

EMINENT NEED: PROPOSING A MARKET PARTICIPANT EXCEPTION FOR MUNICIPAL PARKER IMMUNITY

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ABSTRACT

A township is using its eminent domain powers to become a monopsony in the real estate market for the designated area. That township's monopsony power is then being exploited to create a price-fixing scheme that would violate antitrust laws, either as a per se violation under § 1 of the Sherman Antitrust Act, or as a monopolizing or attempted monopolizing offense under § 2. Under the Sherman Act, affected residents could force the township to appraise each property individually and pay the full market value; if the township refused, they would be subject to the treble damage penalty, erasing any possible advantage of abusing its monopsony power. As the law currently stands, however, a township is immune from suit under the Parker v. Brown decision and its progeny. This Article will use the real-life example of Mount Holly, New Jersey, and the story of one affected resident to illustrate the need for a market participant exception to Parker immunity, such that when a municipality is participating in the market for a good itself, as opposed to merely regulating that market, the Sherman Act should apply.

INTRODUCTION

Carole Richardson does not look a day over fifty. She is friendly, lively, charming, and at one time she had the American dream all to herself. After a lifetime of living with others, she was offered the chance to own her own home. It was affordable, despite her retirement and fixed income. She leapt at it. The house was a newly refurbished two-

bedroom attached unit in a section of Mount Holly, New Jersey.¹ Her mortgage was \$320 per month, and, in her own words: "I never expected to live a life of luxury, but you get a house and you figure you'll be there until you die."² The area she lived in is called the "Gardens."³

At one time, the Gardens consisted of approximately 350 two-story attached units, which were de facto affordable housing.⁴ Built in the 1950s for nearby Fort Dix and McGuire Air Force Base,⁵ the homes were standardized models, with one, two, or three bedrooms.⁶ The neighborhood has gone through extensive changes since its military origins, and has developed its own unique community based around the ideals of mutual assistance and fierce loyalty in all aspects of daily life.⁷ In the words of one young resident, "*All of us here are like family. We live with each other, basically help each other out.*"⁸ And in the Gardens, that community bond was crucial to the well being of many of the residents.

As of 2000, the Gardens was home to 1605 people, almost half of whom earned less than \$20,000 per year. Forty-two percent were African American, twenty-two percent Hispanic, and twenty-eight percent were white.⁹ Senior citizens like Ms. Richardson headed fifteen percent of the households.¹⁰ The Gardens is a modest neighborhood, and has had problems ranging from neglect by absentee landlords to drugs and other crimes.¹¹ Several efforts were made over the years to fight the drugs, deterioration, and destitution that can topple even the most vital of low-income communities.¹² In the end, the efforts of the residents to vitalize and revitalize the Gardens were declared insufficient, and Ms. Richardson's troubles began.¹³

¹ DEP'T OF THE PUB. ADVOCATE, DIV. OF PUB. INTEREST ADVOCACY, *EVICTED FROM THE AMERICAN DREAM: THE REDEVELOPMENT OF MOUNT HOLLY GARDENS 10* (2008), http://www.state.nj.us/publicadvocate/public/pdf/gardens_report.pdf [hereinafter *MT. HOLLY REPORT*].

² *Id.*

³ *Id.*

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 9.

⁷ *See id.*

⁸ *Id.* at 2 (emphasis in original).

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *See id.*

In October 2002, Mount Holly Township (hereinafter Mt. Holly) passed a resolution declaring most, but not all, of the Gardens to be “blighted” and, ultimately, in need of redevelopment.¹⁴ The Township then adopted a redevelopment plan.¹⁵ They pointed to the maintenance problems with the buildings and the high crime rate (among other issues) as justification for their decision.¹⁶ The designation that the area was “in need of redevelopment” (or “blighted”), and the subsequent adoption of a redevelopment plan allowed Mt. Holly to use its eminent domain powers under state law.¹⁷ It is Mt. Holly’s goal to redevelop the designated portion of the Gardens to expand the municipal tax base. To that end, a redevelopment company, Keating Urban Partners, was hired to oversee the entire project. Keating later coordinated the purchase of units and the provision of relocation assistance to residents in accordance with state law and the municipal program.¹⁸

A designation of “blight” or that an area is “in need of redevelopment,” and the adoption of a redevelopment plan, empowers a municipality to use a wide array of eminent domain powers, including the ultimate power to seize a property through condemnation proceedings.¹⁹ Condemnation proceedings entail a valuation of the property by a court, and the forcible transfer of title thereof.²⁰ Mt. Holly has avoided condemning properties, but it has used its redevelopment powers to secure a large swath of the designated area by other means.²¹ Of interest to this Article is one tactic in particular: according to an internal state watchdog agency, the New Jersey Department of the Public Advocate, “[t]he Township has purchased properties at set prices it has offered based on appraisals that have never been tested in court.”²² Mt. Holly appraised individual exemplars of each standard Gardens unit—one, two, and three bedrooms—and arrived at a maximum price of \$32,000, \$39,000, and \$49,000, respectively.²³ Mt. Holly refuses to negotiate over these appraisal prices. The appraisals appear to have taken into

¹⁴ *Id.* at 16 & 34 n.99 (citing Mount Holly, N.J., Resolution 2002-217 (Oct. 28, 2002)).

¹⁵ *See id.* at 16-17.

¹⁶ *Id.* at 4.

¹⁷ *See generally* N.J. STAT. ANN. §§ 40A:12A-7, -8 (LexisNexis 2011). *See also* N.J. CONST. art. VIII, § 3, ¶ 1.

¹⁸ MT. HOLLY REPORT, *supra* note 1, at 3-4.

¹⁹ *Id.* at 2. *See also generally* N.J. STAT. ANN. §§ 40A:12A-7, -8.

²⁰ MT. HOLLY REPORT, *supra* note 1, at 9 & 32 n.46.

²¹ *Id.* at 2.

²² *Id.*

²³ *Id.* at 9.

consideration the “blight” designation of the units, and devalued them accordingly. Worth noting is that had the homes been seized via condemnation proceedings, such devaluation would never have occurred.²⁴ In accordance with state law, since 2006 Mt. Holly has offered selling homeowners relocation assistance of up to \$15,000 and a \$20,000 zero-interest loan to purchase a new home, payable at the time the replacement home is sold.²⁵ Thus, the owner of the largest unit can receive an absolute maximum of \$84,000.²⁶ Identical units in the Gardens, but outside the area designated “in need of redevelopment,” sold in 2008 for \$99,000, \$82,000, and \$87,000.²⁷

This Article will use the Mt. Holly situation described above to illustrate a current deficiency in the antitrust law dealing with municipal liability under the Sherman Antitrust Act (hereinafter Sherman Act or, simply, Act).²⁸ Mt. Holly is using its eminent domain powers to become a monopsony²⁹ in the real estate market for the designated area. Mt. Holly’s monopsony power is then being exploited to create a price-fixing scheme that would violate antitrust laws, either as a per se violation under § 1,³⁰ or as a monopolizing or attempted monopolizing offense under § 2.³¹ Under the Act, residents like Ms. Richardson, whose personal story will be revisited in the conclusion, could force Mt. Holly to appraise each property individually and pay the full market value; if the township refused, it would be subject to a treble damage penalty under the Act, thereby erasing any possible advantage of abusing its monopsony power. As the law currently stands, however, Mt. Holly Township is immune from suit under the *Parker v. Brown* decision and its

²⁴ See *id.* A township might make low offers prior to a condemnation proceeding, but once the proceeding is done, the court will value the property without regard to the effect of the blight designation (as opposed to the conditions leading to the blight), and that is the price that the township must pay.

²⁵ *Id.* at 11.

²⁶ *Id.*

²⁷ *Id.* at 9.

²⁸ Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (2006).

²⁹ A monopsony is “a market with only one buyer that uses its power to reduce the quantity purchased, thereby reducing the price that a monopsonist has to pay.” Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297-98 (1991). It is a corollary to a monopoly, in which there is a market with only one seller. *Id.* at 301.

³⁰ 15 U.S.C. § 1.

³¹ *Id.* § 2.

progeny.³² This Article will use the Gardens example to illustrate the need for a market participant exception to *Parker* immunity, such that when a municipality is participating in the market for a good itself, as opposed to merely regulating that market, the Sherman Act should apply.

The Author has split this Article into two parts. The first part is an examination of the potential antitrust case Gardens residents could bring against Mt. Holly.³³ A simplified economic model (hereinafter the simplified model) will illustrate the market conditions of an idealized municipal eminent domain taking, and an elaboration of that model will demonstrate the market effects of a price-fixing scheme.³⁴ A second model (hereinafter the antitrust model) will approximate the Mt. Holly facts and be subjected to antitrust analysis.³⁵ The antitrust model continues by explaining how the monopsonistic, as opposed to monopolistic, character of the model alters antitrust analysis. Then, §§ 1 and 2 of the Sherman Act are applied to the antitrust model,³⁶ demonstrating that Mt. Holly's price-fixing behavior sketches a problem remediable by antitrust law.

The second section addresses the *Parker* analysis as applied to the antitrust model, and to Mt. Holly by extension.³⁷ First, the Author will briefly explain the evolution and application of *Parker* immunity as it applies to municipal governments.³⁸ Next, it will be shown that the second model qualifies for that immunity.³⁹ The Author then describes how a market participation exception would allow individuals in the antitrust model, and its real world corollary in Mt. Holly, to prevent abuse of monopsony power.⁴⁰ The potential efficacy of antitrust law in remedying the antitrust model as applied to the Mt. Holly situation is then assessed.⁴¹ The Author concludes by suggesting that Mt. Holly

³² *Parker v. Brown*, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Patrick v. Burget*, 486 U.S. 94 (1988); *FTC v. Ticoor Title Ins. Co.*, 504 U.S. 621 (1992).

