California Law Review

VOL. 51 DECEMBER 1963 No. 5

The Determination of Benefits in Land Acquisition†

*Charles M. Haar** and *Barbara Hering***

Freeze, freeze, thou bitter sky,
That dost not bite so nigh
As benefits forgot:
As You Like It, II, vii
174

GOVERNMENT as landowner and redistributor is a familiar part of American life today. Such activities always bear legal consequences. A striking example is the 41,000 mile interstate highway system authorized by Congress in 1956, which brings old legal problems of eminent domain compensation under new scrutiny. In a program which may cost more than seven billion dollars, expense for the payment of rights of way figures prominently, especially because of the appraisal puzzle arising out of the nature of a highway taking: properties are often fragmented, leaving the owner with part of the original parcel—a part whose value may be sharply enhanced or depressed as a result of the public improvement. How are these financial effects to be taken into account in the calculation of damages for the taking?

This article, therefore, concerns an aspect of the law of eminent domain which is of increasing importance and perplexity in the expanding area of federal land taking: the deductibility of the value of benefits in computing condemnation awards in takings for highway purposes.[1] Its aim

† This article began as a report for the Bureau of Public Roads, United States Department of Commerce, whose generous help is gratefully acknowledged. The analysis and views herein expressed are the sole responsibility of the authors.

* A.B., 1940, New York University; M.A., 1941, University of Wisconsin; LL.B., 1948, Harvard University; Professor of Law, Harvard Law School.

** B.B.A., 1952, College of the City of New York; LL.B., 1955, Columbia University; Member, New York Bar.

[1] As the chief commentator in the field of eminent domain has observed, of all the subtopics, that dealing with compensation and benefits is the most difficult and complex. This view is substantiated by statements in numerous cases. See, *e.g.*, Pickering Hardware Co. v. City of Cincinnati, 149 Ohio St. 275, 282, 78 N.E.2d 563, 566 (1948); State Highway Comm'n v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957) (for discussion see notes 105–06 *infra* and accompanying text); State v. Carpenter, 126 Tex. 604, 610, 89 S.W.2d 194, 197 (1936).

is: (1) to describe the substance of certain aspects of the present law, both federal and state; (2) to propose a critique of that law and of the alternatives to it; and (3) to make recommendations for legislative changes that will cope more effectively with the emerging difficulties, and to produce thereby a framework which will more nearly attain the congressional purpose underlying federal highway legislation.

Land acquisition was long ignored in federal highway construction legislation. Under the early acts, Congress lent financial assistance, which the recipient states could use to pay wages and salaries and to pay for materials and equipment. But the federal funds could not be used to pay for rights of way. Even during that period, however, the subject of acquisition could not have been entirely outside the ambit of federal concern. Since location is an integral part of highway planning, federal officials must necessarily, if obliquely, have considered the acquisition of rights of way in their conferences with state officials to plan highway projects eligible for federal financial participation. In 1940,[2] Congress first authorized federal financial assistance to enable the states to make necessary right of way acquisitions. It was not until 1941 that Congress finally authorized a limited exercise of federal condemnation powers to acquire rights of way for highway purposes.[3] The original enactment was subsequently amended,[4] without, however, much substantive change.

The scope of the federal government's present authorization to take private property for highway purposes by eminent domain is delineated by Section 107 of Title 23 of the United States Code, enacted in the 1958 revision of the highway law.[5] It provides, in pertinent part that:

> (a) In any case in which the Secretary of Commerce is requested by a State to acquire lands or interests in lands (including within the term "interests in lands," the control of access thereto from adjoining lands) required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including the Act of Feb. 26, 1931, 46 Stat. 1421) if—

---

[2] Act of Sept. 5, 1940, ch. 715, § 12a, 54 Stat. 867.

[3] Act of Nov. 19, 1941, ch. 474, § 14, 55 Stat. 765, 769.

[4] Federal-Aid Highway Act of 1956, ch. 462, § 109(a), 70 Stat. 381 (acquisition provided that state agreed with Secretary of Commerce to pay an amount equal to 10% of the costs incurred in acquiring the land or a lesser percentage as determined by statute, as amended, 23 U.S.C. § 107 (1958); Act of Aug. 27, 1958, ch. 1, § 108, 72 Stat. 893, as amended, 23 U.S.C. § 108 (Supp. IV 1963) (a new provision for advance acquisition of rights-of-way).

[5] 72 Stat. 892 (1958), 23 U.S.C. § 107 (1958).

> (1) The Secretary has determined either that the State is unable to acquire necessary lands or interests in lands, or is unable to acquire such lands or interests in lands with sufficient promptness . . . .

Neither section 107, nor the predecessor section[6] says anything about the computation of compensation. The few recorded cases in which the condemnation power conferred by those statutes is involved also do not establish the definitive rule for determining compensation. Its formulation must, therefore, await future legislative or judicial action. But before any judicial determination of the substance of the rule can be had, a court must decide whether federal or state law is controlling. Valid arguments can be made either way.

I

CHOICE OF LAW IN FEDERAL PROCEEDINGS

A. Authority for Federal Law

United States v. Miller[7] unequivocally asserts the exclusive governance of federal laws over substantive issues of condemnation law "such as the measure of compensations."[8] A reasonably recent pronouncement of the Supreme Court, *Miller* constitutes the highest authority for the black-letter rule that matters of compensation—including deduction of benefits—are determined solely by reference to federal law.[9] While neither *Miller* nor any of the authorities it cites for the proposition arose under section 107 or the predecessor law, two cases, not distinguishable on that ground, tend toward the same conclusion.

In the first of these, *United States v. Certain Parcels of Land in Knox County, Tenn.*,[10] the United States had been requested to proceed against land that had been dedicated for cemetery purposes. Under state law, this dedication entitled it to special, preferential treatment, including immunity from involuntary sale, and, by the same token, brought it within the scope of federal condemnatory power under section 107. The sole issue in the case was raised by the owner's argument that the state lacked power to condemn the property and that the federal government could not do what the state could not. In rejecting the argument, the court gave two grounds. The first challenges the major premise. The state lacked not power, but

---

[6] Act of June 29, 1956, ch. 462, § 109, 70 Stat. 381, amending ch. 474, § 14, 55 Stat. 769 (1941).

[7] 317 U.S. 369 (1942).

[8] *Id.* at 380.

[9] *Cf.* United States v. 93.970 Acres, 360 U.S. 328 (1959); United States. v. 15.3 Acres, 154 F. Supp. 770 (M.D. Pa. 1957).

[10] 175 F. Supp. 418 (E.D. Tenn. 1959).

authority; hence, special legislation could have been enacted enabling it to proceed. The second, alternative ground, rejects the conclusion that the federal government is necessarily subject to the same disabilities as the state.

The defendant property owner had attempted to capitalize on the conditions Congress attached to the grant of federal power. He contended that the federal government is not empowered to act on its own initiative, but only on the request of a state; therefore, when it does act, he argued, it acts not for itself, but in the nature of an agent for the state. As such, it stands in the shoes of the state with respect to what it may or may not do. The answer, as given by the district judge, was that "since a national interest [defense] is involved, it is immaterial whether the Federal Government utilizes its own power of condemnation or that of the State . . . ."[11]

The court noted that condemnations pursuant to section 107 are to be made in the name of the United States. Its reasoning stresses the importance of the national interests in the view of Congress. Thus, the court pointed out that the authority may be invoked only in connection with the Interstate System. Elsewhere in the Act, Congress declares:

> that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act . . . .[12]

The court concluded, contrary to the defendant's contentions, that the condemnation was federal, and independent of limitations on the state's authority.[13]

Winn v. United States,[14] like the *Knox County* case, tends to support the view that federal law applies. It too arose under section 107. Unlike the *Knox County* case, the defendants in *Winn* did not dispute the federal government's right to take, but only how much it should pay. This was very much in dispute because of the nature of defendants' injury.

Defendants' property lay in the path of both the old major highway, which bisected it, and the new limited access highway, which would occupy the corner of it being condemned. The damage caused by the actual taking was, as is often the case, insignificant—100 dollars. The more significant damage flowed from the change wrought in the traffic pattern. Most of the traffic that formerly passed on the old highway adjacent to defendants' land would be diverted to the new highway, to which defendants' property,

---

[11] *Id.* at 423.

[12] 72 Stat. 887 (1958), 23 U.S.C. § 101(b) (1958).

[13] 175 F. Supp. at 423.

[14] 272 F.2d 282 (9th Cir. 1959).

although adjacent, was not to have direct access. To the defendants this heralded the ultimate demise of their business located on the old unlimited access highway. Among the theories on which they sought compensation for that injury was that construction of the interstate highway would deprive them of a right of access for which they should be compensated. Defendants relied on state case authority. Those precedents were rejected by the court, not because state law was inapplicable, but because they were factually distinguishable.

While under the law of Idaho, the situs state, the question had never been considered, facts very similar to those in *Winn* have been litigated in the courts of other states. The decisions are in considerable conflict. New Mexico,[15] Wisconsin,[16] and Oregon,[17] among others, appear to be in accord with the federal court in *Winn* that the damage suffered is non-compensable. On the other hand, Kansas,[18] certainly, and Alabama,[19] California,[20] and Maryland,[21] probably, would reach a contrary result, though not necessarily by identical intellectual routes. This legal panorama is not discussed in the *Winn* opinion, although the collection and the citation in a footnote[22] of some state cases and law review articles dealing with the subject, strongly imply the court's awareness of it.

In support of its decision the court advances, in another footnote,[23] the practical consideration that, with respect to access, the appellants' position is no different than if the new highway, instead of being located on their property, merely bordered it or were a mile distant. But the crux of the court's opinion on this issue is contained in one paragraph:

> The Federal-Aid Highway Act of 1956 clearly contemplates the "free flow of traffic on the Interstate System" .... If every abutting landowner were given access to the Interstate, the free flow of traffic would be impeded and the object of the Interstate System frustrated. The purpose of the Interstate is to facilitate the movement of traffic, not to serve abutting landowners. The Fifth Amendment obliges the government to pay only for what it takes, not for what it may decline to give.[24]

Whether the court resolved the choice of law issue in favor of state or federal law is not explicitly stated in the opinion. Reconciliation of the substance and methodology of the opinion with a choice of state law would

---

15 State v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960).

16 Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208 (1955).

17 State v. Burk, 200 Ore. 211, 265 P.2d 783 (1954).

18 Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959).

19 Pike Co. v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955).

20 People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943).

21 State Roads Comm'n v. Franklin, 201 Md. 549, 95 A.2d 99 (1953).

22 272 F.2d at 288 n.3.

23 *Id.* at 287 n.2.

24 *Id.* at 288.

have to rest on the absence of any apposite Idaho precedent. In this situation a court frequently looks to out-of-state decisions, but it is under no duty to do so. A court may ignore such decisions entirely or, as the *Winn* court did, relegate a selective few to a footnote as having scholarly interest only. It has the same freedom to look, as the *Winn* court did, to federal law, adopting it to the extent it persuades and rejecting it to the extent it does not.[25] The weakness of this theory is that it requires the assumption that the court, all sub silentio, first decided that Idaho law controlled and then decided that federal law, though not controlling, should be adopted for its intrinsic merit to fill the gap in the applicable state law. It seems far less strained to assume that the court merely omitted to discuss the choice of law issue, perhaps inadvertently or perhaps because it did not regard it as an issue, and proceeded directly to examine the law which it regarded as controlling. Hence, the probabilities are that if the issue were considered at all, it was resolved in favor of federal law and that in any event federal law was regarded as governing the disposition of the case.

B. Authority for State Law: Congressional Intent

Federal courts frequently look to state law to amplify a federal statute on the theory expounded in *Fahs v. Martin.*[26] The question before the court involved the rights of a trustee in bankruptcy relating to a federal income tax return. Before turning to state law the court acknowledged that the case at bar, like a federal condemnation, arises "under the statutes of the United States." That the court did not deem itself compelled by the federal constitution to look to state law is clear. It declared that:

> [federal] statutes being next to the Constitution the supreme law, it is in them we should look for the solution. We are free to construe those statutes by the principles generally accepted in the federal courts, without recourse to the law of any state; and in areas where Congress has legislated extensively so as to establish a general policy, that *policy* may furnish the answer to a particular question, even though the federal statute expressly enacts a contrary rule.[27]

There is probably no field where Congress has legislated more extensively than income taxation or bankruptcy. Nevertheless, the court looked to state law, explaining that:

> [F]ailing a complete solution in the federal statutes (and the penumbral area where Congress has so "filled the field" that state law can have no application) we may then properly look to the foundation of legal inter-

[25] See, *e.g.*, CARDOZO, THE GROWTH OF THE LAW 56–80 (1924).
[26] 224 F.2d 387 (5th Cir. 1955).
[27] *Id.* at 392.

> ests and relationships created only by state law, to which the federal statutes must be related either because by their terms they postulate such interests and relationships, or because constitutional limitations of federal power require this.[28]

Preemption arguments seem less applicable to condemnation than to either bankruptcy or income taxation, two areas of long-standing national concern and legislation. In the 1850's it could be asserted that "upon the admission of a State, as one of the United States, formed from a territory of the latter, the right of eminent domain passes to the State, and nothing remains in the United States but the public lands."[29] Cooley in his work, *Constitutional Law*, had written that "the States are expected to make provision for the conveniences and necessities of public travel," and from this drew the conclusion that "the eminent domain, therefore, pertains in general to the States, not to the United States."[30] This view, though amply justified (at least in the 1850's) by *Pollard's Lessee v. Hagan*,[31] was shortly disavowed sub silentio by Supreme Court decisions sustaining congressional legislation authorizing exercise of the power of eminent domain.

