LAWRENCE BERGER*

The Public Use Requirement In Eminent Domain

IN this Article we address the basic question: under what circumstances should a party, governmental or private, have the right to condemn the property of another? The related question of when compensation need be paid for government regulations not involving a physical seizure is not considered.[1] We deal only with the basic question of power—can this property be taken against the will of its owner even with compensation? The lawyer states this question by asking whether the taking is for a public use.[2] The question obviously raises the most fundamental issues about the nature of our society and the limits of the

* Professor of Law, University of Nebraska.

[1] *See generally* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33 (1968); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

[2] *See generally* 2A C. NICHOLS, EMINENT DOMAIN §§ 7.1–.627 (rev. 3d ed. J. Sackman & P. Rohan 1976); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953); Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Sackman, *The Right to Condemn*, 29 ALB. L. REV. 177 (1965); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Note, *Public Use as a Limitation on the Exercise of the Eminent Domain Power by Private Parties*, 50 IOWA L. REV. 799 (1965); Note, *The Public Use Doctrine: "Advance Requiem" Revisited*, 1969 L. & SOC. ORD. 688; Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation*, 18 MERCER L. REV. 274 (1966); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

institution of private property which is one of its major characteristics. Herein there will first be a relatively short discussion of the law as it has developed. There will then follow a legal and economic analysis which suggests some possible changes in approach.

I

THE HISTORY OF THE LEGAL DEVELOPMENT

A. Pre- and Post-Revolutionary Times

1. In General

The right of the sovereign to condemn private property dates back at least to the ancient Romans.[3] The term "eminent domain" probably originated with Grotius in his seventeenth century work *De Jure Belli et Pacis*, where he affirmed the right of government to take private property for reasons of extreme necessity or public utility upon payment of compensation. The English precedents are based upon two separate powers. First, there was the king's power to make use of but not take ownership of private land in the areas of his prerogative—for example, navigation, foreign affairs, defense, and law enforcement—all without payment of compensation.[4] Second, there was the eminent domain power of Parliament completely to take private property upon payment of compensation, the latter requirement customarily being added to statutes authorizing takings at least since 1514.[5] In the colonies, where there were general condemnation statutes for road construction, the granting of compensation was well established before the Revolution with respect to improved lands but probably not with respect to unimproved lands.[6] As to the latter, the argument was made that the owner's total property values were increased by the road, and so no damage was sustained.

The origin of the public use requirement in America is perhaps more obscure.[7] The civil law writers Grotius, Vattel, Pufendorf, and Bynkershoek had argued against unjustified use of the condemnation power but were in disagreement as to exactly what limitations should be applied against the government. They respectively contended for standards of "public advantage," "public welfare," "necessity of the state," or "public utility."[8] The first constitutions to use the words "public use" were those of Virginia and Pennsylvania in 1776.[9] Thus, Pennsyl-

---

[3] *See* 1 C. NICHOLS, *supra* note 2, § 1.12[1].

[4] Stoebuck, *supra* note 2, at 562–65.

[5] *Id.* at 579.

[6] *Id.* at 582–83.

[7] *See* Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 616 n.7 (1940).

[8] Stoebuck, *supra* note 2, at 586 nn.116–19.

[9] *Id.* at 591.

vania's Declaration of Rights said: "But no part of a man's property can be justly taken from him or applied to public uses, without his own consent, or that of his legal representatives."[10] And the United States Constitution said, among other things, ". . . nor shall private property be taken for public use, without just compensation."[11] It has often been pointed out that these provisions do not expressly forbid governmental takings of property for a private use.[12] Rather, they say in effect: when the government takes property for public use it must pay compensation. Nevertheless, the courts have universally read these provisions as a proscription against takings for a private purpose.

The precise meaning of the "public use" requirement has varied over time and according to the type of taking involved. The conventional statement of the historical case development holds that there are two basic opposing views of the meaning of "public use": (1) that the term means advantage or benefit to the public (the so-called broad view);[13] and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view).[14] The conventional wisdom goes on to say that right after the Revolution the broad view dominated the courts; that later the narrow view came into fashion; and that later still and to date, the broad—and according to many—the enlightened view has returned to favor.[15] Actually, the history is somewhat more complicated.

In the four decades following establishment of the United States Constitution, there was not much dispute about the permissible purposes for which eminent domain might be used. At that time, there were two major kinds of activities for which the power to condemn was required, used, and acquiesced in: road building and milldams.[16] The history of both devices is important in the development of eminent domain in America in that both played a part in the conflict between the

---

[10] PA. CONST., Declaration of Rights, art. VIII (1776), *reprinted in* 5 E. THORPE, FEDERAL AND STATE CONSTITUTIONS 3083 (1909).

[11] U.S. CONST. amend. V.

[12] *See, e.g.*, 2A C. NICHOLS, *supra* note 2, § 7.1[2].

[13] The standard statement of the approach appears in 2A C. NICHOLS, *supra* note 2, § 7.2[2]:

> "[P]ublic use" means "public advantage," and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state (or which leads to the growth of towns and the creation of new resources for the employment of capital and labor), manifestly contributes to the general welfare and the prosperity of the whole community constitutes a public use.

[14] 2A C. NICHOLS, *supra* note 2, § 7.2[1].

[15] *See* Nichols, note 7 *supra*; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

[16] *See* Nichols, *supra* note 7, at 617.

two basic views of public use. That history will be outlined briefly here.

2. The Mill Acts

The Mill Acts[17] had pre-Revolutionary roots, having existed in seven of the original colonies prior to the Declaration of Independence. By 1884, they had been passed in twenty-nine states. Essentially, they provided that a lower riparian owner could build a dam for the purpose of obtaining power for a mill, and, if the upper riparian owner's land was flooded, the latter's common-law rights to recover in trespass without proof of damages, to recover punitive damages, to use self-help to abate the nuisance, and to get a permanent injunction were all forfeited.[18] In place of these rights, he was allowed to recover either permanent damages or annual damages. In effect, then, the lower riparian had a right to condemn the lands of his upper neighbor by flooding.

In the earliest days the mills were grist mills generally required to be open to the public for the grinding of corn. However, in the nineteenth century the dams were used to supply power for saw, paper, and cotton mills as well as other manufacturing enterprises. In these latter cases, the mills were often for the sole use and benefit of their owners. The courts as a general proposition upheld both the statutes involving mills open to the public and those operated for more private purposes. The most common reason stated was the broad view of public use—that great benefit to the public would result from the mills' operation.[19] Another oft stated ground was the long continued acquiescence dating from pre-Revolutionary times.[20] However, some of the cases struck down such statutes under the so-called narrow view that the mill was not open to the public.[21] In recent times, of course, the importance of the Mill Acts has declined with the disappearance of water power and the concomitant rise of hydroelectric power produced by public utilities whose right to condemn is unquestioned. But the significance of the area lies in the early acceptance of the broad view that it was the great advantage to the public which justified the taking, even though a private individual undoubtedly received a substantial and perhaps greater

[17] For a general discussion from which much of the history stated here is drawn, see Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248, 270–79 (1973).

[18] *Id.* at 272.

[19] *See, e.g.*, Hazen v. Essex Co., 66 Mass. (12 Cush.) 475, 478 (1853); Boston & Roxbury Mill Corp. v. Newman, 29 Mass. (12 Pick.) 467, 479–81 (1832); Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 729 (1832).

[20] *See, e.g.*, Head v. Amoskeag Mfg. Co., 113 U.S. 9, 19 (1885); Olmstead v. Camp, 33 Conn. 532, 547 (1866); *In re* Opinions of the Justices, 118 Me. 503, 516–17, 106 A. 865, 873 (1919).

[21] *See, e.g.*, Sadler v. Langham, 34 Ala. 311, 333 (1859); Gaylord v. Sanitary Dist., 204 Ill. 576, 584–85, 68 N.E. 522, 524–26 (1903); Ryerson v. Brown, 35 Mich. 333, 338–42 (1877).

benefit, and even though the public had no right to use the property.

3. The Landlocked Owner Cases[22]

A more radical departure from traditional principles can be noted in some of the road condemnation cases. Statutes authorizing the taking of lands for road building purposes, including private roads, antedated the Revolution.[23] There was good reason for this. At a time when almost the entire country was a wilderness with practically no public roads, and when government was not able to furnish all the roads needed, the use of condemnation to open private roads from one person's land across the property of others to the public roads was a necessity if the country was to be developed at all. Thus, at the time of the adoption of the Constitution, there had evolved a well-developed system of condemnation for what in the narrow sense was a private use. Again, the justification for this kind of taking probably lay in the advantage to the public that was thought to accompany development of the country.[24]

In time, the statutory right of a landlocked owner to condemn for a private road was subjected to challenge in the various states, and there were various judicial reactions. In some states, the courts said that, although the statute denominated such a road a "private" one, it was private only in the sense that the condemning owner had to pay for its maintenance; rather, it was completely open to the public to reach the landlocked piece, and therefore the condemnation was for a public use.[25] In other states, the courts read the statutes more literally and construed "private" to mean that the condemning landowner could bar the public from using the road and, therefore, such a condemnation was unconstitutional as not for a public use.[26] Courts following either view reached it by the narrow public use theory either expressly or sub silentio. The difference in result lay solely in whether they regarded the road so authorized as open to the public as of right or not. In yet a third group of states, the courts allowed condemnation for private ways of necessity, using the broad public advantage test.[27] They based their

[22] For a general discussion, see 2A C. NICHOLS, *supra* note 2, § 7.626.

[23] *See* text accompanying note 6 *supra*.

[24] *See* Nichols, *supra* note 7, at 617.

[25] County of Madera v. Raymond Granite Co., 139 Cal. 128, 134–35, 72 P. 915, 918 (1903); Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 665, 104 S.W. 762, 765 (1907).

[26] Logan v. Stogdale, 123 Ind. 372, 375, 24 N.E. 135, 136 (1890); Welton v. Dickson, 38 Neb. 767, 778–79, 57 N.W. 559, 562 (1894). In one case, a court went so far as to construe a state constitutional provision allowing condemnation of private ways-of-necessity as applying only where there was an implied grant arising out of a conveyance, that is, a common-law easement-by-necessity where condemnation would be unnecessary anyway. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681 (1903).

[27] Brewer v. Bowman, 9 Ga. 37, 41–42 (1850); Robinson v. Swope, 75 Ky. (12 Bush) 21, 25 (1876).

argument of public benefit on the point that condemnation enabled landlocked owners to perform the public functions of citizenry such as voting.

In response to some decisions adverse to such takings, many state constitutions were amended to permit condemnations for private ways of necessity.[28] The cases generally supported the provisions and allowed such takings, but some courts required more than others in the way of necessity before condemnation was permitted.[29] These statutes and state constitutional provisions have been held not to violate the due process clause of the Federal Constitution.[30]

The significance of the private road cases lies in the readiness of some courts and of the people of some states through their constitutions to allow a condemnation for what was essentially a private purpose under either of the traditional tests. For there are cases allowing a single landlocked individual to condemn his way out where the advantage to the public was tenuous and the public's right to use the road nonexistent.[31] In the face of this history, categorical statements of courts that the public use requirement is an inviolable principle should probably be taken with a great deal of skepticism.

B. State Court Developments of the Nineteenth and Early Twentieth Centuries

In the 1840s and 1850s uses of eminent domain other than roads and mills were becoming important. Railroads, which were, of course, privately owned, were given the power in order that they might operate—for to deny them it would have meant that they could not exist at all. In the face of the proliferation of the use of the power, many courts, perhaps fearful that the public benefit standard would allow virtually unlimited invasions into the rights of private property, adopted the "narrow view" that public use meant what it said: actual use or right to use of the taken facility by the public.[32] In the case of certain public utilities like railroads this might be literally required,[33] but with respect to other such facilities like power plants, where public access was inappropriate, it was sufficient if the entire public could use the product

[28] For a complete list of the provisions, see 2A C. NICHOLS, *supra* note 2, § 7.626[1]. As an example, the Georgia constitution says: "In case of necessity, private ways may be granted upon just compensation being first paid by the applicant." GA. CONST. § 2-301 (art. I, § III).

