HURDLES TO JUST COMPENSATION

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INTRODUCTION

Some of the worst atrocities in world history have come when the masses, or at least a controlling faction, are blinded by what they perceive to be the greater good. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[1] Far too often, the pursuit of the perceived collective good stamps out the fundamental rights of the individuals standing in its path.[2] The rights of the individual become disposable. This phenomenon is all too real for property owners in the path of eminent domain.[3]

While the Constitution memorializes the fundamental right to private property, and specifically just compensation, the collective pursuit of public projects has trampled the rights of individual property owners. It is for this reason alone that Americans now live under a Constitution that guarantees just compensation but laws that guarantee otherwise.

The laws have developed to protect the takers, not the individuals targeted by one of the most invasive powers of government. In the end,

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1. Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting).

2. The U.S. Supreme Court recently declared: "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). It then noted that "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id.*

3. State Highway Dep't v. Branch, 152 S.E.2d 372, 374 (Ga. 1966) (recognizing that "[t]oo often . . . the desire of the average citizen to secure the blessings of a good thing . . . blinds them to a consideration of the property owner's right to be saved from harm by even the government").

the thirst for public projects and the zeal to attain them has left the individual property owner—the prey in the property rights contest—in the most precarious position.

For those on the outside looking in or who have never had their property targeted by eminent domain, these claims may seem surreal. To those who wield the powerful stick of eminent domain, these claims may seem overstated. To individuals on the opposite end of that stick, these claims are real; they are truth.[4]

While practitioners and academics alike can argue over theory or what the law should be, the law is what it is. This Article sheds light on the actual state of eminent domain law and the burdens courts have imposed on owners in America's eminent domain courts today.

Imagine being told that you have to sell part of your property to your neighbor. You do not have a choice. The neighbor can put the burden of proving the value of the property on you, and, if you do not meet that burden, the neighbor gets to name the price. In setting the price, you cannot consider actual damages that will be inflicted to the property that you will be left with after the sale. You have to live with these damages forever and without compensation.

Property owners forced to sell their property under eminent domain do not have to imagine this scenario. They live it. The only difference is that the neighbor in the hypothetical is the government.

Owners seeking just compensation must overcome many hurdles, some of which are insurmountable. This Article does not cover all the burdens these owners shoulder, only some of the most glaring ones. The hope is that the reader will gain better understanding into what owners face each day in courts throughout America.

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4. Part of the problem facing property owners today may be much deeper rooted, stemming from the denial of absolute truth and the abandonment of fixed, enduring principles. This departure presents a discussion far beyond the pages of this Article, but, suffice it to say, denial of the existence of certain fixed principles is also a denial of gravity. As the late Ravi Zacharias pointed out when touring the Wexner Center for the Performing Arts at Ohio State University, "America's first deconstructionist building," the architect did not use the same principles in constructing the foundation that he did in building the truth-defying parts of the building. RAVI ZACHARIAS, CAN MAN LIVE WITHOUT GOD 21 (1st ed. 1994). So, too, a legal system cannot stand on any foundation other than those fixed, enduring truths our Founders etched into our constitutional form of government. Recognition of the individual's inalienable rights—fixed, enduring rights that come from God, not government—is an individual's only defense against the masses, those in power, or the collective desire to achieve the prevailing "greater good" of the moment.

I. A REVIEW OF THE COMMON OWNER'S EXPERIENCE REVEALS THE OWNER'S PLIGHT

The following scenario illuminates the owner's plight in eminent domain cases. A city land agent sends you a letter, stating he would like to speak with you about a sewage project that will affect your home. You call the number on the letter and schedule a meeting with the land agent.

During the meeting, the land agent tells you the city is going to build a sewage treatment plant about 150 feet from your front door. He also says the city cannot build the sewage plant without taking some of your front yard. The land agent then pulls out a map to show you a drawing of the project. The map shows that, after the project, your home will face the sewage pond. The pond will be located on the neighbor's property just on the other side of your property line. It also shows that the service road for the sewage pond will run through your front yard.

Before this project, you had a home on one acre with a front yard covered in mature trees and landscaping. The trees provided privacy, peace, and tranquility. After the project, this buffer will be gone. You will have a view of the sewage pond and will have to endure its attendant odors.

You ask, "What happens if I do not want to sell part of my front yard?" The agent responds, "Then we will have to take it." After he is finished explaining the project, the agent says he will come back later with an offer. He gives you a copy of the map and leaves.

Several weeks pass, and the land agent calls to schedule another meeting. During this meeting, the agent informs you the city is offering only $15,000 for the quarter acre of your yard that is needed for the project. When you ask about the depreciation in the value of your home after the taking (i.e., damages), he says the city cannot pay you for that because only the service road will be located on the quarter acre the city is taking from you. He explains that no part of the sewage pond will be on your property.

The agent is very sympathetic and tells you he is sorry. He acknowledges your property will not be nearly as desirable or valuable after the project. However, he explains that he has to follow the law. He says the city has to be able to explain any purchase to its taxpayers

and its auditors so the city must be careful not to pay any more than it is legally required to pay.

He informs you that in your jurisdiction, the government, unlike a private developer or a private party building a similar project, does not have to pay for certain damages it causes when it takes property by eminent domain. He explains that because only the service road, as opposed to the sewage pond itself, is on the quarter acre the city is taking from you, the city cannot compensate you for the loss in value of your home caused by being next to a sewage pond.

You ask, "I cannot get paid for the loss in value caused by your project for which you are taking my front yard?" The agent seems very sympathetic but again explains the city cannot pay for any depreciation in value that it is not legally required to pay. Unfortunately, according to the agent, you cannot get compensated for the depreciation in your home, even if you would get compensated for this reduction in value if you voluntarily sold your property to a developer or private party that was doing a similar project.

You are shocked, but the worst is yet to come. You cannot believe the government gets a condemnation discount and that you have to bear that loss. You then say, "Well, even if I cannot be reimbursed for the damage caused by the sewage pond, the quarter acre you are taking is worth $30,000, not $15,000." The agent then says the most he can offer is $20,000. He explains that other owners have settled with the city and that you will have to hire an attorney and go to court if you do not accept the city's offer. He explains, albeit sympathetically, that you will not be compensated for those expenses.

The agent leaves, and you immediately call an attorney. The attorney proceeds to inform you that, yes, you can go to court. However, the burden of proving the value of your property is on you. Moreover, even if you prove the city is wrong—i.e., that the land taken from you is worth $30,000, not just $15,000 or $20,000—you will have to pay attorneys, appraisers, and any other necessary experts. The city does not have to reimburse you for these costs, even if you prove the city is wrong or unreasonable. Thus, there is no way you can end up with the value of your property even it is truly worth $30,000.

The attorney informs you that he disagrees with the agent's statement that the depreciation in the value of your property after the taking is not compensable. He then says, however, that some courts

have ruled otherwise. He explains that some courts do not allow owners to consider many facts that ordinary buyers and sellers would consider—facts appraisers would also consider in ordinary appraisals.

Worse yet, the attorney explains that the city can take your property now, build its sewage plant, and pay you later. Unlike a normal sale, you may not get paid until months after your property is taken. It may take twelve to twenty-four months or longer for you to receive the full value of your property. The only saving grace for you is that, unlike some of your neighbors, your home is not being taken. Thus, you do not have to vacate your home before the government pays you the full value.

This scenario would not leave most owners feeling good about their government or their courts. The fundamental unfairness is obvious. Yet, this scenario is exactly the one courts have sanctioned for years.[5] It is precisely what property owners face in some jurisdictions.

II. THE LAW PLACES THE BURDEN OF PROOF ON THE INDIVIDUAL WHOSE PROPERTY IS TAKEN, NOT ON THE TAKER

Owners are different from all other defendants under the law. Not only have they done nothing wrong, but they are not even alleged to have committed any wrongdoing. As one judge stated:

> Every other justiciable controversy of a civil nature arises out of some prior relationship or contact between the parties. . . . But in the condemnation proceeding the condemnee (who is actually the defendant although in this state forced to assume plaintiff's burdens) has admittedly done no wrong, broken no promises and committed no negligence. He has only exercised his constitutional right to possess property—which in the condemnation situation, unfortunately, is property coveted by another.[6]

Eminent domain is a forced sale imposed upon the owner. Yet, the law in many jurisdictions puts the burden of proof on the owner whose property is taken. The Wyoming Supreme Court recently observed:

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5. This scenario continues to shed the legal profession in a negative light. To the average person, it is an indictment on the attorneys that perpetuate such a system and on the courts that allow it to continue. To those outside the system, it reveals an utter lack of common sense and defies any notion of justice.

6. Peel v. Burk, 197 N.W.2d 617, 621–22 (Iowa 1972) (Reynoldson, J., dissenting).

> The landowner has the burden at trial to establish the amount of just compensation. The landowners in eminent domain cases have the burden of proving the just compensation to which they are entitled. This is the general rule. This is not an idle statement of a rule meant to be disregarded. This is true in both inverse condemnation actions, such as this case, and in formal eminent domain proceedings, which this case was not.[7]

Although the condemnee is the one who has his property taken against his will, "the burden as to value is on the condemnee."[8] "The burden of proving the value of the land taken is on the landowner."[9] If the owner cannot overcome the legal burden, he has to surrender his property at the government's price. Leave it to politicians and lawyers to think such a system is fair!

In all other legal disputes, plaintiffs bear the burden of proof. The government likewise bears the burden in other cases in which it exerts its power over the citizen. That is not the situation in eminent domain cases in many jurisdictions.

Placing the burden on the owner may seem benign. It is not. For example, in many cases, the government does not even attempt to value the entire disputed property. It just summarily states there is no impact to certain portions of the property and refuses to make the owner an offer that includes the impact to the entire property.[10] Owners in such situations have no choice but to fight. The only way

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7. Byrnes v. Johnson Cnty. Commissioners, 2020 WY 6, ¶ 26, 455 P.3d 693, 700 (Wyo. 2020). Many condemnors attempt to place an even heightened or more exacting burden of proof on the owner. *See* Utah Dep't of Transp. v. LEJ Investments LLC, 2018 UT App 213, ¶ 22, 437 P.3d 569, 574 (stating that while "[t]he burden of showing the damages which the owner will suffer rests on him[,]" the owner "need only do so with reasonable certainty rather than with absolute precision").

8. Religious of Sacred Heart of Texas v. City of Houston, 836 S.W.2d 606, 613 (Tex. 1992); Stephens Prod. Co. v. Larsen, 2017 OK 36, ¶ 13, 394 P.3d 1262, 1267 ("Once the condemnor proves the validity of the taking, the burden shifts to the landowner to prove the fair market value of the property."). Some courts have held that neither party bears the burden of proving the value of the property that is taken, the owner bears the burden of proving the value of the damage to the property remaining after the taking, and the condemnor bears the burden of proving enhancement. Hamer v. Sch. Bd. of Chesapeake, 240 Va. 66, 72, 393 S.E.2d 623, 627 (1990).

9. United States v. 69.1 Acres of Land, 942 F.2d 290, 292 (4th Cir. 1991) (citing United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 274, 63 S. Ct. 1047, 1052 (1943)); *but see* Dep't of Pub. Works & Buildings v. Bloomer, 28 Ill. 2d 267, 270, 191 N.E.2d 245, 248 (1963) ("While the condemnor bears the burden of proving the value of the land actually taken, the owner bears the burden of proof in seeking to recover for damage to the remainder.").

10. *See* Comm'r of Highways v. Karverly, Inc., 295 Va. 380, 813 S.E.2d 322 (2018).

the impact to the entire property will be assessed in such cases is if the owner hires his own attorney and appraiser.

Even an owner with the resources to obtain legal counsel and valuation experts still does not enter the courtroom as an equal. They enter with a burden. This burden is especially onerous because "no private purse can compete with the public treasury in the hiring of counsel and expert witnesses."[11] Owners who do not (or cannot) hire counsel enter the courtroom alone, forced to overcome the burden themselves.

In jurisdictions like Virginia, the law saddles the owner with all the disadvantages of plaintiffs and all the disadvantages of defendants, not just the burden of proof.[12] No other litigant in the law bears the burdens of both plaintiff and defendant. The law singles out owners in eminent domain cases for this dubious distinction.

Owners in such circumstances occupy the most disadvantaged position any litigant can face. The owner has the burden of proof, but he or she does not get the first and last word at trial like other litigants who carry the burden. In other legal cases, the plaintiff bears certain burdens (e.g., burden of proof—substantive burden) while the defendant bears others (e.g., does not get to speak first or last at trial—procedural burden).