But those decisions, as even a very summary review indicates, relate only to power. For instance, *Kohl v. United States*[32] holds that absent any "special provision for ascertaining the just compensation to be made for the land taken," the determination might be made by the federal courts under their general grant of jurisdiction "of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs."[33] Even clearer is the 1942 opinion in *United States v. Miller*.[34] In rejecting respondent's contention that the court below had erred in not employing the state criterion of value, the Court stated that the federal statutes directing courts to adopt state forms and procedures "do not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States."[35]

Although these and similar affirmations of federal power merely establish the outer limits of Congress' capacity to act, they do not establish a duty on the part of Congress to exercise its power to the utmost. Other decisions establish equally clearly the correlative principle that Congress may if it so desires direct that state law govern substantive, as well as pro-

---

[28] *Ibid.*

[29] ANGELL & DURFEE, TREATISE ON HIGHWAYS § 81, at 59 (1857).

[30] COOLEY, CONSTITUTIONAL LAW 332 (1880).

[31] 44 U.S. (3 How.) 212 (1845).

[32] 91 U.S. 367 (1875).

[33] *Id.* at 375.

[34] 317 U.S. 369 (1942).

[35] *Id.* at 380.

cedural questions. Before and after 1875, when *Kohl v. United States* was decided, Congress, in obeisance to states' righters, and members of the federal executive department resorted "to state boards and tribunals to ascertain the value of property and hence the compensation to be made."[36] This practice, challenged as an impermissible attempt to delegate the sovereign power of eminent domain, was upheld in *United States v. Jones*.[37]

Although the practice reviewed in *Jones* has fallen into desuetude, utilization of substantive state law has continued, as, for example, in *United States v. Causby*.[38] There condemnation damages were claimed on the theory that low government flights over petitioner's land, to the injury of the chicken business conducted on it, constituted a "taking" of "property" by the government's power of eminent domain. The Court did not expressly consider the applicability of state law. But in resolving the crucial issue of whether the air space utilized by the planes was "property" of the petitioner, the Court looked for authority to state elaborations of the concept.

Since the *Causby* decision, several lower courts have read it as directing them, when determining compensation for property, to look to the state law definition of property. Both *Blake v. United States*,[39] and *United States v. 15.3 Acres*[40] cite *Causby* as authority that "while it is true that the real meaning of 'property' as used in the fifth amendment is a federal question, it will normally obtain its content by reference to local law."[41]

Cases such as *United States v. 93.970 Acres*[42] and *United States v. Certain Interests in Property*,[43] although refusing to follow state law, do not create any real conflict. The principle guiding these decisions is that "federal law rules unless Congress chooses to make state law applicable."[44] In these cases, as in those dealing with section 107, the congressional choice was not spelled out in the act but had to be sought either in implication or outside the four corners of the enactment, most often in the legislative history. In *United States v. Certain Interests*, the congressional intent deduced from those sources was that the court should fashion an appropriate federal rule, notwithstanding the existence of contrary state law.

---

[36] United States v. Jones, 109 U.S. 513, 520 (1883). See 1 NICHOLS, EMINENT DOMAIN § 1.24[2], at 49 (3d ed. 1950).

[37] 109 U.S. 513 (1883).

[38] 328 U.S. 256 (1946).

[39] 181 F. Supp. 584 (E.D. Va. 1960).

[40] 154 F. Supp. 770 (M.D. Pa. 1957).

[41] 181 F. Supp. at 587. *Accord,* United States v. 70.39 Acres, 164 F. Supp. 451 (S.D. Cal. 1958); United States v. 12.800 Acres, 69 F. Supp. 767 (D. Neb. 1947); and, less clearly, Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); McGowan v. United States, 206 F. Supp. 439 (D. Mont. 1962).

[42] 360 U.S. 328 (1959).

[43] 271 F.2d 379 (7th Cir. 1959).

[44] *Id.* at 384.

With respect to section 107, however, the legislative history can be argued to dictate reference to state law for the measure of compensation.

In 1940, Congress took under consideration legislation dealing with the acquisition of rights of way for highway purposes. One of the bills proposed was H.R. 7891; Title II dealt with rights of way. Section 202 of the proposed act provided in part that the United States could condemn property in connection with "any road project which will be a post road or will foster interstate commerce, aid in the national defense, facilitate the use of the mails, or promote the general welfare . . . . " The real parties in interest nevertheless appear to have been the states. Section 203 provided that the Reconstruction Finance Corporation was to have authority to lend the states money to aid in the acquisition of real property in connection with highway projects. Section 205 qualified the grant of power in section 202 by the condition that the federal officer must first have entered into a contract for the present or future purchase of the property by the state.

The state highway officials and executives of interstate highway organizations who testified at the extensive hearings held by the House Committee on Roads were generally in favor of Title II. Even witnesses from the more sparsely populated western states, while denying that their respective states had any special right of way problems, seemed to think that it would meet a genuine need in more urbanized states. Spokesmen for those areas were in general accord that "the greatest difficulty that the highway departments have in solving this problem ["of getting traffic into and through cities, as well as up to and around them"] . . . is the great expense of right of way which is involved in proportion to the cost of actual construction."[45] But none of the bill's proponents urged the use of federal legal facilities to avoid the state formula for determining condemnation awards.

One justification for the provision authorizing federal condemnation which emerges from the testimony was that in some jurisdictions "difficult and cumbersome . . . legal facilities" constituted a serious impediment to progress in highway construction.[46] This purpose, however, was clearly secondary to the principal purpose of assisting the states with their financial troubles. Where the federal formula for computing compensation would result in generally lower condemnation awards, it would seem that both purposes would be best served by federal condemnation governed entirely by federal law. But the merits of this possible solution were not debated, and the general tenor of the discussion was opposed to it. Thus Thomas A.

[45] Henry F. Cabell, Pres., Am. Ass'n of State Highway Officials, *Hearings on H.R. 7891 Before the House Committee on Roads*, 76th Cong., 3d Sess. 49 (1940).

[46] Charles M. Upham, Engineer-Director, Am. Road Builders Ass'n, Washington, D.C., *id.* at 264.

MacDonald, then Commissioner of Public Roads, and the chief proponent and expounder of the bill, testified that the purpose of the authorization was to enable the United States to take title in its own name only when otherwise the law would be made "inactive and inoperative by reason of the constitutional difficulties that the states would face in borrowing money to acquire rights-of-way or making contracts to buy."[47]

Perhaps because of the quite strong opposition to it manifested by some committee members, Mr. MacDonald elsewhere in the hearings was even more reserved in his advocacy of the condemnation provision:

> It would only be with a great deal of reluctance that I would think of the Federal Government engaging in a business of purchasing the rights-of-way, and probably it is not necessary, so I think it wonld be better to go slowly in that matter and not risk losing any of the confidence that has been built up in our road work. I would prefer to see a simple authority created to lend money for the purpose rather than to have any type of law passed that would in any way cause the loss of confidence of the Congress or of the states.[48]

Mr. MacDonald's suggestion was followed. After a series of mutilating amendments and substitutions, Title II as such disappeared. Its contents were whittled down to a single provision, in which guise it was enacted into law. It simply authorized the Reconstruction Finance Corporation to assist the states financially in acquiring rights of way.[49]

The following year, however, the matter of federal condemnation came up again in the context of highway defense requirements, and this time was enacted into law. Very little interest in the condemnation provision was displayed in Congress. The explanation for it in the House, where it evoked no comment, was that "in some states the laws pertaining to condemnation will not permit possession. Long delays resnlt."[50]

The question of federal condemnation of highway rights of way came up again in 1955. The remarks at this time are most pertinent because the law that eventuated is still in effect: the 1958 Act that is currently on the books was not intended as a modification of prior law, but only a reordering and renumbering of it, without changing its substance.

In answer to a hostile question, the following statement was made by Senator Gore (Tenn.):

> Mr. President, no authority is conferred by the terms of the bill with respect to the rights-of-way or realty rights except as the Federal Government may

---

[47] *Id.* at 339.

[48] *Id.* at 228.

[49] Federal Highway Act of 1940, ch. 715, § 12(a), 54 Stat. 867.

[50] 87 CONG. REC. 6228 (1941) (remarks of Mr. Wittington). Although this was said in connection with H.R. 5110, this provision of the House bill was substantially the same as its counterparts in S. 1580, which was adopted by Congress hut was vetoed for other reasons, and S. 1840, which was passed by the Congress and approved.

> be requested by a particular State to act .... There are a few States which do not have authority, constitutional or statutory, to acquire control of limited access right-of-way. The Bureau of Public Roads recommended that it was necessary, in order to get the program underway, to grant authority to the Secretary of Commerce to act, through the Bureau of Public Roads, as agent of the State ....[51]

The high cost of land acquisitions and the serious financial difficulties thereby created for many states was again commented upon. But once more, no one suggested that the federal condemnation machinery should be utilized whenever its measure of determining damages was more favorable to the condemnor than that of the situs state. That this thought never occurred to the Congress is suggested by a comparison of the brief debate on this topic with that on the provision making the Davis-Beacon Act[52] applicable. There, vigorous and prolonged opposition was voiced on the ground that states' rights were being invaded by the requirement that the wages paid highway workers meet the standard for similar work prevailing in the area.[53] And there the standard being adopted was a local product—wages prevailing in the area.

The conclusion which arguably may be drawn from the congressional history as a whole is that Congress intended the federal power to be used only when the state could not condemn because of a lack of statutory or constitutional authority—and then only to the extent necessary to overcome the difficulty. Thus, in states where there is no authority to condemn for limited access highways, the federal government could act as a condemnor. Similarly, it could act where, as in the *Knox County* case, the use to which the subject property is being put renders it statutorily beyond the condemning power of the state (or its political subdivisions). The probabilities, according to this view, are that Congress never intended the measure of damages to vary simply because the state acts through the "agency" (*i.e.*, requests the federal government to act) of the federal government rather than for itself.

C. On Balance

There is only scant evidence to support the applicability of either state or federal law in federal condemnation cases. And such evidence as exists for either view is vulnerable to attack.

Winn v. United States, one of the underpinnings of the argument for applying federal law, is binding only within its own circuit. Its reasoning lacks the intellectual force calculated to make other courts follow it volun-

---

[51] 101 CONG. REC. 6784 (1955).

[52] 49 Stat. 1011 (1935), 40 U.S.C. §§ 276a–276a–5 (1958).

[53] 102 CONG. REC. 7143–45, 7155 (1956).

tarily. The court commences by citing the necessities of the Interstate System as though they constituted a reason for the result reached. There can be no quarrel with the view that completion of the system precludes granting unlimited rights of access to abutting owners. That, however, was not the issue; the issue was whether the denial of access which was clearly within the legislative power, gave rise to a right of compensation. The practical consideration adverted to by the court has an undeniable appeal: why should the owner of land on which a new highway is located be compensated for an injury identical with that which would be uncompensated if the highway were not so located? Considerations of logic and fairness would seem to dictate equal treatment in both situations. But case law has evolved differently and myriads of cases turn on just that distinction.

Certain Parcels of Land in Knox County, Tenn. is not susceptible to the same kind of logical attack, and the result seems eminently consistent with the grant of authorization to the federal government and the purpose behind it. But to serve as authority for applying a similar approach to the question of compensation, the analogy between the two situations should probably be stronger than in fact it is. The practical obstacle presented by a state's financial inability to condemn land is subject to far different considerations than the legal disability which existed in the *Knox County* case. One consideration common to both types of disability is that the delay, which is the immediate effect of both, has the same impact on national defense. Even so, however, the requirements of national defense in regard to roads was apparently not viewed by Congress as sufficiently exigent to warrant federal action to sweep aside every barrier encountered by a state. Thus, Congress did not confer power to condemn for secondary or feeder roads, notwithstanding that such roads were also declared essential to national defense.[54]

Neither case adverts to the fact that 90 per cent of the cost of acquisition is to come from federal funds, and only 10 per cent from state funds. That fact cuts both ways. The far greater share of the burden borne by the federal government points to applying federal law. On the other hand, all acquisitions for interstate roads are paid for in the same percentages. Most condemnation for such roads, however, unquestionably are brought by state or local authorities in state courts. While the 90-10 reasoning would apply equally to such proceedings, there is no basis whatever in present law for determining compensation in state proceedings by the federal rules on the subject. Thus, to apply the federal measure of compensation in federal proceedings would introduce an inequality hard to justify by reference to the 90 per cent to 10 per cent ratio of federal to state contributions.

[54] See, *e.g.*, CONF. REP. No. 1370, 77th Cong., 1st Sess. (1941).

The black-letter rule of the hornbooks that federal law governs questions of compensation is asserted by such comprehensive and respectable works as *Nichols on Eminent Domain.*[55] Examination of the supporting authorities, however, suggests that some qualifications may be in order. The very case that Nichols quotes in support of his position opens up one of the lines of conflicting argument. If *United States v. 70.39 Acres*[56] is correct that " 'what is "property" for which compensation must be paid, is governed by the law of the state in which the property is located,' "[57] why should the reference to state law be confined to that situation? It seems more logical to suppose that the same reference should be made whenever the same operative legal facts are present. If the "intention" of Congress, as inferred from its failure to provide a definition, is a sufficient operative fact with respect to "property," it is present to precisely the same extent with respect to the "measure of compensation."

It can also be argued that the same body of law should govern the content of property and the measure of compensation, because the two are inextricably interrelated. Conceptually, property has been described as a bundle of valuable rights. It would be meaningless to say that the content of property, or, what is the same thing, rights in property, are to be determined by one body of law if another body of law may determine that those same rights have only a nominal value, or perhaps none at all.

