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Efficient Just Compensation as a Limit on Eminent Domain

James Geoffrey Durham*

INTRODUCTION

Theoretically, eminent domain\(^1\) is an equitable compromise between the needs of the public and the rights of the individual. The fifth amendment permits the government to acquire privately owned land, but only if the land is taken for a "public use" and the property owner is paid "just compensation" for the taking.\(^2\) Eminent domain thus appears to provide an efficient balancing of public and private interests. The government is not precluded from acquiring needed land because the property owner either refused to sell or demanded a prohibitively high price for the land.\(^3\) The government's exercise of eminent domain is constrained, however, by the "public use" requirement, which demands that the anticipated use of the property

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1. Eminent domain is the legal procedure by which a governmental entity can forcibly acquire land owned by a private party. 1 P. Nichols, Nichols Law of Eminent Domain § 1.11 (J. Sackman & P. Rohen rev. 3d ed. 1983); see United States v. Jones, 109 U.S. 513, 518 (1883); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

2. U.S. Const. amend. V. The "public use" requirement has been explicitly held applicable to the states through the fourteenth amendment. See Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2328 (1984). Although it is not clear whether the fifth amendment's "just compensation" requirement is similarly incorporated into the fourteenth amendment, the requirement is held applicable to the states through the fourteenth amendment's due process clause. See, e.g., Olson v. United States, 292 U.S. 246, 254 (1934); Cincinnati v. Louisville & N.R.R. Co., 223 U.S. 390, 400 (1912); Appleby v. Buffalo, 221 U.S. 524, 531 (1911). See generally 2A P. Nichols, supra note 1, at § 7.01.

3. This assumes that the adage "every person has a price" is incorrect. Assuming that there are property owners who will refuse to sell at any price may be unrealistic, but it is quite realistic to assume that there are property owners who will refuse to sell for the maximum price that a governmental agency would be willing to pay. In effect, the result is the same.
be for public purposes.\textsuperscript{4} In addition, the “just compensation” requirement deters the government’s use of eminent domain when the taking will be economically inefficient because the costs of “just compensation” will outweigh the public benefit of the taking.\textsuperscript{5}

Enforcement of these checks depends almost entirely on the judicial definitions given to “public use” and “just compensation” and on the judicial deference given to legislative determinations that a taking meets these definitions. Courts have failed to enforce these checks on eminent domain, however, either by denying that they have the power to substantively review uses of eminent domain or by reducing their review to a mechanical application of an established legalistic formula. “Public use” has thus been defined so broadly that little if anything will not fall within the meaning of the term.\textsuperscript{6} In the recent decision of \textit{Hawaii Housing Authority v. Midkiff}, the Supreme Court made the definition of “public use” largely irrelevant by holding that courts must defer to the legislative determination that a taking is in the public use unless such a determination is irrational or an “impossibility.”\textsuperscript{7}

With the “public use” requirement receiving only minimal judicial supervision, the “just compensation” requirement becomes the sole viable judicial check on governmental exercises of eminent domain.\textsuperscript{8} In \textit{United States v. 50 Acres of Land (Duncanville)},\textsuperscript{9} the Supreme Court recently reaffirmed that just compensation is presumptively the market value of the property interest taken by eminent domain.\textsuperscript{10} Market value,

\begin{itemize}
\item \textsuperscript{4} See, e.g., Midkiff, 104 S. Ct. at 2329-30 (action must be taken for the public welfare).
\item \textsuperscript{5} If, of course, the government’s cost of “just compensation” is less than the actual costs of the eminent domain action, the government may not be deterred from pursuing an inefficient eminent domain action in which the aggregate costs exceed the aggregate benefit. The deterrence value of the “just compensation” check thus depends on the definition given to “just compensation.” It is the thesis of this Article that “just compensation” must be defined to include all costs incurred by property owners to be an effective limit on governmental use of eminent domain actions.
\item \textsuperscript{6} See infra notes 15-28 and accompanying text.
\item \textsuperscript{7} 104 S. Ct. at 2329.
\item \textsuperscript{8} As one author has noted:
\begin{quote}
Apart from the requirement of compensation, there is no limit on the extent to which a selfish majority in the community may appropriate for their own benefits the invested savings of fortuitously selected individuals.
\end{quote}
\texttt{W. BAXTER, PEOPLE OR PENGUINS: A CASE FOR OPTIMAL POLLUTION 46 (1974).}
\item \textsuperscript{9} 105 S. Ct. 451 (1984).
\item \textsuperscript{10} \textit{Id.} at 455.
\end{itemize}
however, often does not adequately measure all the costs that the property owner and others bear because of the taking. The cost/benefit analysis of the government, therefore, becomes skewed, and the government may not be deterred from undertaking inefficient eminent domain actions in which the aggregate costs of the taking exceed its aggregate benefits. The burdens of an inefficient eminent domain action will necessarily fall on a minority of the population, and the fifth amendment's theoretical equitable compromise will become inequitable in reality.

This Article contends that the governmental power of eminent domain must be limited and that the best way of doing so is to require state and federal governments to reimburse property owners for all "large, fairly concrete and roughly monetizable" costs resulting from the taking of their land. Part I briefly reviews the traditional law of public use and the Midkiff decision, and Part II reviews the traditional law of just compensation and the Duncanville decision. Part III addresses the ineffectual political check on the use of eminent domain and discusses the need for a judicial limit on the power. Finally, Part IV proposes that just compensation should include all costs that the government should consider in its efficiency analysis of the eminent domain decision and determines which categories of costs incurred by owners and others affected by an eminent domain action should fall within this analysis. This fi-

11. See infra notes 167-91 and accompanying text.

12. Not only will these actions be inefficient because costs are greater than benefits, but the actions will not reach Pareto Optimality. Pareto Optimality is only reached when no person may be made better off without making another worse off. See P. Asch, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 18 (1970); A. Polinsky, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (1983). In eminent domain actions, therefore, Pareto Optimality is achieved when the owners of the property taken are fully compensated for the costs of the actions.

13. Justice Brennan, in his dissenting opinion in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), explained the equitable theory underlying the fifth amendment, stating that the fifth amendment "was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole." Id. at 656 (Brennan, J., dissenting). Professor Leslie Pickering Francis expanded this idea in her recent article on eminent domain: "Fairness to the individual seems to require that he or she not bear a disproportionate share of the cost of a public improvement, especially since the property transfer is involuntary." Francis, Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model, 1984 UTAH L. REV. 429, 429-30 (1984).

nal Part further analyzes the impact that efficient just compensation would have had on the eminent domain decisions involved in *Midkiff* and *Duncanville*.

I. "PUBLIC USE" AND *MIDKIFF*

Historically, courts rigidly defined "public use" to require that the public have physical access to the property after acquisition by eminent domain. In response to social change and the practical needs of an industrializing nation, this rigid definition of public use eventually gave way to a more flexible meaning. Public use became a fluid concept, with no one definition emerging except that the intended purpose of the eminent domain action must somehow benefit the public. The definition of public use thus expanded beyond acquisitions for public roads and bridges to acquisitions for railroads and privately owned mills, and to what may be the ultimate public acquisition, a professional football team.

Modern courts only rarely find that the intended purpose of the eminent domain action is not in the public use. Those


16. Ross, supra note 15, at 361 n.20. As Professor Thomas Ross notes, this evolution was not uniform. Some early courts applied a very broad definition of public use, whereas other courts persisted in applying a restrictive definition. Id.; see also 2A P. NICHOLS, supra note 1, at § 7.02[2] (compiling definitions of public use applied by different courts).


19. See generally 2A P. NICHOLS, supra note 1, at § 7.51 (collecting cases).

20. See generally id. at § 7.70 (collecting cases).

21. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). In *Oakland Raiders*, the city of Oakland, seeking to prevent the Oakland Raiders from moving to Los Angeles, brought an eminent domain action to acquire all those property rights associated with the football team. The trial court granted summary judgment, resting, in part, on Oakland's inability to establish a valid public use. The California Supreme Court reversed and remanded for trial, stating that the acquisition and operation of a sports franchise might be in the interests of public health, recreation, and enjoyment and, therefore, a public use. Id. at 70-73, 646 P.2d at 841-43, 183 Cal. Rptr. at 679-81. For later proceedings, see City of Oakland v. Superior Ct., 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (1982); City of Oakland v. Superior Ct., 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983).

infrequent occasions in which courts do find an absence of public use usually involve “private-transferee” takings, or actions in which the government intends to transfer the property taken to a private party.\textsuperscript{23} Until recently, courts adopting this limitation to the public use definition were forced to either distinguish\textsuperscript{24} or ignore\textsuperscript{25} a facially contrary Supreme Court precedent—\textit{Berman v. Parker}\textsuperscript{26}—or to rely on state constitutional provisions.\textsuperscript{27} After the Supreme Court’s 1984 decision in \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{28} only the latter course remains open to a court disturbed by such a private-transferee taking.

