"FAIRNESS AND EQUITY," OR JUDICIAL BAIT-AND-SWITCH? IT'S TIME TO REFORM THE LAW OF "JUST" COMPENSATION

Gideon Kanner[*]

[*] Professor of Law Emeritus, Loyola Law School, Los Angeles. Of Counsel, Manatt, Phelps & Phillips. Editor, *Just Compensation*. This article is the product of the author's forty years of practicing, commenting on, and teaching eminent domain law, as well as his service as consultant on eminent domain and inverse condemnation to the California Law Revision Commission, and on the Advisory Committee on the Uniform Eminent Domain Code.

> *[D]efined [as fair market value], just compensation is less than full compensation . . . . Full compensation will often exceed fair market value if only because of moving expenses. But while acknowledging that fair market value is not always full compensation, the Supreme Court blunted the point by saying that the shortfall "is properly treated as part of the burden of common citizenship"—which again is a conclusion rather than a reason—but in a more practical vein remarked the difficulty of determining nonmarket values by the methods of litigation.*[1]
>
> *"The fact [is] that 'just compensation' tends systematically to undercompensate the owners of property taken by eminent domain . . . ."*[2]

INTRODUCTION

Now that the Supreme Court's *Kelo v. City of New London*[3] decision has focused the country's attention on the use and abuse of eminent domain, the time is at hand to refocus on the long-festering problem of inadequacy of "just compensation" payable when private property is taken for public use. This is an effort that peaked in the 1970s in the wake of congressional hearings that demonstrated widespread prevalence of undercompensation of people whose land was being taken for public use.[4] But in

[1] United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) (Posner, J.) (citations omitted). This suggestion is contrary to the settled principle that difficulties in ascertaining the quantum of damages do not justify denying them when their existence is established. Eastman Kodak v. S. Photo Materials Co., 273 U.S. 359, 379 (1927). For a "collector case," citing numerous authorities on this point, see DeVries v. Starr, 393 F.2d 9, 16–19 (10th Cir. 1968). In other words, these losses must fall somewhere, and I am not aware of any justification that passes economic or moral muster, compelling the conclusion that they should fall on the victims of the process rather than on its beneficiaries, particularly in redevelopment cases which are inherently intended to generate private profit to non-government third parties. For a discussion of the fallacy inherent in the "burdens of common citizenship" justification, see *infra* note 63 and accompanying text.

[2] *Norwood*, 602 F.3d at 834.

[3] 545 U.S. 469, 488–90 (2005) (holding that it was consistent with the "public use" limitation of the Takings Clause for a city to take an unoffending lower middle-class neighborhood, raze it, and turn over its site to a redeveloper for $1 per year in order to build upscale shops and condominiums catering to well-paid employees of the nearby Pfizer pharmaceutical company's research facility).

[4] *See, e.g.*, *Hearings on H.R. 386 Before the H. Comm. on Public Works*, 90th Cong. (1968); *Real Property Acquisitions Practices and Federal and Federally Assisted Programs: Hearings Before the H. Select Subcomm. on Real Property Acquisitions of the Comm. on Public Works*, 88th Cong. (1963).

recent years the problem of undercompensation has not received the attention from commentators that it deserves.[5] During the 1980s it was overshadowed by concerns over regulatory takings, and of late by abuse of eminent domain for so-called economic redevelopment—i.e., transfers of privately owned property to other private persons or entities for the avowed purpose of private financial gain in the frequently unrequited hope that some of that gain will trickle down to the community.[6]

The problem of undercompensation is rooted in long-standing doctrinal and moral deficiencies in decisional law. Judges who lecture us about our duty to support judicial independence when it comes to judges' reinterpretation of legal principles in order to bring them into harmony with societal changes, simultaneously turn their backs on their institutional obligation to similarly modify outmoded, largely nineteenth century rules of "just compensation" law, and to exercise their authority to interpret the Takings Clause in conformance with the checks and balances doctrine. [7]

Although *Kelo*-inspired demands for reform of eminent domain law have swept the country, they have mostly produced modest, palliative reforms in right-to-take law, and to a lesser extent in procedures,[8] while largely disregarding deficiencies in the substantive law of compensability. This is not to suggest that

[5] Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580–81 (1995); *see* Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Unexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269 (2007).

[6] *See* Dean Starkman, *Take and Give: Condemnation is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 (stating "Local and state governments are . . . grabbing property from one private business to give to another.").

[7] While the pertinent decisional law is replete with judicial statements that the exercise of the power of eminent domain is an overarching legislative prerogative of such weight that it leaves little or no room for judicial review of whether a particular taking actually meets the "public use" criterion of the Fifth Amendment, the only case of which I am aware in which the Court addressed this point explicitly was *County of Allegheny v. Frank Mashuda Co.*, where it pointed out the opposite, i.e., that the power of eminent domain is no more endowed with "sovereign prerogative" than a host of other government powers and activities, and as such subject to judicial review, 360 U.S. 185, 191–92 (1959).

[8] *See* James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 133–34 (2009); Timothy Sandefur, *The 'Backlash' So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 727 (2006); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2103–04 (2009).

eminent domain procedures are unimportant. Quite the contrary. Condemnees are frequently mistreated procedurally and are routinely denied due process of law that is required in other cases.[9]

With some exceptions, the law of compensation remains not much different from what it has been for most of the past century. For no better reason than asserted judicial convenience,[10] the constitutional phrase "just compensation" has been judicially transmogrified into "fair market value" in almost all cases,[11] even though the two are not the same, and the language of the Just Compensation Clause says nothing about "value"—it requires payment of "compensation," and emphasizes that it must be "just."

I. WHAT'S SO SPECIAL ABOUT "FAIR MARKET VALUE" AS A MEASURE OF JUSTICE?

To begin with, we deal here, not with some arcane legal concept, but with the plain meaning of the English language.

[9] *See generally* D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1282–83 (2010). For reasons that have not been explained, the Supreme Court takes the position that under the rubric of eminent domain, but not otherwise, private property may be physically seized by the government without notice or hearing or contemporaneous compensation. *Compare* United States v. James Daniel Good Real Prop., 510 U.S. 43, 46 (1993) (government must provide pre-deprivation due process to convicted drug dealer whose land is subject to forfeiture); *with* United States v. Dow, 357 U.S. 17, 21 (1958) (the government may "enter into physical possession of property without authority of a court order" leaving the owner with the after-the-fact remedy of hiring appraisers and lawyers and bringing an inverse condemnation lawsuit). This continues to be the decisional law even though the Uniform Relocation Assistance Act ostensibly prohibits such practices and requires the would-be taker to file a condemnation action. 42 U.S.C. § 4651(4) (2006). Nonetheless, decisional law has it that a condemnor may simply seize private property and say to its owner, "sue me." Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973).

[10] *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5–6 (1949).

[11] *See* Sacramento S. R.R. Co. v. Heilbron 104 P. 979, 980 (Cal. 1909) (providing a leading statement of the prevailing fair market value formula). Note that the *Heilbron* court adopted the fair market value standard even though the statute in question called for payment of "actual value." *Id.* at 982. Although the U.S. Supreme Court has indicated that it is not its intention to make a "fetish" out of fair market value, see United States v. Cors, 337 U.S. 325, 345 (1949), it resists the use of other measures of compensation, so that fair market value *as judicially defined*, not necessarily as the market sees it, remains the well-nigh universal measure of damages in eminent domain cases. United States v. 564.54 Acres of Land, 441 U.S. 506, 516–17 (1979); *but see* United States v. Pewee Coal Co., 341 U.S. 114, 117–19 (1951).

"Compensation"—even without the qualifier "just"—means that the aggrieved parties have suffered a legally cognizable detriment, and the law now requires that they be recompensed, i.e., made whole.[12] "Fair market value," on the other hand is an informed party's (usually, but not necessarily, an appraiser's) opinion[13]—a prognostication of how much money the subject property would fetch in the open market were it to be sold by an informed seller to an informed buyer in a voluntary transaction, with both parties giving due consideration to the property's highest and best use.[14] While fair market value of the taken property is certainly a proper element of compensation, standing alone it ignores a variety of incidental economic losses that are inevitably inflicted by forcible displacement of people from their homes and businesses, and thus falls short of being genuinely *just* compensation. The cynic might well conclude at this point that judges have chosen fair market value as the measure of just compensation because doing so enables them to ignore incidental but no less real losses suffered by the evicted condemnees, and thereby to allow condemnors to create public works on the cheap.[15]

Why the taken property's value in exchange (as opposed to its value in use, for example) should be the *sole* measure of compensation, and—more importantly—why incidental losses admittedly inflicted on condemnees when they are forcibly evicted from their homes and businesses should be ignored in the judicial calculus of justice, the Court has not explained. The nineteenth

[12] BLACK'S LAW DICTIONARY 322 (9th ed. 2009).

[13] Strictly speaking, there is no such thing as evidence of value—there is only evidence of qualified witnesses' *opinion of value*. *See, e.g.*, CAL. EVID. CODE § 813 (West 2009) (noting that the value of property may be shown only by opinions of qualified witnesses or owners of the property being valued).

[14] *Heilbron*, 104 P. at 980–81. But as so determined, market value is "only . . . a guess, as well informed as possible, as to what the equivalent of [the taken property] would probably have been had a voluntary exchange taken place." *Kimball Laundry Co.*, 338 U.S. at 6; *see* 590 Realty Co., Ltd. v. City of Keene, 444 A.2d 535, 536 (N.H. 1982) (internal citation omitted) ("[T]he search for fair market value is not an easy one, and is akin to 'a snipe hunt carried on at midnight on a moonless landscape.'"). My point here is that even disregarding the colorful hyperbole of the New Hampshire Supreme Court, there is nothing about "fair market value" that makes it morally superior to other measures of compensation.

[15] *See* Harry N. Scheiber, *The "Takings" Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING, 233, 242 (Eugene W. Hickok, Jr. ed., 1991).

century attempt to do so in *Monongahela Navigation Co. v. United States*,[16] asserting that compensation is "for the property and not to the owner"[17] is self-contradictory because the value in exchange that is said to be decisive of "market value" can have meaning only if we think of it in terms of the subject property's sale, so that the judicially determined compensation (which is said to be the equivalent of voluntary sales price) is inherently not "for the property" but *to the seller*, i.e., what the seller would accept in a voluntary transaction. The property is an inanimate tract of land that neither knows nor cares who pays what to whom. The property has no rights and is not entitled to compensation—its owners are.[18]

Moreover, it is difficult at best to reconcile *Monongahela's* notion with more recent U.S. Supreme Court decisions that view compensation in terms of indemnity for the loss to the owner, such as Justice Holmes' holding in *Boston Chamber of Commerce v. Boston* that in determining compensation "the question is what has the owner lost"[19] and Justice Potter Stewart's more recent *bon mot* that: "Property does not have rights. People have rights."[20] And so they do; the Bill of Rights protects the rights of people, not of inanimate objects.