[29] *Compare* Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967 (1904) *with* Wiese v. Thien, 279 Mo. 524, 214 S.W. 853 (1919).

[30] Ruddock v. Bloedel Donovan Lumber Mills, 28 F.2d 684 (9th Cir. 1928); Flora Logging Co. v. Boeing, 43 F.2d 145 (D.C. Ore. 1930).

[31] *E.g.*, Franks v. Tyler, 531 P.2d 1067 (Ct. App. Okla. 1974).

[32] *See* Nichols, *supra* note 7, at 617-18.

[33] 2A C. NICHOLS, *supra* note 2, § 7.521[4].

of the facility.[34] And if the government were the condemner, the courts tended to be less exacting on this point;[35] otherwise lands could not have been condemned for national defense installations, where no one was prone to argue that complete access by the public ought to be required.

While the narrow view of public use held considerable sway, especially in the latter half of the nineteenth century, it never completely took over the field. The two doctrines competed, leaving the commentators in hopeless confusion as to what the "true rule" (for in those days they believed in such things) was.[36] And no wonder the difficulty, for each view as applied to particular cases obviously led to at least what were then regarded as unacceptable results. Thus the narrow use by the public rule would have allowed condemnation for the purpose of erecting a privately owned theater or hotel,[37] something which no one then (or perhaps even now) would seriously advocate. And the broad public advantage test would have allowed a toy manufacturer who provided substantial employment in the vicinity to condemn land for the construction of a plant, likewise then unthinkable.[38]

Thus by the beginning of the twentieth century, doctrine was in a shambles and predictability of result at a minimum. It would be useful at this point to give an illustration of the confusion. I use here three paradigm irrigation cases of that period for the purpose. As an example of the "narrow view," examine the California case of *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*[39] There plaintiff, Canal Company, was formed by X, a corporate landowner, in order to condemn a two-hundred foot right of way over defendant's lands for an irrigation ditch solely to service the private lands of X. Plaintiff was proceeding under a California statute which declared irrigation a public use and authorized exercise of eminent domain for that purpose, provided the condemner furnished water to irrigate the lands of the condemnee as well. Upon challenge of the validity of the condemnation, the court construed the statute as authorizing such a procedure only where the water was for the use of the inhabitants of the area generally and clearly indicated that, if construed to allow exercise of the power for the benefit of an individual, it would be unconstitutional:

---

[34] *Id.* § 7.522.

[35] *Id.* § 7.5[1].

[36] Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 606 n.37 (1949).

[37] In the case of hotels, this view against condemnation may seem especially anomalous in view of the fact that they are required to be open to the public both at common law and more recently under the Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241 (currently codified at 42 U.S.C. § 2000a (1970)).

[38] As we shall see, condemnations in aid of ordinary private enterprise are no longer unthinkable. *See* text accompanying notes 73-76 *infra*.

[39] 36 Cal. App. 556, 178 P. 150 (1918).

> There can be no question as to the position of our Supreme Court upon this question. It has consistently held that "public use" means "use by the public," and that to make a use public a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken.[40]

On the other hand, consider the Utah case of *Nash v. Clark*.[41] The plaintiff, owner of eighty acres of arid land, sought to condemn a right of way to use an irrigation ditch already on defendant's land so that plaintiff could carry water that he owned in a nearby creek to his land, this being the only means of doing so. Defendant argued that the statute authorizing private persons to condemn such easements for irrigation purposes was unconstitutional as for a private use. The Supreme Court of Utah, by Justice McCarty, held that such a taking was for a public use. After acknowledging that there were two lines of authority on the question, the judge came down on the side of the public advantage test as "more in harmony with enlightened public policy"[42] and "far more conducive to individual and public advancement"[43] than the use-by-the-public test. The court pointed out that in the arid West such condemnations were absolutely essential if there was to be any development of the area at all.[44]

---

[40] *Id.* at 563, 178 P. at 153.

[41] 27 Utah 158, 75 P. 371 (1904), *aff'd*, 198 U.S. 361 (1905).

[42] *Id.* at 162, 75 P. at 373.

[43] *Id.* at 163, 75 P. at 373.

[44] The natural physical conditions of this state are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, upbuilding, and industrial expansion of the state not only depend upon the storing and holding back the high and surplus water so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available; and it is entirely within the province of the Legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. Experience has shown that, the greater the amount of water flowing in a ditch of a given size and grade, the less the percentage of seepage and evaporation. Therefore, as a general rule, the owners of canals and ditches, instead of being damaged by their enlargement and the turning therein

On writ of error, the United States Supreme Court affirmed.[45] Though it was unwilling to approve such a taking by an individual as a general proposition, it accepted the public advantage approach because of the peculiar (*i.e.*, arid) situation obtaining in Utah.

> But we do not desire to be understood by this decision of approving the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated . . . we are of opinion that the use is a public one . . . where it is absolutely necessary to enable [the condemner] to make any use whatever of his land and which will be valuable and fertile only if water can be obtained.[46]

One possible way to square the state court decisions in these two irrigation cases would be to argue that the climatic conditions in the two states were different, calling for different approaches. In the California case the court did point out that irrigation was not a statewide necessity; that parts of the state had sufficient water without irrigation and some did not;[47] but such differences do not fully explain the difference in view. To illustrate this, take our third example—this from the state of Pennsylvania, hardly an arid western state. In *Jacobs v. Clearview Water Supply Co.*,[48] the supreme court of that state adopted the public advantage test in an irrigation case and permitted plaintiff water company, whose charter authorized it to supply water for commercial and manufacturing purposes, to condemn a strip of defendant's land for an easement to lay water pipes. This was done in spite of the fact that plaintiff's main and perhaps only customer was to be a railroad company and no individual consumers were to be served.

> of an additional quantity of water, as is proposed in this case, will at least in times of scarcity during the hot summer months, and especially during the periods of protracted droughts, which have become so common of late years in this state, be benefited thereby, besides receiving the market value of the land condemned. In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution.

Id. at 165–66, 75 P. at 374.

[45] 198 U.S. 361 (1905).

[46] *Id.* at 369–70.

[47] Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 565, 178 P. 150, 154 (1918).

[48] 220 Pa. 388, 69 A. 870 (1908).

Though the court first stated with approval the use-by-the-public approach, it followed that with the statement that "[a]n enterprise does not lose the character of a public use because that use may be limited by circumstances to a comparatively small part of the public,"[49] rendering its espousal of the narrow doctrine almost meaningless. Then, quoting *Mills on Eminent Domain*, it gave the classic formulation of the public advantage approach and allowed the taking:

> It is not essential that the whole community, or any considerable portion thereof, should directly enjoy or participate in an improvement, to make the use public. If the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public. The building of reservoirs for the storage of water, and the laying of mains for the purpose of supplying and transporting water and water power for commercial and manufacturing purposes, would tend to increase the industrial enterprises and promote the productive power of all citizens who desire to avail themselves of water or water power for these purposes in that community.[50]

The irrigation cases, described above, well represent the state of confusion of the period.

C. Federal Decisions of the Late Nineteenth and Early Twentieth Centuries

Federal decisions played little part in the development of doctrine concerning public use until the end of the nineteenth century. The reason for this is clear. The Supreme Court did not, until 1896, really undertake review of state cases.[51] Moreover, the federal government did not exercise the power of eminent domain in its own courts until the 1870s.[52] Prior to that time when the federal government wanted to take certain property, the usual procedure had been a condemnation proceeding in state court by authority of a state statute, culminating in the property being turned over to the federal sovereign.[53] However, when a Michigan court held that the state could not condemn for the United States,[54] the latter began using the federal courts and condemning property in its own name. In *Kohl v. United States*,[55] the United

---

[49] *Id.* at 394, 69 A. at 872.

[50] *Id.* at 393-94, 69 A. at 872.

[51] Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896).

[52] For a more complete history, see 1 C. NICHOLS, *supra* note 2, §§ 1.24-.24[5], 2.113-.113[4].

[53] *E.g.*, Gilmer v. Lime Point, 18 Cal. 229 (1861); Burt v. Merchants Ins. Co., 106 Mass. 356 (1871).

[54] Trombley v. Humphrey, 23 Mich. 471 (1871).

[55] 91 U.S. 367 (1875).

States Supreme Court held the latter procedure to be proper, grounding the federal courts' power upon a catch-all provision of the Judiciary Act of 1789. It was after 1875, then, that a steady stream of litigation began to appear in the federal courts. Thenceforward, federal decisions concerning public use came up in two contexts: (1) review of state court decisions under the United States Constitution; and (2) federal takings, where United States courts began to fashion their own doctrines on the subject. We will trace the history of the second area along with the general discussion of twentieth century developments. Only a few words need be said with respect to federal review of state condemnation cases.

In 1896 in the case of *Missouri Pacific Ry. Co. v. Nebraska*,[56] the United States Supreme Court held for the first time that a state exercise of eminent domain power for a private use was a violation of the due process clause of the Fourteenth Amendment.[57] In that case the state supreme court had upheld a state agency decision under a statute that, as interpreted, authorized the agency to require a railroad to grant a private individual the right to build a grain elevator on railroad land, on terms similar to those already granted to others. The United States Supreme Court reviewed the state court's holding and found that this was an unconstitutional taking for a private use, without stating what test it was applying to reach that result. As far as can be found,[58] this is the only time that the Court ever reversed a state supreme court's decision that a taking was for a public use. On the contrary it has shown great deference to state decisions on the question[59] and for many years has declined to review such cases at all. During the period when it undertook such review, the rule of state court presumptive validity was more important to it than attempting to fashion a coherent theory of public use.[60] But in reviewing some of the state cases, it arguably did favor the public-advantage view or at least refused to mandate the use-by-the-public approach. Take, for example, the case of *Mt. Vernon-Woodberry*

[56] 164 U.S. 403 (1896).

[57] The Court had earlier asserted the power to strike down state or municipal laws where the effect was to tax for a private purpose. Under what clause of the Constitution it acted was not clear. Cole v. La Grange, 113 U.S. 1 (1884); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874).

[58] Some have apparently read the decision more narrowly. *See* Hairston v. Danville & W. Ry., 208 U.S. 598, 607 (1908); 2A C. NICHOLS, *supra* note 2, § 7.212[1] n.4.

[59] *E.g.*, Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916); Hairston v. Danville & W. Ry., 208 U.S. 598 (1908); Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140 (1906); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Clark v. Nash, 198 U.S. 361 (1905); Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885).

[60] Clark v. Nash, 198 U.S. 361, 368 (1905).

Cotton Duck Co. v. Alabama Interstate Power Co.[61] There a power company was seeking to condemn land and water rights for use in manufacturing and selling hydroelectric power to the public. Mr. Justice Holmes, in holding against the contention that this was not for a public use, said:

> In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. *The inadequacy of use by the general public as a universal test is established.*[62]

Later on, as we shall see,[63] the Court did more clearly espouse the public advantage approach in its handling of federal takings.

D. Twentieth Century Developments

Most of the difficult twentieth century cases involving the public use issue can be put into one of five rather broad categories some of which tend to overlap: (1) land redevelopment; (2) private rights of way problems; (3) substitute condemnation; (4) excess condemnation; and (5) condemnation solely for aesthetic reasons. We will discuss each one of the areas, some necessarily more in depth than others, to serve as background for the analysis to follow.

1. Land Redevelopment

We consider in this category takings for the purpose of slum clearance, low cost public housing, and industrial and commercial development. This general category is perhaps of greatest modern importance because of the difficulty of the issues involved, the tremendous amount of case law elicited, and the fact that the United States Supreme Court has written a leading case dealing with the problem.

