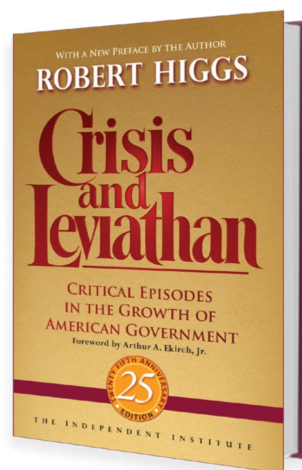
SUBSCRIBE NOW AND RECEIVE *CRISIS AND LEVIATHAN** FREE!

"***The Independent Review*** does not accept pronouncements of government officials nor the conventional wisdom at face value."
—**JOHN R. MACARTHUR**, Publisher, *Harper's*

"***The Independent Review*** is excellent."
—**GARY BECKER**, Noble Laureate in Economic Sciences

Subscribe to ***The Independent Review*** and receive a free book of your choice* such as the 25th Anniversary Edition of ***Crisis and Leviathan: Critical Episodes in the Growth of American Government***, by Founding Editor Robert Higgs. This quarterly journal, guided by co-editors Christopher J. Coyne, and Michael C. Munger, and Robert M. Whaples offers leading-edge insights on today's most critical issues in economics, healthcare, education, law, history, political science, philosophy, and sociology.



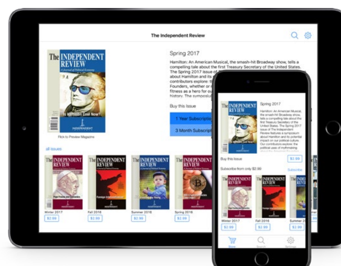
Thought-provoking and educational, ***The Independent Review*** is blazing the way toward informed debate!

Student? Educator? Journalist? Business or civic leader? Engaged citizen? This journal is for YOU!

*Order today for more *FREE* book options

SUBSCRIBE

Perfect for students or anyone on the go! ***The Independent Review*** is available on mobile devices or tablets: iOS devices, Amazon Kindle Fire, or Android through Magzter.



INDEPENDENT INSTITUTE, 100 SWAN WAY, OAKLAND, CA 94621 • 800-927-8733 • REVIEW@INDEPENDENT.ORG PROMO CODE IRA1703

The Mythology of Holdout as a Justification for Eminent Domain and Public Provision of Roads

BRUCE L. BENSON

One of the alleged justifications for government provision of roads is that the power of eminent domain is necessary in order to overcome holdout problems and obtain right-of-way properties (Goldstein 1987).[1] After all, this argument continues, only the state has such power, so the private sector would be unable to supply the efficient amount of roads.[2] In this article, I examine this market-failure justification for public roads from three different perspectives and demon-

Bruce L. Benson is DeVoe Moore Distinguished Research Professor in the Department of Economics at Florida State University.

1. In the United States, the power to force a private-property holder to sell property to a government entity (federal, state, or local government agency) is called *eminent domain,* but this term is not widely used or recognized in other parts of the world. The more general term is *compulsory sale.*

2. There are other alleged justifications for public roads as well. Perhaps the primary one, at least from a theoretical perspective, is the public-good/free-rider argument, which implies that coercive taxation is needed to pay for roads and therefore that the private sector cannot provide an efficient supply of roads. I have rejected this argument elsewhere (Benson 1994). Indeed, private provision of roads is common. Also see Roth (1996, 196–207) for discussion of fallacies in other objections to privately provided roads (justifications for public roads).

The Independent Review, v. X, n. 2, Fall 2005, ISSN 1086-1653, Copyright © 2005, pp. 165–194.

strate that it is not valid.[3] The first and perhaps the most obvious point regarding the eminent-domain justification for government provision of roads is that even if this power is required to obtain a right-of-way, the government does not have to site, construct, finance, or operate (that is, maintain and police) the road. I briefly summarize some of substantial historical and modern evidence that members of the private sector are able and, indeed, willing to site, construct, finance, and operate roads if they are allowed to do so. The implication is that even if eminent domain is required in order to obtain a right-of-way, that right-of-way can be turned over to the private sector, which can then build and operate the road.

I turn next to a direct examination of the alleged market-imperfection justification for the use of eminent domain to obtain right-of-way properties: transactions costs owing to the "holdout" problem that is assumed to prevent private-sector acquisitions of multiple contiguous land parcels for a roadway (Fischel 1995, 68–70). I demonstrate that the holdout problem is not nearly as severe as it is assumed to be when private entities make the purchase. Although government entities may face a significant holdout problem, the magnitude of any market failure that might occur with a private road system is much less significant than this holdout justification for public roads assumes. Finally, I explain that the use of eminent domain is undesirable for a number of government-failure reasons. Therefore, even if a potential market failure limits private road providers' ability to obtain right-of-way properties, the "need" for eminent domain does not justify public provision of roads. Eminent domain is not even justified for the private provision of roads because the probability of market failure is low in the absence of this power and because the substantial degree of government failure that accompanies the power appears to overwhelm any benefit from overcoming the holdout problem.

Must the State Own, Build, or Operate Roads?

Putting aside for a moment the issue of eminent domain, let us consider whether the state must own, build, or operate roads.[4] Numerous examples of privately provided

3. Although a substantial literature exists on such "takings," most of it does not question the validity of government's power of eminent domain. Instead, the literature focuses on three issues that arise given that the government has such power: (1) what constitutes a legitimate public purpose (an issue I discuss later); (2) what constitutes a property taking (that is, where is the boundary between police powers and the power of eminent domain?), considering that eminent domain requires compensation, whereas police powers do not; and (3) what factors should be considered in determining "fair" compensation. As Paul suggests, however, these issues are secondary to a more fundamental question: Is the power of eminent domain (or police powers in general) justifiable (1988, 5–6)?

4. After all, "government failure" in transportation policy is quite apparent (Winston 2000). Simply examine the level of traffic congestion in most urban areas of the United States, the United Kingdom, and many other parts of the world (for example, in Seoul, South Korea). Winston points out that although transportation "experts" advocate more "efficient" polices, such as congestion charges, it is "futile to expect public officials to consider such changes because urban transportation policy is largely shaped by entrenched political forces. The forces that have led to inefficient prices and services, excessive labor costs, bloated bureaucracies,

roads from highways to local roads in the United States and other countries, both at the present time and in the past, indicate that it evidently need not. In addition to the chapters in the forthcoming Roth volume on Sweden's extensive private road system, recent privately built and run highways in the United States, the many privately built and maintained local roads, the history of privately built roads in Great Britain and in the United States, and the privatization of road management, Beito (2002) and Newman (1980) discuss the history and recent past of privately provided roads in St. Louis. Shearing and Stenning (1987) detail the massive role of private security and the resulting order in Disney World, a huge complex with hundreds of miles of private roads and highways (also see Foldvary 1994). Furthermore, many developing countries are franchising roads to private firms that construct the roads and then operate them, charging tolls to earn the costs of construction and operation, and to cover franchising fees paid to the government (Pereyra 2002). Indeed, providing such roads is so attractive, in part because of their impact on real-estate values, that it is becoming increasingly common for governments to auction franchises (Engel, Fischer, and Galetovic 2002). Roth also documents several private road projects in developing and developed countries, such as two recent private highways in Great Britain (the Dartford River Crossing Ltd.'s toll bridge crossing the Thames and Midland Expressway Ltd.'s M6-Toll Road, a twenty-seven mile expressway to relieve congestion in one of England's busiest urban areas) (forthcoming and 1996, 180–97). The United States also has begun to develop and even encourage private highway projects. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 attempts to stimulate privately provided toll roads, bridges, and tunnels in the United States (as long as they are not part of the interstate highway system) by making them eligible for a 50 percent grant from the Highway Trust Fund, and in an effort to take advantage of these available funds a number of states have passed their own legislation to allow private provision of roads (private providers of roads have been reluctant to accept such funding, however, choosing to seek private financing instead because of the added costs and delays that arise when the federal government becomes involved).

Private entities can and do finance, build, and operate roads, and they would do so much more often if they could retain profits. Thus, even if eminent domain is necessary in order to obtain right-of-way properties (and for many of the roads, especially local roads, it is clearly not necessary), the state can purchase and then transfer the land to private entities. Are eminent-domain powers necessary, however, to obtain property for a major road's right-of-way?

---

and construction-cost overruns promise more of the same in the future. The only realistic way to improve the system is to shield it from those influences and expose it to market forces by privatizing it. Preliminary evidence for the United Kingdom and elsewhere suggests that although a private urban transportation sector should not be expected to perform flawlessly, it could eliminate most government failures and allow innovation and state-of-the-art technology to flourish free of government interference" (2000, 2).

Do Holdouts Justify Eminent Domain?

Resources, such as land for a right-of-way, can be acquired through compulsory sale, but for efficiency's sake voluntary exchange is clearly more desirable if it is possible. To see why, suppose one person, individual A, wants to obtain possession of a tract of land that is currently legally controlled by another person, individual B. There are two ways for A to obtain the property: through bargaining in an effort to achieve a mutually advantageous exchange or through coercion if A has the power to force a transfer or the ability to call on someone (for example, the legislature) who has such power. The bargaining option is considered here; the alternative is discussed later. Suppose that A values the land at $500,000, and B values it at $300,000. A and B are then likely to find mutually advantageous terms to make the exchange. At a price of $420,000, for example, both can conclude the exchange pleased by the deal they brokered. A fundamental if common fact is that *voluntary* exchange takes place only when *both parties expect to be better off* as a consequence. Voluntary exchanges occur because both parties trade something they value less for something they value more. Therefore, if a successful voluntary exchange takes place, the traded good will be *allocated to a higher valued use*.[5] Of course, some readers may not find normatively attractive the goal of allocating things to their highest-valued use according to individuals' subjective value. Note, however, that voluntary exchange makes both parties to the exchange better off: voluntary exchange increases *wealth* (subjective well-being) in what economists refer to as a *Pareto optimal* way. Pareto optimality denotes a condition in which all actions that make someone better off without making anyone else worse off have been taken. In general, voluntary exchange achieves this outcome.[6] Pareto optimality is not the end of welfare analysis, but it is an important component that virtually everyone finds desirable.