³³ *See infra* Part I.

³⁴ *See infra* Part I.A.

³⁵ *See infra* Part I.B.

³⁶ *See infra* Part I.C.i.b.1-2.

³⁷ *See infra* Part II.

³⁸ *See infra* Part II.A.

³⁹ *See infra* Part II.B.

⁴⁰ *See infra* Part II.C.

⁴¹ *See infra* Part II.D.

provides a keen example of the need for a market participation exception.⁴²

I. THE ANTITRUST DIMENSIONS OF THE MT. HOLLY GARDENS

Even in the most straightforward of factual situations, there are nuances that can confound the proper application of the law. While the Gardens facts are quite clear, their legal implications may not be immediately obvious. This section will show that in eminent domain circumstances, antitrust law can theoretically apply to abuses of state-granted powers to redevelop. To begin, however, the factual circumstances above will be simplified into two alternative models that describe when and how a rational municipality would behave *vis-a-vis* its residents. The first model will predict the conditions under which a municipality will negotiate for purchase, and when it will commence condemnation proceedings. The second model demonstrates how a township can use its monopsony power to extract producer surplus from economically and socially vulnerable residents. The models are as follows.

A. *Simplified Model: Eminent Domain Antitrust Paradigm*

Assume a municipality named Bree,⁴³ specifically granted the use of eminent domain powers for redevelopment by the Shire State Legislature. The use of eminent domain in Shire requires that the taking authority first designate an area "in need of redevelopment" and adopt a redevelopment plan for the area, and then allows the taking authority to proceed with a condemnation hearing. The condemnation hearing is a judicial proceeding where a court adjudicates the "just compensation" value of the taken property; it decides only the price the taking authority will pay, and it is assumed that the property will be forcibly sold for the adjudicated (as opposed to negotiated) price at the end of the hearing.

Condemnation is a cumbersome, time-consuming, and expensive proceeding for the taking agency. The time and expense of condemnation are the only economic limitations on the taking authority's decision to condemn a property. Negotiation is an individualized proceeding whose primary costs are the time spent negotiating and the price agreed upon. The time necessary for negotiation is significantly less than the time necessary to conduct the condemnation proceedings.

⁴² See *infra* Conclusion.

⁴³ The chief economic resources of Bree are, of course, rumor, conjecture, and the odd ranger for hire.

Further assume that there is an area of Bree called Rivendell. Rivendell has two sections, Weathertop and Moria, each of which contains single-family homes. Each homeowner lives in an identical building on similar lots.⁴⁴ Several homes located in Moria were recently sold, for prices ranging from \$10,000-\$100,000; no homes have recently been sold in Weathertop. Rivendell as a whole is economically depressed, and the municipal government (hereinafter identified as "M") has used its eminent domain powers to designate Weathertop, and only Weathertop, "in need of redevelopment." M has entered into an agreement with a redevelopment company, R, whereby M will sell R all property acquired by condemnation or negotiation and R will turn Weathertop into Bree's new Oddity Newspaper Dispatch Center, which promises to inject much-needed tax revenues into Bree's coffers.

Weathertop is populated by one hundred low- to middle-income homeowners, none of whom are economically or legally sophisticated. By "economically sophisticated," the Author refers to the knowledge, at least consciously, that two apparently identical properties can have strikingly different economic values; by "at least consciously," the Author acknowledges that such information may be known to the homeowners, but such information is not necessarily connected to the value of a home in the context of an eminent domain threat in the minds of affected homeowners. By "legally sophisticated," the Author refers to the knowledge of one's rights, such as the ability to demand a condemnation hearing or that the retention of an attorney could enhance the economic outcome (i.e., could negotiate a higher price while protecting the legal rights and interests of the homeowner).

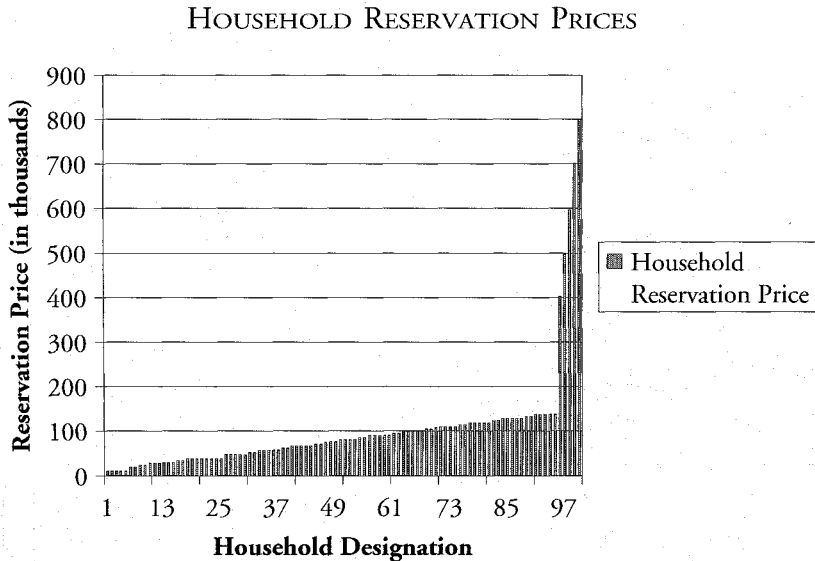
The one hundred homeowners are conveniently named 1 through 100. All but five of them are willing to negotiate sale prices for their homes, each at incrementally higher prices. Households 1-5 are very risk-averse and have reservation prices⁴⁵ ranging from \$8,000-\$10,000. Households 6-25 are progressively less risk-averse, and their reservation prices increase to \$40,000. Households 26-95 are increasingly less risk-averse still, and their reservation prices range from \$43,000-\$140,000. Households 96-100 are completely unwilling to negotiate a sale price for their home and will sell only if forced to, following a condemnation

⁴⁴ The lots share the same total acreage and frontage, as well as access to utility lines and public services.

⁴⁵ The minimum price at which the homeowner would be willing to sell the home.

hearing. It is assumed that households 1-95 want to negotiate for the sale of their homes.⁴⁶

The various reservation prices of households 1-100 are illustrated by the following graph.⁴⁷



Under the simplified model, M would approach each household and attempt to negotiate a sale price for the property. M would agree to any price that is at or below the expected fair market value of the house (FMV) (as would be determined by an independent appraisal such as the condemnation hearing), plus the administrative costs of the condemnation hearing (AC); thus, M will negotiate when Reservation Price = FMV + AC. Conversely, M will condemn when Reservation Price > FMV + AC. For the purposes of these models, assume that M can suc-

⁴⁶ By “want” in this context, the Author means that the households are willing to sell for their reservation price, rather than being holdouts.

⁴⁷ Reservation prices are supplied for households 96-100 solely to visually highlight those households’ comparative unwillingness to sell. The bar graph uses the household designations (1-100) as the x-axis, and the reservation prices of each household as the y-axis. The image approximates an upward-sloping line, illustrating the increase in reservation prices across the households. Households 95-100 are notable outliers, and rise significantly over the reservation prices of their neighbors—recall that these latter households are included only to illustrate their extreme aversion to sell absent a condemnation proceeding.

cessfully negotiate the homeowners down to their individual reservation prices.⁴⁸

There is an active market in home sales in Rivendell. Thus, there are buyers looking for homes and homeowners looking to sell. Since Rivendell is an economically depressed area, potential buyers are looking either to purchase for family residences or possibly as investment property. If the former, buyers will only purchase a home if they can reasonably expect to live there for a period of time, and if the latter, investors will only purchase if they can reasonably expect to retain the property long enough to at least recoup their investment. The threat of eminent domain, however, disrupts the necessary conditions for both types of buyers: if the property is to be seized in the foreseeable future,⁴⁹ then potential buyers will not purchase the home. By invoking its eminent domain powers, M excludes all competing buyers of real estate in Weathertop and secures monopsony power over that market. The homeowners, however, have a balancing power against M's monopsony: the threat of holdout.

M must acquire all properties in Weathertop, and thus each homeowner must sell for Bree's redevelopment to go forward. In a normal scenario, there would be a bilateral monopoly where Bree is the only buyer, and the households are each in the position of the only seller: the monopsony power of Bree is perfectly balanced by the monopoly power of the household. The result of the bilateral monopoly would be a negotiated price of sale since each party has the power to hold out.

In the context of eminent domain, however, the bilateral monopoly is not a truly accurate picture. While the homeowner can hold out, his ability is limited by M's power to seize the property in a condemnation hearing. Thus, the homeowner can only exercise her bargaining power until $\text{Price} = \text{FMV} + \text{AC}$; this is because when the homeowner demands a price in excess of the $\text{FMV} + \text{AC}$, it becomes less costly for M to simply seize the property via eminent domain. Still, the homeowner retains sufficient bargaining power to demand a price above the FMV of their property, so long as he/she does not demand $\text{FMV} + \text{AC} + 1$.

⁴⁸ The Author incorporates this assumption because the households in Weathertop are economically and legally unsophisticated, and thus unable to extract the full $\text{FMV} + \text{AC}$ price they otherwise could.

⁴⁹ No specific date is necessary for potential buyers to be scared off; they need only understand that the property is subject to eminent domain taking in the short- to mid-term period in which they expected to derive their individual benefits from the property.

