"Déjà Vu All Over Again": Repeated Adjustment of Delegated Powers and the History of Eminent Domain

Robert K. Fleck and F. Andrew Hanssen

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"Déjà Vu All Over Again":
Repeated Adjustment of Delegated Powers and the History of Eminent Domain

Robert K. Fleck
Department of Agricultural Economics and Economics
Montana State University
Bozeman, MT 59717
phone: (406) 994-5603
e-mail: rfleck@montana.edu

F. Andrew Hanssen
Department of Agricultural Economics and Economics
Montana State University
Bozeman, MT 59717
phone: (406) 994-5616
e-mail: ahanssen@montana.edu

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Abstract: In representative democracies, citizens delegate powers. Not surprisingly, citizens react angrily when the delegated powers are misused (i.e., used so as to decrease social welfare). Perhaps more puzzlingly, citizens sometimes repeatedly delegate the same power (e.g., surveillance of citizens, conscription), and then repeatedly react with anger to its misuse. In this paper, we investigate a power that the American public has consistently delegated and repeatedly seen misused for nearly 200 years: the power of eminent domain. We begin by developing a simple theoretical model in which a stylized public chooses the set of powers to delegate. The public obtains new information each period and can forecast rationally (but not perfectly) the benefits and costs of delegation. We then apply the model to the history of eminent domain in the United States. Our model provides a simple explanation of why the public has continued to allow the delegation of substantial discretion over taking private property, despite the fact that eminent domain has generated so much public backlash over the last 200 years. The model also highlights the crucial role played by the courts in forestalling (or not) public backlash. Our analysis helps explain why many scholars have misunderstood the public reaction to the *Kelo* decision. More generally, our analysis provides insight into the public's response to a perennial dilemma: How much power should be delegated to elected officials?
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I. Introduction

Deciding which powers to delegate is one of the most important decisions citizens of a representative democracy make.[1] Unfortunately, almost any delegated power that can enhance social welfare can also decrease social welfare; i.e., be "misused."[2] The recent controversy over government spying on American citizens is a case in point: The right to eavesdrop may help prevent terrorist attacks, but also enables the government to infringe on the privacy of law-abiding citizens. The list of potentially useful but potentially misused powers is lengthy: taxation, regulation, the military draft, searches of private residences, seizure of property, arbitrary arrest, and so forth.

In this paper, we investigate a power that the American public has consistently delegated and yet frequently seen misused for nearly 200 years: the power of eminent domain. The furor sparked by the U.S. Supreme Court's decision in *Kelo v. City of New London* is only the latest in a long line of angry public reactions to perceived socially undesirable uses of eminent domain, involving such

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[1]The delegation may be directly to an elected official, or through government institutions to a private party (e.g., a firm granted the right to exercise eminent domain). We adopt the Lockeian notion that representative government draws its legitimacy from the consent of the governed (John Locke, *Of Civil Government*). Epstein (1985, Chapter 2) notes that the U.S. Constitution's two limitations on the exercise of eminent domain (that it be for a "public use" and that "just compensation" be paid) are implicit in Locke's reasoning. Stoebuck (1977, 11-12) writes, "The Lockeian theory of expropriation comes to this: The government does not take your land without your consent; you have delegated the power of consent to your legislative agents . . . Most authorities who have considered the question [of eminent domain] have simply described the power as an inherent power of government, arising out of the imperativeness of governmental activities. However, the Lockeian theory, which directly influenced the original constitution-makers, is a more fundamental explanation both of the nature of the expropriation power, and of why, in our system of government, it resides with the legislature."

[2]James Madison captured something of this in his famous statement, "In framing a government that is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself" (*The Federalist*, No. 51, 349).

varied things as mill dams, railroads, and urban renewal.[3] Yet despite repeated controversy, most states restrict governmental discretion only mildly.[4] Why, time after time, would a rational citizenry delegate a power, observe the power misused, react angrily and take steps to curb the misuse, and then delegate the power all over again?

To answer that question, we begin by developing a simple theoretical model. In each of a potentially infinite number of periods, a stylized public maximizes the expected returns to delegating (or not delegating) a particular power. In any given period, delegating the power may turn out ex post to be welfare-enhancing or welfare-decreasing, but the public must make its delegation decision prior to learning the exact welfare effects for that period. The court can monitor the use of the delegated power, and thus help ensure that the power is used only in periods when use enhances social welfare; however, the court will not always choose to serve as a monitor. In each period, the public observes new information (in the form of shocks) about the way the expected net benefits of delegation have changed from the previous period, and about the likelihood of the court being willing to monitor the power's use.

From the model, we obtain three testable implications. First, a rational public may alternate between delegating and revoking powers as new information about the net social benefits is revealed. In other words, we may observe periods of delegation and proper use, followed by periods of misuse,

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[3]In *Susette Kelo, et al., v. City of New London, Connecticut, et al.*, 545 U.S. 04-108 (2005), the Court ruled (5 to 4) for the city of New London, thus allowing the use of eminent domain to take non-blighted homes in order to provide land to private developers. The city argued that its application of eminent domain would enable the land to be put to more valuable uses (including the building of luxury condominiums), and that this change would benefit the public by spurring economic development and increasing tax revenues.

[4]Most state constitutions employ the same nebulous phrasing found in the federal Constitution: Eminent domain takings must be for a "public use," and the original owner must receive "just compensation." See, e.g., the discussion in Fischel (1995, 65-66).

followed by periods without delegation (i.e., the power revoked or restricted), followed by periods of re-delegation.[5] Second, the court's propensity to monitor is critical. When the court monitors effectively and consistently (forbidding misuses), social welfare is enhanced and revocations of powers are less likely. Third, when the court does not monitor and only one segment of the public determines policy – i.e., one segment is decisive – powers may be delegated even if total net benefits are negative, as long as the net benefits to the decisive group are positive.[6] This is the well-known problem of "tyranny of the majority."

We apply these three implications to an analysis of the history of eminent domain in the United States. We focus on five major episodes of eminent domain use, involving mill dams (early-to-mid 19th century), railroads (mid-to-late 19th century), mining in the Rocky Mountain West (late 19th century), urban renewal (mid-20th century), and *Kelo*-style economic development (late 20th century to present). By no means do these episodes comprise a comprehensive list of eminent domain uses; however, each is historically important, has inspired a large literature, and captures the fundamental trade-off the public faces when considering the delegation of a potentially useful but potentially misused power.[7]

With respect to the model's first prediction, we find that each of the five episodes displays a nearly identical pattern of expansion and contraction of eminent domain powers. The pattern takes

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[5]This idea is somewhat related to that elucidated by Fischel (1995, 88-90) when he discusses changes in eminent domain compensation procedures driven by diminishing marginal benefits in particular applications (e.g., railroads, interstate highways).

[6]Equivalently, the power may not be delegated when the net benefits are positive but the decisive group would suffer losses.

[7]There have, of course, been myriad other applications of eminent domain powers; e.g., for urban power lines, public transport, highways, schools, airports, and sports facilities. See Nichols (1999) for a very extensive treatment of eminent domain.

the following form: Technological or social change raises the expected benefits of broadly-defined eminent domain powers, and broadly-defined powers enjoy widespread public support. As time passes, however, eminent domain is extended to projects with smaller (perhaps negative) social benefits, or new information about the true social benefits is revealed. Public support collapses and controversy ensues. The controversy brings to an end the use of broad eminent domain powers in that particular sphere (i.e., forces a narrowing of the power), but the problem arises again in another sphere, because the solution is tailored *only* to that particular application of eminent domain.

With respect to the model's second prediction, we find the response of the courts to be crucial. In each of the five episodes, when use of the power is pushed beyond the public's accepted limits, one of two things occurs: i) courts intervene and restrict eminent domain powers, or ii) courts fail to intervene, and public backlash puts pressure on politicians to rewrite statutes, pass new laws, or amend constitutions. In other words, where courts crack down on controversial eminent domain practices, no formal rewriting of laws need occur, but where courts choose not to intervene (out of deference to legislative judgement or respect for precedent), the public forces a change in law.

With respect to the model's third prediction, we find episodes where eminent domain use may reflect tyranny of the majority. Definitively establishing the existence of tyranny of the majority is difficult – in the context of our model, it would require identifying actions that would (and would not) be undertaken "behind the veil of ignorance." What we *can* observe are instances where distinguishable minorities, possessing little political influence, were the primary losers from eminent domain activities. Perhaps most notoriously, those "relocated" by the massive urban renewal projects of the mid-20th century were overwhelmingly African American and Latino (see Section IV).

Understanding the history of eminent domain as a dynamic process provides insight into the

delegation of powers under the representative form of government. There will always be some potentially delegated powers for which delegation has positive expected net benefits in some periods, and negative expected net benefits in other periods. Our analysis documents this phenomenon, demonstrates the importance of the monitoring role played by courts, and explains public reaction to court rulings. Repeated phases of desirable use, undesirable use, restriction of powers, and re-delegation of powers are the norm.