Justice Frankfurter's justification for the use of fair market value as *the* measure of just compensation, as offered in *Kimball Laundry Co.*, was the *ipse dixit* that value in exchange has "external validity."[21] He did not enlighten us as to precisely what that means, and why that is so. But even on its own premise, Justice Frankfurter's statement was an assertion, not an explanation. As understood by participants in litigation involving

[16] 148 U.S. 312, 326 (1893). Ironically, earlier in the nineteenth century, the U.S. Supreme Court in *Boom Co. v. Patterson* took note of the many variables that go into valuation of property, concluding that "it is perhaps impossible to formulate a rule to govern its appraisement in all cases." 98 U.S. 403, 408 (1878). Nonetheless, the Court did just that by choosing fair market value as *the* well-nigh inflexible measure of just compensation that trumps others. *See Monongahela*, 148 U.S. at 328.

[17] *Id.*

[18] Significantly, the constitutions of some states guarantee payment of just compensation using some variant of the phrasing that no person's property shall be taken without just compensation, thus providing what the *Monongahela* Court deemed to be the missing "personal element." *Id.* Nonetheless in those states, the same as in others, no compensation is payable for incidental losses caused by condemnation.

[19] 217 U.S. 189, 195 (1910).

[20] Lynch v. Household Finance Co., 405 U.S. 538, 552 (1972).

[21] Kimball Laundry Co. v. United States, 338 U.S. 1, 4–5 (1949).

valuation, the use of market value of commonly-traded properties may be convenient when it involves marketable securities, bulk commodities, or vacant land whose value is ascertainable by reference to actual market transactions including sales of similar or comparable tracts of vacant land. This approach is just when fair market value is to be determined for *ad valorem* tax purposes, to use a common example, but not when the property owner is evicted and thereby forced to absorb a variety of economic losses that owners of land being valued for *ad valorem* taxation do not suffer. More important, in *ad valorem* valuation, any errors can be later corrected by reassessment of the subject property, whereas in eminent domain the judgment fixing compensation is final and immutable.

There is nothing precise about determination of market value, even in the comparatively easy case of appraisers making adjustments to the sales of comparable properties which are said to "shed light" on value of the subject property.[22] Even at its best, this is a mental process that gives the appraiser considerable leeway in formulating an opinion of value based on how closely a particular "comparable" resembles the subject property and how to quantify the differences between them. Indeed, decisional law that authorizes the use of comparable sales as evidence of value, stresses that this is a "vague standard" that requires trial judges to be invested with a great deal of discretion in admitting or excluding them,[23] thus introducing another level of subjectivity into the process.

Far from having objective "external validity," the price that A would pay B for the subject property in a voluntary transaction may be influenced or even determined by a variety of subjective or idiosyncratic factors, ranging from individual profit expectations and the parties' income tax considerations to financial, personal, and emotional reasons that for all their

[22] *See* CAL. EVID. CODE § 816 (West 2009). Appraisers performing market data analysis must not only find sales of comparable properties, but must also compare them to the subject property and quantify the comparison—a process that involves subjective and at times highly sophisticated techniques. *See, e.g.*, Merced Irrigation Dist. v. Woolstenhulme, 483 P.2d 1, 16 (Cal. 1971) (citation omitted) (noting that as part of a market data analysis, appraisers are required to estimate and deduct from the sales prices of comparable properties the increment of increased value brought about by a rise in property values in the area, caused by the market's knowledge of the coming of the public project for which the subject land is being taken).

[23] County of Los Angeles v. Faus, 312 P.2d 680, 684 (Cal. 1957).

imprecision constitute the buyer's or seller's motivation that determines the price they finally settle on. The "market value" that emerges from such transactions can be no more than a product of a subjective, uninformed, perhaps unmentionable thought process that would not be openly considered in fixing compensation in a valuation trial. As Professor Allison Dunham put it in his landmark study of eminent domain law and its deficiencies: "The market assesses expectations and values which, if openly stated as included in market price, would offend the sensibilities and moral standards of a large segment of the population."[24]

There is thus nothing sacred about "market value" that compels its use as the sole measure of compensation. As conceded by Justice Frankfurter, "[t]he value of property springs from subjective needs and attitudes,"[25] and it is those subjective needs and attitudes that determine the price upon which the parties to a voluntary sales transaction agree. But in eminent domain the transaction is forced, not voluntary, and therefore the economic detriments inflicted on parties who are forcibly displaced from their homes or businesses are axiomatically not subsumed within a hypothetical market value of the taken property even though they may be instrumental in shaping the actual sales price in voluntary sales transactions. The market value of two identical tracts of land is the same regardless of whether both their displaced owners and occupants readily find substitute premises, or whether one of them is unable to do so and as a result suffer serious financial losses when both are evicted. Thus, whatever the "fair market value" of these two identical tracts of land may be, one hypothetical owner suffers demonstrable, quantifiable, economic losses that the other one does not, and therefore it is difficult to see why the just compensation payable to them in the name of indemnity should be the same. This is *a fortiori*, so when one hypothetical owner conducts a business on the taken land, while the other one does not.

In short, payment of fair market value of the taken property does not necessarily indemnify its owners. Judicial lip service to the cause of indemnity finds no application in the decisional law of eminent domain.[26] Fair market value, which is to say an

[24] Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 95 (1962).

[25] *Kimball Laundry Co.*, 338 U.S. at 5.

[26] The only case that I am aware of in which the Supreme Court actually

appraiser's opinion of what the subject property would fetch in the market if sold voluntarily, is neither a rigorous nor an objective determination of value, and it provides no insight into the totality of the economic harm inflicted on its owners or occupants. Moreover, differences of opinion between competing appraisers—each competing opinion purporting to present market value that supposedly partakes of Justice Frankfurter's "external validity"—can be enormous.[27] They often reflect the individual appraisers' respective optimistic versus pessimistic subjective assumptions, and professional attitudes—the latter being of particular concern in the case of appraisers who work largely for the government, and whose opinions can be influenced by their desire to please their employers and thus secure future lucrative work.[28] As the U.S. Supreme Court conceded, fair market value "involves, at best, a guess by informed persons"[29] and it certainly does not indemnify the displaced property owners in spite of insincere judicial invocations of the indemnity principle.[30]

By concentrating exclusively on a fictitious sale of the subject property in a conjectured voluntary transaction between informed parties, rather than on the total economic impact of the eviction on the condemnee, the judicial formulation of "just" compensation inherently omits from consideration a variety of economic losses suffered by persons evicted from their homes and businesses.[31]

implemented the "fairness and justice" approach in a straightforward valuation of land was *United States v. Fuller*, where the Court did so in favor of the government, and awarded just compensation that was *less* than the property's conceded fair market value. 409 U.S. 488, 490, 493 (1973).

[27] For a collection of such cases, see Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1146 app. (2007) [hereinafter *[Un]equal Justice*].

[28] *See id.* at 1106–09 (quoting the views of a prominent appraiser and discussing this problem in greater detail).

[29] United States v. Miller, 317 U.S. 369, 375 (1943).

[30] John D. Miller, *Recent Developments in the Eminent Domain Field*, 40 APPRAISAL J. 286, 291 (1972) (stating "[t]he 'fair market value' test as now applied in California courts is unsatisfactory, for it often fails to make whole those who are forced to give up their property for public use."). Mr. Miller was at the time a member of the California Law Revision Commission, then engaged in the study of eminent domain law reform. *Id.* at 286. The Commission's molasses-slow, twenty-year effort culminated with the adoption in 1976 of the California Eminent Domain Law. *See* CAL. CIV. PROC. CODE § 1230.010 (West 2007).

[31] The Uniform Relocation Assistance Act of 1970 provides limited compensation for some incidental losses. 42 U.S.C. §§ 4601–4655 (2006).

These include moving expenses, the cost of finding and renovating substitute premises, the loss of favorable mortgage financing, the loss of rents during the imminence and pendency of the condemnation action, the owner's legitimate though unrealized expectations of gain,[32] and, of course, the cost of litigation which is mandatory if the owner is to demonstrate the frequent inadequacy of the condemnor's offer. Worst of all are cases that involve legitimate claims of concededly suffered business losses which—for reasons that do not withstand scrutiny[33]—are deemed by most courts to be altogether noncompensable.

I must make it clear that for all its limitations, I do not mean to quarrel with the use of fair market value as a component of just compensation, since it is a widely used method of arriving at a property's value *qua* value. But since eminent domain cases involve more than just an abstract determination of value (as is the case in *ad valorem* tax valuation), since "fair market value" lacks the degree of validity that the courts tend to ascribe to it, and *since it concededly disregards a variety of economic losses admittedly inflicted on condemnees*, fair market value should be an element, not the totality of "just compensation."

Defenders of the status quo support the concededly

However, the Act can be a "toothless tiger." For example, compensation for business relocation cost, which is limited to $10,000, is grossly inadequate to acquire even a modest replacement business, or even to renovate new premises for it. *See id.* § 4622(a). Many states apply the Act only to cases of takings for federally funded projects, and even then the condemnees have no right to enforce the Act's provisions, so that where a condemnor refuses to follow the provisions of the Act, the aggrieved condemnees are left without a remedy. *Id.* § 4602; *see* Delancey v. City of Austin, 570 F.3d 590, 594 (5th Cir. 2009).

[32] Thus, where the subject property is nearing private development by its owner who may have expended substantial sums on architectural and engineering plans that increase the property's value to a reasonable buyer, neither the cost of securing the plans and development entitlements nor the increase in the property's value that flows from them, may be considered in arriving at the judicially formulated "fair market value" in eminent domain cases. *See* People *ex rel.* Dep't Pub. Works v. Silveira, 46 Cal. Rptr. 260, 277 (Cal. Dist. Ct. App. 1965) (stating the "[P]rojected specific plan of development is not admissible as an element in determining such market value.").

[33] *See* Gideon Kanner, *When is "Property" not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57, 71 (1969); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 363 (1991); D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation when Business Premises are Condemned*, 15 SETON HALL L. REV. 483, 497 (1985).

unsatisfactory state of just compensation law by asserting that no compensation should be paid for elements of value that are idiosyncratic, or, though useful and valuable to the owner, are incapable of transfer to others, and therefore have no value in exchange.[34] It is not clear, however, why value in exchange should always be preferable to value in use.[35] These defenses of the current practices disregard the fact that condemnees are not selling their property—they are being evicted from it against their will, and this process inherently inflicts economic losses apart from the loss of the "fair market value" of their land. Particularly, when such *economic* losses are neither speculative nor idiosyncratic, but rather quantifiable and ascertainable by conventional valuation techniques, but which, though held by the courts to be readily compensable in other kinds of cases, are not payable in eminent domain.[36]

People do not sell their property willy-nilly just because the [market] price is said to be right. They accept market prices when personal or economic reasons, as well as the price, motivate

[34] *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). This judicial justification is manifestly inapplicable to cases of business losses. Businesses are frequently bought and sold in voluntary market transactions, and there is a lively market in them, the same as for real estate. Business valuation is an activity that is no less mainstream than real estate valuation, and where appropriate it can employ valuation methodology other than market data analysis. *See, e.g.*, People *ex rel.* Dep't of Transp. v. Muller, 681 P.2d 1340, 1346 (Cal. 1984) (using the excess profits capitalization method to arrive at statutorily authorized compensation payable for damage to the goodwill of a displaced business).