No principled basis exists for putting owners on a lesser footing than the taker when it comes to proving the value of the taking. As the government is forcibly taking the owner's property against his will, one might think that the owner would get the benefit of a base runner in baseball where a tie goes to the runner. At the very least, the owner should enter the courtroom as an equal when the government forces him into court. Anything less falls short of basic fundamental fairness.[13]

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11. Comm'rs of Lincoln Park v. Schmidt, 386 Ill. 550, 564, 54 N.E.2d 525, 531 (1944).

12. *See* Commonwealth Transp. Comm'r v. Glass, 270 Va. 138, 149, 613 S.E.2d 411, 417 (2005) ("In a condemnation proceeding, the burden of proof rests upon a landowner to prove the value of the land taken and the resulting damages."); *Hamer*, 240 Va. at 74, 393 S.E.2d at 628 (stating "it has been the traditional practice in this State for the condemner [sic] to open and close the argument" and "[r]egardless of the burden of proof . . . the condemner [sic] has . . . the right to open and close").

13. Condemnors such as the government and large utility corporations almost always have more resources than the individual owner. These entities often have trade organizations and other groups, such as a league of municipalities and the Interstate Natural Gas Association of America. These entities pool resources to fund lobbying efforts, to conduct market and appraisal studies they can use against owners, and to engage in other activities the typical owner cannot afford. In fact, condemnors often argue that an owner should not be able

III. THE LAW DENIES THE PROPERTY OWNER A RIGHT TO A JURY

Despite the Seventh Amendment's provision guaranteeing the right to a jury, many courts have denied owners the right to a jury. The Seventh Amendment to the United States Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[14] Yet, the U.S. Supreme Court has stated "there is no constitutional right to a jury in eminent domain."[15]

The law has preserved the right to trial by jury since the Magna Carta, which included a right to trial by jury when the King took property.[16] The U.S. Supreme Court has recognized that "[t]he colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property."[17] Yet, the same courts have rejected the provisions providing a trial by jury when the King took property.

Federal courts have unilaterally denied landowners a right to a jury. The Federal Rules of Civil Procedure are court-created rules.

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to present evidence of damages unless the owner has a market study like the ones these organizations have paid tens of thousands of dollars to obtain.

14. U.S. CONST. amend. VII. The U.S. Supreme Court long ago stated that suits at common law

> meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.

Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 447 (1830) (emphasis in original).

15. United States v. Reynolds, 397 U.S. 14, 18, 90 S. Ct. 803, 806 (1970); Bauman v. Ross, 167 U.S. 548, 593, 17 S. Ct. 966, 983, 42 L. Ed. 270 (1897) ("By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury."); Welch v. Tenn. Valley Auth., 108 F.2d 95, 99 (6th Cir. 1939) (explaining owners have no right to a jury because eminent domain proceedings are statutory proceedings and not suits at common law); City of Perris v. Stamper, 1 Cal. 5th 576, 593, 376 P.3d 1221, 1229 (2016) ("The Seventh Amendment to the United States Constitution does not guarantee landowners a jury trial in eminent domain proceedings.").

16. *See* MAGNA CARTA (1215) §§ 39, 52; *see also* Horne v. Dep't of Agric., 576 U.S. 350, 358, 135 S. Ct. 2419, 2426, 192 L. Ed. 2d 388 (2015) ("The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property."); Baron de Bode's Case, 8 Q.B. Rep. 208 (1845) (involving a "petition of right," an English common law action akin to inverse condemnation, for which there was a right to a jury); Bayard v. Singleton, 1 N.C. 5, 1787 WL 6 (1787).

17. *Horne*, 576 U.S. at 358, 135 S. Ct. at 2426.

Rule 71.1 of the Federal Rules of Civil Procedure expressly denies owners the right to a jury. It gives federal judges the power to reject an owner's request for a jury and instead appoint three commissioners to determine just compensation.[18]

Even in cases where a court empanels a jury, the court may nevertheless deny the owner a right to a jury through its rulings. When judges substitute their appraisal opinion for that of the independent appraisal expert, they invade the province of the jury.[19] Different appraisers rarely, if ever, come to the same conclusion of value even when asked to appraise the same property on the same day.[20] This result holds true among different appraisers hired by the same party, such as when the condemnor hires multiple appraisers to value the same property.

The appraisers also frequently employ different appraisal methodologies, techniques and approaches. One appraiser may use the sales and cost approaches to measure value. Another appraiser may use the sales and income approaches. Even when different appraisers each use the sales approach, they often use different sales. These differences confirm what many courts have come to acknowledge: appraising is not a science but an art.[21] Just because two appraisers use different valuation approaches, different methodologies or techniques, or different sales does not mean one appraiser did something inappropriate or that one appraisal is contrary to approved and accepted

18. *See* FED. R. CIV. P. 71.1(h)(2)(A) ("[I]f a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation.").

19. Miss. State Highway Comm'n v. Terry, 288 So. 2d 465, 466–67 (Miss. 1974) (explaining that, although appraisals vary widely, the court cannot "substitute [its] judgment for that of the jury" and that "resolution of fact issues is left to a jury of laymen" even if the court disagrees with their opinion).

20. *Terry*, 288 So. 2d at 466 ("An opinion of a real estate appraiser as to land values is not a matter so apodictically exact as not to be susceptible, in all honesty, to wide variation from that of his fellows.").

21. United States v. 1,378.65 Acres of Land, 794 F.2d 1313, 1318–19 (8th Cir. 1986) ("Appraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment."); *see also* United States v. 5.65 Acres of Land, No. 7:08-CV-00202, 2020 WL 5105206, *9 (S.D. Tex. Aug. 31, 2020); Ohio Dep't of Nat. Res. v. Thomas, 2016-Ohio-8406, ¶ 118, 79 N.E.3d 28, 52 (stating that "both parties stressed [that appraising] was more "art than science" and explaining that "specific tests or procedures" used for scientific experts "would not seem to coincide precisely with an appraisal opinion"); Powell v. Kelly, 223 So. 2d 305, 309 (Fla. 1969) ("The appraisal of real estate is an art, not a science."); Trustees of Wade Baptist Church v. Miss. State Highway Comm'n, 411 So. 2d 761, 763 (Miss. 1982) ("[V]aluation of real estate may be an art, but it is not an exact science.").

appraisal methodology. Similarly, just because two appraisers arrived at widely differing opinions of value does not mean one appraiser violated approved and accepted appraisal methodology.[22]

In *United States v. 5.65 Acres of Land*, rather than attacking the owner's appraisal opinion through cross-examination, the United States sought to summarily exclude it so that the jury could not hear it. The court denied the government's attempt, stating:

> The United States appears to be attacking [the appraiser's] assessment of $25,000 per acre as arbitrary when $14,000 per acre could also have been selected within the bracket, but this attack amounts to a complaint that appraisals are not capable of mathematical precision. "[T]here are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking." Appraisals are "more an art than a science; it is incapable of mathematical precision and implicates methods of judgment." [The appraiser's] judgment rests on comparable sales; it is not invented out of whole cloth. Accordingly, the United States' attack goes to Defendant's expert's factual credibility, not admissibility. [The appraiser's] valuation would inevitably rest on his judgment in any case. That [the appraiser] ultimately chose a number does not signify that his expert opinion is inadmissible.[23]

Courts have almost universally recognized that the determination of market value amounts to an educated guess.[24] "Appraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment."[25] It "involves, at best, a guess by informed persons."[26]

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22. *See* United States v. 0.376 Acres of Land, 838 F.2d 819, 827 (6th Cir. 1988) (explaining that different appraisers can arrive at differing values even when they each use accepted appraisal methodology and approaches). "[T]he accepted valuation approaches do not result in absolute property values and thus provide a margin of latitude within which the conclusion of different qualified appraisers acting in good faith could vary." *Id.*

23. *5.65 Acres of Land*, 2020 WL 5105206, at *9 (footnotes omitted).

24. Kimball Laundry Co. v. United States, 338 U.S. 1, 6, 69 S. Ct. 1434, 1438 (1949) ("[S]ince a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place.").

25. *1,378.65 Acres of Land*, 794 F.2d at 1318–19; *0.376 Acres of Land*, 838 F.2d at 825 ("It is true generally, however, that "[a]ppraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment.").

26. United States v. Miller, 317 U.S. 369, 375, 63 S. Ct. 276, 280 (1943).

The market may ultimately prove one appraiser's opinion right (or closer to right), but it does not mean the other appraiser did something wrong. Varying opinions between appraisers is no different than what occurs in the marketplace where market participants exercise differences of opinions each day. Indeed, the one thing that separates the most successful developers or investors from others is the ability to see value or potential where others do not (or to identify risk where others do not see it).

Cases involving scientific expert opinions stand in stark contrast to contests between varying appraisal or valuation opinions.[27] Some courts have recognized that imposing scientific standards on appraisal opinions invades the province of the jury by substituting the judge's opinion for that of the valuation expert.

> The value of property taken by the Government, which is no longer on the market, is largely a matter of opinion. Since there are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking, eminent domain proceedings commonly pit the Government's valuation experts against those of the landowner. Thus, the exclusion of one or all of either party's proposed experts can influence substantially the amount of compensation set by the factfinder. Not only does the landowner have a strong interest in receiving just compensation for property, the public as well has vested interests in insuring that the Government does not pay more than what the owner justly requires. Recognizing the critical role of expert witnesses in these cases and the strong interest on both sides that compensation be just, trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful.[28]

Denying the owner a trial by jury, whether by general rule or individual ruling, denies the owner his constitutional right to just

27. Buchanan Energy (N), LLC v. Lake Bluff Holdings, LLC, No. 15 CV 3851, 2017 WL 1232973, *5 (N.D. Ill. Apr. 4, 2017) (stating "real estate appraisal is not a branch of social science," and therefore, "the court need not apply the same standards of methodological rigor required of social scientific inquiry."). It can be difficult for courts to recognize the differences between expert appraisal opinions and the opinions of scientific experts. Most jurisdictions, New York being the exception, task their judges with handling all types of legal matters, ranging from criminal, domestic relations, personal injury, medical malpractice, contracts, business disputes, and other general types of law to eminent domain and other specialized matters.

28. United States v. 14.38 Acres of Land, 80 F.3d 1074, 1077–78 (5th Cir. 1996).

compensation. If a person has a dispute involving a voluntary sale, he gets a jury in most jurisdictions. It follows that he should not be denied a jury when he is forced to sell.

> [I]n most condemnation cases, the amount of what the award should be varie[s] widely from witness to witness. . . . [U]nless the testimony of an expert witness is irrelevant as to the real subject at hand, which is the true loss of the landowner, it should not be excluded merely because a witness has arrived at his conclusion under a theory of compensation not adopted by the other side or by the district court. . . . And the fact that the other side may not agree with that theory does not mean that the jury should not consider the evidence.[29]

Courts should carefully guard the owner's constitutional right to a jury. If one party does not like the other side's appraisal, the remedy is vigorous cross-examination. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[30]

IV. THE LAW DOES NOT REQUIRE THE TAKER TO PROVIDE FULL DISCLOSURE TO THE OWNER—AND REQUIRES THE OWNER TO PAY FOR SUCH DISCLOSURE WHEN IT IS PERMITTED

Some jurisdictions do not require the takers to disclose the appraisals or other statements of value. At least one state does not even require the condemnor to make the owner an offer before it takes the property.[31]

Federal law requires condemnors to obtain an appraisal and to provide a copy to the owner.[32] However, the same Act that establishes this requirement expressly states that it creates no rights.[33] As courts have noted, "the statute [requiring disclosure of appraisals],

29. United States v. 97.19 Acres of Land, 582 F.2d 878, 883 (4th Cir. 1978) (holding that the testimony and opinion of each side's s appraiser "should have gone to the jury and the jury then should have made its award").

30. *14.38 Acres of Land*, 80 F.3d at 1078.

31. *See* N.C.G.S. § 40A-4 (entitled "No Prior Purchase Offer Necessary").

32. 42 U.S.C. § 4651.

33. 42 U.S.C. § 4602(a).

