from voluntary exchange at negotiated prices at one extreme to confiscation without compensation at the other. In this view, even if courts refuse to challenge legislative decisions about the ends to which property is put, they still might, and perhaps should, play some role in choosing the appropriate means to reach those ends.

After restating the relevant choice in public use cases as one between means, I attempt in Part II to construct a theory that would guide judicial review of a legislature's choice of eminent domain as a means. Drawing on economic analysis, I argue that eminent domain's purpose is to overcome barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer. This "thin market" setting, as I will call it, can lead to monopoly pricing by the seller, to unacceptably high transaction costs, or to both. This conception of eminent domain's purpose is not new,²² but I attempt to explore the basic idea, and certain important qualifications to it, more thoroughly than have others. This exploration produces two models of eminent domain: what I call the "basic model" and the "refined model." Each model carries different implications for judicial review of the exercise of eminent domain. The basic model sanctions virtually unlimited judicial deference to the legislature whereas the refined model supports heightened judicial scrutiny in certain limited circumstances.

Judicial theory is one thing; judicial decisions are another. Notwithstanding the tradition of judicial deference associated with the public use limitation, I seek in Part III to determine whether judicial decisions actually reflect a sensitivity to the choice-of-means issue. To this end, I survey all indexed federal and state appellate opinions since 1954 involving a contested public use issue. The results show that state courts are much less deferential to legislative declarations of public use than one would expect in light of *Poletown*, *Oakland Raiders*, and *Midkiff*. In fact, state court enforcement of the public use limitation has generally increased since 1954. Moreover, the survey strongly confirms the basic model of eminent domain, and partially corroborates the refined model.

Finally, in the concluding section, I return to *Poletown*, *Oakland*

²² See R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.6-7 (3d ed. 1986) (monopoly, holdouts, high transaction costs); Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 225-46 (1978) (monopoly); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1175-76 (1967) (efficiency concerns in overcoming barriers to voluntary exchange); Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 478-92 (1976) (monopoly or holdouts).

Raiders, and *Midkiff*, and consider how courts might resolve those cases under the economic models developed in Part II.

I

THE MEANS-ENDS PROBLEM

Drawing on Calabresi and Melamed's model, one may isolate four possible rights that a citizen might have when faced with an attempted government taking. At one extreme, the citizen would have no entitlement; the government could take his property without his consent and without compensation. This is a citizen's plight when the government legitimately exercises its power to tax or its police power. A second possibility is that a liability rule would protect a citizen's property; the government could take the property without his consent, but would have to pay compensation. This describes a taking by eminent domain. A third possibility is that a property rule would protect a citizen's property; the government could take the property only with the citizen's consent, i.e., if he agreed to sell it to the government. This is the rule generally followed when government acquires chattels or employment services. Finally, a fourth possibility is that the government could not acquire a citizen's property by any means. This situation occurs if the proposed acquisition serves a purpose or end not permitted by the Constitution, for example, the purchase of votes or the services of a slave.

A clear distinction exists between the first three of these rules—no entitlement, liability rule, and property rule—and the fourth, which completely bars government acquisitions of property. The first three rules define different means of achieving permissible government ends. The fourth, however, effectively demarcates a sphere of impermissible government ends. In fact, the means-ends distinction inherent in the Calabresi-Melamed framework suggests that judges may ask two questions of any proposed government acquisition. First, the ends question: is the government acquiring the resources for a constitutionally permissible purpose? Second, the means question: if the purpose is permissible, should the government proceed by police power regulation, eminent domain, or voluntary exchange in the marketplace?

The two questions present sharply different inquiries. The ends questions asks what the government plans to do once the property is obtained. This inquiry, in turn, requires a clear conception of the legitimate functions or purposes of the state. May the state promote employment by subsidizing the construction of a privately owned factory? May it own a professional football team or undertake land

reform?²³ The answers to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake. The means question, by contrast, is narrower. It asks where and how the government should get property, not what it may do with it. For example, the means approach accepts that a state may own a professional football team. It then asks: how should the state acquire the team? Must it purchase the team through voluntary negotiations? Or may the state coerce a transfer by condemning the team? Or may it simply commandeer the team under its police power? The means approach, of course, is also "political" in that it concerns state actions that will advance or retard conflicting interests. Nevertheless, the means approach demands a more narrowly focused and judicially manageable inquiry than the ends approach.

In deciding public use cases, courts nearly always pose the issue in terms of ends rather than in terms of means. Perhaps the constitutional language is responsible for this focus. The fifth amendment provides, "nor shall private property be taken for *public use*, without just compensation."²⁴ This phrasing suggests that the government may exercise the power of eminent domain, but only if it puts the property acquired to a public use, that is, an end that is sufficiently "public" in nature.

The focus on ends also figures into the two judicial tests most often relied upon to define "public use."²⁵ Under the narrower test, public use means literal use by the public. Under this test, a taking

²³ This is essentially how the courts posed the question in *Poletown*, *Oakland Raiders*, and *Midkiff*. See *Poletown*, 410 Mich. at 629, 304 N.W.2d at 457 ("Can a municipality use the power of eminent domain . . . to condemn property for transfer to a private corporation to build a plant . . . ?"); *Oakland Raiders*, 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679 ("Is it possible for [the] City to prove that its attempt to take and operate the Raiders' football franchise is for a valid public use?"); *Midkiff*, 467 U.S. at 231-32 (Does "the Public Use Clause . . . prohibit[] the State of Hawaii from taking . . . title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State?").

²⁴ U.S. CONST. amend. V (emphasis added). The Supreme Court has held that the taking clause applies to states through the due process clause of the fourteenth amendment. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978). The survey reported in Part III suggests, however, that most challenges to state condemnations are based on state constitutional provisions rather than on the fourteenth amendment.

States have widely copied the taking clause's language. Every state except North Carolina has a public use clause in its constitution. I P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § I.3, at I-91 (rev. 3d ed. 1985). Even North Carolina, however, has recognized the limitation "as so grounded in natural law and justice that it is part of the fundamental law of the State." *DeBruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 675, 102 S.E.2d 229, 232 (1958).

²⁵ See Berger, *supra* note 22, at 205-25 (survey of historical development of two tests); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. I, 23-73 (1980) (triumph of public benefit test).

must yield a facility physically accessible to some segment of the public. By contrast, the broader test requires only that the taking produce a public benefit or advantage. This test roughly equates public use with "public interest." Although courts have almost unanimously resolved this interpretive dispute in favor of the broader public interest view,²⁶ the main point for present purposes is that both tests look to the ends of the taking, not whether eminent domain is an appropriate means to achieve those ends.

The distinction between ends and means clarifies several developments associated with the jurisprudence of public use. First, it helps explain the emergence of language of extreme judicial deference in the last thirty years. Given that courts have understood the public use doctrine to refer to the ends of government, the question naturally arises: which institution is better suited to determine permissible ends—the courts or the legislature? In a society committed to majoritarian rule, not surprisingly the answer has been the legislature.

Here, as elsewhere, the crisis in democratic theory generated by judicial opposition to the New Deal provided the critical event. As late as 1930 the Supreme Court still clung to the position that legislative declarations of public use were subject to de novo judicial review.²⁷ After a change in Court personnel produced a fundamental shift in judicial attitudes, however, the Court did an abrupt about-face and implied that the public use determination is exclusively for the legislature.²⁸ This reversal ultimately produced Justice Douglas's formulation in *Berman v. Parker*: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."²⁹ As long as courts regard the public use doctrine as a limitation upon permissible government ends, this extreme rhetoric of deference to legislative judgments will no doubt persist.³⁰

²⁶ The only clear holdout appears to be South Carolina. See *Karesh v. City Council*, 271 S.C. 339, 247 S.E.2d 342 (1978).

²⁷ See *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.").

²⁸ *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946). Confining *Vester* to its facts, *id.* at 552, the Court stated that "it is the function of Congress to decide what type of taking is for a public use." *Id.* at 551.

²⁹ 348 U.S. 26, 32 (1954).

³⁰ At the state level, the movement toward deference has been slower and more uneven. In part, this is because some state constitutions expressly provide that the public use decision is a judicial one and/or state that no presumption favors a legislative declaration of public use. See 2A P. NICHOLS, *supra* note 24, § 7.16[2]; Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 410 n.11 (1983). The slower movement may also indicate that separation of powers principles are weaker at the state level than at the federal level, possibly because interest groups may exert

The distinction between ends and means also helps to explain a second and somewhat opposed development: application of the public use doctrine to government resource acquisitions other than through eminent domain. The principal area into which the public use doctrine has crept is government borrowing. As a matter of state constitutional law, most states and political subdivisions may borrow money, thereby committing the citizenry to payment of future taxes, only if the financing serves a "public use."³¹ Historically, state judiciaries developed the public finance variation upon the public use theme by using state due process clauses, with frequent cross-references to public use in the eminent domain context. The public finance version of the public use doctrine has long since taken on a life of its own, however, and is now frequently embodied in special constitutional provisions.³²

At first, it seems strange that courts would extend a doctrine so closely associated with eminent domain into an area such as public borrowing, where the public use requirement originally had no textual foundation. But the apparent anomaly disappears once one distinguishes between ends and means. Logically, the question of ends is independent of means, and could be asked of any government acquisition, regardless of means. Indeed, as Thomas Cooley recognized long ago, the power to tax may be *more* troubling than the power of eminent domain, because government extracts taxes without actual consent or explicit compensation.³³ Thus, to the extent that courts restrict legislative activities by reference to a conception of legitimate state ends, the public use doctrine should apply to taxation with as much or more rigor than it does to eminent domain.

Finally, the distinction between ends and means helps to explain the Supreme Court's statements equating the public use doc-

greater control over state governments, making judicial oversight more desirable. See Note, *supra*, at 432-35.

³¹ See, e.g., *Lowell v. City of Boston*, 111 Mass. 454 (1873); see generally Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 281-313 (1963). The leading federal case is *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874).

³² See *Poletown*, 410 Mich. at 662-69, 304 N.W.2d at 472-75 (Ryan, J., dissenting). In tax law today the "public purpose" issue mainly arises in determining the tax-exempt status of industrial development bonds issued by state and municipal authorities. Interestingly, Congress and the Internal Revenue Service have continually struggled to define what sort of projects are sufficiently "public" to qualify for tax-exempt status. The most recent manifestation of this struggle is the Tax Reform Act of 1986, Pub. L. No. 99-514, which contains elaborate provisions specifying what kinds of "private activity" bonds are eligible for tax-exempt status. See TAX REFORM ACT OF 1986: CONFERENCE REPORT TO ACCOMPANY H.R. 3838, H.R. CONF. REP. NO. 841, 99th Cong., 2d Sess., pt. 2, at 696-733 (1986), reprinted in 132 CONG. REC. H7784-94 (daily ed. Sept. 18, 1986).

³³ *Ryerson v. Brown*, 35 Mich. 333, 339 (1877); see also R. EPSTEIN, *supra* note 21, at 283-305.

trine with the police power. The association originated with Justice Douglas's opinion in *Berman*. Deciding a public use challenge to a Washington, D.C., urban renewal project, Justice Douglas wrote, "We deal . . . with what traditionally has been known as the police power."³⁴ In recent decisions, including *Midkiff*, the Supreme Court has reiterated this theme, declaring that "the 'public use' requirement of the Taking Clause is 'coterminous with the scope of a sovereign's police powers.'"³⁵ This pronouncement has dismayed commentators³⁶ because the outer limit of the police power has traditionally marked the line between *noncompensable* regulation and compensable takings of property, not the line between compensable takings and the area where the constitution bars government from engaging in any sort of exchange whatever. Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a "public use." This approach would seemingly overrule the entire takings doctrine in a single stroke.

The illogic of the Court's statements disappears, however, once one recognizes that the police power, like eminent domain, can also refer to the question of proper governmental ends, rather than means. This is clearly what Justice Douglas meant in *Berman* when he said that the police power "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."³⁷ He was not saying that government could freely employ any means of achieving slum clearance, and with it choose either compensation or noncompensation. Instead, he was saying that slum clearance is a permissible end of government. The Court's recent decisions echo this notion. "Police power" is here synonymous with the extent to which government may constitutionally regulate private activity. It defines those issues with which government may properly concern itself. The Court's statements again indicate that the permissible ends principle cuts across all means of resource acquisition, and that one should, for the sake of analytical clarity, keep questions of ends and means distinct.

The most important insight to be gained from the distinction between ends and means, however, is that the public use limitation

³⁴ *Berman*, 348 U.S. at 32.

³⁵ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (quoting *Midkiff*, 467 U.S. at 240).

³⁶ See R. EPSTEIN, *supra* note 21, at 110; see also *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 70-71.

³⁷ *Berman*, 348 U.S. at 32.

might be recast or reinterpreted to perform a different role. Rather than concerning itself with government ends, the public use limitation might serve to restrict a legislature's choice of means. I am not suggesting that it is somehow wrong, as a matter of first principles, to inquire about the ends to which government will put condemned property.³⁸ Rather, the point is that the American judiciary is unlikely soon to assume the task of closely scrutinizing legislative judgments about the legitimate ends of government. Given also that the choice of means question is an analytically distinct and important inquiry, it is worth asking whether the public use limitation can be reformulated as a choice of means doctrine, and if so, whether the judiciary should have a role in reviewing the exercise of eminent domain from this perspective.

Before turning to this inquiry, I should note two possible objections to the suggested reorientation. First, one might argue that the fifth amendment's language precludes such an approach. The taking clause says "for public use." As noted earlier, this language suggests an inquiry into ends; it does not say that property may be taken only where "necessary" or where voluntary exchange is impractical. This objection must be counted as a point against the proposed reinterpretation. Nonetheless, the phrase "for public use" is somewhat ambiguous. It could mean, as traditionally thought, that government may *condemn* only if the use is public. But it could also mean that when government condemns, it must *compensate* only if the taking is for a public use. Indeed, in the early nineteenth century some lawyers argued for this latter interpretation of the public use language. They proposed that government need compensate only when a taking serves a public rather than a private use.³⁹ Alternatively, the Framers might simply have intended the phrase to describe the sorts of takings they envisioned as requiring compensation: public, governmental takings like condemnation, not private takings like conversion or theft. Under this view, all takings *by the government*, whether for a public or private purpose, would require compensation. I am not suggesting that either of these latter interpretations is necessarily correct.⁴⁰ The point is that some

³⁸ Richard Epstein's recent book on the taking clause shows that ends arguments are still part of the intellectual tradition associated with eminent domain. See R. EPSTEIN, *supra* note 21, at 161-81; see also Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that public use limitation is implicit recognition that legislative action must further "public values").

³⁹ See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 65 (1977).

⁴⁰ The argument that the fifth amendment requires compensation only for public takings seems at odds with the taking clause's basic purpose—to protect private property against state interference. Owners of private property would suffer as much, if not more, from state-sponsored takings for a private use as they would from takings for a

ambiguity surrounds the public use language, ambiguity which perhaps enhances the interpretational latitude of the courts.