In \textit{Berman}, a department store owner challenged the taking of his store by the District of Columbia as part of a redevelopment scheme for southwest Washington, D.C.\textsuperscript{29} The Supreme Court found the eminent domain action constitutional under the fifth amendment, even though most of the land acquired was to be sold to private developers.\textsuperscript{30} The district court had determined that the taking was constitutional only because the redevelopment area involved slums with “conditions injurious to the public health, safety, morals and welfare,” elimination of which was a public end.\textsuperscript{31} The Supreme Court, however, rejected such close judicial scrutiny and affirmed on the broader grounds of deference to Congress on what constitutes the “public welfare”:

\begin{quote}
In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. . . . Here
\end{quote}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{See, e.g., Midkiff v. Tom, 702 F.2d 788, 796-97 (9th Cir. 1983), rev’d, 104 S. Ct. 2321 (1984).}

\textsuperscript{25} \textit{See, e.g., Continental Enters., Inc. v. Cain, 180 Ind. App. 106, 110, 387 N.E.2d 86, 90 (1979).}

\textsuperscript{26} 348 U.S. 26 (1954).

\textsuperscript{27} \textit{See, e.g., Bacrol Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975); City of Owensboro v. McCormick, 581 S.W.2d 3, 5-6 (Ky. 1979); Phillips v. Foster, 215 Va. 543, 546-47, 211 S.E.2d 93, 96 (1975); In re City of Seattle, 96 Wash. 2d 616, 625-27, 638 P.2d 549, 555-56 (1981).}

\textsuperscript{28} 104 S. Ct. 2321 (1984).

\textsuperscript{29} \textit{Berman}, 348 U.S. at 30-31.

\textsuperscript{30} \textit{Id. at 31.}

one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.32

Thus, the Berman Court not only gave an almost unlimited meaning to public use, it also drew a very limited role for courts reviewing whether such actions were taken in the public welfare.

In Midkiff, the Court unanimously confirmed the Berman rationale.33 Midkiff involved a challenge to the Hawaii Land Reform Act of 1967,34 which allowed Hawaii to condemn large parcels of land owned by a few corporations, trusts, and wealthy individuals and to transfer smaller parcels to individuals then leasing the parcels as homesites.35 The Court of Appeals for the Ninth Circuit held the Act unconstitutional as a "naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."36 The court of appeals noted that, under the Act, lessees retained possession of the condemned property during the eminent domain proceedings, with title passing directly to the lessees on completion of the proceedings.37 The court found that Berman was therefore distinguishable, because the land in Berman was first transferred to the government for a "public use" and only then transferred to private parties.38

The Supreme Court, however, found Berman controlling.39 The Court unanimously held that the "'public use' require-
ment is . . . coterminous with the scope of a sovereign's police powers" and that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." The Court also emphasized that courts must defer to legislative determinations that the eminent domain action is a public use unless the determination "is shown to involve an impossibility." Moreover, the legislatively determined public use need not be successful as long as the legislature "rationally could have believed" that eminent domain action would serve a public end. Such judicial deference to state and federal legislatures is required, stated the Court, "because in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." The Court found that land reform is a valid public purpose and hence a legitimate exercise of police power. It further concluded that adopting eminent domain is not an irrational means of achieving such reform. Because the Act also satisfied the "weighty demand" of just compensation, the Court held that the Act was constitutional under the fifth amendment.

Midkiff eliminates the judicial power to enforce the fifth amendment's "public use" check. Courts may no longer independently inquire into the purpose behind eminent domain ac-

40. Id. at 2329.
41. Id. at 2331.
42. Id. at 2329 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).
43. Id. at 2330 (quoting Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-672 (1981)) (emphasis in Western).
44. 104 S. Ct. at 2331. The court of appeals had indicated that this high level of deference was to be accorded only to the United States Congress, and not to state legislatures. 702 F.2d at 798. The Supreme Court rejected this distinction, stating that "[s]tate legislatures are as capable as Congress of making such determinations within their respective spheres of authority." 104 S. Ct. at 2331. Thus, the Court continued, "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." Id.
45. 104 S. Ct. at 2330.
46. Id.
47. Id. at 2332.
48. State courts, of course, can still interpret their state constitutional provisions to require what Professor Ross terms the "second-guess" mode of review. See Ross, supra note 15, at 352-63. Few courts, however, appeared willing to take this independent path in cases arising before Midkiff. In Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), the Michigan Supreme Court found that Detroit's acquisition and demolition of an entire neighborhood was for a public use under the Michigan
tions but must accept, on face value, legislative determinations that the actions are for a public use. After *Midkiff*, the only judicial checks remaining are just compensation and the economic limitations that necessarily flow from such a requirement.

II. JUST COMPENSATION AND *DUNCANVILLE*

Just as the term "public use" is open to wide variation in interpretation, 49 "just compensation" could include many different levels of payment to the owner of property taken by eminent domain. At one extreme, the government would pay a "fire-sale" price for the property but would not compensate the

Constitution, even though the land taken was to be transferred to General Motors (GM). *Id.* at 652, 304 N.W.2d at 458.

The *Poletown* taking resulted from GM's expressed intention to close two Detroit plants and construct a new plant in an area that would not need to be cleared and that could accommodate new transportation facilities without significant change in those already present. *Id.* at 649, 304 N.W.2d at 466 (Ryan, J., dissenting). No existing site in Detroit met GM's specific criteria for such a "green fields" location. Detroit suggested nine areas that could meet the criteria if acquired under the state's eminent domain power and cleared. *Id.* at 652, 304 N.W.2d at 467 (Ryan, J., dissenting). GM chose the Poletown site, which included a closed automobile factory and a residential neighborhood. *Id.* at 658-59, 304 N.W.2d at 470-71 (Ryan, J., dissenting). Detroit then assembled the necessary land through private negotiation and eminent domain actions. *Id.* at 652-53, 304 N.W.2d at 467-68 (Ryan, J., dissenting).

Poletown residents sought to enjoin the taking. The trial court denied relief and, only ten days after oral arguments, the Michigan Supreme Court affirmed. *Id.* at 659-60, 304 N.W.2d at 471 (Ryan, J., dissenting). The court stated that deference must be given to Detroit's decision that the Poletown taking would be in the public use:

The Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court's role after such a determination is made is limited.

The Legislature has delegated the authority to determine whether a particular project constitutes a public purpose to the governing body of the municipality involved. The plaintiffs concede that this project is the type contemplated by the Legislature and that the procedures set forth in the Economic Development Corporations Act have been followed. This further limits our review.

*Id.* at 632-33, 304 N.W.2d at 458-59 (footnotes omitted). The court went on to find that the Poletown taking was for a legitimate public objective, "even though a private party will also, ultimately, receive a benefit as an incident thereto." *Id.* at 634, 304 N.W.2d at 458. The court thus followed the logic of *Berman*, 348 U.S. 26 (1954); see supra text accompanying notes 29-32, and foreshadowed the Supreme Court's reasoning three years later in *Midkiff*. But see supra note 27 (cases finding higher standard of "public use" under state constitutions).

49. See supra text accompanying notes 15-28; Ross, supra note 15, at 361-62.
owner for any additional costs resulting from the taking. At the other extreme, the government would pay whatever value the owner placed on the property, plus all costs the owner incurred because of the taking. Current law falls somewhere between the two extremes, but clearly leans toward minimal payment.

The Supreme Court has repeatedly held that just compensation is the market value of the property, or the amount that a willing buyer would pay a willing owner for the property. Two 1973 Supreme Court decisions illustrate both the standard and shortcomings of market value as just compensation. In Almota Farmers Elevator & Warehouse Co. v. United States, the government instituted an eminent domain action to acquire both the remaining term on a lessee’s land lease and improvements constructed by the lessee. The lessee had rented the land continuously from 1919 and had constructed and was presently operating grain elevator facilities on the leased land. During this period, the owner of the land had successively renewed the land lease, even though the lease did not contain an option to renew. In 1967, when the government began the condemnation proceedings, the lease term remaining was seven and one-half years. The lessee argued that just compensation for its property interest was the amount a willing buyer would pay for the lease with the improvements in place and with the clear expectation that the ground lease would be renewed.

50. Self-valuation by the owner would, of course, be impractical, because the owner would likely engage in strategic bargaining and refuse to reveal the actual value placed on the land. See United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

51. These costs could include items such as the cost of replacing the property taken, loss of business revenue, and specific demoralization costs. See infra text accompanying notes 167-182.


54. Id. at 471. The government also brought an eminent domain action against the underlying fee, id. at 486 (Rehnquist, J., dissenting), but had not acquired title or possession of the property at the time it condemned the lessee’s property interest, or even at the time of the Supreme Court appeal, id. at 477 n.4.

55. See id. at 470-71.

56. Id. at 471. The lease was renewed for periods of 20 years. See id. at 481.

57. Id. at 471.

58. Id. at 471-72.
The government contended that just compensation was the amount a willing buyer would pay for the remaining seven and one-half years of the lease term and the salvage value of the improvements at the end of that term. In a five to four decision, the Court agreed with the lessee.