42 U.S.C. § 4651, does not create any substantive rights and . . . [t]herefore, the federal statute provides no basis for relief."[34]

Even in jurisdictions that require disclosure, either under condemnation statutes or open records statutes, condemnors have attempted to withhold documents related to valuation.[35] The fact that the right to disclosure has long been a contested issue reveals that condemnors do not typically provide full disclosure unless forced to do so.[36]

Condemnors have used a multitude of creative arguments in their attempt to withhold valuation information, but each argument places the interests of the public collectively over the interests of the individual forced to surrender his or her property. For example, in *State by Commissioner of Transportation v. Hancock*, the state argued:

> There is a need to strike a balance in these cases between protecting the public fisc and providing a prospective condemnee with enough information to make a determination whether the State has made an acceptable offer of compensation. Requiring the State to furnish its appraisal during pre-litigation negotiations gives the prospective condemnee the opportunity to structure a reactive appraisal and thereby to possibly prolong litigation by seeking an excessive award.[37]

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34. Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D.N.H. 1998); Clear Sky Car Wash LLC v. City of Chesapeake, 743 F.3d 438, 444 (4th Cir. 2014) (stating "§§ 4651 and 4655 create[] no individually enforceable rights . . . [and provides no] basis for a private action to remedy violations of those sections"); *but see* Bergano v. City of Virginia Beach, 241 F. Supp. 3d 690 (E.D. Va. 2017) (finding the owner had a remedy under the constitutional protections of due process and equal protection even when the Uniform Relocation Assistance and Real Property Acquisition Act provided no relief).

If the Act creates no right or enforceable benefits, the owner is left with a hearing before the very agency that violated his rights. Bergano v. City of Virginia Beach, No. 2:15CV520, 2016 WL 4435330 (E.D. Va. 2016) (explaining the process under the Administrative Procedures Act). The agency is effectively judge and jury in its own case with limited oversight or judicial review.

35. *See, e.g.*, State v. D'Onofrio, 235 N.J. Super. 348, 355, 562 A.2d 267, 270 (Law Div. 1989) ("[T]he court holds that the reasonable disclosure aspect of bona fide negotiations requires the condemnor to provide the prospective condemnee with all appraisals in its possession which have been obtained for the purposes of making its condemnation offer."); *but see* State v. Town of Morristown, 129 N.J. 279, 289, 609 A.2d 409, 414 (1992) (stating "DOT need not disclose neighboring appraisals during the pre-complaint phase of the condemnation process"); Dep't of Transp. *ex rel.* People v. Hunziker, 342 Ill. App. 3d 588, 796 N.E.2d 122 (2003), *as supplemented on denial of reh'g* (Sept. 10, 2003).

36. *See* S.C. State Highway Dep't v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973) (discussing disclosure requirements and citing cases where disputes arose over disclosure); Pinkham v. Dep't of Transp., 2016 ME 74, ¶ 5, 139 A.3d 904.

37. 208 N.J. Super. 737, 741, 506 A.2d 855, 858 (Law. Div. 1985), *aff'd sub nom*, 210 N.J. Super. 568, 510 A.2d 278 (App. Div. 1985).

Similarly, in *Cartwright v. Commonwealth Transportation Commissioner of Virginia*,[38] the condemnor argued that owners lose their rights under the Freedom of Information Act the moment the government takes their property. According to the state in *Cartwright,* these owners had to pay attorneys to obtain documents through discovery even when the owners' neighbors (whose property was not taken) could get the same documents for free under the Freedom of Information Act.[39] Without disclosure requirements or the ability for owners to readily obtain valuation documents, owners are forced to hire attorneys and to engage in costly litigation just to see the government's documents related to the value of the owners' property.[40]

Common sense and fundamental fairness seem to weigh in favor of disclosure. If the government takes an owner's property against his will, is it not fair to at least require the government to show the owner the documents related to the value of his property? After all, the owner's tax money was used, at least in part, to pay for these documents. Moreover, the Constitution requires the government to make the owner whole so one would think disclosure is consistent with this aim. The lack of disclosure and transparency is yet another hurdle owners face—one that leaves an especially bad taste in the mouths of those forced to surrender their property.

V. THE LAW PLACES UNDUE BURDENS ON OWNERS

A. The Law Allows the Government to Freeze an Owner's Property Under a Cloud of Condemnation

The sheer nature of eminent domain works certain hardships that are seemingly ignored by nearly everyone except the owner and potential buyers or renters of the owner's property. One such hardship is the impact from project influence.[41] When a condemnor announces

38. 270 Va. 58, 613 S.E.2d 449 (2005).

39. *Id.*

40. *See Hancock*, 208 N.J. Super. at 738, 506 A.2d at 856, *aff d sub nom*, *Hancock*, 210 N.J. Super. 568, 510 A.2d 278. The fact that an owner's tax money is used to create documents about the value of his own property makes the prospect of being denied access to these documents even more difficult to accept.

41. *See* Reichs Ford Rd. Joint Venture v. State Roads Comm'n of the State Highway Admin., 388 Md. 500, 511, 880 A.2d 307, 313 (2005) (stating "there are many hidden costs involved in the acquisition of property by the government for public projects that have not been determined

a project, it often freezes the properties in the path of the project. Tenants do not want to rent and buyers do not want to buy properties that are going to be taken. Owners in these situations are left with properties they cannot rent or sell—and certainly not at market value. Yet, these owners must continue to pay their mortgages, their taxes, and other holding costs. If they are unable to do so, they lose their property through default.

This cloud of condemnation that hangs over the property is suffocating to many owners. Consequently, some owners have lost their property or been forced to sell at extreme discounts while others suffer immense losses before the condemnation ever occurs.[42]

In some jurisdictions, the government often sends tenants notices to vacate before the government ever takes the property. The government even pays the tenants to leave the property before the government takes it. This scenario leaves the owner with a mortgage and vacant buildings that he or she cannot rent. Owners with rental property not only lose their property but also their income, which in some cases is the owner's sole source of livelihood.

A recent case in North Carolina represents these very real hardships.[43] A family owned a multi-unit shopping center. This shopping center was their sole source of livelihood. They rented several units and operated their restaurant in another unit. The condemnor sent the tenants notices to vacate many months before it took the property. The condemnor then paid the tenants to leave the property. The condemnor subsequently sent a letter to the owners, stating they could remain in the property for 90 days but were not guaranteed any more time. Again, the condemnor had not taken the property when it sent these notices.

In response to the condemnor's actions, the owners shut down their restaurant, auctioned off what items they could (for salvage value),

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to be compensable as a matter of common law"); *but see* Klopping v. City of Whittier, 8 Cal. 3d 39, 54, 500 P.2d 1345, 1357 (1972) (recognizing "the cloud of condemnation over property" targeted for acquisition and acknowledging the loss in use and value of such property).

42. There are legislative means of addressing this problem, although few have sought to tackle this issue. For example, a condemnor could be required to take properties in the path of the project within a certain time after the announcement of the project. They could also mandate a reduction in taxes during the time the property is targeted for acquisition. While not perfect solutions, such protections would at least ease some of the hardships faced by those targeted for acquisition.

43. *See* Dep't of Transp. v. Hilbert Crossing Plaza, LLC et al., Case No. 20 CVS 00754 (Craven Co. Sup. Court 2020).

and vacated the property. Two weeks later, the project was suspended. The owners were left with an empty building, no tenants, no restaurant, no livelihood, no income stream, and a huge mortgage. The owners also faced the threat of being penalized by the locality if they did not maintain their now vacant property, and they likewise risked losing their insurance on the property because insurers often refuse to insure vacant buildings.[44]

With the exception of premature notices to vacate, the cloud of condemnation is a natural, unavoidable consequence of eminent domain, but this fact does not mean it should continue to go unaddressed. Most owners are unable to obtain relief from the debilitating effects of the cloud of condemnation. "It is well settled that any harm arising from the mere announcement or pendency of a project is not compensable. Even the announcement of a projected public improvement together with the preparation of plans and maps showing the property in question within the limits of the project, without interference with the landowner's use, does not constitute a present taking."[45]

As harm stemming from the "pendency of a project is not compensable," in most jurisdictions, the owner must wait until the condemnor eventually takes the property before the owner can obtain compensation. It is true that the compensation the owner ultimately receives will be based on an amount that does not include the depreciating effects of the project, but owners can recover this amount only if they are able to hold their property until the condemnor finally files suit and the case is resolved.

Some states have attempted to address these harms.[46] However, these statutes frequently fail to offer real relief to owners because the owner must typically prove unreasonable delay or some form of bad faith, and they typically force owners into protracted litigation.[47] When owners are forced to resort to inverse condemnation

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44. To its credit, the condemnor in this case voluntarily took measures to rectify the situation before the owners had to resort to litigation.

45. State v. Westgate, Ltd., 798 S.W.2d 903, 907 (Tex. App. 1990), *writ granted* (June 5, 1991), *aff'd and remanded*, 843 S.W.2d 448 (Tex. 1992); *see also* Atchison etc. Ry. Co. v. S. Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936) *disapproved of by Klopping*, 8 Cal. 3d 39, 500 P.2d 1345.

46. *See Reichs Ford Rd. Joint Venture,* 388 Md. at 519, 880 A.2d at 318 (stating "[i]n an attempt to remedy these problems, the [Maryland] Legislature enacted § 12-105(b)").

47. *See* W. Va. Dep't of Transportation v. Pifer, 242 W. Va. 431, 443, 836 S.E.2d 398, 410

actions for relief, they are not typically well received by the courts.[48] The case of *Kiriakides v. School District of Greenville County*,[49] is indicative of the judicial reception many owners receive when seeking relief through inverse condemnation. There the court stated, "Construction of public-works projects would be severely impeded if the government could incur inverse condemnation liability merely by announcing plans to condemn property in the future."[50] It added that "changes in value [caused by a public project] are incidents of ownership."[51] If government were liable, it "would have a devastating impact on government and its citizens."[52] The court rejected the owner's argument that the "threat of a condemnation suit stigmatized his property and that the [condemnor's] alleged delay in bringing th[e] action entitled him to damages for an inverse condemnation."[53]

As it stands now, owners suffering under the cloud of condemnation must try to hold on to their property until the condemnor eventually files its suit and the case is resolved. As explained below, however,

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(2019) ("Because some delays relating to public projects are natural and unavoidable, before a landowner may recover damages for condemnation blight, he or she must establish that there has been an unreasonable delay in instituting the condemnation proceeding following its official announcement."); Pearsall v. Richmond Redevelopment & Hous. Auth., 218 Va. 892, 242 S.E.2d 228 (1978); *see also Reichs Ford Rd. Joint Venture*, 388 Md. at 523, 880 A.2d at 320 (noting that "[i]f lost rental value and other related damages are not recoverable, it might encourage a condemning authority simply to extend, without justification, the encumbering period prior to condemnation.").

48. *See* Sproul Homes of Nevada v. State, 96 Nev. 441, 443–44, 611 P.2d 620, 621–22 (1980) (stating that "[i]t is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie [and that] not every decrease in market value as a result of precondemnation activity is compensable."); Potomac Dev. Corp. v. D.C., 28 A.3d 531, 548 (D.C. 2011) (dismissing the owner's inverse condemnation action stemming from the cloud of condemnation despite acknowledging that, at least as alleged, the pending taking hung over the owner's property like the "Sword of Damocles" and reduced the income-generating potential of the property "to a small fraction of what it would otherwise have been"); *but see* Stone v. City of Los Angeles, 51 Cal. App. 3d 987, 124 Cal. Rptr. 822 (Ct. App. 1975).

49. 382 S.C. 8, 16–17, 675 S.E.2d 439, 443–44 (2009).

50. *Id.*

51. *Id.*

52. *Id.* As this case demonstrates, many modern courts are seemingly more concerned about the perceived "devastating impact" to the public than what is often an actual "devastating impact" to the individual owner. This utilitarian approach does not bode well for individual owners despite the Just Compensation Clause that was supposed to ensure that any owner forced to surrender his or her property is made whole for such sacrifice.

53. *Id.* (noting that "impairment of the market value of real property" alone does not give rise to a cause of action. *Id.* (citing Kirby Forest Indus. v. United States, 467 U.S. 1, 15, 104 S. Ct. 2187 (1984)).

even those owners must eventually part with their property at a condemnation discount.

B. The Law Allows the Condemnor to Take the Owner's Property and Pay for It Later—Often Months or Years Later

Unbeknownst to the average citizen, the law allows condemnors to take property and pay for it long after it is taken.[54] This process is called the quick take power. The condemnor files a document in court and deposits into court what it claims to be the value of the property taken. The condemnor gets title and possession of the owner's property the moment it files these documents.

The quick take power is especially burdensome when the government's deposit is less than the owner's mortgage. The mortgage company gets the money, leaving the owner with the remaining balance on the mortgage, no property (whether it is a home or business), and the need to find a new place to go. Owners in this predicament are saddled with (1) two mortgages—the one on the property taken and the one on the new property to which they relocate—if they can get financing under these circumstances or (2) a mortgage and a lease—the mortgage on the property taken and a lease on the new property to which they relocate.[55] Needless to say, this scenario puts inordinate pressure on owners hoping to hang on long enough to obtain just compensation.