Second, one might object that the suggested focus on means runs counter to established tradition, which seems to give the government *greater* discretion in the selection of means than ends. In *Berman*, for example, the Court said:

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.⁴¹

But there is a powerful rebuttal to Justice Douglas's apparent suggestion that courts should not review choice of means: takings doctrine. The elaborate and well-established takings jurisprudence, which asks when government regulation goes "too far" and thus requires compensation,⁴² is really an inquiry into choice of means, specifically, the choice between police power regulation and eminent domain. When courts declare a regulation a taking, in effect they say that the government should have proceeded by eminent domain—coerced but compensated exchange—rather than by coerced and *uncompensated* exchange. If judicial scrutiny of a legislature's decision to use its police power rather than eminent domain is warranted, then should not courts also review a legislature's decision to use eminent domain rather than voluntary negotiations?

II

EMINENT DOMAIN AS A MEANS: AN ECONOMIC APPROACH

The literature addressing the public use issue from an economic perspective suggests three possible analytical models. I will briefly consider the first two, only to set them aside in favor of the third. Elements of the first two, however, ultimately reappear, "through the back door" as it were, under my "refined" version of the third approach.

The first economic model of public use, endorsed by Frank

public use. The argument that the public use language merely describes the kinds of takings to which the clause refers is harder to answer; however, given that the Bill of Rights clearly presupposes state action, the argument is weak because it would render the public use language largely superfluous.

⁴¹ *Berman*, 348 U.S. at 33 (citations omitted); see also R. EPSTEIN, *supra* note 21, at 126-45 (arguing that courts should give greater deference to legislative judgments about means than ends).

⁴² See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978) (application of city landmark preservation law not fifth amendment taking); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (statute effectively prohibiting mining is taking of coal company's property).

Michelman,⁴³ involves a straightforward comparison of costs and benefits. This model would have a court calculate all costs associated with an exercise of eminent domain, including the costs of compensation, and compare them with the taking's expected benefits. If the benefits exceed the costs, the court would deem the taking to serve public use; conversely, if the costs exceed the benefits, it would deem the taking to serve an unconstitutional private use.

The cost-benefit model of public use raises several problems. The first relates to measurement. How can courts accurately measure a taking's projected benefits, many of which will be intangible and speculative? A second problem involves the question of proper institutional roles. Presumably, the legislature has concluded that a taking's benefits exceed its costs. Are courts somehow better suited to make such a determination? Finally, the most telling problem, from this article's perspective, is that the cost-benefit calculus demands an inquiry into the ends of the taking rather than the choice of means. The cost-benefit approach explicitly adopts wealth maximization as the proper end, or at least one proper end, of government. Once again, I do not argue that the cost-benefit model is necessarily wrong. The problem is simply that the American judiciary, for reasons related to democratic theory, is not presently inclined to enforce directly any conception of limited government ends.

A second economic model of public use, recently advocated by Richard Epstein,⁴⁴ involves the public goods concept. Public goods, in their pure form, possess two properties: jointness in supply and impossibility of exclusion.⁴⁵ In particular, because of the latter attribute, the market generates fewer public goods than generally thought desirable. Hence, theorists have long viewed public goods as an appropriate object of governmental action.⁴⁶ Under the public goods model, a court would ask whether an exercise of eminent domain is designed to procure a public good. If so, the court would deem the taking to serve a public use; if not, the court would deem the exercise an unconstitutional taking for a private use.

As with the cost-benefit approach, the public goods model

⁴³ Michelman, *supra* note 22, at 1241.

⁴⁴ R. EPSTEIN, *supra* note 21, at 166-69.

⁴⁵ See R. HARDIN, *COLLECTIVE ACTION* 17 (1982); D. MUELLER, *PUBLIC CHOICE* 14 (1979); Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STATISTICS* 387 (1954). Jointness in supply means that consumption by one person does not diminish or otherwise affect consumption by others. Impossibility of exclusion means that once the good is supplied, no one can be prevented from consuming it. Classic examples of public goods are national defense and environmental controls.

⁴⁶ See D. MUELLER, *supra* note 45, at 13 ("The impossibility of exclusion thus raises the likelihood that purely voluntary schemes for providing a public good break down.").

presents several difficulties. First, a definitional problem: there are very few "pure" public goods—goods of a kind that consumption by one does not diminish in some measure consumption by others. With most goods, consumption by one necessarily excludes, at least partially, consumption by someone else. Moreover, one can say that any activity that generates positive externalities—keeping one's lawn mowed, for example—shares the quality of public goods. Thus, the public goods analysis can be either very restrictive or very broad, depending on how the term is defined. Again, however, the main failing of the public goods model, at least for present purposes, is that it directs attention to ends rather than means. It asks whether government will use acquired property to provide a public good, not whether nonconsensual means are necessary to acquire the property.

The third economic model of public use derives from the property rule/liability rule distinction introduced by Calabresi and Melamed. From this perspective, eminent domain provides a mechanism that allows government to convert property rules into liability rules. This model presumes that property rules work well where low transaction costs make consensual exchange of resources practical. Liability rules, on the other hand, are necessary where high transaction costs render consensual exchange difficult.⁴⁷ Applied to eminent domain, this analysis suggests that where a functioning market for a resource exists, the public use doctrine should require that government use that market. In contrast, where barriers to market exchange render such acquisition problematic, the doctrine should permit government to use its power of eminent domain. Importantly, the property rule/liability rule model of public use has the virtue of addressing eminent domain as a means. The distinction focuses on the conditions of the market in which property is acquired, not on its postacquisition use.

In the remainder of this section, I use the property rule/liability rule distinction to develop a basic model of the role of courts in determining eminent domain's proper scope. I then qualify the basic model in light of three persuasive economic objections. Taken together, these qualifications yield what I call the refined economic model of the judicial role in public use cases.

A. The Basic Model

The purpose of eminent domain is analogous to that of other liability rules, in that eminent domain applies where market ex-

⁴⁷ Calabresi & Melamed, *supra* note 19, at 1107-10; Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U.L. REV. 1122 (1984-85).

change, if not impossible to achieve, is nevertheless subject to imperfections. To illustrate the point, consider the most common situation in which we see the exercise of eminent domain: a public or private project requiring the assembly of numerous parcels of land.⁴⁸ Suppose, for example, that an oil refining company wants to construct an underground pipeline to transport crude oil from a producing field to a refinery several hundred miles away. Suppose further that only one feasible pipeline route exists. Without an exercise of eminent domain, the company must obtain an easement from each of hundreds of contiguous property owners. Each owner would have the power to hold out, should he choose to exercise it. If even a few owners held out, others might do the same. In this way, assembly of the needed parcels could become prohibitively expensive; in the end, the costs might well exceed the project's potential gains.⁴⁹

Some have described the above assembly problem in terms of monopoly-regulation.⁵⁰ In the pipeline example, each owner is a monopolist, effectively dominating a resource needed to complete the project. Each owner can thereby engage in monopoly pricing, that is, can set his price well above the opportunity cost of the needed resource. The result: fewer oil pipelines will be constructed, and those few that are built will cost a higher than optimal price.

Alternatively, others have described the assembly problem in terms of transaction cost economics.⁵¹ Because each parcel owner has the power to hold out, each may be tempted to bargain strategically to appropriate some of the pipeline profit. On the other hand, the oil company—the sole buyer in the easement market—may also bargain strategically to appropriate most of the pipeline's gains to itself. The problem thus is really one of bilateral monopoly.⁵² Such strategic bargaining in a bilateral monopoly situation increases the project's transaction costs, and if the transaction costs approach or exceed the project's gains, the pipeline may never be built.

In the final analysis, whether one describes the assembly problem in terms of antitrust economics or transaction cost economics

⁴⁸ See *infra* Part III (case survey indicates that assembly problem most common source of public use litigation).

⁴⁹ For anecdotal accounts of the assembly problem, see Hellman, *How They Assembled the Most Expensive Block in New York's History*, NEW YORK, Feb. 25, 1974, at 31, reprinted in R. ELLICKSON & A. TARLOCK, *LAND-USE CONTROLS* 1014 (1981); Lipman, *The Holdouts: Owners Who Stay Put Play a Part in Shaping the American Skyline*, Wall St. J., May 22, 1984, at 1, col. 1.

⁵⁰ R. POSNER, *supra* note 22, § 3.6, at 49; Berger, *supra* note 22, at 224-25.

⁵¹ See Michelman, *supra* note 22, at 1174.

⁵² See, e.g., Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 91 (1978).

does not matter. In either case, the underlying predicament is the same: market conditions allow the seller to seek economic rents, that is, to charge a price higher than the property's opportunity cost.⁵³ The oil pipeline hypothetical illustrates the potential for rent seeking. The opportunity cost of any one landowner's interest is near zero.⁵⁴ But when this interest combines with other similar interests to form a right of way for a pipeline, its potential value becomes considerable. The difference between these two sums—the property's negligible opportunity cost and its value as part of the pipeline project represents a potential economic rent to the seller.

Assembly projects, however, do not exhaust a seller's rent-seeking opportunities. For example, rent seeking can occur when a buyer wants access to land that he already owns, but which is surrounded by the seller's land.⁵⁵ It can also arise when a buyer needs to expand an existing site by acquiring adjacent land;⁵⁶ when the buyer will lose undepreciated improvements if he does not acquire certain property from the seller;⁵⁷ or when the seller owns property uniquely suited for some undertaking by the buyer, such as promontory for a lighthouse or a narrows for a bridge.⁵⁸ I will hereinafter refer to any situation where a seller can extract economic rents from a buyer as a "thin market." Conversely, I will call any situation where market conditions do not allow a seller to extract economic rents from a buyer a "thick market."⁵⁹

Whatever a thin market's source, its potential for engendering rent seeking may make it economically efficient to confer the power of eminent domain on a buyer. On the one hand, we know that eminent domain would transfer the resource to a higher-valued use, because its value in the new use exceeds its value in every existing possible use (its opportunity cost); otherwise the seller could not extract an economic rent. On the other hand, if this transaction were left to the market, monopoly pricing (or strategic bargaining)

⁵³ See Munch, *supra* note 22, at 474-79. On rent-seeking generally, see TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980) [hereinafter RENT-SEEKING SOCIETY]; Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

⁵⁴ Each individual property interest—the right to use a small underground tunnel—almost certainly has little or no market value if offered for sale for any other use.

⁵⁵ See *infra* notes 131-32 and accompanying text (public use cases involving landlocked property).

⁵⁶ See *infra* notes 124-30 and accompanying text (public use cases involving expanding existing facilities).

⁵⁷ See *infra* notes 134-37 and accompanying text (public use cases involving commitment of specific capital to property).

⁵⁸ See *infra* note 133 and accompanying text (public use cases involving property uniquely suited to condemnor's needs).

⁵⁹ See Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 79-81 (1985), for another example of the use of these terms.

could lead to a suboptimal quantity of the resource being acquired, or could even prevent the transaction from taking place at all.

Before completing discussion of the basic model, however, we must consider another important factor. So far we have focused exclusively on what might broadly be termed the transaction costs of market exchange. But we must also consider the administrative costs of eminent domain, and compare these costs with the costs of market exchange in either thick or thin market settings.

There is reason to believe, at least in thick market settings, that eminent domain is more expensive than market exchange.⁶⁰ First, and most important, legislatures must authorize the exercise of eminent domain.⁶¹ It is thus necessary to persuade a legislature to grant the power of eminent domain, or, if a general grant of the power already exists, to persuade officials to exercise it. Second, the due process clauses of the fifth and fourteenth amendments, as well as local statutes and rules, impose various procedural requirements upon the exercise of eminent domain. At a minimum, these include drafting and filing a formal judicial complaint and service of process on the owner.⁶² Third, nearly all jurisdictions require at least one professional appraisal of the condemned property,⁶³ something generally not done (or not done as formally) in a private sale. Finally, both court-made and statutory law guarantee a person whose property is subject to condemnation some sort of hearing on the condemnation's legality and the amount of compensation due.⁶⁴ Of course, the parties to condemnation proceedings, like the parties to most civil litigation, typically settle before a trial.⁶⁵ But the possibility of trial clearly increases the expected administrative costs of condemnation.

Given what might collectively be called the "due process" costs of eminent domain—obtaining legislative authority, drafting and filing the complaint, serving process, securing a formal appraisal, the possibility of a trial and appeal, and so forth—it is safe to conclude that, in a thick market setting, eminent domain is a more expensive

⁶⁰ There are some costs typically incurred in a private transaction, such as brokerage commissions, that are not incurred in eminent domain. However, other costs, such as title search and insurance expenses, are the same whether government proceeds by negotiation or eminent domain.

⁶¹ See 1A P. NICHOLS, *supra* note 24, § 3.2.

⁶² See FED. R. CIV. P. 71A; 6 P. NICHOLS, *supra* note 24, § 26.12.

⁶³ See, e.g., 42 U.S.C. § 4651(2) (1982); N.Y. EM. DOM. PROC. LAW § 302 (McKinney Supp. 1986); Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 436-40 (1967).

⁶⁴ See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327-28 (1893) (determination of "just" compensation is judicial question).

⁶⁵ See Berger & Rohan, *supra* note 63, at 440, 458 n.60 (approximately 85% of condemnations settled before trial).

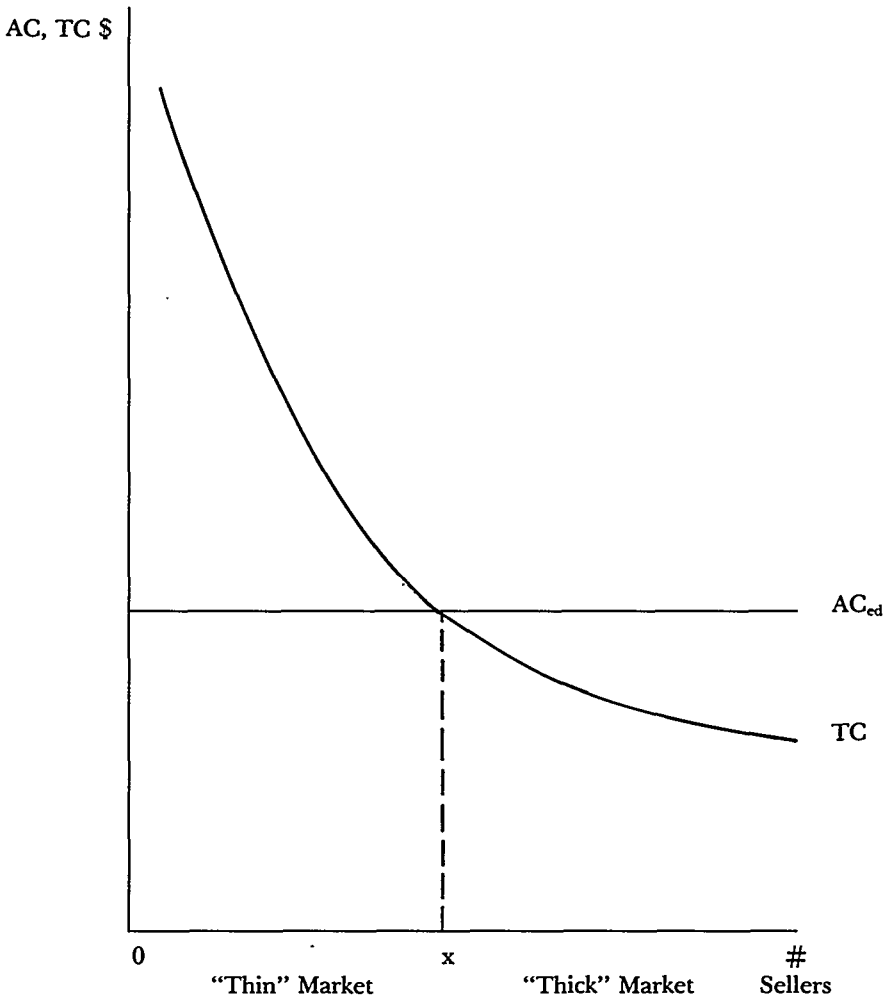
way of acquiring resources than market exchange. This conclusion has important implications for the basic model. In effect, it means that the decision whether to use eminent domain should be, from an economic perspective, self-regulating. In thick markets, where the model initially suggests that eminent domain is inappropriate, the acquiring party should in fact utilize market exchange because eminent domain would consume more resources. Conversely, in thin market settings, where the model suggests that it is appropriate to use eminent domain, the acquiring party should in fact use eminent domain, so long as the administrative costs are less than the costs of market exchange.

