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TAKING EMINENT DOMAIN APART

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Taking Eminent Domain Apart

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Abstract

Part of a symposium on public use, this essay presents an analytic framework for eminent domain that begins by breaking condemnations into two parts: a swap of property for fair market value, and the confiscation of what I term "the uncompensated increment." The uncompensated increment is made up of three distinct components: (1) the increment by which the property owner's subjective value exceeds fair market value; (2) the chance of reaping a surplus from trade (that is, of obtaining an amount larger than one's own true subjective valuation); and (3) the autonomy of choosing for oneself when to sell. Whether government can appropriate this uncompensated increment in a given instance gets to the heart of the public use inquiry. I suggest that the answer to the inquiry can be found in the same unloved and amorphous factors that determine whether other uncompensated appropriations of value amount to regulatory takings. The analytic template of regulatory takings law does a good job of grappling with important features of eminent domain fact patterns such as the degree of market thinness and the potential for political malfunction.

The aim of a regulatory takings inquiry is to determine whether compensation is required in order for the government to pursue an objective that is within its legitimate compass. In the eminent domain context, compensation is already being paid; hence, one might think that the application of regulatory takings factors to the uncompensated increment would merely go to the question of whether the level of compensation ought to be adjusted upward. But there is an incommensurability problem that is suggested by the autonomy component of the uncompensated increment. At least in some subset of cases, overriding autonomy with an involuntary sale seems problematic even if the amount of compensation is adjusted upward; the extra dollars, in a sense, are the wrong currency in which to provide "just compensation" for a taking. I will suggest some ways to set the parameters for this autonomy-based constraint on eminent domain, and will also discuss how principles of self-assessment might be employed to overcome the difficulties associated with forced sales in situations where public use is contested.

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INTRODUCTION

Attacking the Michigan Supreme Court’s now-disavowed decision in *Poletown Neighborhood Council v. City of Detroit*¹ is like taking a swing at a piñata—easy and satisfying, as long as you don’t have to clean up afterwards.

* Associate Professor, University of Illinois College of Law. I am grateful to David Callies, Eric Claeys, William Fischel, Nicole Garnett, James Krier, Daniel Mandelker, Christopher Serkin, Ilya Somin, and Thomas Ulen for very helpful comments on earlier drafts. I also thank participants in Michigan State University College of Law’s symposium on the “Death of *Poletown*” and in the public use panel at the 2005 annual meeting of the Association of American Law Schools for useful discussion and questions. James Gaven provided valuable research assistance. All errors are mine.

1. 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). The *Poletown* decision upheld Detroit’s condemnation of a tight-knit community in order to deliver a plant site to General Motors.

Now that the case and the nearly unlimited view of public use that it stood for have been smashed into oblivion to near-unanimous scholarly applause, the work of piecing together the appropriate scope of eminent domain must begin. In the excitement over *Poletown*'s death, it is easy to underestimate the conceptual difficulty posed by this task. I hope in this essay to sketch out some of the reasons why the problem is a genuinely hard one, and take a crack at an analytic framework for addressing it. In the process, I will comment on the Michigan Supreme Court's approach in *County of Wayne v. Hathcock*²—an under-theorized attempt to put teeth into the Michigan Constitution's public use limitation.³ With *Kelo v. City of New London*⁴ now pending before the United States Supreme Court, the time is ripe for a systematic rethinking of what (if anything) the Fifth Amendment's public use limitation ought to do.⁵

I will argue that the public use problem is most fruitfully understood by breaking the exercise of eminent domain into two parts: a swap of property for fair market value, and the confiscation of what I will term "the uncompensated increment."⁶ The uncompensated increment is made up of three distinct components: (1) the increment by which the property owner's subjective value exceeds fair market value;⁷ (2) the chance of reaping a

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

3. The *Hathcock* court interpreted the public use limitation found in the Michigan Constitution, but the questions it addressed have broad applicability to the interpretation of the public use limitation in the United States Constitution.

4. 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

5. The Takings Clause in the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This clause has been read to mean that property cannot be taken, even if just compensation is paid, unless it is for a public use. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1097-98 (5th ed. 2002). The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment; in addition, nearly all state constitutions contain similarly worded takings clauses. *Id.* at 1093 n.2.

6. I doubt that I am the first to give a collective name to this increment; in any event, the components of it that I identify have been well-discussed in the eminent domain literature. See Part I.A, *infra* (discussing these components, and citing to the literature regarding each of them). The idea that eminent domain "confiscates" the portion of value for which it fails to compensate is also familiar. See *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (observing that a "taking in effect confiscates the additional (call it 'personal') value that [many landowners] obtain from the property, but this limited confiscation is permitted provided the taking is for a public use").

7. See *infra* Part I.A.1 (discussing this premium). The difference between a landowner's subjective valuation and fair market value is sometimes termed "consumer surplus," or is referenced by the idea of the "intramarginal" or "inframarginal" consumer. See, e.g., James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866 (discussing "consumer surplus" and noting its particular importance for residential property); *Coniston Corp.*, 844 F.2d at 464 (noting that many owners are "intramarginal" in that they value

surplus from trade (that is, of obtaining an amount larger than one's own true subjective valuation);⁸ and (3) the autonomy of choosing for oneself when to sell.⁹ Whether or not government can appropriate this uncompensated increment in a given instance gets to the heart of the public use inquiry. I suggest that the validity of an exercise of eminent domain requires evaluating the appropriation of this uncompensated increment in light of several considerations that will have, for property lawyers, a hauntingly familiar ring. They are the same unloved and amorphous factors that determine whether other uncompensated appropriations of value amount to regulatory takings. Although these factors are generally ignored when the government consciously exercises eminent domain and pays compensation, they turn out to have important traction when the uncompensated portion of the exercise of eminent domain is considered on its own.

The aim of the regulatory takings inquiry, of course, is to determine whether compensation is required in order for the government to pursue an objective that is within its legitimate compass. In the eminent domain context, compensation is already being paid; one might think that the application of regulatory takings factors to the uncompensated increment would merely go to the question of whether the level of compensation ought to be adjusted upward. But there is an incommensurability problem that is suggested by the "autonomy" component of the uncompensated increment. At least in some subset of cases, overriding autonomy with an involuntary sale seems problematic even if the amount of compensation is adjusted upward; the extra dollars, in a sense, are the wrong currency in which to provide "just compensation" for a taking. I will suggest some ways to set the parameters for this autonomy-based constraint on eminent domain, and also discuss how principles of self-assessment might be employed to overcome the difficulties associated with forced sales in situations where public use is contested.

The essay proceeds in two parts. In Part I, I offer a brief taxonomy of the uncompensated increment before cataloguing various concerns that pull the meaning of public use in different directions. These worries map onto divergent kinds of political risks and practical problems posed by different

their property at above fair market value). Subjective value in property, especially residential property, is often built up over time. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736-37 (1973).

8. See *infra* Part I.A.2 (discussing confiscation of the chance at surplus from trade); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 162-65 (1985) (explaining how the question of surplus allocation relates to the public use requirement).

9. See *infra* Part I.A.3 (discussing the loss of landowner autonomy implicated by eminent domain).

sorts of takings. In this context, understanding the shape of the problem is more than half of the battle. In Part II, I discuss the *Hathcock* formulation before turning to my suggested framework for addressing the public use problem. Throughout, I will focus on the two criteria that dominate discussions of takings—distribution and efficiency.¹⁰

I. WHY WORRY ABOUT PUBLIC USE?

The question that Jesse Dukeminier and James Krier pose in their Property casebook provides an excellent starting point: “Why is ‘public use’ a matter of concern to property owners, given that they are entitled to ‘just compensation’ if their property is taken?”¹¹ The answer, the authors suggest, has something to do with the way in which compensation is measured.¹² If compensation were truly “just,” the argument runs, we would worry less about the scope and content of limits on the meaning of “public use.”¹³ Surely this is true. However, shifting our focus to the “just compensation” clause does not provide an effective escape from the difficult analytic work of determining what “public use” is all about. First, the “public use” clause bears importantly on what compensation is “just.”¹⁴ Second, incommensurable autonomy

10. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999) (noting the primacy of two considerations in takings analysis—one that can be called “efficiency,” “utility,” or “deterrence,” and another that can be termed “justice,” “fairness,” or “distribution”).

11. DUKEMINIER & KRIER, *supra* note 5, at 1113.

12. See *id.* at 1113-15; see also Krier & Serkin, *supra* note 7, at 865.

13. This position is pursued in Krier & Serkin, *supra* note 7, at 874-75 (suggesting that if compensation is appropriately reconceived to make it “just,” the government should be able to pursue any object within the police powers through eminent domain as long as it makes the appropriate payment). See also Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 679 (forthcoming 2005) (exploring a variety of different methods of valuation for just compensation purposes).

14. The degree to which a use disperses benefits back to the general public determines the amount of compensation that property owners receive “in kind” as a result of the exercise of eminent domain. See EPSTEIN, *supra* note 8, at 195-97 (discussing “implicit in-kind compensation” as it relates to takings law); Krier & Serkin, *supra* note 7, at 866 (noting capacity of public uses to return implicit compensation to landowners); see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 HARV. L. REV. 1165, 1218 (1967) (suggesting that the inquiry into compensability should include questions about whether similar burdens have been imposed on others throughout society and whether there is an “implicit” reciprocal benefit associated with the measure or other concessions that make up for its burden “in kind”). Other things equal, the more compensation property owners receive in kind, the less they would need to receive in dollars in order for the compensation to be considered “just.” See Krier & Serkin, *supra* note 7, at 866 (suggesting that fair market value may be sufficient compensation where a true public

interests are at stake that suggest the existence of some takings for which no amount of compensation will be “just.” In those cases, the problem is not that the money provided is insufficient, but that money is not an acceptable currency for delivering justice.

Still, thinking about compensation points us in the right direction, because it leads us to focus on the uncompensated increment—the specific ways in which the compensation provided to landowners falls short of that which is necessary to make them whole. This uncompensated increment is worrisome from two perspectives. First, there is a distributive concern associated with failing to fully compensate those from whom property has been taken.¹⁵ Second, there is a concern that incomplete compensation distorts the incentives of those who stand to benefit from takings.¹⁶ Of course, there are often good and sufficient reasons to let the uncompensated increment

use is involved, because the implicit compensation helps to make up any shortfall).

15. This is the distributive problem highlighted in *Armstrong v. United States*, 364 U.S. 40, 49 (1960)—that of forcing some parties to bear burdens that ought to be spread across society as a whole.

16. See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 619 (1984) (explaining that “if compensation is offered only at market value, the government does not have the appropriate incentive to avoid regulating or taking properties that are highly valued for ‘unique’ reasons”); EPSTEIN, *supra* note 8, at 164–65 (discussing the potential for skewed incentives and costly efforts to influence the legislative process if private parties are allowed to employ the governmental apparatus to gain surplus from transfers of property). The efficiency issues presented by undercompensation echo those presented by the question of whether to compensate all. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (6th ed. 2003) (suggesting that in the absence of a “just compensation” requirement, “government would have an incentive to substitute land for other inputs that were cheaper to society as a whole but more expensive to the government”). But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 969–71 (2005) (suggesting that the extent and direction of the impact of compensation requirements on the government’s calculus is indeterminate); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT 279, 297 (1992) (observing that in some cases, the government may face less political opposition to a project when it pays compensation and diffuses the cost among taxpayers than it would if it attempted to take from landowners without paying). Farber notes, however, that the government would be expected to pay voluntary compensation where doing so would reduce political opposition, so that one might infer from the nonpayment of (voluntary) compensation that the political costs of a compensated taking are greater than those associated with a compensated taking. See *id.* at 297–98. This analysis suggests that a compensation requirement plays an important role in the very cases where it would become a litigated issue—those in which the government does not voluntarily choose to pay compensation. See *id.* By the same token, we might expect to see voluntary payments designed to make up for the uncompensated increment where this would reduce rather than increase political opposition to a project, so that the cases in which undercompensation becomes an issue are the very ones in which political checks on the eminent domain power are most needed.

go uncompensated, or to deem a sufficiently public use to be sufficient compensation in itself. To begin to sort these considerations out requires understanding the components of the uncompensated increment and the factors to which a proper formulation of public use must be sensitive.

To that end, the discussion in this Part works through several sets of concerns relating to the definition of public use. Subpart A's discussion of the uncompensated increment tells us why landowners should worry about an appropriately defined meaning of public use, subpart B offers some systemic political reasons why the society might wish to limit the meaning of public use, and subpart C closes by considering some of the concerns about thin markets that create anxiety about an overly restrictive meaning of public use.

A. The Uncompensated Increment

It is a truism that fair market value—the usual benchmark for “just compensation”—does not compensate landowners completely.¹⁷ To see why this is problematic, it is helpful to break exercises of eminent domain into compensated and uncompensated portions. Assuming that fair market value is itself properly calculated and paid,¹⁸ eminent domain can be understood as making a compensated swap of dollars for the “fair market value” component of the property. Of course, condemnation confiscates three additional items of value *without* compensation. These three items make up the uncompensated portion of the eminent domain exercise. There is a tendency in writing about eminent domain to either lump the constituent parts of this uncompensated increment together or to focus attention on just one to the exclusion of the others. Because the elements of the uncompensated increment are distinct and have different and sometimes divergent implications, I will begin with a brief taxonomy.