Justice Stewart, writing for the majority, identified just compensation as the "full monetary equivalent of the property taken," in other words, market value is measured by "what a willing buyer would pay in cash to a willing seller." The Court rejected the government's contention that the lease renewal was speculative and determined that the lessee's interest must be measured as of the day the eminent domain proceedings began. It was therefore irrelevant that the government had since contracted to buy the land underlying the lease and could simply have refused to renew the lease on its expiration. Consequently, the market value of the lessee's property interest included a willing buyer's expectation that the grain elevator facilities would remain in place beyond the lease term:

In a free market, [the lessee] would hardly have sold the leasehold to a purchaser who paid only for the use of the facilities over the remainder of the lease term with [the lessee] retaining the right thereafter to remove the facilities—in effect, the right of salvage.

For the Almota Court, just compensation was thus the amount the lessee would have received if a "For Sale" sign had been placed in front of the grain elevator and a buyer had materialized.

In United States v. Fuller, decided on the same day as Almota, the government brought an eminent domain action against 920 of 1280 acres of ranch land owned in fee. The property owner also held federal grazing permits under the Taylor Grazing Act to 31,461 acres adjacent to the fee land.

59. Id.
60. Justices Brennan, Douglas, Marshall, Powell, and Stewart were in the majority, with Chief Justice Burger and Justices Blackmun, Rehnquist, and White in dissent. Id. at 470.
61. Id. at 473.
62. Id. at 474 (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).
63. See id. at 475.
64. See id. at 477-78.
65. Id. Justice Rehnquist, writing for the dissenters, agreed with the government's contention. See id. at 486 (Rehnquist, J., dissenting).
66. Id. at 475.
68. Id. at 488-49.
The property owner contended that just compensation for the property taken included the expectancy value of using the condemned land in conjunction with the Taylor Grazing Act lands. The government argued that the possible availability of the permits could not be considered as an element of value because the permits were expressly revocable at the will of the federal government. A five-justice majority, different from that in Almota, found for the government.

Justice Rehnquist, author of the majority opinion, reiterated that the property owner is entitled to fair market value but declined to compensate the Fuller property owner for the value a willing buyer would have placed on the fee land's proximity to the Taylor Grazing Act land. Because the "constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law," the Court found that the government need not compensate for "elements of value" that it "has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." Thus, the government was not required to compensate for the proximity value of Taylor Grazing Act land because that value was derived from permits that the government had issued and could revoke at will.

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70. 409 U.S. at 489. The owner also leased 12,027 acres from the state of Arizona. Id.
71. Fuller, 409 U.S. at 489.
72. Id.
73. The majority consisted of the four members of the Almota dissent and Justice Stewart, author of the Almota majority opinion. The other four members of the Almota majority comprised the dissent in Fuller. See id. at 488.
74. See id. at 490.
75. Id. (citation omitted).
76. Id. at 492.
77. Id. at 493. This apparently distinguished the Fuller facts from those in Almota for Justice Stewart. In Almota, the lessee's property interest in the land was created by the property owner, and the lessee had constructed the grain elevator facilities. See supra text accompanying notes 53-55. Moreover, the government had no ability to "destroy" the lessee's interest in Almota other than by condemning the underlying fee or the lessee's property interest. See supra text accompanying note 65.

Justice Powell, writing for the four dissenting justices, rejected these technical distinctions, stating that the condemned land derived its value from its proximity to land that, due to its location, was the logical beneficiary of the Taylor Grazing Act, and not from the revocable permits themselves. Id. at 503 (Powell, J., dissenting). Justice Powell also stressed the inequity of placing the costs of an eminent domain action on the property owner:

It hardly serves the principles of fairness as they have been understood in the law of just compensation to disregard what respondents
The Almota and Fuller decisions reveal that the Court does not attempt to determine the actual amount of costs that the property owner incurred from the taking but limits its review to the meaning of "market value." Market value, however, does not include additional costs, such as loss of business revenues, resulting from an eminent domain action. Rather, it is the practical minimum that the Court could have chosen as constituting "just compensation." Any less than some notion of market value would have contradicted any logical meaning of the words "just compensation." Moreover, market value may sometimes be very different than the actual worth of a property interest to a willing buyer. Under the Court's definition, market value is merely a contrived concept based on a hypothetical buyer and a hypothetical seller who enter into a hypothetical purchase agreement. The "uncertainty and complexity" of this concept is exacerbated by the Court's ability to manipulate market value in an effort to comport with "the basic equitable principles of fairness." The Court's interpretation of just compensation is thus a mechanical and legalistic definition that can severely understate the costs of eminent domain. The practical result is that the government will undertake eminent domain in some situations where the benefits to the public do not exceed the costs of the taking.

Duncanville provides an illuminating example of the potential for the inefficient use of eminent domain when the government need only pay market value. As part of a flood control project, the federal government condemned fifty acres of land that Duncanville, Texas, used as a "sanitary landfill." After the eminent domain proceedings began, Duncanville replaced the condemned dump with a superior facility encompassing over a hundred acres of land. Duncanville claimed

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78. See infra text accompanying notes 100-02.
79. See supra text accompanying notes 104-06.
80. Fuller, 409 U.S. at 490.
81. Fuller, 409 U.S. at 490.
83. Id. at 453.
84. Id.
that just compensation for the taking was over $1.2 million, the cost of replacing the condemned dump. The government contended that just compensation was limited to the market value of the condemned dump, which it asserted was approximately $200,000.

At trial, the district court permitted both parties to produce evidence of the fair market value of the condemned dump and the reasonable cost of a substitute facility. On specific interrogatories, the jury found that the fair market value of the condemned dump was $225,000, and the reasonable cost of a substitute facility was over $700,000. The district court, however, determined that no special basis existed for departing from the traditional market value standard and found that to require the government to replace the condemned dump would necessarily provide Duncanville with a "windfall." The court

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85. Id.
86. Id.
87. Id.
88. Id.
89. Duncanville, 529 F. Supp. 220, 222 (N.D. Tex. 1981), rev'd, 706 F.2d 1356 (5th Cir. 1983), rev'd, 105 S. Ct. 451 (1984). The court concluded that the market value standard could be deviated from only when the market value could not be ascertained or provided inadequate compensation for the taking. See id. The jury had determined the market value of the condemned dump, and, according to the court, that market value amply compensated Duncanville for the taking. See id. at 222-23.
90. Id. at 222. The district court relied heavily on United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (Lutheran Synod), for the conclusion that awards for the costs of substitute facilities are "windfalls." In Lutheran Synod, the government condemned three nonprofit summer camps operated by Lutheran Synod. Lutheran Synod claimed that just compensation was the cost of developing functionally equivalent substitute facilities at a new site, approximately $5.8 million. Id. at 508. The government offered only the market value of the property, $485,400. Id. The Supreme Court conceded that market value might not be sufficient to permit Lutheran Synod to continue operation of its summer camps at a new location. See id. at 514. Lutheran Synod's unique need for the property, however, was a "nontransferable value" and not compensable under the fifth amendment. Id. The Court further stressed that Lutheran Synod was under no factual or legal obligation to replace the camps and could therefore receive a "windfall" under the substitute-facilities measure. See id. at 515-16. Concurring, Justice White expanded the "windfall" theory:

Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer. . . . Similarly, if more demanding building codes or other regulations will enhance the cost of replacement, it is reasonable to assume that compliance itself will be of some benefit to the owner and hence need not be financed by the condemnor. Id. at 518 (White, J., concurring). Although Lutheran Synod foreclosed substitute-facilities compensation for private condemnees, it left open the possibility
therefore entered judgement for the city for $225,000, the market value of the condemned dump. The Fifth Circuit reversed, reasoning that Duncanville as a city was required to replace the dump and that to “deny Duncanville reimbursement for its unavoidable loss would be to deny just compensation.” Consequently, Duncanville was entitled to the amount needed to replace the condemned dump with a “functionally equivalent substitute facility.” Any potential windfall to Duncanville from this valuation measure could be avoided by discounting the award by the degree to which the new installation was superior to the one being replaced.

In a unanimous decision, the Supreme Court sweepingly rejected the Fifth Circuit’s approach and reaffirmed that just compensation is presumptively market value. The Court noted that the substitute facility measure created the risk that awards would be given for facilities that were never built or that were later converted to a different use. The Court stated that a superiority discount would not avoid this risk but would instead add uncertainty and complexity to the jury’s valuation process, thereby increasing the possibility of errors and “windfalls.” The implementation of the circuit court’s approach, the Court commented, would require the fact finder to make at least two complicated determinations:

(i) the reasonable (rather than the actual) replacement cost, which would require an inquiry into the fair market value of the second fa-

that public condemnees, required to replace the condemned facilities, could receive such compensation. See id. at 509 n.3. The district court in Duncanville, however, did not find the distinction between private and public property owners persuasive. 529 F. Supp. at 222-23.