To be sure, markets do not neatly arrange themselves into two groups, one "thin" and the other "thick." Instead, rent-seeking opportunities range along a continuum, from very high in the case of a pure monopoly to very low in a highly competitive market. Figure 1 depicts the probable relationship between the transaction costs of market exchange and the administrative costs of eminent domain, based on the following assumptions: (1) transaction costs are always positive and rise as rent-seeking opportunities rise; (2) administrative costs are always positive and do not rise as rent-seeking opportunities rise (or at least do not rise as rapidly as transaction costs rise); and (3) administrative costs are higher than transaction costs in highly competitive markets. The intersection of AC_{ed} and TC at point x on the horizontal axis determines which markets will be attractive candidates for the exercise of eminent domain. In the markets to the left of x , where $TC > AC_{ed}$, eminent domain will be economically attractive, whereas in markets to the right of x , where $TC < AC_{ed}$, eminent domain will not be attractive. Thus, if we assume that administrative costs are fixed—that they flow from institutional practices that do not vary in individual cases—then the decision whether to use eminent domain or the market should regulate itself. Legislatures, agencies, and private parties will rely upon eminent domain only when such reliance is efficient, that is when market exchange would consume more resources.

The assumptions of the foregoing analysis are concededly open to question. In particular, we cannot assume that the condemnor will always act to minimize its costs—especially if the condemnor is the government.⁶⁶ However, several considerations render cost-

⁶⁶ Another problem is that the two curves—the TC curve and the AC_{ed} curve—are probably not independent. As the AC_{ed} curve rises, government exercise of the power of eminent domain becomes less likely. As the eminent domain threat becomes less credible, more parties will engage in strategic bargaining, causing the TC curve to rise. However, as long as the AC_{ed} curve is above the TC curve in thick markets, and the TC curve is relatively smooth rather than kinked, the curves presumably will cross at some point, establishing the respective spheres of market exchange and eminent domain.

Figure 1



minimizing behavior by the condemnor as realistic as any other assumption, at least in the long run.⁶⁷

First, in many cases the condemnor is not the government, but

Under current institutional arrangements, we know that the curves cross, otherwise the government would never use eminent domain (assuming cost-minimizing behavior).

⁶⁷ Munch, *supra* note 22, presents evidence that the city of Chicago systematically committed too many legal resources to condemnation of low valued parcels and too few resources to condemnation of high valued parcels. Private parties, in contrast, tend to expend legal resources in proportion to the value of their holdings. As a result, low valued parcels tend to be undercompensated (the city "outlitigates" the condemnee) and high valued parcels tend to be overcompensated (the condemnee "outlitigates" the city). *Id.* at 484. Munch concludes from these observations that eminent domain leads to an inefficient allocation of resources. *Id.* at 495. It is unclear, however, how far the peculiar practices of the Chicago legal department during the period of her study can be generalized to other governments and other times. Munch's argument rests on an iso-

rather some entity such as a public utility exercising a delegated power of eminent domain. Such a privately owned entity may be constrained by capital markets to seek to minimize its costs. Moreover, even if the government is the condemnor, the taking's beneficiary will often be a private entity, which would not undertake the expense of persuading the government to exercise the power of eminent domain unless these lobbying costs were lower than the costs of a market transaction.

Second, casual observation suggests that when governments acquire interests in land they prefer, if possible, to do so by market transactions. Government officials frequently complain about the costs and delays of eminent domain.⁶⁸ Moreover, in many contested public use cases we read that the majority of parcels in a tract have been acquired by voluntary exchange or settlement, with only one or two holdout landowners forcing the government to resort to eminent domain.⁶⁹ One might explain this preference for voluntary negotiation on the ground that private property owners simply give up in the face of a government threat to use eminent domain. But it also suggests that the government views eminent domain as a cumbersome and expensive process to be avoided if at all possible.

Finally, if we look at the broad range of government resource acquisitions, rather than solely at land acquisitions, we see that in markets that are clearly thick—office supplies, for example—the government almost invariably proceeds by market exchange. The principal exception occurs during wartime, when the need to accumulate vast amounts of material on short notice leaves the government vulnerable to rent seeking.⁷⁰ But this exception only proves the rule. In the vast majority of cases, government does not use eminent domain in thick markets because market exchange is less expensive than condemnation.

If, as the basic model suggests, the decision to use the power of eminent domain is essentially self-regulating, this holds important implications for judicial review of public use issues. Most obviously,

lated observation about one place during one time period, and may not support a general theory of government behavior.

⁶⁸ See, e.g., COMPTROLLER GENERAL, *FEDERAL LAND ACQUISITIONS BY CONDEMNATION—OPPORTUNITIES TO REDUCE DELAYS AND COSTS* (General Accounting Office 1980).

⁶⁹ See, e.g., *Payette Lakes Water & Sewer Dist. v. Hays*, 103 Idaho 717, 653 P.2d 438 (1982); *County of Essex v. Hindenlang*, 35 N.J. Super. 479, 114 A.2d 461 (App. Div. 1955), *appeal dismissed*, 24 N.J. 517, 132 A.2d 807 (1957); *In re Franklin Town Project*, 19 Pa. Commw. 272, 339 A.2d 885, *cert. denied*, 423 U.S. 1018 (1975); *State v. Culley*, 11 Wash. App. 695, 524 P.2d 437 (1974).

⁷⁰ See, e.g., *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950) (ceiling price of pepper when requisitioned is proper measure of damages); *United States v. Cors*, 337 U.S. 325 (1949) (compensation for ship should not increase because of wartime conditions).

there would seem to be little point in courts second-guessing legislative and executive determinations of public use. Judicial review would add only uncertainty and expense, causing the AC_{ed} curve to shift upward. It is simply not clear, *a priori*, that this tighter rationing of eminent domain is desirable.

In sum, the basic model suggests that courts, in setting the limits of eminent domain, should ensure that just compensation is paid and enforce the due process "tax"—the legislative and constitutional requirements that push the administrative costs of eminent domain above the costs of market exchange in thick market settings. Otherwise, the basic model suggests that courts need do nothing to limit the use of eminent domain.⁷¹ Thus, the basic economic model reinforces the principle, enunciated in *Berman* and *Midkiff*, that courts should give virtually complete deference to legislative determinations of public use.

B. The Refined Model

Despite the basic model's appealing simplicity, with its thick market/thin market distinction and its modest conception of the judicial role, the model raises a number of troubling economic and noneconomic questions. To avoid unduly complicating the argument, I will discuss only the economic objections.

The broadest and best-known economic objection to eminent domain is that it is unnecessary.⁷² The critics who raise this objection first note that acquiring parties generally use eminent domain to assemble large tracts of land. They then point out that real estate developers and others are frequently able to assemble such parcels by using buying agents, option agreements, straw transactions, and the like.⁷³ If private developers and the like can get by without eminent domain, the critics ask, then why cannot the government?

This broadscale objection meets with two answers. First, simply because the market can overcome the assembly problem (and presumably other thin market problems) some of the time, this does not mean that market mechanisms, by themselves, always produce optimal land assembly. The market may work well enough for shopping centers and commercial office buildings, but these projects entail relatively small amounts of land, are not strictly site-dependent,

⁷¹ Indeed, if anything the government may tend to underuse eminent domain, because high administrative costs discourage its use in thin markets where transaction costs are high but not prohibitive, or where the resources' value is low.

⁷² See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.5, at 43-44 (2d ed. 1977) (noting that shopping center developers and others can overcome holdout problems without using eminent domain).

⁷³ *Id.* at 44.

and often generate very high gains from trade. It does not necessarily follow that market mechanisms would work for such things as interstate highways, wilderness areas, or urban renewal projects. As the number of parcels and/or the site-dependence increases, the opportunities for rent seeking multiply. Moreover, if a project's expected gains are modest, it may not generate enough additional wealth to buy off the rent seekers. Therefore, limiting government to consensual exchange in all cases would almost certainly reduce the total supply of public goods in a way that, on balance, harms society.

Second, although buying agents, option agreements, and straw transactions may work well for private developers, it is unclear whether government can use these devices effectively. The necessary ingredient of these techniques is secrecy, and governments, at least in an open society like the United States, are not very good at keeping secrets. Moreover, even if governments could keep secrets, the combination of secret land acquisitions and the need to buy off holdouts raises a serious danger of corruption. One can easily imagine government officials charged with engaging in secret land assembly tipping off potential sellers about a project, or buying off sellers at exorbitant prices in return for kickbacks. It is one thing for a private developer to decide when to buy off a holdout and at what price. It is quite another when a government purchasing agent, spending taxpayers' money, makes these decisions without public oversight. To avoid this specter of corruption, government may have to use eminent domain under circumstances where a private developer, with his own money and guile, could use the market.⁷⁴

The broadscale denial of the need for eminent domain therefore fails. Nevertheless, I believe that there are three narrower economic objections that have greater merit. Each objection requires a partial modification of the basic model, and a corresponding refinement of the model's conception of the judicial role.

1. *Uncompensated Subjective Losses*

The basic model posits that eminent domain is designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that would take place only at an inefficiently high cost. Eminent domain, to use a familiar metaphor, is an instrument for increasing the size of the pie. But eminent domain also contains an implicit decisional rule for allocating the gains and losses associated with these forced transactions. This rule, manifested in eminent domain's compensation requirement, dic-

⁷⁴ I am indebted to Victor Goldberg for this point.

tates that a condemnee is entitled to the fair market value of his property in its highest and best use *other than* the use proposed by the condemnor.⁷⁵ In other words, the condemnee is entitled to an award equal to the opportunity cost of his contribution to the condemnor's project, no more and no less.⁷⁶

This opportunity cost compensation formula, however, fails to compensate the condemnee for all of his losses.⁷⁷ The formula awards the condemnee what he would obtain in an arm's length transaction with a third party, but does not compensate him for the subjective "premium" he might attach to his property above its opportunity cost. In some cases, such as those involving undeveloped land, there may be no subjective premium. But in other cases, the premium may be quite large and may reflect several potential concerns: a condemnee may have a sentimental attachment to the property, or may have made improvements or modifications to accommodate his unique needs, or may simply wish to avoid the costs and inconvenience of relocation. In addition, other personal losses which do not "run" with the property, such as lost goodwill, consequential damages to other property, relocation costs, and attorney fees, are also not compensable.⁷⁸

This failure to compensate for subjective losses indicates that the basic model, which emphasizes the self-regulating character of eminent domain, may break down. If the subjective loss is large enough, the condemnee's loss may exceed the additional wealth generated when eminent domain is used to overcome barriers to exchange in thin markets. For example, suppose *A* wishes to purchase *B*'s car, an old convertible. The market is relatively thick and the fair market value (*B*'s opportunity cost) is \$2,000. Nevertheless, *B* is very attached to the old car and will not sell for less than \$10,000. *A* is willing to pay up to \$4,000 for the car, and the administrative costs of eminent domain would be \$1,000. In such a case, although *A* would be better off searching for another car (presuma-

⁷⁵ See *United States v. Cors*, 337 U.S. 325, 334 (1949) (enhanced value excessive; condemnee entitled only to fair market value); *United States v. Miller*, 317 U.S. 369, 375 (1943) (special value to condemnor as distinguished from value to others must be excluded as element of market value); *Olson v. United States*, 292 U.S. 246, 255 (1934) (Compensation "is the market value of the property at the time of the taking contemporaneously paid in money.").

⁷⁶ See R. EPSTEIN, *supra* note 21, at 182-94.

⁷⁷ See Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736-37 (1973) (market value compensation method fails to account for subjective value of nonfungible property and may not make condemnee whole).

⁷⁸ See 2 P. NICHOLS, *supra* note 24, § 5.24 (rev. 3d ed. 1983) (business goodwill); 3 *id.* § 8.10[3] (rev. 3d ed. 1985) (relocation costs); 4A *id.* § 14.01 (consequential damages), § 14.24[4] (attorney fees).

bly at a cost of \$2,000), eminent domain would tempt him. *A* could obtain *B*'s car for \$3,000 (\$2,000 in compensation plus \$1,000 in administrative costs), \$7,000 less than *B*'s price. Note, however, that eminent domain is "rational" from *A*'s perspective, not because of a thin market or rent seeking by *B*, but because the compensation formula does not allow *B* to recover the full value that he attaches to his property.

One possible answer to the subjective loss problem is simply to construct a different compensation rule, one that approximates a Pareto-superior principle of full indemnification.⁷⁹ However, although modifications in the current formula toward more complete indemnification may be possible,⁸⁰ the indemnification principle can be taken only so far. A principle of full indemnification would pose difficult valuation problems, for subjective value is inherently difficult to measure.⁸¹ Furthermore, condemnees would have no incentive to limit their losses or economize on moving expenses, attorney fees, and the like.⁸² If these difficulties suggest that full indemnification is unrealistic, then we can no longer be confident that every exercise of eminent domain authorized by the basic model is in fact efficient.

The foregoing concerns counsel a qualification of the basic model's core conception of the judicial role. Specifically, they suggest that courts should closely scrutinize the decision to condemn whenever an owner's subjective losses are high.⁸³ For example, courts might apply a cost-benefit analysis in these circumstances, upholding an exercise of eminent domain only if the taking's "surplus value," or the total value of the condemned resources to the condemnor net of compensation, exceeds the condemnee's uncom-

⁷⁹ The Pareto-superior criterion would require that government intervention make at least one person better off and no one (including the condemnee) worse off. See Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-13 (1980). For an argument in favor of using the Pareto criterion in determining compensation for takings, see R. EPSTEIN, *supra* note 21, at 183-86, 199-202.