17. See, e.g., POSNER, *supra* note 16, at 57 (observing that “just compensation is not full compensation in the economic sense”); EPSTEIN, *supra* note 8, at 183 (explaining that “[t]he central difficulty of the market value formula for explicit compensation, therefore, is that it denies any compensation for real but subjective values”) (footnote omitted).

18. I will leave to one side difficult questions about precisely how fair market value ought to be calculated under various sets of complicated facts. See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 1115-16; Serkin, *supra* note 13.

1. *The “Subjective Premium”*¹⁹

Most property owners value their property above fair market value; if they did not, they likely would have sold it already.²⁰ The difference between fair market value and the subjective value that an individual places on her property makes up an important uncompensated element in eminent domain.²¹

Two points about the subjective premium bear emphasis. First, the use of the word “subjective” should not be understood as implying that these valuations are always befogged by sentimentality or emotion. Subjective value can include such “hard” components as the out-of-pocket cost of moving to another place, the search costs of finding shops and services in the new location, or site-specific improvements that are well-suited to the owner’s uses but do not enhance fair market value.²²

Of course, personal attachments to one’s home, place of business, or community can make up a portion—in some cases a substantial portion—of the

19. Thomas Merrill uses this phrase to reference the difference between subjective value and market value, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986), and I will adopt his usage here. This premium sometimes goes by other names in the literature, including “consumer surplus,” but the former formulation helps to avoid confusion with a second sort of surplus implicated in eminent domain. See *infra* Part I.A.2 (discussing surplus from transfer).

20. Krier & Serkin, *supra* note 7, at 866.

21. See, e.g., EPSTEIN, *supra* note 8, at 183.

22. See, e.g., Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 780 (1982) (noting the subjective value that might be associated with a homeowner’s bookshelves or trees); Merrill, *supra* note 19, at 83 (noting that the subjective premium includes relocation costs and special modifications to the property, as well as possible “sentimental attachment[s]”). Relocation payments are sometimes available as a matter of statutory law. See, e.g., Uniform Relocation and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 42 U.S.C. §§ 4601-4655 (2000) (providing for moving and related expenses when landowners are displaced as a result of the acquisition of land for a federal or federally assisted program). These payments might be understood as an effort to cover at least part of the amount by which subjective value exceeds fair market value. See Ellickson, *supra* note 7, at 737 n.195 (describing the payments under the Uniform Relocation and Real Property Acquisition Policy Act as “[b]onus payments disguised as relocation payments”).

subjective premium.²³ These attachments can be viewed as the product of investments in networks of friends and the development of social capital.²⁴

The second point worth emphasizing is that this subjective premium is non-transferable. Because it is personal to the individual landowner, its confiscation in the course of eminent domain necessarily means its outright destruction rather than its transfer to someone else. While it is important to recognize the distributive burden that the confiscation of subjective value imposes on the landowner, the fact that subjective value is destroyed rather than transferred implicates efficiency concerns as well. Because no compensation is paid to make up for this loss, it may be disregarded in the decision whether to condemn the property; this introduces the possibility that condemnations will be undertaken that are inefficient.²⁵ It may well be the case that other gains from the movement of property will swamp the loss of the subjective premium, but the fact that compensation is not paid for the subjective premium precludes any hope of testing that proposition.

There is a silver lining to the destruction of subjective value, however. Because it is not something that another party can enjoy, its existence as an uncompensated element does not spur rent-seeking behaviors²⁶ designed to capture it.²⁷ However, in a typical case in which a private party seeks to have

23. Justice Ryan emphasized this element in his *Poletown* dissent, observing that eminent domain “can entail, as it did in this case, intangible losses, such as severance [of] personal attachments to one’s domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character.” *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 481 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

24. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 18-24 (2000) (discussing the meaning of “social capital” and its connection to social networks).

25. See, e.g., Blume & Rubinfeld, *supra* note 16, at 619; Merrill, *supra* note 19, at 83-84.

26. See, e.g., Robert D. Tollison, *Rent Seeking*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 506 (Dennis C. Mueller ed., 1997) (defining “[r]ent seeking” as “the socially costly pursuit of wealth transfers”).

27. It might seem that the party to whom the property is transferred gains what the original landowner loses, but this is not quite the case. The transferee receives the difference between what he pays for the land and what the land is worth for his uses. It is of no concern to a rational transferee whether the price he must pay is lower (or for that matter, higher) than the true value that the condemnee places on the property; the only relevant factor is the relationship between the payment and his own valuation. This can readily be seen if we imagine two identical houses, each of which has a fair market value of \$200,000, and each of which is worth \$500,000 to the transferee. The transferee does not gain anything if the occupant of one of those houses actually has a deep sentimental attachment to it and values it at \$300,000; the surplus the transferee reaps in that case is exactly the same as he reaps from the mirror-image house—whose owner, let us suppose, values it precisely at the fair market value amount. The

the government exercise eminent domain on its behalf, there are significant gains to be achieved from the movement of the property into new hands. This “surplus from transfer,” unlike the subjective premium, *does* attract rent-seeking behaviors, as the next section explains.

2. *A Chance at Surplus from Transfer*

The second element that is potentially confiscated without compensation through eminent domain is the property owner’s chance at some of the surplus generated by the transfer. Surplus results if, and only if, the property is moved from someone with a lower valuation to someone with a higher valuation. As the previous section suggested, it is possible that the uncounted subjective premium actually makes the original owner the higher valuer, so that the transfer of property generates no positive surplus at all. In these cases, the destruction of subjective value through the eminent domain process overwhelms any apparent gains associated with moving property from one owner to another.

However, in many cases the subjective premium will only bring the original owner’s valuation of the property to a point that remains substantially below that of the new owner. For example, very large surpluses generated through land assembly are likely to swamp the uncompensated losses suffered by the landowner.²⁸ The gain associated with moving the land to a different owner need not derive from the assembly of parcels as such, of course; any number of other factors could make the new owner the higher valuer.²⁹

Whatever the source of the gain from transfer, eminent domain typically assigns the entire surplus to the condemning authority (or to that authority’s transferee).³⁰ The original landowner receives only fair market value, an amount that is usually less than her reservation price. Hence, she suffers from

transferee’s net gain is \$300,000 in each case; the fact that one condemnee suffers a loss of \$100,000 does nothing to increase the transferee’s gain.

28. See, e.g., Krier & Serkin, *supra* note 7, at 870 (noting likelihood of surplus from assembly). But see Michael A. Heller & Roderick M. Hills, Jr., *The Art of Land Assembly* 1 (Jan. 2004) (unpublished partial draft, on file with author) (observing potential for either over-assembly or under-assembly, given compensation at fair market value levels), available at <http://www.law.uchicago.edu/Lawecon/workshop-papers/Heller.pdf>.

29. See *infra* note 50.

30. There have been statutory exceptions to that general rule. See, e.g., EPSTEIN, *supra* note 8, at 174 (discussing the New Hampshire Mill Act, which “fixed the compensation payable to the owner of flooded land at 50 percent *above* the market value of the land, thereby ensuring a division of the surplus brought about by the forced exchange”) (footnote omitted).

a double-whammy—she loses her subjective premium and at the same time loses any chance to share in the gains from the property’s transfer.³¹

To illustrate, consider a homeowner whose house has a fair market value of \$200,000. For various reasons, the homeowner subjectively values the home at \$250,000. Suppose further that the land will be worth \$500,000 in the hands of a private party transferee. In the ordinary course of events, the homeowner would refuse to sell for any amount less than \$250,000. Moreover, if confronted with a prospective buyer with a valuation above \$250,000, she would try her best to capture some of the surplus that will be produced by the transaction. In this example, she would certainly command her reservation price of \$250,000 and, depending on her bargaining skills and her insight into the valuation of the transferee, would very likely be able to capture some portion of the \$250,000 surplus produced by the transfer. A payment of fair market value thus automatically inflicts a loss of \$50,000 on her, and also deprives her of the chance to reap a share of the gains from transfer to a higher valuing owner.

3. *Autonomy*

The third element confiscated without compensation in an exercise of eminent domain is the autonomy to decide when and whether to sell. This sort of autonomy always accompanies “property rule” (as opposed to “liability rule”) protection of one’s holdings.³² A property owner typically possesses not just the power to turn away a would-be buyer who offers less than her reservation price, and not just the additional power to try her best to win a share of any surplus that the would-be buyer’s proffered transfer would create, but something more. She has the power to turn away a buyer altogether, even a buyer who offers far more than her reservation price, and even a buyer who generously offers her the lion’s share of the surplus that the bargain will generate. The landowner can elect to hold onto the property in the hopes that some later transaction will generate even more surplus for her. Autonomy in

31. See Krier & Serkin, *supra* note 7, at 868 (explaining how condemnees can wind up “doubly disadvantaged” when they receive less compensation than reflects their true subjective value and also lose any chance to share in the gains from the action).

32. The pathbreaking work of Guido Calabresi and A. Douglas Melamed distinguished between entitlements protected by “property rules,” which are alienable only on the owner’s consent, and those protected by “liability rules,” which can be unilaterally transferred away from the owner upon payment of an established price. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

selling might, therefore, be analogized to the value of holding an option—the capacity to wait on unfolding conditions to decide when one wishes to sell.

The value placed on autonomy may not correlate neatly with the other elements that go uncompensated in exercises of eminent domain, but may depend instead on a landowner's vision of what it means to own property. Indeed, there is arguably a deeper value associated with autonomy that is different in kind from that which accompanies the other two elements. This difference in kind will prove important in developing an approach to the problem of the uncompensated increment.

Surveying the contents of the uncompensated increment takes us some distance in understanding why landowners are properly concerned about the definition of public use. But there are two other sets of worries that relate to the definition of public use. In the next subpart, I consider the political concerns that accompany certain exercises of eminent domain. In subpart C, I consider the practical roadblocks to governmental objectives that may be posed by holdout problems.

B. The Few and the Many

As Neil Komesar has aptly noted, there are two opposite political fears that are often cited in the context of land use regulation—the fear of a powerfully concentrated minority capable of overwhelming ordinary majoritarian processes, and the fear of a powerful majority that squelches the interests of a powerless minority.³³ These divergent concerns map onto different categories of eminent domain and bear a tight relationship to questions about the scope of public use.

Exercises of eminent domain have two sides to them: a “taking” side, in which condemnees are summarily deprived of the uncompensated increment, and a “giving” side, in which transferees receive property for a price unattainable through ordinary market processes.³⁴ Other things equal, political

33. NEIL KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 60-70 (2001) (discussing a “two-force” political model in which malfunctions can result from either minoritarian or majoritarian biases—leading to both a “fear of the few” and a “fear of the many”). These risks may not be symmetrical. For example, William Fischel has suggested that local government tends to be more majoritarian than state and federal government, suggesting a heightened risk of majoritarian bias at the local level and a reduced risk of the disproportionate impact of special interest groups. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 87-92 (2001).

34. See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 550-52 (2001) (observing that “givings” always accompany “takings” and emphasizing the need to develop a doctrinal approach that takes both sides of the governmental action into account).

worries rise as the number of people on *either side* of the equation falls. Small numbers of transferees raise the specter of manipulation of the political process by those wielding disproportionate concentrated power.³⁵ Conversely, small numbers of condemnees present the concern of the political oppression of a powerless minority.³⁶

Figure 1 maps out the various combinations of givings and takings associated with governmental action.³⁷ My ultimate focus is on exercises of eminent domain that involve transfers of property to private parties—the sorts of condemnations at issue in cases like *Poletown*, *Hathcock*, *Hawaii Housing Authority v. Midkiff*,³⁸ and *Kelo*. However, in order to show the full range of possibilities, I include both the possibility that benefits will go to “the public” (which would often be accomplished through the agency of a governmental entity) and the possibility that burdens will fall on “the public” (which would typically take the form of taxation or some other regulatory burden, rather than an actual taking of land).

35. See *id.* at 593-95 (noting political concerns implicated when benefits are concentrated on one or a small number of identifiable individuals). Similar questions about concentrated impacts and concentrated power appear in the literature on public choice. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991) (discussing the role of interest groups in the political process).

36. See, e.g., *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting) (contending that the exercise of eminent domain approved by the majority “disregard[ed] the rights of the few”). It is possible that a small number of would-be condemnees could constitute a center of concentrated power that would actually repel burdens more effectively than could a larger and more diffuse group. Cf. Levinson, *supra* note 16, at 970-71 (suggesting that shifting burdens from a cohesive and relatively powerful group of landowners to the general public may decrease rather than increase political opposition). However, a truly powerful group would be likely to deflect the governmental authorities to another location before condemnation proceedings began. Hence, at least in a regime where payments are undercompensatory, we might view the fact of condemnation as a political judgment that the condemnees are not an especially powerful group. This assumption would not hold, of course, if the government were to shift to a supercompensatory regime in which having one’s land condemned brings a windfall rather than a shortfall.