[35] As Justice Cardozo pointed out, speaking in the context of valuation of fixtures in eminent domain, an old but functioning piece of machinery may be just as useful and hence just as valuable to its owner as a new one, but once disconnected and removed it may fetch only scrap value. *See* Jackson v. State, 106 N.E. 758, 758 (N.Y. 1914).

[36] For a rare example of candid judicial recognition of the disparity of treatment of compensation-seeking parties in eminent domain as opposed to plaintiffs in other cases, see Primetime Hospitality, Inc. v. City of Albuquerque, 168 P.3d 1087, 1092, 1097 (N.M. Ct. App. 2007) (acknowledging that "the notion of full indemnification in the context of condemnation proceedings is generally recognized to encompass a more limited range of remedies than, for example, negligence tort law," but it declined to "import tort concepts . . . to provide constitutionally adequate just compensation.").

Ironically, courts experience no trouble in importing into eminent domain law the tort concept of *damnum absque injuria* (harm without fault) to justify noncompensability of losses that are admittedly suffered but proclaimed to be noncompensable. Use of the *damnum absque injuria* defense makes no sense in eminent domain where neither party is said to be "at fault" so that fault *vel non* is irrelevant to the issue of just compensation. *See* Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983).

them to do so. For example, the owner of a prosperous business may decide to sell the real property on which the business is conducted in order to move to bigger and better quarters, anticipating increased revenues and greater economic rewards in so doing. Thus, the selling owner's willingness to accept market value is motivated by prospects of future gain not just "market value." But no rational people will voluntarily sell their real property when doing so will spell bankruptcy for their business, or otherwise leave them worse off. The law of eminent domain disregards all that and thereby eliminates from its consideration the totality of economic losses inflicted on condemnees, even as courts speak glibly of "indemnity."

II. A MORAL DISASTER AREA: SUBSIDIES TO REDEVELOPERS, BUT CONCEDED UNDERCOMPENSATION OF DISPLACED INHABITANTS OF REDEVELOPMENT AREAS

Undercompensation of condemnees becomes particularly unsupportable when the power of eminent domain is used for urban redevelopment, a process that—even when it meets the judicially tolerated, expansive "public use" requirement—is inherently intended to enrich private parties whose prosperity, so goes the theory, will trickle down and hopefully generate benefits to the community at large. These public benefits, usually in the form of prognosticated new taxes and jobs, are said by the U.S. Supreme Court to qualify as a "public purpose"—a term that over the years has de facto replaced the constitutional phrase "public use."[37]

Even if we take this "public purpose" approach at face value, the mechanism of economic redevelopment presupposes that the redeveloper for whose immediate benefit the properties in question are being taken will profit economically, and by a trickle-down process its enhanced prosperity will benefit the

[37] Kelo v. City of New London, 545 U.S. 469, 480 (2005) (asserting that "public purpose" is a more accurate meaning of "public use"); *see* ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 93 (1987) (noting that over the years courts have replaced the constitutional term "public use" with "nebulous terms such as *public advantage, public purpose, public benefit,* or *public welfare*" thereby de facto using criteria associated with the exercise of the police power, not eminent domain (emphasis in the original)); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 210–12 (2006) (discussing the differences between the police power and the power of eminent domain).

community. Thus, the asserted "public benefit" is inherently dependent on (and therefore incidental to) the redevelopers' economic success which is essential if the redevelopment process is to work as intended. No private economic success—no "public benefit."[38] To put it another way, the "incidental" tail often wags the "public use" dog. After all, major developers who undertake the economic risks inherent in multi-million dollar [re]development projects do not do so because of their public-spirited altruism. Like Willie Sutton, the celebrated safe cracker who robbed banks because, as he famously put it, "that's where the money is," redevelopers act in their self-interest, and so do the government officials who do the actual condemning.[39]

But whether the private economic benefit to third-party redevelopers is incidental or primary is really beside the point. Either way, it is a *private* economic benefit. Therefore it is profoundly immoral for the courts to approve takings of the indigenous owners' property under the flag of "public use" in exchange for ostensibly "just," but in reality concededly inadequate, compensation when the taking benefits private commercial interests whose enrichment is avowedly the *sine qua non* of successful redevelopment. That this process may also benefit the community does not change the fact that it occurs at the expense of the displaced property owners who should therefore be compensated to the full extent of the demonstrable economic harm inflicted on them for the sake of the hoped-for public gain. As Justice Holmes put it, the public is entitled to obtain only what it pays for.[40]

---

[38] *See Kelo*, 545 U.S. at 484–86; *see also* Patrick McGreevy & T. Christian Miller, *Heady Plans, Hard Reality; $117-Million Redevelopment,* L.A. TIMES, Jan. 30, 2000, at A1 (discussing the municipal expenditure of $117 million on failed efforts by the City of Los Angeles to redevelop North Hollywood).

[39] Professor James Buchanan received the Nobel Prize in economics for demonstrating that public officials, the same as others, tend to act in their own self-interest. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY *passim* (Liberty Fund, Inc. 1999) (1962).

For a description of some of the "sweetheart deals" between municipalities and favored redevelopers, see John Gibeaut, *The Money Chase*, 85 A.B.A. J. 58, 58–59 (Mar. 1999). *See also* Editorial, *Let's Make a Deal—For a Buck*, BURBANK LEADER, Aug. 1, 2001, at A9 (commenting on a deal whereby the city paid $3.4 million for a 1.5-acre parcel of land and turned it over to a redeveloper for $1), *available at* http://articles.burbankleader.com/2001-08-01/news/export13213_1_burbank-redevelopment-burbank-housing-authority-sweetheart-deal.

[40] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

In other words, even when the redevelopment project for which the subject land is taken is successful and produces the anticipated economic benefits to the community, its effects amount to unjust enrichment when they achieve such economic gains at the expense of the undercompensated, displaced land owners.[41] In this context, assuming one's adherence to traditional Judeo-Christian moral values,[42] it should require no great intellectual effort to conclude that whatever the "public purpose" behind a particular taking may be, impoverishing the indigenous owners of the taken land in order to enrich more favored (and usually better politically connected) redevelopers, represents an ethical and economic deficiency in the law that is overdue for rectification. And as for the community, the cost of a public project that benefits it should be spread on the benefited public, not disproportionately dumped on individual condemnees.[43]

III. WHO'S IN CHARGE HERE?

Unlike the law governing the right to take, in which the U.S. Supreme Court has abdicated its traditional authority to interpret the Constitution, and has for all practical purposes declared itself to be putty in the hands of local, often unelected government functionaries[44] whose decisions to take the property of others are said to be "well-nigh conclusive"[45] and subject only to minimal—or, if I may say so, subminimal—judicial review,[46] it is another story when it comes to awarding compensation and structuring compensability rules. Here, the Supreme Court declines to defer to the legislature and deems itself to be the

[41] *See infra* note 109.

[42] *See I Chronicles* 21:18–25 (New Revised Standard) (telling of King David's insistence on paying Ornan 600 shekels of gold for the taking of Ornan's threshing floor for the site of the ark of the covenant).

[43] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

[44] Although the need for exercising the power of eminent domain is said to be legislative, Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923), in fact the decision to take a particular property for a particular use and how much of it to take is usually made by unelected administrative bodies—redevelopment agencies, highway commissions, and flood control districts being the obvious, common examples.

[45] Berman v. Parker, 348 U.S. 26, 32 (1954).

[46] Under current law, the decision to take need not even be rational—it suffices that it is "rationally related to [the] conceivable." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). For a vivid example of the absurdity inherent in the application of this idea, see *[Un]equal Justice*, *supra* note 27, at 1080 n.68.

alpha and omega of rule-making: "The ascertainment of [just] compensation is a judicial function and *no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard*."[47] Why the Supreme Court should be all but powerless to interpret the "public use" clause, but all-powerful when it comes to interpreting the "just compensation" clause—both appearing in the same sentence—has not been judicially explained.[48]

Of course, as is the case with other Bill of Rights provisions, the judicially-established constitutional measure of just compensation represents the floor, not the ceiling, and legislatures are free to provide for higher, though not lower, levels of compensation than those established by the courts as the constitutional minimum.[49]

Black's Law Dictionary defines "compensation" as: "Payment of damages or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation *makes the injured person whole*."[50] But as all persons with experience in eminent domain litigation know, condemnees are not made whole, and courts, in spite of occasional flowery judicial prose suggesting the contrary, are outspoken in rejecting the idea of providing indemnity.[51] In a display of judicial insincerity, the same courts that intone the familiar bromides about fairness and equity[52] also make it clear that the

[47] United States v. New River Collieries Co., 262 U.S. 341, 343–44 (1923) (emphasis added) (citation omitted); *accord* Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923); *see* Monongahela Navigation Co. v. United States, 148 U.S. 312, 344–45 (1893) (holding that the legislature lacks the power to limit compensation).

[48] The California Supreme Court provided an oblique, but illuminating, insight into this question when, speaking in the context of an eminent domain case, it noted the existence of a "close relationship" between local government officials and local judges. Garrett v. Superior Court, 520 P.2d 968, 970 (Cal. 1974).

[49] Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676–77 (1923).

[50] BLACK'S LAW DICTIONARY 322 (9th ed. 2009) (emphasis added). This is the definition that is pertinent to judicially awarded compensation as opposed, for example, to "compensation" used in the sense of payment for goods delivered or work done.

[51] *See* Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002); *see also* Cmty. Redevelopment Agency v. Abrams, 543 P.2d 905, 915–16 (1975).

[52] United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950) (explaining that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'"); *see* United States v. Virginia Elec. and Power Co., 365 U.S. 624, 631 (1961) (noting that "[t]he word 'just' in the Fifth Amendment

prevailing judge-made law of just compensation is "harsh"[53] rather than fair. Adding insult to injury, they seek to evade responsibility for this state of affairs by suggesting that though the law of eminent domain is not as it should be, the task of rectifying the prevailing undercompensation of condemnees should be undertaken by legislatures rather than the courts that have created the problem in the first place.[54] In other words, the courts with the final authority to formulate compensation rules exhort abstract justice, but refuse to rectify the conceded injustice inherent in their own handiwork.[55] Inasmuch as this is an area of law that has traditionally been shaped by courts, it is not apparent why legislatures which have had no hand in creating the concededly unsatisfactory state of compensation law should be blamed for its unfortunate state.

