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Gideon Kanner

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"[UN]EQUAL JUSTICE UNDER LAW":
THE INVIDIOUSLY DISPARATE TREATMENT
OF AMERICAN PROPERTY OWNERS
IN TAKING CASES

Gideon Kanner*

It is not by chance that the words "Equal Justice Under Law" have been placed for all to see above the entrance to this nation's highest court. If we are to expect our citizens to treat one another with equal dignity and respect, the justice system must serve as the great example of maintaining that standard.1

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.2

"[W]e have not the right to decline the exercise of...jurisdiction simply because the rights asserted may be adjudicated in some other forum."3

However, when it is alleged that property has been taken without due process or adequate compensation in violation of the takings clause of the Fifth Amendment or the Fourteenth Amendment, an adequate state remedy forecloses a [42 U.S.C. §] 1983 action because the availability of that remedy precludes a violation of either constitutional right.4

* Professor of Law Emeritus, Loyola Law School, Los Angeles. Of counsel, Manatt, Phelps & Phillips, LLP. Editor, Just Compensation. I gratefully acknowledge the research assistance provided by Emily Madueno, J.D., 2007, Loyola Law School, Los Angeles.

Indeed, in some States the courts themselves... refused to entertain any federal takings claim until the claimant receives a final denial of compensation through all the available state procedures. This precludes litigants from asserting their federal takings claim even in state court.5

I. INTRODUCTION

Though the topic assigned to me at this symposium6 speaks of "property rights," that is a misnomer. For, as Justice Potter Stewart put it, "[p]roperty does not have rights"—people do.7 Justice Holmes had earlier likewise admonished that in eminent domain law the Constitution deals with people, not with tracts of land.8 As one knowledgeable commentator put it: "The idea that it is the rights of the property owner that are protected by the Constitution (rather than the more antiseptic idea of 'property rights') is one that needs periodic repetition."9 I concur in that view. Speaking of property rights in this context tends to depersonalize and thereby disparage a vital constitutional guarantee on which personal liberty and security of all other individual rights ultimately depend.10 This conclusion is

5. San Remo Hotel v. City & County of San Francisco, 545 U.S. 323, 351–52 n.2 (2005) (Rehnquist, C.J., concurring) (emphases added) (citations omitted). For an example of state courts denying constitutionally aggrieved landowners an opportunity to have their federal cause of action heard at all—either in state or in federal court—see Breneric Associates v. City of Del Mar, 81 Cal. Rptr. 2d 324, 338–39 (Ct. App. 1998)).

6. This article is based on my presentation, Comparing the Treatment of Property Rights to the Protection Given to Other Rights Under the Bill of Rights, at the Third Annual Brigham-Kanner Symposium on Property Rights, William & Mary College School of Law (Oct. 7, 2006).


10. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 43 (2d ed. 1998); see James Daniel Good, 510 U.S. at 61 (It is "an essential principle" that "[i]ndividual freedom finds tangible expression in property rights."); see also RICHARD Pipes, PROPERTY AND FREEDOM, at xiii (2d ed. 2000).
supported empirically: It has been my observation that the fact that there are no countries in the world where a high degree of personal and political freedom does not correlate strongly with a similarly high degree of economic liberty. Countries that deny their citizens economic liberty protected by a rule of law have generally been the ones that have inflicted misery on their people and devastation on their environment.

Nonetheless, in today's American law we confront a legal regime of invidiously unequal treatment of people in their capacity as property owners, particularly—and perversely—when the government seeks to take their property from them, whether directly by using its power of eminent domain or indirectly through confiscatory regulations. The reasons why this disparity of treatment exists have not been coherently explained by the courts, possibly because no morally and doctrinally respectable underpinnings for it can be articulated consistently with basic morality subscribed to by the Judeo-Christian tradition, or with the values enshrined in the Bill of Rights, or with Americans' prevailing commitment to widespread private property ownership.

In today's property regulation climate it is often a myth that property owners have their way with legislative and regulatory bodies and need no help from the law. However true that may have been in the past and still may be in some cases, it is manifestly untrue in takings law where landowners seek to develop their land for badly needed housing, only to find themselves confronted with hostile city councils and other regulatory bodies—the California Coastal Commission being the proverbial Exhibit A.

11. See Exodus 20:17 (King James) ("Thou shalt not covet thy neighbour's house . . ."); id. at 20:15 ("Thou shalt not steal."). Compare the moral lesson implicit in King Ahab's violent seizure of Naboth's vineyard, 1 Kings 21:1–21 (King James), and the Lord's bloody retribution, 2 Kings 9–10 (King James), with that found in King David's insistence on paying Oram 600 shekels in gold for his land to be used as the site of the ark of the covenant, 1 Chronicles 21:18–26 (King James).


Thus it was not surprising that the country reacted with dismay to the U.S. Supreme Court’s 2005 decision in *Kelo v. City of New London*, which makes people’s unoffending homes fair game for takings, for no better reason than a local municipality’s assertion that seizing those homes and turning their sites over to more favored, profit-seeking parties will produce higher tax revenues. The extent and intensity of that popular reaction makes clear that in spite of decades of “progressive” rhetoric disparaging the institution of property, right-thinking Americans overwhelmingly believe that the right to own and enjoy one’s property, particularly in the form of a family home, is a vital attribute of their personal liberty. The *Kelo* majority opinion plainly misunderstood that reality. The intensity of *Kelo*’s aftermath demonstrates how far beyond mainstream American values was the Supreme Court’s decision allowing the seizure and destruction of lower-middle-class homes to facilitate “economic redevelopment” avowedly intended to provide more upscale facilities to a wealthier population, and making redevelopers richer, all in the dubious hope that by a trickle-down process some of their prosperity would rub off on the community.