As courts have long upheld the use of quick take power that allows government to take property long before it pays the owner just compensation, condemnors routinely exercise this well-entrenched power.[56] Who would not take property now and pay for it later if they

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54. United States v. Miller, 317 U.S. 369, 381, 63 S. Ct. 276, 283–84 (1943) (explaining the process and purpose of the quick take power); *see also Kirby Forest*, 467 U.S. 1, 104 S. Ct. 2187 (discussing the process for the exercise of the quick take power).

55. Some condemnors may argue that the relocation statutes help offset some of these burdens on owners, but, as explained earlier, courts have held that the relocation statutes are a matter of legislative grace and that these statutes create no rights and are unenforceable. *See Clear Sky*, 743 F.3d at 444.

56. *See, e.g.*, Sweet v. Rechel, 159 U.S. 380, 399, 16 S. Ct. 43, 48 (1895) (holding it is permissible for a condemnor to take property before just compensation is ultimately paid to the owner); *see also* State Highway Dep't v. Mitchell's Heirs, 142 Tenn. 58, 216 S.W. 336 (1919); City of Richmond v. Dervishian, 190 Va. 398, 411 (1950) (citing Bailey v. Anderson, 326 U.S. 203 (1945); Bragg v. Weaver, 251 U.S. 57 (1919)) ("That the requirements of due process do not inhibit the sovereign from taking physical possession of private property for public use in a

had the power to do so? Even when the legislature has not authorized certain condemnors to exercise the extraordinary quick take power, courts have judicially granted this power.[57]

Courts have largely ignored or discounted the hardships the quick take power imposes upon owners. For example, the condemnor may abandon the project after it takes the owner's property but before it pays the owner. This situation recently occurred when Dominion Energy and Duke Energy abandoned their multistate pipeline project—the Atlantic Coast Pipeline.[58] It is little solace to owners that they may recover damages if a condemnor, such as Dominion, has already razed buildings or cut through their land.[59]

Such abandonment is not mere speculation; Enron proved no company is too big to fail, and the Atlantic Coast Pipeline project proved the same for individual projects. Additionally, in the wake of COVID-19, condemnors have suspended or abandoned several projects. Moreover, a condemnor could become insolvent. This fact is especially concerning with private condemnors, as they are not backed by the public treasury.

Finally, and as explained above, in situations when the condemnor deposits less money than the owner's mortgage (i.e., times of economic downturns or depressed real estate markets), the owner has to relocate and has to carry the remainder of the mortgage on the old property. No reasonable owner would sell his or her property in times of economic downturn unless he or she absolutely had to sell. Instead, the owner would hold his or her property until the market recovered. Owners are not given this choice when the power of eminent domain is exerted upon them, forcing them to sell when the market is low.[60]

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condemnation proceeding prior to notice to the owner and in advance of a judicial determination of the validity of such taking has been settled by the decisions of the Supreme Court and the rulings of this court.").

57. *See, e.g.*, E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004) (stating that the court-created rules of civil procedure authorized courts to empower private condemnors to exercise the quick take power even in the absence of legislative authorization); Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, 910 F.3d 1130 (11th Cir. 2018); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489 (6th Cir. 2018).

58. *See Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, DOMINION ENERGY (July 5, 2020), https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline (announcing cancellation of the project).

59. *Sage*, 361 F.3d at 826 (stating "the company would be liable to the landowner for . . . any damages" if it abandoned its project after taking the property).

60. Imagine if the government could seize investment accounts when the market is low.

In at least one state, the law did not require condemnors to give owners notice when it took their property by quick take. Until 2017, Virginia law did not require the government to tell the owner when it took the owner's property.[61] Unless the government benevolently sent a copy of the certificate it filed when it took the property, owners would not know the government had taken their property until the bulldozers arrived. Before the Virginia General Assembly enacted laws requiring notice, the government vehemently defended its right to take property without notice.[62]

The Virginia Commissioner of Highways asserted that owners could check the courthouse records or call the highway department if they wanted to know if the Commissioner had taken their property.[63] The Commissioner's position is indicative of the attitude some condemnors have toward owners.

First, the Virginia Commissioner of Highways argued that the Constitution does not require condemnors to give owners notice when it takes their property by quick take.[64] The Commissioner went so far as to argue that it does not have to give owners notice of the taking even after it takes the property. It stated: "The only question before the Court is whether *post-recordation* notice that a certificate has been recorded is constitutionally required. The answer to that question is clear—it is not."[65] In its subsequently filed Reply brief, the Commissioner added, "While other forms of notice are obviously preferred, commencement of construction activity provides yet another form of notice that a certificate has been recorded"—i.e., the owner will know when the bulldozers arrive.[66]

Public outcry would almost certainly ensue. The result is no different when the government takes homes and business properties when the real estate market is low.

61. *See* VA. CODE ANN. §§ 25.1-306, 33.2-1020 (requiring condemnors to provide notice to the owner).

62. The Commissioner's strenuous opposition to a legal notice requirement was even more telling given the fact that notice would cost the Commissioner only the price of a postage stamp. The Commissioner argued that he gave owners notice as a matter of policy, which several owners contested, but the Commissioner apparently did not want to be legally bound to do so.

63. Comm'r of Highways Memo. in Support of his Demurrer and Plea in Bar at 7, Pahlavani et al. v. Comm'n of Highways, Case No. 96850 (Loudoun Co. Cir. Court 2016) [hereinafter Comm'r of Highways Memo] (contending "the Landowners could easily determine whether a certificate has been recorded—by checking the land records or simply asking VDOT").

64. *Id.* at 12–14.

65. *Id.* at 5 (emphasis added).

66. Comm'r of Highways Reply Memo. at 11 n.14, Pahlavani et al. v. Comm'n of Highways, Case No. 96850 (Loudoun Co. Cir. Court 2016).

Second, the Commissioner was so resolute in his position that owners are not entitled to notice that he asserted the owner's suit demanding such notice was unnecessary and a waste of judicial resources.[67] The Commissioner stated: "The Commissioner hopes the Court will press the Landowners to explain why they even filed their lawsuit. It seems unnecessary . . . and both the Court and the Commissioner could better devote resources elsewhere."[68] In other words, how dare a landowner demand to receive notice when the Commissioner takes his property!

Third, the Commissioner contended that courts should not give strict scrutiny to statutes infringing on property rights even though the Commissioner admitted that Virginians amended their constitution in 2012 to expressly affirm that private property is a "fundamental right."[69] According to the Commissioner, other fundamental rights should get strict scrutiny, but not property rights.

While the court in *Pahlavani* did not agree with the Commissioner's arguments, at least one Virginia court found no problem with the lack of notice in Virginia's statutes.[70] Apparently, the arrival of the bulldozers was good enough. Thankfully for Virginians, as multiple lawsuits challenging the lack of notice were making their way through the legal system, the Virginia General Assembly decided to correct this obvious problem.[71]

The quick take power may allow the government or other condemnors to acquire property more quickly. It may also allow the government to build its project more quickly. However, the quick take power sacrifices the rights and concerns of the owner on the altar of expediency. Once again, individual owners suffer uncompensated losses for the alleged public good, even when that good is the profit of a private company.[72]

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67. Comm'r of Highways Memo, *supra* note 63, at 6.

68. Comm'r of Highways Memo, *supra* note 63, at 6.

69. Comm'r of Highways Memo, *supra* note 63, at 17–18 (stating "the Court should not use the 'strict scrutiny' test" even though "Article I, Section 11 [of the Virginia Constitution as amended in 2012] now characterizes the right to private property as being a fundamental right").

70. Order, Gottlieb v. City of Suffolk, Case No. CL16-208 (City of Suffolk Cir. Ct. Dec. 20, 2016) (sustaining the city's Plea in Bar asserting that notice is not legally required).

71. VA. CODE ANN. § 25.1-306 (2021); VA. CODE ANN. § 33.2-1020 (2021).

72. Gas companies asking courts for the quick take power often argue that having to take property through the normal eminent domain process would result in increased costs for their projects. These companies contend that they need the owners' properties immediately—before the companies pay the amount determined to be just compensation. Rather than require these

VI. THE LAW ALLOWS THE GOVERNMENT TO ENGAGE IN COERCIVE TACTICS DESIGNED TO LITIGATE OWNERS INTO SUBMISSION

While some hardships imposed upon owners stem from the unavoidable nature of eminent domain, others are the direct and deliberate result of the government's actions. The lack of disclosure is not the sole way that some condemnors play "fast and loose" with owners. For years, some condemning authorities have engaged in a litigation tactic that owners and their counsel have affectionately dubbed "the leg sweep" or "the bait and switch."[73]

Here is how this tactic works. The condemnor obtains an appraisal and makes the owner an offer. If the owner rejects the offer, the condemnor deposits its appraised value into court and immediately takes title and possession of the owner's property. The owner has to leave the property. After the owner vacates the property but before trial, the condemnor obtains a lower appraisal, often from a select group of appraisal firms.

The condemnor then tells the owner that he must accept the first appraised amount or have to pay money back to the condemnor—if the court awards the property for an amount less than the amount the condemnor previously said the property was worth. Moreover, the condemnor asks the court to exclude any evidence of the original appraisal the condemnor used when it evicted the owner. The condemnor does not want the jury to hear about its original opinion of value or the amount it previously stated was just compensation and paid into court.

This practice is extremely coercive, as the owner faces the prospect of having to pay back the money he was paid when he had to leave his property. Oftentimes, the owner has already used this money to buy his replacement home or business property or to pay toward the mortgage on the property that was taken. Sometimes the owner is

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companies to engage in better planning, courts shoulder individual owners with the burden of the gas companies' poor planning and failure to appropriately schedule their projects.

73. *See* Ramsey v. Comm'r of Highways, 770 S.E.2d 487 (Va. 2015); Coleman v. Miss. Transp. Comm'n, 159 So. 3d 546, 551 (Miss. 2015); Redding v. Miss. Transp. Comm'n, 169 So. 3d 958 (Miss. Ct. App. 2014); Dept. of Transp. v. Frankenlust Lutheran Congregation, 711 N.W.2d 453, 460 (Mich. App. 2006); Ark. State Highway Comm'n v. Johnson, 780 S.W.2d 326, 330 (Ark. 1989); Thomas v. State, 410 So.2d 3, 5 (Ala. 1981); United States v. 320.0 Acres of Land, 605 F.2d 762, 825 (5th Cir. 1979); *see also* NICHOLS ON EMINENT DOMAIN, Ch. 18 § 18.12[1] (Matthew Bender, 3d ed., 2013).

stuck paying two mortgages (i.e., if the amount originally paid was less than the mortgage)[74] until he or she receives full compensation via a trial or settlement. Under this tactic, the law allows the condemnor to pay the owner for his property and then renege on the price only after the condemnor has taken possession and forced the owner to vacate. This tactic is neither novel nor new. Condemnors have employed it for years.[75]

As if the bait and switch alone was not bad enough, some lower courts have not allowed the owner to tell the jury about the condemnor's original appraisal and statement of value. The only appraisal the jury heard in such instances was the condemnor's latter, lower appraisal.[76] Fortunately for owners, appellate courts that have addressed this tactic have seen through it.[77] While not forbidding the tactic, these courts have held that the owner is entitled to tell the jury about the condemnor's initial appraisals and statements of value.[78] Thus, the owner is at least entitled to a fair fight in which the jury is permitted to hear all the evidence, not just the evidence the condemnor wants it to hear.

While some may argue that this tactic is designed to force owners to be reasonable, such rationale does not justify the action. No reasonable person permitted to sell his property voluntarily would sell at the lower end of the price spectrum. He would sell at the highest price he can get. Since the condemnor's duty is to make the owner whole and to place the owner in the same position he would occupy if the taking had not occurred, the condemnor should not seek to get the owner to part with his property for the lowest price possible.

Condemnors should not seek to "win" at the owner's expense. "Just as the Government's interest 'in a criminal prosecution is not that

74. During economic downturns, it is not uncommon for payments to be less than the mortgage. Eminent domain forces the owner to sell his property during this time, and the owner is not permitted to hold his property until the real estate market recovers—as he would without the use of eminent domain to force the sale of his property.

75. *See, e.g.*, *320.0 Acres*, 605 F.2d 762.

76. Denying the jury the right to hear evidence about the condemnor's previous statement of value effectively perpetrates a fraud on the jury as the jury is asked to make a decision based on only half the story. Some jurors are none too happy to learn, only after making a decision, that they were not allowed to hear all the evidence.