93. Id.
94. Id. at 1362-63. The court held that the district court’s jury instructions on the substitute-facilities measure was “inadequate to enable the jury to make a fair and complete determination of the costs,” and therefore remanded for a new trial. Id. at 1363.
95. See 105 S.Ct. at 455. The Court found only two exceptions to the market value rule: deviations upward are allowed when market value is too difficult to ascertain or when market value would be so minimal in comparison to the actual costs as to be manifestly unjust. See id. The Court quickly found the first exception inapplicable because both the Government and Duncanville admitted the existence of “a fairly robust market” for landfill properties. Id. In the remainder of the opinion, the Court explained why the market value was not manifestly unjust compensation for the taking of Duncanville’s dump.
96. See id. at 457.
97. See id. at 457.
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...ility; and (ii) the extent to which the new facility is superior to the old, which would require an analysis of the qualitative differences between the new and the old.98

The end result of this process, even if undertaken correctly, "may amount to nothing more than a round-about method of arriving at the market value of the condemned facility."99

The Supreme Court further found that just compensation requires an objective standard of valuation and should not include any elements of the property's subjective value to the owner.100 To emphasize the necessity for purely objective standards, the Court quoted at length from its 1949 eminent domain opinion in *Kimball Laundry Co. v. United States*:101

Most things ... have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.102

The Fifth Circuit's substitute facility measure of just compensation was therefore improper because it compensated for the condemnee's need to have a replacement facility; in other words, it compensated for a "nontransferable value."103

Although intended as an indictment of the substitute-cost measure of valuation, *Duncanville*'s holding that market value is the proper measure of just compensation actually tends to be undercut by the Court's reasoning that market value is the most simple and certain measure. The process of determining market value contains uncertainties and complexities similar to those in determining the comparative value and superiority of a substitute facility. Under the market value standard, the fact finder establishes the amount that a willing buyer would pay for the property taken by considering amounts paid for compa-

98. Id. at 458.
99. Id.
100. See id.
102. 105 S. Ct. at 458 (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).
103. 105 S. Ct. at 458.
rable properties. The process of comparing values and qualities is thus very similar under the substitute facility and market value standards of just compensation. Moreover, expert testimony on the comparative value of a substitute facility is unlikely to be more difficult for a fact finder to comprehend than testimony on the value of the condemned facility. In Duncanville, expert testimony on the value of the condemned dump ranged from $160,410 to $370,000. From this testimony, the jury found that the market value of the dump was $225,000.

The Court's strict bar against subjective values entering into the just compensation award also appears unsupported. The Court found that market value, as a "transferable value," has an "'external validity'" that makes it a "'fair measure of the public obligation to compensate the loss incurred by an owner as a result of the taking of [the] property.'" The Court, however, offered no reason why "transferable value" has any greater "external validity" than does "nontransferable value." If the Court was relying on the ease of translating market value into monetary terms, market value has no significantly greater "external validity" than does the cost of a functionally equivalent substitute facility or any other element of damages that can be given a monetary value. On the contrary, the cost of the substitute facility in Duncanville was known; the only speculation was over the degree to which it was a superior facility. The Court's reasoning therefore is reduced to the assertion that it is simply "fair" for the owner to bear the burden of losing "nontransferable values" as part of the "burden of common citizenship."

The only justification for Duncanville is its adherence to the rules of prior cases, and stare decisis is hardly a compelling reason to restate bad law. Duncanville does not attempt to negate the possibility that in some situations, market value will not cover all the costs that a property owner incurs from a taking. Instead, the Duncanville Court focuses its attention on

104. United States v. 100 Acres of Land, 486 F.2d 1261, 1265 (9th Cir. 1972); see 4 P. NICHOLS, supra note 1, at § 12.311[3] (collecting cases).
105. 105 S. Ct. at 453 n.5.
106. Id. at 454.
107. Id. at 458 (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)).
108. Indeed, the Court admits that market value is a minimum standard and that Congress, if it desires, can authorize greater compensation. See 105 S. Ct. at 455 n.14. Because the Court concedes that Congress, and by implication
avoiding the risk that a property owner will receive more than its costs, or a "windfall." The end result is that the Court has adopted a measure of "just compensation" that cannot be all things to all property holders. By setting a formalistic standard for all condemnations, the Court neglects to construct a standard that more closely approximates the costs resulting in individual cases and that would thus tend to create a more efficient and equitable approach to eminent domain.

III. POLITICAL LIMITS ON EMINENT DOMAIN

The Court in Midkiff must have relied on its faith in the representative system to conclude that courts should not "second-guess" a government's determination of existence of a public use "unless the use be palpably without reasonable foundation." To a lesser extent, the Court's decision in Duncanville is also built on the belief that the political process provides a check on governmental exercises of eminent domain. Although the Duncanville Court found that courts can deviate upward from the market value formula only "when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public," it also asserted that governments may deviate upward whenever they conclude it best to do so. Thus the Court in Duncanville, as it did in Midkiff, placed the burden of limiting governmental actions on the government itself. The balance has therefore shifted from the judicial enclave to the political arena.

Governmental decisions to use eminent domain are made by legislators and executives who are accountable to their constituents. In theory, when a majority of voters disagrees with its representatives' use of eminent domain, the voters will respond by electing new representatives. The political system, therefore, should itself provide the necessary check on the use of eminent domain. This theory presumes, however, that the American society consists of an informed, politically ac-

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110. 105 S. Ct. at 455 (quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

111. 105 S. Ct. at 455 n.14, 457.

112. It is unlikely that any person has access to perfect information and much less likely that the person has that perfect information. An "informed"
tive, and unprejudiced electorate, that the electorate selects informed legislators and executives who in turn make accurate, uncorrupted, and reasoned decisions, and that the electorate engages in effective review of actions taken by citizen, therefore, is one who has good information. While this is admittedly vague, "good" encompasses enough information to know the basic claims being made by the proponents of the different sides of an issue and to enable a person to form a reasoned opinion about which side should prevail.

113. A "politically active" electorate is one that becomes informed and expresses its preferences by voting. Although this does not necessitate unanimous participation, it should include proportionate participation by ethnic and socioeconomic groups.

114. The electorate should not be prejudiced for or against any group or person. An unprejudiced electorate will weigh the concerns of the various parties in a dispute and base its decision on the merits of the dispute rather than its opinion of the parties to the dispute.

115. An accurate decision is not merely an informed, reasoned, and uncorrupted decision. It is also a correct decision, a decision not based on a mistake or illusion.

116. An uncorrupted decision is a decision not motivated by the personal gain of the decision maker.

117. To be reasoned, the decision must be both efficient, such that its aggregate benefits outweigh its aggregate costs, and fair. "Fairness" in this context encompasses both fairness in fact and fairness in perception. Durham, In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosure, 36 S.C. L. Rev. 461, 503-04 (1985). Fairness in fact is tied to efficiency and equity, with equity being the formulation of society's choices for the distribution of resources and benefits. In this Article, the terms "efficiency" and "equity" will be used to distinguish between fairness in fact and fairness in perception. Fairness in perception goes to procedural fairness—the fairness of the process by which the decision is adopted and carried out—and the fairness of the overall result.

A higher burden is placed on elected officials, who are required to be reasonable, than on the electorate, which is merely required to be unprejudiced. Elected officials should have the information and expertise to make the correct decision, one that is efficient, equitable, and fair. See A. Downs, AN ECONOMIC THEORY OF DEMOCRACY 27 (1957). The electorate, on the other hand, will not always be able to get the same information as the elected officials and will not have the same expertise. The electorate, therefore, cannot always be expected to make the right decision but can be required to make an unprejudiced decision.

The electorate also is not required, as elected officials are, to be uncorrupted. See supra note 116 and accompanying text. This reflects the belief that it is difficult to "buy off" the electorate, but it is at least a possibility that some elected officials will be influenced by personal gain. To the extent that the electorate could be corrupted, the corruption will be manifested in prejudice by the electorate. Although corruption in elected officials might be similarly addressed by the fairness in perception requirement, the possibility of corruption is sufficiently large to address it as a separate component in the theory of a political check on eminent domain.

118. This is the most important assumption underlying the Midkiff and Duncanville decisions. If courts stand as obstacles to the use of eminent domain, the real damage can be stopped when necessary. If the courts block the
its elected representatives.

The premise that the actors in the political process—the electorate and its legislators and executives—are adequately informed\textsuperscript{119} as to the costs and benefits of the eminent domain action is key to the validity of most of the theory’s other assumptions. If this assumption does not withstand analysis, each of the other assumptions also must fall. An electorate with inadequate information cannot always be assumed to be politically active and fair or to effectively review the eminent domain decisions of its legislators and executives. Nor can the most reasonable and uncorrupted of representatives make accurate decisions based on inadequate and thus inaccurate data. The likelihood that the public educates itself with all the facts and figures behind eminent domain actions, however, is slight.\textsuperscript{120} Moreover, the incentive of representatives to gather the necessary information to make the right decision is most likely less than the incentive to make a decision that could aid in their bids for reelection.\textsuperscript{121} The mere possibility that these factors will result in some eminent domain actions based on inadequate information gives rise to the need for some other check.

Even if the decisions of the electorate and the elected are based on adequate information, however, the validity of the

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\textsuperscript{119} "Adequate" information requires both sufficient and correct information.