37. By focusing on the concentration or diffusion of costs and benefits in different combinations, Figure 1 follows in the tradition of typologies used to assess the role of groups in political interactions. See, e.g., MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 65-68 (1981) (discussing James Q. Wilson’s “typology of stakes” which divides policies into four categories based on the incidence of costs and benefits: “distributed benefits–distributed costs, distributed costs–concentrated benefits, distributed benefits–concentrated costs, and concentrated benefits–concentrated costs” (citing JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 331-32 (1973))).

38. 467 U.S. 229 (1984).

FIGURE 1: MAPPING GOVERNMENTAL TRANSFERS

From To	one	some	many
one	From A to B	From Group A to B [<i>Poletown</i>]	From the Public to B [business incentives]
some	From A to Group B	From Group A to Group B [<i>Midkiff</i>]	From the Public to Group B [redistributive taxation]
many	From A to the Public [garden-variety eminent domain]	From Group A to the Public	From the Public to the Public [taxation for public goods]

Unsurprisingly, discomfort with eminent domain is at its apex where the land of one private party is taken to give to another private party—this is the “naked” A to B transfer shown in the upper lefthand corner of Figure 1.³⁹ At the other extreme are burdens that the government places on everyone in a society in order to benefit everyone in that society, such as taxation for public goods.⁴⁰ These sorts of governmental actions, represented by the lower righthand corner, are legitimate exercises of authority that would not even constitute takings (assuming that the burdens are regulatory or financial rather than physical in nature).

As one moves from the lower righthand corner leftward along the bottom row, transfers remain within the realm of legitimate government authority because of the broad dispersal of their benefits but become increasingly likely to require compensation to those who are burdened. Certainly this will be true of any physical taking of land, regardless of the numbers of people affected.⁴¹ But with respect to regulatory burdens, the smaller the numbers involved, the

39. See, e.g., Krier & Serkin, *supra* note 7, at 861 (discussing such “naked transfers” and giving the example of taking a home to give it to the CEO of a favored company).

40. Public goods are characterized by relatively high levels of nonexcludability (it is difficult to exclude people from enjoying them) and nonrivalry in consumption (costs do not rise much as more people consume the good). See, e.g., EPSTEIN, *supra* note 8, at 166. National defense is a standard example. See *id.*

41. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (adopting a *per se* test under which any permanent physical occupation will qualify as a taking for which just compensation must be paid).

more likely it becomes that individuals are being “singled out” to bear burdens that ought to be borne by society as a whole; therefore, the more likely it is that compensation is appropriate.⁴²

The lower lefthand corner is perhaps the archetypical taking for public use. Someone’s land is taken for the benefit of all, and compensation is paid for the privilege of taking it. Worries about victimization of a powerless minority are buffered by two factors: first, the payment of direct compensation for the land taken; and second, the fact that some elements of the public benefit in this and other similar takings will flow back in the direction of the condemnee. Direct compensation offers only fair market value, so confiscation of the uncompensated increment hinges in this case on the “implicit compensation” provided through the public benefits generated by the taking.⁴³

As we move upward from the bottom row, the number of beneficiaries drops. This raises concerns about concentrated power. These political concerns about unduly concentrated power are present even when the takees are large in number, as is the case in the upper righthand corner. It is sometimes noted in discussions about takings for private beneficiaries that local governments can and often do provide direct monetary incentives to those same businesses. The difference, of course, is the incidence of the burdens associated with those incentives. In the typical incentive case, the costs are spread broadly across society, which at least arguably provides a more robust political check.⁴⁴ At any rate, we are in a realm where, as a doctrinal matter, the takings clause does not apply and the public use test is not in play. In appropriate cases, other doctrines may step in to address concerns about concentrated power. For example, jurisprudential attacks on “spot zoning” respond to the concern that overly powerful interests will be able to override the planning agenda of the majority.⁴⁵

42. See, e.g., Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344-48 (1991) (focusing on the notion of unfair “singling out”); EPSTEIN, *supra* note 8, at 204-07 (discussing differences between taking land from a single individual and taking from a larger number of people); Heller & Krier, *supra* note 10, at 1006-07 (observing that the case for individual compensation weakens as losses are spread more broadly and the burden on each person diminishes).

43. See *supra* note 14.

44. See *Poletown*, 304 N.W.2d at 463 (Fitzgerald, J., dissenting) (observing that “[c]ondemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm” whereas “[t]he burden of taxation is distributed on the great majority of the population, leading to a more effective check on improvident use of public funds”).

45. See KOMESAR, *supra* note 33, at 58-59 (discussing *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23 (Or. 1973)).

The chart's interior, where the number of beneficiaries is diminishing simultaneously with the number of takees, contains some of the most difficult terrain for the public use doctrine. Both *Midkiff* and *Poletown* could be plotted in one of these interior locations.⁴⁶ But we must be careful not to draw any conclusive lessons from this chart, which captures only two dimensions of the public use problem. Another crucial dimension for assessing exercises of eminent domain relates to the problem of monopoly landowner power, often styled as an "assembly problem" or "holdout problem." The next subpart explains.

C. Thick Markets, Thin Markets

The preceding two subparts have catalogued some of the reasons landowners and the general public might worry about an overly expansive understanding of public use. But those who wish to make use of eminent domain (both governmental bodies and their private transferees) have reason to worry about an overly narrow definition of public use. Their concerns often relate to the difficulties of achieving desired outcomes in "thin markets"—that is markets for land in which no good substitutes for the desired parcels exist.⁴⁷ Indeed, the importance of overcoming strategic holdouts in order to achieve important objectives constitutes a primary justification for eminent domain.⁴⁸

The source of the holdout's strategic leverage resides in her monopoly power over a desired resource. The problem is presented most starkly in assembly problems, such as those accompanying the routing of a highway, railroad, canal, or pipeline. If we make the simplifying assumption of a single

46. *Midkiff* involved Hawaii legislation that sought to end concentrated patterns of landholding by transferring land from owners to tenants who owned homes on leased land. *Midkiff*, 467 U.S. at 231-34. It can therefore be characterized as a Group *A* to Group *B* transfer, although Group *A* in this case was substantially smaller than Group *B*. *Poletown* involved the transfer of property from a group of landowners to one large entity, General Motors. *Poletown*, 304 N.W.2d 455.

47. See, e.g., Merrill, *supra* note 19, at 74-75 (discussing problems associated with thin markets).

48. See, e.g., Merrill, *supra* note 19 (arguing that the public use inquiry should focus on questions of means rather than ends, and suggesting that thin market considerations should feature prominently in the assessment of whether eminent domain is an appropriate means); POSNER, *supra* note 16, at 55 (maintaining that "[a] good economic argument for eminent domain, although one with greater application to railroads and other right-of-way companies than to the government, is that it is necessary to prevent monopoly"); 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. 829, 947 (discussing assembly problem and the potential for holding out that it creates).

viable route, every individual landowner along that route enjoys monopoly power over an essential piece of the path.⁴⁹ A similar thin-market problem can occur with a single piece of land, if it is uniquely well-suited to a particular use because of its location or other unusually desirable characteristics.⁵⁰ In these instances, too, the landowner can engage in problematic holdout behavior that raises the price of moving the resource to a higher valuing user.⁵¹

If markets are sufficiently thick, the would-be holdout's tactics will be unavailing; the purchaser can simply buy a different parcel of land elsewhere. Therefore, the lack of good substitutes is a prerequisite for the sort of market power that is associated with holding out. Land is spatially unique; its nonfungibility will tend to thin the market, and this is especially true where a group of contiguous parcels must be aggregated. However, not all assembly problems are equally susceptible to problematic holdout behavior. The *Hathcock* court grasped this point when it distinguished the exercise of eminent domain to lay out a railroad (which it presented as an example of "public necessity of the extreme sort otherwise impracticable") from the assembly of parcels for the "Pinnacle Project," a business and technology park.⁵² Noting that the country is "flecked" with uses of the latter sort that were apparently assembled without the assistance of eminent domain, the court concluded that the Pinnacle Project did not present the extreme sort of assembly problem that could only be solved through government-coordinated collective action.⁵³

The difference between these two prototypical assembly problems—the railroad and the office park—can be easily seen if we consider the shape of the production function for the surplus that each assembly generates. Figure 2

49. See, e.g., Merrill, *supra* note 19, at 75 (discussing the example of a pipeline for which "only one feasible pipeline route exists"; in this situation, "each owner is a monopolist, effectively dominating a resource needed to complete the project"); Heller & Hills, *supra* note 28, at 5 (explaining that once part of a planned site has been purchased by a land assembler, the owners of the remaining parcels "become monopoly suppliers of their parcels"). The problem is a species of the anticommons dilemma, in which each of several property owners holds veto or "holdout" power over the transfer of a consolidated resource to another user. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); see also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004).

50. See Merrill, *supra* note 19, at 76 (discussing "thin market" situations that do not involve the assembly of multiple parcels). For example, an important thin market problem unrelated to land assembly arises when one landowner needs an interest in adjacent land in order to access her own land. *Id.*; Levmore, *supra* note 42, at 1339 & n.8.

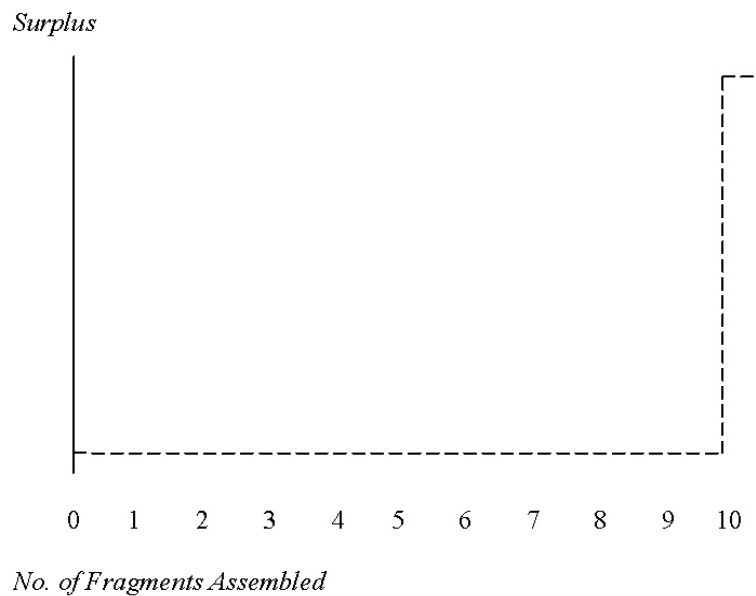
51. See Merrill, *supra* note 19, at 76.

52. *Hathcock*, 684 N.W.2d at 781-82 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

53. *Id.* at 783.

depicts the assembly problem presented where a section of railroad is required to link up two other portions of a major rail system. This section of railroad is a “step good” that delivers its entire social surplus at once in a single “step” when the full assembly is complete.⁵⁴ Until the last parcel is assembled, the other parcels generate no surplus at all—they are as useless as a partial bridge. Therefore, each of the ten parcels is essential to the whole operation, and the owner of any one parcel can block the realization of the entire surplus, absent eminent domain.

FIGURE 2: THE RAILROAD TRACK



As the *Hathcock* court emphasized, such a situation could lead first one owner and then others to attempt to claim a disproportionate share of the surplus that will be created by the assembly, as each recognizes that the entire deal hinges on her cooperation.⁵⁵ Of course, if enough landowners make demands for the lion's share of the surplus, the assembly will become impossible—a socially worthwhile goal is derailed. Even short of this

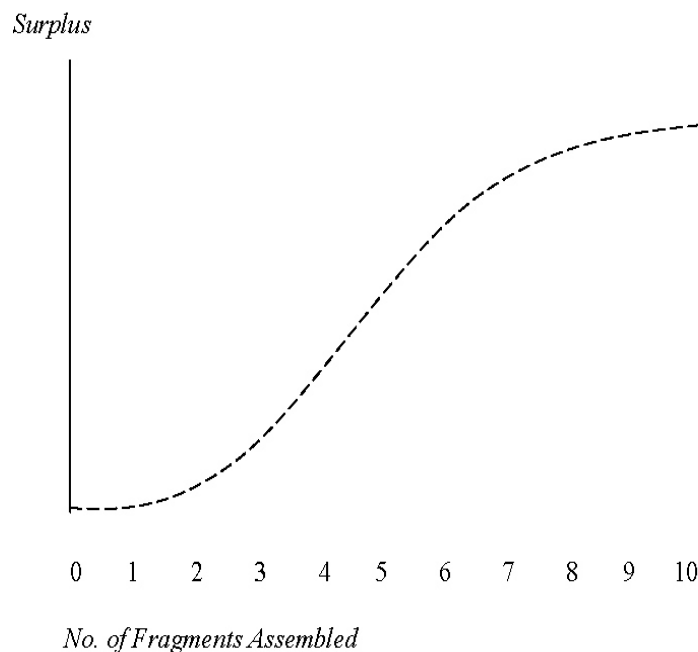
54. See, e.g., RUSSELL HARDIN, *COLLECTIVE ACTION* 55-61 (1982) (analyzing step goods); Fennell, *supra* note 49, at 956-61 & fig.5 (discussing and illustrating step goods, and distinguishing them from smoothly increasing production functions).

55. *Hathcock*, 684 N.W.2d at 781-82.

unfortunate result, negotiations over the division of surplus will typically dissipate value and waste social resources.