77. *320.0 Acres*, 605 F.2d at 825 (stating "the Government is not completely free to play fast and loose with landowners telling them one thing in the office and something else in the courtroom.").

78. *See, e.g.*, *Ramsey*, 770 S.E.2d 487.

it shall win a case, but that justice shall be done,' so its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives."[79] The bait-and-switch tactic imposes yet another hardship on owners in eminent domain cases, one designed solely to litigate owners into submission.[80]

VII. THE LAW GUARANTEES THAT OWNERS CANNOT RECOVER THE MARKET VALUE OF THEIR PROPERTY

The Constitution requires just compensation, yet the law (as applied by the courts) guarantees owners cannot recover the market value of their property. If the government does not offer to pay market value, owners cannot recover it! The courts treat "Just Compensation" as if it were "just" compensation.

Courts often give flowery rhetoric to the requirements of just compensation. The U.S. Supreme Court has repeatedly stated that "'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."[81] It has also declared that just compensation "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[82]

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79. United States v. Certain Property Located in Borough of Manhattan, 306 F.2d 439, 452–53 (2d Cir. 1962) (citations omitted).

80. The owners did not argue the practice was unlawful but rather that the jury should be permitted to hear the evidence.

81. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473–74, 93 S. Ct. 791, 794 (1973); United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304, 43 S. Ct. 354, 356 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.").

82. Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960); United States v. Willow River Power Co., 324 U.S. 499, 502, 65 S. Ct. 761, 764 (1945) (stating "just compensation . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."). "'The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" United States v. Va. Elec. & Power Co., 365 U.S. 624, 631, 81 S. Ct. 784, 789 (1961).

Despite this judicial rhetoric, these same courts have expressed a willingness to tolerate undercompensation. The U.S. Court of Appeals for the Seventh Circuit declared that takings are not unlawful simply because they fail to fully compensate the owner. The court noted: "The fact that 'just compensation' tends systematically to undercompensate the owners of property taken by eminent domain underscores the fact that such a taking is not a wrongful act."[83] The U.S. Supreme Court announced that it is willing to "tolerate" undercompensation.[84] It "acknowledged that, in some cases, th[e] standard [applied by the courts] fails fully to indemnify the owner for his loss" but then added that it is "willing to tolerate such occasional inequity . . . because of the need for a clear, easily administrable rule governing the measure of 'just compensation.'"[85]

Thus, the owner's ability to recover just compensation is dependent upon the benevolence of the taker. Unless a condemnor makes an owner a fair market value offer (or, in partial taking cases, an offer that includes the depreciation in the value of the property remaining after the taking), the owner cannot recover the fair market value of the property taken from him or her. This statement is not hyperbole; it is a fact! Owners cannot be said to receive "just compensation" if they cannot recover (1) the fair market value of the property taken from them or (2) in partial taking cases, the depreciation in the value of the property they are left with after the taking (i.e., the difference in the market value of such property before and after the taking). The court-created non-compensable damages doctrine and the lack of reimbursement for litigation expenses are the major reasons owners cannot receive just compensation despite the constitutional mandate.

A. The Court-Created Non-compensable Damages Doctrine Denies Owners the Ability to Obtain Just Compensation

The reason owners cannot recover just compensation is because courts have created rules that substitute fictional value for market value. These rules prohibit jurors from considering facts and circumstances that buyers and sellers would consider in a voluntary sale.

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83. United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010).

84. Kirby Forest Indus. v. United States, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194 (1984) (acknowledging that the law as applied by the courts "does not make the owner whole").

85. *Id.*

Consequently, owners suffer uncompensated damages and depreciation in the value of their property that they would not suffer in a voluntary sale, i.e., a condemnation discount.

Courts do not deny these damages exist. Rather, they have labeled them as "non-compensable damages."[86] Condemnors have long seized on these court-created rules that reduce what condemnors must pay and that simultaneously shortchange owners.[87] Rather than seeking to fully compensate owners, many condemnors have acquisition manuals with entire chapters dedicated to the damages they can inflict on owners without compensation, i.e., "non-compensable damages."[88]

Courts employing the non-compensable damages doctrine may claim to use market value as the standard of just compensation, but they do not. These courts require the parties to substitute fiction for fact. They require the jury to value the property according to this fiction.[89] They reject ordinary appraisals used in the marketplace and replace them with eminent domain appraisals that fail to include the facts and circumstances considered in the marketplace.

Although courts have rejected fair market value in practice, they have universally professed to adopt fair market value as the standard for determining just compensation for forced eminent domain sales.[90] The U.S. Supreme Court has stated that "fair market value constitutes just compensation."[91]

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86. The principle of just compensation and the notion of non-compensable damages are mutually exclusive.

87. *See, e.g.*, Utah Dep't of Transportation v. Target Corp., 2020 UT 10, 459 P.3d 1017 (involving a condemnor arguing for the imposition of non-compensable damages); State by Humphrey v. Strom, 493 N.W.2d 554, 560 (Minn. 1992); Ryan v Davis, 201 Va. 79, 82, 109 S.E.2d 409, 412 (1959). "Experience has shown all too well the abuses which could thus be made of the privilege of condemnation." Comm'rs of Lincoln Park v. Schmidt, 386 Ill. 550, 564, 54 N.E.2d 525. 531 (Ill. 1944).

88. *See, e.g.*, OREGON DEP'T OF TRANSPORTATION RIGHT OF WAY MANUAL, § 5.450 (entitled "Non-Compensable Damages"); TEXAS ROW APPRAISAL AND REVIEW MANUAL, Chapter 3, § 3 (entitled "Non-compensable Items").

89. Worse yet for jurors is the fact that they make a decision without even knowing they were denied the right to hear all the relevant and meaningful evidence.

90. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015); United States v. Miller, 317 U.S. 369, 373–75, 63 S. Ct. 276, 280 (1943).

91. United States v. 50 Acres of Land, 469 U.S. 24, 33, 105 S. Ct. 451, 457 (1984); United States v. 564.54 Acres, 441 U.S. 506, 510–13, 99 S. Ct. 1854, 1857–58 (1979) (stating the court has adopted "fair market value to determine the condemnee's loss"); Ne. Ct. Econ. Alliance, Inc. v. ATC P'ship, 256 Conn. 813, 833, 776 A.2d 1068, 1080 (2001) ("just compensation is ordinarily calculated by determining the fair market value of the property").

> There are at least two methods by which just compensation in partial taking cases can be ascertained. The first is the before-and-after method of valuation, which computes damages to be the difference in the value of the entire parent tract before the taking and the value of the portion remaining after the taking. The second method computes damages as the value of the actual land taken plus the diminution in the value of the remaining land in the parent tract. Both methods take into consideration the loss of the part taken and severance damages to the remainder of the property left after the taking.[92]

In such cases, "[d]amages . . . are to be measured by the difference in market value of the respondents' land before and after the interference or partial taking."[93]

> Just compensation in cases involving a partial taking is generally the fair market value of the property taken plus all the damages which the residue suffers, including the diminution of the fair market value of the remainder. . . . if a condemnor acquires an easement by eminent domain, just compensation can be no less

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92. United States v. 5.65 Acres of Land, No. 7:08-CV-00202, 2020 WL 5105206, at *8 (S.D. Tex. Aug. 31, 2020).

93. Dugan v. Rank, 372 U.S. 609, 624–25, 83 S. Ct. 999, 1009 (1963); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332, n.27, 122 S. Ct. 1465, 1484 (2002) (stating the "underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation applies to partial takings as well as total takings"); State *ex rel*. Miller v. Filler, 168 Ariz. 147, 149, 812 P.2d 620, 622 (1991) ("In determining just compensation in a partial taking case, Arizona courts consider (1) the market value of the property actually taken by the condemnation and (2) the diminution in the remaining property's market value caused by the taking."); *see also* State by Comm'r of Transp. v. Weiswasser, 149 N.J. 320, 329, 693 A.2d 864, 868 (1997) ("One of two formulas may be used to calculate just compensation in a partial-taking case. The first measures damages as the market value of the land taken plus the difference before and after the taking in market value of the remainder area. The second set measures damages as the difference between the value of the entire tract before the taking and the value of the remainder area after the taking."); W. Va. Dep't of Highways v. Bartlett, 156 W. Va. 431, 440, 194 S.E.2d 383, 389 (1973) ("[T]he measure of damages in an eminent domain proceeding where parts of the land are taken is the fair market value for the land at the time it was taken, plus the difference in the fair market value of the property claimed to be damaged immediately before and immediately after the taking, less all benefits which may accrue to the residue from the construction of the improvement for which the land was taken."); Kendry v. Div. of Admin., State Dep't of Transp., 366 So. 2d 391, 393 (Fla. 1978) (stating that, in a partial taking case, "damages to the remainder . . . are measured by the reduction in value of the remaining property"); Greene v. D.C., 56 A.3d 1170, 1176 (D.C. 2012) (stating "when the government makes only a partial taking, just compensation requires consideration of any decrease or increase in market value to the land that is untaken").

> than the difference between the fair market value of the property before the easement is taken and its market value as burdened with the easement. . . . determination of just compensation must be based upon a determination of the fair market value of the property sought.[94]

Whether the case involves a full or partial taking or a fee taking versus an easement taking, courts have adopted the fair market value standard in their attempt to replicate the marketplace. This standard aims at determining the price a willing buyer and willing seller would agree upon in a voluntary sale. As market value is the standard, neither the condemnor nor the owner should stand on any better or worse footing than an ordinary buyer or seller would occupy in a voluntary sale.

A simple analogy reveals that court-created rules create a fiction that does not replicate the marketplace, but instead puts the parties on much different footing than they would occupy in a voluntary sale. Suppose a developer sought to purchase part of an owner's front yard for a sewage plant project to serve the developer's new residential community. The developer needed the owner's property to build a service road to the sewage plant. Suppose further that, while the service road will be on the owner's property, the actual sewage pond will not be on the owner's property. The pond will sit about 100 feet from the owner's front door but will be physically located on his neighbor's property.

In determining the sales price for the land, the owner would certainly consider the fact that his home will sit next to a sewage pond after the sale to the developer. The developer could not prohibit the seller from considering this fact. Moreover, the developer must either pay a price that contemplates this change or build his service road elsewhere.

If the developer moves the service road onto one of the owner's neighbor's parcel, that neighbor will likewise consider the sewage plant in setting the sales price. No reasonable owner would sell his property without considering the fact that his house will sit next to a sewage plant after the sale. The developer could not force any of the owners to sell their property without contemplation of the impact from the project.

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94. Unger v. Ind. & Mich. Elec. Co., 420 N.E.2d 1250, 1259–60 (Ind. Ct. App. 1981).

This result should not be different when it is the government taking the property by force rather than the developer purchasing it voluntarily. Yet, courts that apply the non-compensable damages doctrine force owners to sell their property based on a fiction that the project will not exist and will not impact the property. This approach is not only contrary to the facts and conditions that actually exist, but it is also contrary to the way buyers and sellers would value the property in a voluntary sale as demonstrated in the developer analogy above.

The end result of these court-created rules is that the government gets a condemnation discount. The government's discount is the owner's loss. The owner is not made whole under such a scenario as he or she suffers losses he or she would not endure in a market sale. Courts applying fictional value place the government on better footing than the developer and place the owner on lesser footing than an owner in a market sale.

For example, if it were the government taking the owner's property to build a service road to a public sewage plant, some courts applying the fictional value standard would not allow the parties to consider the sewage pond. They would not allow the parties to consider the sewage pond because it is not on the owner's property. It would not matter that the government used the owner's property for its sewage project just like the developer in the example above used the owner's property for his or her sewage project. This analogy reveals that courts are using a fictional value standard rather than market value.[95]

The absurdity of the non-compensable damages doctrine was recently borne out in *Utah Department of Transportation v. Target Corp*.[96] In that case, the condemnor built an interchange with a bridge, and part of the bridge was on the owner's property. The condemnor argued that the court should parse out the different pieces of the bridge and that the jurors should be able to consider those pieces of the bridge that were on the owner's property but not those pieces that were not.[97]

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95. The fictional value imposed by courts is also unfair to the juror exercising his or her civic duty who believes he or she has determined market value only to learn after trial that the jurors were not told the actual facts and conditions of the property as it existed after the taking.

96. 2020 UT 10, 459 P.3d 1017.

97. *Id.* ¶ 2, 459 P.3d at 1019 (stating the condemnor argued that the owners "had failed to establish that their severance damages stemmed from the portion of the interchange situated on the claimants' property condemned by UDOT").

