PUBLIC RUSES

James E. Krier[*] *& Christopher Serkin*[**]

2004 MICH. ST. L. REV. 859

The public use requirement of eminent domain law may be working its way back into the United States Constitution. To be sure, the words "public use" appear in the document–and in many state constitutions as well, but the federal provision applies to the states in any event–as one of the Fifth Amendment's limitations on the government's inherent power to take private property against the will of its owners. (The other limitation is that "just compensation" must be paid, of which more later.) Any taking of private property, the text suggests, must be for public use. Those words, however, have amounted to virtually nothing for over fifty years, thanks to a line of United States Supreme Court decisions giving unfettered deference to legislative judgments about what a public use might be. In *Berman v. Parker*,[1] for example, the Court held that when Congress selects eminent domain as the means to accomplish some legitimate public end, the taking is presumed to be for a public use "in terms well-nigh conclusive."[2] The facts in *Berman* suggest just how strained this reading of the public use limitation is, at least in terms of ordinary meaning. The project upheld in the case used eminent domain to condemn slum property and thereafter sell it to private entrepreneurs for redevelopment.[3] Owners of the condemned lots complained that this made "the project a taking from one businessman for the benefit of another businessman,"[4] a taking for a private rather than a public use. But the Court disagreed, holding that the words "public use" don't mean what they say, they mean "public purpose," and clearing blighted land is that.[5] The Court took the same approach thirty years later in *Hawaii Housing Authority v. Midkiff*,[6] where the condemnation action aimed at an alleged land oligopoly, not blight.[7]

---

* Earl Warren DeLano Professor, University of Michigan Law School. For their comments and suggestions, we are grateful to Gregory Alexander, Richard Epstein, Lee Ann Fennell, and colleagues participating in a faculty lunch talk at the University of Michigan Law School.

** Acting Assistant Professor, New York University School of Law.

1. 348 U.S. 26 (1954).
2. Berman v. Parker, 348 U.S. 26, 32 (1954).
3. *Berman*, 348 U.S. at 28-31.
4. *Id.* at 33.
5. *Id.* at 33-34.
6. 467 U.S. 229 (1984).
7. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984).

The highest courts of many states have followed *Berman* and *Midkiff* with respect to the public use requirement in their own constitutions. Perhaps the leading example is the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. City of Detroit*,[8] approving Detroit's plan to condemn a residential neighborhood, clear it, and convey it to General Motors as a site for an assembly plant.[9] Unlike the situation in *Berman*, the land in question was not blighted, but the court nevertheless deferred to the legislative judgment that the project, by giving a boost to the area's strained economy, would meet a public need, thus serve a public purpose, thus amount to a public use.[10] "The benefit to a private interest," the court said of this deal for General Motors, "is merely incidental."[11]

Given a half century or more of decisions like these, it's easy to understand the lament that the public use limitation had come to amount to nothing.[12] Yet suddenly–and just why is a question we leave aside here–signs of life have appeared, thanks to two recent cases, *County of Wayne v. Hathcock*[13] and *Kelo v. City of New London*.[14] The cases converged in terms of their facts–both arose from government programs to condemn unblighted land and convey it to private parties for development–but diverged in terms of their holdings. In *Hathcock*, the Michigan Supreme Court overruled its earlier decision in *Poletown* and took a new approach to the question of public use.[15] In *Kelo* the Connecticut Supreme Court followed the conventional deferential view and upheld the program in question. Perhaps because of this sharp conflict, the United States Supreme Court has recently granted certiorari in the *Kelo* case.[16] So, however unexpectedly, the subject of public use is back on the table, with a good chance of substantial change in the law across the country. Our aim here is to consider several paths that sensible reform might take, and select from them one that we regard, at least tentatively, as superior.

---

8. 304 N.W.2d 455 (Mich. 1981).

9. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

10. *Poletown*, 304 N.W.2d at 459.

11. *Id.*

12. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) ("[M]ost observers today think the public use limitation is a dead letter"); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161 (1985) ("To judge from the cases and the scholarship on the subject, this chapter [on public use] deals with an empty question.").

13. 684 N.W.2d 765 (Mich. 2004).

14. 843 A.2d 500 (Conn.), *cert granted*, 125 S. Ct. 27 (2004).