Our model of adjustment of delegated powers in the presence of shocks helps explain the huge anti-*Kelo* backlash, a phenomenon that has puzzled many legal scholars.[8] Such scholars have pointed out that the *Kelo* majority simply drew on the precedent established by *Berman v. Parker* (1954).[9] However, to understand the public's reaction to *Kelo*, one must recognize how sharply the *Berman* and related decisions departed from earlier precedents, how thoroughly discredited were the policies justified by the *Berman* decision (large-scale urban renewal), how the use of eminent domain in economic development projects had changed since the time of *Berman* (until recently, largely avoiding the taking of residential property), and how many state courts had, in recent decades, arrived at conclusions contrary to those of *Berman* and closer to earlier precedents.[10] In short, the

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[8]Cole (2006) writes, "The political controversy that erupted around *Kelo* took legal scholars by surprise. After all, the decision did not significantly alter eminent domain doctrine; the Court followed well-established precedents."

[9]*Berman et al. v. Parker et al.*, 348 U.S. 26 (1954) allowed eminent domain to be used to condemn a large section of southwest Washington D.C. as part of an urban renewal program. In addition to citing *Berman*, the *Kelo* majority cited the Supreme Court's 1984 *Hawaii Housing Authority v. Midkiff* decision (467 US 229 1984), in which the Court ruled that eminent domain could be used to overcome a land-based oligopoly. The unique and unusual features of the *Midkiff* case render it a less closely related forebear of *Kelo*, as evinced by the fact that Sandra Day O'Connor wrote the majority opinion in the *Midkiff* case, yet authored a scathing dissent in the *Kelo* case.

[10]The earlier precedent (sometimes referred to as the "narrow doctrine" of public use) prevailed until the 1930s, and is characterized by Nichols (1940, 626) as follows: "To take property rights from A for

Kelo Court had a choice between the *Berman* precedent and earlier precedent, and chose *Berman*. Rational, well-informed voters therefore had good reason to view the *Kelo* decision as providing new information about the judicial system's willingness (or rather, unwillingness) to clamp down on socially undesirable applications of eminent domain, and about how prevalent those socially undesirable applications (e.g., the condemnation of un-blighted houses) are. The general public reacted (as it has before) by pressing for restrictions in the use of eminent domain.[11]

Our model and historical analysis thus contribute to a large literature on the delegation of policymaking powers. That literature tends to emphasize the agency problems inherent in delegation, and the means by which principals (e.g., voters, legislatures) attempt to reduce agency slack.[12] By contrast, we abstract from agency problems (which clearly exist and are often severe) in order to focus on how the public adjusts delegated powers in the face of changing circumstances (i.e., shocks). In other words, the "socially undesirable uses" of delegated powers to which we refer are not just the result of agency problems, but also of the inability of the public to predict perfectly the benefits of delegation for a given level of agency slack. Even if the best available means of reducing agency slack were always and everywhere employed, there would inevitably be unexpected changes in circumstances that would render undesirable the use of a previously welfare-enhancing

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transfer to B for B's private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further." See Section IV of our paper for more detail.

[11]See, e.g., Cole (2006) for a discussion of the magnitude of the backlash. See Appendix A in Burke (2006) for a listing of proposed or enacted restrictions on the use by municipalities of eminent domain.

[12]See, e.g., Matsusaka (1992, 2005) on direct democracy; Hanssen (1999, 2000), Besley and Coate (2003) on appointing versus electing public officials; McCubbins and Schwartz (1984), McCubbins, Noll, and Weingast (1987), Moe (1989), Macey (1992) on how legislatures control administrative agencies. The existence of commitment problems is another reason for delegating (or not) certain powers; see, e.g., Schelling (1960) on delegation as a commitment device, and Barro (1986) on rules versus discretion. See, e.g., Milgrom and Roberts (1992) for a discussion of principal-agent problems in a variety of settings.

power. A rational public would then respond by temporarily, but not permanently, restricting the use of that power. When it comes to the delegation of potentially useful but potentially misused powers, we should thus expect plenty of (as Yogi Berra might have put it) "déjà vu all over again."

II. A Brief Review of Eminent Domain

"Eminent domain" refers to the power of a state to take, or to authorize the taking of, private property (typically land and buildings) without the owner's consent.[13] Eminent domain literally means "highest ownership," implying that an individual's claim to property is necessarily subordinate to that of the state (e.g., Nichols 1917, Chapter 1). The U.S. Constitution declares that eminent domain can be applied only 1) for a "public use" and 2) upon the payment of "just compensation." In fact, those two terms have proven sufficiently nebulous so as to support takings of almost any kind.[14]

The economic rationale for eminent domain is the "holdout problem" – socially beneficial projects that require assembling many parcels of land (as when building a highway, for example) may be waylaid by a single recalcitrant landowner demanding well in excess of his or her opportunity

[13]The term "eminent domain" is attributed to Hans Grotius, a 17th century Dutch legal philosopher who articulated the principle that in some cases "public advantage should prevail over private advantage" (quoted in Stoebuck 1972, 559-560).

[14]The 5th Amendment to the U.S. Constitution contains the phrase "nor shall private property be taken for public use, without just compensation," and the 14th Amendment states that U.S. citizens cannot be deprived of "life, liberty, or property without due process of law," which effectively extends the 5th Amendment's protections to actions by individual states (the 5th Amendment was initially interpreted as applying only to the federal government). Most state constitutions contain similar wording, with some state-specific elaborations (see Section IV of this paper). Stoebuck (1977, 14) writes, "Semantically, 'public use' is descriptive and does not limit the purposes for which eminent domain may be used."

cost.[15] At the same time, it is clear that eminent domain can be – and has been – used in socially undesirable ways. Wealth transfers from the politically marginal to the politically influential are a general problem under representative government, and eminent domain powers provide yet another tool with which to engineer such transfers.[16] Alternatively, eminent domain may be employed by a majority to "tyrannize" a minority – residents in one part of town may have their property taken by the other residents despite the fact that the losses to the original owners exceed the gains to everyone else.[17]

III. Theoretical Model

Starting from a Lockeian premise, we develop a simple dynamic model in which citizens delegate government powers so as to maximize expected net benefits.[18] The model works as follows: A stylized public chooses whether to delegate a particular power. The decision is repeated

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[15]For a discussion of the holdout problem, see Fischel (1995, Chapter 2). Scholars have debated whether the holdout problem is, in general, sufficiently large so as to justify the use of eminent domain. For example, Polinsky (1979) suggests that eminent domain may actually be less efficient than market transactions as a means of acquiring land for public use, and Posner (1992, 57) asks why governments find the power of eminent domain necessary while private developers – building a resort or shopping center – manage without it. (Posner's question is somewhat ironic in light of the fact that, in the *Kelo* case, the town of New London sought to use eminent domain for private development.)

[16]And the tool cuts in both directions. In a study of eminent domain condemnations in Chicago, Munch (1976) found that owners of high-value property tended to be over-compensated, while owners of low-value property tended to be under-compensated.

[17]As has been frequently pointed out, determining "just compensation" for private homes is particularly problematic, the value of the home to the homeowner being unobservable and potentially well in excess of the home's "market price" (the latter is usually the basis for compensation).

[18]For related work, see, e.g., Fleck (2000) and Hanssen (2004a). Fleck considers the optimal timing for the establishment of institutions that can, depending on circumstances, increase total surplus or (by threatening property rights) reduce incentives to invest. Hanssen (2004a) examines the optimal level of judicial independence when politicians cannot otherwise establish a credible commitment to future policy.

in each of a potentially infinite number of periods. In each period, the public has full information about the value of the power in the previous period, and uses this information to forecast rationally, but not perfectly, the value for the current period.

The reader will note that we do not explicitly model a government actor. We take this approach in order to focus on adjustments the public makes in response to shocks (i.e., unforeseen changes in circumstances). Nonetheless, the government (and associated agency problems) do appear implicitly in the model's structure. For example, *persistent* corruption (or slack) among government officials would be reflected in a lower base value of delegating a given power. Similarly, *unforeseen changes* in the level of corruption (or slack) from one period to another would be reflected in the model's shocks.

The basic model

To focus on citizens' broadly shared interests, we begin by considering decisions made by a homogeneous public. The public decides whether to delegate a given power i; delegating the power will expand the scope of government powers. When choosing whether to delegate power i for period t, the public's objective function is:

1) $\max Eu_{i,t}$

In the absence of delegation, $u_{i,t} = 0$, while the net benefit of delegating power i for period t is:

2) $u_{i,t} = v_i + \lambda e_{t-1} + (1-\lambda)e_t$

where

$-1 \leq v_i \leq 1$; v_i is constant over time (hence $Eu_{i,t} = v_i$ for all t when not conditional on shocks)
e_t is the period t shock, which is drawn from a uniform distribution from -1 to 1
$0<\lambda<1$

The public observes shock e_t after making the decision regarding period t powers (and before making

the decision regarding period t+1 powers); e_t is drawn independently of shocks in other periods.[19]

The expected value of power i for period t is thus:

3) $E(u_{i,t} \mid e_{t-1}) = v_i + \lambda e_{t-1}$

The public will therefore delegate the power only if:

$v_i + \lambda e_{t-1} > 0$

To simplify notation, let threshold v_t^* define the range of v_i over which the public will delegate power i. Then:

4) $v_t^* = -\lambda e_{t-1}$

The public delegates power i for period t if $v_i > v_t^*$ and does not delegate power i if $v_i < v_t^*$. Given the assumed range from which e is drawn (-1 to 1), the public will always delegate the power if $v_i - \lambda > 0$ and never delegate the power if $v_i + \lambda < 0$. However, the more interesting case involves parameter values where the public will *sometimes* delegate the power: $v_i - \lambda < 0 < v_i + \lambda$. Thus, the sometimes-delegated powers (i.e., powers that will be delegated for some periods and not for others) are those with values of v_i such that $-\lambda < v_i < \lambda$.