The first important case on this subject was *New York City Housing Authority v. Muller.*[64] Under a 1934 state enabling statute, petitioner Housing Authority sought to condemn slum property so that it could clear the land and build public housing thereon for low income persons. The New York Court of Appeals held, upon challenge, that this was for a public use. It applied the broad public advantage test to determine the question. The public benefit to be achieved was to rid society of the juvenile delinquency, the crime, and the disease, which

---

[61] 240 U.S. 30 (1916).

[62] *Id.* at 32 (emphasis added).

[63] *See* text accompanying notes 71–72 *infra.*

[64] 270 N.Y. 333, 1 N.E.2d 153 (1936).

the court was convinced resulted from slum conditions. Noting that prior exercises of the police and taxation powers had failed to correct the problems, the court said eminent domain, the least drastic of the three powers, was certainly appropriate to deal with it.

Many more of such cases were bound to come up after the passage of the United States Housing Act of 1937.[65] Under it the United States Housing Authority was authorized to make loans and grants to local public housing agencies for slum clearance and construction of low rent public housing. Most of the states passed enabling legislation in which city councils were given authority to create local housing agencies empowered to carry out the federal act. There followed a plethora of cases in the ensuing ten-year period which upheld condemnation for the purpose of slum clearance if combined with construction of low rent public housing.[66] The courts generally used the public advantage approach, thereby finessing the point that after construction, each unit would benefit but one private family and therefore would not be "used by the public."

The "urban renewal" cases, raising related issues, came in the wake of Congress's enactment of the Housing Act of 1949.[67] As amended, this Act provided for capital grants to local agencies of up to three-fourths of the costs of urban redevelopment.[68] The basic plan was that these agencies would condemn "slum" or "blighted" areas for the purpose of either complete land clearance or rehabilitation of the buildings. After clearance, the land could be and usually was sold or leased to private developers with restrictions as to what could be done with the property. Housing as well as commercial and industrial development was permitted. In a series of cases most of the state courts upheld these statutes because of the assumed benefit to the public in ridding society of these undesirable areas.[69] They so held in the face of the argument that resale

---

[65] Ch. 896, 50 Stat. 888 (1937) (now codified, as amended, at 42 U.S.C. §§ 1401–1440 (1970 & Supp. V 1975)). For a description of the operation of the statute, see Note, *Enforceability of Contracts Between Local Housing Authorities and City Councils*, 50 YALE L.J. 525, 525–26 (1941).

[66] Housing Auth. v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 (1939); Marvin v. Housing Auth., 133 Fla. 590, 183 So. 145 (1938); Rutherford v. City of Great Falls, 107 Mont. 512, 86 P.2d 656 (1939); Dornan v. Philadelphia Housing Auth., 331 Pa. 209, 200 A. 834 (1938). For a complete list of the cases, see 2A C. NICHOLS, *supra* note 2, § 7.5156 n.6.

[67] Ch. 338, 63 Stat. 413 (1949) (now codified, as amended, at 42 U.S.C. §§ 1441–1490d (1970 & Supp. V 1975)).

[68] For a good summary of the mechanics of urban renewal, see O. BROWDER, R. CUNNINGHAM, & J. JULIN, BASIC PROPERTY LAW 1345–49 (2d ed. 1973).

[69] *See, e.g.*, Katz v. Brandon, 156 Conn. 521, 245 A.2d 579 (1968); Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Boise Redev. Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972); Papadinio v. City of Somerville, 331 Mass. 627, 121 N.E.2d 714 (1954); Housing & Redev. Auth. v. Greenman, 255 Minn. 396, 96 N.W.2d 673 (1959); Yonkers Community Dev.

to private developers (usually at a price well below cost to the government) was contemplated from the beginning and that, therefore, the taking was for a private use. In the leading case, *contra*, the court held that a taking of blighted land for purposes of resale to private developers, who were to use most of the property for light industrial sites, was not for a public use.[70] The court seemed to imply that, if the purpose had been to supply low cost housing to the present occupants of the area or even any housing at all, the taking would have been upheld.

The most influential case concerning urban renewal was *Berman v. Parker*,[71] a United States Supreme Court decision involving a project in the District of Columbia. Plaintiff, a department store owner in a blighted district scheduled for redevelopment, sought to enjoin the condemnation of his property as a taking without due process and for a private use. Plaintiff argued that his particular property was not blighted at all and that the proposal to sell it to a private developer as part of the urban plan was clearly for a nonpublic use. The court upheld the taking. Though it did not specifically say that the public advantage test was controlling, the whole thrust of its opinion was in that direction, for the court emphasized repeatedly Congress's justifiable purpose in ridding the city of slums and accompanying conditions. Indeed, at one point, the court seemed to approve takings for aesthetic reasons only. And it clearly rejected the use-by-the-public test when it said, "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude,"[72] for it knew that private ownership of residences meant the public could be excluded from much of the project.

The importance of *Berman*, however, lies in its seeming open-ended approval of the redevelopment device. Examine the chronology. First, placed by low cost public housing. Then they approve the taking of slums and blighted lands for private housing and private commercial

---

Agency v. Morris, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112, *appeal dismissed*, 423 U.S. 1010 (1975). *But see* Foeller v. Housing Auth., 198 Or. 205, 256 P.2d 752 (1953) (statute upheld on the specious grounds that the public would get temporary use of the property and therefore the use-by-the-public requirement was met). The cases on this subject are voluminously collected in 2A C. NICHOLS, *supra* note 2, § 7.5156 n.1.

[70] Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956). *Accord*, Adams v. Housing Auth., 60 So. 2d 663 (Fla. Sup. Ct. 1952); Housing Auth. v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953). The Georgia holding was reversed by state constitutional amendment. *See*. GA. CONST. § 2-6104 (amend. IX, § 4) ¶ 4. The courts have acceded. *See* Bailey v. Housing Auth., 214 Ga. 790, 107 S.E.2d 812 (1959).

[71] 348 U.S. 26 (1954). The Court earlier had interpreted expansively the federal condemnation power. *See In re* Tennessee Valley Auth. v. Welsh, 327 U.S. 546 (1946).

[72] 348 U.S. 26, 33-34 (1954).

redevelopment. In *Berman*, the court approves taking a perfectly sound building in a blighted area for resale to a private developer for non-housing purposes.[73] There remains one further possible step: taking perfectly good property located in a sound area as part of a private industrial or commercial redevelopment plan. Of course, this last does not fit under the traditional urban renewal statutes, but special laws authorizing such takings have been passed. As might have been guessed, the courts have been divided on their constitutionality. There is an understandable reluctance on the part of many courts to allow the taking of the sound property of one person for the private commercial or industrial use of another, even where the new use is of great economic benefit to an area. These courts have struck down the takings.[74] On the other hand, some courts have allowed them, emphasizing instead the great public advantage that would accrue from additional jobs for the locality.[75] The issues raised by this type of taking will be more thoroughly explored in a later section of the article.[76]

2. Private Right of Way Cases

The state courts continue to uphold condemnation of rights of way by or for landlocked owners. The modern cases have tended to arise in two contexts: (1) those where the landlock has been created by construction of a new limited access highway through the owner's property; and (2) those consensually created by the purchase of property which has no access to a public road under facts not giving rise to an easement by necessity.[77] In the first category, the courts have generally upheld the condemnation by the state of a way, justifying it as being incidental to the condemnation of the highway itself[78] or by the fact that the public would have a right to use the access road as well.[79]

---

[73] *Accord*, Miller v. City of Tacoma, 61 Wash. 2d 374, 378 P.2d 464 (1963).

[74] City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).

[75] *In re* Tennessee Valley Auth. v. Two Tracts of Land, 387 F. Supp. 319 (E.D. Tenn. 1974), *aff'd*, 532 F.2d 1083 (6th Cir. 1976); Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 339 A.2d 278 (1975); Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963); Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *appeal dismissed*, 371 U.S. 4 (1962).

[76] *See* section II C *infra*.

[77] Where an easement by necessity does not arise in such a case, it is usually because the seller of the land has neither access to a public road for the land he sold nor for the adjacent land, if any, that he retains after the sale.

[78] North Carolina State Highway Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970). This theory is a specie of substitute condemnation. *See* text accompanying notes 87–96 *infra*.

[79] Department of Transp. v. Livaditis, 129 Ga. App. 358, 199 S.E.2d 573 (1973); Department of Pub. Works & Bldgs. v. Bozarth, 101 Ill. App. 2d 99, 242 N.E.2d

In the second category, courts continue to uphold takings of ways of necessity by private parties under authorizing state statutes or constitutional provisions.[80] There are also cases upholding takings by the state without special statutory or constitutional provisions for what amounts to a private access road.[81]

An interesting problem is the relationship between condemnations by private individuals for a right of way out, and the common-law easement by necessity, which ordinarily arises when an owner subdivides a tract creating a landlocked piece. Two recent cases have dealt with ramifications of this. In the first,[82] the court allowed a condemnation despite the condemnee's argument that, in order for such a taking to be permitted, the condemner should be required to show the same elements as in the case of the easement by necessity. This, it was argued, would include ownership of the two parcels by a common grantor, landlocked and landlocking, at some previous time—something the condemner could not show in the particular case. The court articulated precisely the opposite rule:

> If the same right of way requirements must be shown when condemnation is sought as when seeking traditional judicial relief, the constitutional and statutory provisions authorizing condemnation would serve no purpose since who would invoke the eminent domain procedure to acquire and pay for a right of way of necessity if he could acquire the same right of way free (except for the expenses of litigation) by seeking judicial relief.[83]

In the other case,[84] the court allowed a condemner a taking for a way out, even where there was a possible easement by necessity. It apparently felt that the easement was of doubtful validity because the common grant creating the landlock had been made fifty years earlier and there was a good likelihood that any possible easement was lost by reason of prescription.[85]

The law has also allowed condemnations for private rights of way

---

54 (1968); *In re* Legislative Route 62214, Sect. 1-A, 425 Pa. 349, 229 A.2d 1 (1967); Stewart v. Fugate, 212 Va. 689, 187 S.E.2d 156 (1972).

[80] *E.g.*, McGowin Inv. Co. v. Johnstone, 54 Ala. App. 194, 306 So. 2d 286 (1974); 2A C. NICHOLS, *supra* note 2, § 7.626.

[81] State Highway Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967); State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965). The two cases show the considerations that motivate a court in these "private road" cases. In the earlier case, the court held unconstitutional a state taking for a 3300 foot road ending in a cul-de-sac and serving only four or five families. In the later one, the same court upheld a similar taking for a road to serve a land-locked transport facility employing 700 people.

[82] Franks v. Tyler, 531 P.2d 1067 (Okla. Ct. App. 1974).

[83] *Id.* at 1069.

[84] Snell v. Ruppert, 541 P.2d 1042 (Wyo. 1975).

[85] *Id.* at 1047.

other than for passage. The story will not be fully traced here, but there are authorities allowing condemnations across others' lands for private sewers,[86] water pipelines,[87] and drainage.[88]

3. Substitute Condemnation[89]

Often the best way to compensate a condemnee is not with money but with other land. For example, suppose a railroad condemner needs to expand its tracks onto land presently used by a number of homeowners for a private access road, and that landlocked persons have no right to condemn a way out under local law. If the railroad could condemn an access road for the residences over land of a third party and give that as compensation for taking the original access road, the interests of all (except perhaps for the second condemnee) would be better served. The railroad would have to pay less in compensation than the damages for loss of access, and the homeowners would be able to keep the use of their homes.[90] It is called substitute condemnation when a condemner, desiring to condemn one piece of land, takes a second piece as well, to use as a means of compensating the first condemnee.