15. County of Wayne v. Hathcock, 684 N.W.2d 765, 770, 788 (Mich. 2004).

16. Kelo v. City of New London, 125 S. Ct. 27 (2004) (granting certiorari).

I. BETWEEN PUBLIC USES AND NAKED TRANSFERS

Whenever the government selects eminent domain to accomplish its purposes, the *means*– condemnation–is a constant, whereas, of course, the *ends* to which condemned property are put can vary considerably. The variation of interest here has to do with the degree to which the property taken from private owners is made available to the public at large. Looking at matters from this perspective, we can imagine a continuum. At one extreme are instances where the property is subsequently put to a use that is open, in the most literal sense, to everybody. These we can rightly call public uses. At the opposite extreme are instances where the property ends up in private hands, the public is excluded, and there is no pretense of some indirect public benefit. These we can rightly call naked transfers. Figure 1 provides an illustration; its purpose is merely to capture two kinds of easy cases insofar as the public use issue is concerned.

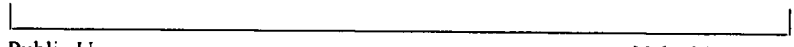

Fig. 1

Consider three examples. In example one, the government tries to buy several privately owned lots well situated as a site for a post office, and, having failed, seeks to take the property by eminent domain, clear the lots, and build the post office. The purpose of building a post office is an appropriate government end and the post office itself is a classic (and a literal) public use–owned and operated by the government, open to the public, and so forth. Condemnation is appropriate, provided just compensation is paid.

Now move to naked transfers at the opposite end of the continuum. Suppose as example two that the government wants to buy and clear the same land as in example one, but not in order to build a post office. Instead, the plan is to build a mansion for the CEO of a big corporation, simply in recognition of his being the CEO of a big corporation. Not by any stretch, of course, would this pass any version of public use scrutiny, not even scrutiny of the most wretchedly deferential sort. In any event, the naked transfer to the CEO would seem to be an inappropriate exercise of the police power, lacking any conceivable relationship to public health, safety, welfare, or morals.[17]

17. Notice, however, that line-drawing problems can arise even in instances similar to our extreme example. Aiming to induce a new employer to move to town, as in *Kelo*, a municipality might offer an enticing package that includes tax incentives, improvements in

But what of programs in between the extremes of public uses and naked transfers? Suppose, as example three, that the government, after negotiations with the CEO of the big corporation mentioned in example two, proposes to condemn a large number of residential properties in a perfectly fine middle-class neighborhood, tear down the houses, clear the land, and transfer the nicely assembled parcel to the big corporation to keep it in the area, this in the hope that the corporation's presence will help lift a sinking economy. Here there is little question that the end in mind is within the police power, and this on one view determines the public use issue as well. As Justice O'Connor put the point in her decision for the Court in *Midkiff*, "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[18]

Some have read this statement as a startling evisceration of all Fifth Amendment limitations on the power of eminent domain, including the compensation requirement. As Thomas Merrill has argued:

> 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.[19]

Actually, however, Merrill's parade of horribles doesn't follow. Suppose that public use is truly "coterminous with the police power," as Merrill puts it. The Fifth Amendment's taking provision would then be read to say *nor shall private property be taken pursuant to the police power, without just compensation.* Obviously, compensation would still be required so long as there is a *taking*–that is, condemnation through eminent domain. So treating public use as coterminous with the police power doesn't do away with takings

---

infrastructure, re-zoning, and the condemnation of land. *E.g.*, James Surowiecki, *It Pays to Stay*, THE NEW YORKER, Dec. 13, 2004, at 40. If some portion of the condemned land is to be used as a site for expensive new housing for the senior executives of the company, should this item move a reviewing court to kill the municipality's plan as an abuse of the police power? Generally speaking, the question has to do with framing the constitutional inquiry. Is judicial review to proceed on the package as a whole, or rather on an item-by-item basis whereby courts would exercise what amounts to line-item-veto power over redevelopment projects? For an interesting look at framing constitutional inquiries in other contexts, see Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002). William Fischel also points out the difficulties of distinguishing between non-public and public uses in his contribution to this symposium. *See* William A. Fischel, *The Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929.

18. *Midkiff*, 467 U.S. at 240.