More important, judicial assertions that condemnees should seek legislative relief are hollow and at times reminiscent of Marie Antoinette's suggestion to starving Parisians that when lacking bread, they should eat cake. Legislative relief is hard to come by. Legislatures are subject to intense, ongoing and usually successful lobbying by full-time, well-funded professional lobbyists hired by government entities that use the power of eminent domain and have a vested interest in maintaining the status quo under which condemnors can build their projects on the cheap. [56] On the other hand, save for occasional, usually

evokes ideas of 'fairness'. . . .").

[53] United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[54] City of Los Angeles v. Allen's Grocery Co., 71 Cal. Rptr. 88, 93 (Cal. Ct. App. 1968).

[55] This article addresses primarily the judicial policies underlying the law of "just compensation," and therefore is not intended to parse specific noncompensability rules. It may be useful for the readers to gain an insight into how widespread this problem is by referring to JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN 47–97 (1982) which devotes an entire chapter of fifty pages to the subject of "Property Devaluations for Which the Fifth Amendment Requires No Compensation." *See* Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 62–63 (1957) [hereinafter *Incidental Losses*].

[56] An example is provided by the ill-fated Uniform Eminent Domain Code drafted by the National Conference of Commissioners on Uniform State Laws. *See* UNIFORM EMINENT DOMAIN CODE § 101–1605 (1974). Though it proposed only modest substantive reforms (notably compensation for business goodwill lost in eminent domain cases), it was successfully opposed by state condemnors, and was enacted in modified form by only one state. *Id.* § 1016. It has since been demoted to the status of a Model Code and is no longer actively promoted. *See* City of San Diego v. Neumann, 863 P.2d 725, 736 n.4 (Cal. 1993).

Another example is the Uniform Relocation Assistance Act of 1970, 42 U.S.C.

litigation, efforts by a handful of public interest entities, there is no organized constituency of condemnees—certainly nothing remotely resembling the power and resources of the legendary "highway lobby," to take an obvious example.

Though courts occasionally take note of this unfortunate state of affairs,[57] they try to obscure the moral aspects of the problem by a smokescreen of benign-sounding platitudes that at first blush purport to make indemnity the polestar of eminent domain compensation law, but that upon examination reveal themselves to be empty phrases. A reader who is new to the law of eminent domain is thus struck by the incidence of flowing judicial prose exhorting fairness and indemnity[58] as the forces behind formulation of compensability rules.

An insight into the unreliability of such judicial expressions was provided by the Supreme Court's most recent foray into the law of just compensation, where the Court asserted that "[i]n giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.'"[59] Unfortunately, in the next sentence the Court dropped the proverbial other shoe and delivered the "however." Said the Court: "However, this principle of indemnity has not been given its full and literal force."[60] Why not? The Court did not say. In other words, what the Court did say is that indemnity is the object of the just compensation constitutional mandate, except that the courts refuse to give it effect.

Similarly, in *United Sates v. Petty Motors Co.*, the Court

§§ 4601–4655 (2006). The Act was inspired by Congressional hearings of the 1960s, which demonstrated widespread prevalence of gross undercompensation. *See, e.g.*, *Hearings on H.R. 386 Before the H. Comm. on Public Works,* 90th Cong. (1968); *Real Property Acquisitions Practices and Federal and Federally Assisted Programs: Hearings Before the H. Select Subcomm. on Real Property Acquisitions of the Comm. on Public Works,* 88th Cong. (1963). After the "highway lobby" got done with it, it emerged from Congress in a form that makes its meager reforms unenforceable. *See* 42 U.S.C. § 4602 (denying aggrieved condemnees the right to sue to enforce the Act's provisions).

[57] Cmty. Redevelopment v. Abrams, 543 P.2d 905, 915–16 (Cal. 1976).

[58] "The Fifth Amendment expresses a principle of fairness . . . ." United States v. Dickinson, 331 U.S. 745, 748 (1947).

[59] United States v. 564.54 Acres, 441 U.S. 506, 510 (1979) (internal citation omitted).

[60] *Id.* at 510–11; *see Cmty. Redevelopment Agency*, 543 P.2d at 916 n.9 (conceding that judicial references to indemnity are merely "panoramic" expressions representing judicial idealism that lacks "universal application").

conceded that "[i]t is recognized that an owner . . . receives less than the value of the property to him but experience has shown . . . the rule [to be] satisfactory."[61] "Satisfactory" to whom? Certainly not to the undercompensated property owners. No doubt, this state of affairs may be quite "satisfactory" to condemnors who thus get to plunder private resources without having to pay for the full extent of the economic harm they cause. This is particularly indefensible in redevelopment cases where private property is taken avowedly for private gain even when the latter is judicially prettified as being "incidental" to the public purpose. The justification offered is that, as noted *supra*, the redevelopers' conjectured prosperity will, by a trickle-down process benefit the community as well. But even on that frequently deficient premise, it is not apparent why condemnees should be forced to subsidize the redeveloper's and the community's economic benefits to a greater extent than other citizens whose property is not taken, but who benefit from the project's economic effects when it is successful.[62]

One judicially proffered explanation has it that by being deprived of the promised full indemnity, condemnees only bear the "burden of common citizenship."[63] But that justification does not withstand scrutiny. Insofar as the creation of public projects is concerned, individuals meet their "burden of common citizenship" when they contribute their proper share of the cost by paying taxes, assessments, tolls and fees exacted by the government. It is not clear, and the Court has not provided an explanation, how impoverishing individuals whose property is taken by eminent domain without full compensation, while simultaneously conferring economic benefits on their neighbors, can be consistent with any rational notion of common burdens of citizenship. Condemnees would gladly share the *common*

[61] 327 U.S. 372, 377 (1946). The Court's insertion of the phrase "to him" in this expression is an evident attempt to get around the inconvenient fact that the shortfall in compensation that is judicially awarded in eminent domain cases, does not involve only subjective or idiosyncratic damages, but also objective, demonstrable economic losses which courts deem to be noncompensable, even though those losses are real, are readily measurable by conventional appraisal methods, and are routinely awarded in other kinds of litigation.

[62] Of course, in some of these cases, as noted elsewhere in this article, there is no public benefit, notably when the "public project" fails altogether, or fails to produce the prognosticated benefits, but consumes large amounts of public funds anyway.

[63] Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

burdens of citizenship, along with their neighbors. But instead, they are singled out to bear a heavier burden than those neighbors whose property is not taken but who get to enjoy the benefits flowing from the project.

The language in the *564.54 Acres* case is only the most recent of similarly misleading U.S. Supreme Court pronouncements of supposed principle that receives lip service, but not application in actual litigation. And so, in the past the Court informed us that the law of just compensation "evokes ideas of 'fairness' and 'equity,'"[64] that "[t]he Fifth Amendment expresses a principle of fairness,"[65] that judicial awards to condemnees must provide a "full and perfect" monetary equivalent of what is taken from them, and restore them to the pecuniary position they would have been in, had there been no condemnation of their property.[66] But actually, as Professor Thomas W. Merrill, put it: "The most striking feature of American compensation law—even in the context of formal condemnations or expropriations—is that just compensation means incomplete compensation."[67] In the words of another commentator:

> Not untypically, however, the broad sweeping language is generally contradicted by the actual results of the decisions. Despite its origin in principles of natural justice, despite the declared object of making the victim whole, despite the generally broad understanding of the term "just compensation" itself—it is clear that only a bare minimum of the effects of a taking become the subject matter of financial awards.[68]

Indeed, the Supreme Court has confessed that even its bare-bones "fair market value" standard of compensation is inherently inadequate. Though the judicial formulation is said to look to value acceptable in transactions involving voluntary transfer of

---

[64] Unites States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950).

[65] United States v. Dickinson, 331 U.S. 745, 748 (1947).

[66] United States v. Miller, 317 U.S. 369, 373 (1943) (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923)).

[67] Merrill, *supra* note 51, at 111.

[68] Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DET. J. URB. L. 1, 21 (1968). Two other commentators have noted that in these cases "[l]ip service was paid to the principle of indemnity, but [the] statement of the principle was invariably followed by a catalogue of emasculating exceptions." Robert Kratovil & Frank J. Harrison, *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 616 (1954). In other words, courts de facto pursue a policy of under-compensation which they then conceal behind a "veil of concept," as one court put it. *See* Bacich v. Board of Control, 144 P.2d 818, 823 (Cal. 1943).

comparable properties in the private market, paradoxically, it does not encompass some elements of value that would concededly be considered by the parties (and certainly, insisted on by the seller) in a voluntary transaction.[69] In short, the ostensibly "just" compensation is admittedly "harsh."[70]

In my own state, the California judiciary has been explicit in revealing its hostility to providing genuinely just compensation in eminent domain cases. In *County of Los Angeles v. Ortiz*, the California Supreme Court rejected a condemnee's argument that he should be reimbursed for his appraiser's fees in the case of taking of his modest home in which he had a small equity.[71] He argued that the cost of litigation necessary to demonstrate the inadequacy of the condemnor's offer would eat up most or all of his equity; thus, leaving him without his home and without just compensation, *even if he prevailed*. And, were he to accept the condemnor's inadequate offer without litigation, all or most of the money would go to the lender, again denying him compensation for his equity and leaving him without a home and without just compensation. Therefore, argued the condemnee, given that on these facts denial of all litigation expenses would necessarily deny him the constitutionally mandated compensation, an exception needed to be carved out to the extent of granting him the right to recover the appraisal fees that he had to incur in order to demonstrate the inadequacy of the condemnor's offer.[72] The court responded by voicing its sympathy for the plight of undercompensated or uncompensated owners of modest dwellings,[73] but explained that the "panoramic" judicial expressions about fairness and indemnity do not represent reliable legal doctrine. The actual holding was that awarding litigation expenses is beyond the courts' power because doing so was a matter of legislative policy, with the courts simply powerless to provide this form of relief.[74] Why the court would be

[69] Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949).

[70] United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[71] Cnty. of Los Angeles v. Ortiz, 490 P.2d 1142, 1143–44 (Cal. 1971).

[72] Bear in mind that at the time California condemnees had the burden of proof on value, and were not relieved of that burden until 1976. *See* CAL. CIV. PROC. CODE § 1260.210(b) (West 2007); *see also* Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc., 161 P.3d 1175, 1181 (Cal. 2007).

[73] "We note with particular sympathy . . . ." *Ortiz*, 490 P.2d at 1147 n.8.

[74] *Id.* at 1147. Though the court did not use that phrase, it obviously saw the problem as one of separation of powers. Note, however, that this "nonexistent" judicial power to award litigation expenses somehow materialized out of thin air in a later, non-condemnation case. *See* Serrano v. Priest, 569 P.2d 1303, 1315

unable to enforce the Just Compensation Clause of the Constitution as applied to these facts because of a legislative omission to provide statutory relief,[75] the court did not explain.

