TAKING STOCK: EXPLORING ALTERNATIVE COMPENSATION IN EMINENT DOMAIN

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INTRODUCTION

In 1961, Vera Coking bought a white, three-story house in Atlantic City, in which she and her husband raised three children.[1] In the early eighties, Bob Guccione, the founder of *Penthouse* magazine, offered Coking one million dollars so that he could build a casino on her property; Coking refused.[2] Guccione built property up to Coking's border, but his casino eventually failed and was purchased by Donald Trump.[3] Donald Trump, like Guccione before him, sought to develop Coking's adjacent land.[4] Trump purportedly offered Coking at least $1.9 million, but Coking still refused.[5] According to a family member, Coking "just never wanted to move."[6] While tearing down Guccione's casino, Trump's demolition crews set fire to Coking's roof and smashed up much of her third floor, according to Coking's attorneys.[7] The city's Casino Reinvestment Development Authority also drew Coking into a three-year legal battle over whether the city could use eminent domain to transfer her home to Trump's real estate empire.[8] Coking prevailed and continued to live in her Atlantic City home until 2010.[9] The home was eventually sold on the open market for $530,000, plus a 10% commission.[10]

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1. Manuel Roig-Franzia, *The Time Donald Trump's Empire Took on a Stubborn Widow—and Lost*, WASH. POST (Sep. 9, 2015), https://www.washingtonpost.com/lifestyle/style/the-time-donald-trumps-empire-took-on-a-stubborn-widow--and-lost/2015/09/09/f9cb287e-5660-11e5-b8c9-944725fcd3b9_story.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. Matt A.V. Chaban, *A Homeowner's Refusal to Cash Out in a Gambling Town Proves Costly*, N.Y. TIMES (July 21, 2014), https://www.nytimes.com/2014/07/22/nyregion/a-homeowner-who-refused-to-cash-out-in-a-gambling-town-may-have-missed-her-chance.html?_r=0. Trump claims to have offered Coking $4 million and a room for life at any of his properties, but Coking's grandson only recalls the $1.9 million offer. *Id.*

6. *Id.* Other initial holdouts, including owners of an Italian restaurant and the owners of a pawnshop, eventually caved and sold their properties for $2.1 million and $1.6 million, respectively. The small businesses were replaced with taxi stands for Trump's casino. *Id.*

7. Roig-Franzia, *supra* note 1.

8. Chaban, *supra* note 5.

9. *Id.* In 2010, Coking moved to a retirement home in San Francisco, where her grandson lived. *Id.*

10. Michael Miller, *Vera Coking's A.C. Home Sells for $530,000 Plus Commission*, PRESS ATLANTIC CITY (July 31, 2014), http://www.pressofatlanticcity.com/business/vera-coking-s-a-c-home-sells-for-plus-commission/article_b158b06a-18e6-11e4-a333-0019bb2963f4.html. Although the final sale price was much

Compensating property owners who, like Coking, have deep sentimental attachments to their home poses a difficult problem for lawyers and economists. The problem, as it relates to eminent domain, will likely become even more relevant during the Trump administration, if Trump's campaign messages are to be believed.[11] During his presidential campaign, Trump readily defended his use of eminent domain, calling it an "absolute necessity."[12] The dispute between the billionaire mogul Trump and the elderly widow Coking highlights the often uneven bargaining power between condemnors and condemnees. The dispute also highlights the high subjective premiums often attached to homes—premiums which sometimes verge on "very foolish."[13] Coking's refusal to sell raises the question: how do we balance individual homeowners' autonomy and subjective value against potential collective economic benefit?

Many legal scholars have argued that opposition to eminent domain stems from undercompensation problems, particularly failure to compensate subjective value. Recently, there has been significant public opposition to pipeline projects in the Midwest, such as the Dakota Access Pipeline ("DAPL," also known as the Bakken Pipeline) and the Utopia Pipeline. This Note will draw on both legal and economic literature to examine whether undercompensation explains opposition to pipeline projects and, if so, how property owners might be compensated to encourage more efficient takings.[14] In doing so, this note will look at three case studies: DAPL, Mariner East 2, and Utopia.

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lower than the offers Coking received, the value of the property in 2014 was likely depressed by the closing of the Trump Hotel and Casino. *Id.*

11. *See, e.g.*, Jennifer Yachnin, *Campaign 2016: 'Eminent Domain Is an Absolute Necessity' – Trump*, E&E NEWS (Feb. 8, 2016), https://www.eenews.net/stories/1060031937/ ("Eminent domain is an absolute necessity for a country, for our country. Without it, you wouldn't have roads, you wouldn't have hospitals, you wouldn't have anything. . . . You need eminent domain.").

12. *Id.*

13. Chaban, *supra* note 5. Trump referred to Coking's refusal to sell at a premium several times the value of the house as "frankly very foolish." Trump was not alone in this sentiment. Vincent Sabatini, a restaurant owner who originally held out with Coking but later sold his restaurant for $2.1 million, believes that "[Coking] got greedy and made a mistake, a big mistake . . . Trump was tough, but it was just business." *Id.*

14. Economists have identified various types of efficiencies. For the purpose of this Note, I describe efficiency as Kaldor Hicks efficiency, or when the net benefit to all actors is greater than the net loss to all actors. This is in contrast to Pareto efficiency, for example, when any gain realized by one party does not create a loss for any other party.

As a potential solution to undercompensation, this Note proposes offering condemnees an equity stake in the public use project. Because cash compensation is unable to compensate for subjective losses and because in-kind compensation is unavailable due to the nature of pipeline takings, some other type of compensation is needed. Allowing communities some kind of equity sharing with pipeline companies allows owners to monitor and exert some control over pipeline operations, while also preventing individual property owners from exercising holdout power over the entire project.

Part I of this Note will outline different compensatory mechanisms and the issues involved, primarily how most forms of compensation fail to account for property owners' subjective value.[15] Part II will describe the proposed use of eminent domain in Iowa, Pennsylvania, and Ohio for DAPL, Mariner East 2, and Utopia respectively. Part III will propose equity-based compensation as a way of resolving the holdout problems inherent in eminent domain, while still reflecting lost subjective value.

I. EMINENT DOMAIN AND THE JUST COMPENSATION PUZZLE

Part I will discuss the surrounding literature on the just compensation puzzle in eminent domain. First, this Part will highlight the positive uses of eminent domain that any reform should seek to preserve. This includes primarily the use of eminent domain to resolve inefficiencies, such as strategic holdouts. Second, it will provide a background on public use, which has been the primary check on eminent domain abuse, and why public use is an insufficient constraint on eminent domain. Third, Part I will explain why the current practice of awarding "fair market value" ("FMV") often undercompensates property owners, especially homeowners. This Subsection will also discuss how undercompensation may encourage inefficient takings. Finally, Part I of this Note will discuss some of the alternative solutions to undercompensation and address their flaws.

A. Why We Need Eminent Domain

At its most basic, eminent domain is "the power of the sovereign to take property for 'public use' without the owner's

15. This subjective value is comparable to what economists would call "surplus value," or the difference between an economic actor's price and the market price.

consent."[16] In this way, eminent domain is a way of compelling a transfer of property that would not otherwise occur in an open market, even if the transaction creates value.[17]

Eminent domain is widely seen as a legitimate means of resolving strategic holdouts.[18] Suppose, for example, that a real estate developer requires a one-acre plot of land to expand a casino by adding a new parking garage.[19] The market value of the one-acre plot is $10, whereas the marginal value to the casino is $200. Because the value to the casino is so great and because there are no appropriate substitute goods (a parking lot located on the other side of town, for example, would be of no value), the owner of the one-acre plot has a strong incentive to hold out for more than the market value and will try to charge the casino owner up to $200. The landowner will reject a $10 offer, even though that is the fair value of his or her land. The potential for holdouts is especially significant where condemnors require specific plots of land to complete their project because the lack of competition puts property owners in a more competitive bargaining position. Columbia Law School professor Thomas Merrill refers to these as "thin" markets, in contrast to "thick" markets where condemnors could plausibly acquire land on the open market.[20] Eminent domain allows

16. 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.11 (3rd ed. 2017) [hereinafter NICHOLS] ("All else that may be found in the numerous definitions which have received judicial recognition is merely by way of limitation or qualification of the power.").

17. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–07 (1972) (describing eminent domain as a type of "liability rule," where an objective value standard is used in cases where subjective negotiations would prohibit a transfer from occurring. Calabresi and Melamed explain that subjective negotiations will be problematic where parties have incentives to hide their true valuations).

18. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986) (arguing that eminent domain's purpose is to "overcome barriers to voluntary exchange created when a seller of resources is in a position to extract economic rents from a buyer"); *see also* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 107 (2006) ("Indeed, the need to avoid holdouts strategically seeking unjust gains from trade is frequently cited as a significant justification for the use of eminent domain to assemble land for large projects, both public and private.").

19. Numbers aside, these facts are similar to those in the eminent domain dispute between Donald Trump and Vera Coking discussed in the introduction.

20. Merrill, *supra* note 18, at 97. Thin markets include step goods or other markets with assembly problems. These markets are thin because there are few adequate substitute goods. For example, with a railway, there is a significant difference in value between a parcel of land in the railway's path and a parcel of land perpendicular to the railway. Substitute goods are unlikely where, as in the

condemnors to resolve holdouts by essentially forcing a sale at the fair market price ($10).

While eliminating the threat of strategic holdouts is seen as a legitimate objective of eminent domain, it is often unclear when an owner is a holdout or a "holdin."[21] Professors Gideon Parchomovsky and Peter Siegelman use the term "holdin" to refer to owners whose subjective value legitimately exceeds FMV, so that their refusal to sell is based on non-strategic reasons.[22] To use the above example, even though the value of the one-acre plot might be $10, the landowner might have resided there for decades or have family ties to that land and therefore values the one-acre plot at $300. In such an example, using eminent domain would actually constitute an inefficient taking, because the loss felt by the landowner ($290, or the $300 loss minus the $10 fair market payment) is greater than the benefit realized by the casino developer ($190). Parchomovsky and Siegelman recognize that holdouts and holdins often appear together and thus may be difficult to distinguish from each other because the same thin markets that give holdouts strength (where condemnors cannot purchase substitute land), often give rise to holdins in the first place (where unique land features have greater subjective value).[23]

While a variety of circumstances can give rise to thin markets, assembly is a particularly common thin market in eminent domain cases.[24] Professor Lee Anne Fennell identifies two different types of

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railway, the project requires specific parcels of land. Indeed, Merrill finds that assemblage is the biggest driver of a market's thinness.

21. Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 83 (2004).