Now, as a simple way to examine the public's optimal decision with respect to the *scope* of powers, consider the assumed range for v_i (i.e., $-1 \leq v_i \leq 1$) as a continuum of potentially delegated powers. The total set of potentially delegated powers has measure 2, and the subset that the public would ever delegate has measure 2λ. Although λ does not have an easily observed real-world analogue, the theoretical observation that a higher λ leads to a larger set of sometimes-delegated powers does provide some practical insight: If in a democracy one observes many types of powers

[19]As discussed earlier, the political actor exercising delegated power i, although not explicitly modeled, may be reflected in v_i (the bigger the agency problem, the lower the value of v_i, all else equal) and/or e_t (an unexpected change that causes a transitory increase in agency slack would be a negative shock).

being misused and subsequently revoked (again and again), one should not jump to the conclusion that voters are acting in a myopic or otherwise irrational manner. Our model indicates that voters making rational use of *better* information will choose a *larger* set of sometimes-delegated (and sometimes abused) powers.[20] This leads to our first proposition:

Proposition 1: Rational behavior will produce a set of sometimes-delegated powers, with large positive shocks leading to delegation and large negative shocks leading to revocation. Moreover, the more observable in advance are the shocks that produce fluctuations in the value of potentially delegated powers, the larger the set of sometimes-delegated powers.

The Court as a Static Institution

We will now introduce a court into the model. For ease of exposition, we will begin with a very simple static court (with rulings made independently across time periods), then expand the model to allow a dynamic court (with a parameter indicating the degree of consistency in court decisions across time periods). We assume that the court has the ability to monitor the use of a power, and to forbid its use in periods when the net benefits are negative. The value of the court can thus be calculated in terms of the negative net benefits avoided. A perfectly monitoring court will prevent the use of power i when $u_{i,t}<0$, saving the public $-[v_i + \lambda e_{t-1} + (1-\lambda)e_t]$. Therefore, a perfectly monitoring court yields expected savings of:[21]

5) $[v_i + \lambda e_{t-1} - (1-\lambda)]^2/[4(1-\lambda)]$.

In the real world, the public cannot count on courts to monitor government activity

[20]More precisely, the higher the value of λ, the larger the set of sometimes-delegated powers, the smaller the set of always-delegated powers, and the smaller the set of never-delegated powers. A high value of λ implies that the current deviation of u_i from v_i depends principally on last period's shock rather than on this period's shock. A higher value of λ thus implies that currently observed information (e_t) allows more accurate predictions of next period's u (u_{t+1}).

[21]The maximum savings is $-[v_i + \lambda e_{t-1} - (1-\lambda)]$. The probability of positive savings is $-[v_i + \lambda e_{t-1} - (1-\lambda)]/[2(1-\lambda)]$. The expected value of savings, conditional on positive savings, is $-[v_i + \lambda e_{t-1} - (1-\lambda)]/2$.

perfectly.[22] Let m represent the probability that the court will serve as a monitor in the sense that when the public decides to delegate a power, the court will act to prevent the power's undesirable use. The expected value of delegating power i is then:

6) $E(u_{i,t} \mid e_{t-1}) = v_i + \lambda e_{t-1} + (m)[v_i + \lambda e_{t-1} - (1-\lambda)]^2/[4(1-\lambda)]$

Basic calculus shows that v_t^* decreases when m increases. This leads to our second proposition:

Proposition 2: When m is higher, the public will be willing to delegate power i in the presence of a lower value of v_i for any given e_{t-1} (and for lower values of e_{t-1} for any given v_i). Therefore, the higher the value of m, the larger the set of delegated powers, ceteris paribus.

In plain language, the greater the court's propensity to block undesirable uses, the greater the set of powers the public delegates.

The Court as a Dynamic Institution

The preceding discussion treats the court statically – in other words, each court decision is determined independently and affects only the period in which it is made. In the real world, judicial decisions appear to have substantial (albeit incomplete) consistency over time.[23] Thus, we will extend the model by allowing the probability of monitoring in any given period to be related to whether the court was willing to act as a monitor in the previous period. We will maintain all of our other assumptions, but now let m represent the *long run fraction* of periods in which the court is

[22] In the first place, appellate courts hear only some (typically a small fraction) of all appealed cases (i.e., courts have high opportunity cost). In the second place, judicial ideology (views on states' rights, for example), may inspire a given judge to allow the government more discretion than the public might wish. Naturally, a court with the power to block eminent domain may use that power to block *socially desirable* uses of eminent domain. Given that we already have the potential for undesirably used powers in our model, we do not model delegation of powers to the court per se, but simply allow court monitoring to have a random component. On the trade-offs the public and politicians face when allocating power to the judicial system, see Ramseyer (1994), Hanssen (2000, 2004a, 2004b), Maskin and Tirole (2004), Klerman and Mahoney (2005).

[23] Perhaps because there is a low rate of turnover among judges, or because courts respect precedent.

willing to monitor.

Let p_{ny} and p_{yn} represent stationary transition probabilities, with p_{ny} indicating the probability of the court being willing to act as a monitor in period t, conditional on the court being unwilling to act as a monitor in period t-1, and p_{yn} indicating the probability of the court being unwilling to act as a monitor in period t, conditional on the court being willing to act as a monitor in period t-1. These transition probabilities generate a very simple stochastic process and imply the value of m:

7) $m = p_{ny}/(p_{ny} + p_{yn})$

We will now define a new parameter, π, to index (conditional on m) the degree to which the court changes its role from a non-monitor to a monitor (from one period to the next); $0<\pi<.5$.

$p_{ny} = \pi$
$p_{yn} = \pi/m - \pi$

which in turn implies that

$p_{nn} = 1-\pi$
$p_{yy} = 1- (\pi/m - \pi)$

The lower the value of π, the more consistent are court decisions over time. Resetting the value of π rescales all the transition probabilities without changing m.

What does this mean for the public's decision? With the static court, the public knows m and acts accordingly. With the dynamic court, the public knows m, but also knows whether the court was willing to act as a monitor last period and the degree of inter-temporal consistency in court decisions. Hence, court rulings in period t-1 will influence the scope of powers the public delegates for period t. This changes the expected value of monitoring by changing equation 6 as follows:

8) $E_{t-1}[u_{i,t} \mid \text{willing to monitor t-1}] = v_i + \lambda e_{t-1} + (1- \pi/m + \pi)[v_i + \lambda e_{t-1} - (1-\lambda)]^2/[4(1-\lambda)]$

9) $E_{t-1}[u_{i,t} \mid \text{unwilling to monitor t-1}] = v_i + \lambda e_{t-1} + (\pi)[v_i + \lambda e_{t-1} - (1-\lambda)]^2/[4(1-\lambda)]$

For a given m, more court consistency (i.e., lower π) leads to a greater expected value of power i when the court has recently been willing to monitor, and a lower expected value of power i when the court has recently been unwilling to monitor. This leads to the next proposition.

Proposition 3: Conditional on the value of m and the court being willing to act as a monitor in period t-1, a lower value of π leads to a larger set of delegated powers for period t (i.e., lower v_t^*). Conditional on the value of m and the court being unwilling to act as a monitor in period t-1, a lower value of π leads to a smaller set of delegated powers for period t (i.e., higher v_t^*).

In other words, for a given long run propensity of the court to monitor some specific category of powers, more consistency over time (i.e., lower π) implies that the public responds more strongly – i.e., adjusts the scope of delegated powers to a greater degree – when it observes changes in court decisions. And, of course, *all* rulings matter: In each period, the court's decision (regardless of what the court does) provides new information with respect to the public's expected net benefits of delegating power i.

To illustrate, consider an example. Following the logic of Propositions 2 and 3, the model predicts that the scope of delegated powers will shrink particularly dramatically from period t-1 to period t (i.e., v_t^* will be much lower than v_{t-1}^*) when the public observes the combination of the following: a negative e_{t-1} following a positive e_{t-2}, with both shocks large in magnitude; a usually consistent (low π) court that switches from monitoring in period t-2 to not monitoring in period t-1.