Contrast the rail connector assembly problem with that presented by the need to acquire, within a metropolitan area, ten acres of land in order to construct a small shopping plaza. Here, we might imagine that the shape of the production function would be significantly different. Even if the land assembler has her eyes on a specific set of ten one-acre parcels ideally situated for the plaza, she will probably be able to obtain most of the surplus associated with the project by assembling some subset of the ideal ten parcels. Perhaps she can alter the physical configuration of the plaza, allowing other adjacent parcels to serve as substitutes for some of the chosen ten parcels. Or perhaps she can get most of the benefits she seeks with a somewhat smaller plaza, or a plaza that somehow “builds around” any troublesome holdouts.⁵⁶ While the production function for the surplus will vary as an empirical matter from situation to situation, one possibility is shown in Figure 3.

FIGURE 3: THE SHOPPING PLAZA



56. See ANDREW ALPERN & SEYMOUR DURST, HOLDOUTS! (1984) (presenting examples of the “build-around” strategy).

Here, much of the value associated by the project can be realized without getting every last parcel. As a result, the incentive to hold out is reduced. Indeed, parties might worry that excessive holding out would lead the project to proceed without them, when there might well be a mutually beneficial price at which they would prefer to sell.

Similar differences in market “thickness” can be detected in settings that do not involve assembly. Consider a case where a particular site would make a desirable location for a post office, but there are four other sites within a six block radius that would work almost as well. Here, the owner of the ideal site has a monopoly on that site, but the existence of close substitutes helps to thicken the market sufficiently to dilute the incentive of any particular landowner to hold out. Contrast this with a situation in which a particular location owned by a single landowner is severely blighted—a blemish on the city. If removing the negative effects caused by that blighted site is the goal, acquiring a “substitute” site will do no good. The owner of the blighted site effectively has monopoly power on the resource that must be acquired in order for the government’s goal to be accomplished. Consistent with this analysis, the *Hathcock* court approved transfers of condemned property to private parties where characteristics of the land to be condemned drove the land’s selection—as in the case of blight.⁵⁷

Assessments of market thickness or thinness depend critically on how one defines the desired good.⁵⁸ It is one thing if one seeks merely “a ten-acre shopping mall in greater Metropolis,” and another thing if the desired end is “a ten-acre walkable shopping district that will serve neighborhoods X and Y in the heart of Metropolis,” and yet another thing if the object is “the ambient quality of life produced by a pleasing built environment in which evenly spaced shopping districts offer easy pedestrian access to stores and restaurants for every city dweller.” The more narrowly the goal is drawn and the more tightly it is linked to particular spatial conditions, the fewer the substitutes and the greater the potential for holdouts. Or, to put it another way, we must consider whether alternatives that seem as if they could alleviate the holdout problem actually represent good substitutes.

57. *Hathcock*, 684 N.W.2d at 782-83. Of course, it would be possible for land to be selected for its desirable characteristics as well as for its undesirable ones. While the *Hathcock* court focused on the blight example, the verbal formulation it used seems broad enough to encompass sites that are especially well-situated or well-suited for a particular use. It is an empirical question whether the thin-market problem tends to be more severe in the blight case than in the case of an especially desirable site. In any case, there is another basis for distinguishing between the two kinds of situations. See Part II.B.2, *infra* (discussing the potential applicability of nuisance principles to the public use question).

58. I am grateful to Dan Mandelker for comments that led me to consider the matters raised in this paragraph and the one that follows.

The fact that private parties seem willing to substitute one site for another—say, a shopping center site on the edge of town for a site in the denser urban core—does not mean that the government necessarily views (or should view) the two types of development as close substitutes.⁵⁹ If there are negative or positive spillovers from particular patterns of development, then government will have a stake in seeing development occur *here* and not *there*. Urban planning is founded on the principle of spatial nonfungibility and on the notion that particular use patterns generate public goods (or public bads).⁶⁰ The greater these nonfungibilities, the more intense the thin-market problem.

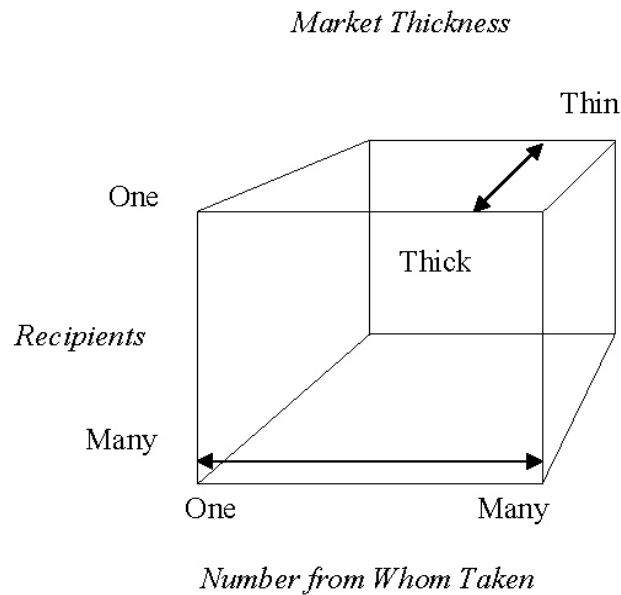
Eminent domain short-circuits thin-market problems by substituting a liability rule for a property rule⁶¹—upon the payment of fair market value, the land will change hands regardless of the wishes of the current owner. Once we add the consideration of market thickness to the political considerations presented earlier, we can begin to see the public use conundrum as a three-dimensional problem, as shown in Figure 4.

59. I thank David Dana for bringing up this example in his presentation on public use at the 2005 annual meeting of the Association of American Law Schools.

60. The “blight” rationale often used to justify eminent domain for redevelopment purposes has suppressed the generality of this point. In a 1967 article exploring the connections between planning and urban renewal, Daniel Mandelker noted a shift toward “a more comprehensive approach to the redevelopment of the city” and presciently observed that “the need to exercise compulsory acquisition powers outside conventional slum areas may raise difficult constitutional problems” that could require a rethinking of the role of planning. Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 69 (1967).

61. See Calabresi & Melamed, *supra* note 32.

FIGURE 4: TAKINGS IN THREE DIMENSIONS



The front upper left corner of Figure 2 represents the apex of governmental overreaching. Here we have a taking from *A* to give to *B*, under thick-market circumstances in which governmental intervention is wholly unnecessary. Such cases are unusual, perhaps because the process of condemnation is typically too expensive to use in thick-market cases.⁶² As we move in any direction from this “corner of illegitimacy,” arguments begin to take shape about why eminent domain should be permissible. As the number of recipients grows, the fears of concentrated political power diminish. As the number of takees increases, the chance of a meaningful political check on majoritarian overreaching rises. And as we move from front to back to ever thinner markets, the necessity of proceeding through eminent domain to achieve a given objective increases.

62. See Merrill, *supra* note 19, at 77-81 (suggesting that the administrative costs of eminent domain make it more expensive than ordinary market transactions where markets are thick).

However, it would be incorrect to suggest that the satisfaction of the public use test depends on a transfer's absolute distance from the front upper left corner. There are at least two considerations that lead to interesting and complicated interactions among the different dimensions represented in Figure 4.

The first involves the treatment of surplus. As just explained, eminent domain is attractive in thin-market settings because it avoids costly and potentially deal-killing squabbles over surplus. However, it typically does so by simply assigning the entire surplus to the acquirer and none of it to the landowner. Yet, assigning all of the surplus to the acquirer may seem inappropriate as a matter of fairness, especially where the number of takees and recipients suggests the possibility of political failure that might misallocate burdens and benefits. The assignment of surplus to the acquirer may also attract rent-seeking behaviors from would-be acquirers that erode efficiency gains.⁶³ Of course, this particular way of allocating surplus is not essential to resolving the holdout problem; what matters is that the acquiring party has the unilateral power to effect a transfer. Other arrangements would be possible—either splitting the surplus or even assigning it all to the condemnee.⁶⁴ But if all the surplus is assigned to the landowner, landowners may seek condemnation through similar rent-seeking efforts.⁶⁵

Any arrangement that guarantees an actor (whether a landowner or an acquirer) more surplus than she would expect to get under ordinary market conditions may attract inefficient rent-seeking behaviors. Yet it is precisely such guarantees—an *ex ante* protocol for surplus division—that delivers the efficiency payoff in thin markets. Hence, observing that a market for a desirable parcel of land is “thin” only carries us part of the way in deciding what to do about it. We also have to know what sort of surplus division is most fair, given the political circumstances, and whether rent-seeking triggered by the surplus assignment represents a greater threat to efficiency than the holdout problem itself.

Prescriptions become more complicated if we think market thinness sometimes serves as a proxy for uniqueness and therefore correlates with significant levels of subjective value. Such a correlation would make the

63. See, e.g., *id.* at 86-87; Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 79-91 (1998).

64. Mill Acts which provided compensation at the 150% level are cited as an example of surplus splitting. See *supra* note 30. Krier and Serkin would go further to assign all of the surplus to the condemnee in certain situations. Krier & Serkin, *supra* note 7, at 870-73 (discussing “gain-based compensation”).

65. See Merrill, *supra* note 19, at 92.

movement from thick to thin ambiguous as a marker of the appropriateness of eminent domain. The essential problem is one of distinguishing true holdouts—that is, people who are strategically attempting to garner a disproportionate share of the surplus that a transfer will generate—from what Gideon Parchomovsky and Peter Siegelman have termed “holdins”—people whose refusal to sell reflects not strategic behavior but rather a very high true valuation of the property.⁶⁶ Overriding a holdout’s strategic position through eminent domain is efficient, whatever it may do distributively. But overriding a holdin risks inefficiency. The holdin typically has a very large subjective premium that will go uncompensated in eminent domain. If the acquiring body is not required to compare the benefits of the transfer with the true costs it imposes on the overridden holdin, acquisitions may be undertaken that are not worth their costs. Moreover, it seems unfair as a distributive matter to take land from an owner at a price that fails to compensate her for her true valuation of the property.⁶⁷

Our three-dimensional problem does not, therefore, come with a neat geometric solution. Getting a sense of the shape of the public use problem is merely an important first step.

II. TOWARD A NEW FRAMEWORK FOR PUBLIC USE

The worries discussed in the preceding Part are familiar to those who have studied the public use question. The difficulty is in confronting them in a way that offers any meaningful guidance in close cases. My analysis to this point has attempted to break down the considerations in a way that will make them easier to manipulate into the shape of a judicial test, but the hard work of shaping that test still lies ahead. Before diving into my approach to the question, I would first like to say a bit more about the *Hathcock* court’s solution and the strengths and shortcomings I perceive in it.

A. Cutting Around Categories

Hathcock’s 3-pronged test for finding “public use” in cases where a private party is the ultimate recipient of condemned land⁶⁸ represents a fine bit

66. Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 128-29 (2004).

67. This point might be debated, depending on one’s normative view of attachments to particular pieces of property. If such attachments are generally socially valuable, then the confiscation of the value associated with them seems problematic.

68. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781-83 (Mich. 2004) (citing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478-80 (Mich. 2004)

of judicial scissorwork. Justice Ryan, the test's author,⁶⁹ looked back at Michigan's pre-1963 caselaw to identify three permissible categories of takings for transfer to private parties: 1) "public necessity of the extreme sort otherwise impracticable," illustrated by the holdout problems that attend assembly of a railroad, highway, or canal;⁷⁰ 2) situations in which "the private entity [that receives condemned property] remains accountable to the public in its use of that property," illustrated by a petroleum pipeline placed on condemned property over which a governmental agency retained control;⁷¹ and 3) "when the selection of the land to be condemned is itself based on public concern," as illustrated by the blight-removal cases.⁷²

Thus, under the Michigan Supreme Court's current approach, every exercise of eminent domain falling into one of these three categories satisfies the public use test, while all other transfers to private parties flunk the public use test. As the foregoing summary suggests, each category is a relatively malleable verbal formulation built around a signature example of the category. As commentators have already begun noting, the approach leaves substantial ambiguity about how elastic the categories will prove to be, and to what extent differences from the illustrative cases for each category will be deemed dispositive.⁷³ The real problem is not with ambiguities in the categories, however, but rather with any approach that creates categories without a conceptual model for why these are the correct, and correctly delineated, categories. The Michigan Supreme Court's historical bases for the categories it exempted offers one response to this criticism, but it is not a response that travels well when one moves to investigating the scope of the federal constitutional limits on public use.

A meaningful understanding of public use must get beyond an historical list of exempt categories of private transfers and find the underlying

(Ryan, J., dissenting)).

69. The *Hathcock* test is lifted, with full attribution, from Justice Ryan's dissent in *Poletown*. See *Hathcock*, 684 N.W.2d at 781-83 (citing *Poletown*, 304 N.W.2d at 478-80).

70. *Id.* at 781-82.

71. *Id.* at 782.

72. *Id.* at 782-83.