⁸⁰ Statutes awarding relocation costs suggest the workability, at least in a limited manner, of such modifications of the rule. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1982); Annotation, *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, 33 A.L.R. FED. 9 (1977).

⁸¹ See Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 619-20 (1984) (difficulties of measuring subjective value).

⁸² See Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985).

⁸³ In the abstract, one might think that determining when subjective value is high would be difficult. In practice, however, courts could require that condemnees who attach a high subjective value to their property cite some believable reason in support of such a contention. For example, condemnees might show that their family has owned the property for a long time, or that they have specially modified the property to meet the needs of their business.

pensated subjective loss. This approach, however, runs into all the difficulties of measurement and comparative institutional advantage associated with judicial cost-benefit analyses generally. More realistically, courts could simply scrutinize cases where subjective losses appear to be high to insure that these losses are not "excessive" relative to the project's probable surplus. In effect, courts would provide a condemnee faced with large subjective losses an additional "trump card," in the form of a higher probability that the project would be enjoined as failing the public use requirement. This additional leverage should induce the government to increase its settlement offer, thus offsetting, at least in part, the subjective losses.

2. *Secondary Rent Seeking*

A second objection to the opportunity cost compensation formula is that it encourages rent seeking by condemnors. Eminent domain almost always generates a surplus—a resource's value after condemnation is almost always higher than before. The present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee. Commentators have questioned such a division on fairness grounds.⁸⁴

There are several conceivable justifications for awarding the entire surplus to the condemnor, rather than requiring restitution of all or part of the surplus to the condemnee. By giving the surplus to the condemnor, we provide an incentive to use eminent domain. In the case where the government directly undertakes public works projects that enjoy broad political support this additional incentive may be unnecessary, although a rule of restitution would put a higher price tag on government projects, and would probably reduce their number. In the case of profit-oriented entities, however, restitution could eliminate the use of eminent domain altogether. Profit-seeking condemnors would no longer be able to capture the added value from improvements brought about through condemnation. In effect, the surplus from eminent domain functions here much as profit does in the market.⁸⁵ If we assume that in the long run citizens will be on both sides of eminent domain proceedings—either as condemnees or as taxpayers and ratepayers—then a rule that encourages value-maximizing exchanges through eminent domain may leave them better off than would a rule that provides for restitution or apportionment of the surplus.⁸⁶

⁸⁴ See R. EPSTEIN, *supra* note 21, at 163; Berger, *supra* note 22, at 233.

⁸⁵ See Buchanan, *Rent Seeking and Profit Seeking*, in RENT-SEEKING SOCIETY, *supra* note 53, at 3.

⁸⁶ Cf. Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 736-37

In addition, a rule of restitution would require some method of measuring the surplus generated by an exercise of eminent domain. Gains from trade or surplus, like subjective values, are notoriously difficult to measure. Thus, under a rule of restitution, either the administrative costs of eminent domain would rise, or some arbitrary measurement rule would emerge that would almost certainly produce distorted incentives.

Finally, awarding all of the surplus to the condemnor is perhaps not as unfair as first appears. The surplus generated by a condemnation may be caused in a but-for sense by both the condemnor and the condemnee. But in most cases the condemnee is merely a passive participant, an involuntary supplier of capital. The active agent, the supplier of the idea and initiative, is the condemnor. The labor theory of property may be out of fashion,⁸⁷ but as between a condemnor and a condemnee, the condemnor is typically more responsible for, and hence arguably deserving of, the surplus generated by the project.⁸⁸

Despite these justifications, there is legitimate reason for concern about allocating the condemnation's entire surplus to the condemnor. The present rule may produce a kind of secondary rent seeking of its own, as competing interest groups attempt to acquire or defeat a legislative grant of the power of eminent domain. In this way, eminent domain, an instrument designed to overcome rent-seeking behavior associated with thin markets, may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid. Indeed, in the extreme, the expenditures undertaken to obtain or defeat a grant of eminent domain could completely offset the expected surplus that would be generated by the use of eminent domain.

Richard Epstein has recently advanced an important argument for limiting eminent domain so as to minimize its secondary rent-seeking potential.⁸⁹ Epstein would limit the use of eminent domain to the creation of either pure public goods or quasi-public goods subject to common-carrier restrictions. Because no one can be ex-

(1982) (shareholders better off with rule that allows controlling block of shares to capture premium than with rule that allocates premium over all shareholders).

⁸⁷ See J. LOCKE, SECOND TREATISE OF GOVERNMENT ch. 5, § 27 (C. Macpherson ed. 1980). For a restatement of the labor theory in terms of moral desert, see L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 2-4 (1977).

⁸⁸ This is, of course, a generalization. Note, however, that there is little incentive to use eminent domain to try to capture surplus that has been created by the condemnee's personal efforts. Suppose, for example, the condemnor seeks to acquire a going business. In such cases, the opportunity cost formula will require that the condemnee receive compensation for the value of a going business, i.e., for the full value of what he has created; thus, little, if any, surplus will remain for the condemnor to keep.

⁸⁹ R. EPSTEIN, *supra* note 21, at 161-81.

cluded from the benefits afforded by such public goods, they present unattractive targets for rent seeking. Thus, limiting the power of eminent domain to public goods and the provision of common-carrier services would minimize secondary rent seeking because no one person could capture a taking's entire surplus for himself to the exclusion of all others.⁹⁰

Epstein's argument contains a valuable insight. However, one must not overestimate the secondary rent-seeking problem. The incentive to capture the legislative process to secure the power of eminent domain is limited by the requirements that the condemnor award the condemnee compensation equal to the opportunity cost of his property and incur the due process costs associated with condemnation. For these reasons, eminent domain is considerably less attractive as a target for rent seeking than, for example, a government grant or a tax abatement, neither of which requires such offsetting expenditures. Furthermore, Epstein's definition of public use, with its drastic limitation on the power of eminent domain, carries with it concomitant losses in social welfare, as certain barriers to exchange caused by thin markets could no longer be overcome. Finally, Epstein's proposal would not totally eliminate the rent-seeking potential of eminent domain, because the equal availability of public goods and quasi-public goods does not guarantee that all will equally value these goods.

From an economic perspective, Epstein's proposal is justifiable only if its gains, in terms of reduced secondary rent seeking, outweigh its costs, in terms of reduced opportunities for using eminent domain to overcome barriers to exchange in thin markets. The proposal, at least in its unqualified form, fails to convincingly pass this test. However, even if we reject Epstein's remedy, the current compensation formula undeniably creates some incentive for rent seeking, and thus raises again the question of whether additional limitations upon the exercise of eminent domain are needed.

The danger of secondary rent seeking suggests that it may be appropriate to add a second qualification to the basic model. In cases where eminent domain is most likely to foster secondary rent-seeking behavior—where one or a small number of persons will capture a taking's surplus—courts should closely scrutinize a decision to confer the power of eminent domain. Cases involving delegation of eminent domain to one or a few private parties, or involving condemnation followed by retransfer of the property to one or a few private parties, present the primary situations where such secondary

⁹⁰ Epstein apparently would not prohibit the use of eminent domain in other contexts, but would insist that the condemnee receive 150% of fair market value, in order to maintain a crude pro rata apportionment of surplus. *Id.*

rent seeking is likely to occur.⁹¹

3. *Market Bypass*

In addition to the foregoing limitations derived from eminent domain's compensation formula, there is a third objection that would apply even if questions of compensation never produced distorted incentives. Suppose a buyer facing a relatively thick market for a resource declines to engage in market exchange, but later changes his position such that, *ex post*, he faces a thin market. Should eminent domain be available to buyers who have either deliberately or negligently bypassed a thick market exchange?

The following example illustrates the need for some kind of "bypass" limitation on eminent domain. Suppose *T* knowingly trespasses on *O*'s land and builds a structure that is uniquely suited to his own (*T*'s) purposes. *O* discovers the encroachment, sues, and secures an order requiring that *T* remove the structure and vacate the premises. If *T* now attempts to purchase from *O* the land on which the structure sits, he faces a thin market. Because of *T*'s commitment of specific capital in the form of the structure, *O* can exact a price higher than the undeveloped land's opportunity cost.

Does the fact that *T* faces a thin market mean that he should not benefit from the power of eminent domain? From an *ex post* perspective, eminent domain makes sense here: the land's value is higher to *T* than to *O*, and giving *O* a property right (i.e., requiring that *T* negotiate the purchase of the land from *O*) could lead to monopoly pricing and strategic bargaining. From an *ex ante* perspective, however, the issue is not so clear. *T* deliberately bypassed the opportunity to purchase in a thick market, and instead knowingly created a thin market situation. Allowing *T* to benefit from eminent domain here might only encourage others to bypass thick market exchange in similar circumstances.

In deciding whether to adopt an *ex ante* or *ex post* perspective, *T*'s mental state at the time of the market bypass assumes critical importance. Suppose that instead of intentionally trespassing, *T* hired a surveyor to fix the boundaries of some land *T* had purchased. Relying upon this survey, *T* built his structure. Through no fault of *T*'s, the surveyor erred, and the structure actually rests upon land belonging to *O*. *O* discovers the trespass, sues *T*, and the court orders the building torn down. Should the court allow *T* to use eminent domain in these circumstances?

⁹¹ Condemnation followed by retransfer is especially likely to engender rent seeking if, as in *Poletown*, the price charged by the government on retransfer is less than the compensation awarded under the opportunity cost formula. See *Poletown*, 410 Mich. at 656-57, 304 N.W.2d at 469-70 (Ryan, J., dissenting).

Most people would probably not object to the use of eminent domain in the second hypothetical. More precisely, they would not object to its functional equivalent: a court order granting *O* damages but refusing an injunction ordering the building torn down.⁹² Note, however, that no distinction exists between the first and second hypotheticals in terms of the "thinness" of the market. The difference is that in the second hypothetical, unlike the first, *T* did not intentionally bypass the opportunity to purchase the resource in a thick market.

How far can we generalize from these examples? Clearly, a buyer who takes all reasonable and prudent steps while engaging in thick market exchange, only to later face the need for further exchange in a thin market, should be allowed to use eminent domain. On the other hand, a buyer who intentionally bypasses a thick market by taking action (like the trespass in the first hypothetical) that leaves him in a thin market should not be allowed to use eminent domain. Disallowing eminent domain under such circumstances is necessary to prevent the transformation of all property rules into liability rules.⁹³ Intermediate cases are more troublesome. Suppose a buyer's mistake derives from mere negligence; for example, the buyer fails to procure a survey in a situation where surveys are commonly ordered before purchase. One possible solution would be to require a buyer to take all measures that are cost justified from an ex ante perspective to eliminate the risk of facing a thin market.⁹⁴ In practice determining just what measures are cost effective would prove problematic, given the difficulty in assessing the ex ante risk of a thin market, and the even greater difficulty in assessing the probable costs of monopoly pricing and strategic bargaining. However, courts should at the very least closely scrutinize cases in which condemnors face thin markets as a result of their own intentional acts or negligence, leaving the meaning of "negligence" to be fixed on a case-by-case basis.

⁹² Indeed, judicial decisions indicate a clear trend toward awarding damages rather than injunctive relief in "innocent" boundary encroachment cases. See, e.g., *Stroup v. Codo*, 65 Ill. App. 2d 396, 212 N.E.2d 518 (1965) (plaintiff not entitled to removal of encroachment when caused by innocent mistake, and cost of removal disproportionate to damage to plaintiff's property); *Graven v. Backus*, 163 N.W.2d 320 (N.D. 1968) (same).

⁹³ See Klevorick, *On the Economic Theory of Crime*, in 27 NOMOS: CRIMINAL JUSTICE 289 (J. Pennock & J. Chapman eds. 1985).

⁹⁴ See Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799 (1983). As an alternative to the conventional economic theory of negligence, which compares the level of precaution that would best minimize social costs with the injurer's level of caution, Grady proposes a cost-benefit theory whereby injurers are liable if the cost of an untaken precaution that would have prevented the accident is less than the reduction in expected harm that would have resulted from that precaution.

C. The Ex Ante/Ex Post Dilemma

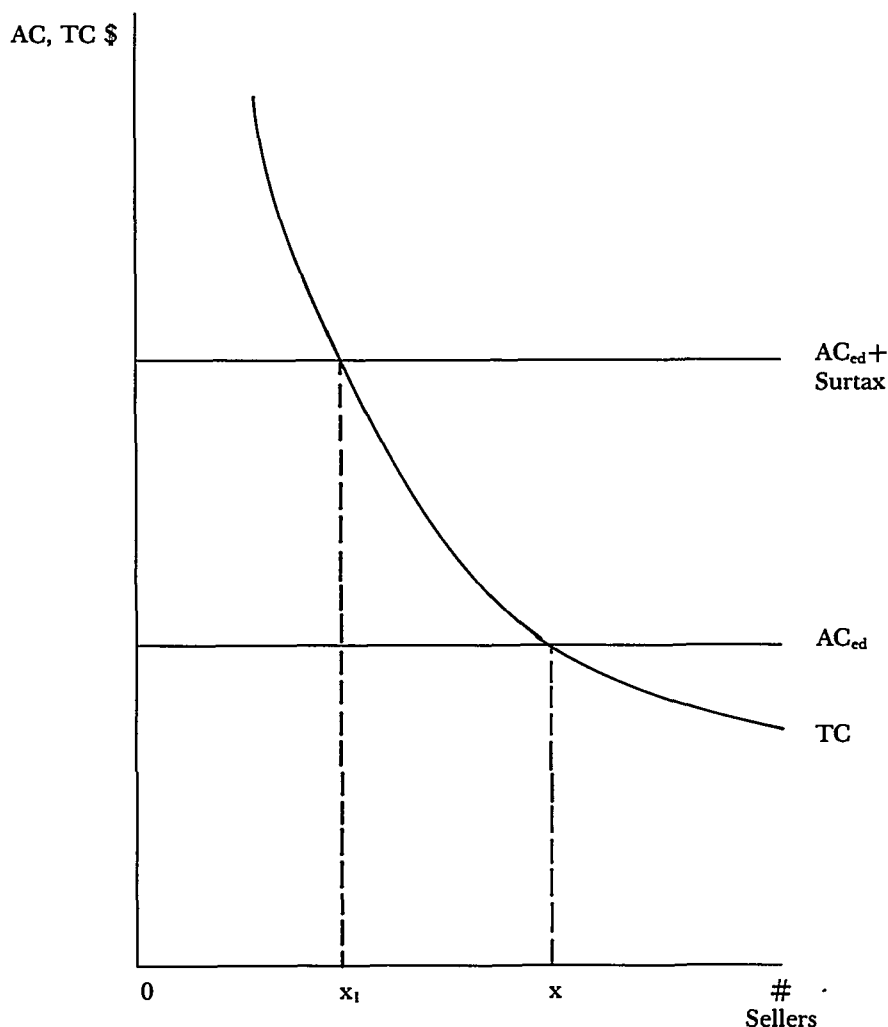
The refined model suggests that heightened scrutiny is appropriate when one or more of three conditions is present: high subjective value, potential for secondary rent seeking, and intentional or negligent thick market bypass. But what does "heightened scrutiny" mean in this context? With respect to high subjective value, the model suggests a rough comparison of benefits and costs. Secondary rent seeking and market bypass, on the other hand, require a more complex analysis. In both cases, the objective is to discourage parties from engaging in secondary rent seeking or from intentionally or negligently bypassing exchange in thick markets—in short, to provide correct incentives for future behavior. But a rule that simply prohibits the use of eminent domain in these contexts would arguably sweep too broadly; it would sacrifice eminent domain's real value in overcoming barriers to exchange in thin markets. The quandary for a court, therefore, is to compare ex ante gains with ex post losses.