No buyer of the owner's property after the taking would break the bridge into parts and only consider those parts that are on the owner's property. The arguments in *Target* stand in stark contrast to the logical approach illustrated in the developer analogy above. Again, the developer analogy, unlike the approach urged by the condemnor in *Target*, is the approach buyers and sellers use in the marketplace.

Courts have relied upon faulty reasoning to support the non-compensable damages doctrine that results in a fictional value. These courts have argued that, when only part of an owner's property is taken, the owner should not receive compensation for damages resulting from the use of his neighbor's property because the owner cannot control what the neighbor does on his property.[98] These courts also argue that the owner whose property is taken should not receive compensation because the neighbors (whose property is not taken) do not recover such damages.[99]

The developer analogy above bears out the fallacy in this rationale. The arguments in support of the non-compensable damages doctrine are contrary to what happens in the marketplace. Again, if a developer needed part of an owner's property to build a project, the owner would not sell his property without considering what the developer would be doing—regardless whether the project would be entirely, or only partially, on the owner's property. Similarly, the developer would have to pay the person whose property it needed but would not have to pay the neighbors unless it needed their property, too. None of the rationale used by the courts support any different result or approach when the government takes an owner's property by force.

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98. Campbell v. United States, 266 U.S. 368, 45 S. Ct. 115 (1924); DuBois v. State, 54 A.D.2d 782, 782, 387 N.Y.S.2d 753, 755 (1976) (stating "damages are plainly limited to those which arise by reason of the use to which the State puts the property taken and do not encompass those which result from the taking of neighbors' land"); *but see* Lee Cnty. v. Exch. Nat. Bank of Tampa, 417 So. 2d 268, 269 (Fla. Dist. Ct. App. 1982) (noting the many exceptions to the rule); State *ex rel.* Missouri Highway & Transp. Comm'n v. Horine, 776 S.W.2d 6, 11–12 (Mo. 1989) ("Considering these rules, we believe the better policy is to permit persons whose land is taken as part of a single public improvement project and who are part of a condemnation action to recover their consequential damages even though it is not the taking of their land that is the direct cause of their damage.").

99. *See* Foster v. City of Augusta, 165 Kan. 684, 690–91, 199 P.2d 779, 784 (1948) ("When it takes only a part of the owner's property it pays the full price for the part taken and such damages as result to the owner's property by reason of the fact that a part of it is taken. Owners of other property nearby or adjoining that which is taken are not entitled to receive any compensation, though in fact they may sustain some loss or injury, such being regarded as consequential and damnum absque injuria.").

Ironically, courts have been willing to tolerate inequity among neighbors when it resulted in lower compensation to the owner but have rejected supposed inequity when it resulted in higher compensation to the owner.[100] In *Miller*, the Court stated that an owner is not entitled to recover any increase in value caused by the project even though his neighbors whose property is not taken get to enjoy the increase in value. The Court added that the neighbors, unlike the owner, would be entitled to recover the increased value caused by the project if their property was later taken by the government.[101]

Courts have readily acknowledged that, while it may be unequal to allow consideration of appreciation caused by a public project (i.e., enhancement or benefits), it is not unjust. For example, an owner whose property is taken may suffer $100,000 in damages caused by the project but those damages are offset by $100,000 in appreciation also caused by the project. It is a net zero gain or loss for such owner. Meanwhile, the owner's neighbor, whose property is not taken, enjoys the full measure of the $100,000 in appreciation caused by the project because the neighbor did not lose any of his or her property. Courts have recognized this result is unequal but not unjust.

As the Virginia Supreme Court explained:

> It is true the law may operate unequally as most human laws do. One class of persons may receive equal benefits with another, and may contribute less or lose nothing. But so long as the other class receives a fair equivalent for losses, how can it be said that the property of those who belong to this class is taken without consideration, and that in violation of the Constitution? The simple fact is, that they get the worth of their property, while others, who lose no land, share the benefit. This is inequality, but not injustice. It is the case of the laborers in the vineyard, who bore the burden and heat of the day, but received only the penny which was given to the eleventh hour man.[102]

Just as it may be unequal but not unjust to allow consideration of the project when the project increases an owner's property value, it is not unjust to allow consideration of the project when it decreases

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100. United States v. Miller, 317 U.S. 369, 376, 63 S. Ct. 276, 281 (1943).

101. *Id.* at 376, 63 S. Ct. at 281 ("Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity.").

102. Town of Galax v. Waugh, 143 Va. 213, 237, 129 S.E. 504, 511 (1925); *see also* Dep't of Transp. v. Rowe, 353 N.C. 671, 680, 549 S.E.2d 203, 210 (2001).

the owner's property value.[103] Indeed, that is precisely what happens in the marketplace. If a developer needs part of a person's property to build a project, the developer must pay the owner for any impact the project will have on the owner's property. The developer does not have to pay the neighbors whose property it does not need for the project.

The rationale of courts attempting to justify undercompensation merely underscores the owner's plight as many courts seemingly view themselves as a defender of the public purse rather than a constitutional check or balance on the power of the other branches of government.[104] In *Symons*, the California Supreme Court explained: "The courts have assumed the burden and responsibility of seeing to it that the cost of public improvements involving the taking and damaging of private property for public use be not unduly enhanced."[105] The court denied the owner recovery of damages caused by the project because it "would impose a severe burden on the public treasury and, in effect, place an embargo upon the creation of new and desirable roads."[106] If it saved the government money, the court was willing to saddle the individual owner with the entire cost of the damages rather than requiring the public to bear its proportionate share.

"Just and adequate compensation should be a two-way street. The public should not expect to finance its improvements by the expropriation of private property. Nor should any citizen expect to be *enriched* (as opposed to *compensated*) from the public treasury."[107] It follows

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103. Any argument that the neighbor in this scenario ends up with a net loss in the value of his or her property merely begs the following question: Why should any individual bear losses caused by a public project rather than the public sharing equally in such costs? Moreover, unlike a person whose property is needed for a public project, the neighbor whose property is not needed does not have to surrender part of his or her property.

104. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 860–62, 357 P.2d 451, 454–55 (1960) (superseded by statute); *see also* United States v. Merchants Matrix Cut Syndicate, 219 F.2d 90, 98–99 (7th Cir. 1955) (stating "condemnation juries . . . commence deliberations in a positive awarding-state-of-mind[,]" that many "envision the public treasury as fair game in [condemnation] proceedings[,]" and that "[a]ll too frequently, profit seeking motives creep into condemnation cases"); W. Va. Dep't of Highways v. Berwind Land Co., 167 W. Va. 726, 737, 280 S.E.2d 609, 616 (1981) (explaining that courts have applied certain rules, such as the unit rule, to "reduce the likelihood of . . . exorbitant awards of compensation by juries"); Richmond v. City of Hinton, 117 W. Va. 223, 185 S.E. 411, 412 (1936) ("If damages could be recovered in such circumstances, crushing burdens would be imposed on the public treasury.").

105. 54 Cal. 2d at 861, 357 P.2d at 455.

106. *Symons*, 54 Cal. 2d at 862, 357 P.2d at 455.

107. Metro. Atlanta Rapid Transit Auth. v. Funk, 263 Ga. 385, 388, 435 S.E.2d 196, 200 (1993).

that neither the owner nor the condemnor should be on any greater or lesser footing than a buyer and seller in a voluntary sale.

Nevertheless, courts have been more apt to look at the owner with a skeptical eye than at the party taking the property, resulting in rules that foster systemic undercompensation.[108] Courts are seemingly less concerned about undercompensation than they are about overcompensation. The U.S. Court of Appeals for the Fourth Circuit explained:

> "Just compensation" is that amount of money necessary to put a landowner in as good a pecuniary position, but no better, as if his property had not been taken. Eminent domain is an indispensable means of constructing public improvements. No citizen has a right to thwart the public use through obstinance, or to reap a windfall from the public treasury because his land must be taken. Overcompensation is as unjust to the public as undercompensation is to the property owner.[109]

Courts with an eye toward protecting the public purse rather than applying the plain meaning and spirit of "just compensation" often fall prey to applying a double standard. For example, courts routinely apply a "fictional" value when it reduces the amount owed to the owner. Yet, courts have been quick to dismiss a "fictional" value when it increases the amount owed to the owner.[110]

In *ATC Partnership*, the court stated that certain facts related to contamination should be considered over the owner's objection because "to conclude otherwise could result in a fictional fair market value of the condemned property."[111] Just as "[i]t blinks at reality to say that a willing buyer would simply ignore the fact of contamination," it likewise blinks at reality to say a willing buyer would blink at the project that will exist after the taking.[112] The former (i.e., contamination) decreases the amount the government must pay the owner

108. United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) (acknowledging that the judicial application of just compensation "systematically . . . undercompensate[s]" property owners).

109. United States v. 69.1 Acres of Land, 942 F.2d 290. 292 (4th Cir. 1991).

110. Ne. Ct. Econ. Alliance, Inc. v. ATC P'ship, 256 Conn. 813, 843, 776 A.2d 1068, 1085–86 (2001) (stating that certain facts related to contamination should be considered over the owner's objection because "[t]o conclude otherwise could result in a fictional fair market value of the condemned property.").

111. *ATC P'ship*, 256 Conn. at 843, 776 A.2d at 1085–86.

112. *ATC P'ship*, 256 Conn. at 833–34, 776 A.2d at 1080.

whereas the latter (i.e., the project) increases the amount the government must pay.

Similarly, some courts have gone so far as to hold that certain facts (i.e., the project) can be considered if it decreases just compensation but not if it increases just compensation. In other words, the project can be considered for enhancement but not for damages.[113] These courts allow jurors to consider the impact a public project has on the value of the property remaining after the taking only when the project enhances the value of the property but not when the project damages the owner's property. Rather than basing just compensation on the fixed principle of indemnity, or even the difference in the actual market value of the property before and after the taking, these courts base just compensation on how much the government has to pay.

Some courts and legislators have, at least partly, begun to see through the fallacy of the court-created non-compensable damages doctrine.[114] Some states, such as Utah and Virginia, recently enacted statutes that did nothing more than state that the parties can consider everything a buyer and seller would consider in a voluntary sale.[115] The fact that such statutes had to be enacted is a seeming indictment on lawyers and the courts. After all, what reasonable person asked to determine market value would not consider things a buyer and seller would consider? Can you imagine telling the average person that he or she must determine market value, but then telling them that they cannot consider things market participants would consider? Yet, that is precisely what courts routinely tell jurors in many eminent domain courts.

The notion of non-compensable damages is inconsistent with the principle of "just compensation." It is also contrary to "the basic equitable principles of fairness" embedded in the constitutional

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113. *Compare* Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941) (allowing consideration of general enhancement or damages from the project) with State Highway & Transp. Comm'r v. Lanier Farm, Inc., 233 Va. 506, 357 S.E.2d 531 (1987) (disallowing consideration of damages from the project).

114. *See, e.g.*, S.C. Dep't of Transp. v. Powell, 424 S.C. 206, 818 S.E.2d 433 (2018), *reh'g denied* (Sept. 28, 2018); Utah Dep't of Transp. v. Admiral Beverage Corp., 2011 UT 62, 275 P.3d 208 (2011); Los Angeles County Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 820–21 (Cal. 1997) (stating that damages "can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property" and that "the landowner . . . need only prove the value of his or her property has been impaired, not that other members of the public are not similarly affected").

115. *See* Utah Code Ann. § 78B-6-511; VA. CODE ANN. §§ 25.1–230.

requirement of just compensation.[116] As the U.S. Court of Appeals for the Fourth Circuit reasoned, jurors should be permitted to consider

> such matters [as] would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. . . . It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.[117]

If just compensation is truly "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," owners must be permitted to consider everything a buyer and seller would consider in setting a price in a voluntary sale.[118] If "the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking," owners must be permitted to consider the facts and circumstances that buyers and sellers would consider.[119] Anything less is a fictional value that requires the owner to part with his property at a condemnation discount.

B. Litigation Expenses Deny Owners the Ability to Obtain Just Compensation

Another reason owners cannot obtain just compensation is that the law in many jurisdictions does not allow the owner to obtain reimbursement for appraisal and attorney fees and other costs—even if the owner proves the condemnor's offer was grossly below market value and thus constitutionally insufficient.[120] Like the non-compensable

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116. United States v. Fuller, 409 U.S. 488, 490, 93 S. Ct. 801, 803 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

117. Cade v. United States, 213 F.2d 138, 140–41 (4th Cir. 1954).

118. Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960).