73. See, e.g., Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1027-39 (discussing whether *Hathcock*'s exceptions "swallow the rule"). This problem of categories and examples is quite general, and contributes to vagueness in the law. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 145 (2002) (explaining that "[t]o the extent that particular examples differ from the best examples, some of us may begin to doubt that they are good examples of the category, and perhaps even that they are within the category" (discussing and citing STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001))).

considerations that drive those exemptions. Only by undertaking this analysis can we find the proper stopping points at the edges of the categories and learn whether these categories represent an exhaustive rather than illustrative set. The *Hathcock* decision takes us part of the way by identifying categories that resonate with the intuitive concerns outlined earlier, but a more systematic framework is needed to deal with the cases in which our intuitions point in different directions. The next subpart suggests that such a framework, fuzzy though it may be, is already in existence.

B. Back to Regulatory Takings

I always impress upon my first-year Property students that there are two flavors of takings giving rise to very different legal questions: “on purpose” exercises of eminent domain for which compensation is contemplated from the outset, and “regulatory takings,” where the central question is *whether* a taking for which just compensation must be paid has occurred at all.⁷⁴ One benefit of this pedagogical line-drawing is that it firewalls the discussion of eminent domain off from the messy, amorphous, and inevitably anxiety-producing analysis associated with regulatory takings.⁷⁵ Therefore, it is with more than a little trepidation that I advance down the path of drawing regulatory takings analysis back into the public use question that arises in purposeful exercises of eminent domain.⁷⁶ However, for reasons that I will discuss, I think it is analytically the right approach.

Early in the essay, I introduced the idea of the uncompensated increment, and suggested that it could be usefully separated out from the compensated component of eminent domain.⁷⁷ Once that conceptual move is complete and

74. Permanent physical occupations arguably occupy a separate, intermediate category, but it is one that causes little difficulty given the *per se* rule adopted by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

75. While the vagueness that surrounds this area is unsatisfying to students, it is not obvious that a clearer substitute exists. Perhaps there is even something to be said for the muddle as an expression of society’s commitment to working through a set of inherently difficult and contested issues. See generally Poirier, *supra* note 73.

76. Others have also suggested importing concepts from regulatory takings analysis to inform the public use question. See, e.g., Fischel, *supra* note 48, at 932 (invoking “demoralization costs”—an idea Frank Michelman developed to help evaluate whether a compensable taking had occurred—in discussing public use standards); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (suggesting that standards developed for land use exactions be applied to test whether a condemnation meets the public use requirement).

77. Cf. EPSTEIN, *supra* note 8, at 207 (suggesting that whenever a landowner’s contributions are out of proportion with the distributions she receives back, “the transaction can be broken down into two transactions, one proportionate and the other not,” with the latter

the compensated swap of land for fair market value is set to one side, one is left with an uncompensated governmental action that can be assessed using standards similar to those that attend other uncompensated governmental actions. Assuming that the ends served fall within the broad compass of the police powers, two questions remain: 1) whether the confiscation of the *uncompensated increment* is a taking for which just compensation is required; and 2) if so, whether it is possible to bring the exercise of eminent domain into constitutional compliance by paying additional money—that is, whether it is the sort of taking for which monetary compensation is “just.” Deciding the first question is the project of this subpart, and it requires turning back to the morass of concepts and structures used to assess regulatory takings claims. In the next subpart, I will take up the second question.

1. *Clearing Away the Underbrush*

Before beginning to work through the ways in which concepts from regulatory takings apply here, I would like to briefly note some elements from takings jurisprudence that will *not* be part of my approach. First, I will not pursue the idea, proposed by Nicole Garnett,⁷⁸ of importing the nexus and proportionality analysis from *Nollan v. California Coastal Commission*⁷⁹ and *Dolan v. City of Tigard*⁸⁰ into the public use inquiry. Second, I view as inapposite to the analysis of the uncompensated increment the categorical *per se* rules developed in *Loretto v. Teleprompter Manhattan CATV Corp.*⁸¹ and *Lucas v. South Carolina Coastal Council*⁸² for permanent physical occupations and “total” takings, respectively.

The nexus and proportionality tests articulated in *Nollan* and *Dolan* were developed for the exactions context, where the government makes a deal with a landowner or developer. Some of the same criticisms that have been leveled against the use of these tests within the exactions context caution against exporting their analytic framework to the public use arena.⁸³ A basic

presenting a case for transfer payments).

78. Garnett, *supra* note 76.

79. 483 U.S. 825 (1987).

80. 512 U.S. 374 (1994).

81. 458 U.S. 419 (1982).

82. 505 U.S. 1003, 1024 (1992).

83. See, e.g., Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); see also WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 348-50 (1995) (arguing that *Dolan*'s proportionality analysis should have replaced *Nollan*'s nexus requirement instead of adding to it). To be sure, much of the criticism of the *Nollan* and *Dolan* rules focuses on their capacity to block mutually

conceptual problem with the *Nollan* and *Dolan* decisions is that they set a much higher standard for validating bargains between landowners and the government than they set for unconditional governmental actions taken against a landowner.⁸⁴ Placing exactions-level burdens of proof on governmental actors consciously employing eminent domain would privilege uncompensated regulatory burdens over compensated takings and create pressures in favor of the former device. The large gap that this approach would create between the standards used to determine whether a taking has occurred and the standards used to determine whether an exercise of eminent domain is valid could, for example, generate incentives for governments to burden people through regulation until they agree to sell voluntarily.

Turning next to the *per se* takings rules, it goes without saying that any conscious invocation of eminent domain proceedings will have the character of a physical occupation. *Loretto*'s categorical rule merely says that such an occupation is always a taking; it does not speak to the level of compensation that will be appropriate. Purposeful exercises of eminent domain already contain a compensated component—the swap of property for fair market value—that might be understood to comply with the dictates of *Loretto*'s categorical rule. It is true that part of the uncompensated increment relates to a loss of autonomy to enforce one's right of exclusion; this right is overrun by the forced sale. However, the trumping of autonomy and exclusion interests will always occur where physical occupations are involved, and the *per se* rule does not speak to the need for an additional payment to make up for those interests.

Lucas's *per se* rule is inapplicable for a similar reason—the “taking” in question is always “total” in the sense that eminent domain is being exercised to deprive the original owner of any continuing rights in the property. But, again, *Lucas* tells us only that there is a taking; it does not specify the level of compensation. We know that the compensation must be “just,” but *Lucas* cannot help us decide whether paying fair market value is sufficient or insufficient, or whether there are deeper problems with the exercise of governmental authority. In other words, the *per se* categories are very helpful in assessing whether a government action is impermissible in the absence of

beneficial bargains that landowners or developers might wish to enter into voluntarily. Because eminent domain involves nonconsensual transactions, it presents somewhat different concerns. However, the conceptual difficulties and potential inefficiencies associated with raising the standard for one kind of governmental action while leaving unchanged the standard for a ready alternative remain. Moreover, adoption of the *Nollan* and *Dolan* standards in the eminent domain context could interfere with the prospect of basing private takings on landowner consent in the fashion suggested in Part II.C.2, *infra*.

84. See Fennell, *supra* note 83, at 4-5, 27-41.

compensation, but they do not help in identifying the circumstances in which paying compensation rectifies the problem.

Having set aside as inapposite to our inquiry both the heightened standards used for assessing land use exactions and the special categorical rules for permanent physical occupations and total takings, we can turn now to the remaining staples of the regulatory takings analysis.

2. *Background Principles and Nuisance*

Governmental regulatory actions that control nuisances or otherwise curtail land use rights that landowners never possessed under “background principles of law” do not count as “takings.”⁸⁵ Holding just the uncompensated increment in mind, we might ask whether its confiscation in the course of eminent domain is in furtherance of nuisance control or otherwise effectuates pre-existing limits on property holdings. One facile way of answering the question would be to point out that all property is held subject to a background principle whereby it may be taken for public use upon the payment of just compensation. This observation is true but unhelpful; we still need to determine what qualifies as a permissible combination of use and compensation.

A better tack would be to ask whether the confiscation of the uncompensated increment directly advances the sorts of nuisance control goals associated with uncompensated regulatory impediments.⁸⁶ Consider blight. The case for clearing blighted land is essentially a nuisance-control

85. See *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992).

86. At first blush, this analysis seems to prove too much. If nuisance control is “never” a taking, then why is *any* compensation—even fair market value—necessary? A tentative answer would be that the *per se* rule classifying all permanent physical occupations as takings trumps (or at least ought to trump) the nuisance *per se* rule except in very limited circumstances. One such circumstance is delineated by “the conflagration rule”—the rule that uncompensated destruction is permissible where necessary to avoid a serious harm such as a rapidly-spreading fire. See DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 118-20 (2002) (discussing “the conflagration rule” and noting its potential connection to the nuisance exception). But in conflagration-type cases, the temporal exigency mutes concerns about politically-motivated “singling out,” and the fact that the property in question is utterly destroyed rather than transferred to someone else reduces worries about rent-seeking. See, e.g., Levmore, *supra* note 42, at 1344-60 (emphasizing the significance of “singling out” in takings analysis, and discussing the importance of examining who benefits from a taking). Because other sorts of physical takings do not share these special features, it seems sensible to keep the class of noncompensable physical takings very limited, even when nuisance control is implicated. Under this approach, physical takings directed at controlling nuisances must be compensated, but the uncompensated increment can be evaluated by analogy to regulatory nuisance control.

rationale that hinges on the negative externalities generated by the land in its present condition.⁸⁷ Such a rationale makes sense—assuming an appropriately limited definition of “blight”—if we consider in turn the components of the uncompensated increment. First, the owners of blighted land are unlikely to enjoy any significant (legitimate) subjective premium. To the extent the land is worth more to these owners than fair market value, we might say that the surplus arises from a willingness to offload costs onto neighbors and tenants, rather than from any affirmative, site-specific investments in the community.⁸⁸

Likewise, taking away the owner’s chance to earn a share of the surplus from the transfer of property seems unproblematic. Blighted land presents a thin-market or monopoly problem that is particularly troubling. If the use is inflicting costs on the surrounding area, then the owner under ordinary market conditions might well be able to hold out for a large share of the surplus that will be delivered from the discontinuance of the use. But as a distributive matter, it does not seem that the landowner has any right to the surplus, the very existence of which is a product of the landowner’s subnormal⁸⁹ use of the land. The incentives for extortionate behavior are clear enough if people are allowed to create bad situations and then glean some of the surplus associated with relieving the negative condition. It is like arguing that someone who is making hideous music on the sidewalk has a right to some of the surplus associated with stopping the racket.⁹⁰

The confiscated autonomy interest can be analyzed similarly. If the right to a share of the surplus is removed as a matter of nuisance control, then it makes no sense to afford someone the autonomy to decide when and whether to sell—the nonselling inflicts ongoing costs that society must be in a position to stop. To put it another way, we might say that a landowner whose property is generating negative externalities has thereby forfeited the right to make autonomous decisions with regard to the property.

However, one limit on this principle must be emphasized. It lines up, at least roughly, with the limits on “background principles” that the Supreme

87. See *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

88. Of course, this argument would not apply to the precise situation the Court was considering in *Berman*—whether an “innocuous” building could be condemned along with blighted properties. See *id.* at 34. However, once the taking of neighboring blighted properties is justified, it might be argued that the interspersed properties present a classic thin-market difficulty for which a taking is justified on grounds other than nuisance.

89. See FISCHEL, *supra* note 83, at 353 fig. 9.2 (categorizing property uses as “subnormal,” “normal,” and “supernormal”); Ellickson, *supra* note 7, at 729-31 (categorizing property uses as “meritorious,” “normal,” and “substandard”).

90. See Randy Cohen, *The Ethicist: Pay for No Play?*, N.Y. TIMES MAG., Nov. 28, 2004, at 66 (discussing a dilemma in which a bad musician attempted to strike a deal with a local store owner for stopping his noise).

Court attempted to formulate in *Lucas*. If government is given unlimited power to decide what counts as “blight” or what sorts of uses are subnormal, then it can characterize any failure to confer a benefit in these terms. It was precisely such sleight of hand that the Court in *Lucas* sought to guard against.⁹¹ Given the inherent malleability of the line between stopping a landowner from harming others and forcing a landowner to provide a benefit to others,⁹² a simple assertion of “blight” or the casting of an exercise of eminent domain in harm-preventing rhetoric cannot be sufficient to bring it within this nuisance-prevention rule.⁹³

A second concern has to do with the fact that the land in question will ultimately be transferred to a private party. The possibility that would-be transferees would engage in socially destructive rent-seeking as they attempt to get the benefit of the condemned land may be troubling, even if the condemnation produces no concerns about distributive unfairness to the landowner. However, this worry is no different and no worse than that which already accompanies transfers of money or tax incentives to favored businesses. Indeed, Thomas Merrill has argued that businesses are more likely to prefer putting their efforts into these latter, relatively easier sources of rents rather than vie for the right to benefit from eminent domain exercises.⁹⁴

An exercise of eminent domain that results in a transfer into private hands might be found to be a valid public use on grounds other than nuisance control, of course. Where nuisance control is not the taking’s rationale, the grab bag of concepts set out in *Penn Central Transportation Co. v. New York City*⁹⁵ can prompt some useful analysis on the public use question. The next section explains.

91. See *Lucas*, 505 U.S. at 1025 n.12 (suggesting that any legislature without a “stupid staff” could come up with a harm-prevention rationale for any desired governmental action).