22. *Id.* Parchomovsky and Siegelman are careful to note that the strategic nature of holdouts makes them very different from genuine holdins. However, they state that "[w]hether the law should treat holdouts and holdins in the same way is a difficult question left for another occasion" and instead focus on explaining the outcome of a proposed power plant expansion that was eventually negotiated by the homeowners. *Id.* at 128–29.

23. *Id.* at 130. It is also important to note that holdouts and holdins, while different in many ways, are not mutually exclusive. A property owner may refuse to sell for both strategic and nonstrategic reasons.

24. Merrill, *supra* note 18, at 97–98. Merrill surveyed 308 cases of contested uses of eminent domain and found that assembly created market thinness in 185 of those cases. Merrill hypothesizes that assembly may be even more common. In his study, Merrill only examines contested public use cases. However, many takings requiring assembly, such as highways, pipelines, or railroads, are unlikely to be contested because they are classic examples of public use.

assembly: step goods and non-step goods.[25] Step goods include linear projects like railroads or pipelines, where each parcel of land acquired is necessary for the entire project to have any value. Each parcel is a "step" required to complete the project. Non-step goods include projects like office parks or shopping malls, where individual parcels can be moved, added, or removed as plans for the project are modified. Because each parcel is necessary for step goods, step goods lead to thinner markets, with a greater potential for both holdouts and holdins.[26]

B. "Public Use" as an Insufficient Check Against Inefficient Takings

When exercising its eminent domain power, a condemnor must meet two constitutional tests: (1) the taking must be for "public use"; and (2) the condemnor must provide "just compensation" to the owner.[27] In *Kelo v. City of New London*, the Supreme Court upheld an expansive interpretation of the public use requirement, which permitted transfers to private owners if the transfer could lead to economic development or revitalize blighted neighborhoods.[28] *Kelo* led to strong public backlash against an interpretation of "public use" that allowed for private-to-private transfers.[29] In response, forty-seven states "increased protection[s] against takings for private use."[30] Some

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25. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 973 (2004).

26. *See* Merrill, *supra* note 18, at 89 (discussing market "thinness").

27. U.S. CONST. amend. V. Many states have also adopted their own restrictions on both the public use and just compensation tests. *See infra* note 30 (describing various state-imposed restrictions).

28. Kelo v. City of New London, 545 U.S. 469, 469 (2005). The Court in *Kelo* based its holding primarily on two previous Supreme Court decisions. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (upholding the government's condemnation of land to break up a land oligarchy and revitalize the local real estate market); *see also* Berman v. Parker, 348 U.S. 26 (1954) (upholding the District of Columbia's condemnation of blighted neighborhoods in Southwest D.C.).

29. *See* ILYA SOMIN, THE GRASPING HAND: "KELO V. CITY OF NEW LONDON" AND THE LIMITS OF EMINENT DOMAIN 3 (2015) ("The aftermath of *Kelo* was in some ways even more striking than the decision itself. The ruling led to an unprecedented political backlash."); *see also* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J. F. 82, 89 (2015) (calling the state response to *Kelo* "overwhelming").

30. Berliner, *supra* note 29, at 88. Thirty states instituted statutory or constitutional changes to the meaning of "public use." *Id.* at 84–85. Twenty-five states restricted their interpretation of "blight," which was the justification used for the taking in *Kelo*. *Id.* at 86. Nine states shifted the burden of proof in eminent domain cases. *Id.* at 87. A total of forty-four states instituted legislative change, while three of the remaining six states with no constitutional or legislative changes

polls found that as much as 80% of the public disapproved of the Supreme Court's decision.[31]

The facts of *Kelo* illustrate the tensions between legitimate holdins and efficient land use. In *Kelo*, the City of New London sought to condemn homes in the Fort Trumbull area as part of an economic redevelopment plan.[32] As part of the city's plan, Pfizer was going to build a new facility in the redeveloped area, potentially bringing new jobs and tax revenue to New London.[33] The city would transfer the recently condemned property to Pfizer, effectively using eminent domain to create a private-to-private transfer. Of those facing condemnation was Susette Kelo, who had lived in Fort Trumbull since 1997 and had recently made improvements to her home.[34] Kelo was deeply attached to her "little pink house" with its water view.[35] Also refusing to sell her home was Wilhelmina Dery, who was born in the same house in 1918 and had lived there with her husband for nearly sixty years.[36] Dery had never lived anywhere else, and ardently wished to continue living there as long as she was alive.[37] However, despite the wishes and deep attachments of the Derys, Kelos, and other homeowners in the Fort Trumbull area, the Supreme Court upheld New London's use of eminent domain, calling the economic redevelopment "public use."[38]

In many ways, *Kelo* exemplifies the problems of eminent domain and why the public use test may fail to curb eminent domain abuse. *Kelo's* expansive interpretation of "public use" created what Ilya Somin, a law professor at George Mason University, has called a "nearly limitless" rationale for eminent domain.[39] Under the guise of economic gain, nearly any private project can be justified, whether

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instituted greater protections through their high courts. *Id.* at 84, 88. Only Arkansas, Massachusetts, and New York have failed to institute any kind of eminent domain reform. *Id.* at 89.

31. *See* SOMIN, *supra* note 29, at 3 (arguing that the public backlash and legislative responses from states across the nation indicate that *Kelo* may be one of the most unpopular Court decisions in recent history).

32. *Kelo*, 545 U.S. at 473.

33. *Id.* at 473–74. The Pfizer facility was not going to be the only generator of economic progress, but rather would help create momentum, encouraging other tenants and investment in leisure and recreation opportunities in the Fort Trumbull waterfront area.

34. *Kelo*, 545 U.S. at 475.

35. SOMIN, *supra* note 29, at 13, fig. 1.1.

36. *Kelo*, 545 U.S. at 475.

37. SOMIN, *supra* note 29, at 14.

38. *Kelo*, 545 U.S. at 489.

39. SOMIN, *supra* note 29, at 81.

through prospective increases to tax revenue, job creation, or some other positive economic benefit.[40] Furthermore, the gains do not need to be actually realized. In *Kelo*, Pfizer pulled out of the project, and ten years later the Fort Trumbull area is still undeveloped.[41] Another example of an economic redevelopment taking where the benefits never materialized is the oft-criticized condemnation of Poletown in Detroit, Michigan.[42] In that case, General Motors never provided the total number of jobs originally promised and the capital expenditures required to complete the plant greatly exceeded the original estimates.[43] In short, because public use tests focus only on a taking's use and not its costs and benefits, which may be largely speculative anyway, public use tests often fail to discourage inefficient takings.

C. Just Compensation Also Fails to Check Against Inefficient Takings

Other scholars have chosen to focus on the compensation issue, positing that public discomfort with eminent domain stems not from the appropriation of property, but from the injustice caused by undercompensation.[44] Furthermore, an expansive reading of "public use" leaves compensation as the only viable judicial check against eminent domain abuse.[45] However, the current compensation model often fails to account for non-transferable values, such as an emotional investment in a personal home, and community values, such as the value created through community relationships. Because non-

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40. *Id.* at 75–76.

41. Richard Epstein, *Kelo v. City of New London Ten Years Later,* NAT'L REV. (Jun. 23, 2015), http://www.nationalreview.com/article/420144/kelo-v-city-new-london-ten-years-later-richard-epstein.

42. *See* SOMIN, *supra* note 29, at 76 (using *Poletown* as an example of "the danger of taking inflated estimates of economic benefit at face value"); *see also* Fennell, *supra* note 25, at 989 (pointing to *Poletown* as an example of economic redevelopment being used to justify eminent domain, despite no robust or reliable promises of growth).

43. SOMIN, *supra* note 29, at 79.

44. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 182 (1985) (arguing that the ideal amount of compensation would leave the property owner "in a position of indifference" between condemnation and retention of the property); *see also* Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 269 (2007) (arguing that "inadequate compensation of property owners is greatly to blame for unjust or inefficient takings").

45. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985).

transferable and community values are not compensated, condemnors may undervalue the net costs of eminent domain. Furthermore, condemnors may not be sensitive to the financial cost of condemnation. In short, the current compensation model might fail to appropriately measure costs and benefits, leading to inefficient takings.

Federal courts have interpreted "just compensation" to mean "the full and perfect equivalent in money of the property taken."[46] This means that the "owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."[47] Typically, such compensation is equal to the "fair market value" ("FMV").[48] FMV is defined by the Supreme Court as "what a willing buyer would pay in cash to a willing seller."[49] FMV is favored by courts for its "external validity."[50]

However, despite its logical appeal, courts have long recognized that FMV rests upon an underlying contradiction: in an eminent domain proceeding, there is by definition no "willing seller."[51] Courts must instead rely on a hypothetical marginal owner, recognizing that this means "intramarginal" owners may lose values not reflected in FMV.[52] Courts justify this loss as "the burden of common citizenship."[53] However, while it is clear that condemnors may constitutionally

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46. *See, e.g.*, United States v. Miller, 317 U.S. 369, 373 (1943).

47. *Id.*

48. *See* 4 NICHOLS, *supra* note 16, § 12.01 ("Thus, 'value' has been variously characterized as (1) fair market value, (2) cash market value, and (3) fair cash market value."); *see also* United States v. Miller, 317 U.S. 369, 374 (1943) ("The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given.'") (citing New York v. Sage, 239 U.S. 57, 61 (1915)).

49. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

50. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). Indeed, finding a way of appraising subjective values poses its own challenges, discussed *infra* III.D.1.

51. *See Laundry*, 338 U.S. at 6 ("Since a transfer brought about by eminent domain is not a voluntary exchange, [the proper amount of compensation] can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place.").

52. *Id.* at 5; *see also* Coniston Corp. v. Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) (where Judge Posner coins the term "intramarginal" owners to refer to owners whose subjective value exceeds the FMV defined by marginal owners). To use our casino example, suppose still that the landowner does in fact value her property at $300. However, the market, which does not receive value for the landowner's memories or sentimental attachment, only values the land at $10. The subjective loss suffered by the landowner will be $290.

53. *Laundry*, 338 U.S. at 5.

impose this burden, it is not clear that such an imposition is always economically efficient. Undercompensating condemnees may cause condemnors to fail to appreciate the total costs of eminent domain.[54] Condemnors might then use eminent domain where the losses suffered by property owners exceeds the public use's net benefit to society.