The leading case on this point is *Brown v. United States*.[91] There Congress by law authorized the taking of three-fourths of a town for purposes of building a reservoir, and also the taking of nearby land, to which the town, including the buildings, could be moved and joined with the one-fourth left intact. The United States Supreme Court upheld the taking, concurring in the district court's holding that the "acquisition of the town site was so closely connected with the acquisition of the district to be flooded, and so necessary to the carrying out of the project, that the public use of the reservoir covered the taking of the town site."[92] The Court added that the substitute condemnation here was "a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted"[93] and, in fact, was "the best means of making the parties whole."[94]

Following the *Brown* case, there have been numerous cases approv-

---

[86] *See, e.g.*, Austin Enterprises v. DeKalb County, 222 Ga. 232, 149 S.E.2d 461 (1966); Town of Steilacoom v. Thompson, 69 Wash. 2d 705, 419 P.2d 989 (1966).

[87] *E.g.*, Kaiser Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970); 2A C. NICHOLS, *supra* note 2, § 7.621.

[88] *E.g.*, H.A. Bosworth & Son, Inc. v. Tamiola, 21 Conn. Sup. 328, 190 A.2d 506 (1963); 2A C. NICHOLS, *supra* note 2, § 7.6223.

[89] *See generally* 2A C. NICHOLS, *supra* note 2, § 7.226; Annot., 20 A.L.R.3d 862 (1968).

[90] The facts are taken from Pitznogle v. Western Md. Ry., 119 Md. 673, 87 A. 917 (1913).

[91] 263 U.S. 78 (1923).

[92] *Id.* at 81.

[93] *Id.* at 82.

[94] *Id.* at 83.

ing substitute condemnation[95] and a few disapproving.[96] Where the first condemnee itself has the condemnation power, the courts generally have no difficulty justifying the second taking under a "separate public use doctrine."[97] But where the first condemnee has no eminent domain power, the courts use the argument of the *Brown* case that it is really a part of or incident to the first taking.[98] The authorities upholding these condemnations are overwhelming.

4. Excess Condemnation[99]

As a general proposition, a condemner may not take more property than needed to carry out the authorized public purpose of the taking.[100] There are three arguments advanced as possible exceptions to this rule: the so-called remnant, protective, and recoupment theories.

According to the remnant theory, where a taking of a portion of a tract would result in leaving uneconomic fragments of land in private ownership, and the condemner, because of severance damages, would have to pay as much or almost as much as if he took the entire piece, he should be permitted to take it all. This argument has found substantial support in the cases.[101]

Under the protective theory a condemner should be permitted to take property adjacent to that actually needed for the public purpose in order to protect, improve the surroundings of, or preserve the usefulness of the primary piece taken. Since such takings are obviously in aid of the main taking itself, it is not surprising to find a number of cases allowing them.[102]

---

[95] The cases are collected in Annot., 20 A.L.R.3d 862, 867–68 (1968).

[96] *E.g.*, Brest v. Jacksonville Expressway Auth., 194 So. 2d 658 (Fla. Dist. Ct. App. 1967), *aff'd*, 202 So. 2d 748 (Fla. 1967).

[97] Meisel Press Mfg. Co. v. City of Boston, 272 Mass. 372, 172 N.E. 356 (1930); Langenan Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953); Annot., 20 A.L.R.3d 862, 869–72 (1968).

[98] Pitznogle v. Western Md. Ry., 119 Md. 673, 87 A. 917 (1913); State Highway Comm'r v. Davis, 87 N.J. Super. 377, 209 A.2d 633 (Super. Ct. App. Div. 1965); Tobin Packing Co. v. People, 42 App. Div. 2d 82, 345 N.Y.S.2d 717 (1973); Annot. 20 A.L.R.3d 862, 876–80 (1968). This justification is also used in some cases where the condemnee has eminent domain power. *See, e.g.*, Brown v. U.S., 263 U.S. 78 (1923); Benton v. State Highway Dep't, 111 Ga. App. 861, 143 S.E.2d 396 (1965); Annot., 20 A.L.R.3d 862, 872–75 (1968).

[99] *See generally* 2A C. NICHOLS, *supra* note 2, § 7.5122; Note, *The Constitutionality of Excess Condemnation*, 46 COLUM. L. REV. 108 (1946); Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60 (1959); 17 NOTRE DAME LAW 35 (1941); Annot., 6 A.L.R.3d 297 (1966).

[100] The cases are collected in Annot., 6 A.L.R.3d 297, 304–05 (1966).

[101] *E.g.*, Department of Pub. Works v. Superior Ct., 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); State Highway Comm'n v. Chapman, 152 Mont. 79, 446 P.2d 709 (1968); Annot., 6 A.L.R.3d 297, 317–18 (1966). *Contra,* State v. 9.88 Acres of Land, 253 A.2d 509 (Del. 1969).

[102] *E.g.*, Department of Pub. Works v. Lagiss, 223 Cal. App. 2d 23, 354 P.2d 926,

The recoupment theory holds that a condemner may take more than needed for the contemplated improvement, so that the excess, increased in value because of the improvement, may be sold, thereby allowing the condemner to recoup some or all of the costs of the improvement. The courts considering the question have generally held that such takings are not for a public use.[103] However, there is one case where the court gave lip service to the rule against condemnations for recoupment but allowed such an excess taking where the state colorably showed another purpose for it.[104] Some states have enacted constitutional provisions allowing excess condemnation, but a case has held that such a provision does not authorize excess condemnation for recoupment purposes.[105]

5. Aesthetic Takings

The courts have taken substantially different views about the validity of zoning regulations as opposed to condemnations for aesthetic reasons.[106] With respect to the former, the dominant view has been that a regulation, whose sole purpose was aesthetic, was invalid.[107] A growing number of jurisdictions more recently have reached the opposite conclusion, allowing regulations motivated solely by aesthetic considerations.[108] On the other hand it has always been the law that a zoning regulation was valid where aesthetic considerations were in addition to other valid purposes such as the public health, safety, or morals.[109] And since that was the law, rare was the case in which the ingenious advocate could not argue that regulations, which were actually motivated solely by aesthetics, were supported by other considerations as well. Witness the cases upholding regulations concerning billboards on

35 Cal. Rptr. 554 (1964); Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959); Annot., 6 A.L.R.3d 297, 314–17 (1966).

[103] *E.g.*, State v. 9.88 Acres of Land, 253 A.2d 509 (Del. 1969); Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910); Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913); Winger v. Aires, 371 Pa. 242, 89 A.2d 521 (1952); Annot., 6 A.L.R.3d 297, 311–14 (1966).

[104] Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Ct. Civ. App. Tex. 1954), *appeal dismissed*, 350 U.S. 804 (1955). *See also* Baltimore v. Clunet, 23 Md. 449 (1865).

[105] Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1930).

[106] On zoning and aesthetics, *see generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 7.12–.24 (1968); Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260 (1962); Baker, *Municipal Aesthetics and the Law*, 20 ILL. L. REV. 546 (1926); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 L. & CONTEMP. PROB. 218 (1955); Rodda, *Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954); Annot., 21 A.L.R.3d 1222 (1968).

[107] The cases are collected in Annot., 21 A.L.R.3d 1222, 1226–35 (1968).

[108] The cases are collected in *id.* at 1235–41.

[109] *Id.* at 1241–47.

the ground that these offensive structures provided hiding places for consummation of "acts of immorality."[110] It probably would have been better just to have come right out and said that regulations solely for aesthetics were constitutional.

There never has been as much controversy with respect to condemnations for aesthetic purposes. For the obvious reason that the person harmed is compensated, courts have generally allowed them much more readily.[111] In 1954, the United States Supreme Court in *Berman v. Parker*[112] used the following dictum in connection with a taking for urban renewal:

> The concept of the public interest is broad and inclusive . . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end . . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine . . . .[113]

This widely quoted language has been the basis for many holdings involving aesthetic takings. The cases have arisen mostly in the scenic easement area. Under the Highway Beautification Act of 1965,[114] federal funds have been appropriated for acquisitions of interests in strips along federal-aid highways for the restoration, preservation, and enhancement of scenic beauty adjacent to the highways. Acting under this statute, the states have condemned land for scenic easements along many highways. Generally these easements do not permit the state to do anything upon the land taken; rather they serve to prevent the landowner from doing anything upon his land that would mar its beauty. Typically, the erection of billboards, creation of dumps, and removal of trees and shrubs are forbidden, while only agricultural and residential

---

110 *E.g.*, St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 145, 137 S.W. 929, 942 (1911), *error dismissed*, 231 U.S. 761 (1913).

111 *E.g.*, Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923); Shoemaker v. United States, 147 U.S. 282 (1893); Bunyan v. Commissioners of Palisades Interstate Park, 167 App. Div. 457, 153 N.Y.S. 622 (1915); 2A C. NICHOLS, *supra* note 2, §§ 7.516–.516[2][c].

112 348 U.S. 26 (1954).

113 *Id.* at 33.

114 Pub. L. No. 89-285, 79 Stat. 1028 (currently codified at 23 U.S.C. §§ 131, 136, 319 (1970)).

uses are permitted. The leading case on the constitutionality of these takings is *Kamrowski v. State*,[115] a decision of the Supreme Court of Wisconsin. The case involved the taking of such an easement in mostly agricultural lands along the Great River Road in that state. The condemnees claimed that since the public had no right to enter the land after the taking, the state failed to meet the use by the public test. Instead of saying, as it probably should have, that it was the benefit to the public that justified the taking, the court adopted the trial court's position that the use-by-the-public requirement was met by a visual occupancy. It went on to assert that the public's enjoyment of the scenic beauty was a direct use by the public of the scenic rights in the land. On the question whether the power of eminent domain could be exercised for an aesthetic purpose the court said:

> Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes. More importantly, however, we consider that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses, is sufficiently definite so that the legislature may be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guides the Commission in performing its task.[116]

Later cases have affirmed this view.[117]

E. An Analysis of the Legal Developments

It has been said that the law has finally eliminated the public use requirement as an effective barrier to takings.[118] This is most certainly a vast overstatement of what the law is. Courts still have a strong desire to act as a check on takings that they regard as "going too far." On the surface of things what they regard as "going too far" is answered by reference to one of the two tests for public use: use by the public or advantage to the public. But it is submitted that two other issues (sometimes perhaps subconsciously) govern their decisions upon the propriety of a nongovernmental taking to a much greater degree than is generally realized.

First, does the condemner's need for the taking outweigh the harm

---

[115] 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

[116] *Id.* at 265–66; 142 N.W.2d at 797.

[117] Department of Pub. Works & Bldgs. v. Keller, 61 Ill. 2d 320, 335 N.E.2d 443 (1975); Finks v. Maine State Highway Comm'n, 328 A.2d 791 (Sup. Jud. Ct. Me. 1974); Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347, 262 A.2d 199 (1970).

[118] Comment, *supra* note 36, at 614.

to be visited upon the condemnee? The most persuasive evidence that this factor plays a part in the ruminations of judges lies in the landlock cases[119] where one private individual is allowed to condemn a way out over his neighbor's land. The fact that there is typically very little harm to the condemnee and that the condemner's need is great, clearly accounts for the judicial approval of these kinds of takings, in the face of the fact that the road will be used by only one family and the benefit to the public is tenuous. The courts perceive that it is basically unfair to allow the condemnee's need for access to go unanswered when the condemnee, for compensation and with but slight harm to himself, can solve the problem. The same could be said for those cases allowing a condemner to take the right to bring water through the irrigation ditches[120] of his neighbor or similarly to drain his land.[121] The need versus harm factor will be considered again in a subsequent part of the Article.[122]

Second, is it necessary that eminent domain be used to carry out the project or could a purchase in the open market practicably be made? One can find dicta in some of the cases to support the existence of this factor,[123] but the chief evidence is the tendency of courts to limit non-

---

[119] *See* text accompanying notes 22–31, 77–88 *supra.*

[120] *See* text accompanying notes 39–50 *supra.*

[121] *See* note 88 *supra.*

[122] *See* sections II A 1(c) & II B 4 *infra.*

[123] I think we can show from the decisions, that a person or corporation claiming to belong to this second class, and to have legislative authority to condemn lands, must first show, that he or they are possessed of each and all of these three qualifications. . . . [t]hird, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property. . . .