92. See, e.g., Michelman, *supra* note 14, at 1201.

93. It is especially important to carefully scrutinize assertions of “blight,” given the term’s history. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003) (observing that, as used in urban renewal, “[b]light was a facially neutral term infused with racial and ethnic prejudice”).

94. Merrill, *supra* note 19, at 87. Of course, it is impossible to generalize about what sort of rent-seeking will be more attractive without knowing the relative rewards as well as the relative costs of the alternatives. A rational company will readily incur heavier costs to engage in a more problematic form of rent-seeking if the expected surplus those expenditures will produce is sufficiently large relative to what the company could glean from simpler, less costly avenues.

95. 438 U.S. 104 (1978).

3. *The Penn Central Factors*

Again, keeping just the uncompensated increment in mind, we can ask whether its confiscation fits with the principles of valid uncompensated regulation laid out in cases like *Pennsylvania Coal Co. v. Mahon*⁹⁶ and *Penn Central*. Perhaps the most useful concept in this connection is the notion of “average reciprocity of advantage.”⁹⁷ In the regulatory takings arena, this factor asks whether the burdens that governmental action places on particular actors is counterbalanced, in at least rough terms, by benefits provided to those same actors.⁹⁸ Where this question can be answered in the affirmative, concerns about unfair “singling out” of particular parties to bear disproportionately heavy burdens are minimized.

In the eminent domain context, the question is similar: Is this exercise of eminent domain of a type that, if universalized, would provide back to the burdened landowner enough benefits to induce a reasonable landowner’s willing participation in the overall scheme? If the overall system delivers results that are 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. In the case of a classic public use, the condemnee receives in-kind compensation in the form of a share of public benefits that arguably makes up for the loss of the uncompensated increment.⁹⁹

One important wrinkle is whether to examine the degree of balance in landowner’s situation *ex post*, after her land has been selected for condemnation, or whether we examine her situation *ex ante*, when she is a member of a society in which she runs a particular statistical chance of suffering the condemnation of her land. It seems disingenuous to suggest that

96. 260 U.S. 393 (1922).

97. *Id.* at 415.

98. One problem lies in finding the appropriate frame for assessing reciprocity of advantage. See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1338-45 (2002) (discussing questions of aggregation across time and contexts in assessing reciprocity of advantage); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 768-78 (1999) (discussing broad and narrow conceptions of average reciprocity of advantage, and suggesting an interpretation that incorporates notions of on-going social responsibility).

99. See *supra* note 14 (discussing “implicit, in-kind compensation”). One might employ Frank Michelman’s framework and suggest that the dispersal of benefits to the public eases the “demoralization costs” associated with the appropriation sufficiently to outweigh the “settlement costs” of placing a dollar value on the difficult-to-quantify uncompensated increment. See Michelman, *supra* note 14, at 1214-15 (explaining that, from a utilitarian perspective, “compensation is due whenever demoralization costs exceed settlement costs, and not otherwise”); see also Fischel, *supra* note 48, at 949 (suggesting that expanding the scope of public use to encompass less traditional uses might increase demoralization costs).

an increase in the expected value of one's holdings through generalized society-wide eminent domain practices can satisfy this requirement, where different individuals suffer greatly divergent outcomes.¹⁰⁰ On the other hand, it is unrealistic to expect that those who are *in fact* burdened by eminent domain will receive back benefits that make up for their own loss—at least in that particular instance.

Following Frank Michelman's analysis, we might instead adopt a Rawlsian perspective.¹⁰¹ Under this approach, before knowing whether one's own land will be condemned, one asks whether this is the *sort* of eminent domain arrangement that will tend to make one better off over the run of cases, given the range of possible distributive outcomes.¹⁰² Some examples will help to clarify. We have already discussed the fact that a "naked transfer" from private party *A* to private party *B* will usually not satisfy the public use requirement. Such a transfer combines the risk of singling out and the risk of undue wielding of power. However, there are at least two sorts of historical examples that defy this rule: condemnations of rights of way for landlocked parcels, and the condemnations contemplated under the Mill Acts.¹⁰³

These cases can be understood if one returns to the three-dimensional diagram in Figure 4: each involves extremely thin markets characterized by bilateral monopoly.¹⁰⁴ So severe, indeed, are the thin market problems that one might imagine rational landowners choosing a system in which these sorts of private-to-private transfers are permitted over one in which such transfers are disallowed, as long as one is just about as likely to end up on one side of the transfer as the other. Rational landowners might find that the arrangement provides an overall measure of reciprocity in that overcoming holdout problems across the board more than compensates for the loss of the

100. See, e.g., Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1707 (1988) (observing that "[c]itizens whose assets have been taken are unlikely to be satisfied with the argument that the system is fair ex ante").

101. Rawls suggested that fair societal arrangements would be developed by actors who were placed behind a "veil of ignorance" about the position they would occupy. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971). See Michelman, *supra* note 14, at 1218-24 (discussing the potential applicability of a Rawlsian analysis to questions about compensation for takings, with the assumption that individuals are able to consider the longer-run effects of practices that are applied across like cases in society).

102. See Michelman, *supra* note 14, at 1218-24.

103. See, e.g., Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 207-08, 217-19 (1978) (discussing condemnations of private rights of way for landlocked owners); *id.* at 206-07 (discussing the Mill Acts).

104. See Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1738 (observing that both of these situations involve "high hold-out potential").

uncompensated increment in the event that one ends up having one's own land condemned.

An additional feature helps to seal the case for average reciprocity of advantage in these historical “*A to B*” transfers: the ability to adjust the terms of the bargain legislatively. For example, the New Hampshire Mill Act provided for compensation at the 150% level, thus buffering distributive concerns.¹⁰⁵ Other statutory provisions can also protect landowners in such settings from victimization by other landowners.¹⁰⁶ As Richard Epstein explains, the New Hampshire Mill Act allowed any riparian owner to build a dam, and the dam's size was determined not by that owner but by a decision by “three disinterested parties.”¹⁰⁷ Similarly, in the case of private condemnation of a right of way, legislative protections such as the involvement of a “board of viewers” can help to ease concerns about unfair burdens.¹⁰⁸

In contrast, situations like the one at issue in *Poletown* arguably lack these indicia of reciprocity. Groups of tight-knit homeowners would not agree to be subjected to eminent domain in the interest of lining the pockets of a wealthy corporation. It is true that if benefits such as improved employment prospects emanated back out to the community in sufficient quantities, the analysis might be different on this score. However, the benefits would need to be robust and reliable enough to make up for the possibility of such a severe burden, and this outcome is less likely where corporations are left free to pursue their own agendas for increasing profits.¹⁰⁹ This analysis might explain the significance of continuing public oversight and accountability—a factor stressed in *Hathcock*. Guarantees of reciprocal benefits help to transform takings exercises to which no rational landowner would agree into ones that might be accepted *ex ante*.

105. See EPSTEIN, *supra* note 8, at 174.

106. See Smith, *supra* note 104, at 1736-38 (discussing the “elaborate safeguards for the benefit of the owners of the proposed servient land” attached to both Mill Act and landlocked easement condemnations).

107. EPSTEIN, *supra* note 8, at 175.

108. See, e.g., *Fengfish v. Dallmyer*, 642 A.2d 1117 (Pa. Super. Ct. 1994) (under the Pennsylvania state statute permitting condemnations of rights of way, a “board of viewers” determines whether the private road is necessary, and is charged with choosing the best route based on distance, ground suitability, minimization of injury to the landowner, and the desires of the petitioner).

109. Nicole Garnett has suggested that covenants might be used to ensure that a use would continue to deliver the promised public benefits over time. Garnett, *supra* note 76, at 980-82.

Under *Penn Central*, we should also examine the economic impact on the landowner from an *ex post* perspective.¹¹⁰ Here, we can consider the relationship between the uncompensated increment and the total value of the land. Because it is difficult to state autonomy interests in dollar terms, and because the chance to earn a share of surplus relates in complicated ways to the thin market considerations that appear elsewhere in the analysis, it makes sense to focus primarily on the magnitude of the subjective premium. Certain kinds of condemnations, such as the ones at issue in *Poletown*, are likely to feature property whose value is significantly, if not predominantly, composed of a subjective premium above fair market value.

Concerns over confiscation of subjective value become clearer when another of *Penn Central*'s factors is drawn into the mix—distinct, investment-backed expectations.¹¹¹ Where the subjective premium is both large and the product of socially valuable site-specific investments, concerns about the appropriation of the uncompensated increment grow. Again, *Poletown* featured homeowners who had made site-specific investments in the neighborhood. These investments increased residents' subjective value in their property without generating an associated increase in fair market value. Condemnations that destroy the subjective premium created by such neighborhood-specific efforts present the same difficulties that have typically been associated with regulatory actions that thwart distinct, investment-backed expectations.

The third *Penn Central* factor, the character of the government action,¹¹² reintroduces some of the thin-market concerns discussed earlier. When the market is very thin, as is the case with difficult assembly problems that take a "step" form, the costs of proceeding in the absence of eminent domain may be very great, given the risk of holdout behavior. At the same time, the thinner the market, the greater the surplus that is likely to be generated by the transfer of the property, and consequently the larger will be the portion of the uncompensated increment that corresponds to the opportunity to obtain a share of the surplus. This presents a bit of a conundrum, because the

110. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

111. *Id.* The idea of "distinct, investment-backed expectations" can be traced to Michelman, *supra* note 14, at 1233 (recasting the "magnitude of harm" or "diminution of value" regulatory takings test as asking "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation"); see Robert M. Washburn, "Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63, 67 (1996) (discussing this provenance of the phrase). Later cases substituted the phrase "reasonable, investment-backed expectations." See, e.g., *id.*; Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?* 31 WASH. U. J. URB. & CONTEMP. L. 3, 14-15 (1987).

112. *Penn Central*, 438 U.S. at 124.

uncompensated increment grows (as a result of forgone surplus chances) at the same time as the government's need to proceed through eminent domain grows (as a result of the thin-market conditions that generate the surplus and produce the risk of holdout problems).

To break out of this bind, it may be helpful to consider how the thin-market conditions came about. Were they the result of some investment on the part of the landowner that rendered the land uniquely suitable, or did the thin market result from nothing more than the government's expressed needs (such as the need to lay a railroad along a given path)?¹¹³ Where the monopoly power is in some sense the product of the landowner's efforts, confiscating the chance at some of the surplus seems more problematic than in cases where the monopoly power arises as a result of circumstances out of the landowner's control. Yet, it is possible to overstate this point. If we think that property ownership can properly incorporate an element of speculation, then perhaps one valuable attribute of property is its potential to be in high demand by someone else and to at some point generate a shareable surplus.

A further difficulty is presented by the often opaque connection between subjective value and holdout power. Even when the surplus available from holding out is not the product of the landowner's investments, the landowner may still be justified in refusing to sell at a given price because of an honest subjective valuation that *is* the result of her own investments. We can see this conflict in the *Poletown* example. On the one hand, the holdout or "thin market" power that the residents would enjoy if eminent domain were out of bounds would be solely the product of General Motors' need to assemble a tract of land of a particular size and configuration. This would suggest that the residents have no special distributive claim on a share of the surplus that the new plant would produce. However, a resident's refusal to sell at a given price might be the product not of a desire to hold out and capture surplus, but rather of a sincerely held high subjective valuation. The latter might in turn well be the product of community-specific investments undertaken quite consciously with the expectation of being able to retain the resulting subjective premium.

113. See Heller & Hills, *supra* note 28, at 7 (asking why landowners should receive a windfall simply because their property happens to lie along the government's chosen path); Merrill, *supra* note 19, at 86 (suggesting that "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"). But see Heller & Hills, *supra* note 28, at 9 (observing that landowners who are denied any incentive to assist in the assembly project may engage in costly litigation and other forms of wasteful opposition, and that it may make sense to reward them for making possible a smooth assembly).

The attribute of property ownership that ordinarily connects these two elements—subjective value, and the chance of surplus from trade—is the autonomy to sell or not to sell as one chooses. Preserving this autonomy respects subjective valuations, but it can also block efficient transfers of property. The exercise of eminent domain risks the destruction of subjective value in order to achieve the gains associated with removing the holdout problem. The appropriateness of this exercise in a given instance must turn on a fact-specific inquiry into precisely what is taken and what is given back in return. The degree of hardship presented by the thin-market conditions can be built into the analysis by considering the hypothetical reaction of landowners to a “social bargain” that overcomes hardships of that type. In other words, part of what a landowner “gets back” in exchange for the burdens that attend the exercise of eminent domain is the benefit of living in a society where holdout problems do not hamstring the pursuit of important societal goals.

C. Remedying Shortfalls

Where the benefits returned to the landowner do not appear sufficient given the likely diminution of value and the landowner’s distinct, investment-backed expectations, the taking of the uncompensated increment (at least without further compensation) would appear unjustified. In other words, the application of regulatory takings analysis would be expected to yield at least some cases in which the exercise of eminent domain flunks the test. A remaining question is what remedy is appropriate for that situation.