\textsuperscript{120} See A. Downs, supra note 117, at 80. Anthony Downs suggests, "[I]n many cases, most citizens do not know what they want government to do." \textit{Id}. at 90. Downs also states that the no one "has a very high incentive to acquire political information" because information is "relatively useless" to those who care. who wins and because those for whom information is useful do not care who wins. See \textit{id}. at 244. He notes that "[a]ny concept of democracy based on an electorate of equally well-informed citizens is irrational" because of the variable costs and incentives to acquiring information. See \textit{id}. at 236. Finally, Downs concludes that people vote even if they are not informed. See \textit{id}. at 298.

\textsuperscript{121} \textit{Id}. at 30-31 (the officials' greatest incentive is reelection, and their decisions will reflect the position that will receive "the most votes without violating constitutional rules").
political check theory is still doubtful in light of the low level of participation by those eligible to vote. It is difficult to argue that the electorate is politically active and engages in effective review of actions taken by its representatives when only a small majority of those eligible vote. Moreover, the level of voter participation is not proportionate socially, economically, or racially, casting serious doubts on the assumption that the electorate as a whole is unprejudiced. As Anthony Downs has suggested, every individual is selfish and seeks to maximize personal utility, which may or may not include altruism. A majority of the voting electorate may decide that the eminent domain action benefits them and therefore support the action despite the inequitable burdening of the minority. When a disproportionate group of people from a high socioeconomic status dominates the polls, for example, the result may not be the one most fair but the one most favorable to people of that status.

The assumption that elected officials constantly engage in both reasoned and uncorrupted decision making also does

122. See generally H. Bone & A. Ranney, Politics and Voters 32-46 (4th ed. 1976). Between 55% and 65% of eligible voters voted in United States presidential elections from 1948-1972. Id. at 35. Voter turnout for national elections has been declining since 1960. Id. at 34. Moreover, voter turnout is even lower for local elections: “Turnout is almost always higher in national elections than in state and local elections.” Id. Because most eminent domain actions are local, this further exacerbates the effect of low voter turnout on eminent domain issues.

123. Professors Hugh A. Bone and Austin Ranney note:

[M]en vote proportionately more than women, older people more than younger, more educated people more than less educated, people with high socioeconomic status more than people with low status, Catholics and Jews more than Protestants, and whites more than blacks.

Id. at 35. Downs states that the wealthy are better educated and better able to acquire information, see A. Downs, supra note 117, at 235, and concludes that these factors may explain why the wealthy are more politically active than the poor, see id. at 299. Downs also suggests that low voter turnout and the voter's lack of adequate information may be interrelated:

No matter how significant a difference between parties is revealed to the rational citizen by his free information, or how uncertain he is about which party to support, he realizes that his vote has almost no chance of influencing the outcome. Therefore why should he buy political information? . . . He will not even utilize all the free information available, since assimilating it takes time.

Id. at 245.

124. See A. Downs, supra note 117, at 27.

125. Id. at 36.

126. Id. at 27.

127. Id.

128. See supra notes 116-17.
not reflect reality. The political livelihood of these officials depends on satisfying their constituents. Even when fully informed as to the consequences of an eminent domain action, therefore, legislators and executives will not always reach the rational decision but may reach a decision that best furthers their self-interests. In addition, government officials sometimes make mistakes. A very probable mistake that some officials might make in eminent domain decisions will be to operate under a "fiscal illusion." The concept of fiscal illusion proposes that governmental bodies underestimate costs unless required to include them in their budgets. Fiscal illusion will be a significant factor in the accuracy of eminent domain decisions as long as current law permits governments to externalize many costs of eminent domain by requiring only minimal just compensation.

New York City's construction of the Cross-Bronx Expressway in the 1950's exemplifies the inadequacies of the political process as a check on the use of eminent domain. The Cross-Bronx Expressway was one of several major traffic arteries that Robert Moses, a New York City Planning Commissioner and Construction Coordinator, built after World War II in

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129. Downs comments:
Favor-buying is usually nothing so crude as bribery; it is the subtler device of making campaign contributions in return for a favorable disposition of attitudes by a party: pro-free-enterprise, pro-labor, anti-free-trade, etc. The payments received by the party may not even be in money. Instead they may be editorial policies, weight thrown in a crucial electoral district, or willingness to refrain from opposing certain policies.

A. DOWN, supra note 117, at 92.

130. See S. MAITAL, MINDS, MARKETS, & MONEY 268-69 (1982) (noting that any new behavioral economics theory must acknowledge that human beings err). Professor Schlomo Maital explains that people err in the way they perceive reality and that this misperception of government and other people's behavior determines conduct.


133. Id. at 3. Although Moses served as Park Commissioner, New York City Construction Coordinator, and Planning Commissioner, he held an incredible amount of power to shape the city of New York. In four decades, he built most of the major expressways and parks, he supervised construction of nearly $27 billion of public works, and he originated and promoted major urban renewal projects throughout New York City. Id. at 3-16.

134. Although not an engineer, Moses supervised the building of 627 miles
an attempt to alleviate New York City's crushing traffic problems. Although the Cross-Bronx Expressway is only seven miles long, Moses's biographer, Robert Caro, chose to describe the process of selecting a mere mile of the expressway's route in his story of political power and political powerlessness.

That one mile section of the Cross-Bronx Expressway runs through the Bronx's East Tremont neighborhood. East Tremont was a crowded neighborhood composed primarily of Jews whose parents had escaped from the poverty of New York City's Lower East Side and who could not themselves afford to escape the crowding of East Tremont. Despite the drawbacks of East Tremont, it was still a neighborhood to which its residents were fiercely loyal.

This mile of the Cross-Bronx Expressway fell at a point requiring a slight curve that could have followed one of two routes. The first route would have taken the expressway along the border of Crotona Park, a right-of-way already owned by New York City, and would have required the acquisition of six apartment buildings, housing a total of nineteen families, and the Third Avenue Transit Company's bus terminal. The second route was longer and entailed a wider curve in the Expressway. In addition, the second route required the acquisition and demolition of fifty-four apartment buildings, ninety buildings housing one or two families, and sixty stores, displacing a total of 1530 families. The land acquisition costs were $10 million higher for the second route, and no estimate of roads in and around New York City, id. at 850, and Moses personally selected the route for the Cross-Bronx Expressway. Id. at 878.

135. Id. at 850.
136. Id.
137. The neighborhood housed 441 persons per residential acre, which "was considered 'undesirable' by social scientists." Id. at 851.
138. Id.
139. East Tremont consisted of older buildings. Id. It was also a neighborhood in an area in transition from being primarily white to becoming primarily black, id. at 857, which may have been viewed as a negative by the white, Jewish residents of the area in the early 1950's.
140. Caro identifies several elements that account for the residents' loyalty. Many of the residents had lived in East Tremont their entire lives. Id. at 853. It was close to the garment district where many of the residents worked. Id. at 851. Finally, rents were low enough to permit many residents to afford a decent place away from the Lower East Side and for others to afford other indicators of social mobility, such as sending their children to college. Id. at 855.
141. Id. at 878.
142. See id. at 864 (map of two routes).
143. Id. at 869.
was made of the additional costs of relocation and loss of future property tax revenues. The residents of East Tremont favored the first route. Moses favored the second.

Caro recounts in great detail the fight mounted by the East Tremont residents to persuade Moses to accept the first route and to influence the politicians who would vote on which route to adopt. The residents' campaign failed. More importantly, those politicians voting for the second route suffered virtually no political consequences from their choice, even though several reneged on promises to help residents, publicly reversed their positions, and voted for Moses's route.

Why Robert Moses insisted on the second route and why the elected officials supported his decision are impossible to determine. Caro suggests several possible reasons for Moses's insistence on the second route, including political corruption and whim exacerbated by stubbornness. The legislators and executives may have acquiesced to Moses because of corruption, fear of Moses's political clout, inadequate information, or simple mistake. For whatever reason, no political repercussions followed the politicians' votes. Robert Moses may have been an extraordinarily powerful man, and New York may be an extraordinarily large city, but 1530 families were directly affected by an arbitrary use of eminent domain and the representative system did not prevent it from happening. No political uprising occurred and very little was ever reported in the New York papers for other citizens to read and consider. The majority of the voting electorate thus either did not know how the route for this mile of the Cross-Bronx Expressway was chosen, did not care how the route was chosen, or knew and cared but felt

\[144. \textit{Id.}\]
\[145. \textit{Id. at} 859-875.\]
\[146. \textit{Id.}\]
\[147. \text{Caro suggests that Moses may have chosen the first route because the second would have required condemnation of property owned by a relative of Bronx Borough President James Lyons. See \textit{id. at} 877. In addition, the Third Avenue Bus Company, whose terminal was also slated to be condemned for the first route, may have applied pressure or used influence to convince Moses to adopt the second route.}\]
\[148. \text{See \textit{id. at} 878.}\]
\[149. \text{The lack of public response may be partly attributed to the great speed at which the eminent domain actions proceeded and were concluded. Only ten months after the East Tremont buildings were taken by eminent domain, the buildings were vacant. \textit{Id. at} 884. The 1530 families were rushed out of their homes in 1954, \textit{id. at} 881, for an expressway that was not completed until 1960, \textit{id. at} 886.}\]
\[150. \textit{Id. at} 869, 876-77.\]
the route was in their best interests. The result was neither efficient nor equitable.