. . . .

And lastly it is obviously impossible for either railroads or ferries to be established and run for the public use, unless the railroad company or the owner of the ferry is allowed to condemn lands for these purposes.

One man by his obstinacy or excessive avarice might readily prevent the building of a railroad. For in many instances it would be physically impossible to run around or avoid passing through his farm, and but for the power of condemning his land he could prevent the public from having the use of a railroad, which might be almost indispensable to the progress and development of the country.

So too by refusing to permit a landing, one obstinate man could prevent the establishment of a ferry necessary for the public use, as the ferry could often be only established by there being a landing on his property. As these three requisites unite in the case of railroads and ferries, all agree, that lands may be condemned for their use.

Varner v. Martin, 21 W. Va. 534, 556–57 (1883). *See also* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 546 (1848) (Woodbury, J., concurring); 2A C. NICHOLS, *supra* note 2, § 7.211 n.2.

governmental takings to those instances where purchase is not feasible. Purchase is generally not feasible where the other party is in a monopoly position and does not want to sell at or even above the fair market value of the interest sought. The monopoly point will also be discussed in detail in later sections of the Article.[124] Suffice it to say here that the major categories of nongovernmental takings (for example, cases involving landlocked owners, public utilities, mill acts, irrigation and drainage problems, and slum clearance) all involve some element of condemnee monopoly.[125]

It is submitted that the above two factors play a much greater role in decisionmaking than the articulated tests. There really is no way to demonstrate that irrefutably, however. All one can do is read a good number of cases and try in some way to make sense of them. But whether the above conclusion is correct or not, it is the message of this article in the succeeding section that the two elements should play an important role in the process of decision. We turn now to a legal and economic analysis of those and the other policy considerations that should govern this area.

II

A Policy Analysis of Public Use

A. General Approach

In this analysis we shall make a basic distinction between what may be called public and private takings. A public taking is one which benefits large numbers of persons in a nondiscriminatory and nonexclusionary manner. Takings for railroads, hospitals, streets, and governmental buildings would clearly come within the classification. But, likewise, others not normally considered to be a "public use" under traditional eminent domain doctrine would also come within the classification. Thus, industrial plants and even hotels (assuming they are open to all members of the public)[126] would for the purposes of this analysis be classified as "public." On the other hand, takings by a private country club, having a large number of members but excluding some persons

---

[124] *See* sections II B 1(a) and II C 2 *infra*.

[125] A third factor might be mentioned. An express requirement of condemnations by public utilities is that the project must be administered nondiscriminatorily and at reasonable rates. 2A C. Nichols, *supra* note 2, § 7.5[2]. This is certainly not universal, however, and is not required where no service to the public is contemplated. The landlock case would be an example where no such requirement is imposed.

[126] As they are required to under the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (currently codified at 42 U.S.C. §§ 2000(a)-2000(a)(2) (1970)). Of course there was a similar obligation under the common law. W. Raushenbush, Brown's The Law of Personal Property § 12.16 (1975).

who wanted to join, would be considered private. As a general proposition, however, a private taking is one which benefits one, or a relatively limited number of persons. Usually, in such cases, no one but the few persons benefited cares or has any interest in whether the taking is permitted. The taking of an easement out by a landlocked individual owner would be the prototype case of the private taking.

The approach here will be first to examine what circumstances justify private takings as matters of fairness and economic efficiency. Then we will try to determine what different characteristics of public takings might call for different approaches. It should be emphasized at the outset that the public/private distinction suggested is not the same as the public advantage requirement of the cases. As it develops, the argument will demonstrate that there are private takings that are fully justified in equity and efficiency. Further in terms of classification, unlike the public-advantage test, any activity benefiting the public nondiscriminatorily would qualify for the more permissive treatment suggested for public takings. It is impossible to distinguish rationally a large plant employing half the town and a railroad right of way, saying there may be condemnation in the latter case but not in the former. We turn first now to the private taking.

B. The Private Taking

1. The Basic Landlock Case and Variants

(a) *Analysis of Remedy—The Increase in Value and Monopoly Requirements*

Assume the following fact pattern: *L* owns Blackacre, a 200 acre tract which he bought from *X* and which has no access to a public road.[127] *O* owns Whiteacre, adjacent property lying between Blackacre and the road. *L* would like to purchase an easement over Whiteacre from *O* who has no desire to sell. Blackacre is worth $2,000 without an easement over Whiteacre, but $200,000 with it. Whiteacre is worth $200,000 without an easement over it and $190,000 subject to the easement.

According to the Calabresian analysis,[128] there are theoretically four possible ways in which the law might handle this problem. First, it might say that *O* shall have the right, enforceable by injunction, that *L*

[127] Of course, if the purchase itself involved the subdividing of a parcel and created the landlock, condemnation would be unnecessary as an easement by necessity would arise. We assume here the parcel was purchased in such a way that an easement by necessity was not created. *See* text accompanying notes 82–85 *supra*.

[128] The analysis was first developed in Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

not cross *O*'s property, and that, if *L* is to gain that right at all, he must do so with *O*'s free acquiescence gained through payment of a price sufficient to satisfy *O*. That is, *L* must pay whatever the market would require for the right that he desires. This, of course, is the view that the law generally takes of such situations in the absence of constitutional or statutory authority to the contrary. Ordinarily we do not compel an owner to sell his property against his will. Second, the law might say in reverse that because of *L*'s necessitous circumstances he shall have a specifically enforceable right to cross Whiteacre and need not pay for it. In fact, in this hypothetical result, *O* would have to pay whatever *L* would insist upon if he wanted to get *L* to stop crossing. This is an expropriation, the taking of another person's property without payment of compensation—something that we do not ordinarily do in our present legal system. A specifically enforceable right which can be overturned only by a market transaction such as the above two remedies, Calabresi calls a "property entitlement."[129]

A third theoretically possible view would give *L* a right to cross *O*'s property enforceable not by injunction but only by a suit for damages if *O* blocked the way. Lastly, *O* might have a right that *L* not cross, enforceable not by injunction but only by a right to damages. This last alternative gives *L* the power of eminent domain—the right to take *O*'s property interest upon payment of damages to *O* as compensation. Both of these damage alternatives, which are the result not of a market transaction but of a court's determination of value, Calebresi calls a "liability entitlement."[130]

The economist would argue that efficiency calls for a result which allows *L* to cross *O*'s property. A proper measure of efficiency would be a comparison of the total value of both properties. With the easement the properties together are worth $390,000, and without it, $202,000. As a matter of good economic sense, clearly *L* should be able to cross. The Coase theorem[131] says that no matter what result is decreed by the law, market forces will tend the parties toward the efficient result unless transaction costs are too high. Thus, under alternatives one or four (*O* has a right to enjoin *L*'s crossing or to recover damages for his doing so) *L* would have a strong incentive to buy the right to cross. Of course, where *O* has the right to injunction, *L* would have to buy at a price satisfactory to *O* in order to cross. But where *O* can enforce only by damages, *L* would in any case cross but might attempt to settle out of court if he thought it advantageous to do so. In either case, since L's property is worth $2,000 if he cannot cross but $200,000 if he can, *L* would be willing to pay some figure up to $198,000 in order to have the

[129] *Id.* at 1092 n.7.

[130] *Id.*

[131] Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

permanent easement.[132] On the other hand, since *O*'s property is worth $200,000 if not subject to the easement but $190,000 if so subject, *O* would be willing to accept some amount in excess of $10,000 to allow *L* to cross. The settlement would thus probably be somewhere between $10,000 and $198,000. Since there is so much difference between the two figures and the costs of entering into the transaction likely are relatively small, it is likely that there will be a settlement achieving the efficient result of *L*'s having the right to cross.

On the other hand, under alternatives two or three (*L* has a specifically enforceable right to cross *O*'s land or a right to damages if *O* bars him) the efficient result will also be reached. Under two, obviously no bargaining is necessary as the law specifically enforces the right to cross. Under three, a settlement allowing *L* to cross is extremely likely, as the damages for *L*'s loss of use of his land would be much higher than the $10,000 decrease in value to *O*'s land when *O* allows *L* to cross, that *O* would gladly settle.

If one changed the figures in the original hypothetical, however, the result might differ substantially. For example, assume Blackace is worth $2,000 with no easement over Whiteacre and only $10,000 with it, while Whiteacre is worth $200,000 without an easement over it and $195,000 if subject to the easement. While it would by hypothesis be more efficient for *L* to have the easement (the total value of both properties being $205,000 with the easement and $202,000 without), it is not as likely that the efficient result will occur if the law puts the initial entitlement in the "wrong" place. That is, if the law gives *O* the right to exclude *L*, enforceable by injunction or just by damages, *L* would be willing to pay some amount up to $8,000 for the right to cross and *O* would be willing to accept an amount of $5,000 or more. Settlement in this case is less likely for two reasons: (1) The amount that *L* would be willing to pay does not greatly exceed what *O* would likely take as it did in the original hypothesis. (2) The costs of entering into the transaction may exceed the $3,000 increase in total values, thereby rendering the transaction uneconomic. If it cost $5,000 to enter into the transaction by way of bargaining costs, legal fees, and the like, the parties would be much less likely to settle as the total increase in values of $3,000 would be more than offset by additional expense of settlement.

Calabresi has argued in a somewhat analogous context that it is best to assess the liability on that person who can most cheaply avoid the cost of the conflict and thereby make the proper move toward efficiency.[133]

---

[132] Of course, if *O* could recover only permanent damages limited to $10,000, *L* might not be willing to pay even that amount in settlement.

[133] G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135–73. *See* Calabresi, *supra* note 128, at 1115–24.

Calabresi based his analysis upon Coase's notion that, in a system that had no transaction costs, there would be a series of bargains which would culminate in the same allocation of resources—one of economic efficiency—no matter where initial liability lay. But if there are transaction costs, and in the real world there always are, these bargains toward efficiency would not take place where the transaction costs exceed the savings made by the move toward efficiency. In that situation it is best to assess the cost upon the cheapest cost avoider as the one who can most easily make the move toward efficiency, thus avoiding higher transaction costs which would otherwise prevent achieving the optimally efficient state.

To illustrate: Suppose that A owns an industrial plant which releases effluent that pollutes the water used by B downstream for his bottling plant. Suppose further that it would cost A $1,000,000 to put in equipment to end all pollution by his effluent, but in the alternative it would cost B $900,000 to put in equipment that would clean up the water he uses. If there were no transaction costs, that is, if it costs nothing for the parties to bargain and enter into a market transaction, then it would not matter so far as economic efficiency is concerned whether A were legally liable to B or vice versa. For if A were held liable to B, he would pay B $900,000 or a little more to install the less expensive equipment, in order to avoid having to spend $1,000,000 to correct the problem. Thus, the less expensive, and economically more efficient, method of pollution control would be used. On the other hand, if the initial liability were placed upon B, that is, if B had no rights against A, B would install exactly the same equipment but at his own expense. He would do this so long as the value of clean water to him were over its $900,000 cost.