There are two possibilities. First, consistent with the application of regulatory takings principles to the problem, we might simply conclude that more compensation needs to be paid, above and beyond fair market value, to make up for the losses associated with appropriation of the uncompensated increment.¹¹⁴ On the other hand, we might focus attention on one element within the uncompensated increment—the appropriation of the property owner’s autonomy to decide when to sell—and conclude that no monetary compensation is a “just” substitute for this autonomy where benefits of a sufficiently “public” character are lacking.

114. This is consistent with Krier and Serkin’s liability rule approach to public “ruses.” See Krier & Serkin, *supra* note 7, at 874-75.

1. *Is More Money the Answer?*

A natural response to concerns about uncompensated increments in exercises of eminent domain is to suggest that additional monetary compensation be provided. Proposals for delivering larger amounts of compensation to condemnees range from bonus fractions (such as an additional 10 percent or 20 percent above fair market value) to restitutionary variations on compensation that would key the condemnee's payment to the benefits that the private transferee will glean.¹¹⁵

Awarding more money seems like an appropriate way to make compensation more "just." However, it suffers from two defects.¹¹⁶ The first is epistemic in nature. It is difficult to know how much value someone places on a property, and resort to proxies such as percentage bonuses will generate inaccuracies in both directions.¹¹⁷ Awards that are too generous can create perverse incentives, including overinvestment in property improvements when talk of eminent domain is in the air.¹¹⁸ Indeed, the problem might not be

115. See, e.g., EPSTEIN, *supra* note 8, at 184 (discussing fixed percentage bonuses, such as the 10 percent bonus previously used in England); Krier & Serkin, *supra* note 7, at 870-73 (discussing gain-based compensation alternatives that effectively apply a restitutionary model); Murray J. Raff, *Planning Law and Compulsory Acquisition in Australia*, in *TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES* 27, 44 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (discussing statutory provision in Victoria for "solatium"—an extra amount, not to exceed 10 percent of the property's market value, "to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition"). It would also be possible to fine-tune increases to take into account factors thought to be correlated with subjective value, such as length of time living in a community. See Ellickson, *supra* note 7, at 736-37 (suggesting that "legislated schedules" of percentage bonuses might be used to address property owners' subjective value, and that these schedules might be calibrated based on factors such as the owner's length of time in the community, to the extent such factors correlate empirically with increased levels of subjective value). My student Daniel Hwang made a similar suggestion in class discussion, noting that the grid-like structure of the federal sentencing guidelines offers a possible analog.

116. See Merrill, *supra* note 19, at 91-93 (noting roughly the same two objections).

117. See, e.g., Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in *TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE* 163, 180-82 (Nicholas Mercuro ed., 1992). But see EPSTEIN, *supra* note 8, at 184 (arguing that paying bonuses may do better across the run of cases than does the systemic undercompensation of the status quo, even if some degree of undercompensation and overcompensation occurs in individual cases under the bonus system).

118. For example, if compensation were provided at 150% of fair market value, a property owner anticipating the exercise of eminent domain might undertake costly improvements designed to raise the fair market value, knowing that she would receive \$1.50 on the dollar. As Blume and Rubinfeld have noted, even compensation at full market value can create perverse incentives in the direction of overinvestment, given that the landowner has no

limited to predictions about exogenous exercises of eminent domain: Individuals might become so eager for condemnations that they engage in destructive rent-seeking to bring condemnation their way.¹¹⁹ On the other hand, a blanket percentage increase may be inadequate in some cases, leaving compensation in the individual case “unjust.”¹²⁰

The second problem with simply increasing monetary payments to owners of condemned land is that it does not adequately address the confiscation of autonomy that attends exercises of eminent domain.¹²¹ The power to exclude, which encompasses the right to refuse to sell, constitutes a fundamental attribute of property ownership.¹²² While this right is conditioned by the government’s power to exercise eminent domain for public use, the right to take land without consent is denied to private actors.¹²³ To the extent that government is susceptible to becoming a conduit for the acquisitive desires of any private party with sufficient political clout, the autonomy interests that accompany property ownership are accordingly eroded. The political process is vulnerable to capture by powerful concentrated interests that will extract land from powerless landholders.

Nor is it realistic to think that higher levels of compensation will necessarily dissuade governmental entities from succumbing to political pressures of this sort. To be sure, to the extent higher compensation levels

incentive to take into account the possibility of a taking that will destroy improvements on the property. Blume & Rubinfeld, *supra* note 16, at 619 (giving the example of a landowner who fearlessly and inefficiently expands a restaurant on land lying in the likely path of a highway, knowing he will receive full compensation for the expanded restaurant if the land is taken). Higher levels of compensation would exacerbate this problem. POSNER, *supra* note 16, at 57 (noting that although the law attempts to address this difficulty “by denying compensation for any property improvements made after the announcement of the government’s intention to take the property,” the underlying problem remains, and becomes “more serious, the more generous the minimum compensation deemed just”).

119. See Merrill, *supra* note 19, at 92 (noting this possibility).

120. Undercompensation can also spawn inefficient efforts to avoid being the target of eminent domain—as well as the potential for rent-seeking by public officials who have the power to decide where to engage in eminent domain. Cf. FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 41 (1997) (discussing a model of “rent extraction” in which politicians “are paid not to legislate” in ways that will impose costs on private actors).

121. However, it might ease the pain associated with the loss of autonomy. See EPSTEIN, *supra* note 8, at 184 (suggesting that a percentage bonus system would serve “as a balm for the infringement upon autonomy brought about by any forced exchange” as well as “an effort to correct the systematic underestimation of value in the market value test”).

122. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

123. See Merrill, *supra* note 19, at 92 (observing that a “bonus payment” system “does not fit comfortably within a legal structure premised on constitutional rights”).

translate into higher payments by transferees, the resulting reduction in surplus available for capture would tend to reduce rent-seeking activity directed at obtaining exercises of eminent domain. However, the private party transferees may not actually be required to foot the bill for higher compensation levels; the government could instead make up the difference out of its own purse.¹²⁴ While it is a convenient fiction to suppose that governments feel the pain of payments as much as private individuals do, the pain from budgetary outlays is indirect, attenuated by the operation of the political process.¹²⁵ To the extent that those who bear the burden of compensation are diffuse or politically powerless, the relevant cost of government action—the political cost—may not increase proportionately with increases in compensation payments.¹²⁶

2. Preserving Autonomy with Self-Assessed Valuations

There is another possibility that could help to answer these concerns. The core idea is to overcome the incommensurability difficulty associated with autonomy interests by eliciting advance consent from landowners to takings that would go to private transferees under circumstances where public use is unclear. Setting up a process for obtaining consent would also offer an opportunity to overcome epistemic difficulties regarding the landowner's actual subjective valuation in these circumstances, and hence permit fine-tuning of compensation. Before outlining the proposal, let me first emphasize that it would apply only to exercises of eminent domain that fail the tests just discussed—that is, situations where it is not possible to infer that a proposed taking is of a sort that members of society would accept. Traditional public uses and transfers to private parties that do not improperly appropriate an uncompensated increment based on the analysis above would continue to be subject to ordinary eminent domain processes.

The basic idea would be to provide a way for property owners to “opt in” to a system of takings for private transfer in exchange for tax benefits.¹²⁷ In

124. See Krier & Serkin, *supra* note 7, at 872 (discussing this possibility).

125. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000) (observing that “[g]overnment actors respond to political, not market, incentives”).

126. See generally Levinson, note 125 (explaining why political costs might diverge from financial costs); see also KOMESAR, *supra* note 33, at 95-98 (arguing that a compensation requirement can address majoritarian bias, but not minoritarian bias).

127. The property owner would be effectively selling an option on her property to the government. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 22-23 (1985) (discussing the possibility that a property owner could sell an option on her property to the government, and explaining how this arrangement

paying annual property taxes, for example, people could simply check off a box indicating their choice to permit their property to be taken for private transfer purposes. Instead of hypothesizing whether people would consent in advance to particular terms, this system provides a way of collecting actual consent. An additional element would permit people to tailor the price at which any such transfers would occur—with an associated adjustment in the applicable tax break. This idea builds on the literature on self-assessment as a way of determining valuation.¹²⁸ The standard problem with requiring people to simply state how much they value an entitlement—that they will lie—can be ameliorated by attaching consequences to statements of valuation that penalize both overstatements and understatements.¹²⁹ The tax break element described here would have just such an effect, insofar as it would impose an opportunity cost on parties who attempted to overstate their valuations.

would produce desirable incentives for both parties). Cooter suggested that the costs of negotiating options might overwhelm efficiency gains in this context, *see id.* at 23, but piggybacking the option sale onto a preexisting property tax interaction could reduce these costs.

128. *See, e.g.,* Levmore, *supra* note 22; Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. (forthcoming 2005). The proposal I develop here has much in common with the idea of allowing individuals to set their own property values for purposes of property tax assessments, with the proviso that their property can then be acquired at that value by the government or by a private party. *See, e.g.,* Levmore, *supra* note 22, at 779, 784-90; Daniel M. Holland & William M. Vaughn, *An Evaluation of Self-Assessment Under a Property Tax*, in THE PROPERTY TAX AND ITS ADMINISTRATION 79 (Arthur D. Lynn, Jr., ed. 1969); Ulen, *supra* note 117, at 182-83. However, my proposal would avoid some of the more problematic aspects of the broader property tax self-assessment schemes by cabining the claimed valuations between some bounds (100% and 200% in my example), constraining the circumstances in which private condemnations would be available (e.g., only with government approval), and extending to property owners the ability to retain their veto power over proffered transfers by declining to opt into the scheme at all.

129. *See, e.g.,* Levmore, *supra* note 22, at 778-79; Fennell, *supra* note 128 (manuscript at 18-32).

For example, landowners might fill out an annual property tax bill that looks something like Figure 5:

FIGURE 5:
OPTING INTO PRIVATE TAKINGS

2006 Property Tax Bill	
Jane Q. Public, 110 Elm Street 2006 Assessed Value: \$200,000 2006 Property Tax: \$6,000 DUE 12/31/05	
Remit in full OR complete the following:	
<input checked="" type="checkbox"/> I agree to make this property available for government-sponsored private condemnations initiated during calendar year 2006.	
1) Choose a private condemnation transfer price, expressed as a percentage of the assessed value (must be between 100% and 200%).	
	<u>130</u> %
2) Subtract line 1 from 200:	<u>70</u>
3) 2006 PROPERTY TAX:	\$ 6,000
4) Multiple line 2 by 10:	<u>700</u>
5) Subtract line 5 from line 4 and PAY THIS AMOUNT	<u>\$ 5,300</u>
Sign and date: <u>Jane Q. Public 12/15/05</u>	

This sample property tax bill provides the property owner with a choice between paying the standard property tax on the property's assessed value and electing to make the property available for government-sponsored private condemnations during the upcoming year. If the property owner elects to make the property available in this manner, then she must select a valuation for such private condemnations, expressed as a percentage between 100% and 200% of the assessed property value. The higher the percentage selected, the smaller the tax break. The largest possible tax break can be achieved by making the property available at 100% of its assessed value. Higher percentages provide increasingly smaller tax breaks, with tax break fully phased out at 200%. If the property owner elects to make the property available for government-sponsored private condemnations in exchange for a tax break, then she may not later challenge such a private condemnation on public use grounds. If the property owner does not elect to make her property

available for private condemnations, she can challenge a condemnation on public use grounds in accordance with the analytic framework discussed above.

There is plenty to quibble with here. Some readers will think that the tax break I have indicated is far too stingy or far too generous, that it sets the minimum or maximum valuation levels too high or too low,¹³⁰ that it creates the wrong relationship between transfer prices and tax breaks,¹³¹ or that it allows too much or too little flexibility to the landowner to update her valuation.¹³² The example I have provided is meant only to make concrete a

130. Indeed, the design choice to cabin valuations between an upper and lower bound at all—rather than allow open-ended self-assessed valuation—is open to question. The argument for doing so is that it mediates between the risk of strategic behavior and the desire to accommodate idiosyncratic valuations. If, as an empirical matter, the vast majority of taxpayers value their property somewhere between one and two times the assessed value, then the extra information gleaned about valuations by allowing assessments outside this range might be outweighed by the risks such an open-ended system would introduce. The temptation to value one's property at ten cents and avoid all taxes or to value it at 3,000% of its assessed value and lobby for condemnation presents much sharper difficulties than are present in a more narrowly cabined assessment system. Of course, the choice to "cap" valuations at 200% is arbitrary, and could be set at some other figure instead.

131. My example applies a flat tax break of \$100 for every ten percentage points below 200 at which one self-assesses for purposes of private takings. There are tremendous distributive implications to setting up the tax break in this fashion rather than scaling back tax liability on a percentage basis. Intuitions about these implications are likely to be sensitive to how one frames the problem. See Edward J. McCaffery & Jonathan Baron, *Framing and Taxation: Evaluation of Tax Policies Involving Household Composition*, USC Law School, Olin Research Paper No. 00-18, at 11-12, 16-21 (2003), available at <http://ssrn.com/abstract=246408> (discussing and testing the "Schelling effect" in which people reverse preferences for a given tax feature depending on whether it is framed in bonus terms (for example, a larger "child deduction" for the poor) or in penalty terms (for example, a larger "childless penalty" for the poor)). On the one hand, a flat rate gives those with less expensive properties a larger tax break in percentage terms than it offers those with more expensive properties. On the other hand, people with expensive properties face a low tax rate for obtaining full "property rule" protection (because the tax break they forgo is so small in percentage terms), whereas people with cheaper properties must pay a very high effective tax rate to gain the same protections.