In *Community Redevelopment Agency v. Abrams*, the California Supreme Court took it a step further, admonishing that those relying on benign-sounding judicial rhetoric promising full indemnity as representative of legal doctrine, are only displaying their "fundamental misunderstanding" of eminent domain law, since eminent domain law does not compensate condemnees for all their losses.[76] The court noted that its "panoramic" language about fairness and justice only "makes up in idealism what it lacks in universal application."[77] In short, the vicious application of the rule denying compensation for business losses to the facts of the *Abrams* case[78] demonstrated that the decisional law in this field talks a good game, as the old expression goes, but fails to deliver on its promises of fairness and justice. In private commerce that would be called "bait and switch."

IV. THE UNBALANCED SCALES OF JUSTICE

California courts have explicitly revealed that their policy has been to shortchange condemnees. In *People v. Symons*, the California Supreme Court conceded that its preferred policy was to limit compensation in eminent domain cases because payment of full compensation would bring about an "embargo" on public projects.[79] No effort has been made to present evidence to support this extravagant judicial assertion. Even though the substantive

(Cal. 1977) (awarding litigation expenses without statutory authorization in cases vindicating substantial constitutional rights).

[75] *Ortiz*, 490 P.2d at 1147.

[76] Cmty. Redevelopment Agency v. Abrams, 543 P.2d 905, 909 (Cal. 1975).

[77] *Id.* at 915 n.9.

[78] *Abrams* was a case of an elderly, ailing druggist who for a quarter of a century operated a drugstore—the only one to serve an inner city neighborhood in Watts, that sold certain specialized medicines—and who found himself unable to relocate and salvage his business goodwill because his clientele had been scattered by the redevelopment project, and he, being elderly and infirm, was unable to start a new business all over again elsewhere. *Id.* at 908. He was also forced to destroy a quantity of valuable "ethical" (prescription) drugs that though wholesome, could not be transferred to another location because a peculiarity of California law required certification of these drugs for purity before their transfer, and here the cost of the required certification would exceed their value. *Id.*

[79] People v. Symons, 357 P.2d 451, 455 (Cal. 1960) (citation omitted).

Symons rule was legislatively repealed in 1976,[80] there has been no indication that in the ensuing thirty-four years California has had to declare an "embargo" on construction of needed public works. To the extent various California public projects were cancelled[81] or delayed,[82] that was the result of legislative unwillingness—not inability—to approve various government pet projects,[83] public opposition,[84] environmental concerns,[85] or attempted violations of law on the part of condemnors.[86] Indeed, at the approximate time the court voiced its fear of the "embargo" in *Symons*, the Department of Public Works (now known as CalTrans), California's largest condemnor, was enjoying surpluses running into the hundreds of millions of dollars per year.[87] Adding insult to injury, over the years, CalTrans, has continued to waste fortunes acquiring excess land and then failing to make use of it or selling it.[88] Nonetheless, the

[80] In 1976, the California legislature repealed *Symons'* substantive holding that severance damages, though concededly suffered, are not payable, unless the public project—narrowly defined, for example, as the actual roadway rather than the right of way—is built on the land taken from the compensation-seeking condemnee. *See* CAL. CIV. PROC. CODE § 1263.420(b) (West 2007). In a noteworthy instance of lack of judicial even-handedness, the way California courts saw it until the legislature intervened, special benefits brought about by the public project could be offset against severance damages irrespective of where the activity generating those benefits occurred. *See* People v. Hurd, 23 Cal. Rptr. 67, 68–69 (Cal. Ct. App. 1962).

[81] *E.g.*, Jones v. People *ex rel.* Dept. of Transp., 583 P.2d 165, 171 (Cal. 1978); *see infra* note 84.

[82] *See e.g.*, Keith v. Volpe, 118 F.3d 1386, 1389 (9th Cir. 1997); *see also* Sherwood v. Bradford, 246 F. Supp. 550, 552 (S.D. Cal. 1965) (enjoining attempted excess condemnation).

[83] M. L. Gunzburg, *Transportation Problems of the Megalopolitan*, 12 UCLA L. REV. 800, 810 (1965) (discussing the successful opposition to the Beverly Hills Freeway by the affluent community through which it was laid out).

[84] The best known examples were the San Francisco "freeway revolt," see Arthur R. Silen, *Highway Location in California: The Federal Impact*, 21 HASTINGS L.J. 781, 810 (1970), and the deletion of the Westway planned across lower Manhattan, that was cancelled after intense community opposition, see Sam Roberts, *The Legacy of Westway: Lessons From its Demise*, N.Y. TIMES, Oct. 7, 1985, at A1; *see also* Irv Burleigh, *Laurel Canyon: State Suspends Freeway Studies*, L.A. TIMES, Dec. 15, 1970, at D1.

[85] *See Keith*, 118 F.3d at 1388.

[86] *See* Neilson v. City of California City, 53 Cal. Rptr. 3d. 143, 147, 149 (Cal. Ct. App. 2007) (striking down a redevelopment plan that would take *vacant* desert land for the benefit of the Hyundai car manufacturing company under the guise of eliminating urban blight).

[87] *See* state budgetary statistics collected in Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 786 n.101 (1972).

[88] *See [Un]equal Justice*, *supra* note 27, at 1111–12.

California Supreme Court has never retreated from its economically and morally unfounded *Symons* position, consciously denying full compensation for economic losses admittedly suffered by condemnees, for the sake of protecting the public from the fictitious "embargo."

The U.S. Supreme Court has not been as explicit in revealing its pro-condemnor disposition as some state courts,[89] but its language, and certainly its holdings, also suggest an unjustified judicial apprehension that genuine just compensation, i.e., full indemnity of condemnees for all their demonstrable economic losses,[90] would be too expensive. I find it remarkable that the same courts that freely find liability and award generous damages in tort cases against the government[91] shrink from awarding even the minimal compensatory damages necessary to make property owners economically whole in eminent domain cases. After all, the sort of economic damages inflicted in takings of land, particularly partial takings, are no different in kind than those awarded in cases of torts against property, with cases of wrongful eviction providing a perfect analogy. Indeed in cases of

[89] See cases collected in Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 690, 716 n.154 (2005) and accompanying text. *See also Incidental Losses*, *supra* note 55, at 62–63; James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985); Klein, *supra* note 68, at 3–4. The literature commenting on the inadequacy of compensation in eminent domain is vast and of long-standing, so I refrain from exploring it here. Suffice it to say that the great majority of pertinent commentaries are critical of existing rules of compensability, and few, if any, make an effort to defend them. With particular reference to non-compensability of business losses, see D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 SETON HALL L. REV. 483 *passim* (1985) (demonstrating that with the exception of one student note, no commentator in the twentieth century has ever supported the judicially-wrought rule denying compensation for business losses inflicted by government takings).

[90] I cannot overstress that I do not address here the compensability of subjective, or emotional losses, because their consideration—though routine in other fields of law—would detract from the discussion of what I consider the meat of this article: the insincere judicial exhortation of indemnity as a measure of "just compensation" in taking cases, coupled with the courts' simultaneous denial of compensation for various *demonstrable, objectively determinable economic losses that, as noted, are routinely compensable in other fields of law.*

[91] *E.g.*, Owen v. City of Independence, 445 U.S. 622, 657 (1980); *accord* Johnson v. Cal., 447 P.2d 352, 363 (Cal. 1968) (approving liberal application of tort liability against the government as a proper means of providing disincentives to wrongful government conduct, and stressing that the resulting cost should fall on society rather than the individual harmed plaintiff).

private torts against property, the California Supreme Court has taken the position that the establishment of such a tort (e.g., nuisance), *ipso facto* triggers the availability of damages for personal annoyance and inconvenience to the damaged land's inhabitants, damages which are deemed to be anathema in eminent domain cases.[92]

In *United States ex rel. TVA v. Powelson*, the U.S. Supreme Court provided a glimpse into such concerns when it observed that it perceived the law of just compensation as fashioned out of a conflict between "the principle of indemnity" and the "people's interest in public projects,"[93] thus suggesting that the people's ability to enjoy public projects would be compromised if the government had to indemnify those in the path of those projects. The Court cited no evidence to substantiate such apprehensions, and one is at a loss to understand why it would say so without any supporting evidence. What evidence there is, notably the recent orgy of wasteful government expenditures and generous congressional "earmarked" handouts *that persist even during the current recession,* demonstrates convincingly that funds for public projects—even projects of dubious soundness—are available.[94] It is also incontestable that many ostensibly public projects amount to little more than pork: politically-motivated, profligate transfers of federal funds to states and local entities for projects of no discernible public benefit.[95] Any legitimate concerns that

[92] Kornoff v. Kingsburg Cotton Oil Co., 288 P.2d 507, 512 (Cal. 1955).

[93] United State *ex. rel.* T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

[94] Indeed, federal focus on "shovel-ready" public projects lies at the core of federal stimulus programs enacted to revive the economy. Carl Hulse, *With 11 Votes from G.O.P., Senate Passes Bill on Jobs*, N.Y. TIMES, Mar. 18, 2010, at A16.

[95] The five notorious examples of failed major government projects that readily come to mind are: (a) the $250,000,000 appropriation for Alaska's "bridge to nowhere," Heather Lende, *Alaska's Road to Nowhere*, N.Y. TIMES, Aug. 20, 2005, at A13; (b) the nonexistent, 17,500-acre Los Angeles "Intercontinental" Airport that cost $100,000,000 in the early 1970s for land acquisition alone, but which failed, with nothing to show for it, Dan Weikel, *L.A. Cuts Ties to Desert Airport*, L.A. TIMES, Jan. 27, 2009, at B3; *[Un]equal Justice*, *supra* note 27, at 1120; (c) New York City's aborted effort to subsidize the construction of a new headquarters building for the New York Stock Exchange, that by the city's own reckoning consumed $109,000,000, with nothing to show for it, Charles V. Bagli, *45 Wall St. is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3; (d) the City of Yonkers condemnation of land for Otis Elevator company, that shortly thereafter shut down its Yonkers plant leaving the city holding the bag to the tune of some $14,000,000, City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 44–45 (2d Cir. 1988); and of course (e) the *Kelo* case, where after spending upward of $80,000,000 on the acquisition of a 91-acre

government expenditures are endangering the country's economic condition are more properly rooted in congressional (as well as state legislative) profligacy in recklessly spending public funds on a variety of pet projects, unfunded retirement plans, waste and fraud in social welfare legislation, and programs that irrespective of their merit, candidly cater to influential local constituencies, in total disregard of fiscal integrity and of the long-term public interest.[96]

The suggestion that there is a "tension" between government's acquisitory desires and its constitutional duty to pay just compensation, so that the latter, if followed, would somehow inhibit the former, does not withstand scrutiny. Indeed, *Powelson* proved to be probably the most inappropriate context in which to voice such a suggestion because, as it turned out, the Tennessee Valley Authority (TVA) made a killing on its construction of hydroelectric dams built on the taken land, and so did the industry served by them. As described in Jane Jacobs' book, the TVA's electrical power generation program prospered greatly, making the TVA the largest electrical utility in the country.[97] Its

waterfront parcel in New London for redevelopment, the project failed completely—as of this writing the subject property remains vacant, and adding insult to injury, the Pfizer pharmaceutical company, whose presence in the community was the linchpin of the redevelopment project, announced that it is shutting down operations and moving out of New London altogether, see Pat McGeehan, *Pfizer to Leave City that Won Land Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

See infra note 109; Carol D. Leonnig et al., *Revitalization Promised, not Delivered in District; Nonprofits Collect Millions as Work Goes Undone*, WASH. POST, Feb. 24, 2002, at A1 (describing how nonprofit community development groups in Washington, D.C. are unable to show how the millions of dollars they have received for uncompleted projects have led to tangible results); Marcia Slacum Greene et al., *Risky Ventures, Little Accountability; After Years of Public Funding, Nonprofits Have Completed Few Projects*, WASH. POST, Feb. 25, 2010, at A1 (describing wasteful expenditures of some $100,000,000 in Washington, D.C. that failed to produce planned improvements).