It may be, of course, that while property and compensation are only two sides of the same coin and hence should be determined by a single body of law, that law, contrary to *United States v. 70.39 Acres*, should be federal law. That in this area property is a federal question is maintained by Mr. Justice Douglas in his dissent to *Martin v. Creasy.*[58] This, of course, is contrary to the approach of *Erie v. Tompkins*. But the applicability of *Erie* to a situation such as the one under consideration has been expressly rejected by one district court, apparently the only one to which the argument has been made.[59] And while there is no Supreme Court precedent squarely in point, a number of decisions manifest a decided disinclination to extend the *Erie* doctrine to the interstices of federal statutes.[60]

The Douglas dissent may, in fact, be read as going even further, and advocating a reverse "*Erie v. Tompkins.*" Petitioners had alleged depriva-

---

[55] 3 NICHOLS, *op. cit. supra* note 36, § 8.6211[1], at 78.

[56] 164 F. Supp. 451 (S.D. Cal. 1958), quoted in 4 NICHOLS, *op. cit. supra* note 36 at 41 n.82. See also cases cited in notes 39–41 *supra.*

[57] 164 F. Supp. at 479–80.

[58] 360 U.S. 219, 226 (1958).

[59] United States *ex rel.* Tenn. Valley Auth. v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941).

[60] See, *e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942). See generally *Clearfield: Clouded Field of Federal Common Law,* 53 COLUM. L. REV. 991 (1953).

tion of their rights under the United States Constitution in that a Pennsylvania statute took their rights of access without compensation. Douglas dissented from the majority's holding that jurisdiction had been improvidently granted because he felt that the issue raised by petitioners "concerns not state law but a concept involved in the Bill of Rights. It is in no way entangled with local law. The Supremacy Clause of the Constitution makes all local projects bow to that concept of 'property.' "[61]

Also pointing to federal law is the consideration that in order to apply state law, a court must depart from the rule reiterated in a very long line of cases. Where Congress has in the past intended use of state law to determine damages, it has so stated expressly.[62] Although nothing was made of it, the Court's statement of background facts in the leading case of *Kohl v. United States*[63] indicates that the pertinent statutes said nothing about compensation. It appears to have been assumed without discussion that the proper measure was the constitutionally required "just compensation." This is also the thrust of *Aaronson v. United States*,[64] which rejects the objection that, without express statutory authorization, the jury was permitted to consider special benefits. The omission was held to be of no legal consequence because benefits, like damages, were integral elements of just compensation, and properly included, presumably on the higher authority of the Constitution, in the judicial reckoning of just compensation.[65]

The legislative history does not add up to a clear picture of congressional intent on this point. Certainly it contains ample evidence of concern for states' rights, but very little from which one could infer a desire that state law be applied. Perhaps the strongest statement on this point is that the federal government condemns as agent of the state.[66] Obviously, however, that was not intended to be taken literally. For one thing, the declarations of national interest are inconsistent with a purely disinterested role as agent. Even without those declarations, the mere fact that 90 per cent of the cost comes from the federal government would seem to establish

---

[61] 360 U.S. 219, 228–29 (1958).

[62] See United States v. Jones, 109 U.S. 513 (1883).

[63] 91 U.S. 367 (1875).

[64] 79 F.2d 139 (D.C. Cir. 1935).

[65] It is but a small step from authorizing the deduction of benefits to requiring their deduction. Some early cases, *e.g.*, Bauman v. Ross, 167 U.S. 548 (1896), can indeed be read as suggesting that the just compensation provision of the Constitution set *maxima* as well as *minima*. That suggestion, however, was never acted upon, and it is now firmly established that Congress has the power to be more generous than is required by strict adherence to the Constitution. See Aaronson v. United States, 79 F.2d 139 (D.C. Cir. 1935).

[66] United States v. River Rouge Improvement Co., 269 U.S. 411 (1926), is interesting in this connection. There the federal government was admittedly acting for "local interests"—the industries located in the area—who were in a very real sense principals, for whom the federal government acted as agent.

a strong interest. An even more formidable logical obstacle, more formidable because, for one thing, it does not rely on inference, is the avowed legislative intent to avoid state laws preventing condemnation for limited access highways. A court might well regard this as dispositive of the argument that Congress intended generally that state law be followed in federal proceedings.

A last factor in weighing the preponderance of probabilities is the sheer weight of cases applying a federal measure of damages. Even though every case is distinguishable, it is easier to ignore the distinction than to create and apply a deviatory rule without a clear legislative mandate to do so. The balance then would seem to be on the side of applying federal law. But whichever decision the court makes, it must decide what the substantive rules of the applicable body of law are.

II

FEDERAL SUBSTANTIVE LAW

Modern federal law on the deductibility of benefits in condemnation awards really begins in 1829 with the decision in *Chesapeake & Ohio Canal Co. v. Key*.[67] In that case, Mr. Key, in his capacity of owner of real property located in the District of Columbia, sang a quite different song from the one generally associated with his name. The substance of the lyrics was clear and simple. The fifth amendment to the United States Constitution requires just compensation for property condemned for public use. Just compensation means positive, not conjectural compensation. Boiled down, his argument was simply that only money is a just or positive compensation. For, he alleged, the requirement of compensation is not satisfied if the entire award for damages and the value of a partial taking could be swallowed up by a deduction for benefits, instead of being paid in money compensation. Chief Judge Cranch thought otherwise. Although not strictly necessary to his decision, he also stated that even without the express authorization of a charter provision, the jury could have considered benefits as well as damages, "for the Constitution does not require that the value should be paid, but that just compensation should be given."[68]

Doubt was cast upon the status of the *Key* case in decisions handed down during the next few decades in the courts for the District of Columbia.[69] Finally, in *Bauman v. Ross*,[70] decided in 1896 and generally regarded

---

[67] 5 Fed. Cas. 563 (No. 2649) (C.C.D.C. 1829).

[68] *Id.* at 564.

[69] District of Columbia v. Armes, 8 App. D.C. 393 (1896); District of Columbia v. Prospect Hill Cemetery, 5 App. D.C. 497 (1895).

[70] 167 U.S. 548 (1896).

as a leading case in federal law on this subject, the question came before the Supreme Court. The opinion reviews past legislation for the District of Columbia and prior decisions, both its own and those of state courts. On the basis of the practice and authority elicited by its review, it approved the language of Judge Cranch and established it as the minimum rule for compensation, by that time applicable not only to the District of Columbia and the federal government, but, by virtue of the fourteenth amendment as construed by the Supreme Court, to the states as well.[71]

The general proposition established by *Bauman v. Ross*, having by now gained the "acquiescence of years,"[72] is probably beyond the pale of serious legal attack. Subsequent decisions, however, reveal considerable obscurity and confusion in the application of the general proposition. The two major categories are (1) questions concerning the type of benefits which may be deducted and (2) questions concerning determination of the amount to be deducted.

A. Type of Benefits Which May Be Deducted

There is, perhaps, more confusion over the question of which benefits are deductible than over any other single question arising under the head of permissible offsets to condemnation damages. *Bauman v. Ross*, though it does not deal squarely with the issue, does touch upon it in language which raises the possibility of a constitutional interdiction against deducting "general" as opposed to "special" damages.

The confusion only becomes rampant, however, on the issue of what constitutes deductible special benefits and non-deductible general benefits. The question arose recently in the case of *United States v. 2,477.79 Acres*[73] in connection with a partial taking for a reservoir on which a part of the remaining property would front. At issue was whether the creation of "lake" frontage constitutes a deductible benefit. The court held that it does, under the rule that "special benefits are those which are direct and peculiar to the particular property as distinguished from the incidental benefits enjoyed to a greater or less extent by the lands in the area of the improvement."[74]

As a test for differentiating special from general benefits, the court's formulation is considerably wanting. "Direct" and "peculiar" convey little, if anything, more than "special." The court rejects exclusivity as an essential characteristic of "special": it is immaterial that "other lands in like

[71] See, *e.g.*, Jones v. City of Opelika, 316 U.S. 584 (1942); United States v. Hall, 26 Fed. Cas. 79 (No. 15282) (C.C.S.D. Ala. 1871); Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251, *aff'd* 319 U.S. 624 (1942).

[72] Judge Benjamin Cardozo's inimitable language.

[73] 259 F.2d 23 (5th Cir. 1958).

[74] *Id.* at 28.

situations are similarly benefited."[75] But it also holds that "if there has been a general benefit . . . as well by reason of the property being in the area of the improvement the amount of the offset would be limited to that part of the increase attributable to the special benefit."[76]

Taken as a whole, the court appears to hold that to create a special or peculiar and direct benefit, the improvement must physically alter the subject property. But read thus, it is hard to understand the court's deprecating reference to *United States v. Alcorn.*[77] *Alcorn* professes satisfaction "that the increase of value to the defendants' property due to its proximity to the great project, while different from that enjoyed by owners of more remote land, is not a special or direct benefit to the land not taken . . . ."[78] But this can hardly have meant, in light of the Supreme Court decision cited in this connection,[79] that *Alcorn* was according weight to the factor of exclusivity rejected in *2,477.79 Acres*. On the other hand, it may well have meant that a physical change, such as the change from upland to riparian land in *2,477.79 Acres*, was essential. For while the government stressed the interrelationship between the location of the subject property and the improvement, the only physical change was that the property would be adjacent to a railroad right of way to be constructed to replace a way that would be flooded by the project proper. The conceded increase in the value of defendant's remaining property was attributable not to the adjacent railroad right of way, but to the demand for residential, business, and industrial sites which the realty market anticipated would be created by the Bonneville Dam, the principal improvement.

The opinion in *2,477.79 Acres* is less readily reconciled with the Supreme Court's decisions in *Brand v. Union Elevated R.R.*[80] and *McCoy v. Union Elevated R.R.*[81] The conflict is not obvious from a reading of the majority opinion in the first case, because that decision appears to rest on unrelated grounds. The dissent, however, takes issue with the majority as sanctioning a test of damage based entirely on the market value before and after the improvement. The vice in such a test was said to be that it "necessarily charges the owner with benefits which this court has repeatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road."[82]

---

[75] *Ibid.*

[76] *Id.* at 29.

[77] 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).

[78] *Id.* at 489.

[79] United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

[80] 238 U.S. 586 (1915).

[81] 247 U.S. 354 (1918).

[82] 238 U.S. at 598–99.

That the majority indeed sanctioned a formula using before and after market values, became certain with its decision in the *McCoy* case. But the court's verbalization seems unfortunate. It begins by noting that "peculiar and individual" benefits are almost everywhere held deductible. It then upholds the right of a state to go "one step further and [permit] . . . consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages."[83] On its face this would appear to relate only to the significance to be accorded exclusivity: the individual versus the neighborhood. But this interpretation seems doubtful in light of *Bauman v. Ross*, since there the road was held to confer deductible benefits on all the several abutting owners whose property was taken only in part. Another possibility is the one which brings the case into conflict with *2,477.79 Acres*: namely, that the court is saying that the improvement need not effect a beneficial physical change on the property provided it causes an increase in its market value.

This is one instance where clarity might well be gained by tracing the confusion to its source, *Monongahela Nav. Co. v. United States*.[84] There, Justice Brewer in a purely constitutional exegesis wrote that the effect of the fifth amendment in directing compensation "for the property, and not to the owner . . . [is to exclude] the taking into account, as an element in compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated . . . ."[85] *Bauman v. Ross* explains the case as excluding general, as distinguished from special, benefits.

Notwithstanding *Bauman v. Ross* and a host of other decisions embarrassed into explaining or distinguishing *Monongahela*,[86] the Brewer dictum seems much maligned. The general-special dichotomy used, if not introduced, in the *Bauman* case is the real villain. The line drawn in *Monongahela* is not general versus special, but person versus property. The underlying cause may be greater convenience of access, or the like. But in every case the result should be an increase in the present market value. The improvement may also benefit the property owner, or it may benefit the property owner individually, but not the property. This can be illustrated by reference to the factual situation in *McCoy*. The plaintiff,

---

[83] 247 U.S. at 366.

[84] 148 U.S. 312 (1893).

[85] *Id.* at 326.

[86] See, *e.g.*, Scranton v. Wheeler, 179 U.S. 141, 155 (1900); Isabela Irr. Serv. v. United States, 134 F.2d 267, 270 (1st Cir. 1943); Latvian State Cargo & Passenger S.S. Line v. United States, 88 F. Supp. 290, 292 (U.S. Ct. Cl. 1950); United States v. 9.94 Acres, 51 F. Supp. 478, 481 (E.D.S.C. 1943); United States v. Big Bend Transit Co., 42 F. Supp. 459, 474 (E.D. Wash. 1941).

a hotel owner, like all his guests, and like all the people having convenient access to and occasion to use the new facility—an elevated street railway—benefited by its construction and maintenance in ease of travel. The property benefited by an increase in its market value. *Monongahela* precludes the former from consideration; it sanctions consideration of the latter in determining compensation.

While some federal cases are contrary to the suggested interpretation of this aspect of the *Monongahela* opinion, there are no Supreme Court decisions among them. The rule has the merit of being conceptually simple, and if less simple in practice, at least no more difficult than competing propositions. It has the additional virtue, to those who value consistency, of using parallel rules to determine the logically parallel questions of damage and benefit.