Allowing for a Heterogeneous Public

So far, we have assumed that a homogeneous public chooses the set of government powers, but in reality the heterogeneity of interests will influence the choice of powers. The main concern for our model is that some members of the public may, at the time the decision with respect to power i is made, expect to garner a disproportionately large share of the benefits, while another group bears

the bulk of the costs. In other words, the decision may be made outside the Rawlsian "veil of ignorance," (i.e., made after the identity of winners and losers is known). It is in such circumstances that the potential for "tyranny of the politically decisive" arises.[24] That is to say, the decisive group may establish policies that yield positive expected benefits for itself, but negative expected benefits for society as a whole.

We incorporate this into our model by allowing v_i (measured in per capita terms) to have two components:

$$v_i = \alpha v_{i,dec} + (1-\alpha)v_{i,nondec}$$

where $v_{i,dec}$ represents the per capita value to the decisive group, $v_{i,nondec}$ represents the per capita value to the nondecisive group, and α represents the number of people in the decisive group, measured as a share of the total population. Assuming for simplicity that shocks (e) affect the decisive and nondecisive equally (per capita), the decisive seek to maximize[25]

$$u_{i,dec,t} = v_{i,dec} + \lambda e_{t-1} + (1-\lambda)e_t$$

With a court that ignores $v_{i,nondec}$ (or in the absence of a court altogether), the only fundamental difference from our previous analysis is that the decision with respect to power i will be made with some of the costs or benefits ignored. Quite obviously, the following holds for a sometimes-delegated power i:

Proposition 4: With a court that either ignores $u_{i,nondec}$ or fails to monitor, $v_{i,nondec} < v_{i,dec}$ implies that the decisive group will delegate power i in more time periods than would be in the interest of the

[24]We speak of the "politically decisive" rather than of the "majority" because, in the real world, the segment of the population that ultimately sets policy is not always a numeric majority.

[25]Symmetrically, $u_{i,nondec,t} = v_{i,nondec} + \lambda e_{t-1} + (1-\lambda)e_t$. This (combined with the assumptions stated above regarding $u_{i,dec,t}$ and v_i) is consistent with maintaining our earlier assumption that $u_{i,t} = v_i + \lambda e_{t-1} + (1-\lambda)e_t$.

general public, and $v_{i,nondec} > v_{i,dec}$ implies that the decisive group will delegate power i in fewer time periods than would be in the interest of the general public.

In this case, the court (if it monitors) acts as an agent of the decisive group, and the decisive group makes its decision with that in mind.

The implications are different if the court acts in the interest of *all* members of society (i.e., the court does not ignore $v_{i,nondec}$). Given our assumption of rationality, the decisive group will anticipate the court's action, and set policy accordingly. This leads to the following proposition:

Proposition 5: By weighing all benefits (u_i) rather than merely the benefits to the decisive group ($u_{i,dec}$), a court may reduce the incentive for the decisive group to delegate power i. This holds even if delegating the power would be in the interest of the general public.[26]

For applying the model, the key point to recognize about Propositions 4 and 5 is how they differ from Propositions 2 and 3. The difference demonstrates the importance of whether policy is set by a group of homogenous citizens behind a veil of ignorance (as in Propositions 2 and 3) or by a decisive subset of the population who are out from behind the veil (as in Propositions 4 and 5).[27] When, as in Propositions 2 and 3, all members of the public set policy behind the veil (e.g., they do not know who will be drafted into the military or whose property will be taken via eminent domain), an always-monitoring court that counts total social benefits will inspire the largest set of delegated

[26]To illustrate this, consider a power such that $\lambda=0$, $m=1$, and $v_{i,dec}>-1$. In this case, if the court ignores $v_{i,nondec}$, the decisive group will always choose to delegate power i. If, however, the court counts all costs and benefits, then any given $v_{i,dec}<0$ combined with a sufficiently high value of $v_{i,nondec}$ implies that the decisive will not choose to delegate power i.

[27]Recall that, given our assumption that members of the public seek to maximize expected net benefits, a power that is in the interest of general public (i.e., maximizes expected total surplus) would be delegated with unanimous support behind a veil of ignorance (i.e., before individuals learn whether they will be in the decisive or nondecisive group).

powers.[28] If instead, as in Propositions 4 and 5, the veil has been lifted at the time of the delegation decision, an always-monitoring court that counts total social benefits will inspire the delegation of *fewer* powers, as compared to a court that counts only benefits to the decisive.

IV. A History of Eminent Domain Use

In this section, we apply the model to the history of eminent domain in the United States. We examine five periods of eminent domain use: mill dams (early-to-mid 19th century), railroads (mid-to-late 19th century), mining in the Rocky Mountain West (late 19th century), urban renewal (mid-20th century), and *Kelo*-style economic development (late 20th century to present). Each episode, although unique in detail, shares features consistent with the model's propositions. In all the episodes, there are technological, social, or policy changes that work in a manner analogous to the shocks in our model. The changes increase or decrease expected benefits from the use of eminent domain and, hence, expand or contract the scope of powers the public wishes to delegate.

In the context of eminent domain, the principal real world analogue to the model's scope of delegated powers is the choice of how narrowly or broadly to interpret "public use" and/or "just compensation."[29] For example, an "always-delegated power" might be the employment of eminent domain to take farmland for the construction of a public road with compensation based on market

[28]In other words, if the public knew behind the veil that the court would weigh some individuals' net benefits more heavily than others' after the veil was lifted, this would reduce the set of powers that the public would choose to delegate. Note that if the set-up of Propositions 2 and 3 were modified so that the court did not count social benefits accurately, the court's monitoring role would be less valuable to the public and, hence, lead to a narrower scope of powers.

[29]For discussions of how "public use" and "just compensation" are related and may substitute for each other to some degree, see, e.g., Fennell (2004).

prices for similar farmland – this would be consistent with narrow interpretations of public use and just compensation. By contrast, a "never-delegated power" might be the employment of eminent domain to take one individual's home and give it to another individual with only trivial compensation paid – this would be consistent with extremely broad interpretations of public use and just compensation. Finally a "sometimes-delegated power" might be the employment of eminent domain to take farmland to build a railroad with trivial compensation paid, or to take private homes so that developers can build new homes with "market prices" paid to the original owners. These two "sometimes-delegated powers" are among the episodes we investigate in what follows.

A. Implication 1: Repeated Broadening and Narrowing of Powers

The model's first proposition is that the behavior of a rational public may generate what appears on the surface to be (but are not) repeated instances of myopic behavior. In other words, there will be periods in which a power is delegated and used desirably, followed be periods in which the delegated power is used undesirably, followed by periods in which the power is restricted, followed by periods in which the power is delegated anew, followed by periods in which the power is used undesirably again. Despite repeated periods of undesirable use, the overall power is never permanently revoked.

The Mill Acts

All of the original thirteen colonies implemented "mill acts," which authorized the erection of dams – and the consequent flooding of adjacent lands – for the construction of mills. The mill acts were intended to aid the establishment of grist mills, which ground grain. When the colonies became states, the mill acts (with minor alterations) were incorporated into new state constitutions. The first such statute was enacted by the Massachusetts colonial legislature in 1713 (Horwitz 1977,

46). The Massachusetts statute referred to "mills serviceable to the public good and the benefit of the town," and gave dam owners the right to improve mill ponds as long as they paid for any damage resulting from rising water. In 1795, this right became part of the Massachusetts state constitution, with mill owners allowed to flood neighboring lands "as required" in order to support the effective operation of the mill (Nichols 1917, 224-228).

The justification for these constitutional provisions was that grist mills were "public necessities" (unground grain had little value) and were required by law to serve all comers at regulated prices.[30] As Nichols (1917, 225) writes:

> The grinding of corn [grain] was a public necessity, which could not well be accomplished in any other way; the miller was bound by law to grind for all who brought corn to his mill and the rates he was permitted to charge were subject to regulation by law. It requires no deviation from well-established principles to hold that a grist mill maintained under such conditions is for the public use.[31]

In essence, grist mills were regulated monopolies (perhaps local natural monopolies), and the benefit a given mill produced for a community presumably depended upon where along the waterway the mill was sited. As with other uses of eminent domain, mill acts required that "just compensation" be paid for flooded land.[32]

The establishment of cotton mills in the early 19th century (and other industrial mills subsequently) was a shock that reduced the expected benefits of allowing a broad interpretation of "public use" in the context of mill dams. Despite being unregulated and serving markets larger than

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[30]For example, the Connecticut code provided that a miller "shall be allowed for the grinding of each bushell of Indian corn, a twelfth part, and for other graines, a Sixteenth part." Quoted in Ely (1992, 20).

[31]See also Munneke (1991) and Nichols (1940).