If, however, the bargain between A and B cost $200,000 in expenses, no transaction toward efficiency would occur if A were held initially liable, for it would cost A more to enter into the transaction with B than to abate the pollution himself ($900,000 equipment plus $200,000 transaction costs = $1,100,000, which is more than the $1,000,000 cost of A's installing the equipment himself). Thus, if A were held legally liable for the pollution, the more expensive (and therefore less efficient) method of pollution abatement would be used, but if B were liable, the less expensive (and therefore more efficient) method would be used. Calabresi maintains, therefore, that it is better to guess who the cheapest cost avoider is and to assess legal liability upon him. The cheaper method of ending the disutility will thus be utilized, and economic efficiency will have its due.[134]

Calebresi in general prefers the use of specific relief and the market (property rules) rather than damages in court (liability rules) as a

[134] *See* Berger, *supra* note 1, at 185–86.

method of settling conflicts.[135] The reason is that the market often is cheaper than resolution of the damages questions in a court proceeding, and any method involving lower costs is preferred. He would turn to damages: (1) when the market is too expensive, for example, where there are too many potential holdouts or freeloaders to allow inexpensive resolution by bargains;[136] or (2) where a market determination is impractical, for example, in the case of accidents in which pre-accident negotiations are an absurdity, and court resolution is the only alternative;[137] or (3) to facilitate a distributional goal such as equality.[138]

In the landlock case hypothesized, bargaining would be relatively inexpensive, as there is but one party on either side, and so a market resolution would at least at first blush be preferred. Rule 1 (*O* may enjoin *L*'s trespass) or Rule 2 (*L* has a specifically enforceable right to cross) would be the apparent preferred alternatives. Also according to the analysis one would seek a legal rule that would achieve efficiency without the necessity of transactions between the adjoining owners. This in turn would avoid the risk of possible frustration of efficiency that might result from transaction costs that are so high that the transaction toward efficiency would not take place at all. Thus, where it appears that the total values of the properties would be substantially greater with the easement than without it, Rule 1 preventing the easement would be out of the question, and Rule 2, giving *L* a specifically enforceable right to cross *O*'s land without paying damages, would be the "proper" remedy. But using efficiency alone as the touchstone for legal analysis can lead to horrendous results. This is clearly the case here, for to allow *L* to cross *O*'s property without paying compensation just because the combined values of the properties could be greatly increased is the sanctioning of expropriation or confiscation in the name of avoiding transaction costs. If efficiency requires that *L* be allowed to cross *O*'s land, then fairness and the normal expectations of landowners require that *L* at least pay *O* for the right. And if the damages *L* must pay added to the transaction costs are greater than the value to *L* of the right to cross, then *L* should not cross, and efficiency must give way to the basic right to be let alone implied in a system of private property.[139] All this would suggest that in such a case *L* should have a right to take the easement but only upon payment of proper damages, that is, *L* should have his right to condemn an easement over *O*'s land.

---

[135] *See* Calabresi, *supra* note 128, at 1106, 1118.

[136] *Id.* at 1107.

[137] *Id.* at 1108–09.

[138] *Id.* at 1110.

[139] Indeed it is questionable that efficiency would be served by allowing *L* to cross without paying compensation in view of the huge demoralization costs that would accompany such a result. As to demoralization costs, see Michelman, *supra* note 1, at 1214–16.

Calabresi's analysis[140] would further suggest (and I think correctly) that where it appears that the total values of both properties would be substantially less with the easement than without it, alternative one (*O* may enjoin *L*'s crossing) would be the appropriate result. This would leave it to the market and *L*'s willingness to pay *O* whatever *O* demands. Even where the total value question is a close one and we are not sure which is the efficient result, as long as entering into bargains is relatively cheap, it would probably be better to use the same alternative and allow the market to determine whether the change in resources is efficient.[141] In summary, the rule would allow *L* the right to condemn where the easement clearly results in higher values but would allow *O* to enjoin *L*'s trespass in all other cases.

Implicit in the above analysis, however, is that *L* is landlocked by *O* and *O* alone. If *L* had possible exits across one-hundred separately owned parcels, the entire argument would fall because the market place would easily and cheaply accommodate the requirements of efficiency. All *L* would have to do is advertise his willingness to buy his way out, and the forces of competition would provide the exit at a reasonable price. This result is, of course, in line with traditional economic theory that a competitive market is the most efficient allocator of resources, but that where a seller has monopoly power, the resulting allocation is inefficient.[142] In the classic industrial monopoly situation, this results from the fact that since the monopolist sets prices to maximize his profits, a higher price than that set by pure competition results. This in turn means that too few of that item and more than optimum of other items are produced, leading to a lower than optimum total production. In the analogous landlocked property situation, the price extracted by monopolists would be higher than a competitive market would dictate, leaving some properties unnecessarily landlocked and useless. This in turn would lead to utilization of other less productive lands and to lower total productivity. Thus, if *O* has a monopoly (but only if he does), there is ample economic justification to force *O* to sell an easement over his property at a judicially determined fair value and thereby prevent the misallocation caused by the monopoly. This remedy would be analogous to the kind of regulation that we engage in when a public utility has a natural monopoly. We control price, profit, entry, and impose

---

[140] *See* Calabresi, *supra* note 128, at 1118–20.

[141] But where entering into bargains is relatively more expensive, the analysis would call for use of a liability rule. (*L* can cross upon payment of damages or *O* can prevent *L* from crossing if he pays *L* damages.) *See* Calabresi, *supra* note 128, at 1118. Obviously as a matter of fairness the first of the two rules is the appropriate one.

[142] *See, e.g.*, Scherer, *Industrial Market Structure and Economic Performance* 8–26 (1970), in ECONOMIC FOUNDATIONS OF PROPERTY LAW 53, 56–60. (B. Ackerman ed. 1975).

duties upon the utility to sell its services to needful buyers.[143] The same considerations that impel us toward turning from the market in the public utility area are effective here.

Suppose *L* had three possible ways out from his land over the properties of three different landowners, an oligopoly situation. Is the market place or eminent domain the appropriate allocator? Economists do not completely agree on whether oligopolists, not coordinating their prices, independently charge amounts higher than those a competitive market would yield.[144] However, I do not think that resolution of that issue is necessary to decide this question, for it appears that in a one-time situation such as this, the risks of undiscovered price-fixing are so great that eminent domain is appropriate to preclude that possibility. This rule would apply where the number of persons controlling the desired use is small enough to present a serious possibility of collusion. It is unclear what that number is, but it would appear that it might vary according to many circumstances. For example, if the possible gain is great, there might be an incentive for five oligopolists to get together and demand very high prices which could be shared by them upon sale. But, where the maximum possible price is low, price fixing would be much more difficult to accomplish with as many as five sellers.

(b) The Measure of Damages

Assuming we force *O* to sell *L* an easement, at what price should it be? The ordinary recovery in eminent domain when an easement is taken is the difference in the market value of the land taken free of the easement and its value subject thereto.[145] If creation of the easement decreases the value of the condemnee's land from $200,000 to $190,000 but increases that of the condemner's from $2,000 to $200,000, the recovery, according to that rule, would be $10,000. But that appears unfair. Why should *O* be forced to confer a great benefit upon *L* at nowhere near the price that *L* would be willing to pay for it in the open market? *L*, after all, should apparently be willing to pay close to $198,000 for the benefit. On the other hand, would not the amount of fair recovery in turn depend on what *L* paid for his land?

In answer, let us look more deeply into the circumstances of *L*'s acquisition of the landlocked land. Since by hypothesis the property was worth $2,000 if landlocked, it is likely that *L* paid near that amount for it if (1) the acquisition was recent and (2) the law afforded him no remedy in condemnation. On the other hand, if the law was that he could condemn an easement out, it appears at first that the property would be worth more than $2,000. But that is not necessarily true. *L*

143 *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 9.1–.8 (1972).

144 *Id.* § 7.3.

145 4 C. NICHOLS, *supra* note 2, § 12.41[2].

would be willing to pay the seller an amount which, when added to the likely condemnation award and related costs, would equal the value of the land not landlocked. Thus, what he would be willing to pay would depend upon what *O*'s award would be. If the law allows *O* to recover only $10,000, the decrease in value of his land caused by the easement, then *L* would be willing to pay something in the neighborhood of $190,000 as a purchase price. But if the law allows *O* to recover the value of the benefit conferred upon the landlocked land measured by a comparison of its value if there were no *possibility* of ever getting out ($2,000) and its value with an easement ($200,000), then *O* would recover $198,000 as a condemnation award and *L* would only be willing to pay $2,000 for purchase of the land. Under the first rule, *L*'s seller would reap the value of the right to get out over *O*'s land; under the second, *O* would. But the point is, as soon as the law was settled that the owner of landlocked land who wished to condemn a way out would have to pay the enhancement in the value of this land to the condemnee, land prices would reflect this fact. It is only where there is an unexpected change in the law that an injustice might result. Thus, it is perfectly sensible as well as just to allow the condemnee the greater recovery.

There are two obvious possible measures of condemnee recovery: (1) The increase in value to the condemner's property[146] plus the loss to the condemnee. Here the total recovery would be $208,000. (2) The increase in value to the condemner's property or the loss to the condemnee, whichever is greater. Here the recovery would be $198,000.

For reasons of equity, the first alternative may seem at first glance to be preferable. The person harmed by the taking ought to be able to recover the loss inflicted upon him against his will in all cases. And in fairness, someone should not be allowed to reap windfall gains through the seizure by legal process of another's property. Therefore, it could be argued that proper compensation would include both elements.

On the other hand there are several arguments that could be posed against the higher (first) and for the lower (second) measure of compensation. By giving the latter, it is at least assured that the condemnee will suffer no gross loss from the taking. Moreover, if the higher measure is used, a disincentive toward making the efficient change in resources is created, for it is less likely that the condemner will condemn where he has to pay as damages a sum greater than the benefit to him. All things considered, it would appear the measure in the usual case should be the greater of the increase in value to the condemner or loss to the condemnee. As we shall see in a later discussion, however, where the loss to the condemnee ends up as the operative measure of recovery,

[146] It is of course well established that a condemnee is *not* entitled to recover the benefit the condemnor reaps through the condemnation. 3 C. NICHOLS, *supra* note 2, § 8.61 n.95.

this presents additional problems of basic fairness and adequacy which argue for a slightly larger award.[147]

Under this approach what would happen if at the time L bought there was access to the road but that the land later became landlocked because the state put a limited access highway through the property in such a way as to cut off the road? This would not actually present any serious new problems not already solved by the law.[148] In such a case either the state or L should be able to condemn a way out over O's property, but, since there is no windfall gain to L (L having paid the full-not-landlocked value of the property), O's recovery would be limited to the decrease in value caused to his property.

(c) The Necessity for the Taking Versus the Detriment Inflicted

There obviously must be purpose limits to a doctrine that allows a private landowner who has the need or desire for the use of his neighbor's land to condemn it where that neighbor has a monopoly over the desired use. The following example will help to define them: A owns a home on a fifteen-acre tract, the value of which is $500,000. Next door to him B owns a ramshackle house on a two-acre piece worth $20,000 which lies between A's tract and a scenic lake. B maintains some trees which block A's view of the lake, but B's house is in full view. A would like to buy the property from B, tear down the house, and cut down the trees that block his view. If A could do so the value of the combined piece would be $550,000. A offers B $50,000 which B refuses. Should A have a right to condemn?

There are similarities to the landlocked case. B's property has a unique utility to A, and therefore B, in effect, has a monopoly over the prospective values. In addition, the total value of the pieces would be greater, so arguably "efficiency" would be served thereby if the change were made. However, there are obvious differences from the landlocked case as well. Here the proposed condemner plans to appropriate his neighbor's land completely rather than just take an easement across it. This clearly involves a much more substantial impingement upon the unwilling neighbor. Secondly, the appropriator has a comparatively frivolous reason for wanting to take the other's property. He is seeking not a means to reach his land but rather to improve it aesthetically. Most observers would not sanction a condemnation under these circumstances. The necessity for the taking ought to be clear before it is allowed. It is submitted that the two above factors should, in law, be closely related because it would appear that a very substantial impingement upon a condemnee could be justified only by the condemner's

[147] *See* text accompanying notes 150, 155–57 *infra*.