Holdout Problems and Involuntary Transfers

Because exchange is not costless, some mutually beneficial exchanges never take place. In theory, then, a substitute for bargaining, such as regulation or compulsory sale through eminent domain, may increase social welfare. In this context, Calabresi and Melamed (1972) point out that an *entitlement* (the right to use an asset or resource) can be "protected" (that is, supported by the legal system) in three different ways: by a "property rule," by a "liability rule," or by "inalienability." An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement

5. Of course, someone else may value the land even more, but if so, that person should bid more for it. *Competitive bidding should lead to exchanges that result in assets being allocated to their highest valued use* unless something prevents such an exchange (an issue addressed later). This outcome is clearly one reason to encourage both voluntary exchange and competition to engage in exchanges.

6. Naturally, fraud can lead to non-Pareto-improving exchanges, so trust or recourse (for example, to a legal system) is required to alleviate this problem when significant asymmetries in information exist (Benson 2001). Problems may also arise if the exchange gives rise to significant nonpecuniary externalities.

from its holder must obtain the current entitlement holder's permission *before* the transfer (for example, in a voluntary exchange). When an entitlement can be taken without prior permission by someone who pays objectively determined compensation after the fact, the entitlement is protected by a liability rule. The government's power of eminent domain exemplifies a liability rule.[7] Of course, after the entitlement has been taken, the previous holder has an incentive to claim that a high price would have been required to induce him to sell, and the taker has incentive to claim the opposite, so a court will often have to determine liability based on evidence other than the statements of the parties involved.

In an efficiency perspective, entitlements should be protected by a property rule when bargaining is possible because only the parties directly involved know their subjective values, which are likely to be revealed only through voluntary bargaining. It is often claimed, however, as Posner (1977, 10–12, 51) and Kraus (2000, 788) explain, that when transactions costs are so high that bargaining is not likely to occur, a liability rule is preferred (see also Barnes and Stout 1992, 56; Fischel 1995, 67–70). Both Kraus (2000, 788–90) and Posner (1977, 39–44) emphasize, however, that this argument has significant problems (see also, for example, Polinsky 1980, 1111; Krier and Schwab 1995, 45). One reason for questioning this widely held conclusion is the often implicit assumption that whereas transactions costs are high for private parties, information costs are low for judges or juries who must determine compensation (Polinsky 1980). As Kraus notes, if "both transactions costs and judicial assessment costs are high, there is little reason to believe that protecting an entitlement with a liability rule will be particularly conducive to efficiency" (2000, 788). Kraus goes on to explain that we have many reasons to expect that the assessment of compensation will be incorrect. The undervaluation bias (discussed later) indicates that his argument often applies to eminent-domain transfers.

The primary source of transactions costs that allegedly justify eminent domain for right-of-way properties is the so-called holdout problem (Posner 1977, 40–41; Fischel 1995, 68; Miceli and Segerson 2000, 3: 330). Posner succinctly explains this problem:

> An economic reason for eminent domain, although one applicable to its use by railroads and other right-of-way companies rather than by government, is that it is necessary to prevent monopoly. Once the railroad or pipeline [or highway] has begun to build its line, the cost of abandoning it for an alternative route becomes very high. Knowing this, people owning land in the path of the advancing line will be tempted to hold out for a very high price—a price in excess of the actual opportunity cost of the land. The high cost of acquiring land will, by increasing the costs of right-of-way companies, induce them to raise the prices of their services; the higher prices will

7. An entitlement is inalienable to the extent that its transfer is not permitted at all, even from a willing seller to a willing buyer. In other words, the asset is not truly private property. The holder has use rights but no right to alienate those use rights.

> induce some consumers to shift to substitute services; the companies will therefore have a smaller output; and as a result the companies will need, and will purchase, less land than they would have purchased at prices equal to (or slightly above) the opportunity costs of the land. Furthermore, higher land prices will give the companies an incentive to substitute other inputs for some of the land that they would ordinarily purchase. As a result of these factors land that would have been more valuable to the right-of-way company than to its present owners remain in its existing, less valuable uses, and this is inefficient. (1977, 40–41)

Indeed, a holdout problem can be so severe that it prevents the transfers of any property for a right-of-way. If land must be obtained from a large number of land owners who know about the intended purchase ahead of time, they all will want to be the last individual to sell in order to be in a monopoly position and extract the highest possible price. Such strategic behavior by sellers means that the private buyer may expect the transactions costs to be so high that he gives up the effort, and the road is never built. Thus, Fischel suggests that "Preventing time-consuming strategic bargaining is an important justification for eminent domain" (1995, 68).

Holdout incentives for sellers actually may be weaker than they are often assumed to be, however, especially if an individual sells only part of his land for a road right-of-way. After all, the increase in the rental value of his remaining land because of its proximity and access to the road can easily be substantially greater than the value of the land that is sold for right-of-way (consider the amount of land that housing developers often set aside for roads, which they also build, because good roads dramatically raise the value of the lots in the development). Thus, many landowners have a strong incentive to sell part of their land, and that incentive can offset the incentive to hold out (Engel, Fischer, and Galetovic 2002). In fact, history demonstrates that many landowners have voluntarily donated land for private-sector highway rights-of-way for precisely this reason (Klein 1990). Private developers also frequently donate land to the state so that it can build roads that connect their developments to public highways.

Note further that Posner's description of the holdout problem explicitly assumes that only one right-of-way exists and that the project begins before all of the land for the right-of-way has been purchased. These two assumptions lead to the potential for a single seller to act as a monopolist because the buyer has no available alternative. If this situation is not the case, then, once again, holdouts may not be a serious concern, as Posner (1977, 43–43) observes. In this regard, for instance, Miceli and Segerson note that, in theory, the land can be acquired prior to construction (2000, 330). They recognize, however, that when projects are publicly funded, plans are not likely to be kept secret until after the land has been obtained because of the need to appropriate the funds (and, we might add, because of the prevalence of corruption as public officials sell information to speculators). They also note, though, that private developers who want to assemble large tracts of land do not have the power of eminent domain

(except through manipulation of the political process), perhaps because it is "easier for them to acquire the property while disguising their ultimate intent, for example, through the use of 'dummy' buyers" (2000, 330). In other words, although Posner explicitly recognizes that the economic justification for eminent domain based on the holdout problem actually is "applicable" to private purchasers of right-of-way "rather than [to] the government" (1977, 41), private-sector purchasers of right-of-way are actually much more likely to avoid the problem than the government is.

Private buyers of multiple parcels can also make their deals much more quickly than public buyers. They do not have to get budgets approved by legislatures, deal with time-delaying statutory procedures, or operate under rules that limit the amount that they can pay for each piece of land (for example, rules that constrain bureaucrats to pay no more than the assessed values). Therefore, the likelihood that a private firm's plans will be discovered is much less than that a government agency's similar plans will be. Not surprisingly, private developers frequently consolidate large parcels of land without being held up (Starkie 1990).

A private buyer's secret efforts to obtain a right-of-way may be discovered, of course, and, if they are, holdout incentives may arise. Can such transactions costs be avoided? Landsburg (1993) provides an interesting solution to what might initially appear to be an intractable problem analogous to the holdout problem, citing a situation from Joseph Conrad's novel *Typhoon*. A number of sailors stored their gold coins in personal boxes in the ship's safe, but a severe storm caused the boxes to break open and mixed all of the coins together. Everyone knew how many coins he had placed in the safe, but no one knew how many the others had placed there. Therefore, everyone had an incentive to claim that he had put more coins in the safe than he actually had, and the captain's problem was to determine how to divide the coins to give each sailor his actual savings. Landsburg's proposed solution: "Have each sailor write down the number of coins he is entitled to. Collect the papers and distribute the coins. [But] [a]nnounce in advance that if the numbers on the papers don't add up to the correct total, you will throw all of the coins overboard" (1993, 29). This scheme clearly reduces and perhaps eliminates the incentive to hold out for more coins than the men had actually contributed.

A similar strategy might be used by the private buyer of a right-of-way even if it is known that a highway is going to be constructed. Suppose, for example, that the highway provider chooses more than one potential route. He then informs the land owners along the two routes that he would like to purchase specified parcels from each of them and that each should submit the price at which he is willing to sell (alternatively the developer might make initial bids that can be accepted, but indicate that each seller has an opportunity to make one take-it-or-leave-it counteroffer). In addition, potential sellers are informed that the buyer will purchase only the right-of-way with the lower total cost (a maximum might also be specified or information provided about the total acreage required on each right-of-way). Pipeline builders, for example, although their precise strategies may differ, "routinely consider alternative routes,

negotiate with different groups of owners, and settle with the first group that comes up with an acceptable arrangement. Where buyers compete with competing groups of sellers, there is extra pressure on the sellers to agree to reasonable deals" (Roth 1996, 199). When a private buyer structures the bargain appropriately (for example, by secretly buying land, or by simultaneously considering alternative routes and buying the parcels only after every seller has agreed and before the project starts, or by choosing routes where landowners give up only part of their land and expect to collect increased rent on the rest), holdouts are not likely to prevent right-of-way acquisition. Indeed, as Roth notes, the first two modern privately provided highways in the United States—the Dulles Greenway in Virginia and SR-91 in California—obtained the land they required from private landowners without relying on eminent domain, choosing instead to bargain (some properties were in existing public roadway corridors, which had to be obtained from governments) (1996, 199).

Fischel, in criticizing arguments against the use of eminent domain, notes that the literature has not indicated how the holdout problem is to be dealt with, and he suggests that the theoretical progress made regarding methods to induce people to reveal their preferences involve complicated voting rules (1995, 70). Similarly, Lazzarotti contends that "without eminent domain, it would be virtually impossible to fathom an alternative means of establishing such a complex network of transportation as exists in this country" (1999, 49). However, these arguments either presume that roads are provided by the government or that private entities will face the same holdout problems that government does. One reason for analysts' failure to indicate how to resolve the holdout problem in right-of-way procurement is that they have not given sufficient consideration to the possibility of privatized road systems. Theorists (as well as observers such as Fischel and Lazzarotti) presume that the government will provide roads and obtain right-of-way properties through eminent domain if the holdout problem prevents voluntary purchase, so there is no problem to resolve. However, if serious consideration were given to private road provision, potential solutions might come forth quickly.