Professor Nicole Garnett describes three types of losses suffered by intramarginal owners: (1) economic losses, (2) subjective losses, and (3) dignitary harms.[55] Economic losses include the costs of relocating, lost goodwill in a business's location, or cost of replacement.[56] The threat of eminent domain may also depress FMV, by taking away owners' ability to say "no" and therefore putting owners in a weak bargaining position.[57] Subjective losses include sentimental attachments and other nontransferable value, such as the memories one may associate with a home.[58] Another subjective loss may be caused by endowment effects, where owners place a subjective premium on property they own over identical unowned property.[59] Finally, dignitary harms include the psychological harm caused by the government's intrusion upon the property owner's autonomy.[60] However, Professor Brian Lee at Brooklyn Law School argues that many of these losses are in fact reflected in the FMV, leaving only "autonomy losses" and "idiosyncratic subjective value" uncompensated.[61]

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54. Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation is Efficient?*, 20 S. CT. ECON. REV. 35, 57–58 (2012) (referring to the "fiscal illusion" where the condemnor mistakes its costs as the true cost of a taking); *see also* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134, 138 (2000) ("Without a compensation requirement, public officials might suffer from a 'fiscal illusion' as to the true social cost of government action.").

55. Garnett, *supra* note 18, at 106–10.

56. *Id.* at 106.

57. *Id.* at 107. This concern is especially relevant where parties may already be in substantially different bargaining positions, such as well-resourced real estate developers and elderly homeowners. *But see* Merrill, *supra* note 18 (noting that in thick markets, market transactions are much more common than condemnation, either because condemnees think condemnation is inevitable or because condemnors view condemnation as prohibitively expensive. Merrill thinks that the latter is more likely).

58. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–61 (1982).

59. *Id.*

60. Garnett, *supra* note 18, at 109.

61. Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 615 (2013). Lee argues that many costs, such as relocation costs, are already internalized by sellers and therefore

In addition to losses felt by individual property owners, larger eminent domain projects may cause losses to whole communities. Just as owners attach sentimental value to their homes, they also may attach sentimental value to their communities, creating a kind of double loss.[62] Failure to compensate community losses is especially problematic where insiders value their community much more greatly than outsiders, such as low-income communities[63] or ethnic enclaves.[64] In other cases, issues of race and class may overlap, as African American communities are particularly subject to "urban renewal" takings.[65] The problem is exacerbated by the fact that the communities most at risk for takings are those inhabited by political outsiders whose community losses are unlikely to be internalized by non-community members.[66]

In one example, Parchomovksy and Siegelman looked at the costs of community externalities and the influence of community in the sale of the entire town of Cheshire, Ohio, to make room for a power plant.[67] Cheshire was a small town in southern Ohio with about 220 inhabitants.[68] The town was also the location of a large power plant,

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reflected in the market price. Lee goes on to argue that other idiosyncratic costs are unreasonable and should be analyzed similar to nuisance, where idiosyncratic use or value is not rewarded. Although drawing from property law's treatment of nuisance admittedly has intellectual appeal, such treatment still leaves "idiosyncratic" owners undercompensated and therefore still poses a risk of inefficient takings.

62. James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain, and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 959 (2006).

63. *Id.* at 988. Kelly frames the issue as "Why try to preserve a 'ghetto?'" arguing that what outsiders see as curing economic blight, insiders see as a potentially destructive process.

64. Merrill, *supra* note 18, at 111 (looking at the *Poletown* case, where the taking of a Polish community near Detroit "destroyed a community irreplaceable at any cost").

65. Garnett, *supra* note 18, at 120 ("Urban renewal was called 'Negro Removal' by detractors.").

66. *Id.* ("During the urban renewal period . . . the evidence suggests that Takers may have avoided the costs of inflaming the passions of politically powerful groups by simply taking the properties owned by those who were powerless and lacked the wherewithal to mount effective opposition.").

67. Parchomovsky & Siegelman, *supra* note 21, at 83–84. The sale of Cheshire was an open market transaction; it was not an eminent domain taking. However, the case still has value here as it helps illustrate how community members often attach subjective value to the community itself.

68. *Id.* at 85.

which caused a significant amount of pollution.[69] The power company came up with the solution to buy out the townspeople of Cheshire, offering two to three times the appraisals found on property tax assessments.[70] Parchomovsky and Siegelman argue that community externalities, such as the value of community networks and social relationships, explain why the residents were able to successfully collectively bargain with the power company.[71] Their research also shows that, where the value of the community itself is reflected in the compensation offered, a more efficient transfer can occur.[72] Parchomovksy and Siegelman conclude:

> Intangible and fragile as it may be, a sense of community is obviously something of great importance to many residents of small towns and urban neighborhoods. Precisely this sense of community was destroyed in the Cheshire buyout. Whether or not [the power plant] paid "adequate compensation," it is nevertheless critical to take account of the importance of what has been lost.[73]

Another oft-criticized example of eminent domain causing a communal loss is the taking of Poletown in Michigan to make way for

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69. *Id.* at 86. Residents complained of sores, nausea, burning eyes, and other health issues caused by the coal plant's sulfur trioxide emissions. In 2000, the EPA launched an investigation into whether the plant violated the Clean Air Act.

70. *Id.* at 90. Residents were also given a minimum guarantee of $100,000 and the option to sell and retain a life estate. The power company also offered to pay for the residents' legal fees. All told, the power company spent close to $20 million. Interestingly, the power company framed the purchase as a way to expand the plant's facility and not as a way to avoid pollution liability, even though a waiver of future claims was a condition of the buyout.

71. *Id.* at 113–14. For example, traditional law and economics models would predict a high chance of holdout risk where there is a high number of bargainers, as there were with Cheshire's 220 residents. However, as Parchomovsky and Siegelman argue, community members are not truly individualistic actors. They are sensitive to the decision-making of other community members and sensitive to the effect of their own decisions on their neighbors. For example, would-be holdouts do not want to be the last sellers standing and risk living in a "ghost town." *Id.* at 122.

72. *Id.* at 123. However, Parchomovsky and Siegelman do note Pareto problems with the Cheshire deal, as they find it likely that some homeowners ended up being undercompensated, even if the community as a whole was compensated. This is because, while it is clear community networks have *some* value, it is impossible to appraise that value for each property owner. *Id.* at 123–24.

73. Parchomovsky & Siegelman, *supra* note 21, at 144.

a General Motors (GM) plant in the mid-1980s.[74] Some legal scholars criticize the taking in Poletown for taking advantage of politically marginalized Polish immigrants.[75] Others criticize the taking because the promised economic gains never materialized.[76] Poletown was a neighborhood in East Detroit and was home to many first- and second-generation Polish-American families.[77] General Motors promised to create "at least 6,000 jobs," and other economic benefits, such as stimulating local businesses and contributing to local tax revenues.[78] Detroit promised to purchase about 1,500 homes, businesses, and churches, and relocate 3,400 residents in order to assemble the land necessary for the GM plant.[79] However, several elderly residents refused to sell.

The Poletown case illustrates the three types of uncompensated losses described by Garnett.[80] Some residents, like Willy and Ethel Feagan, lost their small businesses when they were forced to move, bringing them to the brink of financial collapse.[81] In addition to economic losses, there were also very real subjective losses. Josephine Jakubowski was one of the last holdouts and explains that she fought "because [her] roots were there. [Her] church was there, and [they] were like one big family in [their] parish."[82] Jakubowski helped lead a sit-in at the Immaculate Conception Church, one of several local Catholic churches condemned to make way for the GM plant. Finally, the intrusiveness of the government action was particularly severe in

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74. Fennell, *supra* note 25, at 958 (describing *County of Wayne v. Hathcock*'s overruling of the *Poletown* case as having "smashed [the Poletown ruling] . . . to near-unanimous scholarly applause").

75. *See, e.g.*, Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1008 (2004) (describing condemnations like the one that occurred in *Poletown* as "allow[ing] powerful interest groups to 'capture' the condemnation process for the purpose of enriching themselves at the expense of the poor and politically weak").

76. *See id.* at 1013 (noting that although over 6,000 jobs were promised, the plant never employed more than 3,600 workers); *see also* James Risen, *Poletown Becomes Just a Memory: GM Plant Opens, Replacing Old Detroit Neighborhood*, L.A. TIMES (Sep. 18, 1985), http://articles.latimes.com/1985-09-18/business/fi-6228_1_gm-plant (pointing out that the use of robots at assembly plants explains why the jobs promise was never fulfilled).

77. Risen, *supra* note 76.

78. Somin, *supra* note 75.

79. Risen, *supra* note 76.

80. *See* Garnett, *supra* note 18, at 106–11 (providing examples of economic loss, subjective loss, and dignitary harms).

81. Risen, *supra* note 76.

82. *Id.*

the Poletown case. In July 1981, the Detroit Police raided the church in the early morning and hauled off the dozen protesters there, clearing the way for the church's demolition.[83] The residents moved to an outlying suburb, the jobs never came, Detroit eventually declared bankruptcy, and Poletown was "reduced to little more than a memory."[84]

In addition to potentially undervaluing the costs of condemnation, condemnors might not be sensitive to pecuniary costs to begin with. Condemnors may fail to internalize the cost of the taking when they are able to pass on costs to taxpayers or customers.[85] However, as Yun-Chien Chang, Deputy Director at the Center for Empirical Legal Studies at Institutum Iurisprudentiae, Academia Sinica, explains, while condemnors might not be sensitive to pecuniary costs, they might find political and administrative costs to be more important.[86]

Catholic communities in post-war Chicago are an example of how condemnors might be more sensitive to the political costs of condemnation.[87] There, Catholic churches created "natural rallying points for collective action," creating sufficient political pressure to prevent the condemnation of the churches to make room for highways.[88] Eminent domain practitioners in Texas have also found that opposition to eminent domain is greater in urban areas, where political organization is easier and political costs thus potentially greater.[89] In urban areas, opposition may not only arise during the eminent domain proceeding itself, but also when city residents push

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83. *Id.* Against the wishes of the Archdiocese of Detroit, the local pastor, Father Joseph Karasiewicz, helped organize the sit-ins in the church's basement.

84. *Id.* (quoting Polish immigrant pastor Father Joseph Grzyb).

85. Chang, *supra* note 54, at 58. Passing along costs of condemnation to taxpayers is especially relevant in economic redevelopment takings, where the local government may condemn property and then resell the condemned land to a real estate developer at a discount, in order to encourage developers to invest in the blighted area.

86. *Id.* at 57–58.

87. Garnett, *supra* note 18, at 117.

88. *Id.* Garnett warns, however, that communities without rallying points (like churches), that are more difficult to organize, or have less consolidated group identities, may find it harder to mount sufficient political pressure to deter takings.