B. Limits of Deductibility—Amount of Benefits Which May Be Deducted

Related to the question of type of benefit, but not at all identical with it, is the question of when the amount of the benefit is to be determined. Discussions of the time of valuation in relatively recent cases have almost invariably been in the context of damages. There the rule is that the crucial date is generally the time of taking.[87]

Public improvements, certainly major ones, come into the public limelight long before the government is in a position to begin the undertaking. There is the inevitable and often quite extended period of debate and amendment between the legislative proposal of a public improvement and approval of the final version by the President. There is additionally some lapse of time between the final approval of the project and the taking of the first formal step to condemn the necessary interests in land. Hence, by the date of taking, the realty market may have discounted the benefits anticipated from the project in the same way as stock market prices herald events in the business world. *United States v. Alcorn*[88] describes one such instance in connection with the Bonneville Dam, constructed in the mid-1930's: land that before public announcement of the project had at most a nominal value of about 100 dollars per acre had, by the date of taking, skyrocketed to a value estimated between 1,500 and 6,000 dollars per acre. The Bonneville Dam takings, probably extreme in degree, but not unusual in kind, illustrate the type of situation which has given rise to the principal exception to the general rule that value is determined as of the time of the taking.

---

[87] United States v. Miller, 317 U.S. 369, 374 (1943), citing Shoemaker v. United States, 147 U.S. 282, 304 (1893), and Kerr v. South Park Comm'rs, 117 U.S. 379, 386 (1886).

[88] 80 F.2d 487 (9th Cir. 1935).

The exception, as formulated in *United States v. Miller*[89] is as follows:

> [the owners of] lands [which] were, at the date of the authorizing Act, clearly within the confines of the project . . . were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken.[90]

The rule as stated seems reasonably clear. It would recoup for the public any appreciation in the value of condemned property subsequent to the date (*quaere*, whether approval or effective) of the act; it would give the owner the benefit of any speculative increase before that date. When, however, the rule is juxtaposed to the facts of *Alcorn* its proper application seems far less clear.

The Bonneville Dam project had its origin in a state proposal appraised and authorized by referendum vote in 1932. It was adopted by the federal government in 1935, when Congress authorized and the President approved an appropriation of twelve million dollars for it. Additional appropriations for the project were voted in 1936 and 1937, and the project was again authorized by Congress in 1937. Alternate routes for the right of way were surveyed in 1936. It is not clear whether any of those routes were located on the respondents' lands which were ultimately condemned. This is one of the sources of confusion. Another is that the cut-off date selected by the trial court, and approved by the Supreme Court, is August 26, 1937, the date of Congress' second authorization.

On the face of the rule, it would seem to justify use of a far earlier date, 1935, when the federal government formally entered the picture and perhaps even 1932. It is impossible to say whether use of the 1937 date means that where a project is made the subject of more than one legislative authorization, only the last one will be given legal significance for valuation purposes, or whether it simply reflects a failure on the part of the government to argue that an earlier date should apply.

In a total taking, the question is simply whether or not the owner is to have the benefit of increments in value subsequent to whatever date is selected for that purpose. The question becomes more complex in the context of a partial taking. There it becomes necessary to decide additionally whether the condemnor shall be given the benefit of the appreciation or whether it should be ignored, which would have the effect of splitting the increment between condemnor and condemnee. The light shed by the *Miller* opinion on the condemnor's rights has a decidedly Delphic cast.

---

[89] 317 U.S. 369 (1943).

[90] *Id.* at 379.

The substance of the respondents' argument before the Supreme Court in *Miller* appears to have been that appreciation resulting from announcement of a project is a general benefit, and therefore should not be deducted in computing severance damages. The contention was rejected as lacking in merit "in light of what [had] already been said,"[91] presumably with regard to valuing property actually taken.

The siguificance of "what had already been said" in *Miller* appears to have escaped the Fifth Circuit, which authored *United States v. 2,477.79 Acres*,[92] one of the rare opinions discussing time of valuation of benefits. There, in addition to two tracts taken for the reservoir purposes previously mentioned,[93] a third tract, forming part of the 2,477.79 acres, was to be used in connection with the expansion of a military fort. The court of appeals ruled that the three tracts, which were held in single ownership, were, in legal contemplation, a single parcel. The question presented was whether the enhancement of the value of the fort tract resulting from the reservoir project ought to have been deducted in computing the award for the reservoir tracts. The argument against the deduction was that the appreciation in value of the fort property occurred when the contour line of the reservoir was established, an event which preceded the simultaneous taking. This is little more than a slightly different statement of the argunent rejected in *Miller* that the benefits and damages entering into the computation of a net award for a partial taking were those in existence on the date of taking. While the results are not inconsistent, the bases are, or at least may be. The Fifth Circuit version of the applicable rule is that "it is the creation of the improvement and not the incident of the taking to whicli we look in determining whether there lias been a benefit to neighboring land that is to be reckoned as a factor in measuring just compensation."[94] "Creation of the improvement," the crucial event according to the Fifth Circuit case, is hardly synonymous with the "date of the Act," the Supreme Court's apparent preference in *Miller*.

Integral to the argument of respondents in *Miller* is the interrelation of what and when. Their argument that the appreciation was a general as opposed to special benefit, if it had prevailed, would have eliminated the valuation date as an issue in the case. As reported, respondents phrased the argument thus:

> And to require the exclusion of any increase in value resulting from the announcement of the project in fixing just compensation for the land that

---

91 *Ibid.*

92 259 F.2d 23 (5th Cir. 1958). This conclusion seems not unfair in view of the fact that the district court twice cites the *Miller* case, but not in connection with the deductibility of appreciation in computing damages, a question squarely in issue. The conclusion is, moreover, reinforced by a consideration of the court of appeals resolution of the issue.

93 See note 73 *supra* and accompanying text.

94 259 F.2d at 27.

> is later taken for said project is equivalent to allowing an offset for general benefits, common to the community, against the damages suffered by the landowner by such taking.[95]

This language is strongly reminiscent of that of Mr. Justice Day, dissenting in *Brand v. Union Elevated R.R.*,[96] which is not cited. More surprising is respondents' failure to cite *United States v. Alcorn*, which supports their position on strikingly similar facts.

In both *Alcorn* and *Miller*, the major undertaking in the background was a reclamation project in which the central feature was the construction of a huge dam. In both, carrying out the plan would flood railroad rights of way which were to be relocated as an incident of the major project. In both, respondents' land was taken for the incidental, rather than the principal purpose. The resolutions of the two cases, however, take quite disparate paths. In *Alcorn*, the decision rested on the general-specific dichotomy, avoiding thereby any need to fix the date of evaluation. The decision in *Miller*, by contrast, is made to turn on the date of evaluation, while omitting all mention of general versus special.

This fixing on what or when, each to the exclusion of the other as though the two were entirely unrelated, is the typical pattern of judicial decision in this area, a pattern which harks back at least to 1880, and the decision of the Supreme Court in *Kennedy v. Indianapolis*.[97] There the city, some years before the litigation, had made a number of partial takings of property for a navigable canal. The action was brought to quiet title, and turned on whether the city's title, acquired by eminent domain some years earlier, was good. One of the original owners had sought damages for the partial taking of his property. His claim had been dismissed on the ground that any damages were exceeded by the benefit from the projected improvement, a navigation canal. The anticipated benefit never materialized, however, because the project was abandoned before its completion. This fact proved crucial in the later action. The rule of law applied by the *Kennedy* Court was that title to condemned property passes when compensation—which may include benefits—is paid.[98] It held that, because the benefits never accrued to the land in quesiton, title never passed. The application is correct if benefits means existing physical benefits. It may or may not have been correct—the facts stated in the opinion are insuffi-

---

[95] 317 U.S. 369 (1942).

[96] 238 U.S. 586, 596 (1915).

[97] 103 U.S. 599 (1880).

[98] Certain state constitutions have been construed as requiring a similar result. See, *e.g.*, KY. CONST. art. 13 (construed in Goodwin v. Goodwin's Executor, 290 S.W.2d 458, 460 (Ky. 1956)); MICH. CONST. art. 13, § 1 (construed in State Highway Comm'r v. Newstead, 337 Mich. 233, 241, 59 N.W.2d 269, 275 (1953)). Here, however, no special language was involved and the rule is stated as simply one of general law.

cient to say—if benefit is defined to mean an increase in market value, either unqualified or one resulting from a projected physical change beneficial to the property.

United States v. River Rouge Improvement Co.,[99] in focusing on one element to the exclusion of the other, follows the *Kennedy* case, but takes the alternative approach of ignoring when and dealing only with what. The case arose under an express legislative direction to deduct for any "special and direct" benefit.[100] Whether a benefit within the meaning of the statute had been conferred was very much in issue. The lands in question all fronted on a river which was navigable only to very small vessels. The projected improvement would make it navigable for the large freighters required by local industry. On these facts the Court found the requisite benefit: "We are of opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit . . . ."[101]

To this point, the opinion is perfectly consistent with the fair market value of benefit theory deducible from *Monongahela,* which, though cited by defendants, is not mentioned in the opinion. But the Court went on to distinguish a special and direct benefit "from a benefit common to all lands in the vicinity . . . ." The possible inconsistency with *Monongahela* arises because the Court did not rest its result only on the underlying facts. Not all property beneficially affected by a public improvement will be affected to the same extent. The appreciation will be greatest as to lands bordering and physically changed by it, gradually vanishing as the outer perimeter of the improvement's impact is reached. But market appreciation, regardless of amount and regardless also of whether physical change is an element, is always an indirect benefit in the sense that it is not created by the improvement itself, but rather by the market's evaluation of the improvement. *Monongahela* permits recoupment by the public of all benefit. Congress, however, may elect to recoup less than the constitutional maximum.[102] In *River Rouge,* it can be argued that Congress made that very election, using the word "direct" in order to limit deductions to property physically changed by the improvement. The logical difficulty is that, from all that appears in the opinion,[103] the improvement was still *in futuro* when

[99] 269 U.S. 411 (1926).

[100] 40 Stat. 911 (1918).

[101] 269 U.S. at 415.

[102] See discussion at note 65 *supra.*

[103] It is not at all certain from the Court's statement of the facts whether or not the improvement had been made by the date of decision. The consistent use of the future tense in referring to its benefits strongly suggests that, at least as of the time of argument, the project had not been completed.

the amount of the deduction was calculated. Hence there were at the time no "direct" benefits, but only the indirect benefit of increases in property values reflecting the market's judgment that the improvement would be made and have the anticipated economic effect.

The only conclusion which this attempt at synthesis seems to justify is that the law in this area is badly confused. It is, therefore, to be regretted that the Supreme Court by its curt disposition of this issue tendered by respondents in *Miller,* lost an opportunity to shed some badly needed light.

III

STATE LAW

A. A Vertical Cut

On the issues relating to benefits, it would not be unreasonable for federal courts to look to state adjudications for guidance. For various reasons—principally the generally accepted distribution of functions between federal and state governments which allocates to the states the duty of providing many of the necessary public improvements, notably highways—the states have been the more energetic in using eminent domain. Out of repeated opportunities to rethink an issue in a wide variety of factual contexts, and to test solutions, there could come a consensus which would be a generally acceptable precedent. But despite the undoubted excellence of many of the state judges and the apparently careful and extended consideration given those issues in numerous opinions, the result can hardly be described in glowing terms. An attempt to draw finer distinctions in the area of benefits has involved the state courts, like their federal counterparts, in the semantic riddle of general versus special benefits. Every conceivable resolution has its vigorous exponents, but no one resolution is possessed of enough of whatever it takes to still competing voices. Hence conflict and confusion abound.

In some states, a body of reasonably certain rules appears nevertheless to have somehow evolved.[104] In many others, however, the struggle to reach legal nirvana in this area continues. And *State Highway Comm'n v. Bailey,*[105] a recent Oregon decision, indicates that unhappily, the path is hard and progress slow. There, at least as to one of the two major issues—the type of benefit deemed deductible—a comprehensive review of legal precedents produced not the hoped for principle, but "apparent inconsis-

[104] For a detailed exposition of state law, see generally 3 NICHOLS, EMINENT DOMAIN §§ 8.6205–8.6211 (3d ed. 1950); ORGEL, VALUATION §§ 1–10 (2d ed. 1953); Annot., 145 A.L.R. 7 (1943).

[105] 212 Ore. 261, 319 P.2d 906 (1957).

tencies." Confronted by such a situation, courts will sometimes turn it to advantage. Using the confusion as their key to greater judicial freedom, they will decide the case on reason and equity. Not so the Oregon court; it felt constrained by the weight of the past to reject the rule it apparently preferred, in favor of another, which it adopted "reluctantly" and with a gloomy foreboding that it would prove difficult to apply. Thus, after all the soul-searching, the Oregon law remains—concededly—uncertain and unsatisfactory.

Nevertheless, the paths pursued and the alternatives available merit close examination. The object is not to point up the details of the existing confusion, which would serve little purpose. Rather it is to retrace one segment of the relevant legal history in the hope that it will give an insight into where and why one turn rather than another was taken and perhaps even suggest correctives.

State Highway Comm'n v. Bailey is a convenient vehicle for this review because it raises both the issue of which benefits qualify for offset and the extent to which such qualifying benefits may be recouped.[106] Before the improvement, the property in question was suitable only for agricultural use. This was largely attributable to its inaccessibility. The new road to be constructed by plaintiffs would make it economically feasible to subdivide part of the property for residential development and to devote another part to commercial use. For the purposes of the appeal, these facts were treated as established. The controversy concerned the purely legal question of their effect upon the issues presented. Plaintiffs contended that the newly available uses increased the value of the remaining property by about 5,000 dollars. Defendants persuaded the trial court to strike the allegations of benefit and to exclude proof of them on the theory that such benefits were general and not legally deductible under Oregon law. The Oregon Supreme Court affirmed.

Oregon, like most states, started out with the simple, unitary, and common sense rule that the measure of damages in eminent domain was the difference in the fair market values before and after the taking. This was established in *Putnam v. Douglas County*,[107] where the appellant, part of whose property was taken for a county road, had requested the court to charge that benefits from the road might be "offset against consequential damages to the premises, but not against . . . the land."[108] Instead

[106] It is all the more appropriate because the federal government probably had a practical interest in the outcome; it may well have been a partner in the limited access highway for which a part of the defendants' property had been taken. If so, its share of the cost was affected by the jury's verdict of $22,000 for defendants, of which at least $5,000 and possibly up to $10,000 (the amount claimed by defendants in their answer) represented damages to property remaining after the taking.