119. Kirby Forest Indus. v. United States, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194 (1984).

120. *See, e.g.*, Utah Dep't of Transp. v. Boggess-Draper Co., LLC, 2020 UT 35, ¶ 43, 467 P.3d 840, 849 (holding "just compensation under . . . the Utah Constitution . . . does not . . . cover costs incurred in defending a condemnation action"); *see also* United States v. Bodcaw Co., 440 U.S. 202, 203–04 (1979) (stating "[a]ttorneys' fees and expenses are not embraced

damages doctrine, the failure to reimburse owners for their litigation expenses guarantees that owners cannot receive just compensation unless the government benevolently makes a fair offer that approximates market value. If the government does not make such an offer, the owner has a choice: either (1) take the government's offer and accept less than market value or (2) be sued by the government and forfeit a portion of market value to litigation expenses.[121]

Neither choice gives the owner an opportunity to recover just compensation or market value.[122] The owner's conundrum is exacerbated in cases where the condemnor engages in protracted litigation that is costly to both parties. The owner is not reimbursed for litigation expenses regardless of the condemnor's actions, and some condemnors seize on this fact.

Suppose an owner's home is worth $200,000, and the condemnor's best offer is $160,000. When the owner rejects the offer, the condemnor sues him to take his property. The owner has to hire an attorney and an appraiser. The court determines the value of the home is $200,000, but the owner has to forfeit $25,000 to litigation expenses.[123] The owner receives $175,000 for a $200,000 home he

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within just compensation"); Ryan v Davis, 109 S.E.2d 409, 414 (1959); Ellis v. Ark. State Highway Comm'n, 2010 WL 1720610 (Ark. 2010) (declining to reconsider the rule that just compensation does not require reimbursement for litigation expenses); Comm'rs of Lincoln Park v. Schmidt, 386 Ill. at 563–64, 54 N.E.2d at 531–32 (explaining that, absent reimbursement for expenses in at least some circumstances, condemnors have the power to litigate owners into submission). Courts have denied reimbursement for litigation expenses on the grounds that "just compensation is for the property, and not to the owner." *Bodcaw*, 440 U.S. at 203. This assertion ignores the nature of the Bill of Rights, which protects persons, not things. Just compensation is a personal right belonging to the owner, not the property. *See* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 460 (1910) (acknowledging that just compensation is a personal right of the owner and that "the question [in such cases] is, What has the owner lost?").

121. State v. Johnson, 282 N.C. 1, 22, 191 S.E.2d 641, 655 (1972) (stating that "in order to avoid the expense . . . of the condemnation proceeding . . . the [owner] may accept less" than fair market value).

122. Any argument that the Constitution merely requires the government to pay market value, as opposed to the owner receiving market value, ignores several key points. First, unlike other rights, just compensation is a constitutional right to money. It guarantees the owner a right to a certain amount of money. Second, the government can deprive the owner of this monetary right through its own actions, i.e., making a constitutionally insufficient offer and then forcing the owner into costly litigation when he does not accept it. Third, the right to just compensation, like other rights in the Bill of Rights, is an individual right for the benefit and protection of the owner, not the government.

123. Litigation expenses include attorney and expert witness fees, appraisal fees, exhibit costs, court reporter fees, and other expenses associated with trial.

did not want to sell.[124] Has the owner received market value? Has the law put the owner in as good a position as he would have occupied absent the taking?

It is difficult to perceive why one who is forced into court through no fault of his own should not be reimbursed for litigation expenses when (1) he proves the government was wrong and (2) he cannot receive the constitutionally guaranteed amount of money (i.e., just compensation or market value) absent reimbursement for expenses caused solely by the government.

Fortunately, at least some courts and judges have recognized that just compensation cannot be achieved without reimbursement for litigation expenses. The Florida Supreme Court declared:

> Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received "just compensation" for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value. The plight of the land owner in this situation is well stated . . . as follows: He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the Legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right.[125]

As Justice Reynoldson of the Iowa Supreme Court aptly stated:

> It is illogical to contend . . . that costs in a condemnation proceeding should be treated as costs in any other action. This is no ordinary lawsuit. We are here breathing life into a constitutional right—the right to possess and protect property. We are further

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124. Even if one assumes the owner would incur 6% realtor fees if he sold his home voluntarily, the owner of a $200,000 home would recover $188,000, far more than the amount he would recover in the condemnation scenario.

125. Dade Cnty. v. Brigham, 47 So. 2d 602, 604–05 (Fla. 1950) (citations omitted).

> charged with enforcing a constitutional mandate that such property shall not be taken without payment of just compensation. [I]n the condemnation proceeding the condemnee . . . has admittedly done no wrong, broken no promises and committed no negligence. He has only exercised his constitutional right to possess property—which in the condemnation situation, unfortunately, is property coveted by another. . . . [I]t cannot be said that he has received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property.[126]

Other courts have refused to address the undeniable injustice caused by the lack of reimbursement.[127] In *Bodcaw,* the U.S. Supreme Court stated: "Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. . . . But such compensation is a matter of legislative grace rather than constitutional command."[128] The Utah Supreme Court's recent decision in *Boggess-Draper* illustrates the reluctance of courts to address unjust decisions once established. Courts are not always quick to admit past mistakes. While the Utah Supreme Court did so in the context of eminent domain less than a decade ago,[129] that same court refused to revisit its prior decisions on litigation expenses, thereby perpetuating the injustice of undercompensation.[130]

Leaving the issue of reimbursement to the legislature in the face of the constitutional requirement of just compensation is like leaving the keys to the chicken coop with the fox. By punting on the issue or, worse yet, embracing undeniably unjust past case law, courts have left the issue of reimbursement for takings in the hands of the party with the power to take—the legislature.

The power of eminent domain has as much ability to destroy as the taxing power.[131] Courts should not interpret the Just Compensation Clause in a manner that allows the power to take to become the power to destroy. The lack of reimbursement for litigation expenses

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126. Peel v. Burk, 197 N.W.2d 617, 621–22 (Reynoldson, J., dissenting) (citing *Brigham*, 47 So. 2d at 604–05)).

127. *See Boggess-Draper*, 2020 UT at ¶¶ 39–48, 467 P.3d at 848–50.

128. United States v. Bodcaw Co., 440 U.S. 202, 204 (1979).

129. *See* Utah Dep't of Transp. v. Admiral Beverage Corp., 2011 UT 62, 275 P.3d 208 (2011).

130. *But see id.*; Cnty. of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).

131. McCulloch v. Maryland, 17 U.S. 316, 431 (1819) (stating "the power to tax involves the power to destroy").

empowers the government to destroy the owner's right to just compensation. In small takings, the litigation expenses can exceed the entire amount of just compensation.[132]

At least one court has implicitly recognized that litigation expenses can destroy an owner's right to just compensation. In *State by Commissioner of Transportation v. Hancock*,[133] the court held that the condemnor must fully disclose its valuation information because that was the only way to ensure the owner would not be subject to litigation expenses that would erase the compensation for the modest taking. The court explained:

> This matter does not involve substantial money. The State's offer of compensation totals $9550. The fact that the amount is modest highlights the significance of the principle involved. The statutory requirements of bona fide negotiations and reasonable disclosure are particularly important when minor property interests are being acquired by an exercise of the power of eminent domain. Condemnees subject to these takings can ill afford to hire attorneys and appraisers whose fees are not recoverable in a condemnation proceeding (except in circumstances not relevant here). They must be given every assurance that their government, spending, in part, their money, is treating them with absolute candor and fairness. Such assurance can be provided only if the government, when undertaking negotiations, fully discloses all of the information upon which it relies in making its offer. How else can its negotiations be bona fide?[134]

The U.S. Supreme Court has acknowledged: "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation."[135] If this statement amounts to more than mere rhetoric, courts must (1) reject the court-created non-compensable damages doctrine and (2) require reimbursement to owners for litigation expenses when the condemnor fails to make a constitutionally sufficient

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132. Owners in these situations have little choice but to accept whatever amount the condemnor offers.

133. 208 N.J. Super. 737, 738, 506 A.2d 855, 856 (Law. Div. 1985), *aff'd sub nom*, *Hancock*, 210 N.J. Super. 568, 510 A.2d 278 (App. Div. 1985).

134. *Id.* at 738, 506 A.2d at 856.

135. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365, 38 S. Ct. 504, 507 (1918).

offer that approximates market value.[136] Anything less "makes it impossible for [the owner] to obtain just compensation."[137]

VIII. THE FACT THAT THE LAWS ARE SKEWED AGAINST OWNERS SHOULD NOT BE A SURPRISE

A. The Burdens the Law Places on Owners Today—and the Imbalance Between Government Power and Individual Protections—Is the Result of Good Intentions

The current state of eminent domain law largely stems from what can be best described as the tyranny of good intentions. The owner's plight is not the result of ill-intentioned politicians or evil-minded bureaucrats. Just the opposite!

The sincere desire to use eminent domain for good, and to protect the public purse while doing so, has plagued the decision-making of legislators and other public officials alike, leading to a skewed system. Meanwhile, those exercising the power of eminent domain seek to save the taxpayers money when carrying out public projects. The problem is that they tend to forget that the property owner is a taxpayer, too. He or she should not be forced to bear a disproportionate share of the cost of the project even if it would result in savings for the rest of the taxpayers.

In their zeal to promote public projects and limit costs, public officials and their counsel can succumb to the danger of acting like they are ordinary buyers, attempting to obtain the property as

136. Denying an owner reimbursement for litigation expenses in effect penalizes the owner for exercising his constitutional right. As the High Court has recognized in other contexts, "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" Perry v. Sindermann, 408 U.S. 593, 597 (1972). The Court added that "[s]uch interference with constitutional rights is impermissible." *Id.* Just as "retention of a public position does not require, and cannot be conditioned upon requiring, an employee to completely forego the exercise of his rights to freedom of speech and association," *see* Perez v. Cucci, 725 F. Supp. 209, 232 (D.N.J. 1989), an owner's right to just compensation (i.e., to receiving the value of the property taken from him) cannot be conditioned upon the owner's willingness to forego this right by accepting a condemnor's constitutionally insufficient offer.

137. *McCoy*, 274 U.S. at 354.

cheaply as possible. Lost in this zeal is the individual owner and the constitutional duty to make each owner whole.[138] While their intentions may be good, the result is not.

B. The Powers of Eminent Domain Have Increased with the Growth of Government

As the size and scope of government has grown, so too have government projects and the use of eminent domain power. There have been periods of rapid expanse of eminent domain powers, such as the golden era for railroads near the turn of the twentieth century. For the most part, however, legislatures have gradually expanded powers of eminent domain, in turn chipping away at the protections for owners. Unfortunately for owners, courts have not heeded the warning in *Monongahela Navigation Co. v. United States*, where the court explained:

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[139]

Contrary to this declaration, courts have "liberally construed" government power while narrowly construing individual constitutional protections.[140] Meanwhile, legislatures have delegated vast powers of eminent domain to an array of public and private entities.[141]

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138. *See* Certain Property Located in Borough of Manhattan, 306 F.2d 439. 452–53 (2d Cir. 1962).

139. 148 U.S. 312, 325, 13 S. Ct. 622, 626 (1893).

140. *See* Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005) (broadly construing public use and the government's power of eminent domain); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238, 104 S. Ct. 2321, 2328, 81 L. Ed. 2d 186 (1984).

141. *See* JEREMY HOPKINS, THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA, A VIRGINIA

Today, a multitude of entities, some accountable to the people and others not, wield vast powers of eminent domain over the citizens and their private property. Even entities such as the mosquito control commission in Virginia have wielded this immense power.[142]

Each new delegation of eminent domain power creates another condemnor interested in preserving its power through the legislative process. Federal and state governments and their many agencies or departments, local governments and their various subdivisions and associations,[143] common carriers such as railroads, and utility companies routinely wield the eminent domain power. These entities have cohesive, powerful, well-funded, and politically connected lobbying organizations, trade organizations, and other groups that routinely participate in the legislative process. Meanwhile, the individual owner, who may face eminent domain once or twice in his lifetime, is busy working to provide for his family and to pay his taxes—taxes that are sometimes used to pay the very lobbyists seeking to limit his property rights.[144]

In some jurisdictions, public employees and tax-funded lobbyists participate in the legislative process to determine eminent domain laws.[145] Taxpayers in these jurisdictions fund the demise of their own property rights. Given this state of affairs, it is no wonder that eminent domain laws have become skewed in favor of power and against protections.

The fact that the intentions of those using or promoting the power of eminent domain may be good does not lessen the burdens imposed upon individuals facing this power. Indeed, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[146]

INSTITUTE FOR PUBLIC POLICY REPORT (2006) [hereinafter THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA].