89. John Allen Chalk & Sadie Harrison Fincher, *Eminent Domain Power Granted to Private Pipeline Companies Meets with Greater Resistance From Property Owners In Urban Rather Than Rural Areas*, 16 TEX. WESLEYAN L. REV. 17 (2009).

their local government to pass ordinances restricting eminent domain use *ex ante*.[90]

In addition to political costs, condemnors may be sensitive to administrative costs of using eminent domain.[91] In a survey of different eminent domain takings, Professor Thomas Merrill found that less than 5% of condemnations occur in thick markets.[92] Even though condemnors theoretically pay the same amount to property owners, condemnors choose to use market transactions in thick markets in order to forego administrative costs of eminent domain.[93] Merrill argues that these administrative costs may help limit the use of eminent domain to cases where open market transactions are truly unfeasible.[94]

In short, "just" compensation is probably not the same as "efficient" compensation. Even where markets are efficient, FMV may not reflect the property's value to the seller, because eminent domain is inherently a way of circumventing the market.[95] The seller's uncompensated loss can be an economic loss, a subjective loss, or a dignitary harm.[96] There may also be losses to the community as a whole that go uncompensated.[97] Even if FMV compensates condemnees

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90. *See id.* at 23 (looking at local ordinances passed by the City of Fort Worth restricting pipeline construction). Also, as a result of high political costs in urban areas and relatively lower political costs in suburban and rural areas, undercompensation may also encourage takings outside of major cities, encouraging urban sprawl. Additionally, the greater likelihood of holdouts in urban areas also encourages suburban or rural takings. *See* SOMIN, *supra* note 29, at 91.

91. Merrill, *supra* note 18, at 77. Merrill argues that governments are rational actors and will condemn where the administrative costs of an eminent domain proceeding are less than the costs of a market exchange. Where the market is thick, there are many substitute goods available, encouraging competitive negotiation and making the costs of a market exchange low. With low market exchange costs, the relatively high costs of eminent domain proceedings act as a successful deterrent.

92. *Id.* at 101. Merrill gives an example of a landlocked property owner who sought condemnation of an access road, despite being able to negotiate with any of six different neighbors. Merrill also points out that the number of thick market cases might actually be lower than 5%. Merrill codes "landlocked property" as a type of thin market only where there is one surrounding property owner. However, many "landlocked property" cases deal with only two or three potential access routes. Merrill concedes that these "oligopoly-like circumstances" are not truly thick markets.

93. *Id.* at 78.

94. *Id.* at 101.

95. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949) (discussing valuation issues where there is no voluntary exchange).

96. Garnett, *supra* note 18, at 106.

97. Fennell, *supra* note 25, at 957.

perfectly, inefficiencies may arise where condemnors pass costs along or otherwise do not internalize pecuniary costs.[98]

D. Previously Proposed Solutions

1. Premia

Several solutions to undercompensation problems have been proposed. Compensation premia would allow owners to recover a percentage bonus of the FMV.[99] However, there is still an issue of what percentage bonus is appropriate. Fennell proposes allowing owners to self-appraise their subjective losses by tying compensation premiums to property taxes.[100] Fennell's basic idea is to ask property owners what compensation they would seek if their land were condemned, and then offer a property tax break as the compensation premia decreases.[101] Property owners with high subjective value would be willing to tolerate higher property taxes in order to ensure more complete compensation should a taking occur, whereas property owners with less subjective value will favor lower taxes over takings insurance.[102] Another way of appraising the premium might be to use a well-being analysis, as suggested by Maria M. Maciá, a law and economics J.D./Ph.D. candidate at the University of Chicago.[103] Maciá conducts a regression analysis of psychological survey data to estimate the lost subjective value, ultimately suggesting a bonus of around 22%.[104] Some state legislatures, along with Congress, have adopted statutes that entitle

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98. Chang, *supra* note 54, at 58; Merrill, *supra* note 18, at 77.

99. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 184 (1985).

100. Fennell, *supra* note 25, at 995–96. Indeed, this solution is also similar to the one negotiated in Cheshire, where the buyout tied payouts to property tax appraisals. Property tax appraisals have an advantage where, as in towns like Cheshire, there is a slow real estate market, so finding comparable prices can be difficult.

101. *Id.* For example, a property owner might demand compensation at 200% of the property's value, in which case no tax break would be offered. At the same time, a property owner who is willing to settle for FMV compensation (100% of the property value) would receive a full tax break.

102. *Id.*

103. Maria M. Maciá, *Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain*, 83 U. CHI. L. REV. 945 (2016). Maciá describes a well-being analysis as applying a regression analysis to psychological survey data to estimate the effect of a taking on someone's happiness. She describes similar analyses to try and approximate the lost happiness value in wrongful death or personal injury suits.

104. *Id.* at 995.

homeowners to compensation after a taking. Under the Uniform Relocation Assistance and Real Properties Acquisition Act, the federal government has allowed property owners a way of recovering some of the economic losses associated with a taking by compensating moving costs.[105] States have passed similar statutes compensating other economic costs, such as Connecticut's URA which allows businesses to recover up to $10,000 for lost business.[106]

The common issue with compensation premia is whether they can accurately assess the subjective losses felt by property owners.[107] Bonuses may overcompensate those without subjective losses, such as landlords who rent residential property or owners of commercial property.[108] Chang suggests creating a schedule to approximate subjective losses, such as granting greater bonuses to long-term residents and no bonuses to commercial property owners.[109] However, while a schedule of premia may better approximate subjective losses, it is still likely that two homeowners who have resided in their homes the same amount of time have different levels of emotional attachment. Furthermore, as Somin points out, homes are not the only properties that can have a high subjective value, as places of worship or small businesses may also carry high subjective values.[110] Indeed, Garnett's study of Chicago focused on the strong opposition to the condemnation of Catholic churches.[111]

Compensation premia suffer from several other significant flaws. For example, percentage-based premia would provide greater compensation to wealthier property owners, even though subjective losses may be just as great for less wealthy property owners.[112]

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105. 42 U.S.C. § 4622 (2012).

106. Conn. Gen. Stat. § 8-268 (2017).

107. *See* Fennell, *supra* note 25, at 993 (noting that awarding additional compensation suffers from a couple of defects, including that "it is difficult to know how much value someone places on a property").

108. *Id.* at 994.

109. Chang, *supra* note 54, at 39.

110. SOMIN, *supra* note 29, at 213. Small businesses, while commercial, can often have a strong connection to their location. This connection might manifest itself through relationships with long-term customers or other goodwill. Proprietors may also have an emotional connection to the neighborhoods they serve.

111. *See supra* note 88 and accompanying text (discussing how churches helped create the political organization necessary to resist eminent domain).

112. *See* Lee, *supra* note 61, at 636. Take for example a mandated 50% premium. Assume two property owners have their land condemned. Adam owns 100 acres of farmland worth $500. Beth owns 2 acres of farmland worth $10. Under this regime, Adam will receive a premium of $250, in addition to his FMV compensation of $500. However, Beth's premium will only be $5. Although Adam

Additionally, compensation premia could potentially undermine political resistance to improper uses of eminent domain.[113] Finally, some subjective losses simply cannot be compensated monetarily, particularly loss of autonomy and the right to exclude.[114] In fact, some scholars go further and argue that these autonomy losses represent an attack on the foundation of property law.[115] Another issue with compensating subjective losses is that it might create a moral hazard by encouraging overinvestment.[116]

2. In-kind Compensation

Because of the problems inherent in compensating subjective losses in cash, some scholars have proposed allowing owners to recover in-kind compensation.[117] The constitutionality of in-kind compensation is still an "open question."[118] While the Supreme Court has never ruled

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owns more land than Beth, it is not necessarily fair to assume that Adam's subjective loss is 50 times that of Beth's.

113. Garnett, *supra* note 18, at 142. Garnett argues that premia may normalize otherwise exploitative takings by creating the appearance of just compensation, leading to less sympathy or public support for condemnees, who are often politically marginalized groups to begin with.

114. Fennell, *supra* note 25, at 994; *see also* Garnett, *supra* note 18, at 109–10 ("A compulsory taking deprives an owner of her 'most essential right' to exclude others . . . . To the extent that property owners also may attach independent, noninstrumental significance to the *economic* autonomy that property guarantees, its loss also increases the uncompensated increment.").

115. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 540 (2005) (noting that "the current understanding of just compensation as being payment of market value . . . misses the very element justifying extra property protection").

116. *See* Chang, *supra* note 54, at 37–38 (comparing the issue of moral hazard in eminent domain to a similar issue in torts, where increasing compensation for victims may encourage risky behavior).

117. *See* Parchomovsky & Siegelman, *supra* note 21, at 138 (proposing in-kind compensation as the default rule where an entire community is uprooted and relocated); *see also* Kelly, *supra* note 62, at 929 (proposing that property owners relocated in economic redevelopment takings be provided a "Community Residency Entitlement," allowing them to purchase replacement housing in the redeveloped district); *c.f.* SOMIN, *supra* note 29, at 40. Although he does not advocate for it, Somin argues that in-kind compensation was an important part of the compensation puzzle under mill laws, the predecessor to many eminent domain laws. Under the mill laws in the early Colonial Period, condemnors could take land to build grist mills but only if the mill was opened to the public. In this sense, the public access to the mill was both public use and compensation for the land taken.

118. Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep* Nollan *and* Dolan, 81 VA. L. REV. 1801, 1837 (1995).

directly on the issue, dicta in two cases indicate that nonmonetary damages may be appropriate in limited circumstances.[119] In *Brown v. United States*, the Supreme Court stated that, where money damages may not fully compensate the property owner, "compensation by substitution" might be appropriate.[120] There, a proposed reservoir would have flooded three-fourths of the town of American Falls, Idaho. The United States government compensated the townspeople by paying to relocate them to another side of the town, away from the flood zone. However, the proposed relocation site belonged to Brown, the plaintiff in the case. In other words, there were two takings: the taking of American Falls to make way for the reservoir and the taking of Brown's land to relocate the people of American Falls. Brown was compensated, with monetary damages plus interest. Although the Supreme Court seemed to approve of compensation by substitution for the townspeople of American Falls, the townspeople's compensation was not the issue immediately before the court.

The Supreme Court revisited *Brown* in *United States v. 50 Acres of Land*, reasoning that:

> *Brown* merely indicates that it would have been constitutionally permissible for the Federal Government to provide the city with a substitute landfill site instead of compensating it in cash. Nothing in *Brown* implies that the Federal Government has a duty to provide the city with anything more than the fair market value of the condemned property.[121]

Neither *Brown* nor *50 Acres* created a holding on this issue, leaving only dicta to explain the Supreme Court's treatment of nonmonetary compensation. As the Supreme Court noted in *Blanchette v. Trustees of Property of Penn Central Transportation Co.*, "no decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes."[122] In *Blanchette*, a railroad company going through bankruptcy was forced to transfer some of its railroad holdings to a private, state-incorporated corporation in exchange for that corporation's stock.[123] Although the Supreme Court held that securities are a constitutional form of compensation, because the taking was part of a bankruptcy

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119. *Id.*
120. Brown v. United States, 263 U.S. 78, 83 (1923).
121. United States v. 50 Acres of Land, 469 U.S. 24, 33 (1984).
122. Blanchette v. Trustees of Property of Penn Cent. Transp. Co., 419 U.S. 102, 150 (1974).
123. *Id.* at 111.

proceeding, and not an eminent domain proceeding, its holding should be viewed narrowly.[124]

Similar to the relocation discussed in *Brown*, Parchomovsky and Siegelman propose a type of in-kind compensation for "clearings," or takings in which "an entire community is uprooted."[125] In support of this proposal, Parchomovsky and Siegelman refer to Valmeyer, Illinois, a town which, like American Falls, was relocated by the government due to flooding.[126] In-kind compensation "allow[ed] for preservation of community character, albeit in a different place."[127] Indeed, in-kind compensation might help replicate some of the lost subjective value, thus avoiding valuation problems.[128] For example, in a community taking, if the community is relocated, the value of communal networks is still preserved.