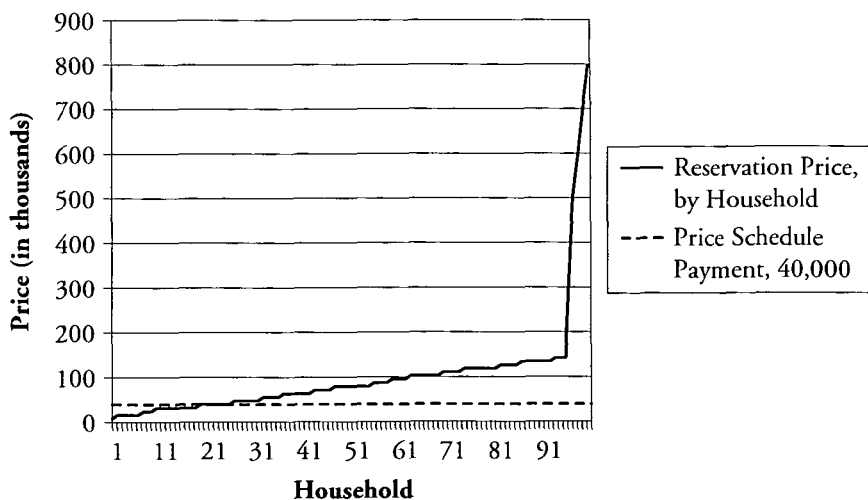
Under the simplified model, households 1-95 will all receive their reservation prices; this is an assumption of the model itself. Only households 96-100 will face condemnation proceedings, because they are unwilling to sell.

B. *Antitrust Model: Eminent Domain + Price-Schedule Model*

For the antitrust model, assume the simplified model with the following alteration: the same number of households with the same reservation prices, but Bree is unwilling to negotiate. Instead of negotiating, Bree implements a price schedule whereby it will pay one price, \$40,000, for all properties in Weathertop.⁵⁰ Bree still wants to avoid AC, but it believes that it can force all one-hundred homeowners to sell for \$40,000. It is crucial to recall that the residents of Weathertop are both legally and economically unsophisticated, meaning they are unlikely, and possibly unable, to vindicate their own rights in the face of Bree's refusal to deal.

This model can be represented as follows.

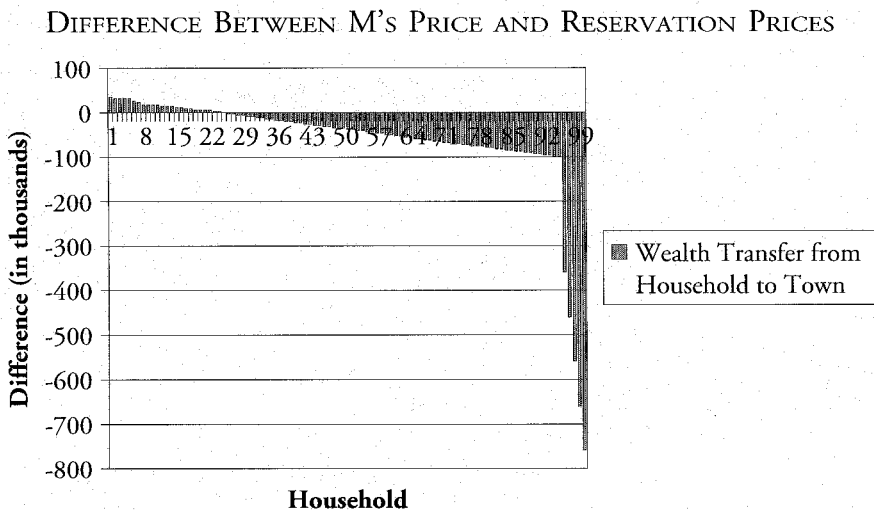
COMPARISON OF RESERVATION PRICES AND PRICE SCHEDULE PAYMENT



⁵⁰ Recall that \$40,000 was the reservation price of household 25. Households 1-24 have reservation prices below \$40,000. See discussion *supra* Part I.A.

The ascending solid line represents the reservation prices of households 1-95.⁵¹ The horizontal dotted line represents the fixed price offered by M: \$40,000. The two lines intersect at the reservation price of household 25. Thus, households 1-24 are being offered more than their reservation price, household 25 is being offered his reservation price and households 26-95 are being offered increasingly less than their reservation prices.

The difference in the offered price and the reservation price can be graphically represented as follows.⁵²



The series is named “wealth transfer” because M is essentially converting the difference between \$40,000 and the reservation prices of households 26-95 into savings for M. Under the simplified model, the difference is cash that the households receive after successful negotiations, which cash is spent by M to purchase the properties.⁵³ Under the antitrust model, the difference is cash retained by M and constitutes a

⁵¹ Again, households 96-100 are represented purely for contrast, not to indicate that they are willing to sell absent condemnation hearings.

⁵² This graph is a bar graph where the x-axis is the designation of the household and the y-axis is the difference between the household's reservation price and the \$40,000 offered by M. Households 1-24 appear in the positive area of the graph—above the x-axis—because they receive more than their reservation prices. Twenty-five (25) received exactly his reservation price and thus lies on the x-axis. Households 26-100 appear below the x-axis in the negative area of the graph because they receive less than their reservation prices. The value in the negative area of the graph is wealth-transfer to M, and is the seized consumer surplus of households 26-100.

⁵³ There are no tabs in Bree.

loss on the part of the households, who receive less than their subjective valuation of the property. Essentially, the difference is the producer surplus of the households, which M converts to its own consumer surplus by refusing to negotiate its price schedule.

One aspect of M's monopsonistic behavior is an old concern of antitrust law in general: the presence of deadweight loss. Normally, one reason monopolies (and monopsonies) concern us is that, by manipulating price, some individuals who demand the product at the competitive price will end up not purchasing the product at all. Deadweight loss in a situation such as the antitrust model takes two forms, both of which flow from the mere ability of a municipality to conduct eminent domain seizures. First, theoretically, there will be some extremely risk-averse individuals who would purchase property, but do not simply because that property may be seized through condemnation.⁵⁴ For these hyper-risk-averse individuals, the deadweight loss seems fairly small and remote; the Author is unsure how to calculate it. Presumably, one could compare the number of homes bought in an economy when eminent domain takings are not possible to the number bought in an economy where seizure is possible; the difference would reflect the sales that do not take place because of the risk of an eminent domain taking. These foregone sales are an inefficient distribution of scarce resources, and they cannot be recouped by the market. Consequently, any deadweight loss would be present in the simplified model as well, and the antitrust model would not necessarily increase the loss to society. No additional deadweight loss is incurred simply because Mt. Holly can force the sale.

The second source of deadweight loss would be similarly present in both the simplified and antitrust models, though the Author believes the magnitude of that loss would be greater in the antitrust model. There are individuals who will purchase homes despite the (normally remote) risk of eminent domain takings. Some of those individuals may, however, under-invest in their homes because of the possibility of seizure. Such individuals may forego repairs, or may not make improvements that they would otherwise have were it not for the risk of seizure. Such investments would presumably increase the value of the home, but there is a risk that the condemnation hearing will not value the improvements, or even their cost.

⁵⁴ See Blair & Harrison, *supra* note 29, at 316.

For example, imagine anti-Melkor siding which costs \$5000, but does not necessarily increase the value of the home by \$5000, at least short-term. The siding may increase the home's value in the long run by preserving the building frame, by increasing the value of the home incrementally over a period of years, or by keeping evil fallen angels away. But like the potential homeowners and investors that the blight designation scares off, the risk of eminent domain makes investment in siding or other improvements uncertain. Some individuals who already own their homes may not make such improvements at all, resulting in deadweight loss from the mere possibility of seizure. Once blight is declared, however, the problem is exacerbated because from the moment M makes the declaration, any investment that does not immediately raise property value by at least the cost of the improvement (\$5000 spent on siding increases the home's value by at least \$5000) ceases to make economic sense. In the antitrust model the problem becomes even worse, because even those investments which result in an equal increase in property value will be foregone: the \$5000 spent on siding is lost even if the property's value increases by \$5000, and any other gain is also lost. Thus, while the deadweight loss from underinvestment is present in both models, the actual loss would likely be higher in a world where the antitrust model is possible.⁵⁵

The eminent domain taking is economically efficient, insofar as all the resources go to their highest value use; the model assumes that the newspaper dispatch center provides higher tax revenues, which implies higher land values when compared to Weathertop as a residential district. There are countervailing fairness concerns, however, that go beyond the strict economics of the situation. Under the antitrust model, M is forcing economically vulnerable households to surrender the value of their homes to M.

As shall be explored in this Article, the antitrust model constitutes an abuse of market power which, under normal circumstances, would violate both § 1 and § 2 of the Sherman Act.⁵⁶ Any individual homeowner could then ask the court, during the condemnation hearing or in

⁵⁵ In reality, of course, even under the simplified model the \$5000 in siding for at least \$5000 in immediate property value increase is highly unlikely; empirical evidence would be needed to demonstrate how unlikely. Theoretically, it still makes sense to invest during the "blight" designation so long as the improvement will earn more than its cost (e.g., the siding makes the home worth \$5001 more). This is because the added value would be reflected in the condemnation proceeding valuation, or sale negotiations in the alternative.

⁵⁶ 15 U.S.C. §§ 1-2 (2006).

an action in lieu of prerogative writs, to enjoin M from using the price-schedule, and perhaps even sue M to recover the wealth transfer. Because M is a municipality, however, it is insulated from that liability by the State Action Immunity Doctrine first announced in *Parker v. Brown*.⁵⁷ While it is analytically clear that M has committed no legal wrong, the conduct of M towards its own citizens who reside in Weathertop begs the question: should we allow this kind of intentional price-fixing in an effort to seize producer surplus from economically disadvantaged individuals?