As demonstrated by the Cross-Bronx Expressway experience, some check on governmental decisions to use eminent domain actions is necessary, and the political system cannot provide it. At one time, the "public use" requirement of the fifth amendment may have provided a sufficient check by permitting courts to inquire into the purpose, the quality, and the advisability of the eminent domain action. Following Midkiff, however, the public use requirement will be no greater a check than the political system. Only the "just compensation" requirement retains enough vitality to allow courts to check the inefficiencies and inequities of governmental eminent domain actions—inefficiencies and inequities caused, to a large extent, by the present interpretation of just compensation.

IV. EFFICIENT JUST COMPENSATION

If all eminent domain actions proposed by governments were efficient and equitable, no need would exist for a judicial check on such actions. The Cross-Bronx Expressway demonstrates the fallacy of such a proposition. A government may pursue an inefficient eminent domain action because it underestimates the costs or overestimates the benefits of the taking. Moreover, the decision to use eminent domain may be made by corrupted or unfair officials, who are unconcerned about inefficiency even though aware of it. Finally, an eminent domain action may be inequitable because the burden of the action falls on a minority of the population.

Measuring just compensation by the market value of the property taken greatly increases the probability that a government's eminent domain action will be inefficient. Because the government is not accountable for all the costs of the taking,
“fiscal illusion”\textsuperscript{156} may cause underestimation of costs and fail to deter if not induce inefficient actions. Further, the market value standard allows inequity to taint even efficient eminent domain actions. For example, the benefits of a taking may indeed outweigh its costs, but a substantial proportion of those costs will be borne by the owners of the property being taken by the eminent domain action.

Many of the causes of inefficient and inequitable eminent domain actions could be eliminated by requiring governments to compensate owners and the public for all external costs that should enter into a government’s cost/benefit calculus. The governments would thus be forced to consider the efficiency of proposed actions, and the burden of actions undertaken by the governments would be borne by the same public that is supposed to benefit from the action. Such “efficient just compensation” would not, of course, prevent inefficient actions arising from overestimation of an action’s benefits or from corruption and unfairness of decision makers. The potential that these factors create for inefficient takings, however, indicates that the individual property owners should not suffer the consequences of these inefficiencies, but rather that the burden should fall on the public that fails to prevent these inefficiencies through effective review of government decisions to employ eminent domain.\textsuperscript{157}

A. DETERMINING THE COSTS IN AN EFFICIENCY ANALYSIS

For efficient just compensation to be an effective check on governmental uses of eminent domain, the costs to others, or “externalities,”\textsuperscript{158} that should enter into a government’s cost/benefit analysis must be identified. Implicit in the notion that efficiency can be determined by weighing an action’s costs against its benefits is the idea that both the costs and benefits can be reduced to some uniform method of valuation. The most intuitive method of valuation is to use monetary value, but not all externalities of an eminent domain action can readily be given monetary value. In such circumstances, as Judge Stephen

\begin{itemize}
\item \textsuperscript{156} See supra text accompanying note 131.
\item \textsuperscript{157} See supra text accompanying notes 119-27.
\item \textsuperscript{158} Externalities, or spillovers, have been described as “[t]he differences between true social costs and unregulated price.” S. BREYER, supra note 14, at 23.
\end{itemize}
Breyer has stated, the efficiency analysis should only recognize those externalities that are "large, fairly concrete, and roughly monetizable."\(^{159}\)

To illustrate this method of determining the costs of an action, consider a situation in which a coal-fired electrical generating plant equipped with the best pollution control devices available is located in a residential neighborhood. To produce one unit of electricity, the plant can burn either scarce, expensive hard coal for $5 or plentiful, cheap soft coal for $4. With no other factors entering the efficiency analysis, the plant should burn soft coal because it costs less than burning hard coal. Further assume, however, that the plant's pollution control devices prevent any smoke emissions when hard coal is burned but permit a substantial amount of smoke to be emitted from the plant when soft coal is burned. The smoke primarily affects persons living in the adjacent residential neighborhood, with only a negligible effect on the overall air quality of the city in which the plant is located. The cost/benefit calculus must now include those effects on other persons, or externalities, that are "large, fairly concrete, and roughly monetizable."

The physical damage to surrounding residents\(^{160}\) by the smoke clearly should be regarded as one of the costs of burning soft coal. It is large, concrete, and roughly, if not exactly, monetizable.\(^{161}\) In contrast, the physical damage suffered by the city's citizens is arguably concrete and monetizable,\(^{162}\) but is not large because the smoke has only a negligible effect on the city's air quality. Therefore, under Judge Breyer's assertion

\(^{159}\) \textit{Id. at 26.}  
\(^{160}\) The damages suffered by both the residents of the surrounding area and the city's citizens include any physical damage to or diminution in value of their real and personal property, any costs of avoiding the effects of the smoke, and any shortening or loss of life.\(^{161}\) Physical damage to or diminution in value of real and personal property may be difficult to ascertain, but both are monetizable. The same can be said about the costs of avoiding the effects of the smoke. It will be more difficult both to ascertain and monetize any shortening or loss of life, but to the degree that they can be ascertained and monetized they should be included.\(^{162}\) The damages should be as readily monetizable as the physical damage to surrounding residents. \textit{See supra} note 161. In an absolute sense, the damages should also be just as concrete. \textit{See id.} The smoke only negligibly affects the city's air quality, however, and the physical damage incurred by the city's citizens may be so small as to defy easy detection. For example, the smoke may noticeably and rapidly deteriorate the paint on an adjacent resident's house but only slightly affect the paint on houses in other parts of the city. The damage is concrete nonetheless, but finding the damage and linking the damage to its cause is another matter.
that only those externalities that are large should enter into an efficiency analysis, the physical damage to the citizens is not included as a cost of burning soft coal.

Another externality to be considered is the demoralization costs suffered by the adjacent residents and the citizens of the city. Professor Frank I. Michelman has defined "demoralization costs" as

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. \(^{163}\)

Demoralization costs can be divided into specific and general demoralization costs. \(^{164}\) The adjacent property owners, for example, suffer specific demoralization costs because they are directly affected by the smoke. The city's citizens are indirectly affected by the small, immeasurable impact of the smoke when combined with other air pollution, and thus suffer general demoralization costs.

In this hypothetical, both specific and general demoralization costs may not be large, are not concrete, and are difficult to monetize. Indeed, ascertaining the very existence of such costs is a formidable task. As Professor Michelman noted:

[I]t obviously will not do to interview every potential compensation claimant and ask him how demoralized he expects to be if a given measure is adopted without provision for compensation. . . . The interviewee probably will not himself know the answer to the question (putting aside the difficulty of his attaching a dollar value to his outrage and his loss of incentive even if he could appraise those subjectively) and, for strategic reasons, would not reveal the true answer if he knew it.

We are compelled, then, to frame the question about demoralization costs in terms of responses we must impute to ordinarily cognizant and sensitive members of society. \(^{165}\)

Consequently, the specific and general demoralization costs resulting from a decision to burn soft coal do not meet the test

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163. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214 (1967) (footnote omitted). Although Professor Michelman's brilliant article dealt with the problem of uncompensated takings resulting from governmental actions other than eminent domain, his definition of demoralization costs is adaptable to the compensated takings resulting from eminent domain.

164. See Ross, supra note 15, at 377 nn.89-90.

165. See Michelman, supra note 163, at 1215-16.
for externalities suggested by Judge Breyer and should not be considered a cost of burning soft coal within a cost/benefit analysis.

The only externality entering into the analysis, therefore, is the physical damage to persons living in the surrounding residences. If the damage is less than the $1 per unit differential between hard and soft coal, the plant should burn soft coal. On the other hand, if the damage is more than the $1 per unit difference, the plant should use hard coal.\textsuperscript{166} The coal chosen will be that which the cost/benefit analysis indicates will produce the most efficient result.

B. DETERMINING THE COSTS OF EMINENT DOMAIN

Just as efficiency was initially determined in the power plant hypothetical by looking only at the internal cost of burning hard or soft coal and ignoring the costs incurred by others, the current use of market value as just compensation in eminent domain limits a determination of the efficiency of eminent domain. As with the power plant, the efficiency of a taking is

\textsuperscript{166} This hypothetical has approached the efficiency analysis without regard to who is making the decision whether to burn hard or soft coal. If the plant is making the determination, it very likely will not include externalities such as the physical damage to residents in its cost/benefit analysis unless it is legally responsible for those costs. In most circumstances, however, legal entitlement will not affect the actual efficiency of an action. Coase, \textit{The Problem of Social Costs}, 3 J. Law \& Econ. 1 (1960). Thus, the plant's cost/benefit calculus, reflecting only its legal obligations, does not reflect efficiency but the plant's balance sheet.