Consider the growing literature on combinatorial auctions (see De Vries and Vohra 2001 for a review). Among the issues considered in this literature is the structure of auctions employed to buy or sell simultaneously sets of assets that are complementary (or perhaps substitutable for other sets of assets). Such auctions allow buyers to submit bids on groups of assets and make the purchase of each asset conditional on the purchase of other, complementary assets (or perhaps conditional on the combined price being lower than that of a substitute bundle). Clearly, the parcels of land for a road right-of-way are complementary (and the parcels that compose another potential right-of-way may be substitutes for those in a particular right-of-way). Alternatively, sellers of a set of complementary assets might offer a combined bundle of such assets to potential buyers (for example, if a group of land owners wants to increase the rental value of their land, it might offer a right-of-way to toll-road developers). Such auctions are used in a number of areas, and several logistics-consulting firms have produced

software to implement complex combinatorial auctions. For example, several large firms (including Sears, Wal-Mart, Kmart, Ford Motor Company) use combinatorial auctions to select transportation carriers in order to construct routes that minimize costs by avoiding empty back hauls and other unnecessary costs. Actual market participants have discovered many ways to induce people to reveal their relative preferences in situations similar to those that would characterize right-of-way purchase by private firms, and this really is the relevant issue, even if theorists do not fully understand how these processes might be refined to accumulate the parcels needed for highway routes. Indeed, the growing literature on combinatorial auctions is developing as theorists attempt to understand the processes already being implemented.

Government Failure Through Eminent Domain

In light of the preceding discussion, recall individual A introduced earlier who valued a parcel of land at $500,000. In the earlier hypothetical example, individual A tried to obtain control of the land through voluntary bargaining, but doing so is not his only option. Assume that by spending $50,000 (perhaps on a lobbyist, a bribe, or some other method of influencing the city council) he is sure he can get local government officials to decide that the business he is going to establish on the land is in the "public interest" because it will generate employment in the community and increase the tax base (in my later discussion of the actual purposes of eminent-domain condemnations, it becomes clear that this expectation would be an adequate justification for such political action). He negotiates with the local officials, who decide to condemn the land and sell it to him for $100,000—well below its market value—because they are convinced (or claim to be convinced) that the project will benefit the community. The city's land appraiser determines that the "fair compensation" for the parcel is $250,000 (after all, the assessor cannot determine individual B's actual subjective value of the land; furthermore, as explained later, an undervaluation bias prevails in such assessment processes), which is paid to B. In this case, the land is still transferred to a higher-valued use, but the transfer is not Pareto optimal because B and the taxpayers who pay the $100,000 difference between the compensation payment and the sales price are worse off. Individual A is clearly much better off, and we know that he could fully compensate B and the taxpayers for their losses if he wanted to (his decision to choose condemnation rather than bargaining suggests that he is not willing to do so, however). Thus, the "net" gain in social welfare is as large as it was under voluntary exchange, but the gain is now distributed so unequally that the "transaction" now makes some people worse off. In this light, note that some economists suggest that the Pareto criterion is too constraining in the public-policy arena and that an alternative, called Kaldor-Hicks efficiency (the gainers gain enough to compensate the losers, even if no compensation is paid), is preferable. Recognize, however, that if full compensation is not required when a "Kaldor-Hicks efficient" transfer is made through the government, then the incentives to bargain in the first place are weak-

ened, as a subsidized political transfer is a more attractive option for the "buyer." Why bargain and pay for a property that can be obtained without full payment through the use of political influence (unless the political influence is more expensive than the property would be)? Furthermore, whereas under voluntary exchange we know that the exchange makes both parties better off, no guarantee (not even in expectation) exists that under eminent domain land is moved to its highest-valued use. The example just given works just as well if B valued the land at $550,000, in which case any forced exchange would fail even the Kaldor-Hicks test and cause a reduction in net welfare.

Can inefficient transfers be avoided by constraining the use of eminent-domain powers to a limited set of circumstances? Suppose such purchases can be made only if the benefits to the "public" are clearly very large and sufficient compensation is paid to avoid making individuals worse off when their property is condemned, thus meeting the Pareto criterion.

The U.S. Constitution's Fifth Amendment states, in part, "nor shall private property be taken for *public use,* without *just compensation*" (emphasis added). Thus, it appears that the U.S. government's eminent-domain powers are constrained to "public-use" purposes (presumably uses with substantial benefits for many members of the public at large, as opposed to narrowly focused private uses) and that such takings must involve "just compensation." Because this constitution is one of the most widely emulated in the world and perhaps one of the most successful at constraining government action over a substantial period of time, let us consider the effectiveness of these constraints on transfer activity. After all, it would be surprising to find in many other countries constitutional constraints on compulsory sale that are stronger than those in the United States (indeed, in other parts of the world, weaker constraints on government probably mean that compulsory sale is not used because arbitrary, uncompensated takings occur instead). First, let us consider how U.S. courts have interpreted *public use,* to see if they have prevented compulsory sale for purposes that produce relatively small, concentrated benefits. Thereafter we can consider the "justness" of compensation.[8]

8. Other constitutional constraints were also created. For example, the clauses in Article 1 of the U.S. Constitution (one of the sections from which the power of eminent domain is inferred) appear to limit federal takings by requiring the "Consent of the Legislature of the State" in which the property is located. This constraint probably raised the cost of federal seizures somewhat (the states faced no such constraint, however) and limited their use for several decades until the Supreme Court eliminated the constraint in *Kohl v. United States* (91 U.S. 367 [1875]), wherein the federal government was determined to have the power to take property directly in its own name. Prior to this case (which arose because Congress authorized the secretary of the Treasury to acquire land in Cincinnati for a public building, and federal officials condemned the land directly rather than obtaining it through state condemnation or voluntary exchange), the federal government had condemned land only through the intermediary of the state government. As Paul explains, however, "Justice Strong deduced a federal power to condemn in its own name both from the very nature of sovereignty and, more concretely, from the Fifth Amendment's taking clause… . The latter inference was, undoubtedly, inventive. The requirement that the government must pay compensation when it takes was construed to imply a power to take in the first place. This clause, as virtually all commentators agree, is a restriction on government's powers, not a concession" (1988, 73).

The Disappearance of the "Public-Use" Constraint

James Madison, who wrote the Fifth Amendment, and those who supported him clearly hoped to restrict takings of the sort that had occurred in the colonies under British rule.[9] Therefore, besides stipulating just compensation, the amendment explicitly requires that takings be for *public use* rather than for *public purpose, interest, benefit,* or some other term. *Public use* was recognized at the time as a narrower and more objective requirement than such alternative terms might imply (Jones 2000, 290). Indeed, this wording was understood at the time as a strong constraint because the Framers did not recognize a nonpublic authority in government; "an express prohibition on 'private' taking would [therefore] have been superfluous" (Jones 2000, 289 n. 23).

Before 1875, all eminent-domain condemnations in the United States were performed by state or local governments, and therefore most early litigation over the constitutional limits implied by "public use" took place in state courts.[10] Evidence from this litigation illustrates that even though state constitutions had takings clauses similar to the U.S. Constitution's Fifth Amendment, two interpretations of the term *public use* were made in the states. The narrow interpretation required that the project for which the condemned property was used had to be open to the public (Jones 2000, 293), whereas the broader interpretation "equated *public use* with more nebulous terms such as *public advantage, public purpose, public benefit,* or *public welfare*" (Paul 1988, 93). States adopting this broader interpretation allowed transfers of condemned land to private commercial activities under the assumption that "the public" benefited from economic development (Jones 2000, 292). Thus, many states used eminent-domain powers to transfer property from one private entity to another for a

Today the eminent-domain power is generally assumed to be implied by such clauses as 7 and 17 of Article 1, Section 8, which give Congress the authority to establish post offices and post roads, and authority over property purchased for forts, arsenals, and other such facilities, as well as by the taking clause of the Fifth Amendment quoted earlier (Paul 1988, 73). In this context, however, note that one of the arguments Alexander Hamilton raised against including the Bill of Rights in the Constitution was that "it would contain various exceptions to power which are not granted" (*Federalist* No. 84). Indeed, some of the Founding Fathers argued for an explicit recognition of private-property rights that could not be taken by the government. For example, Thomas Jefferson contended that all remnants of feudalism in regard to property should be eliminated. The feudal underpinnings of the common law of property, including the law of compulsory sale, were transplanted to the American colonies from Great Britain. Under feudalism, private individuals might "own" land, but they did so at the discretion of the king, essentially acting as stewards of the land, because the king (and later Parliament) could dispossess them if he chose to do so (Benson 2002), although it was also customary to compensate the landowners for the condemned property. Jefferson vigorously pushed for allodial ownership, wherein landowners would hold absolute dominion over their property. In other words, he contended that landholders should not be treated as stewards, with property ultimately allocated of the government's prerogative (Paul 1988, 9). He feared that if the government were considered to be the ultimate owner of land, freedom could not be secure because the state would be in a position to reduce men to poverty or even serfdom. Other Founders obviously had a different view.

9. This subsection draws heavily from Paul 1988, Jones 2000, and Kulick 2000. For similar analysis and conclusions regarding the public-use issue and police powers, see Epstein 1985, 161–81.

10. See note 8 for an indication of why this practice obtained even for compulsory purchases of properties to be used for federal purposes.

variety of private purposes. In other states, however, the courts interpreted *public use* to mean "use by the public" (Paul 1988, 93).

When the U.S. Supreme Court began to consider eminent-domain issues, it adopted the narrow view of public use (Jones 2000, 292). In *Kohl v. United States* (91 U.S. 367 [1875]), for example, the Court explicitly stated that this power can be used by "a sovereign to take private property for its own public use, and not for those of another" (at 373–74). Furthermore, in *Missouri Pacific Railway Co. v. Nebraska* (164 U.S. 403 [1896]), ruling on a condemnation of railroad property by the state of Nebraska in order to transfer it to a private grain elevator, the Court concluded that the taking was an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment, as well as being "in essence and effect, a taking of private property [for a] private use."[11] Two decades later, however, the Court reversed itself. The opinion in *Mount Vernon–Woodberry Cotton Duck C. v. Alabama Interstate Power Co.* (240 U.S. 30 [1916]) explained that the Court would exercise great deference when reviewing a state court's findings regarding public use, and in *Old Dominion Land Co. v. United States* (269 U.S. 55 [1929]) the Court began to suggest that it would exercise similar deference with regard to legislative decisions about public use. Indeed, a relatively broad definition was explicitly adopted in *Rindge C. v. Los Angeles County* (262 U.S. 700, 707 [1923]): "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."