19. Merrill, *supra* note 12, at 70; *see also* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 176 (1995).

doctrine; rather, it seems to have done away with serious judicial scrutiny of the public use question. As we have seen, most courts defer to legislative judgments in this regard with the same abandon that characterizes their deference to legislative judgments about economic regulation pursuant to the police power. Yet that seems worrisome in the case of government programs like those in our example three, and in *Hathcock* and *Kelo,* all of which involve forced transfers from some private owners to other private owners. Precisely because these kinds of programs might not involve any literal uses by the public at large, they smack of something other than what they announce themselves to be. Recall that in *Poletown*, involving a transfer to General Motors, the court said of the government's plan that "[t]he benefit to a private interest is merely incidental."[20] Perhaps, but with private-to-private transfers there is always the danger that it is the benefit to the public interest that's merely incidental, that the underlying program is, in short, a ruse. The question is how courts might guard against this possibility.

II. PUBLIC RUSES AND JUDICIAL REVIEW: TWO CONVENTIONAL APPROACHES

To date, courts unwilling to defer on the issue of public use have employed one of two approaches, each of which has also been noted or suggested in the scholarly literature. The first of these is the categorical approach and the second is close scrutiny (strict scrutiny, intermediate scrutiny, and so on). As we shall see, each has its problems, which will lead us to suggest an unconventional alternative.

The categorical approach. At its narrowest, this method of judicial review takes the words "public use" literally, meaning "actual use or right to use of the condemned property by the public . . . ."[21] A more expansive but still categorical approach is illustrated by the Michigan Supreme Court's decision in *Hathcock*, involving Wayne County's plan to condemn unblighted land adjacent to Detroit Metropolitan Airport and transfer it to private parties for the purpose of developing a business and technology park with a conference center, hotel, and recreational facility–all this with the purpose of stimulating the local economy.[22] The court held that transfer of condemned land to private parties is appropriate as a public use only (1) where "'public necessity of the extreme sort'" requires eminent domain to assemble land on behalf of enterprises generating public benefits (for example, rights of way for

---

20. *Poletown*, 304 N.W.2d at 459.

21. Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978).

22. *Hathcock*, 684 N.W.2d at 770-71.

railroads and highways); (2) where the condemned property "remains subject to public oversight after transfer" (for example, it is transferred to a regulated public utility); or (3) where the condemned property is taken not in the interest of private parties to whom it is transferred, but rather "because of 'facts of independent public significance'" (for example, to clear blighted land).[23] The court ruled that the Wayne County project met none of the criteria.

Close scrutiny. In *Berman*, the Court equated public use with public purpose and reviewed the legislative judgment in terms of the very undemanding rational basis test.[24] In contrast, some state courts refuse to regard purpose and use as indistinguishable and, notwithstanding a clear public purpose, take a close look at the government's reasons for using the power of eminent domain to achieve its ends.[25] The thrust of the approach is to insist that the government show a public benefit resulting from eminent domain that cannot be achieved by some less intrusive means.[26]

Problems. Any level of judicial scrutiny beyond the little required by the rational basis test suffers, of course, from one familiar problem–that courts might end up substituting their own judgments for those of legislative bodies. Close scrutiny amounts to courts taking a second look and making a second guess, and an ultimate judgment finding no public use, however well-intentioned, could be wrong from the standpoint of sensible policy or constitutional doctrine. The most important point, however, is not judicial error but its consequences–which, in the case of heightened scrutiny, are binary in nature, in that the government project is approved or it is not, with no option in between for cases close to the line. Courts operating under this approach have only a clumsy set of alternatives at their disposal. They can strike down the contested government action, but this creates high costs if a court gets it wrong. To be sure, the government may, in the event it loses in court, revamp its program and try again, but that process can be protracted and difficult and likely lead to further litigation. Difficulties like these may

---

23. *Hathcock*, 304 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). Ilya Somin has criticized these categories on a variety of grounds. *See generally* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005. For a related categorical approach to the public use issue, see EPSTEIN, *supra* note 12, at 169-81 (arguing that the public use test should be considered satisfied only in the case of programs to provide pure public goods, or where there is universal access to the condemned property after conveyance, as with common carriers, or where eminent domain is necessary to assemble land and the resulting surplus is fairly divided).

24. *Berman*, 348 U.S. at 31-32.

25. *See, e.g.*, S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002).

26. *See, e.g.*, James W. Ely, Jr., *Can the "Despotic Power" be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 PROB. & PROP. 30, 36 (2003).

actually increase judicial reluctance to find violations of the public use requirement, thus increasing costs in the other direction as well–allowing too many government programs to go forward with impunity, despite the lack of significant public benefits.