C. *Application of Antitrust to a Generic Use of Eminent Domain*

With the above models in mind, it becomes possible to explore the antitrust dimensions of the idealized scenario. Section 1 of the Sherman Act outlaws “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade[.]”⁵⁸ Section 2 makes it a felony to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]”⁵⁹ Because M has entered into a redevelopment agreement with R, § 1 is applicable to the above model, assuming the conduct is “in restraint of trade.” Absent the agreement with R, § 2 is also applicable to M’s conduct if it is “monopolizing” or attempting to. It thus becomes a question of whether M’s conduct is either in restraint of trade or monopolistic.

Using the antitrust model described previously,⁶⁰ one can see that M has restrained trade in Bree’s real estate market. There is certainly an active market for homes in Rivendell: it is a given that Moria has had several homes sell recently,⁶¹ and the absence of recent sales in Weathertop does not exclude homes there from the real estate market in Rivendell, or Bree, or possibly even the Shire as a whole. One will recall that the homes in Weathertop and Moria are assumed to be identical.⁶²

By declaring Weathertop “in need of redevelopment,” Bree is essentially excluding all other potential buyers from the market for homes there. M is a true monopsony in that at the time it declares Weathertop

⁵⁷ *Parker v. Brown*, 317 U.S. 341 (1943).

⁵⁸ 15 U.S.C. § 1.

⁵⁹ *Id.* § 2.

⁶⁰ See *supra* Part I.B.

⁶¹ See *supra* Part I.A.

⁶² See *supra* Part I.A.

to be “in need of redevelopment,” it is thenceforth the only buyer in the market. On its face, the forcible exclusion of all other buyers from the market would be a violation of at least § 2 of the Sherman Act because the monopsony is achieved in a way that is not a natural or normal part of the competitive market.⁶³ And since the exclusion of competing buyers is the result, or at least a necessary component of the agreement between M and R, § 1 of the Sherman Act is also implicated by the conduct.⁶⁴ Thus, at first blush, it seems that M has run afoul of the Sherman Antitrust Act simply by using its eminent domain powers.

Unsurprisingly, municipalities are not constantly besieged by antitrust suits whenever they attempt to take property for redevelopment or otherwise. Two well-founded exemptions shield the municipality from antitrust liability: the Constitutions of the United States and of the individual states, and the State Action Immunity Doctrine first enunciated in *Parker v. Brown*.⁶⁵ The latter will be addressed in the next section, and is not strictly applicable to the hypothetical as it has thus far been described. Constitutional immunity, however, is independently notable, and, as far as this Author has found, not addressed in the literature.

The Fifth Amendment of the Constitution of the United States of America reads, in relevant part, “nor shall private property be taken for public use, without just compensation;”⁶⁶ the “takings clause” of the Fifth Amendment specifically grants the federal government the power to seize property. State constitutions also have independent “takings clauses,” granting the same power.⁶⁷ All eminent domain takings render the taking authority a monopsony over the relevant product. Thus, if

⁶³ See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (“there must be some ‘exclusion’ of competitors; that the growth must be something else than ‘natural’ or ‘normal;’ that there must be a ‘wrongful intent,’ or some other specific intent; or that some ‘unduly’ coercive means must be used.”).

⁶⁴ See 15 U.S.C. § 1 (2006).

⁶⁵ *Parker v. Brown*, 317 U.S. 341 (1943).

⁶⁶ U.S. CONST. amend. V.

⁶⁷ See, e.g., N.J. CONST. art. IV, § 6, ¶ 3.

Any agency or political subdivision of the State or any agency of a political subdivision thereof, which may be empowered to take or otherwise acquire private property for any public highway, parkway, airport, place, improvement, or use, may be authorized by law to take or otherwise acquire a fee simple absolute or any lesser interest, and may be authorized by law to take or otherwise acquire a fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the public highway, parkway, airport, place, improvement, or use; but such taking shall be with just compensation.

See also N.J. CONST. art. VIII, § 3, ¶ 1.

the prior analysis in this section is correct, all takings constitute an anti-trust violation. In other words, in the context of an eminent domain taking, the Federal and relevant State Constitutions are in conflict with the Sherman Act. Where the Federal Constitution and a statute are in conflict, the Constitution trumps.⁶⁸ And where a state constitution and a federal statute are in conflict, the state constitution will generally trump.⁶⁹

i. Antitrust in the Context of the Antitrust Model

a. *Monopsony Complications*

In consideration of the constitutional immunity for a standard eminent domain taking, this Article posits that only the antitrust model is capable of violating § 1 and § 2 of the Sherman Act. This segment will construct the antitrust case against the antitrust model. Before delving into a potential violation, however, it is necessary to recognize that the market power at issue here is that of a monopsony, rather than a monopoly.

Monopsonists, no less than monopolists, pose a threat to interstate commerce and the operation of a free market. In the seminal case *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,⁷⁰ the Supreme Court found monopsonistic agreements to be subject to the same kind of antitrust analysis as monopolistic ones. There, the plaintiffs were sugar beet growers who had only three potential purchasers, namely the three closest refiners; this was because sugar beets could not be transported great distances, and they were valuable only to sugar refiners.⁷¹ The refiners agreed to set a single price for beets, and refused to pay farmers more than their set rate: they thereby created and exercised mo-

The clearance, replanning, development or redevelopment of *blighted* areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

Id. (emphasis added).

⁶⁸ U.S. CONST. art. VI.

⁶⁹ See U.S. CONST. amend. X.

⁷⁰ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948).

⁷¹ *Id.* at 222 & n.2.

nopsony power over the sugar beet market available to the plaintiff growers.⁷² The Court held: “It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers.”⁷³

Because monopsony power affects sellers, however, the nature of antitrust analysis is somewhat altered. First, the market definition analysis looks to excluded buyers, rather than sellers.⁷⁴ Market power is measured in reference to those buyers whom sellers view as reasonably good substitutes.⁷⁵ Similarly, when assessing whether sellers have alternative buyers, modern courts will inquire into the elasticity of sellers’ supplies. In *Todd*, for example, the sellers’ supply was highly perishable and thus inelastic.⁷⁶ Under the antitrust model, the housing stock would also be inelastic because it cannot be transported, and it cannot be subdivided or otherwise rendered more saleable.

Damage measurements also change in the monopsony context. “In an oligopsony, the risk is that buyers will collude to depress prices, causing harm to sellers.”⁷⁷ For the purposes of calculating damages, it is often very difficult to determine an exact value for the competitive harm. One commentator explained the problem of monopsony damages as follows: “The sellers suffer a loss in revenue due to the decreased price The damage calculation itself, however, would be difficult. One would be required to determine what the price of the final output would have been had the colluding firms paid *more* for the input.”⁷⁸

In the standard monopsony situation, the damage calculation may be practically impossible to measure. Luckily, the antitrust model—and the Gardens situation—presents a remarkably straightforward damage measurement that is already an accepted practice. The damages will be the difference between the appraised value of the property (ignoring the

⁷² *Id.* at 223.

⁷³ *Id.* at 235 (internal citation omitted).

⁷⁴ *Id.* at 236 (“[n]or is the amount of the nation’s sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned”), 240 (“The growers’ only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market.”).

⁷⁵ See *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

⁷⁶ *Id.* at 211.

⁷⁷ *Id.* at 214.

⁷⁸ Blair & Harrison, *supra* note 29, at 338 (emphasis in original).

effects of eminent domain) and the set price offered by M.⁷⁹ Appraisal is how a court in a condemnation hearing would set the value of the home, and thus no special efforts would have to be made to determine damages in an antitrust challenge to M's price schedule.

To illustrate the damages under the antitrust model, recall that several homes in Moria, identical to those in Weathertop, sold recently for prices ranging from \$10,000-\$100,000;⁸⁰ assume \$100,000 was the price of a home in perfect repair. If the homes in Weathertop are in perfect condition, it is safe to assume that they would also sell for a figure within the \$10,000-\$100,000 range. M pays only \$40,000 for properties in Weathertop. Using the comparable \$100,000 home as a measure, the antitrust damage measurement would be \$60,000, which is then trebled under the Sherman Act. Thus, in the hypothetical scenario, the residents of Weathertop could recover up to \$180,000 under the Sherman Act.⁸¹ The market value is used instead of the reservation prices because the market is the measure of the damages, rather than the subjective valuation of each individual homeowner.

There is one other problem in assessing damages, however, which is not strictly related to a monopsony versus monopoly case. In 1984, Congress passed the Local Government Antitrust Act of 1984 (hereinafter 1984 Act),⁸² which limits the antitrust remedies against a "city, county, parish, town, township, village, or any other general function governmental unit established by State law," among other listed entities.⁸³ The 1984 Act limits suits against such entities to injunctive relief,

⁷⁹ Briefly returning to the Gardens facts, recall that identical homes outside the redevelopment area sold for up to \$99,000. The largest standard unit in the Gardens in perfect repair is sold for a set price of \$49,000. The \$15,000 relocation assistance and \$20,000 zero-interest loans are not part of the purchase price for the property, and thus should not be included in the damage measurements. See *supra* text accompanying note 25. Thus, the damages faced by a Gardens resident with a three-bedroom home who sells at the non-negotiable price suffered \$50,000 in damages—the difference between the market price of a comparable unit and the price paid. Trebled, that resident would be awarded \$150,000.