[32]The compensation usually took the form of an annual payment (see Horwitz 1977, 48).

the local community (as well as selling in reasonably competitive output markets), the industrial mills followed the example of grist mills and invoked the power of eminent domain to justify the flooding of adjacent property. Horwitz (1977, 50) writes, "The dramatic growth of cotton mills after 1815 . . . brought to a head a heated controversy over the nature of property rights." Distressed landowners argued that industrial mills, being neither "public necessities" nor regulated, were not a legitimate "public use" and therefore should not have the right to employ eminent domain.[33] Others argued that, to the contrary, the phrase "public use" encompassed public benefits of any kind (e.g., creation of jobs, the promotion of economic growth), and that industrial mills therefore should be allowed to invoke eminent domain powers. A number of state courts initially concurred with the latter view.[34] For example, Nichols (1940, 619) writes that "At first, even such jurists as Chief Justice Shaw of the Massachusetts Supreme Court had no hesitation in holding that such expropriations [by industrial mills] were valid under the power of eminent domain because of the general benefit which the growth of industry conferred upon the community as a whole."[35] The

[33]Horwitz (1977, 49-51) writes that "there was a major difference between the 18th century grist mill, which was understood to be open to the public, and the more recently established saw, paper, and cotton mills, many of which served only the proprietor. . . . Extension of the mill act to manufacturing establishments brought forth a storm of bitter opposition. One theme – that manufacturing establishments were private institutions – appeared over and over again."

[34]Eminent domain practices were considered the province of state courts, and were not challenged in federal court until later in the 19th century (e.g., Scheiber 1971).

[35]In *Scudder v. Trenton Delaware Falls Co.* (1832), the Massachusetts Supreme Court ruled in favor of a company that wanted to build an industrial dam – the court agreed that manufacturing activity would raise property values and open markets for the region's farm produce, and that, as such, the dam was a legitimate public use (Munneke 1991, 3). Similarly, Horwitz (1977, 49) writes of Massachusetts' Chief Justice Parker, "Parker's language seemed to imply that the only public purpose required in order to justify an extensive invasion of private rights was an increase in total utility – and such a calculation was within the exclusive domain of the legislature."

language has striking parallels to today's debate over *Kelo*-type takings.[36]

Yet, in contrast to the *Kelo* case, by the mid-19th century the courts had reversed themselves and begun to rule that this expanded concept of public use was inappropriate.[37] Eminent domain, state courts declared, could not be employed by industrial mills – industrial mill owners had to negotiate and purchase land through voluntary exchange, like other private businesses. These court decisions formed the basis of what became known as the "narrow doctrine" of public use, which, for the most part, would prevail for the next three-quarters of a century.[38] In short, when circumstances changed (i.e., industrial mills appeared), the benefits of the original broad definition of public use

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[36]Although we cannot observe the net social benefits of grist mills (let alone the social benefits of allowing the use of eminent domain to construct grist mills), it is easy to see how grist mills differed from industrial mills (and from modern economic development plans of the *Kelo* type). As a regulated firm (presumably with at least some market power), a grist mill generated social surplus for local farmers and local buyers of milled grain. Relying on private contracting over prime locations for grist mills could easily have lowered total surplus, because the bargaining agents would not have weighed the full potential benefits to consumers. Such an argument would not apply to price-taking firms (or firms that face highly elastic demand) – something analogous to the case of textile mills (or condominium builders). And even if a textile mill had substantial market power, the benefit of locating a given mill in a given spot would go to the owner of the mill or of the land – the surplus flowing to the local community would be little changed. Of course, our point is not that eminent domain necessarily generated large benefits when used for grist mills and losses otherwise; rather, it is to explain why public reaction might have been what it was.

[37]Horwitz (1977, 52) writes, "The [public's] nearly unanimous denunciation of the mill acts soon brought forth a degree of change. From 1830 . . . the Massachusetts court began a marked retreat away from its earlier, reluctant, but expansive, interpretation of the act." Horwitz (1977, 49) suggests that the change may have been part of a learning process: "By 1814, the significance of the growing separation between public and private enterprise was only beginning to penetrate the judicial mind. Some still conceived of mills as a form of public enterprise in which competition was impermissible." By 1830, judicial understanding of the distinction between private and public enterprises was clearer.

[38]Describing the narrow doctrine, Nichols (1940, 617), writes "public benefit was insufficient, and public use began to be defined as use by the public." Horwitz (1977, 260) writes, "Before [1840] any compensated taking of property would be upheld so long as it could be plausibly connected to the promotion of economic growth. In the next decade, however, a major change became apparent . . . In general, a widespread fear of legislatively authorized redistributions of wealth began to overshadow the enthusiasm for eminent domain as an important instrument of cheap economic growth." Horwitz notes that debates similar to those about industrial mills and the mill acts occurred with respect to other eminent domain applications, such as the taking of land to build privately-owned roads.

(applied to mills generally) diminished, and eminent domain powers were restricted.

The railroads

Like the privately-owned grist mills, privately-owned railroad companies were empowered to employ eminent domain directly.[39] The reason again lies with the size of the benefits produced – railroad lines were enormously valuable to previously isolated communities. In addition, most railroad rates were regulated. As a result, there was general agreement that the construction of a railroad, like the building of a grist mill, was a "public use."

Nonetheless, controversy eventually arose. This time, however, the issue was not how broadly to define "public use," but rather how broadly to interpret "just compensation." It was evident that the building of railroad lines raised substantially the value of nearby land, and railroad companies – which had discretion in setting compensation levels – began to reduce, or "offset," the compensation paid to landowners by the anticipated rise in value of remaining lands. This practice became known as the "benefit-offset." Use of the benefit-offset was initially uncontroversial, because the gains to landowners were so large. But as time passed, the size of the offset grew, eventually reaching the point where railroads paid only a nominal sum (for example, one dollar) to a farmer whose land was taken – in effect, no compensation at all.[40]

The ability to take land without compensation clearly reduced the expense of building

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[39]The rights were specified in a railroad's corporate charter, or defined on a line-by-line basis, rather than written into a state constitution (e.g., Nichols 1917, 992-3). Of course, eminent domain was not the only means by which railroads obtained the land necessary for their operations, and the U.S. government provided the railroads with a tremendous amount of land through grants.

[40]Scheiber (1973, 237-238) writes, "Frequent damage awards of one dollar, after offsetting had been figured, occurred in Illinois, and . . . awards of six cents, after offsetting, became a cause célèbre in New York."

railroad lines, and may have promoted the construction of railways for which the true costs exceeded the benefits. Furthermore, one would expect the marginal benefits of additional lines to fall as more and more lines were constructed.[41] In terms of this paper's model, the initial positive shock – the very large value resulting from the first railroad lines – faded. The result was a storm of protests, and a barrage of litigation.[42] Some state courts forbid the use of the offset; others did not, and where courts did not, the public successfully pressed for changes in the laws.[43] Changing a statute or rewriting a constitution (in some states, the offset was outlawed via constitutional provision) is costly; furthermore, it is possible that more flexible compensation practices would have encouraged the building of socially valuable railroad lines that otherwise went unbuilt. But given the alternative, the public chose to revoke the power. When circumstances changed (the net value of additional lines declined), the benefits of allowing the railroads broad discretion in determining just compensation diminished, and the power was restricted.

Rocky Mountain Mining

All six of the Rocky Mountain states that entered the Union in the latter part of the 19th century enacted constitutional provisions allowing miners and mining companies to employ eminent domain directly to build access roads, dump tailings, dig tunnels, and so forth.[44] No such provisions

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[41]Fischel (1995, 88) suggests this in his discussion of railroad compensation practices.

[42]The issue was not only the offset, but the fact that railroads were not required to pay compensation until actually commencing operation, and a number of railroad companies went bankrupt first. Furthermore, although increased land values were used to justify reduced compensation for takings, decreased land values (because of noise, smoke, fires, etc.) went uncompensated, on the grounds that no land was physically taken.

[43]See Table 1 and the discussion in part B of this section.

[44]See Nichols (1917, 254-5). For example, the 1889 Idaho constitution (Art. 1, ¶ 14) stated that land could be taken "for the drainage of mines, or the working thereof, by means of roads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to complete development." Quoted in Lewis (1909,

were granted in most of the eastern states, although (as discussed) similar powers had been specified for grist mills. The discovery of large quantities of ore (the "shock") had rendered mining extremely valuable in the West. Holdout problems could be avoided and transaction costs reduced by assigning default eminent domain rights to miners. Given that so many residents of these areas *were* miners (or worked in related industries), such rules were heartily endorsed. As Nichols (1917, 254) notes, "the successful operation of the mines had been essential to the very existence of the community and to the occupation of the states by any considerable number of permanent inhabitants." The rights were incorporated first into territorial law, and then, when the territories became states, into state constitutions. Bakken (1987, 29) describes the writing of the first Rocky Mountain constitutions as follows:

> Private eminent domain rights [i.e., eminent domain rights granted to private firms or individuals] originated in territorial law based on the peculiar economic necessity of the region. Local mining district regulations had allowed rights of way for tailings and water ditches . . . Constitutional convention delegates drew upon this tradition . . . Without such extraordinary powers, mining . . . [was considered to be] impossible.[45]

Writing precise rules into state constitutions obviously limited the discretion that policymakers could exercise. There were potential costs to this approach – neither politicians nor courts could restrict a given mine's use of eminent domain even if that use was socially undesirable. But limiting discretion was the whole point – miners' use of eminent domain for "essential

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[45]Miners were everywhere among the most powerful of interests, although they often competed with ranchers, the two having potentially, though not necessarily, antithetical interests. Indeed, cattle ranchers (and sometimes sheep herders) were often similarly favored by constitution writers (see Bakken 1987).

activities" was secure.[46]

The gains from allowing miners to invoke eminent domain declined as time passed – in the context of our model, the initial large positive shock faded. Migration changed the population mix, and the opportunity cost of the broad eminent domain powers rose – what had been efficient for a population of miners was not for farmers and townspeople. Some Western states altered their constitutions so as to eliminate provisions that had favored mining interests, while others left those provisions in place, but essentially ignored them (most were rendered irrelevant by changed land-use practices and new regulations, in any case).[47] Circumstances had changed, and the broad eminent domain powers granted to miners were restricted.