[107] 6 Ore. 328 (1877).

[108] *Id.* at 329.

the court directed the jury to consider "all special advantages . . . as, for instance, the giving of an outlet to market to said premises, and the enhancement in value of the land taken."[109] Furthermore, the trial court stated that in the event the jury found that appellant's property was not rendered less valuable by the improvement it was to render its verdict for the respondent—which the jury proceeded to do.

The appellate court, one judge dissenting, sustained the judgment below. The majority rested its decision on an ancient canon of judicial construction that a legislature which "borrows" the statute of a sister state is deemed to have also adopted the judicial construction of the statute by the courts of that state. The court noted, with obvious satisfaction, that the market value rule had been adopted by the then far more legally sophisticated triumvirate of Pennsylvania, New York, and Massachusetts. But it gave particular weight to the consonance of the decisions of Indiana, because the constitution and statute of Indiana had been the model for its own.

Putnam v. Douglas County was not, however, fated to become a milestone in Oregon law. The single issue there posed and resolved was transformed into the now familiar dual issues posed in *Bailey*. The substance of the *Putnam* resolution was also modified over the years.

1. Offset Against Value of Land Taken

Offsetting benefits against the entire award may well have been the accepted practice for a time after the decision in the *Putnam* case.[110] But the rule appears to have been expressly affirmed in only one subsequent decision—*Re petition of Reeder*.[111] That case, decided in 1924, states that the value of land taken as well as consequential damages may be compensated in benefits other than money payment. Other cases, stretching in a chain from *Putnam* to contemporary decisions, unbroken except for *Reeder*, seem inconsistent with the *Putnam-Reeder* view. They state the "well-settled" rule to be that "in estimating the damages accruing to a land owner from the exercise of right of eminent domain by a railway company the owner of the fee is entitled to recover . . . the fair value of the land actually taken . . . ."[112]

---

[109] *Id.* at 329–30.

[110] Thus, in Beekman v. Jackson County, 18 Ore. 283, 22 Pac. 1074 (1890), the jury returned a verdict of "no damage," although the municipality had opened a road through the petitioner's property.

[111] 110 Ore. 484, 222 Pac. 724 (1924).

[112] Harrison v. Pacific Ry. & Nav. Co., 72 Ore. 553, 559, 144 Pac. 91, 93 (1914). See also Keane v. City of Portland, 115 Ore. 1, 12, 235 Pac. 677, 681 (1925); Portland-Oregon City Ry. v. Sanders, 86 Ore. 62, 73, 167 Pac. 564, 568 (1917); Portland-Oregon City Ry. v. Penney, 81 Ore. 81, 85, 158 Pac. 404, 406 (1916).

Several of those cases are arguably distinguishable in that the condemnor was not a public body but a private corporation operating for private profit.[113] Furthermore, the language dealing with deductibility of benefits in most and perhaps all of these cases is merely dictum, since the facts, as stated in the opinions, did not put the question of benefits in issue.[114] Presumably in recoguition of this, these cases do not appear to have been urged as authority that no benefits whatever may be considered. Nor should they be authority in cases, such as *State Highway Comm'n v. Bailey*, in which the deductibility of special benefits is conceded and the issue is whether particular benefits qualify as "special."

In this entire line of cases, including, in fact, *Re petition of Reeder*, *Putnam v. Douglas County* was not cited in connection with the issue of deductibility of benefits. *State Highway Comm'n v. Bailey* unearthed the apparently forgotten precedent, only to overrule it. Since the contra-*Putnam* cases cited in *Bailey* were all susceptible to reconciliation by one technique or other, and since on the surface *Putnam* was still a precedent in good standing, its jettisoning would seem to have been the free act of the *Bailey* court. The court, however, disclaimed the power of choice. The opinion states, virtually at the outset, that:

> It is now firmly established by our decisions that such benefits may be set off or employed to reduce the damages to the remainder of the tract not taken, but cannot be used to adversely affect the right of the owner to receive the fair cash market value of the land actually taken . . . for highway use.[115]

One consequence is that the judicial record is barren of any statement attempting to justify the departure from the law of *Putnam v. Douglas County*. On the one hand, the cases which do not recognize its relevance even to the extent of citing it, can hardly be looked to for such a statement. On the other hand, the one case which does recognize its relevance

---

[113] See ORGEL, *op. cit. supra* note 104, at 44–45; Annot., 145 A.L.R. 18, 22 (1943), both of which make this distinction. While not conclusive against this argument, it is of some significance that other jurisdictions, for example Pennsylvania, construed just compensation as an objective quantity not dependent on the identity of the payor. See, *e.g.*, Pittsburgh, B.&B. Ry. v. McCloskey, 110 Pa. 436, 1 Atl. 555 (1885).

[114] In this series of cases, it can even be argued that the statements are more debased than ordinary dicta. For in many, the court does not appear to be addressing itself to benefits as a hypothetical issue—the typical context of dicta; it appears perfectly oblivious to the issue. Thus, in Harrison v. Pacific Ry. & Nav. Co., 72 Ore. 553, 559, 144 Pac. 91, 93 (1914), the statement of the measure of just compensation includes only two elements. There is the fair market value of the part taken and there is the "injury to the remainder of the same tract." A more recent case, State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 412, 281 P.2d 707, 715 (1955), states the rule in virtually identical language. Since neither case involved a legal or factual controversy as to benefits, there was no need for the court to state what the effect would have been had they been present.

[115] 212 Ore. at 277, 319 P.2d at 914.

treats the question as settled by prior cases, which precludes reason from any role in the determination of the case at bar.[116]

2. Special versus General Benefits

The distinction between general and special may have been known to the court that decided *Putnam v. Douglas County* in 1877. Indeed, its reference to "special advantages" in its instruction pertaining to the assessment of benefits suggests rather strongly that it was. But it is a distinction which can be greatly blurred if not entirely obliterated by the before and after market value measure of damages. In *Beekman v. Jackson County*[117] the distinction comes into sharper focus. There, too, a road had been laid out over the plaintiff's property, but he was denied a verdict by the jury which found that his property was no less valuable after the taking. Chief Judge Thayer reversed, quite clearly because he differed from the jury's conclusion. Thus, he stated that plaintiff's lands "are already accessible to a public road, which answers their necessities in that particular, and the benefit to them by the opening of the road in question is evidently remote and speculative."[118] If the opinion had said no more, it could be read as applying precisely the same law as *Putnam*. The opinion, however, says more, and in doing so adds confusion. Thus, the court stated that it was not clear from the record whether the jury had in view a peculiar benefit to appellant's premises, or some general benefit which he would receive in common with others,[119] and at another point, that for a benefit to be legally cognizable the land must "gain some peculiar advantage."[120]

The confusion was heightened by two condemnation proceedings brought in 1916—*Portland-Oregon City Ry. v. Ladd Estate Co.*,[121] and *Portland-Oregon City Ry. v. Penney*.[122] Although both cases were brought by the same party within a single year, there is an interesting difference of approach in the opinions. The *Ladd* case, which was decided first, was approached as an ordinary condemnation case governed by the general

---

[116] The regret voiced by the *Bailey* court applied only to its resolution as to the type of benefits that were deductible. This reluctance may have sensitized the court to the diversity, distinctions, and conflict on which it commented. These characteristics seem hardly more marked in this area of legal evolution than in the development of the law governing the extent to which non-money compensation might be given for property taken or damaged by eminent domain, an area which is not so described by the court.

[117] 18 Ore. 283, 22 Pac. 1074 (1890).

[118] *Id.* at 286, 22 Pac. at 1075.

[119] *Id.* at 285, 22 Pac. at 1075.

[120] *Id.* at 286, 22 Pac. at 1076.

[121] 79 Ore. 517, 155 Pac. 1192 (1916).

[122] 81 Ore. 81, 158 Pac. 404 (1916).

principles enunciated in the *Beekman* case. *Penney*, which was decided only three months later, has a quite different tenor, although it cites *Ladd* and is perfectly consistent in result. In *Penney*, the court emphasized a special statute, which precluded the deduction of benefits, applicable to private corporations condemning for railway purposes, but not to a county condemning for highway purposes. Furthermore, although pursuing the same road as *Ladd*, *Penney* "follows it with unwilling feet . . . ."[123]

The quite clear tendency in this line of cases was toward restricting the benefits that could be classified as special and deductible. *Re petition of Reeder*, although in accord with *Putnam v. Douglas County* on the extent to which benefits can be deducted,[124] would seem to complete the break from the view probably taken in *Putnam* on the issue of which benefits qualify for deductions. The instructions to the jury in *Reeder*, on appeal, taught that, to be deductible, benefits had to be "founded on some increased use and useable value . . . as well as the market and saleable value of the land, and not such as increases the market and saleable value alone."[125]

These cases are the milestones in the development reviewed by *State Highway Comm'n v. Bailey*. If the *Bailey* court objectively sought the guiding light of authority, and not merely authority consonant with its own views, it is hard to see why it did not read *Re petition of Reeder* as continuing the trend which had set in almost before the ink was dry on the opinion in the *Putnam* case.[126] The *Bailey* court, however, did not view *Reeder* in this light and did not so evaluate the trend. It distinguished

---

[123] *Id.* at 86, 158 Pac. at 406.

[124] See notes 107–12 *supra* and accompanying text.

[125] 212 Ore. at 297–98, 319 P.2d at 924.

[126] This seems clear enough from the formulation of the applicable legal rules in those cases. But it is heavily underscored by the facts. Special benefits in the *Penney* case were alleged by way of three counterclaims. One set forth that because of the coming of the railroad for which the right of way was being condemned, a convenient modern highway would be constructed to replace the steep, unimproved road which was then the defendant's only means of getting from his land to the main highway for the general area. While this may be dismissed as an attempt to recoup betterment value not yet in existence and to be created by another agency, this is not true of the other two claims. They alleged benefits in enhancement of the value of the land (1) in terminating its inaccessibility which had hitherto prevented its profitable use and (2) in the construction of a freight and passenger depot.

In the *Ladd* case, the special benefits claimed were again transportation facilities to an underdeveloped area. Counsel for the railroad attempted to counter the charge of general or community benefits by arguing that the mile-long tract to be traversed was lined by two additions, both owned by the defendant, and that there was no "community" to reap the benefits which were, thus, peculiar to defendant's land. To this the court made two replies. First, both additions had in large part been sold. Second, that "any benefit accruing to defendant thereby which is greater than that of its remote neighbors is merely a question of degree rather than class." 79 Ore. at 521, 155 Pac. at 1194.

the *Penney* case as resting heavily on a statute, which was inapplicable to highway condemnations, and distinguished both *Penney* and the *Ladd* case as condemnation by private rather than public corporations.[127] Out-of-state authority was also consulted, and found to be no more satisfactory.[128]

B. A Horizontal Cut

Nevertheless, the *Bailey* court did adhere to the special-general distinction, declaring, however, that special benefits should not be narrowly construed. Two facts are of special note in this resolution. First, the court professed reluctance to adopt it. Second, its reason for acting contrary to its own inclination was its respect for Justice Holmes and his admonition that "The life of the law has not been logic, it has been experience." The court then sums up the relevant experience: "it appears that the earlier practice which set off both general and special benefits against damages has lost ground and is now retained in only one state, Indiana."[129] The accuracy of this statement is highly questionable.[130] But its peculiar interest derives not from that, but from the fact that Indiana is the state whose case law had been given added weight by the Oregon court in *Putnam v. Douglas County*, on the strength of the still respectable canon of construction that a legislature in borrowing a statute is deemed to also borrow the judicial construction given it.

The *Bailey* court's avowed distaste for its solution is not packaging calculated to give it a wide appeal in other jurisdictions. Furthermore, the court seems to have been quite moderate in its appraisal. This, however, is not conclusive of whether other courts would do well nevertheless to follow the same path as the Oregon court, assuming they have freedom of choice. That requires a relative evaluation of the Oregon rule, to the extent that it can now be gauged, against other alternatives.

1. Special Benefits—Oregon Style

The Oregon law, per *Bailey*, is committed to the rule of *Hempstead v. Salt Lake City*.[131] It qualifies as special any benefits which pass the test

---

[127] While these differences do exist, it is perhaps an interesting insight into the judicial process that this possible distinction is not mentioned in connection with whether land taken had to be paid for in money, although equally relevant to that issue.

[128] No principle of selection is articulated by the court. The quotations appear, however, to be marks of approval for the views expressed rather than a representative sampling of different views.

[129] 212 Ore. at 305, 319 P.2d at 927.

[130] See note 134 *infra*.

[131] 32 Utah 261, 90 Pac. 397 (1907).

of whether they add anything to the convenience, accessibility and use of that property is contradistinction to benefits arising incidentally out of the improvement and enjoyed by the public generally.[132] This sort of generality could mean all things to all people. The court indicates by a list of specific items what it understands to be within the scope of the rule: an improved outlet to the market; suitability for a higher and better use, specifically for residential or commercial subdivision; frontage on a better road; and improved modes of access[133]—provided, always, the benefits are not shared by non-abutting lands.