[148] This is the problem of substitute condemnation. *See* text accompanying notes 89–98 *supra*.

clearest necessity, while an insignificant impingement might be justified by somewhat less in the way of condemner exigency.[149]

2. The Tests Applied to Other Private Takings—Further Refinements in the Proposed Rule

From the foregoing, a tentative rule might be stated as follows: One private owner may condemn the land of his neighbor when (1) the proposed condemnee has a monopoly or near monopoly of the rights sought by the condemner; and (2) the total values of all the properties involved after the change in resources is higher than the total values before the change; and (3) the intensity of the objective need for the condemner's taking in connection with the beneficial use of his property clearly outweighs the degree of impingement upon the interests of the condemnee. The second and third elements need further amplification. The following hypothetical will illuminate some of the problems: Assume that *C*, *D*, *E*, and *F* each own neighboring office buildings in a large city. The buildings of *C*, *D*, and *E* are each worth $20,000,000, while that of *F*, older and smaller, is worth but $3,000,000. Parking in the area is in very short supply and the utility of the buildings would be greatly enhanced if there were a large parking building constructed in the immediate area. The only parcel feasibly inexpensive enough for the purpose in the vicinity belongs to *F*. *C*, *D*, and *E* in consortium offer to buy out *F* for $3,000,000 so that his building can be torn down and replaced with a new parking facility costing $10,000,000 to construct. It is estimated that the buildings of *C*, *D*, and *E* would each be worth $25,000,000 if the parking were provided and that the new parking facility with land would be worth $10,000,000. *F* refuses to sell, and *C*, *D*, and *E* seek to condemn his property. Should they be able to do so?

The first suggested prerequisite for the private exercise of eminent domain would seem to be met. *F* effectively has a monopoly over the rights sought, as his is the only land whose price is low enough to make the project feasible. The disposition of the second element needs a word of additional explanation, however. Here we seek to discover whether the taking and accompanying change in resources is an efficient activity. In the landlock case a comparison of pre- and post-taking values was sufficient to make that determination, because no construction costs were incurred in making the change. But where there are such costs, the test would have to be whether the total increase in values to all prop-

[149] A similar point was expressed in Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 519 (1959); Note, *"Public Use" as a Limitation on the Exercise of the Eminent Domain Power by Private Parties*, 50 IOWA L. REV. 799, 815 (1965). Both notes suggest that public need for the private taking be balanced against the detriment to the condemnee, while the suggestion here balances private need against private detriment. It is fictional to talk of a public need for a landlocked owner to get out.

erties caused by the change exceeds the cost of making it. In the example here, the total values of all properties have increased by $21,000,000. (The properties of *C*, *D*, and *E* have each increased by $5,000,000 and *F*'s by $7,000,000.) Since the cost of making the change is only $10,000,000 (the cost of construction), the change is "efficient."

The handling of the third element should also be amplified. In the spectrum between a frivolous motivation on the one hand and absolute necessity on the other, the parking fact pattern appears to lie in the middle. It clearly is not as necessitous as the landlocked parcel case but is much more so than the scenic case. On the other hand, the degree of impingement upon condemnee rights is the most severe possible—a complete taking of the fee simple. There are obvious difficulties in the weighing process. Nevertheless, it may be argued that the outcome of that process is not as important as it first seems when the damages rule suggested above is recalled. For under that rule, *F* would recover the $15,000,000 increase in value of condemnor's property. The taking would therefore not be as radical a measure in view of the very substantial recovery that *F* is receiving.

Under the damages rule here suggested, the efficient change in resources probably would occur because *C*, *D*, and *E* would have to spend $25,000,000 ($15,000,000 condemnation award plus $10,000,000 cost of construction) in order to acquire total values of $25,000,000 ($15,000,000 increase in values to their three properties plus acquisition of a new asset worth $10,000,000). If on the other hand, the parking facility were not worth the total cost of its construction, the prospective condemners would have much less incentive to make the expenditure and therefore might not undertake the project.

But change the figures: Suppose the total increase in value of the property of *C*, *D*, and *E* was only $500,000, instead of $15,000,000, the cost of the parking facility was only $300,000, and the value of *F*'s land was not increased by the change, remaining at $3,000,000. The taking would be "efficient" because the $500,000 increase in total values would exceed the $300,000 cost of making the change, but it would be more difficult to justify a taking here because *F*'s compensation would be very close to his loss. In such a case, if the court holds that the condemner's necessity outweighs the impingement on the condemnee and therefore allows a taking, then it is submitted that the recovery allowed should be substantially in excess of the loss, perhaps fifty percent higher,[150] in order to compensate the condemnee for the gross infliction of

[150] Of course legislation would be necessary to make an award which is in excess of that constitutionally required. There have been numerous cases in which statutes have so provided and been upheld. 1 C. NICHOLS, *supra* note 2, § 3.32; 3 *id.* § 8.6[1]. In New Hampshire, for example, the Mill Act provided for flooding a neighbor's land upon payment of actual damages plus an additional fifty

injury for private purposes solely in the name of efficiency. Again, if such an award were made, the condemners would be paying more in awards than the change in resources was worth. In this example, they would be paying $4,800,000 ($3,000,000 for land plus fifty percent bonus plus $300,000 cost of construction) for assets worth only $3,000,000. Ordinarily that would be a sufficient deterrent and the eminent domain proceeding would not be undertaken. That might be the best result, as it seems unfair to force someone off his property where the efficiency of the change is so minimal.

One more illustration of the operation of the third requirement might be useful. Assume that *A* and *B* own neighboring agricultural lands each worth $500,000. *A* would like to flood *B*'s land completely for the purpose of constructing a milldam. If this change in resources were made, *A*'s land would be worth $2,000,000 and *B*'s nothing. The increase in value and monopoly requirements would be present, but it is doubtful that the importance of *A*'s need for *B*'s property could be said to outweigh B's interest in being let alone. Nevertheless, if a court were to so hold, *B* would be entitled to recover $1,500,000 under the suggested measure of damages.

C. Public Takings

1. The Hypotheticals

We have dealt thus far with fact patterns wherein the proposed condemner was advancing interests which were essentially private. That is, the property taken was of no apparent benefit to the general public or large numbers thereof. To determine whether such a private taking should be allowed, a three pronged test was suggested. In this section, we seek to determine to what extent that same test should be applied

---

percent. The Supreme Court of New Hampshire upheld the provision. Dow v. Electric Co., 68 N.H. 59, 31 A. 22 (1894), *aff'd*, 166 U.S. 489 (1897). The court said:

> When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to him and 50 percent in addition. Pub. St. C. 142, §§ 12–18. The statute is permissive. It confers a privilege, which the defendants were at liberty to exercise or not, as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land and applying for an assessment of the damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the federal or state constitution is not open to them.

Id. at 60, 31 A. at 23. The United States Supreme Court affirmed using the same argument. 166 U.S. 489.

where the taking is for the purpose of advancing the public good. In that connection, we will consider the following hypotheticals. In each assume that the owner of the desired piece refuses to sell.

Case 1: *The Public Golf Course*

The City of Farwell is a medium size suburban municipality presently well served by a number of public parks and golf courses. The city fathers decide that it would be nice to have yet another park and golf course in a section of town presently having adequate facilities. They decide to condemn land on the edge of town belonging to X, a working farmer. X's sole means of livelihood is in farming, and he has a strong attachment to his land which has been in his family for five generations.

Case 2: *The New Industrial Park*

The City of Dalton, suffering from high unemployment, decides it would like to have a new industrial park on a vacant tract owned by P and the adjoining slum tenement block owned by Q. It is projected that the new park will provide many jobs and substantially relieve the unemployment problem in the area. The city seeks to condemn both areas, construct plants, and then lease the properties to private manufacturers.

Case 3: *The Manufacturer's Expansion*

The R Company employs fifty percent of the work force of the city of Franklin. The Company needs to double its facilities in order to meet regional demand and threatens to pull out of the city completely unless the city condemns for its use the farmland of S next door. As part of the plan, the Company would buy the needed land from the city.

Assume in the alternative that the Company needs an easement for rail access across the property next door.

Case 4: *The Railroad Condemnation*

The T Railroad Company has been given the power to condemn a right-of-way for a new route across the state. The Company plans to condemn a one-hundred foot wide, thirty-mile long easement over privately owned farm, residential, industrial, and commercial sites.

Case 5: *The New Hospital*

A group of physicians in Allen, a small city, decide that they would like to build a small hospital there to avoid the great inconvenience of treating their hospital patients from the thirty mile distance to the nearest institution. They select as the ideal location K's unused seven acre site at the edge of the downtown area. There are other locations available which would be almost as ideal, but the doctors decide they want K's tract. They form a nonprofit corporation and seek to condemn under an appropriate statute allowing such.

Case 6: *The Hospital Expansion*

H Hospital is a nonprofit institution operating in a declining neighborhood of a large city where there is a shortage of hospital beds. The Hospital Board decides to double its capacity by building a large addition on a five-acre parcel immediately to the south owned by *J*. That land presently contains a number of small stores which *J* rents out to individual tenants at rather low rents. The land and buildings are appraised at $15,000, but *J* refuses *H*'s offer of that amount, and *H* seeks to condemn under a statute authorizing the exercise of eminent domain power by hospitals.

Case 7: *The Urban Renewal Project*

The Urban Renewal Authority of the City of Bates, a large Eastern municipality, is authorized by state statute to condemn areas classified as either "slum" or "blighted" as defined, and after land clearance to sell or lease the lands for private commercial or residential redevelopment. The authority seeks to condemn the following properties located in the slum area that they intend to clear entirely: (1) the house of *L*, an immaculately kept two-family dwelling; (2) the profitable store of *M*; and (3) the dilapidated tenement building owned by *N*.

2. The Monopoly Factor

Should condemnee monopoly be required where the condemner's use furthers the public good rather than his private interests? The law, of course, presently makes no such requirement. Let us examine the various hypotheticals to approach an answer. We can first dispose of the easy problems, the hospital expansion and manufacturing expansion cases. By hypothesis, the condemnees have what amounts to a monopoly over the proposed use. This would be true of just about any case where one neighbor seeks to take the land of another. Any monopoly requirement we cared to impose would be met anyway.

The difficult questions arise in the nonneighbor situations. Consider the new hospital and new industrial park hypotheticals. Assume in each case that there are numerous other sites available that are just as suitable for the proposed use. What justifies a taking against the owner's will? It will be recalled, we argued (1) that the policy underlying the monopoly requirement was the promotion of efficiency by preventing the charging of a supracompetitive price, and (2) that if the condemnee had no monopoly, efficiency would be promoted by letting the market work its will. These arguments are just as applicable to the case where the condemnation promotes the public weal as they are to private ones. Why should a proposed hospital be able to take my property for its purposes when there are any number of other tracts available on the market that will suit the same purpose? And if this argument is applicable to hospitals, is it not just as applicable to takings for post offices

or city halls? In each case, society would benefit from competition and the potentially lower cost of such improvements. Condemnee monopoly should be a requisite to condemner's right to take.

The monopoly requirement, however, should be applied somewhat differently in the public taking case. If there is one tract that is clearly more suitable for the hospital, post office, or even the new industrial park, the fact that there are other available less suitable tracts probably should not defeat the condemnation. This is because of the interest in an efficient location of facilities that benefit the public in general. It would appear that this question of suitability and monopoly is for the trier of fact.

Two other hypotheticals present special problems in the definition of monopoly. The railroad (or highway) hypothetical is a classic case of monopoly, not *ab initio*, but as a result of evolving facts. That is, before the plans for a railroad are completely set, no one person has a monopoly over the route, but as soon as the route is finally determined, each owner along the right-of-way has a monopoly, and eminent domain is clearly appropriate. The urban renewal case is in another special category. Such condemnations are not done because the condemnor "needs" or "wants" the land of the condemnee, but because the condemnee's use is deemed harmful to society. In that sense, the condemnee has a "monopoly" over the desired use; it is after all his piece that society wants to change.