This quandary admits of no simple solution. Although in principle it would be possible to convert both ex ante gains and ex post losses into monetary values, in practice it is difficult to assign dollar values to ex post losses (surplus is hard to measure) and virtually impossible to compute ex ante gains (the deterrent effect of legal rules is hard to measure). A more practical solution might be to impose a pricing mechanism, analogous to the "due process tax" emphasized by the basic model, which would increase costs in those situations where we wish to discourage the use of eminent domain. Unlike a flat prohibition, imposition of a "surtax" would not altogether deny the use of eminent domain. It would simply make market exchange the medium of choice, and eminent domain a method of last resort. Figure 2 illustrates how a surtax would limit the availability of eminent domain. The surtax causes the AC_{ed} curve to shift upward; this moves the intersection of the AC_{ed} curve and the TC curve to the left, at x_1 . Eminent domain is now attractive only in the area to the left of x_1 , rather than in the larger area to the left of x .

One might implement a surtax by adopting a limited version of the proposal, advanced by both Epstein and Lawrence Berger,⁹⁵ that would award condemnees 150% of fair market value in certain circumstances. Specifically, when one or more of the refined model's three suspect conditions is present—high subjective value, potential for secondary rent seeking, or market bypass—the condemnation could proceed only if the condemnor paid the condemnee 150% of the condemned property's opportunity cost. The

⁹⁵ R. EPSTEIN, *supra* note 21, at 173; Berger, *supra* note 22, at 243.

Figure 2



bonus payment would have the effect of a surtax, discouraging the use of eminent domain in these three situations but not prohibiting it altogether.⁹⁶

There are, however, at least two problems with a surtax in the form of extra compensation. First, the bonus payment might not

⁹⁶ To some extent we already provide a bonus payment through favorable tax treatment for property subject to condemnation. Under special rules that apply to "involuntary conversions," one whose property is taken in eminent domain can defer recognition of any gain if the proceeds are reinvested in similar property. I.R.C. § 1033(a) (1982); Rev. Rul. 81-180, 1981-2 C.B. 161; see *Balistreri v. Commissioner*, 38 T.C.M. (CCH) 526 (1979).¹ Indeed, in *Midkiff* the Supreme Court intimated that these tax considerations may have motivated the use of the eminent domain procedure in the Hawaii Land Reform Act. *Midkiff*, 467 U.S. at 233.

exactly measure the disutility from the exercise of eminent domain (lost subjective value and so on). In some cases it would undoubtedly provide the condemnee with a windfall, and could thus produce a kind of tertiary rent seeking; property owners might maneuver to get their property condemned in circumstances where they would receive bonus compensation.⁹⁷

Second, a judicially imposed bonus does not fit comfortably within a legal structure premised on constitutional rights. In particular, judicial enforcement of the public use requirement proceeds on an either/or basis: either a taking violates a condemnee's constitutional rights or it does not. In contrast, a pricing system entails no sharp differentiation between constitutional right and wrong, but implies instead that behavior ranges along a continuum, from less costly and more desirable to more costly and less desirable.⁹⁸ The normative structure of constitutional adjudication seems to prohibit courts from declaring that the taking clause requires compensation equal to 100% of fair market value in some circumstances, and 150% of fair market value in others.⁹⁹ In the hands of courts, the public use requirement is much cruder: courts either allow eminent domain because there is a public use or reject eminent domain because there is not a public use.

Because of the limited options available to courts in the adjudication of "rights" issues, the refined model does not predict a clear-cut pattern of results as courts struggle to sort out ex ante costs and ex post gains. The refined model does, however, lead one to expect at least two patterns where one of the three limiting conditions is present. First, where the limiting conditions are present, one would expect a decline in the relative frequency of cases finding a valid public use. Second, where these conditions are present, one would expect to find a positive correlation between the public use decision and the size of the surplus generated by the condemnation. In particular, one would expect the relative frequency of holdings that a

⁹⁷ Great Britain formerly required that condemnees receive 110% of fair market value as compensation. The practice was eliminated, however, by the Acquisition of Land Act, 1919, 9 & 10 Geo. 5, ch. 57. Apparently, disquiet over some large awards made under the older acts was one reason for the repeal. See *Reconstruction*, 83 JUST. PEACE 41, 53 (1919).

⁹⁸ The distinction between rights-based adjudication and a pricing system is similar to that drawn by Robert Cooter between sanctions and prices. See Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

⁹⁹ This is not to say that a legislature could not adopt a "surtax." See, e.g., New Hampshire Mill Act, 1868 N.H. Laws ch. 20 (authorizing owners of mills on non-navigable streams to flood adjoining lands, conditioned upon payment of jury-assessed damages), noted in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.* (1885); see also R. EPSTEIN, *supra* note 21, at 174 (discussing Mill Act).

taking is for a public use to increase as the size of the surplus increases.

III CASE SURVEY

Although courts almost invariably discuss the public use issue in terms of government ends, *Poletown*, *Oakland Raiders*, and *Midkiff* suggest that courts have no theory as to what those ends might be. Indeed, courts seem to have abandoned the idea that they should articulate and enforce a conception of permissible government ends. Nevertheless, one still finds state courts declaring that a proposed taking does not serve a public use. This state of affairs—no agreement on general principles, frequent statements of broad deference, and intermittent holdings of no public use—has led several courts and commentators to a kind of legal realist despair. We thus read that coal mining may be governed by one rule, metal mining by another,¹⁰⁰ and that litigants should base their claims not on “general principles” but on “specific favorable decisions.”¹⁰¹ One court, purporting to track the leading treatise,¹⁰² summed up the state of affairs this way:

[A]ny attempt at a concise and comprehensive definition of “public use” would be unsuccessful. Only by the gradual process of judicial exclusion and inclusion, and by a study of the influences which have affected the development of the law in the area under consideration, can any authoritative delimitation of “public use” be attained. Among these influences one of the most significant is the historical development of public use and the forces—economic, social and political—which have affected it.¹⁰³

Here as elsewhere, a “totality of the circumstances” analysis masks intellectual bankruptcy.

Nonetheless, the judiciary’s failure to articulate either a coherent theory of public use or a theory of the judicial role in enforcing the public use limitation does not imply that public use cases are wrongly decided from an economic perspective. The very absence of coherent legal doctrine effectively allows courts to justify any result that strikes them as intuitively correct.¹⁰⁴ With this thought in mind, I undertook a fairly large survey of appellate opinions con-

¹⁰⁰ *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 416, 467 P.2d 986, 988 (1970).

¹⁰¹ *Sturgill v. Commonwealth*, 384 S.W.2d 89, 90 (Ky. 1964).

¹⁰² 2A P. NICHOLS, *supra* note 24, § 7.02[3].

¹⁰³ *County of Essex v. Hindenlang*, 35 N.J. Super. 479, 490, 114 A.2d 461, 467 (App. Div. 1955), *appeal dismissed*, 24 N.J. 517, 132 A.2d 807 (1957).

¹⁰⁴ See Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985) (discussing economic significance of discretionary rules).

cerning contested public use issues to determine whether the outcomes of these cases are consistent with the economic models developed in Part II.¹⁰⁵ My operating hypothesis was that courts operating in a common law fashion, although interpreting an open-ended constitutional provision rather than fashioning rules of common law per se, would tend to embrace efficient results.¹⁰⁶

A. Description of the Survey

To test both the basic and refined versions of the economic

¹⁰⁵ Using appellate decisions to test economic models is concededly subject to a number of familiar pitfalls. First, reported appellate decisions sit atop a large pyramid of underlying transactions. Studies suggest that government land acquisitions proceed by market exchange about 80% of the time. COMPTROLLER GENERAL, *supra* note 68, at 81. Even when eminent domain is necessary, between 80% and 90% of condemnation cases are settled before trial. *Id.* at 83; Berger & Rohan, *supra* note 63, at 440, 458 n.60. Of the cases that go to trial, only a fraction are appealed. Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2 (1984) (quoting surveys finding that between .09% and .2% of claims are pursued through appeal). Of those appealed, not all result in a reported opinion. See R. POSNER, *THE FEDERAL COURTS* 120-24 (1985) (discussing federal court practice of issuing unpublished orders and opinions in cases deemed to lack precedential significance). Finally, of the cases that result in reported appellate opinions, only a small portion involve any question of public use; questions involving the amount of compensation are much more frequently litigated. See Dunham, *supra* note 36, at 65 (table). Thus, if we look only at government land acquisitions, reported appellate decisions involving public use issues undoubtedly represent only a tiny fraction of all such acquisitions.

Thus, there can be little assurance that reported appellate public use decisions are representative of all government-sponsored resource acquisitions. On the other hand, reported appellate decisions tend to result from cases with the greatest uncertainty of outcome, see Priest & Klein, *supra*, at 35-37 (concluding from survey results that in non-jury cases parties only push disputes to trial when probability of plaintiff or defendant victory is roughly equal), and hence are most likely to test the outer boundaries of eminent domain. Accordingly, if these decisions confirm the proposed economic models, surveying the underlying mass of uncontested cases (both those in which the government uses eminent domain and those in which it uses the market) would undoubtedly confirm them to an even greater degree.

A second problem with reported appellate decisions concerns the validity of the data they contain. As every litigator knows, an appellate opinion's statement of facts reflects the "real" facts of a controversy with varying degrees of accuracy. The court culls its statement of facts from the parties' briefs, which inevitably favor one outcome or the other, and from the trial record, which is distorted by an adversarial system operating under restrictive rules of evidence. Moreover, the evidence of record is amassed with an eye toward the applicable legal doctrine, which focuses on ends rather than means. As a result, information often significant to the economic model never enters the record. That appellate judges who render the decision may not actually write the opinion aggravates the problem. If opinion writing is delegated to someone not privy to the decisionmaking process, such as a law clerk, the factors the judge found dispositive may not find their way into the opinion. An inevitable element of uncertainty thus attaches to any conclusion about whether the outcomes of reported appellate decisions confirm or do not confirm the model.

¹⁰⁶ Frank Michelman has suggested that positive economic analysis of law should work as well with constitutional law as with private law. See Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431 (1980).

model, I surveyed all reported appellate cases decided between *Berman v. Parker*¹⁰⁷ and January 1, 1986, that involved a contested public use question. The primary source of the case list was a WESTLAW search for all state and federal decisions indexed under the appropriate key numbers for "public use."¹⁰⁸ The original search revealed 710 state decisions and 85 federal decisions, for a total of 795 cases.¹⁰⁹ Of these, I excluded those that were improperly indexed. To further limit the sample's size and ensure reasonably well-developed factual records, I also excluded cases in which the parties did not actively contest the public use issue (such as where the index entry was to dictum), or where the court rendered an advisory opinion at the legislature's request. In addition, I excluded cases decided by trial courts, again partly to minimize the sample's size, but also on the assumption that single-judge decisions would be more idiosyncratic than decisions by (typically) a three-judge appellate panel. After these deletions, I added to the sample decisions that the search missed but that came to light through decisions cited in the indexed decisions or other sources. The net result: a sample of 291 state and 17 federal appellate decisions, or a total sample of 308 cases.¹¹⁰

Berman served as the survey's starting point for two reasons. Again, one was manageability. Second, such an approach enabled me to review the state and lower federal courts' acceptance of *Berman's* deferential approach to legislative public use determinations. *Berman* dealt with the taking clause of the fifth amendment, and thus is not binding on state courts interpreting their own constitutions. Nevertheless, the decision is widely regarded as an important watershed, with one commentator suggesting that it "prescribes a relationship between court and legislature that state courts may consider persuasive."¹¹¹

Before discussing specifics, a few general observations about the survey are in order. First, virtually all the cases involved acquisitions of interests in land—either fees simple or easements. Other than *Oakland Raiders*, only four cases challenged the use of eminent domain to acquire interests in personal property: one involved condemnation of the hunting rights of members of a duck hunting club

¹⁰⁷ 348 U.S. 26 (1954).

¹⁰⁸ Specifically, the search included the Eminent Domain (numerical equivalent 148) key numbers 12 to 52 and 61 to 62, although not all states use all of these numbers.

¹⁰⁹ The initial search located 1036 (ALLSTATES) cases and 147 (ALLFEDS) cases. The same search with the qualifier "not (same sentence) public (within 3 words of) use, benefit, or purpose" narrowed the field to 710 (ALLSTATES) and 85 (ALLFEDS).

¹¹⁰ An appendix listing the decisions is on file at the *Cornell Law Review*.

¹¹¹ Note, *supra* note 30, at 417.

in conjunction with the expansion of a wildlife refuge,¹¹² two involved condemnation of the operating certificates of private bus companies being taken over by public transit systems,¹¹³ and one involved a government taking of trade secrets in the course of a pesticide registration.¹¹⁴ That eminent domain is almost exclusively confined to real property markets is not surprising, because thick markets usually exist for other forms of property such as natural resources, consumer goods, securities, and the like. The principal exceptions may be intellectual property rights such as patents and copyrights. But even here devices—for example, compulsory licensing decrees, themselves a kind of liability rule—may obviate the need for eminent domain.

Second, of the 308 opinions in the sample, 261, or 84.7%, held that the proposed taking served a public use; conversely, 47, or 15.3%, held that it did not. Given *Berman's* and *Midkiff's* assertion that a legislative public use determination is virtually dispositive of the issue, the relatively high number of cases finding no public use is somewhat surprising. The apparent anomaly disappears, however, once we separate federal decisions from state decisions. Although the survey contained only 17 federal cases, each upheld a legislative public use determination, suggesting that lower federal courts have been faithful to *Berman's* deferential standard of review. State courts, on the other hand, seem more willing to depart from *Berman's* virtual abandonment of judicial review. Looking at the state appellate decisions alone, we find that 16.2%, roughly one in six, held that a proposed taking did not serve a public use.¹¹⁵

Third, the survey failed to reveal any clear regional patterns. The 47 cases holding that a taking did not serve a public use are spread fairly evenly from across the country. Washington had four such decisions; Arkansas, Florida, Indiana, Montana, and South Carolina each had three; and eight states (California, Kentucky, Maine, Nebraska, North Carolina, Pennsylvania, Texas, and Virginia) had two, with the remainder widely scattered. Perhaps the only signifi-

¹¹² *Swan Lake Hunting Club v. United States*, 381 F.2d 238 (5th Cir. 1967) (held public use).