142. *Id.*

143. Cities and counties have active lobbying arms through their associations like the municipal leagues and associations of counties.

144. *See* THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA, *supra* note 141. This author once heard it said that "Democrats do not believe in property rights, and Republicans do not want to pay for them." While this statement is too sweeping, there is much truth to the fact that owners have not traditionally been represented in the political process surrounding the making of eminent domain laws. With that said, there has been a recent movement in states like Virginia to change this situation.

145. *Id.*

146. Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564, 572–73 (1928).

C. As Courts Have Broadly Construed Powers of Eminent Domain and Narrowly Construed Individual Protections, It Has Further Skewed the Balance Between Powers and Protections

Courts are not immune from the same dangers that plague legislators and other public officials. These courts tend to view their role as a check on the individual's constitutional rights as opposed to a check on the government's power.[147] Although courts once exercised judicial review as a check and balance on the other branches of government,[148] some of today's eminent domain courts view themselves as a check on the owner and a protector of the other branches.[149] Imagine how an owner must feel in a court where one branch of government is taking his property, and the other branch of government presiding over the trial is there to protect the taker, not the constitutional rights of the owner!

This judicial phenomenon reminds this author of a debate between a prominent judge and a leading constitutional scholar. At one point, the judge declared, "I find it difficult to find rights that are not in the Constitution." The opponent responded, "I find that difficult to believe, judge, because you do not have any problem finding powers that are not in the Constitution."

This statement rings true with regard to private property rights where judicial construction has led to further imbalance between powers and protections. The Constitution once provided a sea of liberty with mere islands of government power, but the Constitution as construed by the courts today consists of a sea of government power with only islands of liberty.[150] Thomas Jefferson's warning that "[t]he natural progress of things is for the government to gain ground and

147. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 861, 357 P.2d 451 (1960) (stating "courts have assumed the burden and responsibility of seeing to it that the cost of public improvements involving the taking and damaging of private property for public use be not unduly enhanced").

148. *See* Marbury v. Madison, 5 U.S. 137 (1803).

149. *See, e.g.*, *Symons*, 54 Cal. 2d 855, 357 P.2d 451.

150. Georgetown law professor Randy E. Barnett, coined the phrase and discussed the topic of islands of power in a sea of liberty (and vice versa) in his book, *Restoring the Lost Constitution*. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (1st ed. 2004). As Profession Barnett stated, "The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers." *Id.* at 1.

for liberty to yield" has proven prophetic, especially with regard to property rights.[151]

The infamous *Kelo* case illustrates the expansion of power and contraction of protections. In *Calder v. Bull*,[152] the Court noted that "a law that takes property from A. and gives it to B. . . . is against all reason and justice." In 2005, the Court declared that government can take one person's property (Susette Kelo's home) and give it to another (Pfizer Inc.).[153] The Court reasoned that such government action was legal because it created more jobs and increased tax revenue.[154] Once again, the Court eradicated the protections for the individual because it felt it was better for the public at large.

Eminent domain powers that are unquestioned today would have been unthinkable in years past.[155] Even the quick take power, which is universally accepted today and used almost exclusively by some condemnors, was once questionable.[156]

Anyone that doubts the courts' narrow construction of property rights protections need only spend a day or two in the trial courts. One trial court's construction of a seemingly clear constitutional restriction is indicative of the courts' approach. The question presented to the court was: "Whether Article I, Section 11 of the Constitution of Virginia limits the Commissioner to taking only the property necessary to achieve the public use?"[157] The court acknowledged: "The voters amended Article I, Section 11 of the Constitution of Virginia in 2012 by adding, '[n]o more private property may be taken than necessary to achieve the stated public use.'"[158] It then concluded:

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151. Letter from Thomas Jefferson to Edward Carrington, May 27, 1788, *in* THE PAPERS OF THOMAS JEFFERSON, 13:208–09.

152. 3 U.S. 386, 388 (1798).

153. Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005).

154. *Id.*

155. *See, e.g.*, Yarborough v. N.C. Park Comm'n, 196 N.C. 284, 145 S.E. 563, 569 (1928) (stating "a proposition to take private property . . . for a public park would formerly have been regarded as a novel exercise of legislative power, but now the validity of legislative acts erecting such parks and providing for their cost is uniformly upheld") (citing Shoemaker v. United States, 147 U. S. 282, 297, 13 S. Ct. 361 (1893)). The court noted that "the old doctrine [limiting the government's eminent domain power] is now little more than a theory or a canon of construction." *Yarborough*, 196 N.C. at 292, 145 S.E. at 569.

156. *See* Sweet v. Rechel, 159 U.S. 380, 399, 16 S. Ct. 43, 48 (1895) (determining the constitutionality of the quick take power).

157. Comm'r of Highways v. Sadler, No. CL14-292, 2016 WL 1390274, *1 (Va. Cir. Ct. Mar. 16, 2016).

158. *Id.* at *2. Amongst other provisions in the constitutional amendment, Virginians had to add a provision reaffirming that private property is a fundamental right because courts had

"This Court is not convinced by the respondent's argument that amendment of Article I, Section 11 limits the Commissioner to take no more property than that which is necessary to achieve the stated public use."[159]

It is difficult to perceive a more limited construction of the constitutional amendment than the one the court provided there. After all, the court concluded that "no more private property may be taken than necessary to achieve the stated public use" did not "limit[] the Commissioner to take no more property than that which is necessary to achieve the stated public use."[160]

Condemnors arguing against compensation frequently seize on the judiciary's tendency to view itself as the protector of the public purse. In *Arkansas Game & Fish Commission v. United States*, the Court explained: "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest."[161] The Court further recognized that, despite these arguments, the "sky did not fall" as predicted by condemnors seeking to avoid payment of compensation.

Any argument that awarding just compensation for depreciation caused by the project would increase the costs of public projects merely admits that condemnors have been shortchanging owners. If compensating owners for depreciation to their property increases the cost of a project, it means only that individual owners have been shouldering this cost alone—as opposed to the public at large. The cost of public projects does not change. The only thing that changes is who pays for it.[162] Does the individual forced to surrender his property pay this entire cost alone or does the public, for whom the property is taken, share in this cost?

In *Tidewater Railway Co. v. Shartzer*,[163] the Virginia Supreme Court was faced with the argument that allowing damages from a

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not given property rights the protections afforded other fundamental rights or the heightened judicial scrutiny given to infringements upon other fundamental rights. The courts had treated private property as something other than a fundamental right.

159. *Id.* at *3.

160. *Id.*

161. 568 U.S. 23, 36–37, 133 S. Ct. 511, 521 (2012).

162. *Id.* at *2. The damages caused by the project are part of the costs. The fact that some courts do not require the public to reimburse the owner for these costs does not change the fact that such costs exist.

163. 107 Va. 562, 573–74, 59 S.E. 407, 411 (1907).

railroad project would "give rise to an indefinite number of claims."[164] The court stated that "this contention . . . is without merit."[165] It then explained,

> If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £>>1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?[166]

IX. THE QUESTION OF JUST COMPENSATION GOES FAR BEYOND MONEY

Some may say that just compensation is merely a question about money. Nothing could be further from the truth. Tell the farmer who lost the land that had been in his or her family for six generations, the mother or father that just lost their family's home, or the small business owner that just lost his or her shop that just compensation is only about money.

The right to just compensation extends far beyond mere dollars and cents. It impacts people and affects their lives forever. In too many instances, those individuals impacted by eminent domain cannot recover enough to restore what they lost. They are not, in the words of the court, put in the same monetary position they occupied before the taking.

The protections afforded to the right to just compensation, and property rights in general, are one of the most telling indications about the nature and character of a government and the freedoms

164. *Id.*
165. *Id.*
166. *Id.* at 573–74, 59 S.E. at 411.

of its people.[167] While courts once understood this fact, they have seemingly forgotten it. In *Monongahela Navigation Co. v. United States*, the United States Supreme Court declared:

> The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance, for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.[168]

Private property and the venerable right to just compensation is one of the last barriers the individual has against the masses and the prevailing political winds of the moment.[169] Without it, an

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167. In *The Guardian of Every Other Right*, Professor Jim Ely highlights the history and importance of private property rights in the protection of liberty. He explains how private property rights undergird every other right. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (2d ed. 1998). With the expanse of government and the rise of governmental projects that require a weakening of private property rights, the importance of private property has been lost on politicians, practitioners, and professors alike—many of whom later sit as judges in eminent domain cases.

168. 148 U.S. 312, 324, 13 S. Ct. 622, 625, 37 L. Ed. 463 (1893).

169. The rights to private property and just compensation protected in the Constitution illustrate one of the most important differences between a democracy and the constitutional republic our Founders created. As James Madison explained in Federalist 10, "democracies have ever been . . . found incompatible with . . . the rights of property." In a democracy, the only limit on government power is the will of the majority, and every person's home, farm, business, or place of worship is subject to the whim of such majority. As John Adams declared: "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." JOHN ADAMS, DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1787).

individual has no liberty.[170] The Supreme Court of Georgia summed it up well when it avowed:

> Private property is the antithesis of Socialism or Communism. Indeed, it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner's right to be saved from harm by even the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.[171]

Only time will tell if America's courts will wake up to the injustices they are perpetrating every day in eminent domain courts throughout the country. "Just compensation" will not fulfill the plain meaning of those two, simple words until such awakening occurs.[172] It is too late for Susette Kelo and for the many individuals who have been

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170. *See* ELY, *supra* note 167.

171. State Highway Dep't v. Branch, 222 Ga. 770, 772, 152 S.E.2d 372, 374 (1966).

172. As illustrated by the earlier example of the Virginia trial court's construction of the constitutional amendment of 2012, even if the people act to restore their own property rights, those rights will not be secure absent a place the people can go for a remedy, i.e., the courts. As Chief Justice John Marshall declared:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . .

Marbury v. Madison, 5 U.S. 137, 176, 2 L. Ed. 60 (1803).

shortchanged by their government, despite the principles of equity and indemnification embedded in the Just Compensation Clause. It is not too late for those whose ox may be gored tomorrow or for a government that is teetering on the edge of a slippery slope into a form of government this nation has never seen—one that has a complete disregard for the property rights of the citizen and the liberties these rights undergird.[173]

CONCLUSION

The owner's plight today reminds one of President Reagan's prescient words: "The nine most terrifying words in the English language are, 'I'm from the government, and I'm here to help.'"[174] Owners forced to surrender their property for the public good should not bear the burdens and injustices they suffer today. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[175]

The time is long overdue to reconsider America's eminent domain laws and to restore individual protections. To paraphrase Thomas Paine in *Common Sense*, doing a wrong thing for a long time does not make it right.[176] Time may make more converts than reason,[177] but one can only hope that reason and justice will ultimately prevail.

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173. James Madison wrote, "Government is instituted to protect property of every sort." *See* James Madison, *Property*, *in* PRIVATE PROPERTY AND POLITICAL CONTROL 30 (1992). Madison noted that every individual "has a property . . . in . . . his person" as much as in his possessions. *Id.* As Madison further explained, property (and, with it, liberty) are in jeopardy when there is an (1) "excess of power" (i.e., no protection against government encroachment) or (2) "excess of liberty" (i.e., anarchy or no protection against one's neighbors). In each instance, "the effect is the same." *Id.* The right to private property succumbs to the whim of the majority. The only difference is that the former is clothed in governmental authority.

174. This warning is especially prudent in today's "sloganeering culture" in which those seeking to agitate the masses or escape constitutional restrictions have "cleverly redefin[ed] words and prostitute[ed] ideas." *See* ZACHARIAS, *supra* note 4, at 11. By saying these slogans loud enough and long enough, they have been able to escape reason and, all too often, the language of the Constitution. *Id.* In the context of property rights, one must point no further than Susette Kelo or the many urban homeowners who lost their family homes to "regentrification."

175. Penn. Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 160 (1922).

176. "[A] long habit of not thinking a thing *wrong*[] gives it a superficial appearance of being *right*." (emphasis in original). THOMAS PAINE, COMMON SENSE 1 (Dover Publications, Inc. 1997) (1976).

177. *See id.*

The balance between government power and individual protections for private property is far off-kilter. While the property owners should not get a windfall, they certainly should not bear burdens they would not have to suffer if they voluntarily sold their property. Until the process and method of providing "just compensation" fulfill the plain meaning of the Just Compensation Clause, this supposed constitutional right will be nothing more than a noble concept on a Constitution that provides little more than a lofty ambition.