⁸⁰ See discussion *supra* Part I.A.

⁸¹ The individual reservation prices in the hypothetical are well below the FMV of their homes, but it should be recalled that the residents are economically and legally unsophisticated, which would explain their failure to value the properties according to actual market conditions; if that is unconvincing, stay tuned to the conclusion, where it is shown that Ms. Richardson likely suffered damages of \$43,000, or a total damage award of \$129,000, which might be enough to entice attorneys to rush to the aid of a friendly, lively, charming woman undaunted by circumstance. See *infra* Conclusion.

⁸² 15 U.S.C. §§ 34-36 (2006).

⁸³ *Id.* § 34(1)(A).

specifically prohibiting actions for damages, interest on damages, costs, and attorney's fees.⁸⁴ By its terms, the 1984 Act applies only to actions brought under sections 4, 4A, and 4C of the Clayton Act.⁸⁵ This Article concerns itself with actions brought under § 1 and § 2 of the Sherman Act, but given the interconnectedness of antitrust statutes, plaintiffs suing under the Sherman Act might find themselves limited to injunctive relief nonetheless.

As to the redeveloper, R, the 1984 Act is arguably applicable. Assuming that the redeveloper argues that the 1984 Act applies to Sherman Act claims, R would then have to show that it is covered thereby. Section 36 of the 1984 Act extends the damages-protection to claims "against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity."⁸⁶ In countering the protection afforded by the 1984 Act, the Author would argue that R's actions are not directed by M, but rather are done under the auspices of the price-fixing scheme. The Author was unable to find much guidance on the applicability of the 1984 Act to R but, given the specificity of the statute, which applies only to certain Clayton Act cases, it seems that both M and R would be liable in damages; still, one must remain aware that injunctive relief may be the only remedy.

Keeping the monopsony complications in mind, the next section will run through the Sherman Act § 1 and § 2 actions that could be brought against M.

b. *The Antitrust Case*

In an antitrust action alleging a monopoly, whether filed under § 1 or § 2 of the Act, the first step is to define the relevant geographic and product markets.⁸⁷ In the antitrust model, much of the work of defining a relevant product and geographic market has already been done by M. The relevant product market is real estate. Under the analysis described in *Mandeville* and *Todd*, a litigant looks to the elasticity of the seller's supply to define the product market.

Here, the residents of Weathertop have a highly inelastic supply of housing, both because of their limited economic means and because the potential substitutes for ownership of a home would conceivably be

⁸⁴ *Id.* §§ 35-36.

⁸⁵ *Id.* §§ 35(a), 36(a).

⁸⁶ *Id.* § 36(a).

⁸⁷ *See, e.g.,* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

ownership of another home. Real property is, by legal fiction, unique, lending further credence to defining the relevant product market as real estate. In economic terms, the value of real estate is strongly tied to its locality, so a close substitute would not simply have to be another improved parcel, but another improved parcel in the same geographic area. Since the residents of Weathertop have no close substitutes for their current properties, the relevant product market would be real estate.

As to the geographic market, *Mandeville* provides a strikingly close analytic parallel to the antitrust model. In *Mandeville*, there was a large network of potential sugar refiners to whom the plaintiffs could sell, but only the three named defendants were practical options.⁸⁸ The Court found that “[t]he growers’ only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market.”⁸⁹ Because the growers had no other outlets, the geographic area was defined as that where the refiners actually exercised their control, rather than the national sugar market.⁹⁰

The residents of Weathertop stand in the identical place as did the growers in *Mandeville*: they have no other potential purchasers because their real property is under the threat of eminent domain, and the product itself is not transportable. Residents outside of Weathertop, however, such as those in Moria and Bree, are not generally subject to condemnation proceedings; because the monopsony power cannot be used against them, it seems in accord with *Mandeville* to limit the geographic market to Weathertop.⁹¹

The second step is to identify the degree of market power that M has;⁹² the analysis is fairly simple. In Weathertop, M has a complete monopsony because the likelihood is that few, if any, other buyers can or will purchase a property. Potential buyers looking to speculate on property value, or to purchase rental stock in Weathertop, would be unlikely to purchase because any investment is almost guaranteed to be wasted when M forces a sale of the property. Property values in an economically depressed area subject to condemnation are unlikely to skyrocket in the near future, and the property will be seized for market

⁸⁸ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 222 (1948).

⁸⁹ *Id.* at 240.

⁹⁰ *Id.* at 236 (“[n]or is the amount of the nation’s sugar industry which the California refiners control relevant, *so long as control is exercised effectively in the area concerned*”) (emphasis added).

⁹¹ *See id.*

⁹² *See, e.g., Spectrum Sports*, 506 U.S. at 459.

value should an investor hold out.⁹³ Even R (M's redevelopment partner), which is in the business of redeveloping communities, will not purchase from the current owners, because it no longer has to. Those looking to purchase a home will be similarly deterred. M's eminent domain powers render it the only participant in the market for property in Weathertop, and as such grant M complete market power.

1. The Section 1 Case

Applying the market definition and power analysis above, a case under § 1 of the Sherman Act becomes extremely straightforward. M entered into an agreement with its redeveloper, R, to establish monopsony power over the Weathertop real estate market. M then used its monopsony power to fix a price for all properties in the market. Price fixing is *per se* illegal under the Sherman Act for monopolists and, by extension, for monopsonists.⁹⁴ The agreement between M and R is clear. No case has specifically applied the *per se* rule to monopsonistic price fixing,⁹⁵ but it seems a natural conclusion. The Court of Appeals for the Second Circuit, in *Todd*, briefly addressed the question when it said, "If the plaintiff in this case could allege that defendants actually formed an agreement to fix . . . salaries, this *per se* rule would likely apply."⁹⁶ Having demonstrated that M is price-fixing, a court would find for the residents and grant the damages described above.⁹⁷

⁹³ Some particularly adventurous speculators might purchase properties after an area is declared subject to condemnation; they would be hoping to achieve a higher price during a condemnation proceeding than that paid to the owner. The examples of households 1-5, who are extremely risk-averse, would be the targets of such investors. Still, the Author argues that, once subject to condemnation, there would be little fluctuation in home-prices because the market is in the thrall of the monopsonistic taking-agency.

⁹⁴ See *Mandeville*, 334 U.S. at 227 ("In our judgment the amended complaint states a cause of action arising under the Sherman Act, §§ 1 and 2, and the complaint was improperly dismissed."); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("The Sherman Act, however, also applies to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony.").

⁹⁵ The *Mandeville* decision revolved around the threshold question of whether the Sherman Act applied to monopsonies, and the case was remanded for determination of the antitrust violation. The Sherman Act does apply to monopsonies. See *Mandeville*, 334 U.S. at 246.

⁹⁶ *Todd*, 275 F.3d at 198 (italics in original). In *Todd*, the antitrust complaint alleged an antitrust violation for information-sharing about competing salaries; no agreement was shown, but evidence of information sharing was found sufficient to support a claim. See generally *Todd*, 275 F.3d 191.

⁹⁷ Assuming that damages are available under the 1984 Act; otherwise, an injunction against price-fixing would be granted.

2. The Section 2 Case

A monopsonistic price-fixing scheme can also be challenged under § 2 of the Sherman Act, forbidding monopolization of a market. A § 2 case shares the same market definition requirement as a § 1 case, and thus the above analysis is equally applicable. Section 2 also requires a showing of market power, which, as shown above, is present in the antitrust model. The final requirement is a showing of anticompetitive conduct—a “bad act.”

The antitrust model shows that M has complete market power within Weathertop. The simplified model shows that M can exercise its monopsony power without extracting the entire producer surplus of the residents of Weathertop. By fixing prices, M is arguably monopsonizing the real estate market to the detriment of the competitive market. Monopsony power is harmful to competition when it is used to lower the price of inputs in such a way as to decrease the quantity of inputs exchanged.⁹⁸

In the antitrust model, the homeowners are forced to sell their property below their own reservation prices through a combination of their own lack of sophistication and the threat of eminent domain. Thus, the quantity of inputs will not be decreased, but producer surplus will be redistributed from economically vulnerable individuals to the township, and from the township to R, which will presumably retain some of that surplus once it redevelops Weathertop. In turn, the former Weathertoppers are economically worse off, and may not be able to purchase replacement properties at all, leading to a kind of secondary harm to consumer welfare should such individuals require state assistance that they otherwise would not have needed; such harms are speculative in the model, however.⁹⁹

For the purposes of this Article, it is necessary only to recognize that M's use of its monopsony power does not avoid consumer harm by lowering exchanges of inputs. Rather, M recasts the consumer harm by extracting *all* consumer surplus under the antitrust model, whereas under the simplified model only that producer surplus in excess of FMV + AC is extracted by M. M's price-fixing and refusal to negotiate would thus seem to state a cause of action under § 2 of the Sherman Act.

⁹⁸ See Blair & Harrison, *supra* note 29, at 306.

⁹⁹ A brief perusal of the report on those who sold in Mt. Holly demonstrates that the Author's speculation is distressingly correct. See *generally* MT. HOLLY REPORT, *supra* note 1.