United States ex. re. TVA v. Welch (327 U.S. 546 [1946]) came close to withdrawing the federal court from even considering the question of public use when Justice Black wrote, "We think it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority" (at 551–52). Whatever limitation might have remained was severely undermined by Justice Douglas's decision in *Berman v. Parker* (348 U.S. 26 [1954]). The case involved a District of Columbia condemnation of land in areas of the city apparently dominated by slums, with the land subsequently transferred to private developers. The plaintiff owned a department store in one of the areas, and, among other things, he objected to the fact that the seized property could be transferred to another private party who would then redevelop it and sell it for private gain. Douglas wrote, "The concept of the public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well

11. Such rulings were consistent with earlier Supreme Court views of constitutional constraints. For example, in *Calder v. Bull* (3 U.S. 386, 388 [1798]) the Court stated that there "are acts which the Federal or State Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican Governments, which will determine and overrule an apparent and flagrant abuse of legislative power… . [For example, a] law that punishes a citizen for innocent action … a law that destroys, or impairs, the lawful private contracts of citizens, … *or a law that takes property from A and gives it to B:* it is against all reason and justice, for people to entrust a Legislature with such powers" (emphasis added).

as carefully patrolled. . . . [T]here is nothing in the Fifth Amendment that stands in the way" (at 33). Paul describes the implications of *Berman v. Parker* as follows:

> In a decision remarkable for its confusion of the central issues, Douglas and his colleagues concluded that the appellants' "innocuous and unoffending" property could be taken for the larger "public purpose" of remediating urban blight. . . . [T]raditionally the limitation on the exercise of the police power, the power of the states to regulate property, has been something called the "public purpose." This broad phrase allows quite a wide range of state regulatory behavior . . . so long as they serve some loosely defined notion of the public purpose. . . . What Douglas accomplished by his confusion of the more permissive criterion of the police power's public purpose with eminent domain in *Berman v. Parker* was the application of the more permissive criterion of the police power's public purpose to eminent domain. Public use as a constraint on governmental seizures suffered a crippling blow as the result of Douglas's confusion.
>
> . . . If the legislature is "well nigh" the final arbiter of "public needs," then what is the purpose of the Bill of Rights or the Constitution? The Court apparently lost sight of the purposes behind the Fifth Amendment's property clauses: to limit congressional seizures of property; to place conditions on those seizures that are necessary for a "public use," and to protect individual property rights. (1988, 94).

Similarly, Epstein suggests that the public-use constraint suffered "a mortal blow in *Berman v. Parker* when [the Court] noted that 'the concept of the public welfare is broad and inclusive' enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress" (1985, 161). The decision essentially implies that whatever the legislature says is a public purpose (which now is the meaning of *public use*) is a public purpose, which "opened a Pandora's Box of state interference with individual property rights" (Jones 2000, 294). If this decision did not completely eliminate the public-use constraint, then subsequent decisions probably have.

---

12. Some state courts continued to employ a stricter public-use interpretation, however—at least for a while. See, for example, *Baycol. v. Downtown Development Authority* (315 So.2d 451 [Fla. 1975]) and *In re City of Seattle* (638 P.2d 549 [1981]).

13. For example, see *People ex rel. City of Urbana v. Paley* (368 N.E. 2d 915 [1977]), from Illinois, recognizing the stimulation of economic growth as a valid public purpose; *Courtesy Sandwich Shop Inc. v. Port of New York Authority* (190 N.E. 2d 402, appeal dismissed, 375 U.S. 78 [1963]), regarding the condemnation of property in order to build the World Trade Center with its public purpose of increasing the flow of commerce; *Sun Co. v. City of Syracuse Indus. Dev. Agency* (209 A.D.2d 34 [N.Y. App. Div. 1995]), approving a condemnation in order to make way for a shopping mall; *NL Indus. v. Eisenman Chem. Co.* (645 P.2d 976 [Nev. 1982]), approving a taking to support an "important" industry for the region; *Prince George's County v. Collington Crossroads Inc.* (339 A.2d 278 [Md. 1975]), where the economic benefits from a particular industrial development project were seen as a sufficient public purpose. See Berliner 2002 for discussion of some of the condemnations that have occurred during the past few years.

Kulick notes that the state courts have closely mirrored the Supreme Court's treatment of the public-use issue (2000, 654),[12] and many of them, now unconstrained by the federal constitution's takings clause, have obviously continued to see new kinds of private transfers as acceptable public uses.[13] One dramatic case occurred when the city of Detroit condemned the entire residential community of Poletown in order to provide land for General Motors Corporation to build a new assembly plant. This condemnation displaced 3,438 residents. The city paid $62 million dollars for the land and another $138 million for other costs, including improvements required by General Motors to establish the facility, for a total of $200 million in taxpayer outlays, and then the city resold the property to General Motors for $8 million. The residents of Poletown sued, arguing that the takings did not constitute a public use. The city countered that massive unemployment would occur if the plant were not built (General Motors had announced the closing of its Detroit Cadillac and Fisher plants, with some six thousand employees, but offered to build a new assembly plant if it could obtain a satisfactory 465-acre site in the city)—hence the alleged public-use justification for the transfer. The Michigan Supreme Court agreed with the city, stating that "the legislature had determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court's role after such a determination is made is limited" (*Poletown Neighborhood Council v. City of Detroit* [304 N.W. 2d 455 (1981)] at 458). Strongly worded dissenting opinions in *Poletown* suggest some of the consequences: Justice Fitzgerald explained that "the decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently 'public' to authorize the use of the power of compulsory purchase means that there is virtually no limit to the use of condemnation to aid private businesses" (at 644); and Justice Ryan recognized that the majority had "seriously jeopardized the security of all private property ownership" (at 465). Yet *Poletown* may involve a more "public" use than some cases.

Jones notes that "in *Hawaii Housing Authority v. Midkiff*, the United States Supreme Court dealt the public use requirement a final mortal wound." (2000, 296–97). Hawaii passed the Land Reform Act, which transferred property from private-land owners to the lessees of that land. Although the Ninth Circuit Court of Appeals (*Hawaii Housing Authority v. Midkiff* [702 F.2d. at 798]) declared the act to be "a naked attempt on the part of the state to take land from A and give it to B solely for B's private use and benefit," the Supreme Court declared the act consti-

14. Since *Midkiff*, the Supreme Court has reconfirmed the same public-use standard (or perhaps *nonstandard* would be more appropriate). See *National R.R. Passenger Corp. v. Boston & Maine Corp.* (503 U.S. 407, 422 [1992]) and *Susette Kelo, et. al., Petitioners v. City of New London, Connecticut, et al.* (545 U.S. 1 [2005]).

tutional (*Hawaii Housing Authority v. Midkiff* [476 U.S. 229 (1984)]). The Court ruled once again that if a legislature has determined that an eminent-domain taking involves "a conceivable public purpose," then the public-use requirement has been met. As Kulick explains, "a legislature, under the Supreme Court's guidance from

---

15. Indeed, not even the supposed freedom-of-religion constraint on government prevents compulsory sale. Cypress, California, condemned land belonging to the Cottonwood Christian Center on May 28, 2002, in order to provide it to Costco for a retail center (Austin 2002). Similarly, in New Cassel, New York, the North Hempstead Community Development Agency seized land owned by St. Luke's Pentecostal Church and to be used to construct a new church (Berliner 2002). The land was condemned in order to provide it to a private retail developer (the condemnation decision was actually made in 1994, before the church purchased the property, but neither the church nor the previous owner had been informed of the decision to transfer the land).

16. Some have suggested that the public-use requirement is now being strengthened, noting, for example, the New Jersey Superior Court's ruling in 1998 that the Casino Redevelopment Authority's condemnation of a residence and its transfer to the Trump Plaza Hotel and Casino was not legal (*Casino Redevelopment Authority v. Banin*, 727 A. 2d 102 [N.J. Sup. Ct Law Div. 1998]), and this decision's citation by some as a more "rational basis for review with a bite" (Kulick 2000, 661); also see Mansnerus 2001 and Starkman 2001 for popular press reports of change. The alleged purpose of the transfer was to build a parking area and lawn ("green space," according to the documents) for the Trump casino, and this, along with the "alleviation of traffic congestion," was sufficient justification for "a conclusion that the primary purpose … is a public one." However, no contractual restriction guaranteed that the land would be used for the stated purpose. The implication of the ruling was that the authority and Trump had to start over and include restrictions in the transferred deed that would prevent Trump from changing the use of the property, at least for a reasonable period of time, after the property had been transferred. I discuss this case in more detail later. A Connecticut state judge struck down the condemnation of eleven homes in New London for a similar reason--the authority that had condemned the property was not sufficiently explicit in stating what it was going to do with the land (Starkman 2002). The U.S. Supreme Court later upheld this condemnation, however in *Kelo v. New London*.

The Mississippi Development Authority's condemnation of thirty acres of residential property for a parking lot to be part of a fourteen-hundred-acre Nissan plant project has been challenged, and the Mississippi Supreme Court issued a stay blocking the condemnation in May 2001 (Starkman 2001). Again, the court did not rule against the alleged public purpose, finding instead that the Development Authority may have taken more land than it needed to in order to meet the public use. This was actually a small part of a large financial deal with Nissan that included more than $300 million in subsidies and tax breaks along with a pledge by the Development Authority to "quick-take" the property in question so Nissan could build a parking lot near the factory, but the executive director of the Development Authority admitted that it did not actually have to seize the land in order to ensure that the factory would be built (Mississippi Churning 2002).