Legal entitlement enters the efficiency analysis to the extent that a decision must be made as to where the entitlement should be assigned. Under the Coase Theorem, the legal entitlement should be assigned to minimize transaction costs, thereby reaching the efficient result for the situation. \textit{Id.} Transaction costs occur when affected parties deal with each other. For example, if the plant is not legally liable for its pollution, and the surrounding residents suffer aggregate damages of $2 for every unit produced from the soft coal, the residents will be willing to pay the plant up to $2 per unit to burn hard coal. Transaction costs will result from meeting with plant managers to set the payment terms and from any strategic bargaining, which occurs when one party asserts an inefficient position to gain an advantage. For example, the plant managers may insist on a $2 per unit payment even though their additional cost of burning hard coal is only $1; if no agreement is reached as a result, the strategic bargaining has, by itself, become a transaction cost.

If the transaction costs are higher when the plant is allowed to pollute than when it is not, the plant should be forbidden to pollute. When the legal entitlement is assigned, the resulting distribution of wealth does not figure in the efficiency analysis. That the plant must now bear the additional cost of burning hard coal and the citizens have gained the benefit of clean air does not affect the decision to bar the plant from polluting.
determined only when both internal and external costs and benefits are considered. A government's cost/benefit calculus of an eminent domain action, therefore, must include not only the market value of the property taken but also all externalities that are "large, fairly concrete, and roughly monetizable." The proposed efficient just compensation standard would force the government to recognize these externalities in its efficiency analysis by making them internal costs included in the government's budget, and thus impossible to ignore.

1. Externalities of the Owners Whose Lands Are Taken

Five categories of external costs presently borne by owners whose lands are taken by eminent domain can be identified: replacement of the land and improvements taken; relocation, including moving costs, and the termination and startup costs of utilities and other services; lost current business revenue; lost business goodwill or value; and any specific demoralization costs. The first four categories of costs should all enter into a government's cost/benefit analysis. Like market value in the current system of just compensation, these costs are measured in monetary terms and are either directly provable by the owner or can be estimated by experts.

167. The following listing of an owner's costs includes costs that would be incurred by both a residential owner and a business owner. Obviously, not every owner will incur the same costs.

168. Compensation for these costs would only be appropriate to the extent they exceeded the market value of the property taken. Compensation for these additional costs would not be double recovery, but instead would put the owner in the position that would have existed but for the eminent domain action. Further, the owner does not owe the government any money if the owner acquires replacement property for less than the market value of the taken property. Every owner has the right to relocate for financial gain. The government should not be able to deprive the owner of any potential gain by forcing the relocation decision.

169. Such costs can result from a business being forced to temporarily cease operation during physical relocation of the business.

170. A business may be worth more in one location than in another. If the new location results in a less profitable and hence less valuable business, the eminent domain action has injured the property owner in an amount equal to the loss in value.

171. In combination, these costs represent the "opportunity costs" that the owner has suffered.

The fact that the condemnor in an eminent domain proceeding is not required to show that his use of the land will be more valuable than the present owner's, but only to render compensation, will result in inefficient land uses if required compensation is not equal to the opportunity costs of the land seized . . . .

Under the proposed interpretation of the "just compensation" requirement, therefore, the government should assume these costs of eminent domain. Demoralization costs, however, are more problematic. In the power plant hypothetical, the demoralization costs suffered by the adjacent residents and the city's citizens did not meet the externalities test and consequently were not considered a cost of burning soft coal. The specific demoralization costs incurred by owners of property taken by eminent domain must be examined to determine whether they are sufficiently "large, fairly concrete, and roughly monetizable" to be includible within a government's cost/benefit analysis.

Specific demoralization costs appear to be greater for eminent domain actions than for other governmental actions. Property owners suffer particular demoralization costs when their property is forcibly taken from them and used for whatever reason the government sees fit. In many instances, however, these costs will not be sufficiently large or concrete to meet the externalities test. In the case of owners of business property that is taken by eminent domain, for example, the first four categories of externalities should amply compensate for their costs. In contrast, the owner of residential property that is taken by eminent domain suffers the additional demoralization cost of being required to abandon a home. These demoralization costs will increase with the length of time that the owner has used the property as a home. For example, the owner of a residence that has been the family home for generations will likely suffer large demoralization costs. In addition, these costs will be as concrete and monetizable as those damages compensated in any emotional distress tort case. These demoralization costs, therefore, should be included in the government's cost/benefit analysis and in the owner's compensation for the taking. The taking of a home owned for only a few months, or even a few years, however, will not normally cause demoralization costs large and concrete enough to be included within the efficiency analysis. Consequently, this demoralization will not, in most instances, be a

172. See supra notes 163-65 and accompanying text.
173. See supra notes 167-70 and accompanying text.
174. The award will, in a sense, be compensating the owner for any emotional distress or "exogenous preferences," which is the value a person establishes for a thing independently of the values placed on that thing by other persons. See A. Polinsky, An Introduction To Law And Economics 10 (1983) (defining exogenous preferences).
compensable cost under the proposed efficient just compensa-
tion measure.

In all cases, however, there will be some demoralization
costs caused by the very act of taking. Moreover, the property
owner may not agree with the eventual use of the property.
Eminent domain is one of the few situations in which citizens
see the direct consequences of governmental actions that nega-
tively affect them. For example, two federal income taxpay-
ers may envision differently the government’s use of their tax-
monies. One who is pro-defense spending may find a “морали-
зация” benefit in thinking that the money is used to build
weapons, whereas another who is pro-social spending may find
such a benefit in thinking that the money is used to feed hun-
gry children. Either way, any moralization benefit or demorali-
zation cost of paying taxes is not directly associated with any
particular action by the government. The owner of property
taken by eminent domain, however, does see the direct conse-
quences of the action—the project for which the government
used eminent domain. The specific demoralization costs caused
by the taking will be amplified when the taking’s outcome is
not to the owner’s liking.

Another incidence of demoralization costs is more direct
but rests on a more subtle foundation. Eminent domain, unlike
most other governmental actions, pits one person or a small
group of persons directly against the majoritarian govern-
ment. As Professor Michelman explained, an owner faces addi-
tional demoralization costs by being singled out for an eminent
domain action:

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175. “Negatively” is not used in the absolute sense, but in the sense that
citizens may perceive that they are losing wealth or position from governmen-
tal action.

176. Alternatively, the taxpayers could focus on how they do not want
their monies spent. Again, however, the taxpayers will not directly observe
their money being applied to the project.

177. Of course, if the owner agreed with the use, the owner might gain a
moralization benefit. This benefit will be reflected in the owner’s lack of de-
morализация costs, but it should not entitle the government to “set off” the
benefit against the other compensable costs.

178. Taxes, for example, similarly affect all people, or at least a very large
group of people.

179. Although some eminent domain actions can affect an entire neigh-
borhood, see Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304
N.W.2d 455 (1981); supra note 48, or a substantial number of persons, see supra
notes 132-50 and accompanying text, even these groups are small in compari-
son to the number of persons residing in the city where the neighborhood or
persons are located.
If I [as a property owner] am able to mobilize my productive faculties under the general conditions of uncertainty which prevail in the universe, why should I be paralyzed by a realization that I am at the mercy of majorities?

... The defense must begin with an imputation to human actors of a perception that the force of a majority is self-determining and purposive, as compared with other loss-producing forces which seem to be randomly generated. ... When the bearing of strategy is evident, one faces the risk of being systematically imposed upon, which seems a risk of a very different order from the risk of occasional, accidental injury.180

Moreover, the specific demoralization costs resulting from this confrontation with the collective majority can be increased by the owner's realization that the majority, and the representative system as a whole, is less likely to check abuses of eminent domain actions than in other governmental actions.181

Although these additional demoralization costs are significant, they are probably not sufficiently large and concrete for a judge or jury to impute to an "ordinarily cognizable and sensitive owner."182 Consequently, these costs are not considered under an efficiency analysis and are therefore not included within an owner's efficient just compensation. These demoralization costs, however, are not excluded from the efficiency analysis because they do not exist, but rather because they are too difficult to plug into a cost/benefit analysis. Governments, therefore, will probably continue not to recognize these excluded costs, even though such costs will be present in most actions.

Although requiring governments to assume costs that should enter into their cost/benefit analysis will increase the efficient use of eminent domain actions, the benefit of this efficiency must also outweigh any additional transaction costs caused by awarding property owners those costs. When transaction costs are considered in an efficiency analysis, legal entitlement should be assigned to minimize transaction costs and thereby reach the result that best maximizes aggregate wealth.184 Thus, if the transaction costs of efficient just compensation exceed its benefits, the added compensation should not be awarded.