See also Patrick McGreevy & T. Christian Miller, *Heady Plans, Hard Reality*, L.A. TIMES, Jan. 30, 2000, at A1 (describing the waste of some $117,000,000 on the North Hollywood redevelopment project that failed to produce the planned new studios).

[96] *See, e.g.*, Danny Hakim, *New High in '06 on Borrowing for Pet Projects*, N.Y. TIMES, Jan. 14, 2007, § 1, at 1 (noting that money borrowed by the State of New York during 2006 for assorted "pork" projects, known locally as "member items," "exceeded the total amount of borrowed money disbursed over the previous eight years," and that "[o]ver the last decade, lawmakers have used the [borrowed] money to finance a number of failed economic development projects, including a now-defunct high-speed ferry between Rochester and Canada that cost the state millions of dollars.").

[97] JANE JACOBS, CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC

hydroelectric dams generated power at a fifty percent cost advantage over competing power generators—so much so that much industry seeking cheap electric power was attracted to the area, exhausting the TVA's hydroelectric power generating capacity.[98] The TVA then built additional coal-fired generating plants which still gave it a thirty percent cost advantage over its competitors.[99] Ironically, in order to operate those coal-fired power plants, it became necessary to engage in large-scale coal strip-mining—an activity that contributed greatly to water pollution and general environmental degradation in the area.[100]

The judicial apprehension that in its capacity as a condemnor, the TVA had to be protected by the courts from having to indemnify those whose lands it took, since the full price of doing business, would impair the people's right to enjoyment of its public projects, proved to be simply absurd. Finally, it cannot be overemphasized that, adding insult to injury, it also turned out that though the TVA had compromised some of its land acquisition cases and had promised to provide agreed-upon compensation, the TVA never paid for some of the land it took as far back as the 1940s, and never constructed the promised roads.[101]

Even during the Great Depression, when money was scarce, the government built large numbers of dams all over the country, without any indication that it was economically hard put to do so. If anything, some critics have argued that it built too many of them.[102] Indeed, current conventional wisdom has it that this dam construction effort was excessive, and that some of those dams must now be breached for the sake of migrating salmon, as well as for recreational activities by canoeists and kayakers.[103]

LIFE 116 (1984).

[98] *Id.*

[99] *Id.* at 117.

[100] *Id.* at 117–18; *see* Mays v. Tenn. Valley Auth., 699 F. Supp. 2d 991, 997–98 (E.D. Tenn. 2010) (describing the environmental devastation caused by TVA's spill of large quantities of coal ash generated by its coal-fired power plants).

[101] Felicity Barringer, *Decades Later, Simmering Debate on a Road Heats Up*, N.Y. TIMES, Feb. 21, 2006, at A12 (reporting how in the 1940s the TVA took 100,000 acres from Swain County, N.C., and in return promised to replace a road that got flooded by a TVA dam. Road construction was started but was stopped in the 1960s leaving the county without the promised road and uncompensated for its loss).

[102] *See* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 178 (1986).

[103] Sam Verhovek, *Returning River to Salmon, and Man to the Drawing Board*, N.Y. TIMES, Sept. 26, 1999, at § 1, at 11; *see* Pam Belluck, *Agreement in*

In short, judicial concerns that genuinely just compensation will impede the construction of necessary, genuinely public projects are unfounded—they are what one commentator aptly called "fearful [judicial] guesstimates."[104] Other commentators have dismissed such judicial fears as "[t]he old chestnut"[105] or a judicial "inarticulate desire" to limit the cost of public improvements.[106] In other words, judges go on about fairness, justice, and indemnity, but in the event they consciously undercompensate condemnees for fear of a conjectured fiscal impact on the government, that has yet to be proven. Perversely, courts turn a blind eye to situations where large sums of public funds are being dissipated for pointless or at best questionable purposes.[107]

In a society that is on the verge of bankrupting itself by spending money like the proverbial drunken sailor[108] on *inter alia* incontestably inefficient and wasteful projects that at times generate no genuine public good, and are avowedly pursued to placate local constituencies by transferring money from the public treasury to favored parties, including some of the largest enterprises in the country,[109] it is an ongoing national scandal for

Maine Will Remove Dams for Salmon's Sake, N.Y. TIMES, Oct. 7, 2003, at A1; Matthew Preusch, *Dams Go Down, Uncorking Rivers for Kayakers*, N.Y. TIMES, Aug. 9, 2009, at T3.

[104] Klein, *supra* note 68, at 35.

[105] Frank A. Aloi & Arthur Abba Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604, 647 (1968).

[106] Frank S. Sengstock & John W. McAuliffe, *What is the Price of Eminent Domain?: An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 U. DET. J. URB. L. 185, 191 (1966).

[107] Eagan Econ. Dev. Auth. v. U-Haul Co., 787 N.W.2d 523, 526 (Minn. 2010) (approving a taking for a "[redevelopment] project [that] did not materialize because [several] redevelopers withdrew their proposals."); *see* Thomas J. Posey, Note, *This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403, 1415–16 (2003) (discussing judicial endorsement of eminent domain takings for projects that could not be built for legal or fiscal reasons).

[108] I use here this time-honored metaphor even though, as a wit observed, it does an injustice to drunken sailors who perforce stop spending when they run out of money, which is more than one can say about the government.

[109] The power of eminent domain has been used for the avowed benefit of General Motors, Chrysler, Otis Elevator Co., the New York Stock Exchange, and The New York Times Company, even though all of the projects involved in these takings ultimately failed to achieve their stated purpose. Eminent domain has also been used for the benefit of mass merchandisers like Costco, Target and Best Buy. For a collection of citations to sources for this statement, see Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill*

the courts to permit takings of private property under conditions of undercompensation, in disregard of the often promised but never delivered indemnity said to be implicit in the "just compensation" mandated by the Fifth Amendment.

If indeed there is any genuine tension between the constitutional mandate of just compensation and the "people's interest in public projects," it ought to be addressed honestly, by a more analytical cost-benefit approach on the part of government. I do not suggest here that courts go into the business of reviewing the economics of public projects. What I do suggest is that since the courts defer entirely to condemnors' decisions as to how much land should be taken for what public projects, and where, they should carry that policy choice to its logical conclusion and also hold that where condemnors design and lay out public projects so as to cause a high level of private damages, that should be viewed as the natural consequence of the condemnors' own unreviewable decision making. For the courts to assert that they may not inquire into the necessity for or the cost of public projects when condemnees challenge the taking and argue that those projects are unaffordable, and yet to engage in hand-wringing over the imminence of fiscal doom when it comes to fixing just compensation necessitated by the condemnor's own plans, is both unseemly and inconsistent to the point of putting judicial impartiality into question. Worse, though the courts disclaim any

Their Unique Role"? A Response to Professor Dyal-Chand, 31 U. HAW. L. REV. 423, 467–69 (2009) [hereinafter *Impair or Strengthen Property Rights*].

See also Jim Dwyer, *Companies We Keep, and Pay For*, N.Y. TIMES, May 16, 2010, at MB1 (reporting that not only has New York City been subsidizing large, prosperous companies (that need no public subsidies), but now it is paying those companies again when they decide to move from one location to another *within New York City*). The list of undeserving recipients of such municipal largesse includes The New York Times Company, CBS, Reuters, NBC, News America, ABC, McGraw Hill, Viacom and Hearst. *Id.* (noting "[b]ut most of the recipients [of such municipal largesse], especially of the larger deals, were in the financial industry. Goldman Sachs was given $850 million in city and state subsidies to build in Battery Park, and JPMorgan Chase was awarded $240 million for space in Lower Manhattan. Others that have been given public subsidies include the American International Group, or A.I.G.; Credit Suisse; Bear Stearns; Merrill Lynch, Bank of America; Citicorp (now Citigroup); Morgan Stanley."). To say nothing of "hundreds of millions of dollars in public money to help the Yankees and the Mets build stadiums." *Id.*

Additionally, millions of federal dollars are being wasted on improvements to tiny local airports that serve a few score people at best, but receive fortunes in federal funds provided by the political clout of local representatives. *See, e.g.*, Tyler Grimm, *John Murtha's Airport for No One*, WALL ST. J., Sept. 4, 2009, at A15.

power or intention to become involved in examining the soundness of public projects when property owners challenge the taking of their land, judges do exactly that when they overtly shape compensability rules in an effort to protect the government from that mythical "embargo." Indeed, in environmental review cases judges freely review, second-guess, and overrule considered opinions of scientists, engineers and planners.[110]

Such concerns are of particular weight when one reflects on the fact that the courts generally refuse to provide meaningful review of necessity for takings, even when local statutes provide that before takings for public projects may proceed, there must be a formal determination of necessity for doing so.[111] Ironically, the U.S. Supreme Court based its early twentieth century holdings regarding the right to take for private-to-private transfers on dire necessity when it approved the use of eminent domain for takings of private property in order to transfer it to other private land owners for their private gain.[112] But only a few years later, the Court held that necessity is not a part of federal eminent domain law,[113] thereby unwittingly discarding the justification for its earlier right-to-take rulings. The California Supreme Court went a step further and held that a condemnor's ostensible compliance with a statute requiring a finding of public necessity as a precondition to filing an eminent domain action, was nonjusticiable—i.e., not subject to any judicial review, *not even where the condemnor's resolution of necessity was procured*

[110] *E.g.*, Andrew Pollack, *Judge Revokes U.S.D.A. Approval of Modified Sugar Beets*, N.Y. TIMES, Aug. 14, 2010, at B1.