The categorical approach to the public use question suffers this same all-or-nothing difficulty and gives rise to another as well. The approach invites the government to behave strategically and take ill-advised steps for no good purpose other than to fit its undertaking into one of the relevant categories. For example, the business and technology park at issue in *Hathcock* might well have satisfied the Michigan Supreme Court's criteria provided only that it were actually owned and operated by the government itself. Most likely, though, private enterprise would do a better job, meaning the court's methodology could end up imposing unnecessary costs on the public at large.

III. AN UNCONVENTIONAL APPROACH TO PUBLIC RUSES: ADJUSTED COMPENSATION

Consider the second constitutional limitation on the government's power to take property against the will of its owners–namely, that condemnees must be awarded just compensation. Given this, why should owners care about the meaning and application of the public use requirement, since they are paid for what's taken in any event? Each of them, the Court said in *Olson v. United States*, "is entitled to be put in as good a position pecuniarily as if his property had not been taken."[27] Owners, then, should quite literally be indifferent, yet they are not.

The reason is plain: As the Court explained some forty-five years after *Olson*, the principle of indemnity announced in that case

> has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking.[28]

---

27. Olson v. United States, 292 U.S. 246, 255 (1934) (citation omitted). This is not to suggest that indemnification needs to be, or should be, the goal of just compensation. Indeed, one of us has previously argued that compensation can serve fundamentally different goals, depending on how the substantive constitutional rights at stake are identified. *See* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 679 (forthcoming 2005).

28. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (citations omitted) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

The difficulty, of course, is that in condemnation cases the sellers are not willing at all, however eager the buyers happen to be. They are unwilling precisely because, absent some statutory provision, they are not compensated for moving expenses, loss of goodwill, consequential damages, nor, most importantly, loss of consumer surplus–which is to say the amount by which an owner values property over and above its fair market value.[29] That amount, especially significant in the case of residential property, has to be positive, for otherwise owners would already have sold their holdings on the market.

There are three lessons to be taken from cases like *United States v. 564.54 Acres of Land*. The first, acknowledged by the Court in its opinion, is that fair market value results in systematic under-compensation from the property owner's perspective, which explains why owners are not indifferent to the public use issue.[30] The second is that the measure of just compensation is purely a matter of judge-made law; nothing in the Constitution defines it.[31] The third, less apparent, is that courts can use their power to alter the measure of compensation as a means to guard against public ruses.

Begin with the observation that the shortfall of fair market value will generally be at its smallest in the case of classic public uses, precisely because the benefits so clearly accrue to the public at large (and not to private interests for their own sake) in such forms as access and services. In turn, these benefits provide some amount of implicit compensation to the erstwhile owners whose property has been taken to enable the government project in question.[32] To be sure, condemnees are still worse off relative to all the rest of the public who realize the benefits of the same government project but retain their property as well. Over time, however, imbalances should even out as those whose property is taken in one round for one public use are later benefitted by other public uses subsidized by condemnation of other private property.[33]

---

29. Lee Anne Fennell has identified this as part of what she calls the "uncompensated increment." Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957.

30. *564.54 Acres*, 441 U.S. at 506-07. It may not be under-compensation, however, from the perspective of sound policy, distributive justice, or other important interests. *See* Serkin, *supra* note 27 ("Criticisms about the adequacy of compensation have too often elided the difficult prior question, 'adequate for what?'").

31. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

32. Our discussion of implicit compensation grows to some degree on arguments presented in EPSTEIN, *supra* note 12, chs. 12 & 14. *See also* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967) (suggesting the compensation requirement be relaxed "when there are visible reciprocities of burden and benefit, or when burdens similar to that for which compensation is denied are concomitantly imposed on many other people").

33. *Cf.* Fennell, *supra* note 29, at 987 ("If the overall system delivers results that are

There are plenty of opportunities to refine this insight to take account of different interests. If, for example, government burdens disproportionately fall on particular groups, additional compensation may be necessary to preserve horizontal equity, perhaps by adding bonuses aimed at making up, in a rough and ready way, for loss of goodwill, consumer surplus, and so on.[34] The list of concerns implicated by just compensation is long and heterogenous, and compensation can look very different when geared toward one versus another.[35] As a first pass, however, we think that compensation awards based on fair market value, plus the implicit benefits of true public uses, come close, at least, to what the Fifth Amendment generally demands.