Urban renewal

The Great Depression and the New Deal ushered in an era of massive public projects. Among these was "urban renewal," sometimes referred to as "slum clearance."[48] In 1937, Congress enacted the United States Housing Act, which began the practice of providing federal funds to the states for the construction of public housing (later, the federal funds became available for re-development, broadly defined). In order to gain access to federal funds, municipalities were required to demolish (or modernize) existing housing (Babler 1937, 278). To do this, municipalities invoked

[46] As Bakken (1987, 29) writes of the Rocky Mountain states, "In general, all were willing to extend this custom [private eminent domain] to constitutional sanctity based on their belief in its economic necessity and distrust of the legislative process."

[47] For example, starting a mining operation today requires ensuring that roads, drainage, disposal of tailings, etc., be undertaken in compliance with environmental regulations, regardless of whether one's own or another's land is used.

[48] We use the terms "slum clearance" and "urban renewal" interchangeably. As Altshuler and Luberoff (2003, 22) write, "Slum clearance, after all, was an explicit objective of the urban renewal program."

the power of eminent domain.[49] In contrast to the earlier episodes we have discussed, local governments acted directly, subject only to the constitutional constraints of "public use" and "just compensation."

Whether takings for urban renewal qualified as a public use was initially debated in the courts. Clearly, under the narrow doctrine, which had applied up to that time, they were not.[50] In the end, courts abandoned the narrow doctrine – "public use" once again became synonymous with "general benefits to the public" (e.g., economic growth, increased tax revenue), as had temporarily been the case with respect to industrial mill dams.

Slum clearance was initially accepted as a wonderful idea by Democrats and Republicans, by the courts, and by most non-slum dwelling observers.[51] However, displaced residents, whose homes were taken, felt differently, and unable to find help in either the courts or city hall, some reacted violently – slum clearance was one of the factors that sparked the massive urban riots of the mid-1960s (e.g., Kerner Commission 1968). The result was to bring most large-scale urban renewal projects to a halt. As Altshuler and Luberoff (2003, 24-5) write:

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[49]To some degree, the practice continues – Fischel (2005) proposes that the infamous *Poletown* condemnations, in which the Michigan Supreme Court allowed a non-blighted residential neighborhood in Detroit to be demolished to build a General Motors plant, were undertaken only because federal funds were so large (*Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 Mich. 1981). The *Poletown* condemnations were clearly exceptional in the post-1960s era, as the notoriety of *Poletown* would suggest.

[50]Recall that the narrow doctrine had emanated from litigation over mill dams in the early- to mid-19th century, and held that (with some few exceptions) a public use required "use by the public" (e.g., Nichols 1940).

[51]Wilson (1966, 407) writes, "Few national programs affecting our cities have begun under such favorable auspices as urban renewal. Although public housing was from the very first a bitterly controversial policy, redevelopment and renewal by contrast were widely accepted by both Democratic and Republican administrations and had the backing of both liberals and conservatives, labor and business, planners and mayors."

> Dramatic national change [in the urban renewal approach] awaited the urban riots of 1965-67. Some of the poster cities of the urban renewal program, such as Newark and Detroit, were among the hardest hit. Study commissions appointed to explain what had caused the riots, moreover, commonly found government clearance activities to be among the most intense sources of ghetto resident grievance. . . . One immediate result was a near-total abandonment of slum clearance activities. Some renewal officials, of course, wanted to proceed with their plans, but virtually no one else cared to risk provoking riots.

This was backlash at its starkest. The positive shock originating in the Depression era's general enthusiasm for federally-funded public projects (and the incentives created by providing federal funds for municipal projects requiring the condemnation of private housing) was followed by the negative shock of the riots, and broad use of eminent domain powers for urban renewal no longer appeared desirable. Urban renewal was formally terminated as a distinct federal program in 1974 (Frieden and Sagalyn 1989, 49).

Economic development

Finally, there is the use of eminent domain litigated in the *Kelo* case: "economic development." To some extent, small-scale economic development projects were the logical successors to the grand urban renewal programs of earlier decades. But the designers of the post-1960s projects generally attempted to avoid the most objectionable feature of large-scale urban renewal – the condemnation of residential housing.[52] The newer projects tended to be small and precisely focused (for example, the building of retail centers, convention centers, and sports facilities), with relatively little land taken for any given project.[53] Few objected to this application

[52]Most taken land tended to be vacant, abandoned, or in skid-row or red light districts; see Altshuler and Luberoff (2003, 31).

[53]The average in a sample compiled by Frieden and Sagalyn (1989) occupied just 5.7 acres. Of course, there were exceptions, such as the notorious *Poletown* condemnations.

of eminent domain power.

Yet once again, eminent domain powers were extended to less desirable uses. Perhaps because of the booming urban property markets of the mid-1990s onwards (or because of something else), redevelopment projects began once again to take residential property. Writing more than 30 years after the supposed demise of the urban mega-projects (and before the *Kelo* decision), Altshuler and Luberoff (2003, 42-4) conclude that

> At the turn of the twenty-first century, the trajectory of urban mega-project investment was upward, and 'do no harm' constraints were fraying at the edges. . . the consequence was growing pressure [from private businesses] to relax or eliminate many of the barriers to physical development put in place over the previous three decades. . . . more projects involving residential displacement were going forward than at any time since the 1960s.

The backlash to the *Kelo* decision may once again lead to a narrowing of eminent domain powers.

B. Implication 2: The Court as Monitor

The model's second and third propositions demonstrate how monitoring by a court reduces the public's incentive to narrow ("revoke" in the context of the model) eminent domain powers. The dispute over mill dams illustrates this most clearly. The "narrow doctrine" of public use resulted from state courts reining in attempts to expand the public use justification to include benefits of almost any kind (e.g., jobs, economic growth). The courts (eventually) concluded that such a broad interpretation of public use would leave, in effect, no check on the ability of public officials to take private property. For example, in 1837 New York state's highest court declared, "Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable

security of private property?"[54] In the context of Proposition 3, the courts forbid use of the power in a period when net benefits would have been negative, and thus indicated a high likelihood of continuing to curtail undesirable uses. Indeed, in the mid-19th century several states so emphasized judicial monitoring of eminent domain applications that they wrote provisions into their constitutions explicitly assigning the monitoring role to the courts. For example, the 1876 Colorado constitution stated, "the question whether the contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public."[55]

The narrow doctrine of public use, as developed by state courts, prevailed into the 20th century, and is reflected in this quote from the 1917 first edition of Nichol's classic treatise on eminent domain:

> It is well-settled, as a general principle of law, that the power of eminent domain cannot be constitutionally employed to enable private individuals to cultivate their land or carry on their business to better advantage, even if the prosperity of the community will be enhanced by their success.[56]

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[54]*Bloodgood v. Mohawk & H.R. Co.*, 18 Wend. (N.Y.) 9, 65 (1837). The opinion continued, ". . . to insist that the determination or the expression by the legislature that it is for the public interest and expedient in a particular case to exert the right of eminent domain, or the power of sovereignty, *ipso facto* establishes that the power of sovereignty is rightfully exerted, is in effect to insist that the power of legislature is above the power of the constitution, and to prove that instead of possessing a government of defined and limited powers, we have one with powers more extensive and irresponsible than those of the regal governments of Europe." Quoted in Nichols (1940, 618-9), who also cites a number of other state court decisions expressing similar sentiments.

[55]Colorado constitution of 1876, Art. 2, ¶15. (See the NBER State Constitutions Project, at http://www.stateconstitutions.umd.edu/index.aspx.) In 1902, Pennsylvania's highest court drew a similar distinction between legislative and judicial roles. "Whether it is expedient or wise for the legislature to . . . take property for a public use, is a purely political question, and one solely for the legislature. But whether the use to which it is sought to appropriate the property . . . is a public use, is a judicial question for the determination of the courts." (Quoted in Babler 1937, 280)

[56]Nichols (1917, 217). A 1909 text states similarly, "The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question . . . it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical

Contrast that quote with the following statement from a revised version of the same text published 46 years later:

> Anything that tends to enlarge the resources, increase the industrial advantages and promote the productive power of any considerable number of the inhabitants of a section of a state, or which leads to the growth of towns and the creation of new resources for the employment of capital and the prosperity of the whole community, giving the constitution a broad and comprehensive interpretation, constitutes a public use.[57]

Tellingly, the latter quote is from a chapter-section titled, "The Definition of Public Use Has Changed Over Time." Why did it change so drastically? The roots of the answer lie in the New Deal's slum clearance projects. Writing at the time the first of these projects was underway, Nichols (1940, 626-33) discusses what he called the "decay of the narrow doctrine," stating, "the unkindest cuts to the narrow doctrine are given by recent state cases upholding condemnation for housing and slum clearance." Slum residents appealed to the courts, but judges refused to gainsay elected officials – after some debate, court after court began to rule that slum clearance was a legitimate public use.[58] Nichols (1940, 633) continues, "It seems apparent that these cases mark the end, or at least the beginning of the end, of the basic hypothesis of a narrow doctrine, that the requirement of public use necessitates judicial scrutiny of the intended use of the land taken without regard to the broader purpose of the authorizing statute."