Professor James Kelly, Jr., of Notre Dame Law School has also suggested in-kind compensation in the context of economic redevelopment.[129] Kelly proposes a Community Residency Entitlement ("CRE"), which would be an alienable right to "replacement housing in the redeveloped district."[130] Like other forms of in-kind compensation, CREs would allow owners to "maintain community relationships developed over decades."[131] CREs also allow for community participation in redevelopment and allow community members to directly share in the benefits generated by economic redevelopment.[132]

Although in-kind compensation might generally be allowed, in-kind compensation may not be used to overcompensate property owners. In *United States v. 564.54 Acres of Land*, eminent domain was

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124. *Id.* at 154; *see also* 3 NICHOLS, *supra* note 16, § 8.02 (explaining that *Blanchette* is not a standard condemnation case and has its own limitations when used as support for the proposition that money is not the sole measure of just compensation).

125. Parchomovsky & Siegelman, *supra* note 21, at 84.

126. *Id.* at 141.

127. *Id.* at 138. However, Parchomovsky and Siegelman note that, unfortunately, many owners refused to relocate to the substitute site and "much of the community spirit seems to have been lost in the process." *Id.* at 141 n.273.

128. *Id.* at 140.

129. Kelly, *supra* note 62, at 929.

130. *Id.*

131. *Id.* at 983.

132. *Id.* One of Kelly's concerns is that in many economic redevelopment takings, such as that in Poletown, the residents are forced to move away and are not able to reap the benefits (or supposed benefits) of the economic redevelopment. Kelly is particularly concerned about economic redevelopment takings being used as a way to remove low-income families from urban areas.

used to take land from a nonprofit summer camp operator.[133] Because a newly-built camp would be subject to regulations that the original camp had been grandfathered into, the owner claimed he would not be able to continue operating a summer camp with only FMV compensation.[134] The owner asked for costs to obtain "functionally equivalent substitute facilities at a new site."[135] However, the court rejected the owner's argument, reasoning that the value of regulatory exemption was the same as any other "nontransferable value," and therefore he was not entitled to replacement value compensation.[136] In that case, the Supreme Court was particularly worried that the difference in replacement value and market value (mostly due to the assets having depreciated over time) would constitute a "windfall" to the property owner.[137]

Eminent domain is a valuable tool in resolving strategic holdout problems, allowing for efficient takings. However, where condemnees are undercompensated, particularly where there is high subjective value, takings may become inefficient as the condemnees' losses will exceed the FMV paid by condemnors. While premia may help address undercompensation, several issues remain, such as calculation of premia, exacerbation of inequality between the wealthy and poor, and the potential normalization of political marginalization. In-kind compensation seems to better encourage efficient takings in an economic sense, but its legal foundation remains unexplored.

II. THE PROBLEM POSED BY PIPELINES

Part II will first discuss the unique issues pipeline projects pose in eminent domain, as opposed to other projects like blight or economic redevelopment. It will then examine three cases where eminent domain has been attempted. The first case is the unsuccessful use of eminent domain in Ohio to complete the Utopia Project. The second case is the successful use of eminent domain in Pennsylvania to complete the Mariner East 2 Pipeline, an expansion of Mariner East 1. The third and final case is the currently-disputed use of eminent domain in Iowa to complete the Dakota Access Pipeline.

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133. United States v. 564.54 Acres of Land, 441 U.S. 506, 508 (1979).
134. *Id.* at 514.
135. *Id.* at 508.
136. *Id.* at 514.
137. *Id.* at 516. The Court also raised concerns that if, for example, the funds were not put towards a replacement facility, the compensation for replacement would constitute a windfall.

A. Pipelines Generally

The use of eminent domain for energy pipeline projects has been brought to the spotlight in recent times, in part because of *Kelo*'s relaxing of the public use standard, but perhaps more so because of the historically high demand for energy infrastructure.[138] This demand is fueled by new fracking and shale projects in many northern states.[139] Furthermore, existing utility corridors, such as powerlines and pipelines, attract more utility corridors, which are often built on the same route.[140]

While there has been a high demand for energy infrastructure, property owners seem less willing to sell easements to pipeline companies.[141] This phenomenon might be explained by environmental opposition to pipeline and other energy projects, shifting eminent domain from a "regulatory issue to a political issue."[142] The increased size of energy projects has also made opposition cheaper, as the costs of legal representation can now be diffused across more property owners.[143]

Pipelines and other partial takings are unique in that they may have political checks that total takings do not.[144] A pipeline does not displace property owners, meaning property owners may still vote and influence local politicians, unlike in many blight and economic development takings where owners of condemned property are displaced and left with little political recourse. Not only are condemned owners pushed out of the political system by being forced to move, but these owners are often likely to be politically marginalized to begin with.[145]

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138. Keith Goldberg, *Energy Boom Tests State Eminent Domain Laws*, LAW360 (May 12, 2014), https://www.law360.com/articles/535660.

139. *Id.*

140. Thomas H. Peebles, IV, *Eminent Domain and Natural Gas Pipeline Easements: Valuation and Right to Take Issues*, PRAC. REAL EST. LAW., Mar. 2016, at 27.

141. *See* Goldberg, *supra* note 138 ("Landowners are increasingly willing to push back against companies looking to condemn their property, experts say.").

142. *Id.*

143. *Id.*

144. *See* SOMIN, *supra* note 29, at 221 ("Property owners are unlikely to 'vote with their feet' against eminent domain because, if they move out, they cannot take their land with them.").

145. *See* Garnett, *supra* note 18, at 120 (discussing how condemnees are often political outsiders). Somin goes further to argue that not only are outsiders forced to leave, but condemnation is often used as a way to bring "politically favored

Pipelines may not only take property in the form of an easement but may also devalue the remaining property.[146] While many property owners instinctively believe that pipelines or powerlines devalue their property, professional appraisers remain split.[147] Furthermore, proving incidental damages can be difficult because of their prospective and speculative nature.[148]

B. Utopia Pipeline in Ohio

The Utica to Ontario Pipeline Access Project ("Utopia") is a 215-mile long, 12-inch diameter pipeline in Ohio being built by Kinder Morgan.[149] Utopia is designed to carry ethane and ethane-propane mixtures from the Utica shale area to Windsor, Ontario, where it will be used as feedstock for plastics manufacturing by NOVA Chemical, a Canadian company.[150] The pipeline project is entirely within Ohio, although it does link up with another existing pipeline in Michigan to connect to Ontario.[151] The pipeline will carry 50,000 barrels per day, with the potential to transport 75,000 barrels per day if additional pumping stations are built.[152] In June 2016, Kinder Morgan sold a 50% share of the Utopia Project to Riverstone Investment Group.[153] As part of the deal, Riverstone also agreed to pay for 50% of future capital expenditures.[154]

An economic impact study done by Kent State University estimates that the project will create a $237.3 million economic benefit

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interest," especially in the context of private-to-private transfers. SOMIN, *supra* note 29, at 224.

146. Peebles, *supra* note 140, at 30. Devaluation damages are often referred to as "incidental damages" or "severance damages." *Id.*

147. *Id.*

148. *Id.*

149. Press Release, Kinder Morgan, Kinder Morgan Announces NOVA Chemicals as Anchor Shipper for Utopia Project (Sept. 29, 2014), http://ir.kindermorgan.com/press-release/all/kinder-morgan-announces-nova-chemicals-anchor-shipper-utopia-project.

150. *Id.*

151. *Id.*; *see also infra* Figure 1.

152. *Utopia East Pipeline Project Fact Sheet*, KINDER MORGAN, https://www.kindermorgan.com/content/docs/Utopia_Fact_Sheet.pdf (last visited Nov. 29, 2017).

153. Press Release, Kinder Morgan, Kinder Morgan Sells 50% Equity Interest in Utopia Pipeline Project to Riverstone Investment Group (June 28, 2016), http://ir.kindermorgan.com/press-release/kindermorgan/kinder-morgan-sells-50-equity-interest-utopia-pipeline-project-riverstone.

154. *Id.*

for the state of Ohio.[155] The study cites four primary sources of economic benefit: (1) increased spending in Ohio for pipeline construction; (2) local spending from out-of-state workers; (3) hiring of permanent workers once the pipeline is completed; and (4) benefits from reduced manufacturing inputs because of nearby feedstock sources.[156] Many of these benefits will manifest themselves indirectly. Utopia will create 625 construction jobs, but it will also create an additional 1,105 non-construction jobs due to the supply change effects and increased income of construction workers.[157] Utopia will also create another twenty-five permanent jobs after construction is completed, which is estimated to create an additional forty-four jobs indirectly.[158] The Kent State University study also estimates that the direct GDP increase of Utopia will be $64 million and will have an almost identical indirect impact on the Ohio economy, creating a total GDP boost of $127.5 million.[159]

In order to complete the project, Kinder Morgan requires a permanent fifty-foot easement from property owners, with an additional 100 to 125 feet for temporary construction.[160] While Kinder Morgan claims it will try to restore the disturbed land as best it can, property owners are prohibited from building permanent structures, ponds and pools, or from planting deep-rooted vegetation, such as large trees.[161] In determining how to compensate property owners for these easements, Kinder Morgan relies on appraisals to determine the fair market value.[162] In doing so, Kinder Morgan considers five factors to compare the easement against comparable properties: (1) the location of the property; (2) the property's size; (3) unique property attributes

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155. Shawn M. Rohlin & Nadia Greenhalgh-Stanley, Economic Impact of Kinder Morgan Utopia Project 2 (2016) (unpublished economic impact study), https://utopiapipeline.com/wp-content/uploads/2016/08/Utopia-EIS-FINAL.pdf [hereinafter Utopia EIS].

156. *Id.* at 2.

157. *Id.* at 6.

158. *Id.* at 8.

159. *Id.* at 6. Indirect GDP increases will come from retail, healthcare, services, and other industries that will benefit from an influx of construction workers and the workers' income.