The greatest difficulty with the Utah rule, or, more accurately, with the rule as annotated by the Oregon court, is its seeming inconsistency. For example, the court specifically declares newly created suitability for subdivision to be a special benefit. Yet it would seem that such a benefit might well be shared by non-abutting land in only slightly lesser degree than the abutting lands. An area may, for example, be separated from a large, central city by a mountainous ridge. While the route between them is poor and circuitous, the difficulty of commuting renders the outlying area unsuitable for development as a suburb of the city. A road tunnelled through the ridge removes the commutation obstacle to the area generally. Land abutting the new road is forthwith suitable for subdivision. But so are nearby, non-abutting lands. The construction of a modern highway, of even ten miles—a short commute in our automobile age—especially through mountainous terrain, is probably beyond the financial resources of any subdivider, and probably not economically feasible for private enterprise. This is by no means true as regards a secondary road leading into the main road. In fact, in Levittowns of today, which are increasingly the rule rather than the exception in the pattern of development, construction of such secondary roads connecting the subdivision with the world outside it are a commonplace. On this analysis, the special quality of the benefits singled out for the inclusion by *Bailey* is reduced to insignificance, if, indeed, it is not eliminated entirely. Prevision of difficulties of this nature appears to have been responsible for the Oregon court's Cassandra-like conclusion. Nevertheless, it casts aside as even less acceptable, two other alternatives: (1) to lump all benefits in a single category, without regard to general and special, and (2) to disregard benefits as such and look only to the value put on the property by the market. The objection voiced to treating all benefits alike, without regard to whether they are special or general, is of wide applicability but doubtful validity. It is, purely and simply, that no state does so, with the single exception of

---

[132] 212 Ore. at 306, 319 P.2d at 926.

[133] *Id.* at 307, 319 P.2d at 928.

Indiana.[134] Every other state—except, of course, Indiana—could with equal accuracy make the same objection. But on this kind of reasoning man would never have progressed past thinking the world was flat and the center of the universe.

2. Market Value

Although the Indiana rule may be unique in its formulation, it is not unique in its effect. A rule which looks to market value before and after, without adjustment for general benefits, should arrive at the same quantum of damage as the Indiana rule. The Oregon court does not regard the market value measure in this light. It views market value, not as an alternative rule, but as a manifestation of confusion which has entered the cases in this area because of the different ways in which the question may arise: the same court which distinguishes general from special in instructing the jury on benefits and damages will allow in evidence the testimony of real estate experts as to appreciation in value which makes no such distinction.

While this theory can probably be documented, the quotations contained in the *Bailey* opinion point in quite another direction. Thus, it quotes the holding of a South Carolina court that "certainly, to the extent that the benefits accruing to those who own land on the highway exceed those of their neighbors whose lands are off the highway, they are special."[135] This is tantamount to saying that there must be a difference in degree of the participation of abutting and non-abutting land; that non-abutting lands must be excluded from any participation whatever. The relative nature of the benefits is further emphasized by the court's statement that they "usually find concrete expression in a comparatively greater increase in the value of such [benefited] lands . . . ."[136] If the South Carolina view was caused by confusion, the effect, nevertheless, is clarity. Its definition substitutes for vague generalities the concrete money measure of the market place. Rather ironically, if this analysis has any merit, the Oregon court cites a decision of North Carolina[137]—another market value jurisdiction—as specific authority on the effect of availability for new uses.

---

[134] In fact, present Indiana law does distinguish between general and special benefits (see, *e.g.*, State v. Ahaus, 223 Ind. 629, 63 N.E.2d 199 (1945); Renard v. Grande, 29 Ind. App. 579, 64 N.E. 644 (1902)), although earlier the law appears to have offset all benefits. See, *e.g.*, Renard v. Grande, *supra*; Hagaman v. Moore, 84 Ind. 496 (1882). Moreover, some other states do hold the view erroneously ascribed in *Bailey* to Indiana. See NATIONAL ACADEMY OF SCIENCES, SPECIAL REP'T NO. 59, PUB. NO. 805, CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1960).

[135] Wilson v. Greenville County, 110 S.C. 321, 326, 96 S.E. 301, 303 (1918).

[136] 212 Ore. 299, 319 P.2d 925 (1957) (quoting from Wilson v. Greenville County, 110 S.C. 321, 326, 96 S.E. 301, 303 (1918)).

[137] Phifer v. Commissioners of Cabarrus County, 157 N.C. 150, 72 S.E. 852 (1911).

3. Special Benefits—Variations on the Theme

Other attempts to distinguish general from special on some principle which would afford guidance in various factual contexts have produced somewhat different results. *Backer v. City of Sidney*,[138] a 1958 Nebraska decision, dealt with improved drainage, achieved by the construction of an underpass. The original decision holds that as a matter of law no special benefits were conferred thereby, because the drainage of lands, no part of which was taken, was also improved. On rehearing, however, the court modified its views, resulting in the question of benefits being submitted to the jury.[139]

The *Backer* rule tests benefits by whether they arise from the fulfillment of the public object—in which case they are general—or are merely incidental to it—in which case they are special. The court does not say to what the jury should be directed to look in applying the new test. The implication, however, would seem to be that, notwithstanding the oft-reiterated judicial refusal to pry into legislative motive,[140] the issue is being made to turn on precisely that elusive factor. Presumably the jury is to be instructed in the case of an improvement such as the underpass in *Backer*, to first ascertain the legislative "purpose." If the project was initiated in order to improve the drainage in the area, no deduction could be made; if, however, the underpass was inspired by traffic considerations, then the improved drainage is to be treated as a special benefit and, contrary to *State Highway Comm'n v. Bailey*, an offset even though non-abutting lands are also benefited. A grey area situation would seem to be in the offing should an improvement be undertaken for one purpose, but the particular form it assumes be determined by secondary purposes.[141]

An interesting situation under the *Backer* rule would be posed by an

---

138 165 Neb. 816, 87 N.W.2d 610 (1958).

139 Backer v. City of Sidney, 166 Neb. 492, 89 N.W.2d 592 (1958).

140 Compare Appalachian Elec. Power Co. v. Smith, 4 F. Supp. 6 (W.D. Va. 1933); Glass v. City of Fresno, 17 Cal. App. 2d 555, 62 P.2d 765 (1936); Grand Trunk Western R.R. Co. v. Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949); Hood v. New York Guar. Trust Co., 270 N.Y. 17, 200 N.E. 55 (1936).

141 Thus, in the *Backer* case, the legislature may have been primarily concerned to eliminate a dangerous traffic intersection. The alternatives discussed could have included, in addition to the underpass which was actually undertaken, an overpass; regulation, as to making the two streets one way; perhaps installation of traffic lights; a modification of the width or alignment of the streets; improving an alternate road, and perhaps others. To sharpen the issues we may assume that it is concluded that the underpass and overpass are equally good solutions to the traffic problem, and that both are far better solutions than any of the other possibilities considered. It seems a curious twist that if, as between those two, the legislature chooses the underpass because it will serve the secondary purpose of correcting a drainage problem, the public forfeits the right to recoup therefor, whereas if it makes the same choice for esthetic reasons, bad reasons, or even no reason except the necessity of choosing, then the public may recoup the value of the benefit in question.

improvement such as the Bonneville Dam, involved in *United States v. Alcorn*.[142] If the legislative purpose in improving a river is navigation or power, *Backer*, although not *Alcorn*, would permit deduction for appreciation in the market value of land in anticipation of an increased general potential of the area, including increased demand for land. If, on the other hand, the project were undertaken as an anti-depression measure or to bring about the economic development of an isolated, backward, and depressed area, then *Backer* would seem to point in the opposite direction like *Alcorn* and numerous other decisions which declare that deductions may not be made for increases in general prosperity resulting from the improvement.

Other judicial expositions thus seem to invite difficulties at least as formidable as may await the rule of *State Highway Comm'n v. Bailey*. Although common, such difficulties are not the inevitable consequence of adhering to the special-general distinction in defining benefits. The New York courts, for example, have demonstrated in a series of cases one means of retaining the distinction, while surmounting or avoiding the usual incidents of it.

The Rapid Transit Acts passed in New York at the end of the 19th century gave rise to innumerable claims of damage to the property along the railroads' rights of way. While many of these came before the courts, the rights and liabilities of the property owners and the railroad were fairly well charted by a trilogy consisting of *Bohm v. Metropolitan Elevated Ry.*,[143] *Becker v. Metropolitan Elevated Ry.*,[144] and *Bookman v. New York Elevated Ry.*[145] To appreciate the results of those cases, it is helpful to first look at the opinion in a slightly earlier litigation arising out of the same type of improvement, a railroad.[146] There, both before and after the event, the plaintiff's property was devoted to a mixture of residential and commercial use. Despite evidence that the advent of the railroad had increased the value of the commercial use by more than it had decreased the value of the residential use, the trial court had ruled that in assessing damage the jury might not take the benefits into consideration. The reversing opinion attempts to draw the line which has proved in other states to be so fraught with difficulty. No deduction could be made for "the increase of value resulting from the growth of public improvements, the construction of railroads and improved means of transit . . . " since they "accrue to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the prop-

[142] 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).
[143] 129 N.Y. 576, 29 N.E. 803 (1892).
[144] 131 N.Y. 509, 30 N.E. 499 (1892).
[145] 147 N.Y. 298, 41 N.E. 705 (1895).
[146] Newman v. Metropolitan Elev. R.R. Co., 118 N.Y. 618, 23 N.E. 901 (1890).

erty owner."[147] But damages assessed against the road were to be reduced by the amount of "special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations . . . ."[148] This approach, very much the conventional one, commands very little assent from *Bohm*, in which the court of appeals very nearly junks the distinction in its entirety: "I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed special and general benefits to the property left, or whether such benefits have been caused by the defendants."[149] Given a free rein, the court indicated that it would have limited the inquiry to the actual result in terms of market value upon the remainder of the land. Although the opinion purports to stop short of this, the margin by which it does is certainly not great. It finds that the increase in market value was caused by the defendant and holds that such an increase is a special benefit:

> Whether the increase is common to every other owner . . . and is greater in proportion with some owners of property in the side streets than with the plaintiffs, are matters of no importance. The plaintiffs are not damaged because their neighbors are benefited to an even greater extent than they are by the defendants' road.[150]

The *Becker* opinion, written by the same judge (Peckham J.) in the same year, reaches a contrary result by what may have been a retreat toward the more conventional approach of the prior law. The *Bookman* opinion, however, is persuasive in its reading of the two Peckham decisions as entirely consistent on the law, but differing in their facts. The New York rule (in this regard) is clarified by the *Bookman* decision. Its reconciliation of the two decisions rests on the different state of development of the two areas affected. In the *Bohm* case the neighborhood in question was substantially vacant before the coming of the road, which, therefore, could reasonably be viewed as causing the development that followed in its wake. While *Becker* could have gone either way, the area in question there was largely built up before the construction of the railroad. In such a situation, according to *Bookman*, the previous rate of growth should be determined and if it is found that the rate after the improvement is less than before and less also than that enjoyed by the side streets, it would be legally permissible to infer that the railroad depreciated the value of abutting properties. By the same token, commencement or acceleration of growth after the construction of the improvement could be attributed to it. The ascertainable appreciation is classed as a special benefit, and is measured by the increase in the market value of the property.

---

147 *Id.* at 628, 23 N.E. at 903.

148 *Ibid.*

149 129 N.Y. at 592, 29 N.E. at 806.

150 *Id.* at 595, 29 N.E. at 807.

IV

EVALUATION

A. In General

One general conclusion which emerges from the foregoing discussion is that the law—federal and state—started out on a fairly sound basis. A second conclusion is that the original foundation has been eroded by subsequent decisions, until today in almost every jurisdiction it is far weaker than it was at the outset. The simple market value test has been greatly complicated by various niceties and distinctions—actual use value versus market value; incidental benefit versus benefit contemplated by the improvement; individual benefit versus community benefit; benefits conferred by the improvement versus benefits accruing from increased prosperity originating in the improvement—which are employed to differentiate deductible benefits, usually labeled special, from non-deductible benefits, usually labeled general.

These refinements have immeasurably complicated the task of the courts in contested takings for public use. They have also complicated, even if probably to a lesser extent, the task of administrative officials in attempting to negotiate voluntary purchase and sales. Doubtless there were valuation difficulties under the original, uncorrupted market value rule.[151] Experts (in every place and at every time) appear to have in common the ability to rationalize widely varying conclusions deduced from a given set of facts. No matter how simple the formulation of the rule, if the valuation proof consists of the expert for the plaintiff testifying to one value and the expert for the defendant to a vastly divergent value, all other things being equal, a basis for objective, impartial, and rational decision is lacking.

While such proof is all too common in condemnation proceedings, the difficulty has not been obviated by the various departures from the pure market value rule. To the extent that market value remains part of the

[151] In a comparative policy evaluation, the market value rule might be criticized as resting on a not wholly true assumption. In forcing an owner to accept for his property an amount of money that would put hypothetical buyers and sellers into equilibrium—a somewhat simplified definition of market value—the law assumes that any piece of property is reasonably fungible, both with money and with other real property. Unquestionably this assumption is false for many individuals in our society, at least as to their homes, but the assumption is not unique to market value measure of compensation. Moreover, it is probably true for our society as a whole and certainly accords with the market economy that characterizes it. If the assumption is, therefore, warranted, then the rule can fairly be said to relieve property owners from any undue burden falling on them as a result of any improvement made for the good of the general public. By the same token, it can be said to recoup the betterment value from property owners for redistribution on whatever principle is deemed politically desirable by that same general public.

equation, the evidentiary problems are unchanged. But that is true even to the extent that market value is eliminated from the original equation. Where, for example, the deduction is measured by the increase in actual use value, it must still be translated into money value, usually proved by "expert" testimony.

Thus, the various refinements have left the old difficulties virtually intact; at the same time they have introduced new ones. Inordinate amounts of time and energy are squandered in hair-splitting controversy as to whether a particular fact complex falls within or without the rule as formulated in a given jurisdiction.