Notice, though, that as we move away from classic public uses and in the direction of naked transfers, implicit compensation of the sort discussed above will decline (to zero in an extreme case like our example two discussed earlier). Condemnation for such non-public uses gives rise to concerns with fairness and efficiency alike.[36] We therefore envision an approach by which just compensation is adjusted upwards in specific ways as the use of condemned property moves from classic public use to possible public ruse to naked transfer.[37]

Adjusted compensation could range from the current fair market value standard, to an adjusted measure to make up for the absence of implicit in-kind benefits in public ruses, to a different adjusted measure based on the

---

both efficient and distributively acceptable, then we might hypothesize that landowners are receiving back from the system enough in-kind benefits to make up for the burdens that the system imposes on them.").

34. The idea of bonuses based on some percentage of fair market value is commonly suggested in the literature, and is put to work in some countries. *See, e.g.*, TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 31 (Tsuyoshi Kotaka & David L. Callies eds., 2002); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1C.11[3] (rev. 3d ed. 2004). Other opportunities to increase compensation are described by Serkin, *supra* note 27.

35. Fennell, for example, has proposed an interesting three-dimensional approach to identifying particular public use concerns. *See generally* Fennell, *supra* note 29. Wherever substantive lines are drawn in this area, our view is that compensation is the appropriate place to turn for a remedy.

36. On efficiency and fairness in the context of condemnation, see, e.g., Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999).

37. Some commentators have considered and rejected increased compensation for non-public uses. *See* Fischel, *supra* note 17, at 950-53; Fennell, *supra* note 29, at 992. Others, too, have at least acknowledged the possibility of adjusting compensation, but without any grounding in existing takings doctrine. *See* EPSTEIN, *supra* note 12, at 174-75 (describing 150% compensation under the Nineteenth Century Mill Acts); Merrill, *supra* note 12, at 86-87 (discussing EPSTEIN, *supra* note 12); *see also* Richard Epstein, *Look at Damages First*, NAT'L L.J., Sept. 27, 2004, at 27 (describing the importance of damages in public use cases).

ultimate transferee's gains. As to the two adjusted measures, neither would require legislative action or constitutional reform. Figure 2 describes the range of possibilities. We have already discussed fair market value, and shall consider the two adjusted measures now.[38]

Public Uses	Public Ruses	Naked Transfers
Limited fair market value	Compensation for loss of implicit, in-kind benefits	Gain-based compensation

Fig. 2

Compensation for Loss of Implicit, In-Kind Benefits. The middle of our spectrum would consist largely of programs that transfer condemned property to private parties. Such programs entail giveaways but might also result in improvements (such as shopping centers) more or less accessible to the general public. In addition, there might be various sorts of diffused economic benefits as the private transferee of condemned property puts it to uses which, this is the hope, revitalize the local or state economy. Condemnees can end up doubly disadvantaged in these situations: Not only has their property been taken against their will in exchange for an unsatisfactory price, they might also be precluded from sharing in some or all of the economic gains created by the government action.

The *Kelo* case provides a good example, judging from the facts described in the opinion. There, the perennially distressed City of New London created a development plan to complement a new global research facility that Pfizer was building in the area. New London's expressed goal was to "create jobs, increase tax and other revenues, encourage public access to . . . the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city, including its downtown area."[39] In short, the government anticipated increased tax revenue, increased employment, and ultimately increased property values as New London became more well-to-do and a more desirable place to live. Its mechanism for achieving this prosperity, however, was to transfer property from one private individual to another, based on nothing more than an attempt to put the property to a more profitable use.

38. We are proposing one possible range of compensation solutions to the public use question. There may be others that are more or less well suited to addressing different substantive concerns, but we leave an exploration of those alternatives for another day.

39. *Kelo*, 843 A.2d at 509.

When New London condemned property to achieve these goals, it not only expropriated the property itself, but may also have taken (and will certainly have compromised) the erstwhile owners' opportunities to share in New London's newfound prosperity. After all, they received compensation in amounts below the value they put on their property; in addition, if the government project does revitalize the local economy, real estate prices will go up in a way that traditional compensation for the condemnation will not reflect.