As an alternative to an outright monopolization case, residents of Weathertop could bring a claim for attempted monopolization. Attempted monopolization (and monopsonization under *Mandeville*) is also an offense under § 2 of the Sherman Act, and has the same market definition, showing of market power, and “bad act” requirement described and analyzed previously in this section. The distinctive feature of an attempt case, however, is the additional elements of a specific intent to monopolize and a “dangerous probability” of success.¹⁰⁰

The ability to use eminent domain powers, specifically the declaration of an area to be “in need of redevelopment,” necessarily entails the creation of monopsony power in the taking body, M. By authorizing eminent domain powers, including takings, it would seem that there is a clearly demonstrated intent to create monopsony power. When one considers the conduct of M in the antitrust model, it is clear that, absent the monopsony power, the township would have had to pay at least the original reservation prices of the residents; with monopsony power, however, M can and does extract all producer surplus. The facts of the antitrust model—as compared to the simplified model and a situation where eminent domain powers are unavailable—seem, to the Author, sufficient to demonstrate a specific intent to monopsonize.

As to the dangerous probability of success, courts look to the facts of the individual case. Plaintiffs must convince the court of the “defendant’s ability to lessen or destroy competition in that market.”¹⁰¹ Once again referring to the analysis above, M in the antitrust model has complete market power, and has driven away all potential competing buyers of real estate in Weathertop. Since there is an active market for the kinds of homes found in Weathertop (recall that homes recently sold in Moria, which has identical housing stock and is immediately adjacent to Weathertop), there would be competing purchasers were it not for M’s monopsony power. Thus, even if a full case for monopsonization could not be made, a case for attempted monopsonization would be available to Weathertoppers.

ii. Objection to the Application of Antitrust Law to the Antitrust Model

The antitrust model seems to present a straightforward violation of §§ 1 and 2 of the Sherman Act. What is not straightforward, however,

¹⁰⁰ *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993).

¹⁰¹ *Id.* at 456.

is the nature of the violation itself. M is clearly price-fixing, and that price-fixing is largely possible because of M's threat to seize the homes of residents. Legally, however, M's threat rings hollow. Weathertoppers may be easily bullied because of their lack of legal and economic sophistication, but their ignorance of their own rights does not extinguish those rights. Put plainly, even if they do not know it, they can always hold out for the condemnation hearing which will place a market value on their property and (presumably) compensate them above M's price.

It should be recalled that M is a governmental unit, which is pursuing municipal welfare with its redevelopment program.¹⁰² The power to condemn, or to threaten to condemn property, is granted to municipalities so that they can regulate their own economic environment, even if that regulation is to the detriment of some residents. In short, the anti-trust model can be seen merely as two competing visions of the best use of Weathertop to the township, with the township exercising its powers to expedite the process and lower costs to the entire citizenry; market competition over prices could derail a legitimate regulatory goal to shape the market itself. In short, the market may be unable to achieve an economically optimal use of the land in Weathertop.

Applied to the facts of the models, M feels that Weathertop can be better used by the township as a whole were it redeveloped. Because Weathertop consists of low-income housing, it would be a risky venture for a private developer on its own to purchase property and build an Oddity Newspaper Dispatch Center which would provide more revenue for the township and a safer environment. M decides to overcome the market failure that led to sub-optimal allocation of land in Weathertop, and pairs with a developer. M assumes the purchasing risk, and distributes that risk to the township as a whole. The township as a whole is repaid with higher tax revenues and attendant service improvements after redevelopment. M is essentially correcting a market failure.

Under the market correction theory, the application of antitrust laws would be counter-productive. It may be that M needs to avoid paying more than its set price for the project itself to be viable. The application of antitrust law would then scuttle a regulatory attempt to correct market failure.¹⁰³ As such, one may ask why the antitrust model

¹⁰² See *supra* Part I.A.

¹⁰³ See Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COM. L.J. 105, 106 (2006).

is appropriately viewed as an antitrust problem at all since antitrust law is meant to prevent harm to the market, not perpetuate market failures.

The first response to the market correction argument, however, is that it is idealistic. While M may be looking after the welfare of its citizenry as a whole, it is doing so by consciously sacrificing its most vulnerable residents. Further, it is “correcting the market” in a fashion that is clearly harmful to competition. Finally, market failure may be in the eye of the beholder. M and R certainly intend a more profitable use of the land in Weathertop, but more profitable for whom? “At the local level, the costs to firms of organizing and lobbying regulators are much lower than at the state level[,]”¹⁰⁴ and municipal government is nothing if not local. It is entirely possible that M and R are colluding precisely because R has captured M and is using the township to enhance its own economic interests; such capture might have no long-term benefit to the township and result in harm to the competitive market for land in Weathertop. Where competition is being harmed, it seems appropriate to use the antitrust law to at least challenge the form of that harm.

Second, monopsony power poses another problem beyond merely lowering prices offered to sellers. A successful monopsonist will ultimately lower its output to maximize its profits, and it will not pass its savings on inputs to the end-purchaser.¹⁰⁵ A monopsonist is able to remove itself from the competitive supply curve entirely, and on to the “all-or-none” supply curve:

The all-or-none supply curve, however, is a different matter. It answers the question: what is the maximum quantity suppliers will make available at each price when the alternative is to sell nothing at all? Accordingly, the all-or-none supply curve lies below the standard supply curve. Knowledge of the all-or-none supply curve enables the monopsonist to fully exploit its power by extracting all of the producer surplus.¹⁰⁶

¹⁰⁴ Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 549-50 (2005).

¹⁰⁵ Blair & Harrison, *supra* note 29, at 305.

Since marginal cost drives the firm's output decision, the monopsonist will actually reduce its output below the level that a seller without monopsony power would select. This output reduction by one firm in a competitive market will have no impact on the market price. The monopsonist will sell its output at the market determined price. Thus, the decrease in the input price to the monopsonist is not passed on to consumers.

¹⁰⁶ *Id.* at 317.

In the short run, the all-or-none supply curve leads to purely distributional effects: all producer surplus is transferred to the monopsonist. In the long run, however, “[f]irms will leave the industry . . . if the price offered is below average total cost.”¹⁰⁷ The antitrust model is on the all-or-none supply curve, which is entirely removed from market competition. Even giving Bree the benefit of the doubt, it has “corrected” market failure by completely excluding market forces.

In the long run, M and municipalities that behave similarly will experience a decrease in land purchases because they are pursuing an extractive goal, rather than looking to the consumer welfare of their citizenry. In sum, M is engaged in an agreement to create and use its monopsony power to extract producer surplus from its residents. Though the residents can hold out, M’s behavior is harmful to competition unto itself, and the antitrust laws are well-suited to preventing and remediating such behavior. Thus, the antitrust model, and the Mt. Holly Gardens by extension, presents a viable antitrust case which would prevent price-fixing by the municipality in the future.¹⁰⁸ That is, if the municipality were not immune.

II. A MARKET PARTICIPATION EXCEPTION TO *PARKER* IMMUNITY SHOULD BE DEVELOPED

A. *Parker Immunity*

In the previous section, the Author demonstrated that there is a viable antitrust suit available to residents of Weathertop under both §§ 1 and 2 of the Sherman Act. Residents who sold at M’s set price could recover three times the difference between the market value of their home and the set price. Even failing damages, residents could receive an injunction forbidding M to continue using a non-negotiable set price when purchasing properties in Weathertop. Unfortunately, M is insulated from the Sherman Act by the State Action Immunity Doctrine first set out in *Parker v. Brown*.¹⁰⁹

Parker dealt with an effort by the California state government to regulate the raisin market in California by forcing growers to, among other things, set aside portions of the harvest for a common pool, which

¹⁰⁷ *Id.* at 318-19 (internal citation omitted).

¹⁰⁸ *Id.* at 309 (“Rather, collusive monopsony is a behavioral problem that can be regulated by the usual antitrust weapons. Indeed, the Supreme Court has held that collusive monopsony violates section 1 of the Sherman Act.”).

¹⁰⁹ *Parker v. Brown*, 317 U.S. 341 (1943).

was used to effectively stabilize the nationwide market for raisins.¹¹⁰ Despite the blatantly anticompetitive result of the California program, the Court found no antitrust violation: “We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”¹¹¹ Thus began the State Action Immunity Doctrine, which insulates some anticompetitive state schemes from antitrust liability.

Since its inception, *Parker* immunity has become more and more refined. In *California Retail Liquor Dealers Ass’n v. Midcal Aluminium, Inc.*,¹¹² the Supreme Court reframed the immunity by creating a two-pronged test that all state action immunity claims must meet. “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”¹¹³ The “clearly articulated” prong has, itself, been refined over the years. Under current analysis, the anticompetitive state measure need not “announce expressly [its] intent to displace competition.”¹¹⁴ The present state of the “clearly articulated” prong is very permissive: the statute that allows a challenged state measure need only contemplate that a state may engage in anticompetitive conduct.¹¹⁵

The second prong, that of active supervision by the state, began as a fairly stringent requirement. In *Patrick v. Burget*—dealing with a hospital’s ability to expel physicians according to procedures mandated by the state—the Supreme Court decided that “[t]he State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations.”¹¹⁶ A later case, *Federal Trade Commission v. Ticor Title Insurance Co.*, elaborated by stat-

¹¹⁰ *Id.* at 348.

¹¹¹ *Id.* at 350-51.

¹¹² *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

¹¹³ *Id.* at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

¹¹⁴ *Hettich*, *supra* note 103, at 118.

¹¹⁵ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985).

[T]he statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.

¹¹⁶ *Patrick v. Burget*, 486 U.S. 94, 102 (1988).

ing: “Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.”¹¹⁷ What *Burget* and *Ticor* did not make clear, though, was what counted as state involvement or supervision. In terms of this Article, the open question is whether a municipal government was “actively supervising” an anticompetitive program if it was the controlling state entity involved in the program.