Two recent state court cases also appear to be attempting to reinstate some form of public-use constraint. First, in June 2000, a California court blocked an eminent-domain condemnation that had previously been rescinded by the city of Lancaster, California (the plaintiff pursued the case even after the rescind order, fearing that the city might reverse itself again). This case, discussed by Starkman (2001), involved condemnation of space within a shopping center that was occupied by a "99 Cents Only Store" (one of a 110-store discount chain) in order to transfer it to a major competitor, Costco Wholesale Corporation. Costco was the mall's anchor and had been in place about ten years, whereas 99 Cents Only had moved into the mall in 1998. At that point, Costco told the city it needed to expand and demanded the 99 Cents Only Store's space, threatening to move to a mall in a nearby town if it did not get the space. The city manager informed 99 Cents Only that it would have to move, and in June 2000 its site was condemned. The alleged public purpose was to avoid the "future blight" that would arise if Costco left. The court characterized the condemnation as "nothing more than the desire to achieve the naked transfer from one private party to another" and concluded that "Such conduct amounts to an unconstitutional taking purely for private purposes." Of course, that does not matter under the *Midkiff* standard, and the city has announced that it will appeal, with the city attorney pointing out that "99 Cents produces less that $40,000 [per year] in sales taxes, and Costco was producing more than $400,000. You tell me which was more important." That may well be a sufficient argument for a public purpose upon appeal. Similarly, Starkman (2002) explains that the Illinois Supreme Court just struck down the condemnation by the Southwestern Illinois Development Authority (*Southwestern Illinois Dev. Auth. v. National City Environmental* [Ill. 2002]) of property belonging to a metal-recycling plant in order to "reduce traffic congestion" by converting it into

Midkiff, can legitimately effectuate public-private takings by merely making some legislative pronouncement that the taking will serve some public purpose or goal" (2000, 653).[14] Clearly, no significant constitutional barriers remain to obstruct government condemnation of lands in the United States[15] if the government can take land from landlords simply to transfer it to tenants.[16]

The demise of the public-use constraint is undesirable, as we can see from a number of perspectives, including those of efficiency, liberty, and equity (Epstein 1985, 2001; Paul 1988; Jones 2000; Kulick 2000).[17] My focus here is on economic efficiency. One efficiency implication is that the lack of a public-use constraint increases the chance that the benefits of an involuntary transfer will be less than the costs, implying inefficiency even with the weak Kaldor-Hicks efficiency standard (and clearly from a Pareto perspective), especially if the individuals who lose their property are undercompensated. It might be contended that although the demise of the public-use constraint is problematic, the issue does not apply for privately provided roadways because transportation improvements clearly have significant public benefits, but even if this were the case, the point remains that the existence of a power of eminent domain to transfer property from one private enterprise to another has not been constrained to situations where the transfer clearly is efficient. Thus, in an efficiency perspective, the question of whether eminent domain to transfer property between private entities should be allowed for right-of-way acquisitions must be considered in the broader context: What is the net social benefit or cost of this power? After consideration of the "just compensation" constraint, I attempt to answer this question.

a parking lot for the Gateway International Raceway. The majority ruled that the condemnation's primary purpose was to serve the private interests of the racetrack owners and that "Using the power of government for purely private purposes to allow Gateway to avoid the open real-estate market and expand its facilities in a more cost-efficient manner, thus maximizing corporate profits, is a misuse of the power entrusted by the public" (qtd. in Starkman 2002, 2). There was a lengthy dissent by two justices, however, contending that this was a proper public use, and the Southwestern Illinois Development Authority is seriously considering an appeal to the U.S. Supreme Court. Therefore, it may be a while before this potential reinstatement of a public-use constraint can be counted on (and then it probably will hold only in Illinois), as indicated by *Kelo v. New London*.

17. This conclusion is far from universally accepted. For example, Fischel contends that the broad interpretation of public use is desirable in part because he sees two other constraints on the use of eminent domain: the transactions costs of using it are high, so the "budget-preserving instincts of government agencies may usually be depended upon to limit eminent domain"; and uses of compulsory sale to transfer property for private uses "are also limited by popular revulsion at the government's action" (1995, 74). The Constitution is supposed to protect people's rights even without a "popular revulsion," even when the majority supports some action that harms a minority, so it is supposed to be a stronger constraint than popular beliefs. Moreover, the budget-preserving tendency is not a relevant constraint when powerful political interests are seeking benefits through the political process, especially if the "fair compensation" constraint is also relatively weak (in addition, revenues matter, as indicated in note 16). Finally, some bureaucracies have found ways to enhance their budgets through compulsory purchase. Recall the Southwestern Illinois Development Authority's seizure for Gateway International Raceway (note 16). Gateway used the Development Authority's standard "application form" for seeking a condemnation for "private use" and paid the $2,500 application fee. The authority also charged a percentage commission for the land: $56,500, a sum greater than the Development Authority's appropriated budget (officials from the Development Authority also got free tickets to Gateway events) (Berliner 2002, 3).

The Systematic Undervaluation Bias under Eminent Domain

The Fifth Amendment to the U.S. Constitution requires "just" compensation. The federal courts, however, did not constrain state or local compensation awards in eminent-domain situations at all until the Fourteenth Amendment and its Due Process Clause were adopted. The Supreme Court previously had ruled that the Fifth Amendment's Taking Clause applied only to the federal government (*Baron v. Baltimore* 7 Pet. 243, 247 [U.S. 1833]).[18] The Fourteenth Amendment states, in part: "nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law," which implies that at least some legislative and bureaucratic actions may not meet constitutional standards. Therefore, in *Chicago Burlington and Quincy Railroad Company v. Chicago* (166 U. S. 266 [1897]), the Supreme Court considered a claim that payment of just compensation for a takings was an essential ownership right, implying that any takings without such compensation was a violation of due process. The Supreme Court's mere consideration of this issue might have been important because it implied that state-court decisions regarding compensation under eminent domain could be appealed to the federal level on due-process grounds, suggesting a potential constraint on compensation assessments. However, the potential constraint did not materialize. The Court ruled that its review of state-court rulings on matters of fact was improper (under the Seventh Amendment) and that the Illinois court's conclusion that no significant property had been taken was an issue of fact, not one of law. The city of Chicago had opened a public street on the railroad's land and compensated it with a payment of one dollar, contending that no significant property had been taken because the land's railroad purposes were not impaired; ignoring the railroad's erection of a gateway to make the street-crossing safe, the Court ruled that "such expenses must be regarded as incidental to the exercise of the police powers of the state."

The Supreme Court has considered both federal and state (and local) eminent-domain compensation cases since *Chicago Burlington and Quincy Railroad Company v. Chicago* in 1897, and it has shaped the law regarding just compensation, just as it has the public-use requirement. Note first that the concept of property (what really

---

18. The only other eminent-domain case to reach the U.S. Supreme Court during the first decades of the country's existence was *West River Bridge v. Dix* (6 How. 507 [U.S. 1848]), but that case was based on Article 1, Section 10, of the Constitution, which bars states from impairing the obligation of contracts. This case is interesting in the context of privately provided roads because it involved a privately operated bridge. Vermont had granted an exclusive franchise to operate a bridge for one hundred years. The private firm was willing to operate the bridge, but the state decided to take it over anyway. West River Bridge sued, contending that the franchise charter was a contract, and even though the Supreme Court agreed that the charter was a contract, it ruled that the state's breach and seizure of the bridge did not violate Article 1, Section 10. Instead, the Court stated that the state's eminent-domain powers were "paramount to all private rights vested under the government, and these last are by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise." In other words, contracts, including contracts entered into by a state legislature, can be taken through eminent domain—"a rather odd conclusion," according to Paul, "one among many that served to eviscerate the contract clause, while strengthening the states' power to take all kinds of interests in property" (1988, 78).

constitutes a taking) and the notion of just compensation are intertwined. Although compensation might be generous, if the definition of *property* is very narrow, so that most government actions that affect property uses and values are not considered to be significant takings (as in *Chicago Burlington and Quincy Railroad Company v. Chicago*) or are treated as police-power actions that do not require compensation rather than as eminent-domain takings that do, then compensation will not be paid very often. In this regard, the U.S. Supreme Court's view of property appears to have broadened after 1897. Indeed, the Court has been explicit in some cases, stating, for example, that the meaning of *property* is not interpreted in the "vulgar and untechnical sense of the physical thing with respect to which citizens exercises rights recognized by law. . . . [*Property* refers to] the group of rights inhering in the citizen's relation to the physical thing. . . . The constitutional provision is addressed to every sort of interest the citizen may possess" (*United States v. General Motors* 323 U.S. 373, 377–78 [1945]).[19]

In *Olson v. United States* (292 U.S. 246 [1934]), the Court explained that compensation should put an owner "in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by the state and federal constitutions." Epstein notes that this standard is an appropriate one in an economic perspective because the Pareto criterion is met (1985, 182). If compensation really comes close to making the loser whole, however, then one must wonder why a voluntary exchange did not occur, either between the state and the property owner or between two private parties. One obvious conclusion is that the compensation is actually less than what a willing seller would accept, as Epstein (1985) observes, because in reality courts do not follow this

19. Some relatively recent Supreme Court decisions also appear to broaden the concept of property-rights takings that require at least some compensation (for example, *Lucas v. South Carolina Coastal Council*), but the overall trend in such requirements is far from clear, especially given the decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002). See Greenhouse 2002 and Paul 1988, 82–91.