[111] *See, e.g.*, CAL. CIV. PROC. CODE § 1245.340 (West 2007); *see also* City of Chicago v. St. John's United Church, 935 N.E.2d 1158, 1171 (Ill. App. Ct. 2010) (explaining that judicial inquiry into necessity in eminent domain cases would give rise to "questions of a technical nature that are not appropriate for judicial review" and "would lead to interminable delays, as there is always a different way to configure the use of land"). Note further the court's holding that questions of the city's ability to pay are not relevant. *Id.* Compare environmental review cases in which courts take a contrary position and insist that all alternatives to the proposed project must be considered and evaluated, even when that process delays completion of the project "interminably."

[112] *See* Clark v. Nash, 198 U.S. 361, 369–70 (1905); *see also* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (justifying a private-to-private property taking to facilitate the efficiency of a mining company, and asserting that this was a matter of great necessity in "exceptional times and places in which the very foundations of public welfare could not be laid" otherwise).

[113] Bragg v. Weaver, 251 U.S. 57, 58 (1919).

through fraud, bad faith or abuse of discretion.[114]

V. HAS REDEVELOPMENT BEEN WORTH IT?

Such concerns are *a fortiori* valid in redevelopment cases in which there is no longer any pretense of slum clearance or genuine blight elimination, and where the "public" benefit, *if any*,[115] goes primarily to private profit-making parties, with only a hopeful government prognostication that by virtue of a trickle down process, some of that money will benefit the community—something that may or may not occur.[116]

The current poster child for such concerns is the *Kelo* case. There, the Supreme Court permitted the taking of an unoffending, well-maintained lower middle-class neighborhood for "economic redevelopment" that would avowedly benefit the Pfizer pharmaceuticals company and its high-income employees by constructing high-end shops and condominiums on the taken land, that would serve those employees working at the nearby Pfizer pharmaceutical research facility.[117] As Michael Kinsley put

[114] *See* People *ex rel.* Dep't of Pub. Works v. Chevalier, 340 P.2d 598, 603 (Cal. 1959). In 1976, the California Legislature modified the *Chevalier* rule, and provided that a resolution of necessity is not conclusive in cases of "gross abuse of discretion" or bribery. CAL. CIV. PROC. CODE §§ 1245.255, 1245.270 (West 2007). Note, however, that even under those extreme circumstances, the resolution is not deemed void but merely subject to judicial review. *See* Robert C. Bird, *Reviving Necessity in Eminent Domain,* 33 HARV. J.L. & PUB. POL'Y 239, 244–45 (2010); Michael V. McIntire, *"Necessity" in Condemnation Cases—Who Speaks for the People?*, 22 HASTINGS L.J. 561, 569 (1971).

[115] Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 58 (2007) (a prominent advocate of government power conceding that "[P]ublic entities rarely make money on these projects. They must devote all the increased tax revenues from the project to tax-increment financing . . . .").

[116] *See* Cmty. Redevelopment Agency of Hawthorne v. Force Elecs., 64 Cal. Rptr. 2d 209, 210–11 (Cal. Ct. App. 1997) (noting that the failed redevelopment project was unable to pay for land it took); Jeff Koven, *Hawthorne Mall*, PHOTOBUCKET, http://s42.photobucket.com/albums/e339/MeetAtDennys/Hawthorne%20Mall-%20by%20Jeff%20Koven/ (last visited Oct. 24, 2010) (showing photos of the vacant Hawthorne Mall); *see also* Pasadena Redevelopment Agency v. Pooled Money Inv. Bd., 186 Cal. Rptr. 264, 265 (Cal. Ct. App. 1982) (requiring state taxpayers to pay for the cost of a failed local redevelopment project); Kim Christensen & Jessica Garrison, *Arrested Redevelopment: Lots of Cash and Little Scrutiny*, L.A. TIMES, Oct. 1, 2010, at A1 (reporting numerous California redevelopment projects for which land was acquired at the cost of millions of dollars, but which were not built).

[117] *See* Kelo v. City of New London, 545 U.S. 469(2005).

it, the Court held in *Kelo* that yuppification is a public purpose.[118] But though the city prevailed in its condemnation case on the basis of what it represented to be carefully prepared and thoroughly vetted redevelopment plans, those plans proved to be worthless. Instead of building the proposed improvements, generating new jobs and gaining an increase in tax revenues, the City of New London and the State of Connecticut squandered at least $80 million, with *nothing* to show for it. Even before the onset of the current recession, New London's chosen redeveloper was not able to obtain financing, and eventually the city had to abandon its redevelopment effort altogether. The site of the Fort Trumbull redevelopment project where the homes of Susette Kelo and her neighbors once stood is now a vacant, 91-acre trash-strewn wasteland, generating no tax revenue.[119] As noted *supra*, the Pfizer pharmaceutical company, whose New London research laboratories were located across the Thames River from the failed redevelopment project, and whose presence in the community was touted as a major factor in promoting that redevelopment, has announced that it is shutting down its New London facility and moving out of town, taking some 1400 jobs with it.

The failure of the New London redevelopment project is emblematic of a larger, long-standing problem. Readers may find it instructive to read the cover story in a 1964 issue of *Time* magazine, devoted to redevelopment.[120] That article concluded on a note of enthusiastic assessment of urban redevelopment:

> U.S. planners . . . properly should be, thinking in terms of the long future, to make the city attractive and stimulating again—creating new neighborhoods, bringing old ones back to life, seeding the streets with sudden green, opening up unexpected views, and giving men room to work and stroll and play and talk. To rediscover, in short, the pleasures of urbanity.[121]

That vision of a brave, new urban world was rightly challenged by Jane Jacobs who presciently lamented that modern urban

---

[118] Michael Kinsley, Editorial, *GOP Judicial Activism Takes a Hit*, L.A. TIMES, June 26, 2005, at M5 (stating "The court ruled, 5-4, that yuppification is a valid public purpose. Or at least it was reasonable for the city of New London to promote yuppification.").

[119] Jeff Benedict, *With Pfizer Leaving, City Has Nothing But Weedy Acres to Show for Grandiose Development Scheme that Uprooted Homeowners and Razed a Neighborhood*, HARTFORD COURANT, Nov. 15, 2009, at C1.

[120] *The City: Under the Knife, or All for Their Own Good*, TIME, Nov. 6, 1964 [hereinafter *Under the Knife*], *available at* http://www.time.com/time/magazine/article/0,9171,876419,00.html.

[121] *Id.*

redevelopment as practiced was not enhancing, but destroying the urban habitat as a desirable place to live and raise families.[122] Now, almost a half century later, we know that she was right: urban redevelopment notions of the 1950s that were put into effect in the ensuing decades were overly optimistic at best and disastrous at worst. Not only did they fail to revive cities, but they actually contributed to the cities' decline.[123]

For reasons rooted in major societal changes that followed World War II, the bulldozer model of urban redevelopment praised by *Time* magazine did not and could not succeed, certainly not on the scale envisioned by its promoters, because even then urban dwellers were in the process of abandoning cities and moving *en masse* to the suburbs. On the whole they continue doing so now. Yet redevelopment was advanced—and at times still is—by frankly elitist notions of inept urban planners who brazenly cater to the economic interest of redevelopers, and who simply refuse to understand that the radical destruction of city neighborhoods, and construction of the familiar clusters of (usually downtown) high rise office towers surrounded by sterile, usually deserted, concrete plazas, cannot provide an impetus for people to reverse the exodus from cities to suburbs. Why not? Because life in the suburbs is more agreeable, housing is better, schools are safer, and until quite recently the single-family suburban home has been an excellent investment for families, providing them with shelter both physically and with regard to income taxes—a situation that still prevails in many cases.[124]

[122] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 3–4 (1961); *see* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC. HOW AMERICA REBUILDS CITES 61–62 (1989) (describing how modern urban redevelopment largely favors shopping mall developers and large-scale merchandisers who get to occupy subsidized urban shopping malls built on the taken land); *see also* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 994–95 (candidly conceding that redevelopers are not interested in reviving genuinely blighted areas—what they want, and what cities provide, is "blight that's right," i.e., urban areas that are sufficiently downscale to support an arguable claim of being blighted, and yet sufficiently upscale so that the shopping facilities and other income-generating structures built on them by redevelopers will be attractive to affluent shoppers and occupants whom they hope to lure as customers—which is the *raison d'etre* of redevelopment).

[123] There is an important semantic matter involved here. When proponents of redevelopment boast of their successes, they typically speak of successes of individual projects, not successes in revitalizing cities and reestablishing them as attractive habitats for the middle class.

[124] While the housing crash of 2008 and the ensuing recession have

Nonetheless, in spite of its many failures, the redevelopment process has ground on, Detroit being the prime example of such failures. Urban redevelopment was started in Detroit back in the 1960s, but over the years it produced a string of abuses and failures as over half of the city's 1950 population fled to the suburbs, making Detroit America's urban basket case.[125]

Readers may find it instructive to compare *Time* magazine's *Under the Knife* with *Notown,* another, recent *Time* magazine cover article devoted to the urban calamity that befell Detroit.[126] *Notown* intones a string of excuses seeking to place the blame for the plight of Detroit on such factors as white flight, the "politics of retribution" pursued by former black Mayor Coleman Young, the decline of the automobile industry, and the political pandering of congressional politicians, notably Rep. John D. Dingell who resisted imposition of more-stringent mileage standards that would have helped Detroit compete today.[127] But whether or not these factors account for the extent of Detroit's deterioration (in my opinion, they do not, though they may have contributed to it), none of them were implicated in the decline of other cities—such

precipitated a decline in home prices and home equities, and have brought about a wave of foreclosures of lower priced homes that were improvidently bought using "subprime mortgages," in Southern California, prices of better homes, though down, are still high and the weekly newspaper real estate tabloids are chock full of advertisements offering seven-figure homes for sale. Thus, large numbers of people who bought better homes in the decades before the current recession are still enjoying substantial equities, and substantial, though unrealized, capital gains.

[125] For pictures of the virtually post-apocalyptic urban devastation that is today's Detroit go to TIME, http://www.time.com/time/photogallery/0,29307,1864272_1810098,00.html (last visited Oct. 24, 2010). For examples of abuses of Detroit's historical redevelopment process, see *Foster v. City of Detroit*, 254 F. Supp. 655, 662 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *In re* Urban Renewal, Elmwood Park, Detroit, 136 N.W.2d 896, 898–99 (Mich. 1965). By far the most notorious Detroit case was *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Though in the latter case a divided Michigan Supreme Court permitted the taking of 200 acres of urban land, displacing a functioning, integrated community in order to raze it and transfer its site to General Motors for a new Cadillac plant, the new plant never reached the promised 6,000 jobs, and in the long run General Motors went bankrupt. *See* ARMOND COHEN, POLETOWN, DETROIT: A CASE STUDY IN "PUBLIC USE" AND REINDUSTRIALIZATION 1 (1982).

[126] Daniel Okrent, *Notown,* TIME, Oct. 5, 2009, at 26 [hereinafter *Notown*] (chronicling the deterioration of Detroit, and noting that its population declined from 1,849,568 in 1950 to 951,270 in 2000). The currently trendy planning for Detroit contemplates the plowing under of most of the city and devoting the vacant land to truck farming. *See* Susan Saulny, *Razing the City to Save the City*, N.Y. TIMES, June 21, 2010, at A16.