¹¹³ *New York State School Bus Operators Ass'n v. County of Nassau*, 39 N.Y.2d 638, 350 N.E.2d 593, 385 N.Y.S.2d 263 (1976) (held public use); *Fifth Ave. Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342, 183 N.E.2d 684, 229 N.Y.S.2d 400 (1962) (same).

¹¹⁴ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (held public use).

¹¹⁵ Indeed, of the state appellate decisions surveyed, only 15.5% even cited *Berman*. Moreover, when state courts did cite *Berman*, they typically did so for the proposition that urban renewal projects are a public use, rather than for *Berman's* statement of the applicable standard of review. Although one cannot yet tell what impact *Midkiff* will have on state courts, the decisions rendered since *Midkiff* do not reveal any greater proclivity to cite that case than to cite *Berman*. Of the 24 cases in the survey decided since *Midkiff*, only three (12.5%) cite it.

cant point about geographic distribution is that several of the large industrial states (New York, New Jersey, Ohio, Michigan, and Illinois), where one would expect a large number of condemnations, had no cases holding that a taking was not a public use during the test period.

Finally, the survey did disclose a clear—and surprising—temporal pattern. When we divide the survey cases into five-year periods, we find that the total number of public use cases is fairly constant, ranging from 42 to 61 cases in each period from 1954-1985. But the percentage of cases holding that a taking does not serve a public use generally increases throughout the 31-year period. The percentages are as follows: 1954-1960, 11.8%; 1961-1965, 12.5%; 1966-1970, 13.1%; 1971-1975, 13.7%; 1976-1980, 21.4%; and 1981-1985, 20.4%.¹¹⁶ These figures suggest that, most commentary notwithstanding,¹¹⁷ judicial enforcement of the public use requirement is not a thing of the past. On the contrary, it is generally on the rise.

B. Testing the Basic Model

The survey revealed that contested public use cases tend to fall into certain recurrent categories. Significantly, each category reflects what I have termed a thin market situation: the condemnor would be susceptible to a seller's rent-seeking behavior if an open market transaction were attempted.¹¹⁸ After the cases revealed these recurrent categories, I reexamined the cases labeling each as either "clearly" falling into one of the categories or "arguably" falling into one of the categories.¹¹⁹ Table 1 summarizes the results.

1. *Assembly*

By far the largest category of cases involved projects problem almost always requiring the assembly of a large tract of land or of numerous contiguous easements in land. For reasons previously discussed, the assembly presents the condemnor with a thin

¹¹⁶ The breakdown by decisions is as follows: 1954-1960, 6 of 51 decisions concluded no public use; 1961-1965, 7 of 56; 1966-1970, 8 of 61; 1971-1975, 6 of 44; 1976-1980, 9 of 42; and 1981-1985, 11 of 54.

¹¹⁷ See, e.g., Stoebeuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 597 (1972); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

¹¹⁸ In fact, in a great many cases a negotiated sale had been attempted, resulting in resort to eminent domain only when strategic bargaining occurred.

¹¹⁹ The "arguable" cases were cases that could have fallen into more than one of the categories, not cases that involved no rent-seeking potential at all.

TABLE 1
CATEGORIZATION OF CONTESTED PUBLIC USE CASES

	<u>Clearly</u>	<u>Arguably</u>	<u>Total</u>	<u>% Total Holding Public Use</u>
Assembly	143	42	185	90.3
Expanding Existing Facilities	25	16	41	85.3
Landlocked Property	16	25	41	75.6
Unique Property	9	5	14	100.0
Specific Capital	7	7	14	85.7
Thick Market	7	6	13	15.3
Total	207	101	308	84.7

market.¹²⁰ Of the 207 "clearly" classifiable cases, 143, or 69.0%, involved assembly; of the total sample, 185, or 60.1%, at least "arguably" involved assembly. These percentages almost certainly underrepresent the relative frequency with which an assembly problem triggers the exercise of eminent domain. Because most projects requiring assembly involve well established public uses such as highways, railroads, and utility lines, they are probably not contested as often as less traditional uses of eminent domain.

Eminent domain is used to overcome a broad range of assembly problems. Most common among the contested cases were utility easements, urban renewal projects, and dam sites. Some of the more unusual examples of assembly included a site for a Sears, Roebuck department store,¹²¹ acquisition of a scenic easement along a highway,¹²² and an effort to straighten out jigsaw-like lot lines in Guam.¹²³

2. *Expanding Existing Facilities*

A second category of contested cases involved efforts to expand existing facilities. In a typical expansion case the condemnor or the beneficiary of the condemnation has invested capital to improve a particular piece of property, only to find later that the resulting facility is too small for his needs. The only way to expand is to acquire additional land. If the only land feasible for expansion is owned by one seller, then the condemnor faces a thin market. Of the clearly classifiable cases, 25, or 12.1%, involved expansion of existing facil-

¹²⁰ See *supra* notes 48-54 and accompanying text.

¹²¹ *Asch v. Housing & Redev. Auth. of St. Paul*, 256 Minn. 146, 97 N.W.2d 656 (1959).

¹²² *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

¹²³ *Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969).

ities; of the total sample of cases, 41, or 13.3%, arguably involved expansion.

During the 1954-1985 period, one of the most frequently litigated expansion issues involved parking lots. As automobile travel became more popular in the postwar era, government buildings,¹²⁴ department stores,¹²⁵ and sports facilities¹²⁶ found their parking areas inadequate. Frequently, the only way to acquire needed parking space was to condemn an adjacent lot or structure. Other expansion cases involved airports and airport runways,¹²⁷ public utilities,¹²⁸ wildlife refuges,¹²⁹ and public recreation areas.¹³⁰

3. *Landlocked Property*

A third category of cases, encountered with virtually the same frequency as the expansion cases, involved rights of access to landlocked property. When someone owns land completely surrounded by another owner's property, or by variously owned parcels where there is only one feasible route of access, the landlocked owner faces a thin market for an access easement to his land.¹³¹ The landlocked property cases thus fit comfortably within the basic model. Of the clearly classifiable cases, 16, or 7.7%, involved landlocked property; of the total sample of cases, 41, or 13.3%, arguably involved landlocked property.

Access roads presented the most frequently litigated problem

¹²⁴ *County of Essex v. Hindenlang*, 35 N.J. Super. 479, 114 A.2d 461 (App. Div. 1955), *appeal dismissed*, 24 N.J. 517, 132 A.2d 807 (1957).

¹²⁵ *Seligsohn v. Philadelphia Parking Auth.*, 412 Pa. 372, 194 A.2d 606 (1963), *cert. denied*, 376 U.S. 952 (1964).

¹²⁶ *Superior Laundry & Towel Supply Co. v. City of Cincinnati*, 11 Ohio App. 2d 352, 168 N.E.2d 447, *appeal dismissed*, 170 Ohio St. 191, 163 N.E.2d 164 (1959).

¹²⁷ *City of New Ulm v. Schultz*, 356 N.W.2d 846 (Minn. Ct. App. 1984) (clearance easement); *Oklahoma City v. Shadid*, 439 P.2d 190 (Okla. 1966) (sound buffer zone), *cert. denied*, 386 U.S. 1034 (1967).

¹²⁸ *Citizens Utils. Water Co. v. Superior Court*, 108 Ariz. 296, 497 P.2d 55, *cert. denied*, 409 U.S. 1022 (1972); *State ex rel. Clothier v. Yeaman*, 465 S.W.2d 632 (Mo. 1971).

¹²⁹ *Arkansas State Game & Fish Comm'n v. Gill*, 260 Ark. 140, 538 S.W.2d 32 (1976); *Ottawa Hunting Ass'n v. State*, 178 Kan. 460, 289 P.2d 754 (1955), *appeal dismissed*, 352 U.S. 804 (1956).

¹³⁰ *State v. Williams & Hessee*, 53 N.C. App. 674, 281 S.E.2d 721 (1981); *Johnson City v. Cloninger*, 213 Tenn. 71, 372 S.W.2d 281 (1963).

¹³¹ In many cases a landlocked owner can obtain a right of way under the common law doctrines of easement by necessity or implication, *see, e.g.*, *Van Sandt v. Royster*, 148 Kan. 495, 83 P.2d 698 (1938), or irrevocable license by estoppel, *see, e.g.*, *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976). But easements by necessity or implication generally require that the dominant estate has been carved out of the servient estate, and an irrevocable license by estoppel requires prior permission by the servient estate's owner. If these requirements (or other limiting conditions) are not satisfied, then the common law affords no remedy, leaving the landlocked owner with only a thin market transaction or eminent domain as options.

in this area, followed by condemnations of utility easements to landlocked property. One unusual case involved construction of a road to a landlocked bog used for duck hunting.¹³²

4. *Unique Property*

The fourth most frequently litigated issue involved property uniquely suited to the condemnor's enterprise. A good example is *Williams v. Hyrum Gibbons & Sons Co.*¹³³ In that case, the company needed to acquire an elevated parcel of city land unobstructed by surrounding buildings to operate a radio station for mobile telephone and radio paging services. Because such property was in short supply, the owner of a parcel having these characteristics could extract economic rents from the buyer. Of the clearly classifiable cases, 9, or 4.3%, involved unique property; of the total sample of cases, 14, or 4.5%, arguably fell into this category.

5. *Specific Capital*

The fifth category, appearing with about the same frequency as the fourth, involved the condemnor who has committed specific capital which would be lost or reduced in value if he did not acquire an additional interest in land. The specific capital problem can arise in a variety of ways: perhaps a condemnor improved land belonging to someone else,¹³⁴ made improvements before discovering a defect in his chain of title,¹³⁵ or made improvements under a lease which the landlord refuses to renew.¹³⁶ Because of the condemnor's commitment of specific capital, the holder of the rights to the additional land can extract economic rents (perhaps, more accurately, "quasi rents"¹³⁷) as a condition of sale. Consequently, the condemnor faces a thin market. Of the clearly classifiable cases, 7, or 3.4%, involved the commitment of specific capital; of the total sample of cases, 14, or 4.5%, arguably involved specific capital.

6. *Condemnations in Thick Markets*

Not all contested cases involved thin markets; several opinions

¹³² *Branch v. Oconto County*, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

¹³³ 602 P.2d 684 (Utah 1979).

¹³⁴ *City of Alabaster v. Housing Auth.*, 451 So. 2d 336 (Ala. Civ. App. 1984) (sewer system hooked to city system by crossing Housing Authority's property); *Kennedy v. Yates Petroleum Corp.*, 101 N.M. 268, 681 P.2d 53 (1984) (gas pipeline buried across ranch property).

¹³⁵ *Waynesburg S.R.R. v. Lemley*, 154 W. Va. 728, 178 S.E.2d 833 (1970) (railroad tracks built over cemetery access easement).

¹³⁶ *State ex rel. Devonshire v. Superior Court*, 70 Wash. 2d 630, 424 P.2d 913 (1967); see also *infra* notes 171-72 & 179 and accompanying text (discussing lease renewal problem in *Midkiff*).

¹³⁷ See Klein, Crawford & Alchian, *supra* note 53, at 298.

reflected the exercise of eminent domain where a market transaction should have been possible at or near the property's opportunity cost. Of the clearly classifiable cases in the sample, however, only 7, or 3.4%, involved a thick market; of the total sample of cases, 13, or 4.2%, arguably involved a thick market. For example, in *O'Neil v. Board of County Commissioners*,¹³⁸ a landowner sought to condemn an access road to his property, but could have negotiated with any of six different landowners to obtain the access. Given my definition of landlocked property—where one other owner completely surrounds the condemnor or where the condemnor has but one feasible access route—this is necessarily a thick market case. Indeed, one would think that the condemnor here could have played off one owner against the other to obtain a right of way at or near its opportunity cost.

Other cases that fail to qualify under my landlocked property designation, however, clearly involved oligopoly-like circumstances, for example where only two or three alternative routes exist.¹³⁹ These situations could conceivably breed rent-seeking behavior. This may explain why virtually all the contested thick market cases involved landlocked property where the condemnor was surrounded by more than one landowner. Had I adopted a broader definition of landlocked property, the number of thick market cases would be even smaller than it is.

7. Summary

Recapitulating the foregoing six categories, we find that of the clearly classifiable cases, 200, or 96.6%, involved some sort of thin market; of the total sample of cases, 295, or 95.8%, arguably involved a thin market. These figures forcefully confirm the basic economic model. Regardless of courts' conclusions about whether a taking is for a public use, condemnors rarely use the power of eminent domain unless it is necessary to overcome barriers to voluntary market exchange—monopoly pricing or strategic bargaining. Thus, if we adhere to the basic model and ignore the refined model's three qualifications, eminent domain is in effect self-regulating.

The distinction between thin and thick markets is also useful in predicting appellate definitions of public use. In the five thin market categories, courts held that a taking serves a public use at a fairly consistent rate, ranging from 75.6% (landlocked property) to 100% (unique property), with the largest single category (assembly) com-

¹³⁸ 3 Ohio St. 2d 53, 209 N.E.2d 393 (1965).

¹³⁹ See, e.g., *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982); *McKenney v. Anselmo*, 91 Idaho 118, 416 P.2d 509 (1966); *Phillips v. Naumann*, 154 Tex. 153, 275 S.W.2d 464 (1955).

ing in at 90.3%. In the few thick market cases (13 in total), courts found a public use only 15.3% of the time. These numbers suggest that the basic model at least partially explains the pattern of decisions reached by courts in deciding what constitutes a public use.

C. Testing the Refined Model

Can the refined model do even better? To find out, I adopted a two-part strategy. First, I tried to identify those cases involving one of the three conditions that the refined model suggests justify heightened scrutiny: high subjective value, potential for secondary rent seeking, and intentional or negligent market bypass. I then compared the relative frequency of nonpublic use holdings in these cases with the average frequency of 15.3%, and sought to discover any relationship between the size of the surplus and the public use determination. Second, I focused on the 47 decisions holding that a taking was not a public use to determine how often the three limiting conditions appeared in these cases.

Unfortunately, the data in the appellate opinions did not allow me to make these estimations in a very precise manner. First, of the three limiting conditions, only the second, potential for secondary rent seeking, clearly emerged from the statements of facts contained in most of the opinions. Appellate judges nearly always recite facts indicating whether a taking transfers property to a few previously identified parties. However, the other two factors, high subjective value and market bypass, could not be established from the statements of facts in most cases. Consequently, I did not obtain a satisfactory case sample presenting the first and third factors.

Second, even in those cases that did clearly suggest the presence of one of the three limiting conditions, the courts only occasionally supplied enough information to estimate the size of the taking's surplus. In order to make even a rough guess about the surplus's size it is necessary to have some information regarding the property's use before and after the taking. Surprisingly, the opinions often failed to report even this seemingly elementary data. Indeed, the opinions in the survey were commonly short on facts and long on legal boiler plate.

Given these two shortcomings, I could not rigorously assess the accuracy of the refined model. Nevertheless, the survey did yield some suggestive results.