So the situation in *Kelo* puts a mean twist on the Supreme Court's observation in *Armstrong v. United States* that the requirement of just compensation "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[40] The decision in *Kelo* permits the government to do that and more by denying to a small group of property owners benefits that, in fairness, should be granted to everyone. Where the putative public benefit is both general and economic–as in *Kelo* and most other condemn-and-retransfer cases–we propose valuing the condemned property using projections about the economic benefits of the government action instead of using the economic conditions as they actually exist at the time the government takes the property. In effect, this will permit condemnees to share in the economic benefits the community expects to receive. This approach has an additional advantage, too. Because governments themselves would (through higher condemnation awards) bear the costs of undue optimism about the benefits of their programs, there would be incentives to make realistic assessments.[41]

Note finally that our proposal is not as radical as it might seem. Despite blackletter law to the effect that condemned property is to be valued as of the date of taking, there is considerably more discretion in the timing of valuation than courts explicitly acknowledge.[42] It is, in fact, commonplace for courts to employ a variety of techniques to increase compensation as of the date of the condemnation to account for any diminution of value resulting from the mere threat of a government action, overcoming what is commonly referred to as

---

40. Armstrong v. United States, 364 U.S. 40, 49 (1960).

41. This suggestion responds directly to Somin's observation that current eminent domain practices build in incentives for governments to overestimate economic benefits. *See* Somin, *supra* note 23, at 1011.

42. For a more comprehensive discussion of this timing issue, see Serkin, *supra* note 27.

condemnation blight.[43] We are simply proposing rolling the compensation date forward instead of backward.

Relatedly, federal courts have crafted rules to withhold from condemnees any increases in property value attributable to the government's action. For example, in acquiring property piecemeal for a single project, the government need not pay higher compensation for later-acquired property if the increase in value owed to the earlier condemnation activity, and the subsequent condemnation was within the scope of the original project.[44] Just as an exception sometimes proves the rule, this "scope of the project" rule proves how easy it would be to achieve its opposite. It would not be a significant change in approach for courts to hold, within a range of public ruses, that condemnees should share in the value created through condemnation.

Gain-Based Compensation. The more government actions move in the direction of naked transfers, the less likely that the programs in question will provide any tangible public benefits–no increases in property values in which condemnees can share by way of adjusted condemnation awards, no in-kind benefits by which true public uses confer some measure of implicit compensation. For these cases we need a different way of adjusting compensation, and gain-based awards look like a suitable candidate. Not only would they give appropriate compensation to condemnees, they would also provide a good test for government claims that taking from Peter to give to Paul will, by some sort of magic, actually advance the public weal.

Suppose a case where the government uses its power of eminent domain to assemble separately owned parcels of land to be transferred later to some private party (eminent domain is important in such instances because it sidesteps the holdouts and high transaction costs that commonly make land assembly by voluntary means so difficult[45]). Assembling property should create a surplus, because the value of each individual parcel is likely less than its value as part of a larger whole put together by the government. The

---

43. *See* Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 778 (1973) (arguing that courts should compensate for the decrease in value due to the threat of a government action); *see also* Vaizburd v. United States, 384 F.3d 1278, 1280-81 (Fed. Cir. 2004) (manipulating date of the valuation to account for some diminution of value prior to the date of the actual expropriation); City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971) (finding *de facto* taking as of earlier date); United States v. 38,994 Net Usable Square Feet of Space, No. 87 C 8569, 1989 WL 152806, at *2 (N.D. Ill. Nov. 21, 1989) (including information about actual losses suffered by the property owner after the date of the condemnation).

44. *See* Almota Farmers Elevator & Warehouse, Co. v. United States, 409 U.S. 470, 477-78 (1973).

45. Assembly by eminent domain gives rise to the majority of public use challenges. *See* Merrill, *supra* note 12, at 98.

question, of course, is how the assembly surplus is to be shared among all concerned parties–condemnees, the government, and private transferees. Under current compensation rules, condemnees get nothing; all of the surplus goes to the government or the ultimate transferee. Changing the rule so as to distribute some or all of the surplus to condemnees would create more robust protection against questionable projects.[46] Moreover, forcing the government to disgorge the surplus should decrease its incentive to condemn property in the first place.[47]

Gain-based compensation does not aim to put condemnees in the position they would have occupied but for the government action. Its purpose, rather, is to prevent the government from benefitting by assembling property for transfer to private parties. Accordingly, gain-based compensation gives condemnees awards based on the value their property would have had if they had been able to hold out for the anticipated gains of the condemnation.[48] In a very real sense, this has the effect of giving to the condemnees the value to be realized through the government's condemnation power. The remedy is a strong one, though not the equivalent of the injunctive relief that would follow were the court to adopt an all-or-nothing approach to public use. The government retains the ability to assemble parcels through the power of eminent domain, and thus to facilitate value-maximizing exchanges, notwithstanding that the immediate benefits of those exchanges go to the condemnees.