160. *Utopia East Pipeline Project FAQs*, KINDER MORGAN, https://www.kindermorgan.com/content/docs/Utopia_FAQs.pdf (last visited Nov. 1, 2017).

161. *Id.* at 6.

162. *Eminent Domain White Paper*, KINDER MORGAN, https://www.kindermorgan.com/content/docs/White_Eminent_Domain.pdf (last visited Sept. 11, 2017).

such as use or fixtures; (4) existing and area zoning; and (5) other real estate or commercial factors that may be relevant.[163]

Kinder Morgan was offering property owners about $10–15 per linear foot of easement.[164] Many of the holdout landowners claimed that they felt Kinder Morgan was using the threat of eminent domain to "lowball" them.[165] Other property owners were concerned about permanent changes to their property, including Scott Miarer, a local property owner who would be forced to have four trees cut down, ruining his view and eliminating a buffer against noise from a nearby U.S. highway.[166] Although more than 60% of the land required for the Utopia Project was acquired through open market transactions, about 100 landowners refused to sell to Kinder Morgan, prompting eminent domain actions.[167] Under Ohio common law, private takings are constitutional, so long as they are for public use.[168] Following the Ohio Supreme Court case of *Norwood v. Horney*, "a public purpose has for its objectives the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all."[169] However, in *Norwood*, the Ohio Supreme Court determined that economic redevelopment takings do not fall under that definition of public use, as the objective is not public despite indirect public benefits.[170]

The Wood County court's decision rested heavily on the fact that Utopia will deliver its product solely to NOVA Chemicals, a Canadian corporation.[171] The court concluded that Utopia did not serve

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163. *Id.*

164. Casey Junkins, *Battle for Utopia Pipeline Proceeding in Harrison County*, WHEELING NEWS-REG. (Sept. 11, 2016), http://www.theintelligencer.net/news/top-headlines/2016/09/battle-for-utopia-pipeline-proceeding-in-harrison-county/.

165. *Id.*

166. Daniel Carson, *Landowners at Odds over Easements, Eminent Domain Suits*, NEWS-MESSENGER (Oct. 14, 2016), http://www.thenews-messenger.com/story/news/local/2016/10/14/kinder-morgan-landowners-odds-over-easements-eminent-domain-suits/91873108/.

167. Junkins, *supra* note 164.

168. Kinder Morgan Utopia v. PDB Farms of Wood Cty., Wood Cty. C.P. No. 2016-CV-0220, at 4 (Oct. 12, 2016) (citing Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896)), http://www.ohioconstitution.org/wp-content/uploads/2016/10/SKM_284e16101212350.pdf.

169. Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 55.

170. *Id.* ¶ 9.

171. Kinder Morgan Utopia v. PDB Farms of Wood Cty., Wood Cty. C.P. No. 2016-CV-0220, at 5 (Oct. 12, 2016), http://www.ohioconstitution.org/wp-content/uploads/2016/10/SKM_284e16101212350.pdf; *see also* Press Release, Kinder Morgan, Kinder Morgan Announces NOVA Chemicals as Anchor Shipper

a public purpose because there was no guarantee that the pipeline would be used by anyone other than NOVA.[172] The court also rejected Kinder Morgan's argument that as a pipeline company it was entitled to common carrier status and therefore had statutory authority to appropriate land. In doing so, the court pointed out that "Kinder Morgan [could] not claim to be a common carrier as a matter of fact."[173] The court ultimately reasoned that, because Kinder Morgan was not providing any service to the public, and because its only customer was a Canadian company, it was not a common carrier.[174] Therefore, Kinder Morgan was denied eminent domain power.

C. Mariner East 2 in Pennsylvania

Similar to Utopia, Sunoco's Mariner East pipeline will transport natural gas liquids ("NGLs"), such as liquid ethane or propane.[175] Mariner East 1 transported NGLs from Western Pennsylvania to the Marcus Hook Industrial Complex, outside Philadelphia on the Delaware River.[176] Mariner East 2 expands Mariner East 1's delivery capacity, while also extending its reach into Ohio and West Virginia.[177] Whereas Mariner East 1 had a capacity of 70,000 barrels of NGLs per day, Mariner East 2 would increase that by an additional 275,000 barrels per day.[178] Mariner East 1 has already failed to meet Pennsylvania's energy demands, such as when demand peaked during the polar vortex in 2013.[179] In response to the vortex, Sunoco added two offloading stations to Mariner 1 in Southeast

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for Utopia Project (Sept. 29, 2014), http://ir.kindermorgan.com/press-release/all/kinder-morgan-announces-nova-chemicals-anchor-shipper-utopia-project (announcing that Kinder Morgan entered into long-term agreement to transport ethane for NOVA Chemicals through the Utopia Project).

172. Kinder Morgan Utopia v. PDB Farms of Wood Cty., Wood Cty. C.P. No. 2016-CV-0220, at 5 (Oct. 12, 2016), http://www.ohioconstitution.org/wp-content/uploads/2016/10/SKM_284e16101212350.pdf.

173. *Id.* at 6.

174. *Id.*

175. *Mariner East Projects*, SUNOCO LOGISTICS (Mar. 20, 2017), http://marinerpipelinefacts.com/wp-content/uploads/2017/03/mariner-east-factsheet-03202017.pdf.

176. *Id.*; *see also infra* Figure 2. The Marcus Hook Industrial Complex is also partially in the state of Delaware.

177. *Mariner East Projects*, *supra* note 175.

178. *In re* Condemnation of Sunoco Pipeline, 143 A.3d 1000, 1009 (Pa. Commw. Ct. 2016).

179. *Id.*

Pennsylvania.[180] However, some more cynical landowners believe the offloading stations were built as a ruse to demonstrate public use, especially as the vortex coincided with the decision in York County Court questioning whether Sunoco was a public utility.[181]

Sunoco estimates that the Mariner East projects will require approximately $3 billion in capital expenditures.[182] Over its two-year construction timeline, Mariner East 2 will provide 15,000 jobs a year and $62 million in tax revenue.[183] Upon completion, it will provide Pennsylvania with 300 to 400 permanent jobs and contribute $100 million annually to the Pennsylvania economy.[184]

A Cumberland County judge approved Sunoco's use of eminent domain in October 2015.[185] Under Pennsylvania law, public utilities have the power to condemn, just as common carriers have the power to condemn in Ohio.[186] Furthermore, an order from the Pennsylvania Public Utility Commission ("PUC") had granted Sunoco the power to expand or upgrade its existing pipelines, citing a propane shortage.[187] The PUC had reasoned that Mariner East 2 would provide a public benefit by "increas[ing] the supply of propane in markets with a demand for these resources, including in Pennsylvania, ensuring that Pennsylvania's citizens enjoy access to propane heating fuel."[188] The

180. Susan Phillips, *Commonwealth Court Upholds Eminent Domain in Sunoco Pipeline Case*, STATEIMPACT (July 14, 2016), https://stateimpact.npr.org/pennsylvania/2016/07/14/commonwealth-court-upholds-eminent-domain-in-sunoco-pipeline-case/.

181. *Id.*; Sunoco Pipeline, L.P. v. Loper, Dkt. No. 2013-SU-4518-05 (York Cty. Feb. 24, 2014), *affirmed on reconsideration at* Dkt. No. 2013-SU-4518-05 (York Cty. issued Mar. 25, 2014). The York County Court determined that Sunoco was not a public utility, denying the petitioned right for immediate entry of private property for the purpose of building the pipeline, although Mariner East 1 was ultimately allowed to be completed.

182. *Mariner East Projects*, *supra* note 175.

183. *Id.*

184. *Id.*

185. *In re* Condemnation of Sunoco Pipeline, L.P., 143 A.3d 1000 (Pa. Commw. Ct. 2016); Max Mitchell, *Judge Rules Sunoco Has Power of Eminent Domain in Pipeline Project*, LEGAL INTELLIGENCER (Oct. 8, 2015), http://www.thelegalintelligencer.com/id=1202739254622.

186. Business Corporation Law of 1988, 15 PA. CONS. STAT. § 1511(a)(2) (1988).

187. *In re* Condemnation of Sunoco Pipeline, 143 A.3d at 1006.

188. *Id.* at 1007. The court went on to reason that the pipeline would be safer than any alternatives, such as hiring rail or trucking services.

landowners, however, questioned whether a public need was demonstrated.[189]

In its decision, the court focused less on the use of Mariner East 2 and more on its status as a public utility. The court relied on statutory language which gives "public utility corporations" the power to condemn.[190] The court also gave deference to the PUC's decision, citing the Pennsylvania Supreme Court's decision in *Fairview v. PUC*, which held that "determinations of public need for a proposed utility service are made by PUC, not the courts."[191] The court was sympathetic to the PUC's argument in its amicus brief that for common plea courts to question the PUC's eminent domain decisions would "constitute impermissible collateral attacks on otherwise valid PUC orders and raise[] serious jurisdictional concerns."[192] The court found no reason to question the PUC's finding that Mariner East 2 would provide a public benefit by allowing for the safe and economic transport of petroleum products, as well as increasing homeowner access to heating fuels.[193] Although eminent domain was necessary to complete Mariner East 2, a Sunoco spokesperson, Jeff Shields, claimed Sunoco only used eminent domain "as a last resort."[194]

D. Dakota Access Pipeline in Iowa

The Dakota Access Pipeline is a $3.8 billion, 1,168-mile-long project owned by Energy Transfer Partners LP.[195] The pipeline is intended to transport 500,000 barrels of oil daily from the Bakken fields in North Dakota to a refinery in Illinois, crossing South Dakota and Iowa along the way.[196] Although most of the land needed for the pipeline was acquired through open market transactions, some of the

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189. *Id.* at 1017. The landowners also argued for procedural violations such as the PUC's jurisdiction over the pipeline.

190. *Id.* at 1017–18 (citing Business Corporation Law of 1988, 15 PA. CONS. STAT. § 1511(a)(2)).

191. *Id.* at 1019 (citing Fairview Water Co. v. Pa. Pub. Util. Comm'n, 502 A.2d 162 (Pa. 1985)).

192. *Id.* at 1017.

193. *In re* Condemnation of Sunoco Pipeline, 143 A.3d at 1019.

194. Mitchell, *supra* note 185.

195. John Kennedy, *Iowa Farmers Seek to Stop $3.8B Dakota Access Pipeline*, LAW360 (Aug. 11, 2016), https://www.law360.com/articles/827257/iowa-farmers-seek-to-stop-3-8b-dakota-access-oil-pipeline.