1. *Cases Involving Limiting Conditions*

In my first attempt to test the refined model, I examined the survey's 308 cases to identify those that presented one or more of

the three conditions justifying strict scrutiny. Table 2 summarizes the results.

TABLE 2

	No. Cases	No Public Use	% Conforming to High/Low Surplus Distinction
High Subjective Loss	69	10.1%	64.5%
Secondary Rent Seeking	180	16.7%	86.1%
Market Bypass	12	30.8%	84.6%

a. *High Subjective Loss.* Few cases in the survey provided enough information to determine whether the condemnee attached high subjective value to his holdings. Consequently, to test this limiting condition I devised a proxy: the existence of a functioning structure on the condemned property. Although this proxy is undoubtedly both overinclusive and underinclusive, cases involving functioning structures seem most likely to involve either sentimental attachment, special improvements or modifications, or relocation costs—any one of which either alone or in combination would generate uncompensated subjective losses.

The survey disclosed 69 cases in which the condemned property included a functioning residence or business. Courts held that the taking did not serve a public use in only 10.1% of these cases. Surprisingly, this figure indicates a *greater* propensity to uphold takings involving high subjective losses—hardly an auspicious beginning for the refined model. Moreover, when I sought to subdivide the 69 cases according to the size of the surplus generated by the taking, I found that the majority of the opinions contained insufficient information to permit such a distinction. Indeed, only 31 cases contained enough information to make even a crude guess about the size of the taking's surplus. Of these 31 cases, 20, or 64.5%, conformed to the refined model's predicted outcome. That is, in 64.5% of these cases, where the reported facts suggested a large surplus relative to the subjective loss, the court found a public use. This provides some support for the contention that judges engage in an *ex post* comparison of the size of the surplus and the uncompensated subjective loss to determine whether a taking serves a public use.

Two cases involving port authorities illustrate implicit judicial balancing of surplus and subjective value. *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*¹⁴⁰ concerned the condemnation of a

¹⁴⁰ 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

small business to assemble land needed for construction of the World Trade Center in New York City. Regardless of the property's subjective value, the added value from putting together a 13-block area in downtown Manhattan for commercial development surely dwarfed it, at least in monetary terms. Although the court placed great weight on the positive externalities that would be produced by the Trade Center in finding that the taking served a public use, under the refined model it could have sustained the taking on the basis of the increased land value alone. In contrast, *Port Authority of St. Paul v. Groppoli*¹⁴¹ involved a proposal to condemn a beer distributor's warehouse and transfer it "as is" to another company. The other company did not contemplate a change in the use or operation of the property; accordingly, it is unclear what surplus, if any, would be generated by the taking. Moreover, the court could point to no positive externalities that would be generated by the project, because the plan included no structural improvements or alterations. On the other hand, the beer distributor would almost surely sustain some subjective losses, if only relocation costs. The court held the taking did not serve a public use.

b. *Secondary Rent Seeking*. The survey disclosed 180 cases where the surplus generated by the exercise of eminent domain would go to only one or a few previously identified persons. These cases presumably involved a high potential for secondary rent seeking. Of these, 16.7% held that the taking did not serve a public use—a slightly higher percentage than on average.

Of these 180 cases, 122 provided sufficient facts to permit a rough estimate of the surplus. Of these 122 cases, 86.1% conformed to the refined model's predicted outcome. That is, in 86.1% of these cases, courts sustained the taking if the surplus was high, but denied the taking if the surplus was small. These findings provide substantial support for the refined model.

Two North Carolina decisions involving construction of cul de sacs illustrate the tradeoff between ex ante and ex post considerations where there is a potential for secondary rent seeking. In *State Highway Commission v. Batts*,¹⁴² three or four related families sought construction of a cul de sac, although each already had access to a nearby highway via an old farm road. The court noted that the cul de sac's benefit ran to only a few persons, and that any public use or benefit "would be merely incidental and entirely conjectural."¹⁴³ The court thus concluded that the taking did not serve a public use.

¹⁴¹ 295 Minn. 1, 202 N.W.2d 371 (1972).

¹⁴² 265 N.C. 346, 144 S.E.2d 126 (1965).

¹⁴³ *Id.* at 361, 144 S.E.2d at 137.

In *State Highway Commission v. Thornton*,¹⁴⁴ decided just two years later, the cul de sac served two houses and a modern trucking terminal that cost \$1,750,000 and employed 700 persons. Although testimony alleged that a narrow private road already provided access to the houses and the terminal property, the terminal's optimal use depended upon construction of the new cul de sac. The court distinguished *Batts*, noting that in *Batts* the taking benefitted only one family, but that here the road would serve over 700 people.¹⁴⁵ The court thus found that the taking served a public use. Note that both *Batts* and *Thornton* involved the potential for secondary rent seeking. However, the surplus generated by the taking in *Batts* was probably rather small, whereas in *Thornton* it was clearly very large.

c. *Market Bypass*. Market bypass proved the most difficult of the three factors to test. I was unable to devise an effective surrogate for bypass, and had to resort instead to examining each case to identify those in which the condemnor had bypassed thick market exchange. Because the reported cases were more than usually inadequate in reporting facts relevant to market bypass, only 13 cases emerged that I can confidently say fit the bypass pattern. Of these 13, 30.8% concluded that the taking did not constitute a public use. When the surplus's size is taken into account, 84.6% of the cases conformed to the refined model's predicted pattern: courts declared high surplus takings valid public uses, and declared low surplus takings invalid.

Two New Mexico cases show how the surplus's size interacts with other considerations to influence courts' decisions in the market bypass context. In *Kaiser Steel Corp. v. W.S. Ranch Co.*,¹⁴⁶ Kaiser owned land completely landlocked by Ranch and also certain water rights in a river flowing through the Ranch property. After Kaiser began developing a coal mine on its property, it intentionally trespassed on the Ranch property to build a water pipeline from the river to the mine. When Ranch sued for the pipeline's removal, Kaiser, relying on a New Mexico statute authorizing the use of eminent domain for the "conveyance of water for beneficial uses,"¹⁴⁷ urged the court to limit Ranch to an action for inverse condemnation, in effect sanctioning the trespass as a private taking. The court did so, holding that under New Mexico law Kaiser could unilaterally appropriate Ranch's property without prior resort to judicial process. From an ex ante perspective, allowing Kaiser to use eminent domain to extricate itself from a thin market created by its decision to de-

¹⁴⁴ 271 N.C. 227, 156 S.E.2d 248 (1967).

¹⁴⁵ *Id.* at 244, 156 S.E.2d at 261.

¹⁴⁶ 81 N.M. 414, 467 P.2d 986 (1970).

¹⁴⁷ N.M. STAT. ANN. § 72-1-5 (Supp. 1985).

velop the mine seems to encourage self-help rather than market exchange as a means of acquiring scarce resources.¹⁴⁸ But from an ex post perspective, allowing Kaiser to link its mine and its water rights obviously produces a substantial monetary surplus.

Similarly, in *Kennedy v. Yates Petroleum Corp.*,¹⁴⁹ a landowner discovered an unauthorized oil pipeline crossing his property and sued to have it removed. The pipeline company alleged that it had purchased a right of way from the prior owners, but admitted that it had not properly recorded the agreement; the company had thus failed to complete a valid market transaction. The company argued that because a statute authorized it to condemn a right of way in these circumstances, the court should, as in *Kaiser Steel*, limit the landowner to an action for damages. Because the pipeline company probably could have constructed another pipeline around the property, albeit at some expense, the surplus resulting from eminent domain in this instance was probably not as great as in *Kaiser Steel*. Although not ruling conclusively that the pipeline did not serve a public use, the court distinguished *Kaiser Steel* and remanded for further proceedings, perhaps to ensure that more care be taken in the future to pursue market exchange when feasible.¹⁵⁰

2. Cases Holding No Public Use

I also reviewed the 47 cases in the survey holding that a taking was not a public use to determine how many involved any of the refined model's limiting conditions. Thirty-two of these cases, or 68.1%, presented one or more of the three conditions, a figure virtually identical to the frequency with which the characteristics appeared in the survey generally.¹⁵¹ Thus, at first glance, this suggests the refined model has no predictive value for determining when courts will find a public use. A closer examination of these cases, however, suggests that factors such as high subjective losses and secondary rent seeking may affect more decisions than at first appears.

Several of the 47 cases that did not satisfy my high subjective loss proxy—condemnation of a functioning structure—might nevertheless be explained as reflecting a judicial intuition that the taking's

¹⁴⁸ The case is complicated by the fact that Kaiser probably could have used eminent domain in the first place to lay the pipeline had it instituted the proper proceeding. See *Kaiser Steel*, 81 N.M. at 422, 467 P.2d at 994.

¹⁴⁹ 101 N.M. 268, 681 P.2d 53 (1984).

¹⁵⁰ Alternatively, the case can be read as enforcing the "due process" tax associated with eminent domain. From this perspective, Yates could not use eminent domain because it had not previously incurred the costs of obtaining official authorization.

¹⁵¹ Out of the total sample of 308 cases, 216, or 70.1%, involved at least one of the three conditions.

uncompensated losses did not justify the purported benefits. For example, in *Florida Power & Light Co. v. Berman*,¹⁵² a power company wanted to condemn a 15-foot easement to construct a transmission line along a road canopied by trees and other ecologically significant vegetation. The court quoted the trial judge to the effect that the trees were "very valuable to at least three of the families that live along this road."¹⁵³ Because the project would have required cutting back the trees, it would undoubtedly have involved some subjective loss to these families. Moreover, the opinion suggests this particular condemnation would have small marginal benefits: the power company had five other routes available, including one accompanied by an offer of donation. The court held that the utility had abused its discretion by selecting this particular route for condemnation.

Similarly, in *Merrill v. City of Manchester*,¹⁵⁴ the city sought to condemn a 23 acre family woodlot for use as an industrial park. Although the woodlot contained no structures, it had been in the condemnee's family since 1889 and was obviously the subject of a strong subjective attachment.¹⁵⁵ In assessing the public use challenge, the court weighed the proposed project's public benefit against the social costs of losing the property in its present form. The court stated that "[i]f the social costs exceed the probable benefits, then the project cannot be said to be built for a public use."¹⁵⁶ Relying on state legislation giving woodlots favorable tax treatment, the court concluded that the social costs of converting the woodlot to an industrial park would be high. The court compared these costs with the industrial park's expected public benefit, which the court found would be largely "incidental."¹⁵⁷ The taking was declared unconstitutional.

Other cases holding that a taking is not a public use raise concerns about secondary rent seeking, even though the proposed takings would benefit more than just a few people. For example, in *Young v. Wiggins*,¹⁵⁸ two enterprising landowners in an area with development potential conceived a plan to dam a creek, create a large lake, and then sell off lots for homes. Of some 20 property owners affected by the plan, two refused to sell. The enterprisers thereupon secured legislation creating a new entity called the "Ebenezer

¹⁵² 429 So. 2d 79 (Fla. Dist. Ct. App.), *review denied*, 436 So. 2d 98 (Fla. 1983).

¹⁵³ 429 So. 2d at 80.

¹⁵⁴ 127 N.H. 234, 499 A.2d 216 (1985).

¹⁵⁵ See Ober, *Merrill vs. Manchester: A Landowner Battles the City for His Family Woodlot*, *FOREST NOTES*, Fall 1985, at 9.

¹⁵⁶ *Merrill*, 127 N.H. at 237, 499 A.2d at 217.

¹⁵⁷ *Id.*, 499 A.2d at 218.

¹⁵⁸ 240 S.C. 426, 126 S.E.2d 360 (1962).

Community Watershed District" with the power of eminent domain. The Watershed District duly instituted condemnation proceedings against the holdouts' property. In the ensuing litigation, the South Carolina Supreme Court saw through the pretextual justifications for the project and focused upon the developers' rent-seeking motives. As the court put it, "The proposed lake was conceived as a private project, to be accomplished by private treaty among neighboring landowners, for their private benefit."¹⁵⁹

Ultimately, if we disregard the survey's narrow definitions of high subjective loss and secondary rent seeking and include all cases where a close examination of the facts suggests high subjective loss or a potential for secondary rent seeking, 38, or 80.9%, of the 47 "no public use" cases involve one of the three limiting conditions. Furthermore, no other common theme better explains the results in these cases. In particular, the ends sought in the "no public use" cases do not seem any less "conventional," or public goods oriented, than the goals of takings in cases where courts found a public use. The cases holding that a taking did not serve a public use involve natural gas pipelines,¹⁶⁰ drainage ditches,¹⁶¹ access roads,¹⁶² industrial parks,¹⁶³ wildlife refuges,¹⁶⁴ and urban renewal and redevelopment¹⁶⁵—the same sorts of issues one finds in the cases holding that a taking did serve a public use. In fact, the cases holding that a taking lacked a public use contain nothing as exotic as the acquisition of a professional football franchise, upheld in *Oakland Raiders*, or the land reform scheme sustained in *Midkiff*.

3. Summary

In the end, the survey provides a degree of support for the refined model, although it does not support the refined model as much as the basic model. The data generally suggest that state courts are fairly sensitive to an ex post consideration of a taking's surplus and will more readily sustain a taking when the added wealth to society appears large. Thus, when we factor in the size of a taking's surplus, the refined model is reasonably predictive. However, it is less clear that courts are concerned with uncompensated subjective loss, or with the ex ante incentive effects of secondary

¹⁵⁹ *Id.* at 433, 126 S.E.2d at 364.

¹⁶⁰ *E.g.*, *Mid-America Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 114 N.W.2d 622 (1962).

¹⁶¹ *E.g.*, *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975).

¹⁶² *E.g.*, *Continental Enters., Inc. v. Cain*, 180 Ind. App. 106, 387 N.E.2d 86 (1979).

¹⁶³ *E.g.*, *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959).

¹⁶⁴ *E.g.*, *Arkansas State Game & Fish Comm'n v. Gill*, 260 Ark. 140, 538 S.W.2d 32 (1976).

¹⁶⁵ *E.g.*, *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956).

rent seeking or market bypass. Some evidence suggests that these factors influence courts, but the impact of these factors, by themselves, seems minimal and inconsistent.

Perhaps more striking is that the opinions contain so little factual information relevant to the refined model. This must count against the model. One would think that if concerns like uncompensated subjective value or market bypass influenced courts, they would at least mention facts that would tend to support or refute the presence of these elements in any given case.¹⁶⁶ Thus, if the refined model is at work, it operates at a fairly subconscious level.

CONCLUSION

Explaining public use in terms of choice of means seems moderately successful, at least as a positive model for predicting the outcome of contested public use cases. In concluding, I consider how courts might apply this perspective as a normative standard. To do so, I return to the three cases that introduced this study: *Poletown*, *Oakland Raiders*, and *Midkiff*.¹⁶⁷

The basic model posits that eminent domain seeks to overcome thin market barriers to negotiated exchange. The basic model also posits that beyond assuring proper procedures and just compensation, courts need not intervene to limit the exercise of eminent domain, because the higher administrative costs associated with eminent domain render it essentially self-regulating. Nevertheless, it is instructive to ask how the three cases might have come out if the deciding courts had explicitly employed the thin market/thick market distinction in determining the limits of eminent domain.