In 1954, the U.S. Supreme Court handed down its decision in *Berman v. Parker*, the urban

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application" (Lewis 1909, 507).

[57]Nichols (1963, section 7.2). Quoted in Groberg (1966, 514).

[58]See Nichols (1940, 630) for a list of court decisions. For an illustration of how rapidly and extensively state courts abandoned the narrow doctrine, compare Babler (1937, 276) with Groberg (1966, 514).

renewal era's most iconic case. In *Berman*, the Court voted 9 to 0 to permit eminent domain to be employed to support the demolition a large swathe of southwest Washington, D.C. As far as public use was concerned, the Court's sentiment can be summed up in a phrase from the majority opinion (authored by Justice William O. Douglas): "The entire area needed redesigning."[59] The narrow doctrine was dispensed with once and for all – if "redesigning" was a public use, so was almost anything. Justice Douglas further stated that

> where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.[60]

Yet Justice Douglas' statement was untrue – in the late 19th and early 20th century, the U.S. Supreme Court had endorsed the state courts' promotion of the narrow doctrine.[61] The U.S. Supreme Court's *Berman* ruling reflected a *new* consensus. And that consensus was: The courts need not monitor how "public use" is interpreted by local officials.[62]

Although the urban riots of the mid-1960s marked the end of the large-scale "slum clearance" projects, their successors survive in the form of *Kelo*-style economic development. In recent years, the number of municipalities attempting (like New London) to use eminent domain to take residential housing has increased. Many state courts have checked the trend, perhaps the most

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[59] *Berman et al. v. Parker et al.*, 348 U.S. 26 (1954), page 34.

[60] Quoted in Merrill (1986, 63).

[61] See Nichols (1940) for examples.

[62] In previous instances, even when the Supreme Court expressed substantial deference to local determinations (legislative and judicial) of what comprised a "public use," it had acknowledged that a basic level of scrutiny was warranted. For example, in 1920, when ruling on a North Dakota statute, the U.S. Supreme Court majority opinion stated, "the judgement of the highest court of the State declaring a given use to be public in its nature would be accepted by this court *unless clearly unfounded* [emphasis added]." Quoted in Babler (1937, 283).

noteworthy decision being *Wayne v. Hathcock*, in which the Michigan Supreme Court effectively reversed its 1981 ruling that had allowed the vilified *Poletown* condemnations.[63] Merrill (1986, 66) surveys indexed state and federal court cases involving eminent domain from 1954 onwards and concludes, "state courts are much less deferential to legislative declarations of public use than one would expect in light of [the expansive interpretation of public use allowed in] *Poletown* . . . In fact, state court enforcement of the public use limitation has generally increased since 1954."

Nonetheless, in the *Kelo* case, Connecticut's highest court and the U.S. Supreme Court decided otherwise. Proposition 3 of our model predicts that the public will treat any court ruling as news, and that the public's move to effect a change in the scope of powers will be particularly dramatic when at the same time the public observes a negative shock to the net benefits of delegating a broad power, it sees the court switch from monitoring to not monitoring. In the *Kelo* controversy, the general public clearly views the taking of well-maintained homes for *Kelo*-style development projects as an undesirable use of eminent domain. And the *Kelo* decision – which signaled that some state courts were not monitoring and that the nation's highest court would not insist upon it – reduced the likelihood of judicial monitoring for citizens in all states. Public displeasure with the *Kelo* decision has been expressed in local meetings, published articles (in newspapers and magazines), opinion polls, agitation for changes in law, and ballot measures.[64] The public reaction

[63] *County of Wayne v. Edward Hathcock et al.*, 684 N.W.2d 765 (Mich. 2004). See Mossoff (2004) and Somin (2004) for detailed discussions of *Wayne v. Hathcock*, and Cole (2006, 20-25) for a review of a number of other state court decisions that have restricted the circumstances under which municipalities may employ eminent domain. See, e.g., Fischel (2005) on *Poletown*.

[64] As Cole (2006, 1) puts it, "in June 2005 the U.S. Supreme Court decided the case of *Kelo v. New London Development Corporation* and all hell broke loose." He then discusses (and catalogues) the public reaction.

has put pressure on politicians to reduce the scope of eminent domain powers delegated to city governments.

Our analysis helps clarify the controversy surrounding the *Kelo* decision – a controversy that many legal scholars consider baseless. For example, David Barron, a professor at Harvard Law School, was quoted in the *Hartford Courant* as follows:

> To many, the headlines about the Supreme Court's June 23 decision in *Kelo vs. City of New London* – 'Court Authorizes Seizure of Homes' – must sound un-American. But in upholding a city's right to take private property as part of an economic redevelopment plan, the court affirmed principles as old as the Constitution.[65]

Such arguments miss a critical point: While very broad interpretations of "public use" indeed date back to the country's early history, so, too, do angry public reactions reining in very broad interpretations of public use. For instance, as discussed above, the narrow doctrine – the precedent cast aside by *Berman* and related decisions – originated in the early 19th century backlash against attempts to define "public use" as encompassing the creation of jobs and economic growth. Considered in this light, the public reaction to *Kelo* should come as no surprise.

Because it is too soon to determine what effect *Kelo* will ultimately have on state law, it is instructive to examine the railroad compensation cases of 150 years ago. As discussed above, some state courts allowed politicians free rein in deciding whether railroads should be able to offset benefits, while others did not. Table 1 lists the 48 continental states, whether the courts in those states allowed or forbade the use of offsets, and whether the state changed its laws subsequently to prohibit offsets.[66] As can be seen, of the 16 states whose courts allowed use of the benefit-offset,

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[65]The quote is taken from Burke (2006), who shares the view that the furor over *Kelo* was "much ado about nothing."

[66]The table draws on Nichols (1917).

14 changed their laws so as to forbid it.[67] By contrast, of the 22 states whose courts limited the use of the benefit-offset, only two changed their laws to forbid it.[68] These results are consistent with the predictions of the model. The fading of a positive shock made a specific broad use of eminent domain powers – the offset – undesirable, inspiring the public to make sure that the power would not continue to be used. Hence, if the court did not monitor, the power was typically revoked (14 revocations in the 16 states where courts chose not to monitor). The likelihood of revoking the power was obviously much higher where the court did not monitor (revocation in 14 of 16 states) than where the court did monitor (revocation in 2 of 22 states).[69]

In short, the evidence suggests, as our model predicts, that monitoring by the court reduces the public's incentive to revoke a power (i.e., there is less reason to press for a rewriting of the law). Because the courts forbade the application of mill act powers to industrial mills, there was little reason for formal change in the law (and the mill acts stayed on the books). When courts gave public officials carte blanche in large-scale urban renewal projects, the backlash was dramatic, and large-scale urban renewal was abandoned. And where some courts showed themselves to be monitoring while others did not – as with the benefit-offset – only in the latter instance did the public effect a change in the law.

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[67]Several state constitutions banned "general" benefits from being offset, but allowed "special" – i.e., specific to that landowner – benefits to be offset. Some state constitutions also incorporated clauses requiring payment in advance and payment for damages.

[68]Every state that entered the Union from 1889 through 1912 included a ban of the benefit-offset in its constitution or legal code.

[69]Note that formally revoking the power even when courts have shown themselves to be monitoring (as two states did) is consistent with the model's predictions – unless the court is a *perfect* monitor, a power with sufficiently little potential for desirable use will be revoked by the public.

C. Implication 3: Tyranny of the Decisive

The model's fourth proposition is that in the absence of a monitoring court, a politically decisive group may establish powers that decrease social surplus but generate net benefits for itself – "tyranny of the majority" would be an example (the decisive group being the majority).[70] Although we are unable to measure the gains and losses to particular segments of society, it is clear that in some instances, identifiable minorities bore the brunt of the burdens brought about by broadly-defined eminent domain powers.

The slum clearance episodes are perhaps most likely to reflect true "tyranny of the majority." The benefits to most non-slum dwellers from the eradication of a slum were probably very small (at best), while the costs to the displaced residents were enormous. Those who lost their homes were typically working class or poor, and more often than not, members of ethnic or racial minorities. Anderson (1966) estimates that by March 31, 1963, over 600,000 people had been removed from their homes under the auspices of urban renewal programs, and that two-thirds of the displaced were African American or of Puerto Rican ancestry. Gans (1982, 385) suggests that one million households were displaced by federally-sponsored urban renewal between 1950 and 1980.