Municipal supervision was addressed in *Town of Hallie v. City of Eau Claire*.¹¹⁸ There, the City of Eau Claire was empowered by the State of Wisconsin to provide sewage services to its citizens.¹¹⁹ The City was also empowered to refuse to provide services to towns that refused to be annexed.¹²⁰ The Court found that the “clearly articulated” prong was satisfied because the ability to refuse services was an anticompetitive effect contemplated by the empowering statute.¹²¹ As to the second prong of *Midcal*, the Court stated: “We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.”¹²²

B. Parker Immunity and the Antitrust Model

Free of having to prove the “active supervision” prong, a municipal government overseeing an anticompetitive scheme need only meet the “clearly articulated” requirement. Under *Hallie*, a program is “clearly articulated” if the anticompetitive effects were contemplated by the enabling statute.¹²³ Turning to the anticompetitive scheme of the antitrust model, one quickly realizes that *Parker* immunity would insulate M from what is otherwise a fairly straightforward application of antitrust law.

Recall from the model that the eminent domain powers of M are specifically granted to municipalities by state law to allow for economic redevelopment. The mere declaration that an area is “in need of redevelopment” and adoption of a redevelopment plan grants a municipality a complete monopsony over the designated area. Thus, it is necessarily within the contemplation of the statute that an anticompetitive program

¹¹⁷ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

¹¹⁸ *Hallie*, 471 U.S. 34.

¹¹⁹ *Id.* at 37-38.

¹²⁰ *Id.* at 37-38.

¹²¹ *Id.* at 42, 44.

¹²² *Id.* at 46.

¹²³ *Id.* at 42, 44.

results from the use of eminent domain powers. As such, M's redevelopment plan using its eminent domain power qualifies under the "clearly articulated" prong of *Midcal*. And there the analysis ends. M need demonstrate nothing more to claim its State Action Immunity from suit. Residents 1-100 have no other recourse against M's monopsonistic power than to hold out; and if the residents are not aware of their rights, they have no practical choice but to take M's set price and hope that they find a new home priced at or below the amount of money they were forced to take.

The application of *Parker* immunity to the antitrust model leads to what the Author considers to be an inappropriate result, where a municipal government is permitted to abuse its market power to capture the producer surplus of its own economically vulnerable citizens. Were R to attempt on its own to force the residents of Weathertop to accept a set price, antitrust law would swiftly put an end to the entire program if even only one resident sued. What is more, an antitrust action would be fairly likely—despite the lack of legal sophistication of the residents—for a simple reason: the treble damage remedy would incentivize attorneys to search for such abuses and file suit. A § 1 claim itself provides a fairly simple legal case, comparatively speaking, and even with a one-third contingency fee arrangement, the resident would receive twice his own loss, and the program would rapidly become unprofitable. However, since M is conducting the program, there is no antitrust case, no incentive for legal involvement, and no remedy for the residents other than to be stubborn and hope they can wait M out.

C. *A Market Participant Exception Should be Created for
Parker Immunity*

Under the current law, the antitrust model is not reachable by antitrust law. Thus, the current law should change. The Author concedes that there may be situations which demand *Parker* immunity. Such situations should flow from the original purpose of the immunity, however. *Parker* found that a state program to achieve a specific end was beneficial to state constituents and was immune from the Sherman Act.¹²⁴ In other words, when Congress passed the Act, it did not abrogate the several states' ability to regulate their own internal markets; it is to such regulatory actions that *Parker* immunity was first addressed.

¹²⁴ *Parker v. Brown*, 317 U.S. 341, 358 (1943).

The antitrust model does not portray a township regulating a market. Instead, M is participating in the market for land in Weathertop. And by participating in the market, the courts should recognize that it has thrown off its regulatory cloak, and with it, its State Action Immunity. When a state or political subdivision such as a municipality actually participates in the marketplace, *Parker* immunity should not apply.

A market participant exception for *Parker* is not entirely novel. Indeed, the Supreme Court itself has hinted that such an exception exists. First, in *Midcal*, the Court stated that “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”¹²⁵ But *Midcal* dealt with two private parties, with no state defendant, and thus the quoted language merely hints at a limit to the immunity without practical guidelines for future courts.¹²⁶ A second case, however, specifically mentions the possibility of a market participant exception—though no such exception currently exists in the law of *Parker* immunity.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court was faced with a township that had used its ordinance powers to impose a moratorium on the construction of new billboards within the city; the moratorium—and later onerous restrictions—was instituted after strong lobbying by an incumbent billboard company.¹²⁷ The Court, in the portion of its decision dedicated to the City’s *Parker* defense, upheld the City’s immunity. In dicta, however, the Court stated: “with the possible market participant exception, *any* action that qualifies as state action is ‘*ipso facto* . . . exempt from the operation of the antitrust laws.”¹²⁸ Dicta, however, is not law.

Justice Stevens’s dissent in *Omni* points out that the Court’s actions are at odds with a market participation exemption. He wrote, “[the Court] errs in extending the state-action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare.”¹²⁹ The literature has largely agreed with Justice

¹²⁵ Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc. 445 U.S. 97, 106 (1980).

¹²⁶ See generally *Midcal*, 445 U.S. 97.

¹²⁷ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991).

¹²⁸ *Id.* at 379 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984)) (emphasis in original).

¹²⁹ *Id.* at 397 (Stevens, J., dissenting).

Stevens that a municipal or state market participant should not benefit from *Parker*.

As one commentator succinctly put it, “[t]here is no reason to treat states differently from private actors if a state is becoming a participant in a private agreement or in a combination with others to restrain trade.”¹³⁰ Indeed, as noted above, municipalities are much more susceptible than states to capture by local constituencies, which can then turn the powers granted by the state against the market, resulting in the very harm to competition that the antitrust laws are designed to guard against.¹³¹

i. Precedent for a Market Participation Exception

The harms to competition which flow from the antitrust model, and all situations where state bodies are participating in a market rather than regulating it, may tug at the heart-strings when faced with sympathetic plaintiffs, but it is not at all clear that the courts should be solving the problem. After all, *Parker* immunity is the judicial outgrowth of a legislative decision not to strip states of their power to create anticompetitive regimes within their own markets.¹³² *Parker* was decided in 1942, and Congress has not yet seen fit to eliminate the immunity. Congress has similarly not seen fit to introduce a market participation exception to the immunity, and they have actually further insulated municipalities from antitrust enforcement through the 1984 Act discussed previously.¹³³ Perhaps the Court’s refusal to clearly announce a market participation exception is simply a recognition that they are not, in fact, the body which should be deciding the issue: Congress should be.

If the Court is holding back because of Congressional reluctance or inattention, however, they would be firmly grounded in creating the exception themselves. Indeed, the Court has actually found a market participation exception in an unrelated, and now defunct, area of anti-

¹³⁰ Hettich, *supra* note 103, at 150.

¹³¹ See William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1101 (2005).

If anything, courts should recognize that such benefits [of applying the active supervision prong] are probably even greater in the context of municipal supervision due to the greater likelihood of interest group “capture” and the fact that an additional layer of government—the municipality—stands between the state policy and its implementation.

¹³² See *Parker v. Brown*, 317 U.S. 341, 344 (1943).

¹³³ See *supra* text accompanying notes 81-83.

trust law: the Robinson-Patman Act.¹³⁴ A 1983 case, *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, featured a trade association of retail pharmacists suing a state hospital's Board of Trustees; the allegation was that the governmental purchaser of pharmaceuticals was enforcing a (lower) retail price at pharmacies it supplied.¹³⁵ As a defense, the Board argued that the Robinson-Patman Act simply did not apply to a state purchaser. The Court dismissed the argument, stating, "this Court has never held nor suggested that there is an exemption for state purchases."¹³⁶

It should be noted that *Abbott* came two years before *Hallie*, a case which somewhat redefined what constituted the "clearly articulated" prong of *Midcal*; thus, *Abbott* may simply be a relic from a time before municipalities could so easily achieve antitrust immunity. Still, *Abbott* shows that the Court has a history of finding that states which participate in a market, rather than regulate it, can be subject to antitrust law.

Further, the Court has a long history of analyzing when a state is participating in the market rather than regulating it. Under the Commerce Clause of the Constitution,¹³⁷ states are implicitly restrained from acting as regulatory bodies whenever Congress has already created a regulatory regime,¹³⁸ also known as the Dormant Commerce Clause. When the state is acting as a market participant, however, it is not subject to the Dormant Commerce Clause.¹³⁹ To determine if a state is a market participant, the courts conduct "a single inquiry: whether the challenged program constituted direct participation in the market."¹⁴⁰ When a state is not a market participant, it cannot regulate in an area if Congress already has. This Article argues that, by extension, when a state is participating in a congressionally regulated market, it should be subject to those same congressional regulations as all other market participants: namely, the Sherman Antitrust Act.

¹³⁴ Robinson-Patman Act, 15 U.S.C. § 13 (2006).

¹³⁵ *Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 151-52 (1983).

¹³⁶ *Id.* at 166.

¹³⁷ U.S. CONST. art. 1, § 8, cl. 3.

¹³⁸ *See, e.g.*, *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 220 (1984).

¹³⁹ *Id.* Under Dormant Commerce Clause analysis, a state normally is prohibited from interfering with a market that Congress has already regulated; as a market participant, however, it is free to enter the market itself. *Id.* This Article argues that, when a state has entered a market, it should be subject to the federal regulatory regime.

¹⁴⁰ *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 208 (1983) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n.7 (1980)) (internal quotation marks omitted).