If condemnation of land for transfer to private parties were simply a matter of bilateral exchange between the government and the class of burdened property owners, then gain-based awards would remove the government's incentive to use the power of eminent domain altogether. (Thomas Merrill has rejected the idea of a gain-based award at least partly on

---

46. As rights-remedies literature has observed, the content of a right is coextensive with the remedy for its violation. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (examining the relationship between rights and remedies across constitutional law).

47. One caveat is in order. We are discussing here only those cases in which the government action does, in fact, create some surplus. Where this is not true, and the property retransferred to a private party is put to *less* valuable use, an alternative to gain-based compensation would be needed. We leave aside that possibility here, but acknowledge an interesting discussion of possible solutions in HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 21 (1997) (suggesting, in the restitution context, awards based on the higher of harm or gain).

48. Although Fennell does not ultimately propose a gain-based award, part of her "uncompensated increment" includes the closely related value to property owners of being able to bargain for a share of the surplus created by the transaction. Fennell, *supra* note 29, at 965-66.

these grounds.[49]) In fact, however, the condemn-and-retransfer cases involve tri-lateral exchanges, with the government acting as intermediary. Importantly, the price the government must pay the condemnees is not necessarily the same as the price the government then charges the subsequent transferee. The government may still have an incentive to condemn and retransfer property if the other benefits it generates outweigh the costs of paying the full assembly surplus to the condemnees. A simplified example should demonstrate how this works, and also point out the appeal of a gain-based compensation regime.

Imagine five adjacent properties, each valued individually at $100,000. The government aims to condemn the land and transfer it to a developer for a new shopping mall. Once assembled for the mall, the property will be worth $1,000,000 (or $200,000 per parcel). This program looks close to being a naked-transfer, but the government might justify it because it will increase tax revenue, employment, and perhaps even the availability of commercial services for an under-served neighborhood. With gain-based compensation, the government would have to pay $200,000 for each condemned lot, rather than the $100,000 current fair market value. This doesn't mean, however, that the government has to charge the developer (the ultimate transferee) the full $1,000,000.[50] Indeed, if the government tried to do that, the developer would be unlikely to undertake the project at all. The question facing the government, then, is whether there exists a bargaining range in which the benefits from the expressed purpose of the condemnation–taxes, employment, and services for the under-served–are sufficient to make up for any shortfall in the sale price to the condemnee. If, for example, the ultimate transferee was willing to pay $900,000 for the $1,000,000 worth of assembled property, the government would then have to decide whether the new shopping center would generate over $100,000 worth of the sort of public benefits it cited as reasons to go forth with its project in the first place. If it turns out the bargaining range is insufficient, this indicates that the project's benefits weren't all the government claimed them to be, in which case it should be scrapped in any event. In short, compensation based on the transferee's ultimate gain is a way to test the government's claims about the public benefits of its project.[51]

---

49. Merrill, *supra* note 12, at 85 ("In the case of profit-oriented entities, however, restitution could eliminate the use of eminent domain altogether.").

50. In *Poletown*, for example, the City of Detroit paid almost $200 million for property it retransferred to General Motors for only $8 million. *Poletown*, 304 N.W.2d at 469.

51. While there is no guarantee that subjective harms will not be higher still than this gain-based award, the point here is not to indemnify against any loss but instead to transfer the value of the government's condemnation power to property owners, both to increase

Implementing gain-based awards would also require relatively little change in current law. Despite occasional pronouncements to the contrary, the idea of restitutionary recovery is familiar in condemnation, as well as in takings doctrine generally. While the Supreme Court recently announced that takings are to be valued by the net harm to the property owner,[52] a competing line of cases values the government's gain instead of the property owner's harm.[53] Though the latter cases usually arise in the context of *limiting* property owners' recovery to the extent of the government's gain, they nevertheless provide doctrinal footing for the gain-based approach. At present, property is valued for purposes of compensation by reference to its highest and best use, *other than* the use anticipated by the condemning authority.[54] As the United States Department of Justice's appraisal standards for condemnation explain, "The use to which the government will put the property after it has been acquired is, as a general rule, an improper highest and best use."[55] Altering the highest and best use standard to include the ultimate use of the property by the transferee would effectively give condemnees the gains created by the condemnation.