To illustrate the political divisions, consider James Q. Wilson's (1966, 412) discussion of a neighborhood association's (the Community Conference) support of what turned out to be a very unpopular urban renewal project near the University of Chicago:

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[70] Although the phrase "tyranny of the majority" was coined by de Tocqueville in the early 19th century, the concern was at the center of the earlier debate over the proper governmental structure for the post-Revolution United States. As James Madison wrote in the *Federalist Papers* (*Fed.* 11: 297-300), "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."

> The upper middle-class professors, housewives, and business and professional men (both black and white) who made up the bulk of the Conference were mostly people who were going to remain in the community and whose peace, security, cultural life, and property values would probably be enhanced by a successful renewal plan. The persons who were to be moved out of the community and whose apartments and homes were to be torn down were usually lower-income Negroes who, with very few exceptions, were not part of the [negotiation].

The upper middle class professors and their Conference colleagues were out from behind the veil of ignorance – it was clear *their* houses would not be taken.[71] Our model predicts (Propositions 4 and 5) that the establishment of powers when the overall expected benefits are negative but the expected benefits to the (decisive) majority are positive will be more likely if courts do not protect a tyrannized minority. And in this case, courts allowed very broad interpretations of "public use" to prevail despite evidence that net benefits were negative and costs were borne by displaced minorities. Poorer residents were not pleased, as Jane Jacobs (1961, 5) vividly described:

> [P]eople who get marked with the planner's hex signs are pushed about, expropriated, and uprooted much as if they were subjects of a conquering power . . . Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment, and despair that must be heard and seen to be believed.

Resistance (especially in the form of riots) presumably rendered the costs insuperably large even to the erstwhile beneficiaries (a "blighted" neighborhood in one's city is better than a burned-down neighborhood). It is certainly the case that big urban renewal projects were brought to a quick halt.[72]

By recognizing that (as the model predicts) the decision to establish a given power depends

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[71]Lewis (1959) surveyed local urban renewal directors in 91 cities, and found that residents likely to be displaced were seldom involved in the meetings, and almost never served on the committees that planned and carried out the work. The projects instead tended to cultivate city-wide support and to approve and carry out plans without seeking the consent of the most adversely affected neighborhoods.

[72]Although urban renewal was formally terminated as a distinct federal program in 1974 (Frieden and Sagalyn 1989, 49-53), federal funds continue to be supplied for less all-encompassing building efforts.

critically upon whether the decisive segment of the public is behind the veil of ignorance, one can better understand the public reaction to the *Kelo* decision. Why did a court case involving residents of New London, Connecticut, generate a *nationwide* public backlash? In New London, itself, the development project at stake in *Kelo* had enough public support that the city fought legal challenges all the way to the U.S. Supreme Court. Of course – and this is the key distinction – the residents of New London were out from behind the veil with respect to whose homes would be taken, and very few stood to lose. Justice O'Connor said as much in her *Kelo* dissent:

> The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

However, for the typical homeowner elsewhere in the U.S., *Kelo*-style redevelopment projects were an application of eminent domain for which *the veil had not yet been lifted*. Unblighted middle class homes are not safe from government-sponsored redevelopment (in sharp contrast to the earlier slum clearance projects), and neither majority rule ex post (i.e., outside the veil) nor the courts post-*Kelo* can be counted upon to protect property rights that the majority would choose to protect ex ante (i.e., behind the veil). Thus, current and prospective homeowners who remain behind the veil (in practice, the vast majority of the public) favor revoking city governments' power to interpret public use expansively when taking private homes.

The 19th century Rocky Mountain mining episode provides an interesting counterpoint. Note that miners could have chosen to rely on courts to monitor the use of eminent domain, but chose instead to write eminent domain powers for themselves directly into state constitutions (thereby leaving little for courts to monitor). Why did miners choose not to rely on courts? Our model

suggests two possible reasons. First, as Proposition 2 illustrates, miners might have expected that courts would not monitor with sufficient frequency to protect miners' eminent domain rights, notwithstanding that the rights were socially beneficial (i.e., benefits to miners were larger than costs to the rest of the public). Alternatively, miners may have recognized that in some cases their eminent domain powers would not be socially beneficial (i.e., benefits to miners would be smaller than costs to the rest of the public), and as such, would not withstand scrutiny from the courts. As our Proposition 5 suggests, in that case miners would do best by not allowing court discretion in the first place.

V. Conclusion

This paper models a citizenry that rationally but imperfectly forecasts the value of delegating powers to a government. In each period, the public obtains new information about the expected value of delegation, and about the court's willingness to monitor how the delegated powers are used. In response, the public adjusts the set of delegated powers. We apply the model to the history of eminent domain. Consistent with the model's predictions, we find that the scope of eminent domain powers has been adjusted repeatedly over time – from narrow to broad and from broad to narrow – in response to new information about the social benefits of particular applications of eminent domain (e.g., to mill dams, railroads, mining, and urban development), and to judicial rulings indicating the willingness of courts to curtail socially undesirable applications.

Our analysis has implications for understanding more generally the delegation of powers in a representative democracy. The public faces a trade-off: In order to enjoy the benefits resulting from delegation, the public must run the risk that the powers will be used in a manner that decreases

social welfare. Consider spying on citizens (or detaining citizens without trial). Our model predicts that the public will allow the government substantial discretion to engage in domestic spying (or to detain suspected traitors) when the expected net benefits are very high; for example, following a foreign attack. Furthermore, the more likely are courts to curtail socially undesirable spying (or detention) and the less likely is the majority of the public to be affected (perhaps only citizens who physically or culturally resemble those who carried out an attack will be spied upon or detained), the broader are the powers the public will be willing to delegate. Eventually, however, the expected net benefits of broadly-defined powers (to spy or detain) become negative even for the majority, and public pressure narrows the delegated powers (the powers will be restricted even more dramatically if new information reveals that courts are unlikely to monitor abuses).[73] The powers will then remain restricted until circumstances once again change (another attack occurs?) and the public loosens the reins, as it has done many times before.

[73]For example, the bombing of Pearl Harbor was followed by the notorious internment of Japanese-Americans (of all ages, without evidence of wrongdoing), and the September 11, 2001, attacks were followed by the de facto suspension of *habeas corpus* for suspected terrorists. But the former policy was abandoned and repented of once the perceived threat had diminished, and so (someday) may be the latter.

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Table 1: The Benefit-Offset

State	*Year entered Union*	*Court allowed use of benefit-offset?*	*Law change to limit use of benefit-offset?*	*Form of law change (Year)*
Alabama	1819	Yes	Yes	const. amend. (1868)
Arizona	1912	n.a.	n.a.	original const.
Arkansas	1836	Yes	Yes	unknown
California	1850	Yes	Yes	const. amend.
Colorado	1876	Yes	Yes	statute (1891)
Connecticut	1788	No	No	n.a.
Delaware	1787	No	No	n.a.
Florida	1845	Yes	Yes	original const.
Georgia	1788	No	No	n.a.
Idaho	1890	n.a.	n.a.	original statute
Illinois	1818	Yes	No	n.a.
Indiana	1816	Yes	Yes	statute (1852)
Iowa	1846	Yes	Yes	const. amend.
Kansas	1861	Yes	Yes	original const.
Kentucky	1792	No	No	n.a.
Louisiana	1812	No	No	n.a.
Maine	1820	No	No	n.a.
Maryland	1788	Yes	Yes	statute
Massachusetts	1788	No	No	n.a.
Michigan	1837	No	No	n.a.
Minnesota	1858	No	No	n.a.
Mississippi	1817	No	No	n.a.
Missouri	1821	Yes	Yes	const. amend.
Montana	1889	n.a.	n.a.	original statute
Nebraska	1867	No	No	n.a.
Nevada	1864	Yes	Yes	statute
New Hampshire	1788	No	No	n.a.
New Jersey	1787	No	Yes	const. amend.
New Mexico	1912	no rulings	No	n.a.
New York	1788	Yes	Yes	statute
North Carolina	1789	No	No	n.a.
North Dakota	1889	n.a.	n.a.	original const.
Ohio	1803	Yes	Yes	const. amend. (1851)
Oklahoma	1907	n.a.	n.a.	original const.
Oregon	1859	No	No	n.a.
Pennsylvania	1787	Yes	No	n.a.
Rhode Island	1790	No	No	n.a.
South Carolina	1788	Yes	Yes	const. amend.
South Dakota	1889	n.a.	n.a.	original const.
Tennessee	1796	No	No	n.a.
Texas	1845	No	No	n.a.
Utah	1896	n.a.	n.a.	original statute
Vermont	1791	No	No	n.a.
Virginia	1788	No	No	n.a.
Washington	1889	n.a.	n.a.	original const.
West Virginia	1863	No	No	n.a.
Wisconsin	1848	No	Yes	statute
Wyoming	1890	n.a.	n.a.	original statute

Source: Nichols (1917, Chapter 16).