20. A possibility considered earlier is that transactions costs prevent bargaining, but the answer suggested here is clearly relevant in many cases. After all, "abuses in practice are legion" (Paul 1988, 81). Furthermore, many loses are still considered to be "incidental," as in *Chicago Burlington and Quincy Railroad Company v. Chicago*. In *United States v. General Motors,* the U.S. Supreme Court ruled that the loss of business goodwill or other injury to a business is not recoverable. Other losses that the Court considers to be unrecoverable include future loss of profits and the expenses associated with removing fixtures or personal property from the condemned property (even though expenses for moving are supposedly recoverable). As Paul explains, "the Court reasoning that such losses would be the same as might ensue upon the sale of property to a private buyer … because when business persons sell their buildings … they have presumably factored in these ancillary costs and found the deals satisfactory despite such costs. No such assumption, of course, can be made where the government forcibly takes property … over the owner's objection … and, indeed, the opposite assumption is far more likely" (1988, 165). The Court actually recognized this matter, however, when it stated that "no doubt all those elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent of the sovereigns' seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the government" (*United States v. General Motors,* at 379). In other words, in the past such property takings have not been compensated, so compensation is not required. As a result, loses arising in many condemnations are considered to be incidental owing to the interpretation of *property,* and therefore as not warranting compensation.

standard.[20] Instead, they have chosen to ignore subjective value in most cases. This practice stems from *Monongahela Navigation Co. v. United States* (148 U.S. 312 [1893]), at 325–26), in which the Supreme Court recognized that one of the important reasons for awarding just compensation is that "it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." Yet the Court went on to hedge this statement by stressing that "this just compensation, it will be noticed, is for the property, and not the owner" (at 326). This qualification has been interpreted to mean that the compensation is for the property taken and not for losses to the owner that are a consequence of that taking (Epstein 2001, 12). In other words, the landowner bears any losses that are collateral to or a result of the taking of property. In fact, although the *Monongahela* standard may imply that the person whose property is taken is entitled to be compensated for losses of subjective value, subsequent interpretation has denied such an interpretation. In *United States v. 564.54 Acres of Land* (442 U.S. 506, 511 [1979]), the Court stated that "the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[21] However, as Epstein explains,

> There is a good reason why "for sale" signs do not sprout from every front lawn in the Untied States. In a well ordered society most individuals are content with their personal living or business situation. They do not put their property up for sale because they do not think that there is any other person out there who is likely to value it for a sum greater than they do. In the normal case, use value is greater than exchange value, so the property is kept off the market. The use of the market value standard therefore results in a situation in which the party who owns the property, even if he shares in the social gain generated by the project, is still left worse off than his peers. He is forced to sacrifice the subjective values associated with his property, values which almost by definition he could not recreate through his next best use for the funds received. (2001, 12–13)

After all, owners purchase property because they value it at more than the purchase price, or they hold onto the property because they place more value on it than the market price they could get for it. Thus, even an accurate assessment of market value "does not leave the owner indifferent between sale and condemnation" (Epstein 1985, 183). Indeed, the Supreme Court has explicitly recognized that compensations are lower than the level that would actually restore the landowner. In *Kimball Laundry v. United States* (338 U.S. 1 [1949]), Justice Frankfurter noted that "the value of property springs from subjective needs and attitudes; its value to the owner

21. The opinion quotes an earlier ruling in *United States v. Miller* (317 U.S. 369, 374 [1943]), which stated this market-value rule.

may therefore differ widely from its value to the taker.... In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship." Thus, the laundry owner in *Kimball* could not recover for the dissipation of the "goodwill" he had built up at his location because it was not transferred to the state—it was simply destroyed.

Clearly, "the disregard for non-market values... creates a systematic downward bias in the prices paid in eminent domain proceedings" (Posner 1977, 43). Beyond that, the Supreme Court has frequently stated that the fair-market-value standard is not "absolute." In fact, the courts have developed a number of doctrines that allow compensation substantially below market value, even lower than the owner actually paid for the property, thereby guaranteeing that compensation must be below the value that the owner places on the condemned property (*United State v. Commodities Trading Corp.* 339 U.S. 121 [1950] and *United States v. Fuller* 409 U.S. 488 [1973]), and thus creating incentives for undervaluation by condemning agencies.

Consider Vera Coking's situation. She had lived in her ocean-front home in Atlantic City for almost four decades when, in May 1996, she received notice that the Casino Redevelopment Authority had condemned her property. She had ninety days to move so that the Trump Plaza Hotel and Casino could use her land to build a parking area and put in a lawn. The "fair market value" of her home was appraised to be $251,250. However, she had actually turned down a $1,000,000 offer by another casino operator in 1983, which suggests that the actual market value was much greater than the assessed value but still less than Coking's personal subjective evaluation. This appraisal was quite consistent with other condemnation assessments done in the same community: a pawnshop that the owners had purchased recently for $500,000 (an obvious indicator of actual market value) was assessed at $174,000, and a neighboring restaurant was assessed at $700,000, an amount that would not even cover the legal fees and start-up costs for the restaurant owners to relocate. Of course, the victims of an undercompensated takings can sue in an effort to overturn the condemnation or increase the compensation (and the victims of the Atlantic City condemnations just mentioned have done so), but this resort is clearly a costly and time-consuming process with considerable risks. Thus, government authorities making the condemnations and assessments have strong incentives to undervalue property, and doing so is a common practice (Starkman 2001). In fact, "initial compensation offers by the government often pale in comparison to the market value of the land" (Kulick 2000, 665 n. 159) or to the value that the victim might ultimately receive through litigation. The recent Mississippi case mentioned earlier awarded a landowner $20,000 for his 1.6 acres seized in order to build a subsidized Nissan plant, or more than twice the state's highest offer of $9,200 (Mississippi Churning 2002). Of course, this landowner probably had to pay his lawyer approximately 40 percent of the award, so the actual gain from litigation was small, illustrating the disincentive associating with such litigation and the bargaining power that eminent domain gives to the state.

Not surprisingly, "once . . . subjective values are ignored [by the courts in setting rules for compensation in eminent domain], then institutionally, government behavior will take advantage of the background legal rules. The eminent domain power thus allows the state to push hard so that the landowner will take a price which is . . . lower than he would have taken in any voluntary exchange" (Epstein 2001, 7). Indeed, as a result of the bargaining power that eminent-domain powers and the high cost of litigation give to government agencies, "government officials are becoming increasingly brazen in invoking eminent domain" to transfer land to private for-profit organizations (NCPA 2002, 1), in part because "many owners cave in to the pressure and settle" (Berliner 2002, 1). The prospect (and expected costs) of fighting a threatened eminent-domain taking through the courts in an effort to get more money than a government official has offered can be sufficiently frightening to induce many individuals to accept substantially lower prices than they would otherwise be willing to take. Thus, an underevaluation bias exists even for "voluntary" sales of property to the government, at least for individuals who do not have sufficient political influence to counter such a bargaining-power advantage.

Inefficient Transfers Through Eminent Domain

As the public-use constraint on eminent domain has disappeared, it has become easier for government to use this power to transfer land to other private entities, thus encouraging the use of the process by those with political power to gain wealth transfers—a quest often called "rent seeking" (Kulick 2000, 673–75)— for substantially less than they would have to pay through a voluntary purchase. Recall the *Poletown* case, where the city of Detroit paid $200 million dollars for the condemned property and improvements to it and then resold it to General Motors for $8 million. Or consider the more recent use of compulsory sale to attract a Nissan plant to Mississippi, which included more than $300 million in subsidies and tax breaks along with condemnation of the property in question (Mississippi Churning 2002). This sort of government action creates excess demand for private-benefit condemnations relative to what would be necessary with a strong public-use constraint. Subsidies also give the private recipient of the transfer a competitive advantage over others who have not obtained similar subsidies, creating incentives for everyone who may want to obtain property for a new, expanded, or relocated business to look seriously at the political process of condemnation as an alternative to direct bargaining.

Subsidies are often explicit, as in the *Poletown* example, but even if the recipient of a condemned property repays the full amount that the government pays as compensation, he receives an implicit subsidy if the victims of the condemnation (or con-

22. Individuals who have political connections are not likely to suffer such losses. In the empirical study of compulsory sales in Chicago's urban-renewal program, high-valued parcels (those owned by individuals who probably had political clout) were systematically paid more than estimated market prices (Munch 1976, 473). This problem of discriminatory pricing based on political influence is inevitable given the flexibility of the assessment standards and the ease with which some (but not all) individuals and groups can influence political decisions.

demnation threat) are not fully compensated for their subjective losses. In this regard, the only empirical study of the use of eminent domain found that low-valued parcels (those most likely to belong to individuals with little political influence) systematically received less than estimated market prices through compulsory sale in Chicago's urban-renewal program (Munch 1976, 473).[22] Clearly, such transfers are not efficient in a Pareto sense, and we have no way to know whether they are efficient in a Kaldor-Hicks sense. Indeed, as Epstein notes, the undercompensation bias "has the unfortunate effect of inviting government initiatives that do not even meet the hypothetical compensation [Kaldor-Hicks] requirement" (2001, 6). Moreover, inefficiencies from such transfers go well beyond those implied by undercompensation (Pareto inefficiency) or possible net reduction in "social welfare" (Kaldor-Hicks inefficiency) arising from the specific transfers of resources through compulsory sale. "The inequitable treatment, of course, leads to profound allocative distortions: the lower prices stipulated by government lead to an excessive level of takings, and thereby alters [sic] for the worse the balance between public and private control" (Epstein 2001, 15).

Government Failure: The Costs of Involuntary Transfers

Political wealth transfers reduce wealth—that is, they are inefficient—for at least five reasons. First, involuntary transfers, whether through regulations under the police powers or through condemnation and reallocation of property, as in *Poletown*, generally produce deadweight losses, a net reduction in wealth. For example, when explicit subsidies such as those in Detroit *(Poletown)* or implicit subsidies attributable to undervaluation are given, they "[encourage] economic markets to operate in an economically inefficient state by lowering the cost for firms to purchase property for corporate activities" (Kulick 2000, 662). Standard neoclassical production theory implies that a subsidy to a producer in obtaining a particular input, such as land, leads to inefficient overuse of the subsidized input relative to other inputs (in the Mississippi-Nissan arrangement mentioned earlier, the Mississippi Supreme Court remarked that the state may have taken more land than it needed to carry out the alleged public use). These inefficient methods of production mean that less is produced, given the true opportunity cost of production, than could be produced for the same expenditures if the prices paid for resources reflected full opportunity costs: society suffers a "deadweight loss" because resources are allocated inefficiently.

Second, as Tullock (1967) explains it, the resources consumed in the process of seeking such transfers also have opportunity costs. He emphasizes the striking analogy between monopoly achieved through regulation or tariffs and transfers achieved through legislation and ordinary theft. Thieves use resources, especially their time, in order to steal, and potential victims employ resources (to produce locks, alarms, private security, and public police) in an effort to deter or prevent theft. Tullock points out that precisely the same analysis applies to the political transfer process, or what has come to be known as "rent seeking" (Krueger 1974). Some individuals and

groups expend resources (time spent in organizing interest groups, money spent for lobbyists, political campaign contributions to support the election of persons with discretionary power to create transfers) in an effort to gain wealth in the form of subsidies or artificial rents created by government actions (for example, monopoly franchises, licenses, quotas, tariffs), and others expend resources in an effort to ward off such transfers. These loss-avoidance costs, arising through litigation as well as investments in political information and influence by potential losers in the political transfer process, can be considered a third source of costs arising in the involuntary transfer. Because resources used in both rent seeking and loss avoidance have opportunity costs—they can be used to produce new wealth rather than to transfer existing wealth—they are "wasted" (Tullock 1967; Krueger 1974). Yet individuals and groups have incentives to invest time and resources in an effort to gain wealth through the political process if they expect positive private net gains. Use of condemnation powers to provide subsidized transfers of property from one private entity to another is part of this rent-seeking process.