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180. Michelman, supra note 163, at 1217 (emphasis in original).
181. See supra note 122 and accompanying text.
182. See supra note 165 and accompanying text.
183. The transaction costs would include actual attorney and court fees, delay, time spent by the litigants and others, and the possibility that the decisions by the court will be inefficient.
184. See supra note 166.
Including all costs entering into the efficiency analysis within the just compensation award should not significantly raise the transaction costs of eminent domain lawsuits. Some parties will already be in court litigating valuation, with experts ready to testify to market value and other losses by the owner. In situations where the owner has agreed to the government's market valuation, thus avoiding litigation, the owner may also agree to the government's offer covering all costs. In this circumstance, including the proposed just compensation award will have no significant impact on transaction costs. Another possibility is that the owner will dispute the offer, thereby forcing a lawsuit and causing transaction costs that would have been avoided under the current law of just compensation. Even in this instance, however, the transaction costs are not great enough to make the proposed just compensation award inefficient. Although both the government and the owner may engage in strategic bargaining, both will be aware of the costs of litigation, and this awareness will be a deterrent to bargaining to impasse. Moreover, the greater awards of efficient just compensation are justified, in part, by the inequity of burdening the property owners with costs that the public should bear and by the need to find some judicial limit to replace the ineffectual political check. The transaction costs

185. The lawsuit will therefore be a cost of strategic bargaining by the land owner or the government. Strategic bargaining occurs when one or both parties to a negotiation will hold out for a personal gain in excess of what would be efficient. See A. Polinsky, supra note 174 at 18; supra note 166.

186. This assumes that a party to an eminent domain lawsuit will not be awarded attorney's fees by the court unless the party can prove that its refusal to continue negotiations was reasonable.

187. If efficiency is a singular goal, these factors might not enter into the weighing of the benefits of efficient just compensation. Governmental actions, however, must also be equitable. See supra note 117. Even assuming that most actions taken by governments under the market value measure are efficient, the actions still are not equitable when they burden a minority for the public good. As Professor William F. Baxter explained, the public must pay when it has determined that the property is worth more to the public than to the property owner.

[The basic justification for taking the land at all is that it is more valuable to the community (including the owner) in the new public use than it is to the community in the privately profitable use to which the owner would put it. If this justification is truly available with respect to a given parcel, then it follows that the community can afford to pay the owner the market value of the land. For by assumption, the aggregate benefits that the community has received are greater in amount than are the marketable benefits which he could have produced by the alternative use, and those marketable benefits determine the market value of the land. The requirement of compensation
therefore would have to be very high to cause efficient just compensation to be inefficient, much higher than the apparent costs of additional lawsuits when a governmental entity is already engaging in some eminent domain actions.\textsuperscript{188}

2. Externalities of Owners Whose Lands Are Not Taken

Owners whose lands are not taken incur three categories of presently external costs from the taking of another's property by eminent domain: loss of market value of land surrounding the parcel taken by eminent domain; loss of current revenue by businesses located proximately to the parcel taken; and general demoralization costs. The first two present difficulties of proving loss from the eminent domain action and thus lack the concreteness necessary to be included in an efficiency analysis.\textsuperscript{189}

\begin{quote}
therefore imposes a test on the good faith of members of the community: do they really believe that the value of the land, when put to the public use, is greater than its private value? If they do, they gain by condemning it, even though they must pay. If they do not, they should not condemn it.

W. BAXTER, \textit{supra} note 8, at 46. The "test of good faith" that demands that the public pay for efficient takings also demands even more strongly that the public pay for those inefficient takings that result from the weakness of the political check on the use of eminent domain: the corruption, unfairness, or mistakes of elected officials and the electorate's failure to effectively or fairly review the actions of its representatives. \textit{See}, \textit{e.g.}, \textit{supra} notes 119-50 and accompanying text.
\end{quote}

\textsuperscript{188} After proposing a compensation system based on the amount the owner of land would pay to avoid a taking, Professors Lawrence Blume and Daniel L. Rubinfeld come to the reluctant conclusion that since the administrative costs of such a system might be prohibitive, "market value ought to be viewed as a 'second-best' attempt to measure the appropriate level of compensation." Blume & Rubinfeld, \textit{supra} note 131, at 620. Professor Francis also concedes that market value is the most feasible measure of just compensation:

Perhaps we would do better simply to recognize that eminent domain compensation serves a number of different values: the need of the public to acquire property, the concern that the government not take more than it needs, the protection of investment decisions, and the equitable sharing among individuals of the costs of improvements that benefit us all.

Francis, \textit{supra} note 13, at 481. This Article's proposal uses more objective criteria to measure just compensation and is therefore not forced to adopt "second-best" because of administrative costs. Moreover, the efficient just compensation measure can better achieve the values recognized by Professor Francis than can the market value measure.

\textsuperscript{189} Both also directly contradict current eminent domain law. The costs invoke a concept called inverse condemnation, or de facto condemnation. The claim is that the government's action has impaired the value of land that has not been taken by eminent domain and that the government is therefore obligated to pay just compensation. It is virtually hornbook law that a court will not consider such claims of a proximate landowner unless the land has been
Further, the transaction costs of identifying potential claimants and substantiating their claims of lost market value and revenues would likely be greater than any increased efficiency in governmental uses of eminent domain.

The problem of identifying claimants and substantiating claims will be accentuated if general demoralization costs are compensable. Like specific demoralization costs, however, general demoralization costs exist. When a taking occurs, citizens see one like themselves lose property by the unilateral act of the government. Moreover, these citizens may not agree with the eventual use of the project. Finally, citizens may suffer general demoralization costs by realizing that they too may someday be pitted against the majoritarian society as a target of an eminent domain action and that, in such actions, the political system is unlikely to provide any relief. These demoralization costs will be even more acute for owners of property proximate to that taken. Despite the potential size of these costs, however, they lack the necessary attributes of quantifiable externalities and would greatly increase transaction costs if awarded as just compensation. The general demoralization costs, therefore, should not be included within an efficient just compensation award.

The existence of these general demoralization costs, however, further support compensating the property owner for any "large, fairly concrete, and roughly monetizable" externalities. Such compensation would decrease general demoralization costs by decreasing the sympathy pains of others who, under the present market value measure, recognize that property owners are not being compensated for all their costs and who fear that, in the same situation, they too would be inadequately compensated. Under the proposed interpretation of "just compensation," therefore, efficiency would be increased not only by requiring the government to recognize the costs of eminent domain but also by reducing some of the costs resulting from such actions.


190. "There, but for the Grace of God, go I."

191. See supra note 120-22 and accompanying text.
C. APPLYING THE EFFICIENT JUST COMPENSATION MEASURE: MIDKIFF AND DUNCANVILLE

The positive effect of efficient just compensation on the efficiency and equity of eminent domain actions can be seen by applying the award measure to the facts in Midkiff and Duncanville. The result in Midkiff was clearly correct under an efficient just-compensation analysis. The owners of the land taken in Midkiff did not occupy the land and had no legal right to occupy it for the long periods of the land leases. The Hawaii Land Reform Act of 1967 provides that compensation will be based on market value determined as if the land acquired were to continue to be leased for a long period of time. Quite literally, the owners received everything they could have hoped for. Moreover, the takings most likely had little general demoralization costs. Indeed, the ending of control of residential land by large landholders probably had moralization benefits.

Midkiff is an unusual case, of course, but it is nonetheless an example of the efficiency and equity resulting from one state’s attempt to provide full compensation.

In contrast, the amounts paid in Duncanville appear clearly inadequate. The federal government was permitted to externalize a significant cost of its project, the replacement cost of the condemned dump. The efficiency of the federal government’s project is therefore suspect. Arguably, the federal government’s project would have been redesigned or abandoned had the decision makers been forced to consider the full costs of acquiring the Duncanville dump. Moreover, the result in Duncanville is certainly inequitable regardless of the merits of the government’s project. Even if the project was efficient, the people of Duncanville should not have required to directly bear the costs of a federal project.

192. See supra notes 33-35 and accompanying text.
194. See supra note 35 and accompanying text.
195. It might be tempting to respond to this by saying that the people of Duncanville will benefit from the federal flood control project. It would clearly have been efficient, to any degree that the project conferred a direct, identifiable benefit on Duncanville, for the people of Duncanville to have borne a proportionate share of the cost of the project. The way for the federal government to achieve such efficiency, however, was not to undercompensate Duncanville for the value of its dump but to bargain with Duncanville over how the costs of the project should be apportioned.
CONCLUSION

Efficient just compensation should provide the significant legal check on the use of eminent domain that is now lacking. As long as the Court chooses not to permit meaningful review of public use claims, just compensation is the only effective constitutional check on governmental exercises of eminent domain. The just compensation requirement, however, provides few limits as presently interpreted. Adoption of the efficient just compensation measure here proposed will breathe life into the requirement and once again provide a meaningful check on the power of eminent domain. If governments are required to internalize the costs of the eminent domain actions, they should pursue only efficient and equitable actions, at least in the absence of a breakdown of the political system. Such a breakdown is an event that just compensation cannot prevent and that courts are unwilling to review. The possibility of such a breakdown and the presence of uncompensated demoralization costs further support the awards of efficient just compensation and outweigh any additional transaction costs caused by the proposed measure of compensation.

196. Arguably, the efficient just compensation award will to some extent deter inefficient actions taken because of corruption, mistake, or unfairness of elected officials. By requiring the internalization of the costs of the eminent domain action, there will be a greater likelihood that the voting electorate will discover the inefficient decision and do something about it.