196. Joey Aguirre, *Dakota Access: Faces Class Action Over Pipeline Construction*, DES MOINES REG., Oct. 27, 2016, at 2, Class Action Reporter, ISSN: 1525-2272; *see also infra* Figures 3–4.

pipeline's path in Iowa was acquired through eminent domain.[197] In fact, all landowners in North Dakota, South Dakota, and Illinois gave permission for the pipeline, with only 2% of the relevant landowners in Iowa holding out.[198]

After *Kelo*, the Iowa state legislature amended its eminent domain statutes to prohibit the Iowa Utilities Board ("IUB") from considering economic benefits, such as tax revenue and job creation, when deciding whether or not to grant eminent domain.[199] Iowa also restricts the ability to take agricultural lands.[200]

On August 9, 2016, a group of Iowa farmers petitioned the state court for a stay, claiming that if land is dug to make way for the pipeline, it will be impossible to return that soil to its original condition.[201] The concerns voiced by property owners and other Iowans vary. Some focus on environmental concerns. One property owner, Sandy Kipper, believes that "running crude oil down the entire watershed of an entire continent is probably not a good idea."[202] Property owners are especially concerned with the pipeline crossing the Des Moines River, threatening local drinking water.[203] Property owner Zachary Ide is concerned that the benefits of a pipeline, such as jobs or low energy costs, "are going to mean nothing when the water is

197. Kennedy, *supra* note 195.

198. *Id.* This is not to say that DAPL's construction has been without controversy. Recently, DAPL has received much attention due to environmental concerns and concerns over Native American ancestral lands, particularly that of Standing Rock. However, while the pipeline runs close to tribal areas and water sources, the land itself was acquired through market transactions. Because this note is concerned with eminent domain, I focus only on DAPL's opposition in Iowa; however, it is important to remember that even market transactions can cause harmful externalities, leading to inefficient transfers. For more on public opposition to DAPL, see Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp.3d 4 (D.D.C. 2016) (a suit by a Native American tribe seeking an injunction against DAPL's construction); see also Nives Dolsak, et al., *The Big Fight Over the Dakota Access Pipeline, Explained*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/this-is-why-environmentalists-are-targeting-energy-pipelines-like-the-north-dakota-project/?utm_term=.ff6b4389d89a (describing how environmentalists have made crucial alliances with other activist groups, especially Native American rights groups).

199. Kennedy, *supra* note 195.

200. *Id.*

201. *Id.*

202. Aguirre, *supra* note 196.

203. *Id.* Carolyn Raffensperger, an environmentalist who has joined the Iowan coalition opposing DAPL, calls DAPL "a pretty appalling idea."

poisoned and [their] land is soaked in oil."[204] Their concerns are not unfounded: a leak could potentially cause one million gallons of oil to pour into the Des Moines River every hour.[205] Still, in July 2016, the U.S. Army Corps of Engineers declared that the proposed pipeline complied with federal environmental laws.[206]

On August 29, 2016 the Iowa District Court for Polk County denied the stay.[207] The court reasoned that the easements sought by Dakota Access were "much less intrusive" than the takings in *Kelo*.[208] The court also believed that the IUB had conducted a thorough study of DAPL's benefits to the public.[209] Moreover, the court was not convinced that the taking had caused real harm to the farmers, as the pipeline would only affect property below ground.[210]

III. EQUITY-BASED COMPENSATION AS A SOLUTION FOR PRIVATE TAKINGS

To recap, "public use" is not a reliable way to curb eminent domain abuse and, in fact, a better tool would be to find a way to encourage condemnors to exercise their eminent domain power only in efficient takings. Currently, takings are often inefficient because landowners' subjective value is often left uncompensated. Condemnors fail to internalize the costs they subject condemnees to, allowing for projects where any gains are exceeded by those costs. To encourage efficient takings, condemnors must somehow internalize the costs created by lost subjective value, or the lost subjective value must otherwise be minimized. Equity-based compensation, such as voting stock in a corporation whose sole asset is the pipeline project, could help address many of the issues in the compensation puzzle.

Part III will provide four reasons why equity-based compensation should be favored over cash compensation in private-to-private pipeline takings. First, although the public use and just compensation prongs are often separated, equity-based compensation would help unite the two prongs and address concerns of a broad public use reading. Second, equity-based compensation would force

204. *Id.*
205. *Id.* (quoting Mark Edwards, an Iowa Department of Natural Resources employee).
206. *Id.*
207. Lamb v. Iowa Util. Bd., No. CVCV 051997, slip op. at 14 (Iowa Dist. Ct. Aug. 29, 2016).
208. *Id.* at 8.
209. *Id.* at 6.
210. *Id.* at 10.

condemnors to internalize some—although probably not all—of the subjective losses felt by homeowners. Third, equity-based compensation would help preserve some of the autonomy values of homeowners, lessening the subjective losses they would otherwise feel. Fourth, equity-based compensation could help resolve holdout problems.

A. Equity-based Compensation Could Help Allay Public Use Concerns

Scholars and practitioners alike seem to focus their attacks on eminent domain by criticizing the public use prong.[211] Indeed, in many of the recent pipeline cases—Utopia, Mariner East 2, and DAPL—landowners have attempted to stop eminent domain proceedings by questioning whether a privately-held pipeline is really "public use." While some landowners, such as those in Ohio opposing Utopia, have been successful in showing that a private pipeline taking is not public use, others, such as the Pennsylvania residents attempting to oppose Mariner East 2, have been less successful.

The public use analysis in both of those cases had nothing to do with the efficiency of the eminent domain proceeding. Utopia, for example, was held not to be a public use because the benefits flowed directly to a Canadian petrochemical company. It did not seem to matter that the Kent State University study showed a nearly 1:1 ratio between the benefit to NOVA Chemicals and the economic benefit Ohio would realize indirectly, nor did it seem to matter that the pipeline project would create jobs and other revenue through its construction costs. Indeed, it seems plausible that the taking would have been efficient, assuming the subjective losses to the holdouts was less than $2.37 million.[212]

Providing equity-based compensation would provide another way for private-to-private transfers to meet public use tests. As shareholders, landowners would have a stake in the pipeline project and a right to any dividends or proceeds from asset sales. In many ways, the pipeline would be a kind of joint venture between pipeline

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211. *See supra* Part I.B.

212. *See* Utopia EIS, *supra* note 155, at 2 (estimating a $237 million benefit to Ohio). There were approximately 100 holdouts in the eminent domain suit and the Kent State University study estimated a $237 million benefit to the State of Ohio. This means that the approximate opportunity cost caused by each holdout is $2.37 million. *Id.*; *see also* Junkins, *supra* note 164 (noting that attorney Michael Braunstein is representing more than 100 property owners who control about thirty miles of land in Utopia's path).

companies and local landowners. This would provide a direct financial benefit to landowners, rather than speculative projections of job creation or increased tax revenue. While an equity stake is still inherently speculative, this stake could help avoid problematic situations where condemnors may underdeliver on job promises due to changing economics, as in *Poletown*.[213]

In addition to the right to proceeds, the control exercised by voting stockholders would make otherwise private takings subject to more public accountability and therefore more similar to common carriers. In analyzing the public use prong in the cases of Utopia and Mariner East, the court considered whether the pipeline was subject to public accountability and thus behaved like a common carrier or utility, not only whether it could be labeled one. Therefore, granting greater public control over the pipeline may make pipelines like Utopia seem more like "public use." With DAPL, one of the primary concerns is that the pipeline will only be accountable to Energy Transfer Partners and its shareholders. Granting landowners voting stock in the pipeline project creates more public accountability, addressing public use concerns and making the project more similar to a public utility. This opens the door to a greater focus on an efficiency analysis.

B. Equity-based Compensation Forces Condemnors to Internalize Homeowners' Costs

The primary compensation issue is that landowners, particularly homeowners, face uncompensated subjective losses, such as an emotional attachment to a childhood home.[214] Because condemnors are not forced to pay those costs, they do not internalize those losses, allowing potentially inefficient takings. Just as cash does not provide condemnees with any subjective benefit, paying cash compensation insulates condemnors from subjective losses; neither party has any attachment to cash. However, forcing private pipeline companies to cede partial control to condemnees, through the form of voting stock, might give condemnors some pause.

While subjective losses experienced by condemnees may take the form of memories or sentimental attachment, as it often does for homeowners, this does not necessarily mean that corporate condemnors cannot experience noncash costs. Here, the "subjective" loss for corporate condemnors is likely more similar to autonomy losses

213. *See supra* notes 42–43 and accompanying text.

214. *See, e.g.*, *Kelo*, 545 U.S. at 494–96 (involving the compensation for the emotional attachment of a childhood home).

felt by homeowners. Just as homeowners experience a subjective loss when they are forced to have their property used against their will, corporations, especially closely held corporations, will attach a significant premium to control over the corporate entity.

Still, it must be conceded that giant pipeline companies do not have the same subjective attachments to control as individual homeowners. There is also a question of whether it is fair to call a corporation's loss of control a "subjective" loss when a corporation is a fictional entity. A better way to think about subjective losses is therefore probably from the landowners' side.

C. Equity-based Compensation Preserves Autonomy Values

Granting voting stock in lieu of cash to condemnees allows condemnees to continue to exert some control or ownership over their land. Pipeline condemnees are not totally displaced, as are economic redevelopment condemnees. Therefore, the subjective losses are likely driven by lost autonomy—the ability to determine how land is used. This goes beyond questions of whether to install a pipeline; instead, it includes questions of what structures may be built over the pipeline, how the pipeline should be drilled and laid, or what trees might be cut down to make way for the pipeline. An additional problem is created if dignitary harms and lost autonomy simply cannot be compensated through cash.[215]

While voting stock does not restore total autonomy—and indeed, condemnees would not be able to oppose the most fundamental invasion, the pipeline's existence on their land—voting stock would restore at least some of their autonomy. Through voting stock and corporate governance, compensated property owners can still monitor the project's use of the land. This control may be especially relevant in pipeline cases, where property owners may often have strong environmental concerns. Yet even where there are fewer monitoring concerns, having ownership of the eminent domain project may help property owners preserve a sense of ownership in their land.

Furthermore, awarding this kind of non-cash compensation may help avoid the tricky problem of appraising individual homeowners' subjective values. Part of the issue with appraising cash

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215. Garnett, *supra* note 18, at 148. ("[T]o the extent that the losses associated with private takings are non-instrumental and 'dignitary,' resulting from the nature of the government's action rather than the owner's subjective attachment to her property, even accurate valuation methods may fail to make owners whole.").

premia is that some landowners have greater subjective valuations than others. By using voting stock to offset the autonomy losses, landowners who feel a greater subjective loss will also realize a greater offset; they will likely value the control that voting stock grants at a higher value.