Exit is another option for potential victims, perhaps by moving to an alternative political jurisdiction or by hiding economic activity and wealth (for example, moving transactions into black markets). Although immobile resources such as land cannot be hidden in a gross sense, many attributes of land can be hidden (or destroyed) in order to make it less attractive for taking. Thus, rapid development or exploitation of land might be attractive if an undercompensated transfer (or regulatory taking) is anticipated, perhaps because such development eliminates, or at least raises the cost of achieving, alternative and potentially more valuable future uses that make the land attractive for seizure. The incentive is to capture whatever benefits from the property can be extracted relatively quickly before the property it is taken away or before police powers are exercised through zoning or some other regulatory process that attenuates use rights. A landholder might develop (create a residential or commercial development) or exploit the property (sow plant crops that consume the soil's nutrients, harvest all its trees, or extract minerals) much more quickly than he otherwise would, even though greater benefits potentially exist from later development or exploitation. In order to reduce such "exit" actions and induce compliance with discriminatory transfer rules, other rules are likely to be developed, and the rule makers will generally have to rely on courts and bureaucracies to implement and enforce those rules. Governments across the United States have created or are creating development authorities, zoning commissions, growth-management commissions, environmental authorities, and other agencies in order to implement controls on land use. Lawyers representing landowners, developers, and government authorities are involved in mil-

23. Rules that facilitate voluntary production and exchange (private-property rights, enforceable contracts) also require some enforcement costs, of course, but the level of these costs (litigation costs, assessment costs, policing costs that arise when individuals attempt to hide their wealth) increases dramatically when laws are also imposed in order to generate involuntary wealth transfers.

lions of hours of negotiation and litigation, and experts (assessors, scientists, engineers), landowners, and many other parties devote many more hours to dealing with control and compliance issues. These implementation, enforcement, and compliance costs are a fourth reason why the involuntary wealth-transfer process is inefficient.[23]

The fifth source of inefficiency may be the most significant. Use of the takings power (including police powers and the power of eminent domain) undermines the security of private-property rights (Kulick 2000, 663), and insecure private-property rights result in "tragedies" like those that arise in a common pool: rapid use and undermaintenance of resources relative to the efficient level of conservation.[24] The more frequent and arbitrary transfers are expected to be, the more significant these costs become. The trends in the use or threatened use of eminent domain discussed earlier suggest that this power is being used increasingly frequently and arbitrarily in the United States. Although by themselves perhaps these actions may not have a tremendous impact on the security of property rights, in the context of overall trends

24. When a number of people have free access to a resource (a pasture to graze their cattle, a fishery, an urban highway), each individual has an incentive to use up as much of the resource as possible before other users do the same. Therefore, the commons becomes crowded (with cattle or fishermen or cars), and the resource (grassland, fish stock, highway) deteriorates in quality as the result of overuse (overgrazing, overfishing, traffic congestion). Each user has an incentive to use up the resource because he is not fully liable for the cost of doing so. Part of the cost is born by others. None of the users has an incentive to reduce his use (the size of his herd, his fishing catch, his highway trips) or to consider other means of maintaining the resource (for example, by supplementing the grass with feed grown on one's private property, by privately farming fish, or by car pooling). So all of those with access try to use up the resource before someone else does, and the commons deteriorates and is perhaps even destroyed. Contrast this process with the outcome under private property (a private pasture, a fish farm, a private road). If an individual owner overuses his resource, he bears the full costs of that action. His resource deteriorates in quality and loses its long-run productive value. Therefore, the private owner has an incentive to conserve his property so that it can be used to generate income or other benefits over a long period. Crowding is not the only consequence of free access, however. When a resource is overused, it deteriorates rapidly in quality and is used up inefficiently, so the quality of the output (fatter, healthier cattle, the size of fish, travel time and convenience) diminishes rapidly over time. This outcome could be offset with appropriate investments in maintenance or improvement (the grass might be fertilized or replanted, a fishery might be restocked, or people might car pool), but the individuals with common access to the resource have no incentive to invest in maintenance because they cannot exclude others from benefiting from such an investment (other people's cattle will consume part of the new grass, other fishermen will catch part of the new fish, and other drivers will add trips on the highway). Two characteristics of common-pool resources prevent a Pareto solution. First, because users do not pay for the use of the resource, they tend to overuse it. The costs of this overuse are external to the individual decision makers because such costs are shared with (imposed on) others. Second, because others cannot be excluded from benefits of investing in maintenance or improvements that would increase the productivity of the resource, these benefits are external to the decision maker, and there is an underinvestment in such activities. In essence, the investment in the maintenance of public, common-access property generates external benefits. This process has been called the "tragedy of the commons," a concept originally attributed to biologist Garrett Hardin (1968). The classic treatment of the subject in economics is by Gordon (1954), but substantial research supports the hypothesis (see Libecap 1984; Johnson and Libecap 1982). Also see Benson 1996 for a discussion of the consequences of changes in law that reduce the security of property rights and produce results analogous to those in a commons.

25. When property rights are relatively insecure, bargaining is also less likely (Coase 1960). When the insecurity arises because of government's power to take, however, there is an additional reason for expecting bargaining to decline. People who can operate effectively in the political arena essentially have potential claims on other people's property. Seeking control of the desired land through political channels is costly, of course, but if it is expected to be less costly than direct bargaining and voluntary exchange, the incentive to seek involuntary transfers is strong. Thus, individuals who are active in and familiar with the political process are likely to choose that arena because the marginal cost of seeking condemnation is very low once someone has invested in building political connections and influence, whereas individuals who

in government takings (including takings through regulatory actions under the police powers), property rights to land in the United States are becoming less secure. In much of the rest of the world, where the use of government powers is substantially more arbitrary and less likely to produce net benefits for citizens and where under-compensation is even more likely, property rights appear to be even more insecure.[25]

Government taking powers clearly have substantial costs. Indeed, as Epstein concludes, "The consequences are quite sobering. Whatever the theoretical promise of taking property only with compensation, that gain has been nullified in large measure [if not entirely] by the troubling circumstances of its application" (2001, 18). Therefore, we should question any justification for such powers that fails to recognize their potential government-failure consequences.

Conclusions

Epstein contends that "the government *must* establish the legitimacy of its taking in order to legitimate its subsequent transfers of the property taken. Otherwise it is little better than the thief who attempts to convey good title to a third person" (1993, 4, emphasis added). Criticism of uses of the eminent-domain power is widespread and growing, which suggests that in practice, at least, the legitimacy of this power is not being established.[26] Nonetheless, even many of the strongest critics of eminent-domain practices do not conclude that this power should be withdrawn from the government. Jones writes that "the power of eminent domain is a fundamental and necessary attribute of government" (2000, 286), and Epstein contends that "the formation and operation of the state, moreover, requires transferring resources from private to public use. Yet the power in the state to take for public use arises because the state will not obtain the resources needed to cooperate by voluntary donation or exchange. . . . [T]hese exchanges do not occur voluntarily and must therefore be coerced" (1985, 4). By accepting the theoretical arguments that (1) the government must be the provider of certain goods and services, such as roads, and that (2) difficulties, such as the holdout problem, will prevent the government from obtaining the resources, including right-of-way properties, required to produce those goods and services, critics can only propose that somehow we must constrain the government more tightly in its use of eminent-domain powers. In 1985, Epstein contended, "It becomes critical to regulate the terms on which the [involuntary] exchanges take

---

are not politically connected are relatively likely to choose direct bargaining. Furthermore, as the level of state transfer activity increases, more people will be forced to learn about the political process, so over time political takings will tend to replace voluntary exchange. In contrast, increasing the constraints on the state and reducing the ease of obtaining forced transfers would lead to the substitution of voluntary exchange for political actions. Indeed, the fact that compulsory sale may appear to be necessary to obtain property rights under the existing property regime does not mean that it will be necessary with very secure allodial rights.

26. The Institute for Justice has developed the Castle Coalition as a nationwide network of property owners and community activists dedicated to the prevention of the use of eminent-domain power in the United States for effecting transfers to private parties for private uses. See http://www.castecoalition.org.

place" (4); and sixteen years later he was still arguing that although he was "sufficiently skeptical about the practical success of the constitutional program of forced exchanges to favor a sharp curtailment of the eminent domain process even when full compensations is paid," because he recognized that "public virtue is a scarce commodity," he favored "a higher level of judicial scrutiny of legislative action to improve the odds of securing limited government by constitutional means" (2001, 6 and 33). Similarly, Paul (1988, 266), Jones (2000, 305–14), and Kulick (2000, 679–91) propose much stricter public-use interpretations by courts rather than stronger constitutional constraints that eliminate the government's power to force involuntary transfers of property. Posner is much more circumspect, however, explaining that although it is easy to identify ways in which the eminent-domain process clearly could be improved, even if such reforms are adopted

> the system would be a poor approximation to market transactions . . . and, as a practical matter, they are perhaps no more likely to be adopted than eminent domain is likely to be limited to *the only case in which it is conceivably warranted* on economic grounds: where the need to assemble contiguous parcels creates a *holdout problem*. Even in that case, the argument for eminent domain is *hardly conclusive*. Shopping-center developers—among many other parcel assemblers who do not enjoy eminent domain powers—manage to overcome holdout problems by devices such as option contracts and dummy purchasers. Experiences with these market alternatives to eminent domain must be studied carefully before compulsory purchase can be adjudged the superior alternative. (1977, 44, emphasis added)

In light of this suggestion, I have examined in this article "the only case in which [compulsory purchase] is conceivably warranted [but] . . . hardly conclusive." I conclude that members of the private sector are willing and able to provide roads if they are allowed to do so, especially if they are allowed to earn a profit. Because the private sector can overcome the holdout problem more effectively than the government can, private provision of roads is likely to be accomplished relatively efficiently with no eminent-domain powers whatsoever. Finally, I have considered government failure associated with government takings, including eminent domain, in the United States. Despite what may be the most effectively constrained constitutional govern-