Poletown presents a straightforward assembly problem. Hence, it easily conforms to the basic model. Because of holdouts, General Motors would have encountered tremendous difficulties had it tried to acquire a 465-acre tract in the middle of a major urban area by voluntary negotiation. Without eminent domain, GM would almost certainly have built the plant elsewhere, or at least not built it on the same scale.

Oakland Raiders presents a unique property case, and is thus also consistent with the basic model. The number of National Football League franchises is artificially restricted: the league, which controls the formation of new franchises,¹⁶⁸ has created only 28 to date, and seems reluctant to add new ones. Realistically, Oakland had

¹⁶⁶ See *supra* note 105.

¹⁶⁷ See *supra* notes 3-15 and accompanying text.

¹⁶⁸ See Constitution & By-Laws for the National Football League for 1975, 3.1-.3, quoted in *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 562 n.13 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

only one source for an NFL lessee for its stadium—the Raiders—making the case a classic example of bilateral monopoly.¹⁶⁹ Moreover, the Raiders had been based in Oakland for approximately 20 years, and the residents of the area had developed a strong identification with the team—thus entailing a kind of reverse subjective loss when the Raiders sought to leave.

Midkiff appears at first blush to be another unique property case; after all, the Supreme Court's opinion emphasized that Hawaii's supply of residential property had been "artificially" restricted, and suggested that the price of single family homes had soared beyond the reach of most would-be purchasers. However, the Court's figures suggest that the residential home market in Hawaii is neither a monopoly nor a cartel, and is thus not subject to noncompetitive pricing.¹⁷⁰ In all probability, the litigants and the Court mistakenly equated a "housing shortage" caused by high demand with oligopolistic pricing by sellers. Moreover, regardless of whether high demand or oligopoly caused Hawaii's high housing prices, the eminent domain solution would not provide the renters with any significant measure of relief. The opportunity cost compensation formula requires that the renters pay the same high prices in just compensation that they would pay in a market transaction. Of course, if oligopolistic pricing was the problem, then over the long run the use of eminent domain might sufficiently atomize the market that prices would come down. But if high prices in the current market are the problem, renters would have no incentive to use eminent domain, because the measure of compensation—fair market value—would also reflect these high prices.

One should always pause before attributing a seemingly futile purpose to a statute. Perhaps a better explanation for the Land Reform Act is that it addressed a specific capital problem. From this perspective, the refusal of Hawaii's land magnates to sell their land in fee simple did not motivate the statute; rather, it was motivated by their transfer of the land through long-term ground leases that were either coming due or up for renegotiation.¹⁷¹ The expiration or renegotiation of the ground leases rendered tenants with substantial capital investments in the property vulnerable to rent-seeking behavior by landlords. A landlord could charge a lease-renewal

¹⁶⁹ The United States Football League had not been organized at the time of the suit, and it appears that in terms of its ability to generate revenue a USFL franchise would have been a poor substitute in any event. See N.Y. Times, Aug. 5, 1986, at 1, col. 1 (USFL owners vote to call off 1986 season after receiving three dollars in damages after lengthy antitrust suit against National Football League).

¹⁷⁰ See *supra* note 13.

¹⁷¹ See Note, Hawaii Housing Authority v. Midkiff: *A Wolf in Sheep's' [sic] Clothing?*, 12 W. ST. U.L. REV. 325, 326-27 (1984).

price that included not only the unimproved land's opportunity cost, but also the value of improvements previously paid for by the tenant. The Land Reform Act would have represented a rational response to this problem. In fact, there is evidence that tension between landlords and tenants over lease renewals was a contributing factor in the statute's enactment.¹⁷²

Thus, under the basic model's thin market/thick market distinction, all three cases present proper occasions to exercise eminent domain. True, an opinion sustaining these takings under the basic model would be drafted quite differently from those the courts actually produced. But an opinion written from the basic model's vantage point would at least embody a coherent vision of eminent domain as a means, and would thus possess a degree of intellectual credibility. This is more than can be said for the decisions in *Poletown*, *Oakland Raiders*, and *Midkiff*.

As one might expect, the analysis under the refined model is a good deal more complex. *Poletown* involves both high subjective value and secondary rent seeking. The taking displaced thousands from their homes and businesses and destroyed a community irreplaceable at any cost.¹⁷³ The uncompensated subjective loss was undoubtedly large. Furthermore, the condemnation transferred the property to a single entity, General Motors, and accordingly presented a high potential for secondary rent seeking. Under the refined model, both factors suggest that heightened judicial scrutiny was appropriate.¹⁷⁴

Whether the ex post gains from assembly of the *Poletown* plant site would outweigh the costs in terms of lost subjective value and incentives for future secondary rent seeking is difficult to determine. To measure the surplus generated by the plant one would have to consider enhanced property values created by assembly of the plant site and the plant's positive and negative externalities, such as more or better jobs and additional pollution. One would then have to subtract the subsidies given to GM in the form of tax abatements and below-market prices for retransfer of the real estate. The uncertainties inherent in such an analysis are patent. Nevertheless, a court could perhaps rationally conclude that an accurate accounting would show that the surplus from the taking offsets the plan's uncompensated subjective losses.

When the potential for secondary rent seeking enters the pic-

¹⁷² *Id.*

¹⁷³ See Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

¹⁷⁴ The court in *Poletown* did in fact purport to apply a heightened standard of review. See *Poletown*, 410 Mich. at 634-35, 304 N.W.2d at 459-60.

ture, however, the *Poletown* decision looks increasingly dubious—especially if the grant of eminent domain was just one of many subsidies designed to influence GM's plant location decision.¹⁷⁵ Such subsidies could easily degenerate into bidding wars between states and localities competing for plant sites, bidding wars that might simply cause transfer payments from one class of citizens to another (subsidies have to be paid out of taxes) rather than ensure efficient siting decisions. Only very large ex post gains from plant sites would justify this kind of inducement to rent-seeking behavior. Thus, under the refined model, we can perhaps conclude that *Poletown* was wrongly decided. It must be stressed, however, that all of the evidence demanded by the model is unavailable, and a confident assertion on this score is simply impossible.

Oakland Raiders also seems to involve uncompensated subjective losses and a high potential for secondary rent seeking. Most NFL owners probably view their team as not only a business venture, but as a personal hobby as well. Thus, one can reasonably conclude that Al Davis, owner of the Raiders, would incur uncompensated subjective losses if stripped of his ownership rights in the team. Given that the condemnation also involved players' and coaches' contracts, we should also consider the possibility that the players and coaches attached subjective value to playing for Davis. In addition, *Oakland Raiders* presents an open invitation to secondary rent seeking.¹⁷⁶ A general practice of allowing municipalities to condemn corporate franchises to prevent businesses from relocating elsewhere could easily foster abuses, as municipalities sought to use eminent domain to keep businesses offering high-paying jobs and tax dollars from relocating. The risk of abuse would rise even further if a city could condemn a corporate franchise by simply securing personal jurisdiction over corporate officers or quasi-in-rem jurisdiction over some of its assets.¹⁷⁷ If this were possible, Detroit would not be limited to condemning plant sites to induce GM to remain in the city. It could conceivably condemn some other auto company, Honda of America for example, and simply sell it to the highest bidder that agreed to relocate in Detroit—unless, of course, that company was not condemned by some other city first.¹⁷⁸

¹⁷⁵ See V. Goldberg, *Poletown: Eminent Domain or the Dormant Commerce Clause?* (Apr. 1, 1985) (unpublished manuscript) (on file at *Cornell Law Review*).

¹⁷⁶ To be sure, the facts do not quite match the operational definition of secondary rent seeking cases adopted in Part II. Although it appears that the city contemplated transferring the Raiders to some other private party, no individual transferee had been identified at the time of the taking.

¹⁷⁷ The city of Baltimore's attempt to condemn the Baltimore Colts franchise after it had relocated to Indianapolis illustrates the possibility of such an action. See *supra* note 8.

¹⁷⁸ This suggests that, at a minimum, courts should limit the exercise of eminent

It follows from the foregoing that *Oakland Raiders* should also be subject to heightened scrutiny under the refined model. Here again, we must draw some difficult inferences about the surplus generated by the project to decide whether the taking should survive such scrutiny. Note that the city was seeking to condemn a viable business. If that business can internalize the value of all the benefits it produces, there would be no surplus, because all of the business's value would be included in the price a willing buyer would pay. After paying the required compensation, the city would be no better off than before. If the franchise produces positive externalities, however, then condemning the team and forcing it to stay in Oakland would conceivably generate a surplus.

Although a professional sports franchise may do a fairly good job of capturing the value it produces (fan enthusiasm translates into ticket sales, concession sales, television revenues, and so forth), undoubtedly some externalization exists. If nothing else, the franchise's market value would not reflect increased newspaper sales to sports fans, hotel rentals to teams and media personnel, and so forth. There is also the ineffable element of civic pride that a successful professional sports team offers a town. In the aggregate, the external community benefits probably exceed the subjective loss to the franchise's owners. On the other hand, as with *Poletown*, the surplus would not likely justify the rent seeking that could follow from a general practice of allowing cities to condemn corporate franchises. So, when we add together both the subjective losses and the potential for secondary rent seeking, *Oakland Raiders*, like *Poletown*, was probably wrongly decided under the refined model.

At first blush, *Midkiff* involves none of the refined model's qualifying factors. The gentry of Hawaii may derive a certain psychological benefit from the size of its holdings, but it probably views any particular parcel as fungible wealth. Thus, the condemnees probably cannot claim great uncompensated subjective losses. Moreover, because triggering the takings mechanism required petition by one-half of the renters in a tract, or 25 renters, whichever is less,¹⁷⁹ the Land Reform Act does not satisfy the conditions that suggest a high

domain by some form of "local action" rule, restricting the ability to exercise the power to the jurisdiction which is the situs of the property. See *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521-22 (D.C. Cir. 1984) (citing cases to this effect), *cert. denied*, 470 U.S. 1051 (1985).

¹⁷⁹ *Midkiff*, 467 U.S. at 233. Despite the Hawaii statute's collective action requirements, some 30 tracts were apparently subject to condemnation actions during the first 14 years under the Act, covering over 5,000 individual parcels. Note, *Midkiff v. Tom: The Constitutionality of Hawaii's Land Reform Act*, 6 U. HAW. L. REV. 561, 568 (1984) (citing 1982 annual report of Hawaii Housing Authority).

probability of secondary rent seeking. The benefits of "land reform" will necessarily be spread among a sizeable group of people.

If the earlier speculation about the true purpose of the Act is correct, however, *Midkiff* may involve a market bypass problem. Persons purchasing homes subject to long-term ground leases should be aware of the date the leases are due to expire. Moreover, if the purchaser improves the leased land, he should be aware of the potential for rent-seeking behavior by the landlord when the lease comes up for renewal. Some possible responses to the limited duration of the ground lease would be to insist on a discounted price for improvements (if the improvements have been purchased separately) or a discounted ground rental (if the improvements are to be made by the tenant himself), or to negotiate a lease renewal or renewal option well before the original lease's termination. In other words, when the renter makes his initial commitment of capital, he faces a relatively thick market. Only later, when lease termination is imminent and the renter has invested a great deal in improvements, does he face a thin market. This suggests that the renters in *Midkiff* who sought to condemn their landlord's reversionary interest negligently bypassed opportunities for thick market exchange.

However, two other considerations, both quite speculative, suggest that even if *Midkiff* presents a market bypass situation, that fact perhaps should not invalidate the taking. First, although commercial tenants seem to cope successfully with the problems of long-term lease renewal, the experience may be relatively novel for residential tenants, especially if they have emigrated from parts of the continental United States where such leases are uncommon. Thus, the "negligence" in the *Midkiff* market bypass may not be very great. Second, as in any case involving specific capital in the form of structures, the renter's subjective premium guarantees at least some surplus from condemnation. Taking these factors into consideration, perhaps a more complete account of the facts in *Midkiff* could justify the taking under even the refined model. Here again, however, the reported decision simply does not provide enough information to apply the model with confidence. If the legal system were to adopt the refined model as a normative standard, clearly courts and lawyers would have to develop a different kind of record as a basis for appellate review.

In sum, under the basic model, *Poletown*, *Oakland Raiders*, and *Midkiff* were rightly decided; under the refined model the result is less clear, but possibly two and arguably all three were wrongly decided. The choice of the model thus bears directly upon the degree of deference that courts will give legislative decisions, and accordingly upon the outcome of contested public use cases. How then

should courts decide which model to adopt as an interpretation of the meanings of public use?

I will offer only a few tentative thoughts on this question. The case survey summarized in Part III suggests that federal courts have adopted a highly deferential approach to public use, an approach consistent with the basic model. State courts applying state constitutional provisions, however, present a more mixed picture, with some state courts adopting an interventionist stance consistent with the refined model. Perhaps this dichotomy reflects an appropriate division of authority under our system of constitutional government.

Most of the federal cases in the survey involved fifth amendment challenges to takings by the federal government.¹⁸⁰ As *The Federalist No. 10*¹⁸¹ suggests, it is difficult for a small faction to influence the federal government, given our constitutional separation of powers and the geographical diversity and range of interests embodied in the federal establishment.¹⁸² It should thus be difficult to persuade Congress to grant the power of eminent domain, or to convince a federal agency to exercise it once granted. The AC_{ed} curve, if you will, is higher for the federal government than it is for state or local governments. It follows that eminent domain should automatically be more tightly rationed at the federal level than at the state and local levels. To the extent then that fifth amendment challenges to federal takings are involved, this analysis suggests that the additional check provided by a rigorous public use review is perhaps unnecessary.

In addition, the Supreme Court has declared that the Constitution does not create property rights; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."¹⁸³ This suggests that perhaps state law should determine and elaborate upon the contours of the prohibition against takings for private use, an incident of private property rights.¹⁸⁴ De-federalizing public use

¹⁸⁰ Of the 17 federal cases, 12 involved takings by the federal government, 4 involved takings by state governments, and 1 involved a taking in a federal territory, Guam.

¹⁸¹ (J. Madison).

¹⁸² See Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 853-57 (1983).

¹⁸³ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

¹⁸⁴ It may be objected that this "solution" reads the public use language out of the fifth amendment. What I am suggesting, however, does not ignore the public use language, but gives it two different meanings: one meaning for the fifth amendment, both as applied to the federal government and to the states via the fourteenth amendment, and another meaning under state constitutional provisions. Here, as in certain other areas governed by the first or fourth amendment, courts would simply give the state

would allow us to take advantage of the twin virtues of federalism: experimentation and competition among states. If the interventionist judicial stance implied by the refined model works well, we can expect other states to emulate the refined model. If, on the other hand, the refined model's additional litigation and uncertainty seem not to justify the effort, we can expect states to follow the federal courts toward greater judicial deference.

constitutions a more rigorous reading than the federal. *See, e.g.*, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).