There may also again be a parallel to draw here with public utilities. Whereas private condemnors have no accountability to condemnees, but rather are accountable to shareholders, public condemnors (in this case public utilities) are still sensitive to the will of condemnees, i.e., voters. This is evidenced by the important role that political costs play in explaining public condemnors' decision making.[216] Providing voting stock in private takings could instill some of the tolerance felt with regards to public takings by instituting the same type of democratic control in private takings. Just as voters exercise control over public utilities through democratic processes, shareholders can exercise similar power over corporations.

D. Equity-based Compensation Resolves Holdout Problems

Lastly, eminent domain remains an important tool in combating holdout problems by forcing holdouts to sell. Changing the form of compensation does not change a condemnor's ability to force a holdout's hand. In fact, offering greater choice in the forms of compensation may decrease the likelihood of holdins who, while different from strategic holdouts, can still stall a project by refusing to sell.[217] Moreover, providing condemnees with an equity interest allows them to preserve their autonomy interests and partial control, without subjecting the project to holdout problems in the future. Although all shareholders can exercise some say, no shareholder has veto power. Thus, equity-based compensation offers a way to compensate landowners without providing an incentive to strategically hold out.

POTENTIAL ISSUES AND CONCLUSION

This proposal is not without its own potential problems. First and foremost is whether corporations will be willing to offer equity-based compensation. Equity-based compensation may be more expensive for corporations than cash compensation, if there is in fact value in shareholder voting. This is part of the point—to force

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216. *See supra* Section II.B.2.

217. Parchomovsky & Siegelman, *supra* note 21, at 83; *see also supra* Part I.A.

condemnors to realize at least some of the subjective value they are taking from condemnees. However, this cost will not be prohibitive, and actually comes with other benefits for condemnors. Namely, by providing equity-based compensation, condemnors provide more of a public use by providing value and control to condemnees.[218] Condemnors may be willing to pay this control premium to avoid costly litigation over public use.

Second, it is possible that condemnees will not value equity-based compensation. Condemnees should not be forced to take equity-based compensation, the monetary value of which may be speculative. However, they should at least have the option to do so. This allows those landowners who place a high value on autonomy to opt in and take shares, while those landowners who do not value control may opt out. In fact, the very ability to choose between forms of compensation helps preserve otherwise lost autonomy values.

In complete takings, condemnees may not be financially capable of accepting equity-based compensation, as they will need cash to purchase a new home or relocate. For this reason, equity-based compensation is probably more appropriate for incomplete takings, such as pipeline projects. There may be other forms of non-cash compensation that can be offered to homeowners who are forced to relocate, such as in-kind compensation for "clearings"[219] or "community residency entitlements" for economic redevelopment takings.[220]

Furthermore, there may be fewer autonomy values to preserve in complete takings. The homeowner, being forced to relocate, arguably has less of an interest in monitoring the eminent domain project's use of the land. The project has no relation to the homeowner's existing property. In contrast, with a partial taking such as a pipeline, the project is in many ways an intrusion upon the property owner's land, albeit one excused for its public use. Because property owners will often have closer interactions with the project where there is a partial taking, equity-based compensation should be limited to partial takings.

Relatedly, if the value of easements is a relatively small percentage of the value of the entire project, which is entirely possible, then the percentage of voting stock held by landowners will be very low. If this is the case, then the minority shareholders might simply be at the mercy of the majority shareholder. However, the law of business

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218. *See supra* Part IV.A.

219. Parchomovsky & Siegelman, *supra* note 21, at 84.

220. Kelly, *supra* note 62, at 929. Both clearings and community residency entitlements are discussed *supra* Part II.D.2.

organizations has devised numerous ways to ensure the protection of minority rights against controlling shareholders.[221] There is no reason to believe that minority rights cannot similarly be protected here. However, balancing protections for minority shareholders against the will of a controlling shareholder is too large a discussion for this Note.

Moreover, related to the literature on business organizations is a concern that minority voters may exhibit rational apathy and may not exercise their voting power. Indeed, this concern seems reasonable not only given the literature in business organizations, but also upon examining Somin's research on post-*Kelo* legislative reforms, which find that although most voters favored legislative reform, few could explain whether their state had enacted any reform or what such reform looked like.[222] However, rationally apathetic shareholders may opt for cash compensation if they have no intention of exercising their rights as shareholders. Conversely, those property owners who choose equity-based compensation will do so because they place a higher value on control and are therefore less likely to be apathetic.

The public use test is a weak and ineffective tool for monitoring eminent domain abuse and ignores the issue of whether eminent domain takings are efficient. A better way to limit takings to only those that are efficient would be to tackle the just compensation puzzle. Specifically, reformers must find a way for condemnors to internalize the subjective costs they impose on condemnees, find ways to limit the subjective costs suffered by condemnees, or both. These problems are especially significant with private pipeline takings, where the public use question is still not prohibitive despite concerns about private exploitation, the risk of holdout is greater because the project is a step good, and homeowners are not permanently displaced but still suffer autonomy losses. Providing equity-based compensation, in the form of voting stock in a corporation whose sole asset is the pipeline, can address many of these concerns: bringing the project closer to a public use, forcing condemnors to internalize subjective losses, lessening condemnees subjective losses, and resolving holdout problems. As this country's energy demands grow and as the Trump administration threatens to further favor condemnors, finding ways to protect the

221. Examples include cumulative voting and the fiduciary duties of directors. *See* WILLIAM T. ALLEN AND REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 77 (5th ed. 2016) ("The major problems in corporation law deal with the relations between 'outside' investors, who lack power, and 'insiders,' who control the company's assets.").

222. SOMIN, *supra* note 29, at 169–70.

property and dignity rights of landowners will only become more important.

Figure 1. Utopia Pipeline Map

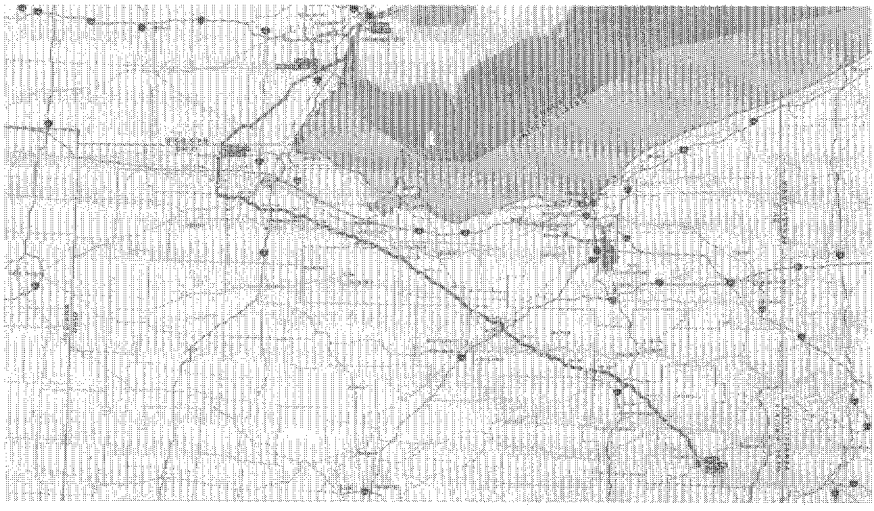

Figure 2. Mariner East 1 and 2 Map

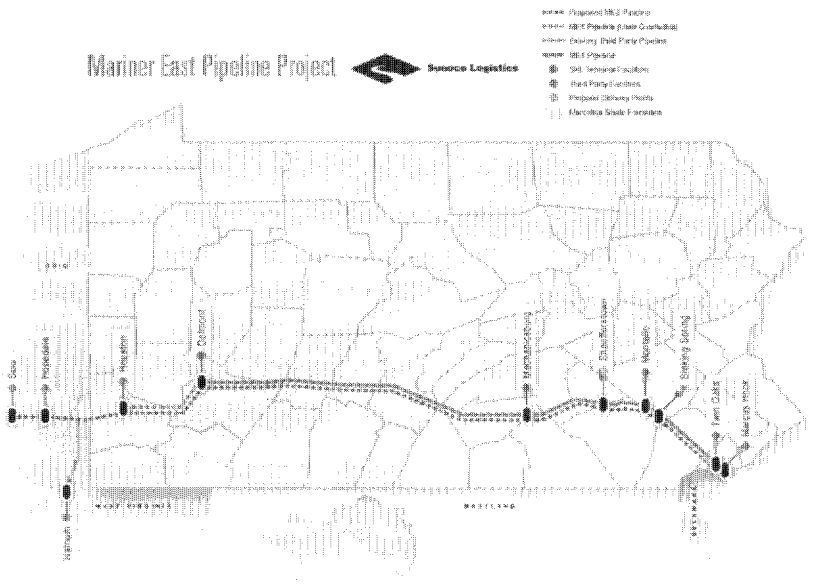

Figure 3. DAPL Map

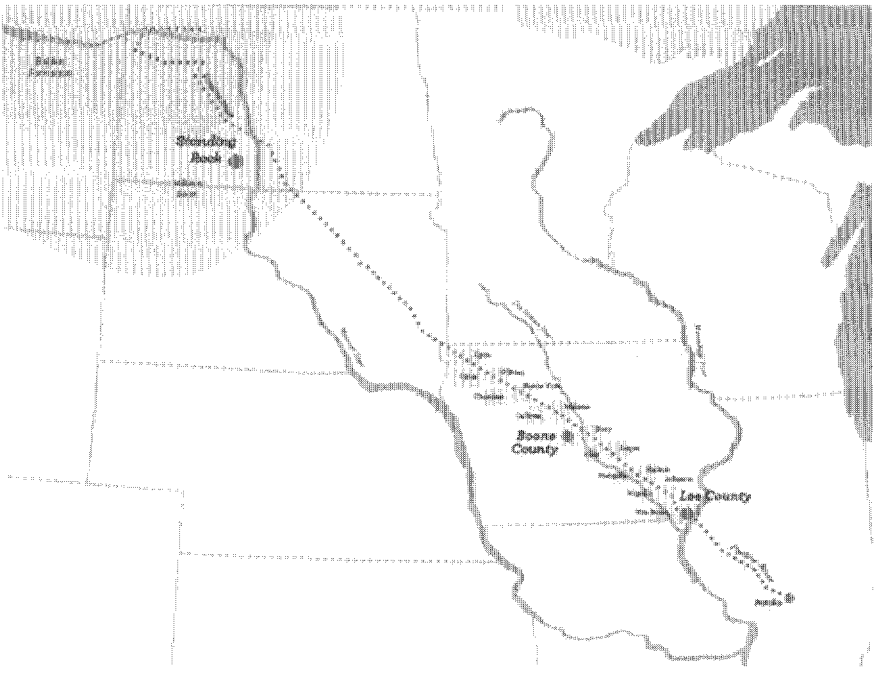

Figure 4. DAPL, Iowa insert