Conceivably, additional administrative and judicial difficulties could be justifiably assumed to advance policy considerations. That, however, does not appear to be the case. This is not to say the modifications which have taken place over the years were not policy inspired. The contrary is probably true; certainly many judicial opinions touching this subject are replete with policy arguments. It is to say that, notwithstanding arduous and sustained efforts at a more perfect justice, progress has certainly not been notable. The results in some cases even raise the suspicion that the effect has been not progress but regression.

B. The Problem of Diversity

On the national level, the paramount consideration pertinent to this evaluation is diversity. Under the present law, whether one owner of property located near a projected highway will fare better or worse than another may be influenced by one or more of several factors. Assuming a highway traversing two states, the law of one state may be more favorable to property owners than that of the other. The law of either or both states may be more favorable than federal law. State law may be relatively more favorable to property owners in one geographic relation to the project than to others. Thus, the amount of an award will depend on the state in which the subject property is located, whether it is condemned by the state or federal government, and whether it is a partial or total taking.

The coexistence of more than one legal rule applicable to factually similar situations is a commonplace under our legal system. A certain amount of diversity is doubtless inevitable, but even for us it is rare to have such a kaleidoscope of rules pertaining to so narrow a subject as the various rules pertaining to the deductibility of benefits from condemnation awards.

In most areas of law, competing rules can be adequately described and classified by the majority-minority rule dichotomy, so beloved of hornbook writers. By contrast, in this area the rules require at least five pigeon holes. The present classification of rules, based on special versus general benefits and on value of property taken versus damage to property

remaining after a partial taking, is as adequate today as when it was devised shortly before the turn of the century.

To the extent that this classification creates any misleading impression, it is in picturing less, rather than more, diversity than actually exists, since it looks only to legal rules. But the legal rules of two jurisdictions may be phrased the same, yet lead to quite different results in awards. In a state that defines "special" benefits restrictively, to isolate one example, fewer deductions will be permitted than in a jurisdiction which defines the same term more broadly.

If diversity of rule is measured not simply by verbal comparison, but application as well, it has more probably waxed than waned with the passing years. As new technologies and concepts emerge, the possible factual combinations become more numerous. And as the factual variables increase, so too does the chance of divergent results from the application of identical general propositions of law.[152]

A finding that legal diversity exists is not necessarily the equivalent of an unfavorable value judgment. Conceivably, it may in the long run even rebound to the general good. If each jurisdiction regards itself and other jurisdictions as legal laboratories, the result could be the evolution of a "best" set of rules uniformly applied throughout the nation. Or diver-

---

[152] Nor is legal diversity always reflected in the non-legal facts affecting community life. One point of refraction at which distortion can occur is in determining factual connotations, such as the meaning of special and general, which figure so importantly in the rules of many jurisdictions. Another, at least as important, is in the decisional process itself. A facilitating condition in condemnation cases is the tremendous discrepancy in the evidence on every valuation issue, so that a very great range of verdict can be supported on the record. And rightly or wrongly, juries are widely believed to take advantage of that latitude in returning verdicts reached by tempering the law as charged with a lay view of justice in the particular case. Judges doubtless can better rationalize their results, but beneath the legal jargon may be the same extra-legal motivation. At least, there is room to suspect that that may be the explanation of cases such as Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946). The government's position was that the property could best be used for low-cost housing and was worth approximately $7,300. Defendant valued the same property at more than $200,000, based on a highest and best use for industrial, waterfront purposes. Two facts were incontrovertibly established: (1) the condition of the harbor ruled out present industrial use, and (2) that condition would be remedied by the harbor improvements planned by the government. The controversy was whether the expense of making the improvement would be prohibitive for private enterprise. The award in the trial court was far less than defendant asked, but about four times more than petitioner offered. On the record alone, it would almost certainly have been sustained on review. The trial court, however, filed a supporting opinion in which it rested its conclusion on a federal "policy" of aiding commerce by improving navigable waters without cost to property owners.

While practical realities probably play a larger part in determining damages, United States v. Causby, 328 U.S. 256 (1946), there is no reason to suppose that the calculation of benefits is insulated from their influence. Thus, whatever the legal formula for "special" benefits, it is not hard to imagine the straining to find a legal "benefit" from an improvement which clearly and unquestionably increases the market value of a property.

sity of rule may be relatively neutral. Because of the immobility of real property, legal rules concerning it are generally thought to have only a local impact. Hence, little if any significance is attached to the fact that neighboring jurisdictions may have different and even conflicting rules.

Goals are the litmus that makes legal diversity meaningful and enables an evaluation of its social impact. Rules are only better or worse as they serve or disserve the ends they are intended to advance. The rules in this area have relevance to several possible goals—for example, national defense, equality, and economy. The evaluation is not necessarily the same or even consistent as to all of these goals.

When the purpose of constructing a particular highway is the defense of the nation, the principal concern would seem to be getting the road built. Because a nation's resources are never unlimited and because other defense needs compete with roads for the tax dollar, cost is a factor, but only secondarily. Under the stress of war-time emergency such as existed in the early 1940's, the normal order of priorities becomes greatly accentuated; cost consciousness diminishes virtually to the point of complete obliteration. Other values—fairness and reasonableness, for example—which in more normal periods are highly esteemed, are sometimes sacrificed in the effort at self-preservation. The need to accomplish the task at hand, adequately and in the shortest possible time, overshadows all factors. If deductions for benefits were equalized and maximized, some property owners would be hurt; the taxpayer would have a somewhat lighter burden. It can perhaps be argued in justification that defense measures are taken for the benefit of the nation as a whole, not for the property owners who may receive some wholly incidental benefit. The mere fact that the benefit is incidental to, rather than the principal purpose for, the activity does not make it any the less real nor necessitate making a gift of it.

If deductions for benefits were equalized and maximized, property owners adversely affected by the change would almost certainly know of it. While patriotism would again tend to weaken opposition, it might not be enough to eliminate it entirely. This could, if unchecked, result in serious delay under state procedures which make possession contingent upon payment of the final condemnation award. Assuming state and federal cooperation, however, the problem in such states could be circumnavigated by use of federal law and forum under the present section 107. While some savings might be affected, the goal of national defense in time of peril might well be better served by minimizing friction, ignoring the diversity, and conserving national energy for the major task.

Economy is probably the simplest goal by which to evaluate diversity. The rule which produces the lowest cost is the best rule and any deviation from that rule is bad precisely to the extent that it increases cost. Unques-

tionably, rights of way costs may be a very significant element of total costs, as in the widening of a Detroit street, where that single item accounted for ten of the eleven million dollars spent on the project.[153] On the face of it, this would seem to point unequivocally toward a nationally uniform rule that would permit maximum deduction. The difficulty is that things are not always what they seem to be. Reduced awards might result in fewer settlements, and increased litigation conceivably could offset reduction in awards. So, too, could the feeling that a small group—property owners—was being made to bear too large a share of the burden of public improvements. In the past, this has led to numerous modifications in state laws intended to equalize the burden. If changing the rule to effect a reduction in net awards caused a recurrence of that feeling, it could find an outlet in more generous verdicts for damages, again offsetting any increase in deductions for benefits.

To other goals—increased employment, promotion of commerce, and mobility—diversity per se among rules governing benefits that may be offset has at most a very nominal significance. Its significance is that some of those differences result in higher net awards than would otherwise be the case. To that extent, the rule disserves each of the goals in varying degrees. Thus, a higher cost of land acquisition does not directly aid employment or any other of the goals. On the other hand, it is certainly possible that it will reduce the amount available for construction, and thereby the number of road miles that can be built, directly and adversely affecting jobs, commerce, and mobility.

The goal of equality, from the federal viewpoint, has two dimensions. One is common both to the federal government and the states, namely, equality among groups: abutting landowners, non-abutting landowners in the area, propertyless residents in the area, and the community as a whole. The other is equality among differently located segments of the same group, for example, abutting landowners in New York, New Jersey, and California.

Equality, as it will be used here, is not a mathematical concept, but an equitable concept, or, if you will, a moral one. The principal criterion of judgment is fairness. This still leaves the question of scope. Is the goal satisfied by equality among owners whose property is condemned? Should it be broadened to take in all property owners affected by the improvement? Should it go the whole way, striving for an equality which comprehends the entire community?

An eloquent commentary on the difficulty of the search for the rule which would best achieve equality is the number of different rules that it has produced. For although a type of benefit which may be set off under

[153] LEVIN, LEGAL ASPECTS OF CONTROLLING HIGHWAY ACCESS 19 (1945).

one rule may not be deductible under another, and although the extent to which an award may be reduced may be more or less under one rule than another, the choice, when judicial, appears to have been animated principally by considerations of fairness.

This consideration, for example, was the focus of *Bauman v. Ross*,[154] which put the United States Supreme Court's imprimatur on the definition of constitutional "just compensation" as the sum of (1) the value of land actually taken, and (2) damages to the remainder after deduction of benefits. This rule was chosen because, according to the Court, "to award [the property owner] . . . less would be unjust to him; to award him more would be unjust to the public."[155] The principle does not, as interpreted by Mr. Justice Day, authorize the deduction of all benefits, but only special benefits. It is clear from his dissent in *Brand v. Union Elevated R.R.*[156] that his objection was that an abutting property owner would be paying for something which the rest of the community received free, although all benefited alike.

The special-general distinction and the various tests for distinguishing one from the other have evoked similar utterances. The consensus appears to be that it is unfair to deduct general benefits, however defined, but not special benefits, again however defined. Nichols, who agrees with that view, states in justification that general benefits "are very difficult to assess accurately, and as they usually arise from an increase in population or business prosperity expected to follow the improvement, they will never be received if the results hoped for do not follow."[157]

This seems short of persuasive, for two reasons. Neither the uncertainties nor the difficulties of assessment are significantly greater than those encountered in estimating the market value of property taken or damaged, or the value of "special" benefits.[158] It may be admitted that the anticipated benefits may prove to be ephemeral. But this possibility is

---

[154] 167 U.S. 548 (1897).

[155] *Id.* at 574.

[156] 238 U.S. 586, 596 (1915).

[157] 3 NICHOLS, EMINENT DOMAIN § 8.6205, at 58 (3d ed. 1950).

[158] In United States v. River Rouge Improvement Co., 269 U.S. 411 (1926), it was within the absolute power of the government to bar the property owners from further enjoyment of the benefits in question at any time in the future. But this was held to be simply one fact to be weighed in assessing the value of the benefit; as a matter of law, however, the benefit was held to nevertheless have some value. A similar view was expressed on the somewhat different facts of Reichelderfer v. Quinn, 287 U.S. 315 (1932). There the condemnation for park purposes and the offset for benefits were past history. The litigation was commenced because the government had indicated its intention to terminate the beneficial use and devote the property to another public use less beneficial to property values in the vicinity; the Court upheld the government's freedom of action, reiterating that the contingency which there came to pass was always a possibility that should have been taken into account in assessing the value of the benefit.

merely one of the elements in the market value calculus. While increases in general prosperity and therefore realty values in an area may be conjectural in the extreme, that is insufficient reason for a general rule of exclusion, for at other times they may be susceptible of clear and incontrovertible proof. Certainly in *United States v. Alcorn*[159] the increase in value of the remaining property was clear beyond dispute and very substantial. The point is that there is no necessary and precise relation between market value and speculation and remoteness. Hence, if the purpose is to exclude speculative and remote benefits from the calculation, as is certainly desirable, a rule would serve better that was phrased in those terms, rather than general benefit or market value, which may be neither speculative nor remote.

Secondly, under any rule deductible benefits are calculated in terms of market value. It is never the physical fact that is the benefit but the market's consensus of its worth. If some misanthropic property owner were attached to a slum view, which was eliminated by the creation of a park, his property would still be held to benefit because average buyers and sellers have a different scale of values from that potential seller. If the same park were created in a rural area not likely to be urbanized in the foreseeable future, it might very well not have any impact at all on real property values in the neighborhood.

In addition to the argument raised by Nichols, fear that adjacent properties might be treated disparately has also played a role in the tendency to disregard benefits in computing condemnation awards.[160] If two properties received exactly the same benefit, but only one suffered a taking, that one would pay for the benefit, while his neighbor enjoyed the same benefit free.[161] But, as one court has pointed out,[162] if a property owner is receiving full value for what he is giving up, there is no reason why he should be heard to complain that someone else is getting a greater bargain or paying less than fair value.

Even the law, with its vaunted tolerance of differences among reasonable men, might well ponder the absence of a consensus among opinions. The explanation seems to be that although all were striving to reach the just result, one that would be fair to all affected by it, the means— the

---

159 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).

160 *In re* Water Front in City of New York, 190 N.Y. 350, 83 N.E. 299 (1907).

161 Carried to the next logical step, this line of reasoning would seem to preclude even the reduction of damages for benefits received from a taking. One property may be only slightly damaged and greatly benefited by a public improvement, while another is greatly damaged but only slightly benefited by the same improvement. Still another may be benefited without being damaged at all. Here, too, the situation is inequitable as between owners.

162 See Young v. Harrison, 17 Ga. 30 (1855). See also McCoy v. Union Elevated R.R., 247 U.S. 354 (1918).

treatment of benefits—was not and is not adequate to the task. Whatever variant is adopted, some individual or group gets favored treatment relative to another. If reformulation of the rule governing offsets is to be the sole tool, something less than perfect justice must be accepted as inevitable. Realistically, the law can only aspire to minimize the inequity and to place its burden on a rational basis.