Another question that my example leaves unanswered is whether the tax break can yield a negative tax liability (a payment from the government) in the case of very inexpensive properties.

132. I am assuming that the taxpayer would get just one chance each year to make this election, and that the taxpayer's choice would be binding for the ensuing calendar year. If there were empirical concerns about exogenous volatility in the real estate market that would make valuations become outdated more quickly, some kind of indexing feature could be added. Another approach would be to tie the compensation elected not to assessed value, but rather to fair market value as determined at the time of the private condemnation. To give landowners security, this approach could be coupled with a caveat that the landowner would receive an award based on the greater of assessed value or fair market value.

mental image of the opt-in process, and could obviously be adjusted in innumerable ways based on the judgments about the costs of holdout behavior, the appropriate distribution of tax burdens, and the empirics of landowner behavior.

A more serious concern is that landowners will find ways to behave strategically to thwart the purposes of this scheme. For example, a group of neighbors might collude as follows: All but one of them would claim the maximum tax break (offering their homes for private condemnation at 100% of the assessed value) while one (centrally located) neighbor would refuse the opt-in alternative, seeking to immunize the entire group against any redevelopment taking that requires a significant assembly of land. Even in the absence of such strategic behavior, scattered holdouts among large numbers of opters-in might cause the government to lose significant revenue in tax breaks without realizing any appreciable gains in its ability to deliver desirable assemblages of land to private parties.

These difficulties are worrisome, but they do not seem unanswerable. First, the idea that governments will lose revenue without achieving corresponding gains is in one sense a red herring. Styling the opt-in payoff as a “tax break” does not actually require that aggregate revenue levels drop below preexisting levels; the “break” merely indicates a distributive change in the allocation of the tax burden. Hence, taxes could go up sufficiently for all those who do not opt-in to make up for the “breaks” given to those who do opt in. The relevant question is whether the *distributive* change is justified by the gains that the opters-in make possible for the rest of society.

This point, however, underscores a matter that the “tax break” styling may have partially suppressed: that these “tax breaks” for opters-in can just as well be understood as “tax penalties” for those who choose not to opt in. Although the two formulations are equivalent, thinking about the proposal in the latter light more sharply raises concerns about the possibility that different income groups may be differentially affected by the proposal. One might object that low-income people will feel “forced” to opt into the system, because they cannot afford the financial penalties that go with refusing to do so, and that this will tend to make low-income areas more likely sites for

From another perspective, annual chances to opt in may allow more room for strategic behavior based on the landowner’s ability to predict whether or not a private condemnation in the upcoming year is likely or unlikely. There could also be inefficiencies associated with calendar-year cycles, if governments had to move quickly to condemn before a new chance at self-assessment rolled around. These concerns might be alleviated somewhat by staggering property tax due dates to avoid an eleventh-hour rush to condemn.

private condemnation.¹³³ A related problem is that those who have the political clout to stave off condemnations could collect tax breaks risk-free.¹³⁴

However, the results could still represent an improvement over the status quo or other imaginable regimes. Where no meaningful limits are placed on the public use doctrine, the government is free to serve as a conduit for private interests. One would predict that, to maximize the political payoff, the government would attempt to channel condemnations into areas that would generate the smallest amounts of political resistance. If one supposes that political clout and property values are both correlated with personal wealth, then the less well-off are likely targets under an unlimited view of public use. Even if some teeth are put into the public use clause, the very poorest residents are likely to remain vulnerable under any reading that retains a “blight” exception for transfers to private entities. Indeed, one function of the “blight” rhetoric may have been to make it possible to pursue private condemnations that disadvantaged the poor and powerless while simultaneously retaining strong “property rule” protections against such

133. An unconstitutional conditions argument might also be attempted. See, e.g., Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989). The argument in the present context would be that the government is demanding extra tax money from those who insist on their constitutional right not to have their property confiscated for private use, compared with those who choose to cede the right. Following this logic, questions might be raised about the legitimacy of the opt-in system as a way of side-stepping the public use question. But property, unlike other constitutional rights, is not inalienable—one can choose to sell it. Indeed, the ability to sell property to anyone one chooses, including the government, on any terms that one decides to accept, is one of the things that gives it value. See Vicki Been, *“Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 497 (1991) (“To argue that individuals cannot trade their property to the government at whatever price they choose is inconsistent with the deeply ingrained notion of property as including an almost absolute right of alienation.”). In the present context, we might understand opters-in to be writing an option for those who might later wish to engage in private condemnations. If the price that the government chooses to pay for the option is one voluntarily elected by the landowner, then it seems no more (and no less) problematic than an ordinary decision to offer a developer an option on one’s land at a mutually negotiated price. If this “option” characterization is accepted, then the opt-in system would appear to immunize the government from a challenge by the opter-in on public use grounds; the transaction would be analytically indistinguishable from any other voluntary market transaction.

134. Of course, that same political clout likely *already* offers the well-off various tax benefits. Whether tax benefits in this form would increase or decrease the overall distributive position of the more well-off is not clear. Cf. David A. Weisbach, *An Economic Analysis of Anti-Tax-Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88, 109 (2002) (observing that the distributive effects of eliminating tax shelters that benefit the rich are unclear, because compensating adjustments might be made elsewhere in the tax system to maintain the same degree of progressivity).

condemnations for everyone else.¹³⁵ Against this backdrop, even the limited relief of easing property tax burdens for those who are not as well-off would seem to represent a small step in the right direction.¹³⁶

Strategic actors raise another obvious challenge to the distributive realignment embodied in this proposal. However, strategic behavior in this context entails risks to the strategists' own holdings. For example, it is always possible that a developer will choose a "build-around" solution or will otherwise alter the configuration of a given development in ways that would defeat simple efforts to plant a neighborhood "anchor" in the manner suggested above.¹³⁷ To get around the broader "scattered holdout" problem, it might be possible to combine the present proposal with another that would affirmatively involve entire blocks or neighborhoods in the project of land assembly—perhaps granting groups special bonuses if they could obtain 100% opt-in participation across a contiguous geographic area of a particular size.¹³⁸

Ultimately, it would be up to the relevant governmental body¹³⁹ to decide whether the opt-in system is a good deal for it politically. The basic idea, though, of using a voluntary system of self-assessment to get around the

135. See Pritchett, *supra* note 93, at 13 (explaining that the "discourse of blight" offered a way to reconcile urban renewal with protection of private property).

136. It would not, of course, help tenants who are forced to relocate—except to the extent that landlords passed along the tax savings in the form of reduced rent. This is a larger problem with a system that compensates only landowners, when others may bear much of the brunt of the taking. See Michelman, *supra* note 14, at 1254-56 (discussing the fairness problems associated with the uncompensated displacement of tenants for urban renewal, and some legislative efforts that serve as partial responses to the problem).

137. However, if strategists guess wrong, they could end up attracting *inefficient* condemnations, rather than just ones that are personally disadvantageous. If a strategic actor decided to price her property well below her true subjective value, and the land was taken for transfer to someone else who did not, in fact, value the land more highly, the transfer would be inefficient. An additional efficiency concern is the deadweight loss associated with the act of strategizing itself.

138. Cf. Heller & Hills, *supra* note 28 (presenting a proposal that would enable neighborhoods to form "land assembly district[s]" that would collectively negotiate with developers over the acquisition of land); Robert H. Nelson, *The Private Neighborhood*, REG. Summer 2004, at 40, 44 (discussing the possibility that private neighborhoods could collectively set up a process for terminating the neighborhood upon a supermajority vote to sell the entire parcel to a developer).

139. I have been assuming in this discussion that the local governmental entity charged with administering the property tax would also administer this scheme, and that it would be "purchasing" for itself through tax breaks the ability to engage in private-transfer condemnations. One could imagine intergovernmental arrangements in which the local government would receive money from state or local governments in exchange for offering property tax breaks that would make the opt-in vulnerable to private-transfer takings by these other governmental bodies as well.

autonomy concerns associated with overuse of eminent domain is one worth exploring. The proposal would add another “means” to the menu for achieving governmental ends¹⁴⁰—one that would avoid both the coercion of eminent domain and the hold-out problems often associated with market transactions.

D. A New Reading of the Public Use Clause

All of the above suggests a new and improved way of reading the public use clause. The typical approach has been to treat the public use and just compensation requirements as independent of each other. Some scholars are now suggesting that we get rid of any independent “public use” test and focus on providing the right degree of “just compensation.”¹⁴¹ The analysis here suggests a third possibility. It boils down to a claim that the public use clause is meant to screen out takings for which monetary compensation is not “just.” The uncompensated increment presents a challenge to the justice of compensation, and the challenge can only be met when the confiscation of the uncompensated increment produces reciprocal societal benefits of the sort that generally justify uncompensated regulatory actions. If this sort of in-kind compensation is lacking in a given instance, then additional monetary compensation can only be “just” when it is made pursuant to an autonomy-preserving rule such as self-assessment.

A landowner’s preservation of autonomy as against other private parties plays a primary and decisive role in this schema. It is worth emphasizing, however, the limits on this autonomy interest. First, I assume that an autonomy interest is not sufficiently implicated to render monetary compensation unjust unless a private party will receive the condemned property. This not only rules out public use challenges in cases where the government retains the property for its own use, but also rules out public use challenges to regulatory takings.¹⁴² Second, as discussed above, exercises of

140. See Merrill, *supra* note 19, at 64-65 (suggesting that analysis of the public use question should focus on the appropriate means for the government to achieve its ends, and noting that possible means range “from voluntary exchange at negotiated prices at one extreme to confiscation without compensation at the other”).

141. See Krier & Serkin, *supra* note 7, at 874-75.

142. When a regulatory taking is established, the government can choose either to discontinue the regulation (and pay for the period during which the taking occurred) or to continue regulating upon payment of compensation. See *Lucas*, 505 U.S. at 1030 & n.17. Continued regulation with compensation amounts to a forced sale of a property interest to which the property owner was previously entitled. While any forced sale implicates autonomy at some level, property owners hold their interests subject to the possibility of governmental regulation, just as they hold their property subject to the possibility of eminent domain for public use.

eminent domain that transfer property to private parties will not generate a cognizable public use issue if the confiscation of the uncompensated increment satisfies the tests that are ordinarily applied to uncompensated governmental actions. Third, the government can freely encourage landowners to make use of their autonomy in ways that will increase social value, whether through the negotiation of voluntary sales or through a voluntary self-assessment system.

The resulting reading of the public use clause presents a decision tree for assessing governmental efforts to transfer property to private parties through the eminent domain power. First, one asks whether the taking of the uncompensated increment associated with attempted exercise accords with regulatory takings principles. If the answer is affirmative, then the analysis is at its end and there is no public use issue presented. If the answer is negative, however, there is a significant danger that the political process has been improperly manipulated and that the results will be inefficient or unfair. Unless the landowner has consented to the transfer—either *ex ante* through a self-assessment option or *ex post* through a voluntary sale—the government has exceeded the bounds of the public use clause, and the payment of additional compensation will not satisfy the constitutional requirement.

This approach accords with a more realistic understanding of how governments respond to incentives. Where a high risk of political malfunction exists, requiring the payment of extra money may not help, and could even make matters worse.¹⁴³ If a government wishes to use eminent domain in settings where a high risk of political malfunction exists, then it must stand ready to safeguard against that malfunction through an autonomy-preserving system. The difficulties associated with thin markets are quite real, but if the resolution is not of a sort that citizens could be reasonably expected to accede to as part of a social bargain with each other, then their consent must be more explicitly sought.

In sum, the public use restriction might be understood to stand for the following idea: A taking is not for a public use unless the entire taking, including the uncompensated increment, is susceptible of being justly compensated—where justice in compensation is understood to encompass values of autonomy as well as dollar amounts.

143. See Levinson, *supra* note 16.

CONCLUSION

These are exciting times for students of eminent domain. There has been a growing backlash against the perceived overuse of the condemnation power to achieve objectives that benefit private parties. And with good reason—the uncompensated increment is often substantial, and there is often reason to believe that the political process has been manipulated in ways that seem inconsistent with the constitutional protections that landowners ought to be afforded. The *Hathcock* decision broke the ice with a reinterpretation of public use, and the United States Supreme Court must now address the issue in *Kelo*.

At the outset, I suggested that the public use question is a difficult one. The reasons why it is difficult, I contend, are precisely those same reasons why regulatory takings analysis is so difficult. Understanding the conceptual connections between regulatory takings analysis and the public use question may be capable of advancing the understanding of both bodies of doctrine. As an academic watching from the sidelines, I cannot help but hope that the unfolding parameters of the public use doctrine will produce an elegant configuration. But if elegance is beyond our reach, then perhaps we can settle for muddling through.¹⁴⁴

144. The regulatory takings arena has been described as a confusing muddle. See, e.g., Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Dagan, *supra* note 98, at 743 (describing regulatory takings as “one of the most confusing areas of law”). For a sympathetic treatment of the muddle, with optimism for the prospects of muddling through, see generally Poirier, *supra* note 73; see also Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959).