3. Net Values Must Increase

In the private taking case, the measure for efficiency suggested was that the increase in values as a result of the change should exceed the total cost of making it. We question here whether some such requirement should be imported into the public takings area. Let us examine first the hospital expansion and new hospital cases. What appears first is the obvious difficulty of measuring, in a meaningful way, the market values of the new facilities. There is no ready "market" for hospitals. Thus, measures of efficiency based on property values would tend to be quite unreliable. Probably the closest meaningful figure for the value of a new hospital would be the cost of land and construction.[151] This,

[151] Such a measure of fair market value of public and nonprofit property is provided for by UNIFORM EMINENT DOMAIN CODE § 1004(b)-(c) for the purposes of measuring compensation in case such properties are themselves condemned. The Code says:

> (b) The fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, char-

of course, would make the comparison circular and tell us nothing about whether the expenditure of these amounts was efficient. There are other ways of measuring efficiency than through the use of property valuations alone. Cost-benefit analyses in economic resource allocation are among the tools of policy analysis,[152] but they are both expensive and relatively easily manipulated to reach a preordained result. The expense of using such tools would often be too high in proportion to the amount of money involved in the typical condemnation. For these reasons, the value requirement should be dispensed with where: (1) because of the nature of the condemner's activity or for other reasons, measures of market value are not reliable; and (2) possible alternate measures of efficiency are not worth their costs.

It is unfortunate that this requirement must be dispensed with in those cases where it is often most needed, that is, in the public enterprise cases. Where a taking has private motivation, the necessity for earning a profit most often, but far from always, serves as a constraint upon embarking on inefficient activities. But where there is no profit motivation, considerations of efficiency are much more often neglected. Therefore, the value requirement should be dispensed with only when the grounds for doing so are clearly present. Using these standards, it is probable that the railroad and the public golf course takings would also present difficult if not insurmountable problems in measuring efficiency, whereas the industrial park, manufacturer's expansion, and urban renewal cases might more easily be handled. My guess would be that, if an increase in value requirement were imposed in the latter cases, some of these projects would never be undertaken in the first place.

4. Public Benefit Outweighs Impingement on Condemnee

The third requirement suggested for private condemnations was that

itable, or eleemosynary services; and (2) the facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) includes (1) the cost of a functionally equivalent site; (2) the cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and (3) the cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities.

Id.

[152] For discussions of cost-benefit analyses and their strengths and weaknesses, see J. KRUTILLA & O. ECKSTEIN, MULTIPLE PURPOSE RIVER DEVELOPMENT (1958); C. MEYERS & D. TARLOCK, WATER RESOURCE MANAGEMENT 435–75 (1971); J. SAX, WATER LAW, PLANNING AND POLICY 29–42 (1968). A careful dissection of the cost-benefit analysis of cleaning up the Delaware River, showing the problems of making such an analysis rational and meaningful, is found in Ackerman, Ackerman, & Henderson, *The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution Along the Delaware River*, 121 U. PA. L. REV. 1225 (1973).

the condemner's objective need for the condemnee's land should clearly outweigh the degree of impingement upon the latter's interest. There were two related reasons for this requirement. First, it was unfair to impose the drastic remedy of involuntary taking upon another for frivolous reasons. Second, even where the proposed taking is for good grounds of necessity, there was no justification for imposing a private taking where it would weigh almost as heavily upon the condemnee. Why should one party be forced to give up his substantial interests merely to make some other individual better off? It would appear that different considerations govern public takings, however. Take the public golf course as an illustration. To many, perhaps most, it would seem unfair to take the land of a productive farmer for the construction of what is clearly, under the circumstances, an unneeded golf course. The weighing process in our minds, however, does not involve balancing private need versus private detriment. Rather we are really weighing how much the public benefits from the taking against how much the condemnee is harmed. If the benefit to the public is insubstantial and the harm to the individual great, why should the private interest yield? There ought to be some limit on the right of the government or other body acting for the public to be arbitrary in its decision to take the property of its citizens. The notion of the absolute right of government to take whatever property it wills as long as it benefits the public is related to the discredited doctrine of sovereign immunity in tort—that the government is superior to its citizens in that it is not liable for its acts in the same way as a private person committing those same acts would be. The evolving passing of sovereign immunity[153] should be accompanied by a similar movement in the eminent domain area. In a public taking, the condemner should have to show that the benefit to the public is of greater weight than the adversity to be visited upon the individual.

That is not to say that this should be a substantial barrier in the way of most public condemnations, for they generally are of sufficient importance clearly to outweigh the private interests of the condemnee. The hospital expansion, new hospital, and railroad condemnation cases all seem to be of sufficient public benefit to outweigh the private concern. Some of the other cases, however, raise more difficult problems. Should a new industrial park needed for community employment be able to take a tenement occupied by low income persons? Or even more difficult, should a manufacturing corporation employing fifty percent of the area labor force be able to expand into the farm next door in view of its threat to leave if not permitted to do so? Though more dubious, I

153 The history of the abandonment of sovereign immunity for tort liability is exhaustively traced in K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 25 (1958 & 1970 Supp.). The materials are brought up to date in K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 25.00 (1976).

would say the public interest outweighs the private in these cases. And perhaps an even tougher one, should an urban renewal authority have the power in the name of slum clearance to take sound property in a blighted area with the intention of razing it and selling it to a private developer? In view of the doubtful benefits of these latter programs it becomes more difficult to say that the public need outweighs the private impingement, but it would be better to err here on the side of public experimentation to cure our urban ills. So, in the final analysis, it would be only the more frivolous and arbitrary public takings that this rule would forbid.

5. Damages and the Public Taking

In the case of a private taking by a neighbor, it was suggested that the measure of damages should prima facie be the greater of the increase in value to the condemner's property or 150% of the loss to the condemnee.[154] Such a measure makes sense where a private party seeks the land of his neighbor. Should the same rule apply where the taking benefits the public? The cases may first be subdivided into two categories: those where the condemner and condemnee are neighbors and those where they are not. It is in the former situation that the suggested measure of damages might be applicable. The manufacturer's expansion hypothetical is a good starting point. In that case, since the continued presence of the industry is crucial to the entire community, the condemnation clearly benefits the public. Yet, it is also apparent that the manufacturer will obtain substantial private benefit to his own operations from the taking. In such circumstances, he should not be allowed to reap the great increase in value of his original property resulting from the condemnation. Consequently, the rule of damages should be the same as in the private taking cases. A private person should not be permitted to appropriate the values of another person to his own use just because the taking also benefits the public generally.

On the other hand, the hospital expansion case presents different issues. In the first place, though there is in a sense a private benefit to the hospital, that institution is nonprofit and no particular person or limited group of persons is benefiting from the taking. Rather, it is the consumer of hospital services who would benefit presumably through lower charges. That kind of appropriation seems less unconscionable than the clear case of private individual or corporate benefit. In addition, there is the problem already mentioned that measures of increase in market value are almost meaningless with respect to assets such as hospitals. Wherever the condemner is a nonprofit institution, the above two factors will likely be present. Therefore, it could be argued that the meas-

[154] *See* text accompanying notes 145–50 *supra*.

ure of damages in such cases should conform more nearly to the traditional standard of loss to the condemnee as measured by the fair market value of the condemned property. That measure is also arguably appropriate not only in the neighbor-nonprofit condemnor type of case but also in all nonneighbor cases. In the latter situation the condemner has no property that is being increased in value to which a claim of condemnee recoupment could be attached.

This again raises the more basic question of whether the fair market value standard meets the twin criteria of fairness and economic efficiency. On the fairness question, there is no doubt that condemnees generally perceive the damage awards they receive as being much too low. This perception stems from a fundamental characteristic true of most property owners which relates to efficiency also. That is, most owners are, at any particular time, generally unwilling to sell their property at its fair market value.[155] Each person has a price for which he would sell just about everything he owns, but by definition he will accept fair market value for an item only if he desires to sell it, as fair market value implies a seller who does not have to but is willing to sell. The owner of a house who wants to continue living in it or the owner of a car who wants to continue driving it will not accept "fair market value" for his property from a prospective buyer. There is, however, some higher price which he would normally accept in return for his agreement to sell. It is inefficient to allow a condemner to take such an owner's property at a value less than he would be willing to sell it. To do so takes property from the hands of a person who values it more and gives it to one who pays less for it, thereby encouraging the overuse of the taking power and the excessive acquisition and construction of facilities by those instrumentalities which happen to have eminent domain power. This argues for using a value greater than fair market value in condemnation.[156]

Another argument for such an approach lies in what has been called

---

155 R. POSNER, *supra* note 143, § 2.5, at 21-22 (1972).

156 The fact that the condemnor in an eminent domain proceeding is not required to show that his use of the land will be more valuable than the present owner's but only to render compensation, will result in inefficient land uses if the required compensation is not equal to the opportunity costs of the land seized. And it commonly is not. The disregard of nonmarket values mentioned earlier creates a systematic downward bias in the prices paid in eminent domain proceedings. Where land is worth more to the owner in its present use than fair market value, the effect of eminent domain is to transfer land at a lower price than the market. And since land worth less to the owner than fair market value is not likely to be involved in an eminent domain proceeding at all—he would have sold it already—there is little off-setting tendency to overcompensate some owners. The standard of fair market value also ignores the owner's moving and transaction costs (including the legal costs of es-

demoralization costs—those costs that accrue to society by reason of the hostile reactions of those adversely affected by a decision regarded as unjust.[157] Such costs would likely lie in the unwillingness of such persons to engage in productive risk-taking endeavors which are at the heart of the economic system. For these reasons, the rule ought to be that condemnees in public takings (who are after all being forced to sell their property against their will) should be compensated with a price that is at least somewhat nearer the amount they would insist upon in the open market to induce them to sell. A rule allowing a minimum compensation of 120 or 125 percent of fair market value would, it is submitted, be fairer than the present system.

An important caveat is in order, however. There exist today some notorious cases of overcompensation. It is well known that some slum owners have prayed for urban renewal so that they could receive "fair market value" in a condemnation proceeding. The reason for this is that, for one reason or another, such figures have often turned out to be much higher than is really available in the market. (In recent years there has often been absolutely no market for slum property at any price.) There is no justification for society to bail out investors who have made huge mistakes, and there is every reason not to do so. Inefficient investments should not be encouraged by government subsidy. Therefore, in any recasting of the compensation system, provision should be made for the avoidance of the fictitious appraisals that have often accompanied slum clearance and other projects.

Conclusion

With respect to private takings three requirements should be imposed to establish public use. The condemnee ought to have a monopoly or near monopoly over the proposed use. The increase in values to the properties resulting from the taking should exceed the costs in making any change in resources. The importance of the condemner's need should outweigh the harm to be inflicted upon the condemnee. In addition in private takings, the condemner should have to pay as compensation, the greater of any increase in values to his land resulting from the taking, or 150% of the fair market value of the land taken.

With respect to public takings similar but less stringent considerations should govern. A condemnee monopoly requirement should be imposed but less strictly enforced. The increase in value test should be used but only where market or other measures are meaningful. In

tablishing fair market value). If the condemnor bought in the market, the existence of such expenses would frequently force him to pay higher prices in order to obtain the land that he wanted.

Id. at 23.

[157] *See* Michelman, *supra* note 1, at 1214.

addition, there ought to be some showing that the public benefit outweighs the harm to the condemnee. Finally a liberalized system of damages with awards somewhat in excess of fair market value should be initiated. The present system of eminent domain is in need of a substantial rethinking.