It is thus clear that courts are capable of determining if and when a state or municipality is participating in a market rather than regulating. Further, it is clear that the Court has shown some willingness to subject states to antitrust laws. The judicial creation of a market participation exception to *Parker* would merely be an extension of preexisting analysis, and the enforcement of preexisting dicta. Where other authors have presented the legal and economic reasons that state and municipal abuses of market powers should be subject to the Sherman Act, this Author has one last argument: Ms. Richardson.

D. *The But-For World: Futility or Not?*

In this final section, the Author will briefly examine the plausibility of the antitrust solution to the antitrust model. Assume that a market participant exception is created by the courts. The antitrust model becomes impossible, because any attempt to force residents of Weathertop to take less than their reservation price runs the risk of treble damages. Even if treble damages are not available, M may be enjoined from using price schedules. How has the world changed?

M is no longer permitted to use price schedules, it is true, but it is still fully capable of taking advantage of Weathertop's residents. Even under the simplified model, Mt. Holly is "taking advantage" of economically and legally unsophisticated individuals: they may pay more than FMV for each property, but they likely are not paying the full FMV + AC that the simplified model allows the residents to demand. Some residents may, in fact, receive less than the FMV for their homes, such as households 1-5, who will sell for pennies out of pure fear. So instead of having a price schedule, the municipality will simply suggest a price, say, \$40,000. How do the residents keep hold of their producer surplus? To put it another way, what has the application of antitrust law actually accomplished for the residents?

The answer is that we have restored the marketplace to the weak bilateral monopoly of the simplified model. Recall that each resident has a personal reservation price: the amount at which they are willing to sell their home.¹⁴¹ Households 1-25 have reservation prices below and up to \$40,000; if M approaches them individually with an adhesion offer of \$40,000, they will take it because they are either receiving more or exactly what they would have asked. But for household 26, the situa-

¹⁴¹ See *supra* note 45 and accompanying text.

tion is more pressing. M tells household 26 (and all others) “\$40,000 is the best you are going to get. Remember, we can always take your house.” Why is household 26 better off now that he has antitrust protection?

The answer may be that household 26 and up are no better off. They remain economically and legally unsophisticated; they may not understand that they can hold out; they certainly don’t understand that they can get more than their reservation price. Have they truly regained the bargaining power contemplated in the simplified model? The answer is yes, and no. Yes, because if M refuses to negotiate, there is now an economic incentive for legally sophisticated parties to intervene: the treble damage remedy, or the public interest lawyer who is specifically employed to defend the interests of economically disadvantaged individuals.

But the answer is no as well because if M is willing to negotiate, it is incumbent upon 26 and those after him to actually demand the negotiation. M could conceivably take a hard line at first, and only give in as the negotiation costs climb towards $FMV + AC$. Household 26 never lacked the power to force negotiations, but they had that power under the antitrust model as well; what they lack is the ability to use it effectively. And that remains true whether or not antitrust laws apply. The difference is that M can use a fixed price only as a negotiating tactic, not a stonewall against any demands; if it insists too strongly on the \$40,000, then it is facially committing the same § 1 and § 2 violations discussed previously.¹⁴² M’s intention to use the fixed price as a bargaining chip can easily backfire the moment an attorney shows up, hoping to take a contingency fee on a per se violation, in a fairly uncomplicated monopolizing case. And it is this interest of third party attorneys which the application of the Sherman Act grants to households 1-100.

As soon as M declares Weathertop to be ripe for eminent domain seizures, attorneys looking for a large payoff with comparatively simple work will likely become interested. Absent relief in damages, attorneys interested in defending economically disadvantaged individuals will remain interested and might show up; these, one can assume, will be fewer and farther between, but it is of no moment that some people will still make a bad deal if others will not. These third-party lawyers, whose

¹⁴² See *supra* Part I.C.i.b.1-2.

personal or professional interests draw them to the situation in Weathertop, are the chief difference between a world where antitrust laws do and do not apply. Household 26 may still be too frightened to demand his full reservation price, and in that case he is no better off because he has an antitrust claim. But if an attorney comes knocking at his door, telling him that he can sue M for \$180,000, or even more, for a contingency fee of one-third, 26 may let his lawyer do the talking. The application of antitrust law does not guarantee better results, but as one can see from the antitrust model, and the Mt. Holly example, its absence guarantees worse outcomes.

CONCLUSION

Carole Richardson does not look a day over fifty. She is friendly, lively, charming, and at one time she had the American dream all to herself. After a lifetime of living with others, she was offered the chance to own her own home, affordable despite her retirement and fixed income; she leapt at it. The house was a newly refurbished two-bedroom attached unit in a section of Mount Holly, New Jersey. Her mortgage was \$320 per month, and in her own words: "I never expected to live a life of luxury, but you get a house and you figure you'll be there until you die." The area she lived in is called the Gardens.

Today, Ms. Richardson lives in a trailer which she owns, parked on a lot she rents for \$450 a month. She was paid \$39,000 for the house where she spent eleven years; she received an additional \$15,000 in relocation assistance so that she could purchase a new home—Ms. Richardson did not receive the \$20,000 zero-interest loan. The Gardens was home to her: "Everybody called me Ms. Carole. Little kids would say, 'Hi Ms. Carole.'" Then Mount Holly Township decided to redevelop her section of the Gardens.¹⁴³

Mt. Holly called meetings and invited the residents. Accounts of those meetings are confused, but Ms. Richardson vividly remembers hearing someone say, "If you don't leave when you're supposed to, a policeman will escort you from your home and you won't be able to get your belongings." Homes that Mt. Holly bought were boarded up, displaying bright orange "NO TRESPASSING" signs. Buildings were left vacant. Others were bulldozed. The Gardens fell silent. Carole Richardson was scared, and she jumped at the township's offer. After paying

¹⁴³ MT. HOLLY REPORT, *supra* note 1, at 10.

off the mortgage to the first house she ever owned, she had \$17,000 to find a new house. Today, Ms. Richardson lives in a trailer which she owns, on a lot she rents for more than her old mortgage.¹⁴⁴

The residents of the Gardens are not economically or legally sophisticated. They are poor, tight-knit, and have weathered the problems of drugs, crime, and neglect. Carole was seventy-one years old when the Public Advocate's report was published, and she has no hopes of ever owning a brick-and-mortar house again. Carole is not alone in her circumstances. Those residents of the Gardens who have sold their homes have been stripped of their wealth by the overwhelming force of a township which refuses to negotiate over price. Mt. Holly is impoverishing its own citizens.

Were the suggestions of this Article followed, however, that impoverishment would be economically impossible. Carole was paid \$39,000 for her home—the \$15,000 in additional money was state-mandated relocation assistance,¹⁴⁵ not part of the home price.¹⁴⁶ Homes in the Gardens, built at the same time, on the same plan, in the same area, sold for \$99,000, \$87,000 and \$82,000 in the same period that Carole sold her home.¹⁴⁷ Carole's home was newly refurbished when she bought it, and from the picture in the Mt. Holly Report, it appears in good repair even boarded up.¹⁴⁸ Using the lowest, \$82,000 sale as a baseline, Carole was underpaid by \$43,000, or 52.44% of the value of a comparable home; this would be her economic damage measurement. Trebled, Carole Richardson would have a lawsuit worth \$169,000 on a Sherman Act claim alone. Under the § 1 analysis, her case is a fairly easy one, and one-third of \$169,000—\$56,333.33—would be enough to draw in many attorneys. The most Mt. Holly pays for an individual home is \$49,000, leading to \$33,000 in damages, or 40.24% of the market value. Trebled, damages would be \$99,000: still enough to draw a hungry attorney to troll the newspapers looking for municipal redevelopment projects raising antitrust claims.

¹⁴⁴ *Id.*

¹⁴⁵ See Relocation Assistance Law of 1967, N.J. STAT. ANN. §§ 52:31B-1 to -12 (LexisNexis 2011). See also Relocation Assistance Act of 1972, N.J. STAT. ANN. §§ 20:4-1 to -22 (LexisNexis 2011).

¹⁴⁶ MT. HOLLY REPORT, *supra* note 1, at 10.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.* at 10.

Still, it must be remembered that damages may not be available.¹⁴⁹ Many attorneys are concerned with the abuse of the poor and the elderly, and the Gardens situation is a clear example. Some of the residents who remained in the Gardens were ultimately represented by volunteer attorneys from South Jersey Legal Services, a public interest group that works on behalf of low-income individuals who need legal representation they could not otherwise afford.¹⁵⁰ Even without the economic incentive of a large damage award, a group like South Jersey Legal Services could still make out a § 1 case of per se liability, and prevent Mt. Holly from extracting wealth from its most vulnerable citizens.

Carole and her neighbors could have an economically viable case against Mt. Holly, one that would put a halt to the price fixing and restore the homeowners' producer surplus. Even with only an injunction, the monopsonistic price-fixing could be stopped. Instead, she and her neighbors are without recourse. *Parker* immunity stands in the way of any antitrust action, be it for injunction or thrice the consumer surplus that Mt. Holly extracted; but that need not be the case. Legally, courts have a firm footing in creating a market participant exception to *Parker*. Such an exception would be in accord with prevailing constitutional analysis. Economically, a market participant exception would prevent a state or municipality from abusing its market power, particularly in the eminent domain context, when that market power is absolute. But legal, constitutional, and economic justifications do not fully demonstrate the very real need for a market participation exception to *Parker* and its progeny. Carole Richardson and her friends used to own their own houses. With a little help from the courts, they might still.

¹⁴⁹ See discussion *supra* Part I.C.i.a.

¹⁵⁰ MT. HOLLY REPORT, *supra* note 1, at 3.