27. Economics is not the only relevant consideration in regard to appropriate institutions. Some natural-law theorists have considered the issue (Stoebuck 1977, 12–13; Paul 1988, 74–77), but not convincingly. As Paul suggests, "None of these arguments for the putative right of the state to take property—whether it be (1) the inherent attribute of sovereignty claim, or (2) the 'public good' contention, or (3) the attempt to extract an implied consent to takings from the initial agreement to join civil society—flow inexorably from the natural law position. Indeed, the power of eminent domain seems to fit better with a feudal conception of property… . In a Lockean [or natural law] theory of property rights, in which property flows not from the state but from individual labor, and the state is nothing more than a device for the protection of preexisting, individual property, the power of eminent domain is not self-evident" (1988, 77).

ment in the world, the constraints on takings have been gradually undermined so that today the costs of government failure are rising continuously. Therefore, even if some roads were to be relatively expensive or not built at all owing to holdout problems, the consequences of private provision would probably be much less damaging than the present government failure. Granting government the power of eminent domain does not appear to be the "superior alternative" from an economic perspective.[27] Some readers may counter that even if the arguments made here are valid, they are incomplete because provision of roads is not the only purpose of such powers. Other vital government purchases in national defense, environmental and historical preservation, and public health may not be accomplished without such powers. Although this claim may be true, Posner suggests that merely making it is not enough: "market alternatives to compulsory purchase must be studied carefully before compulsory purchase can be adjudged the superior alternative." Admittedly, I have not taken this step here, but my present objectives are much more modest: to demonstrate that the holdout problem does not provide a justification for public road provision or even for eminent-domain power in order to obtain right-of-way properties for privately provided roads. In making this more modest point, however, I have raised serious questions about the presumed legitimacy of eminent-domain powers in general.

Despite Epstein's contention that legitimization "must" be provided for eminent domain (1993, 4), challenges to the legitimacy of eminent domain collide with the reality that governments need respond satisfactorily only to those with political power. If the "third persons" who must be convinced of the justification of takings and transfers are those with sufficient influence to receive the transfers, then the declaration that the government is no better "than the thief who attempts to convey good title to a third person," though true, is of little consequence.

References

Austin, P. 2002. Cypress Invokes Eminent Domain to Seize Church Land. *Orange County Register*. May 29. Available at: OCRegister.com.

Barnes, D. B., and L. A. Stout. 1992. *Cases and Materials on Law and Economics*. St. Paul, Minn.: West.

Beito, D. T. 2002. The Private Places of St. Louis: Urban Infrastructure Through Private Planning. In *The Voluntary City: Choice, Community, and Civil Society*, edited by D. T. Beito, P. Gordon, and A. Tabarrok, 47–75. Ann Arbor: University of Michigan Press for the Independent Institute.

Benson, B. L. 1994. Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England. *Economic Inquiry* 32, no. 2: 249–71.

———. 1996. Uncertainty, the Race for Property Rights, and Rent Dissipation due to Judicial Changes in Product Liability Tort Law. *Cultural Dynamics* 8: 333–51.

———. 2001. Knowledge, Trust, and Recourse: Imperfect Substitutes as Sources of Assurance in Emerging Economies. *Economic Affairs* 21, no. 1: 12–17.

———. 2002. Eminent Domain Powers Are Not Necessary for the Provision of Roads. Florida State University Working Paper, presented at the Association of Private Enterprise Education Meetings, Cancun, Mexico, April 8.

Berliner, D. 2002. *Government Theft: The Top 10 Abuses of Eminent Domain, 1998–2002.* Report from the Castle Coalition: Citizens Fighting Eminent Domain Abuse (March). Available at: http://www.CastleCoalition.org.

Calabresi, G., and A. D. Melamed. 1972. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review* 85: 1089–128.

Coase, R. H. 1960. The Problem of Social Cost. *Journal of Law and Economics* 3: 1–44.

De Vries, S., and R. Vohra. V. 2001. *Combination Auctions: A Survey.* Zentrum Mathematik Working Paper, October. Munich: Zentrum Mathematik.

Engel, E., R. Fischer, and A. Galetovic. 2002. *Highway Franchising and Real Estate Values.* National Bureau of Economic Research (NBER) Working Paper no. 8803, February. Cambridge, Mass.: NBER.

Epstein, R. A. 1985. *Takings: Private Property and the Power of Eminent Domain.* Cambridge, Mass.: Harvard University Press.

———. 1993. *Bargaining with the State.* Princeton, N.J.: Princeton University Press.

———. 2001. *In and Out of Public Solution: The Hidden Perils of Property Transfer.* John M. Olin Law and Economics Working Paper no. 129. Chicago: Law School, University of Chicago.

Fischel, W. A. 1995. *Regulatory Takings: Law, Economics, and Politics.* Cambridge, Mass.: Harvard University Press.

Foldvary, F. 1994. *Public Goods and Private Communities: The Market Provision of Social Services.* Aldershot, U.K.: Edward Elgar.

Goldstein, A. 1987. Private Enterprise and Highways. In *Private Sector Involvement and Toll Road Financing in Provision of Highways.* Transportation Research Record no. 1107. Washington, D.C.: Transportation Research Board.

Gordon, H. S. 1954. The Economic Theory of a Common Property Resource: The Fishery. *Journal of Political Economy* 62: 124–42.

Greenhouse, L. 2002. Justices Weaken Movement Backing Property Rights. *New York Times,* April 24. Available at: http://www.nytimes.com.

Hardin, G. 1968. The Tragedy of the Commons. *Science* 162: 1243–248.

Johnson, R. N., and G. D. Libecap. 1982. Contracting Problems and Regulation: The Case of the Fishery. *American Economic Review* 72: 1005–22.

Jones, S. J. 2000. Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment. *Syracuse Law Review* 50: 285–314.

Klein, D. B. 1990. The Voluntary Provision of Public Goods? The Turnpike Companies of Early America. *Economic Inquiry* 28: 788–812.

Kraus, M. I. 2000. Property Rules vs. Liability Rules. In *Encyclopedia of Law and Economics,* edited by B. Bouckaert and G. De Geest, 3: 782–94. Cheltenham, U.K.: Edward Elgar.

Krier, J. E., and S. J. Schwab. 1995. Property Rules and Liability Rules: The Cathedral in Another Light. *New York University Law Review* 70: 440–83.

Krueger, A. O. 1974. The Political Economy of a Rent-Seeking Society. *American Economic Review* 64: 291–303.

Kulick, P. J. 2000. Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking": A Proposal to Redefine "Public Use." *Law Review of Michigan State University–Detroit College of Law* 3: 639–91.

Landsburg, S. E. 1993. *The Armchair Economist: Economics and Everyday Life*. New York: Free Press.

Lazzarotti, J. J. 1999. Public Use or Public Abuse. *University of Missouri at Kansas City Law Review* 68: 49–75.

Libecap, G. D. 1984. The Political Allocation of Mineral Rights: A Reevaluation of Teapot Dome. *Journal of Economic History* 44: 381–91.

Mansnerus, L. 2001. Refusing to Let Go, Property Owners Test Eminent Domain's Limits. *New York Times,* July 25. Available at: www.nytimes.com.

Miceli, T. J., and K. Segerson. 2000. In *Encyclopedia of Law and Economics,* edited by B. Bouckaert and G. De Geest, 3: 328–57. Chelthenham, U.K.: Edward Elgar.

Mississippi Churning [editorial]. 2002. *Wall Street Journal*, January 4.

Munch, P. 1976. An Economic Analysis of Eminent Domain. *Journal of Political Economy* 84: 473–97.

National Center for Policy Analysis (NCPA). 2002. State and Local Issues: Eminent Domain Used for Economic Development. In *National Center for Policy Analysis: Idea House* (March 5). Available at: http://www.ncpa.org/pd/state/pd12298b.html.

Newman, O. 1980. *Community of Interest*. Garden City, N.Y.: Anchor Press.

Paul, E. F. 1988. *Property Rights and Eminent Domain*. New Brunswick, N.J.: Transaction.

Pereyra, A. 2002. *Auction Theory and Road Franchising*. Departamento de Economia, Universidad de la Republica de Uruguay Working Paper, February. Montevideo: Departamento de Economia, Universidad de la Republica de Uruguay.

Polinsky, M. A. 1980. Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies. *Stanford Law Review* 32: 1075–112.

Posner, R. A. 1977. *Economic Analysis of Law.* 2d ed. Boston: Little, Brown.

Roth, G. 1996. *Roads in a Market Economy.* Aldershot, U.K.: Avebury Technical.

———, ed. Forthcoming. *Street Smart: Competition, Entrepreneurship, and the Future of Roads.* Oakland, Calif.: Independent Institute.

Shearing, C. D., and P. C. Stenning. 1987. Say Cheese! The Disney Order That Is Not so Mickey Mouse. In *Private Policing,* edited by C. D. Shearing and P. C. Stenning, 317–24. Newbury Park, Calif.: Sage.

Starkie, D. N. M. 1990. *The Private Financing of Road Infrastructure.* Transportation and Society Discussion Paper no. 11. Cambridge, U.K.: Oxford University Press.

Starkman, D. 2001. In the Clash of Eminent Domain and Private Property, Courts Are Sending Cities a Message: Enough. *Wall Street Journal,* July 23. Available at: http://www.wsj.com-From the Archives.

———. 2002. Most Important Case in Years to Curb Local Government Use of Eminent Domain Powers. *Wall Street Journal,* April 5. Available at: http://www.wsj.com-Law.

Stoebuck, W. B. 1977. *Nontrespassory Takings in Eminent Domain*. Charlottesville, Va..: Michie.

Tullock, G. 1967. The Welfare Costs of Tariffs, Monopolies, and Theft. *Western Economic Journal* 5: 224–32.

Winston, C. 2000. *Government Failure in Urban Transportation*. AEI-Brookings Joint Center for Regulatory Studies Working Paper no. 00-8. Washington, D.C.: American Enterprise Institute and Brookings Institute.

Acknowledgments: This article is drawn from a chapter prepared for the Independent Institute for inclusion in the forthcoming volume *Street Smart: Competition, Entrepreneurship and the Future of Roads,* edited by Gabriel Roth. I thank Alexander Tabarrok and Gabriel Roth for their helpful comments and suggestions on an earlier draft.