[127] *Notown*, *supra* note 126, at 29.

as Cleveland, Buffalo, Camden, Flint, Newark, St. Louis, Kansas City, and Bridgeport, to name a few—which lost population and deteriorated nonetheless. In other words, Detroit may be the worst-case example of urban deterioration, but the problems associated with urban populations abandoning cities and moving to the suburbs afflict many other cities as well.

Moreover, none of *Time* magazine's facile excuses takes into account the real cause of the decline of American cities—the huge socio-demographic changes that have swept and transformed the country after World War II, beginning with the rise of a large, new middle class created by educational opportunities provided by the GI Bill, the availability of mass-produced, affordable suburban homes that could be purchased by ordinary people for no money down with low-interest mortgage loans guaranteed by the federal government, and the federally-financed road network that made commuting feasible and (at least at first) convenient.

Then there were the negative factors that drove people out of cities: urban riots that began in the 1960s, the 1970s rise in urban crime and the corresponding decline in effective law enforcement,[128] the rise of the drug culture that metastasized into the inner city raising the number of addicts who turned to crime to support their habit, the deinstitutionalization of mentally ill people who became homeless and took to roaming city streets, deindustrialization of cities that caused a massive loss of urban jobs, the catastrophic collapse of safety and quality of urban schools, including the pernicious though unintended effects of forced student bussing, the deliberate destruction of intra-urban public transportation (i.e., urban trolley cars that, ironically, are now being reintroduced into cities), the construction of freeways through cities[129] and last but not least, urban redevelopment that

[128] David Brooks, Op-Ed., *Children of the '70s*, N.Y. TIMES, May 18, 2010, at A27 (blaming not only the rise in crime for the urban exodus, but also urban redevelopment that in the name of "slum clearance" displaced large numbers of people); *see* Sam Roberts, *The Year New York Lived Really Dangerously*, N.Y. TIMES, May 15, 2005, §4, at 43 (describing the wave of events in New York City during the infamous summer of 1977 that contributed to urban flight).

[129] MICHAEL RAPUANO ET AL., URBAN ADVISORS TO THE FED. HIGHWAY ADM'R, THE FREEWAY IN THE CITY: A REPORT TO THE SEC'Y, DEP'T OF TRANSP. 19 (1968) ("In urban areas especially, many displaced families and businesses, unable to locate or afford comparable living or commercial space, are subjected to severe hardship."); *see* Charles Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 U. DET. J. URB. L. 297, 298–99 (1971) (stating one of the main function of highways in cities is a path to suburban commuters who work in the city and the construction of highways through cities often has a

in its heyday was an effective machine of destruction of low and moderately priced urban housing, displacing hundreds of thousands of people from their urban dwellings annually.[130]

These negative factors that continue to provide incentives for a city-to-suburbs exodus were further amplified by positive factors that attracted urban dwellers to the suburbs—such as widespread recognition that the purchase of a good suburban home provided its owners and their families not only with an agreeable lifestyle, but also with better quality, safer schools, as well as superior shelter that in short order became a rapidly appreciating, tax-advantaged asset. Put these factors together and what you get is a set of irresistible incentives to a mass migration out of the cities by their middle-class inhabitants, in favor of the suburbs. An added factor aiding this process has been the rise of feminism that allowed large numbers of women to obtain lucrative employment and enabled them—alone, or by pooling their incomes with that of their husbands'—to purchase upscale homes in better suburbs, all of which enhanced their standard of living and self-image, and provided added incentives to moving out of cities.

These were mega-forces that were and still are impervious to the efforts of individual municipalities to turn their effects around by demolishing urban dwellings and replacing them with a limited number of office buildings and shopping malls.[131] In other words, what planners call "sprawl" has been the unavoidable consequence of government policies and of social mega-forces that provided city dwellers with powerful incentives to get out of Dodge, and with disincentives to remaining in place and enduring the many detriments of modern urban living.

devastating effect on the urban poor). As a long-time condemnation lawyer, I have seen many city aerial photographs that consistently depict large swaths of urban land consumed by freeways, freeway interchanges and parking lots—all of which were constructed by displacing the indigenous population in their path. *See also* Malcolm Gay, *A Design Challenge for St. Louis: Connecting the City with its Symbol*, N.Y. TIMES, Aug. 21, 2010, at A11 (noting that in the past half century St. Louis lost roughly 500,000 people, and its "entire neighborhoods were razed . . . to accommodate highways.").

[130] Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 745–46 (1971) (stating that between 1950 and 1968, 2.38 million housing units were destroyed). *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOV'TS 129–30 (1965) (estimating that by the mid-1960s, more than 111,000 families and 17,800 businesses would be displaced by redevelopment annually).

[131] FRIEDEN & SAGALYN, *supra* note 122, 41–42.

Between the two, it was no contest.[132]

The bottom line of all this is that urban redevelopment as practiced for the past half-century has been unable to maintain today's American cities as bulwarks of the middle class and all that it implies to a desirable urban ambience and governance. The days when cities were population magnets are gone, and efforts to recapture them through the outmoded bulldozer model of redevelopment are doomed to failure. At its best, modern urban redevelopment may produce a few revived, usually downtown, city areas that are attractive to limited numbers of aging boomer "empty nesters," and trendy yuppies who tend to seek out what one commentator has aptly termed "hip" neighborhoods, but not to families with children.[133] The continued efforts to "throw money" at selectively chosen aspects of the problem—money that society can no longer afford—are not only failing to revive cities, but in the name of saving the government the need to pay the full cost of its improvident policies, are abusing people who find themselves in the path of the municipal bulldozers. After a half century, it's time to say: "Enough already!" If indeed these policies are truly necessary, they should only be carried out upon indemnification of the victims of the process. Professor Frank Michelman hit the bull's eye when he called,

> for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose cost, including costs that remain 'unsocialized,' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.[134]

---

[132] A detailed exploration of urban sprawl and its causes are matters beyond the scope of this article. Readers with an interest in these matters may wish to see Gideon Kanner, *Sprawl: How we got There and Why There is No Going Back in the Foreseeable Future*, ALI-ABA LAND USE INSTITUTE 129 (2010), *available at* http://www.lexis.com/.

[133] Joel Kotkin & William H. Frey, *Up From Ultimate Urban Dystopia*, L.A. TIMES, Oct. 11, 2004, at B11.

[134] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1181 (1967).

CONCLUSION

The reverse Robin Hood process of displacing indigenous (usually lower middle-class or poor) populations in redevelopment project areas under conditions of undercompensation, in order to enrich private redevelopers, or for that matter, to enrich the community, does not withstand moral or economic scrutiny, notwithstanding that the Supreme Court and its defenders are vainly trying to convince the people that the private profit tail is not wagging the "public use" dog. Ironically, giving the redevelopers a free hand and providing them with a proverbial "free lunch," may well be counterproductive because it encourages municipalities to spend their revenues in pursuing eminent domain takings for projects of dubious worth, in the forlorn hope of attracting new businesses and inhabitants—an effort that so far, shows no signs of succeeding on anything like the scale necessary to revive the deteriorating older American cities.

Though not quite as morally egregious, the same is true in garden variety condemnations for genuinely public projects where homes and businesses are taken to provide a benefit to the community, while allowing "the community" to do so on the cheap by undercompensating those who land it appropriates.

It is therefore time to renew the effort of the 1970s and to demand that rules of compensability in eminent domain law be reexamined and reformed to be more consonant with the publicly espoused, judicially promised standards of "fairness and equity." Those rules need to be brought up to date out of the factually obsolete[135] and morally unwholesome—and often corrupt—nineteenth century practices. Today, we should be able to take the courts at their word and insist—particularly where takings of property are intended to provide an economic benefit to private entities—that condemnees be put in the same pecuniary position they would have been in had their property not been taken. That seems only fair.

Courts tell us that they, not the legislatures, are the arbiters of

[135] The rules in question are obsolete because they were largely formulated in the nineteenth century, when takings were typically for railroad rights of way across vacant farmland, causing few incidental losses, and no mass displacements of people and businesses, as became the case in mid-20th century. For an insight into these conditions and into the railroads' practice of undercompensating condemnees, see 1 JOHN SHERMAN'S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE, AND CABINET 81 (1896).

compensability,[136] and so they are when they construe the meaning of the "Just Compensation" Clause of the Fifth Amendment. It is therefore their moral duty to shoulder the responsibility that goes with power, and to start acting accordingly. It is unseemly and irresponsible for them to claim the primary power to fix compensability rules in the name of justice, while simultaneously conceding the prevailing injustice that is inherent in their handiwork.

Providing genuine compensation in eminent domain cases will not only rectify a festering injustice, and reduce the growing incidence of at times irresponsible anti-government rhetoric, but will also inhibit profligate expenditures for unjustifiable faux public projects that waste public funds but often fail to produce the promised public benefits. Once cities and their favored redeveloper-clients come to understand that they will have to pay the true cost of doing business in redevelopment areas and will have to budget accordingly, they may take another, more realistic look at the soundness of their plans before plunging ahead. As pointedly noted by Justice Kourlis of the Colorado Supreme Court,

> [a]ny balancing of interests should be conducted by the condemning entity *prior* to deciding whether to condemn a private individual's land for a public purpose—not *after* the decision has been made and the economic consequences of that decision are brought to bear [on condemnees].[137]

Encouraging such responsible planning would go a long way toward rectifying eminent domain abuses, for those are often driven, not by efforts to pursue genuine public good, nor by serious concerns for public economy, but by redevelopers' and cities' opportunistic profit expectations. However, as long as courts tolerate and indeed facilitate kleptocratic government practices, thus encouraging consumption of the judicially-served "free lunch,"[138] they are proper objects of criticism for selectively

---

[136] *See* United States v. New River Collieries Co., 262 U.S. 341, 343–44 (1923) (emphasis added) (citation omitted); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923); *see also* Monongahela Navigation Co. v. United States, 148 U.S. 312, 344–45 (1893) (noting that the legislature lacks the power to limit compensation).

[137] Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1050 (Colo. 2004) (Kourlis, J., dissenting).

[138] Redevelopers receive the land condemned for them by redevelopment agencies either free or for substantially less than the public cost of acquisition. Daniel R. Mandelker, *Public Purpose in Urban Redevelopment*, 28 TULANE L. REV. 96, 97–98 (1954). This is known as "land write-down." Thus in *Kelo*, for

failing to perform their cherished function of constitutional interpretation, thereby disserving the checks and balances doctrine that animates our constitutional system.

example, the plan called for the redeveloper to gain possession of a 91-acre waterfront tract of land for 99 years at a cost of $1 per year. Kelo v. City of New London, 545 U.S. 469, 475–76 n.4 (2005). Nice work if you can get it.