The extent to which existing differences should, if possible, be eliminated, depends upon which of the competing value judgments are chosen. Underlying the entire problem is the fact that, theoretically at least, the whole of a public improvement is larger than its parts. The undertaking of an improvement entails numerous categories of cost, only one of which is for land taken or damaged. If the improvement succeeds in its objective, those costs will be transmuted into benefits in at least that amount, but hopefully far exceeding it. Thus, if the value (at the valuation date) of the land taken for highway purposes is X, and the value of labor and materials to construct the road is Y, the value of the highway according to that theory will not be X + Y, but X + Y + Z. The issue this raises is: What shall be done with Z?

One possibility is that all of it should go to the owners of the property which has been taken in part or whole or that is beneficially affected though not taken. Another possibility is that all of it should go to the creating agency. Still another is that it should be shared by the creating agency and the affected property owners. Unfortunately for any resolution, the issue is not of the black or white variety which admits of only one view by right thinking men. Thus, the first view is embodied in Mississippi law,[163] the second was sustained under the challenge of the two *Union Elevated* cases,[164] and the third is sanctioned by most rules, which, however, differ as to ratio. With such a wide divergency, there is no objective basis for adjudging one view "right" and the others "wrong."

The conclusion of this paper is that, in general, the law should aim at recouping all of Z, the surplus value, for the public. Property owners have no better claim to it than the general public, with whom they would share under a rule of recapture. Moreover, reductions in the cost of individual projects might result in a larger number of projects being undertaken. If so, and if each results in a Z product, or surplus value, the production of value and with it the material well-being of the general community is maximized.

---

[163] See, *e.g.*, Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940); State Highway Comm'n v. Buchanan, 175 Miss. 157, 166 So. 537 (1936); Meridian v. Higgins, 81 Miss. 376, 33 So. 1 (1902).

[164] McCoy v. Union Elevated R.R., 247 U.S. 354 (1918); Brand v. Union Elevated R.R., 238 U.S. 586 (1915).

This approach to the problem is suggested as exposing a weakness in one argument which is sometimes made against market value measurement of compensation. The gravamen of this argument is that the public purpose of improvements intended to increase the general prosperity of a particular area would be frustrated by a rule, such as market value, that would cream off all benefits.

Compensating a property owner only to the extent of a diminution in the market value might just possibly have this effect. Now and then a public investment may be ill-advised. In such cases the value of the benefit produced by it falls more or less short of its cost. In the extreme cases the benefits may fall as low as, or even below, the cost of the land (including in that item, damages and cost of acquisition). If, in that case, the property owner is charged with all the benefit conferred on his property, as a property owner he is in the same financial position as before the improvement. But the frustration of public purpose comes not from the rules of compensation, but from the failure of the undertaking. Where the improvement attains its minimal objective of creating benefits of equal value to costs, the property owner may still be better off financially than he would be without the improvement. The benefit, *ex hypothesi*, is equal to total costs—and land is only one of the raw materials which, with capital and labor, comprise total cost. While no hypothetical general apportionment could possibly be accurate, it seems not improbable that abutting landowners will frequently be benefited by more than their damages, *i.e.*, the cost to the public of their land. It follows that since the worst that may befall an owner in a pure condemnation proceeding is a verdict of no damage, in all those cases he will derive a net advantage—as property owner—from the improvement.

But it is by no means clear, assuming the intent attributed to the public is the correct one, that it would be frustrated even by a rule which did cream off all benefits. The intent, as stated, is to increase general prosperity. It would be the rare case indeed where all residents of an area, or even those most in need of public assistance, would also be landowners in the area. Rules that modify the market value measure so as to leave the property owner with a greater share of the benefits may thus, much more than the market rule, impede the redistribution of wealth anticipated from the improvement.

None of this applies in toto to condemnations by virtue of authority delegated to public service corporations or semi-public bodies and the like. The sole exception is the corporation regulated as to rates and profits. By such regulation, the public can control the redistribution of wealth without departing from the general law as to compensation in condemnation cases. In all other cases, however, that is not true. And if there is

little reason for landowners as a class to profit at the expense of the general public, there is even less reason to weight the scales against the public where the beneficiary is the owner of a private enterprise operated for private profit, however much the public may need the particular improvement.

But even the market value rule does not recapture the betterment value from non-abutting landowners. Here again the early legislation had an answer. Statutes frequently provided that the cost, or part of it, was to be assessed against the properties benefited in proportion to the benefit received regardless of whether or not the benefited property had also been injured. These doubtless did not mete out perfect justice; in *Bauman v. Ross*, for example, the act contained such a provision. For some unexplained reason, however, the scheme of the statute called for deducting from any award the entire value of the benefit received by the property, but taxed benefited property only to the extent of one-half the benefit. Thus, even though owners of injured properties were given a deduction in the amount of the tax, the effect was to charge them with the whole of the benefit received, half again as much as their more fortunate neighbors.

While assessments are still used to raise funds for public improvements, it is a technique which may be discouraged by the state-federal partnership in highway construction. Judging by its utility as a financing device, the assessment would appear to be a valuable tool on every level of government. Traditionally, however, its use has been largely confined to municipal corporations, including non-governmental, special function districts such as park and sewer districts. On the federal level, outside the District of Columbia, the national government has used other means of financing public works sponsored by it. Hence, as road building becomes less a matter of city streets and more a matter of state and national highways, built by the states or by the states in cooperation with the national government, the special assessment, for all its merits, may fall into greater disuse.

Another method of recoupment is excess condemnation.[165] And it may be that if costs of improvement continue to rise, partly because benefits are not recouped in measuring condemnation awards, states will be forced to resort more and more to that expedient. As an exclusive device, however, it is clearly inadequate, although as another tool in the arsenal it can undoubtedly help toward achieving the goal of cost minimization.

When one leaves the realm of abstraction for concrete situations, practical considerations become more important. For example, even if everyone is agreed that condemnation awards should not include any Z or sur-

[165] On excess acquisition, see HAAR, LAND-USE PLANNING 467–69 (1959).

plus values, in practice that may be hard to isolate and hard to value. There is also the concern that the anticipated benefits may never materialize, in which event the defendant will never receive value for the property which he was coerced into "selling."

Whatever the merits of these qualms, they would seem to apply equally to the computation of damages. The difficulties of valuation are as great and the chance that anticipated damage will never occur are as good. If market value can do rough justice on the issue of damages, it is hard to see why it cannot function with equal efficiency on the issue of benefits.

There is an additional consideration which leads to this same conclusion. Under *United States v. Miller*,[166] the award for land actually taken is its market value at the time of taking, less any increment in value resulting from the improvement. The effect apparently intended by that rule is to protect the public from having to pay for value which it created. But the other side of the coin is that the condemnee whose entire property is taken is denied a share of the newly created wealth. His situation is no better or worse than that of the property owner none or only part of whose property is taken if, but only if, all the value of the benefit conferred on the property by the public is paid to the public. Otherwise, such property owners are given favored treatment relative to that accorded the first group, whose entire property is taken in connection with the improvement.

This reasoning cannot, however, quiet apprehension of possible hardship. If the calculation results in a net benefit, the owner may not have the means of discharging the resulting debt. Such a negative award is not possible where the only means of recoupment is to offset benefits. But some might characterize as an unfair hardship the situation in which a person's income is reduced by the taking of part of the property from which he derives his livelihood. His loss is immediate and out of pocket; his offsetting gain in the market value of the remainder is also immediate, but before he can have it in pocket, he must sell the remainder, which may not be a subjectively acceptable expedient or even practicable.

CONCLUSION

It is suggested that the ideal legislation governing federal participation in highway construction programs would recoup to the public substantially all the benefit conferred by public improvements on land within its sphere of influence. This could be accomplished by means of a special assessment alone. It could be accomplished most efficiently, however, by coordinating the assessment provisions with those governing compensation

[166] 317 U.S. 369 (1943).

in condemnations. The measure of damages recommended is the net market value increase or decrease—a measure that appears to have achieved the best results in the crucible of controversy.

This conclusion might be objected to on the ground that the vast majority of jurisdictions, which did formerly use that measure, modified it for one reason or another. However, that trend has halted and is in the process of reversal. As a New Mexico court ably states:

> The trend throughout the nation is toward considering *all* benefits in the determination of damages in condemnation cases. This trend is nurtured by the policy of the state in trying to bring down excessive cost of rights-of-way so as to make the money appropriated and available for roads and other public improvements go as far as possible. It is possibly due also to some extent to a gradually changing concept of the sacred character of real property ownership which thus gradually is altering the basic theory of "just compensation" in condemnation cases.[167]

This picture, purportedly of what is, may be colored by the court's view of what ought to be. But if not perfectly descriptive, it does seem predictive of the developing trend. If so, less resistance on the part of the states may be anticipated to the substance of the proposed rule.

In adopting such a general rule, exceptions may be deemed desirable or expedient in specific areas. The rule might, for example, be limited in application to those roads more than 50 per cent of whose cost is borne by the federal government. While such a limitation has only the expediency of compromise to recommend it, special treatment for developed residential areas may arguably be justified on more concrete grounds. Commercial and industrial parcels are in an economic sense fungible to a fairly high degree. Benefits conferred on portions of such parcels remaining in private ownership after partial condemnation can be expected to be practically realizable, even if not in fact realized. The benefit to a home owner, on the other hand, may be equally realizable in theory, but only in theory because so many other very real and important values are often tied in with the concept of "home." The probabilities are, however, that the value of benefits conferred on developed residential areas will not be a very significant factor in the land acquisition picture and that the value of benefits conferred on present or future sites for industry and commerce will be a very substantial element in the cost picture. If economic data substantiates this hypothesis, the proposed measure would have a built-in adjustment mechanism which would take care of the problem. But even if not, exceptions could take care of it without unduly complicating the rule or its administration.

---

[167] Board of Comm'rs of Dona Ana County v. Gardner, 57 N.M. 478, 483, 260 P.2d 682, 685 (1953).

In phrasing such exceptions, if made, and the provision generally, care should be taken that the special and general distinction, ejected through the front door, does not return through the back, as in valuation evidence. This danger is underscored by the confusion which has marked the application of the before and after market value and various of the compensation measures phrased in terms of special and general.

Two considerations have been given greatest weight in selecting the measure of net change in market value. One is that this measure would maximize equality of treatment of residents of the area, without regard to whether they are propertied or propertyless. The other, extremely practical consideration is that this measure would cream off what is commonly referred to as "general" benefits, which, however denominated, may well be the only benefit having a substantial enough value to warrant any real effort at recapture.

To recoup benefits to property not involved in condemnation proceedings, a complementary device is needed, such as a special assessment.[168] The assessment would be levied by the state and would thus in the first instance swell state revenues. Either the state would retain the funds in addition to receiving its full federal contribution, or the amount of the assessment would be counted as part of the federal government's statutory percentage. Which possibility is selected seems relatively unimportant. Either level of government, unlike the individual property owner, may be expected to use additional funds to further the general welfare.

Although these are innovations in national law governing the federal-state highway building partnership, they are not without analogous precedent. The unemployment insurance legislation provides some guidance. There the federal government accomplished its objective by making it relatively costly for a state not to enact desired legislation. The same principle could be employed here. The federal government could deduct from the state's contribution for land acquisition costs that part of costs which it would have recouped had it enacted necessary legislation. An exception might perhaps be made, at least for a time, in those states having constitutional limitations preventing the statutory changes necessary to accomplish that result. Furthermore, there is analogous precedent within the present highway law. Certain state expenditures are limited by federal statute to a percentage of cost.[169] The state may pay more if it wishes, but it may only

[168] Another possible avenue of recoupment is through taxation; federal and income taxes (including capital gains taxes), and local property taxes. Taxation, however, takes only a percentage of gain. The guiding principles, particularly as to certain aspects of taxation, have little relevance to condemnation problems. And, perhaps most importantly, it confuses the accounting picture of the improvement without any compensating advantages.

[169] 72 Stat. 892 (1958); 23 U.S.C. § 106(c) (1958).

look to the federal government for reimbursement up to the specified maximum.

A compromise with the ideal, or an evolutionary stage in the transition, but still a gain over present practices, would be federal legislation deferring the attempt to recoup benefits where no part of the property is taken, and simply making market value the measure of condemnation awards for both state and federal proceedings. Another intermediate step might be to put the rule into effect only as to industrial and commercial, but not residential property. The rule of law would still be an innovation on the federal level. The probabilities are that no constitutional obstacle would be raised against it.

With respect to federal legislation looking to changes in state law itself, further compromises could be made. For example, the few states which do not now offset any benefits might be induced to deduct special benefits. It is extremely doubtful, however, whether, from a practical viewpoint, it would be worth the effort entailed. As Judge Parker pointed out back in *James River & Kanawha v. Turner*,[170] the chief benefit to be anticipated by property owners by reason of adjacency to a public improvement is an increase in the market value of the property.[171] Many decisions since then indicate the correctness of his view. If this "general" appreciation is not to be taken into the calculation, the other elements combined probably do not represent a large dollars-and-cents value. It certainly does not seem large enough to justify possible federal-state conflict or the expenditure of administrative energy to overcome congressional resistance, which the legislative history of enactments in this area indicates would be aroused.

It is undeniable that enacting the rule proposed in this article may cause some political anguish, if only because of the force of inertia and because any change is bound to collide with some vested interests. But the federal government has a duty to be in the vanguard of reform. This legal change should bring in its wake very sizeable returns. The time and effort now expended by appraisers, lawyers, judges, and juries in the multitudinous distinctions between those benefits that are general and those to be classified as special, and the hair-splitting to which they have given rise, will be swept away. In their place will be a rule that is not only simple—simple to understand, simple to administer, simple to adjudicate—but one that will come much closer to meeting current needs and current notions of justice. Lastly, it will reduce the cost of improvements—thereby enabling more effective use of funds available for such improvements or other public welfare objectives.

---

[170] 36 Va. 313 (1838).

[171] *Id.* at 329.