IV. FROM PROPERTY RULES TO LIABILITY RULES

By way of conclusion, we should note what some readers have no doubt seen for themselves, that our approach to the public use question exploits the distinction between property rules and liability rules introduced by Calabresi and Melamed some years ago.[56] So-called property rules protect rights holders with a veto power, whereas liability rules protect them with damages. Eminent domain provides a classic example of the distinction.[57] If *A* wants to buy *B*'s house, he has to negotiate with *B* and meet *B*'s price in order to close a deal–unless, of course, *A* is the government and wants *B*'s property for a public use. In that event, A can force a sale, at a price determined not by *B* but by a court. So in the ordinary case, *B*'s right to his house is protected by a

---

compensation and to test the government's claim of public benefits.

52. Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

53. *E.g.* United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 282 (1943); Francini v. Town of Farmington, 557 F. Supp. 151, 157 (D. Conn. 1982); Whitney Benefits, Inc., v. United States, 18 Cl. Ct. 394, 407 (1984).

54. Merrill, *supra* note 12, at 83 & n.75.

55. INTERAGENCY LAND ACQUISITION CONF., UNIF. APPRAISAL STANDARDS FOR FED. LAND ACQUISITIONS, *available at* http://www.usdoj.gov/enrd/land-ack/data_part3.htm (last visited Jan. 22, 2005).

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

57. *Id.* at 1106-08.

property rule, whereas in the case of the government as the buyer, it is protected by a liability rule. The reasons for the limited protection in the second instance are familiar: Given that condemnation often aims at the purchase of many properties for purposes of some large government project, the government's ability to proceed by voluntary purchase is impeded by the high costs of transacting with so many parties, in particular parties seeking to hold out for all the surplus (and more!) that might result from the government's action.

The government's power is limited, of course. It must pay compensation; it may take only for public uses. Notice, though, that while compensation entails protection only by way of a liability rule, the public use requirement has to date been enforced by a property rule. If a court concludes that a taking is not for a public use, then the government action is enjoined and the government is forced to deal, if it wishes to go forth with its plans, with each buyer on each buyer's own terms. The likely result in most cases is stalemate, thanks to the problem of holdouts.

No wonder courts have so often deferred to the government's will, given these consequences. They must fear the costs of error on their part, should they kill a project that might in fact be worthwhile. But deference results in error as well, just in the opposite direction. Public ruses go forth, notwithstanding questionable benefits and inadequate compensation.

So to avoid the clumsy all-or-nothing property rule approaches to public use–whether deference, a categorical approach, or closer scrutiny–together with their high error costs, we propose a shift to liability rules, with compensation increasing as skepticism about the public nature and benefits of government action grows.[58] We discussed some recognized measures of adjusted compensation that courts could use to implement our approach, but they are merely suggestions or illustrations. Alternatives are available.[59] The

---

58. Fennell has suggested that higher compensation raises the possibility of opportunist rent-seeking by property owners. *See* Fennell, *supra* note 29, at 978. While we acknowledge this possibility, it strikes us as the least grave of the various dangers facing possible solutions to the public use question. In fact, adjusting compensation responds directly to the premise of *Berman v. Parker*, 348 U.S. 26 (1954), preventing courts from second-guessing legislative judgments while still mitigating the unfairness resulting from non-public uses.

59. *See* Serkin, *supra* note 27 (describing stress points in existing compensation doctrine that skew compensation either higher or lower, such as allocating development risks to the government in computing property's highest and best use, narrowly drawing the line around both the benefit offset test and permissible but unenacted regulations, adjusting the timing of valuation to account for compensation blight, recharacterizing the nature of the property taken, and awarding replacement value). All of these mechanisms, alone or in combination, could be used to approximate the sorts of compensation we have proposed, without requiring any change in existing law.

short of it is that the government should be able to proceed in any condemnation action the ends of which are within the police power, provided only that it pays the appropriate price.