Though the *New London* affair was egregious in effecting a wealth transfer from the lower-middle-class to the rich, the taking was rubber-stamped by the Court’s majority as a “public benefit.” The Court’s semantic and doctrinal confusion, equating the constitutional term “public use” with “public purpose” and the Court’s assertion that the latter term is a “more natural” meaning of the former bring to mind the *bon mot* of California’s late Chief Justice Roger Traynor who observed that there are “notions [embedded in the law] that have never been cleaned and pressed and might disintegrate if they were.” The Supreme Court’s version of the “public benefit” element of eminent domain law fits that mold. It disregards the plain meaning of the phrase “public use,” mistreats faultless citizens and sacrifices the public interest by facilitating

dissipation of public funds for the benefit of politically connected private business interests. This occurs without any serious judicial attempt at a reasoned explanation of why the power of eminent domain should be exulted above all other government powers. No less a paladin of the anti-property movement than Professor Joseph L. Sax has had to concede that "[t]he majority view in Kelo may give a green-light to bad public policy," though he maintains "it’s good constitutional law."19 He has offered no explanation why pursuit of this concededly bad public policy should be placed beyond reach of the checks and balances system inherent in American constitutional law, nor why the power of eminent domain should be deemed so overarching that the bases for its exercise need not even be rational, but merely "rationally related to [the] conceivable."20

To illustrate my point that complaints of property owners do not receive even-handed treatment from the courts, one can do no better (or perhaps more accurately, no worse) than to consider the handiwork of the U.S. Court of Appeals for the Fourth Circuit, reputedly a conservative court, in National Advertising Co. v. City of Raleigh.21 There, a billboard company, aggrieved by an ordinance requiring it to take down its billboards after five-and-a-half years, sued on two theories. First, it argued that the amortization ordinance amounted to a taking of its billboards, and second, that the ordinance impaired the company's First Amendment rights by denying it the ability to convey its messages to the public through the medium of billboards.22 The court rejected both claims, but how it did so tells volumes.

The court first held that the takings claim was barred by limitations; it should have been filed when the ordinance was first enacted, even though at that time the case would have been unripe because the billboard owner had then not yet suffered any interference with the billboards' use and hence had suffered no damage.23 The court thus declined to reach the merits of the takings

22. Id. at 1160. See generally Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (holding that billboards convey speech and may not be banned).
23. Cf. Pennell v. City of San Jose, 485 U.S. 1, 9–10, 15 (1988) (holding that a taking challenge to a rent control ordinance was premature because, as of the filing of the lawsuit (immediately after enactment of the ordinance), the city had not yet applied it).
claim. But paradoxically, when it came to the First Amendment claim, the court was born again and, without any explanation for the disparity of treatment of the two constitutional claims, asserted that it was doubtful whether the bar of limitations could ever be interposed as a defense to a First Amendment claim. The court made a point of deciding that claim on the merits. All this on the same facts of the same case.

And therein lies a tale.

II. THE FICKLE “GRAND MUFTIS”

The invidious disparity between treatment of constitutionally aggrieved property owners seeking judicial redress for uncompensated takings of their property, as opposed to the treatment of persons seeking redress for violations of other constitutional rights, is highlighted by the behavior of federal judges. The federal courts stand ever ready to adjudicate constitutional issues, including, inter alia, local controversies over regulations of land whose owners complain of impairment of their [other] federal constitutional rights, notably in cases of regulations of “adult entertainment” venues, group homes, and religious uses of land. This has been so commonplace a phenomenon that litigation of local land-use regulations in federal courts has for years been the subject of a major treatise. Thus, federal courts routinely respond on the merits to constitutional claims concerning the use of land for performances by nudie cuties displaying their unmentionable charms to an audience of

24. For an extensive collection of such cases, see Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 693 n.102 (2004) [hereinafter *Shell Game!*].


28. See *BRIAN W. BLAESER ET AL., FEDERAL LAND USE LAW & LITIGATION*, at xiii (2005) (“Why is this treatise needed? Simply put, today, a thorough knowledge of federal land use law has become a necessity for anyone seeking to practice in the field of land use and development regulation.”).
beer-swilling saloon patrons ("free speech," don't you know). At the same time, federal judges recoil from addressing serious constitutional issues raised by landowners who complain of confiscatory land-use regulations when they seek to devote their land to construction of housing, which is ostensibly a highly favored species of land use under federal law.

The worst of it is not just that this situation prevails, which would be bad enough. Rather, it is that many federal judges dealing with these cases become palpably hostile to the plight of the constitutionally aggrieved property owners when asked to protect those owners' constitutional right to use and improve their land. With the lone, honorable exception of the U.S. Court of Appeals for the Second Circuit in what has sometimes been referred to as the "Great Santini case," no federal judges that I am aware of have had the courage to speak out candidly to address explicitly the prevailing double standard of judging in takings cases and the logical and moral anomalies with which these cases are replete.

Federal courts that freely adjudicate the constitutional aspects of non-takings land-use regulation issues disparage regulatory takings

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29. I hasten to note that I am neither prude nor censor, and that I enjoy the vistas of Tony Soprano's silicone-augmented bimbos gyrating au naturel around firehouse poles in the "Bada-Bing" saloon, as much as the next fellow. However, summoning all the meager intellectual resources at my command, I do experience difficulties in understanding just how all that commercialized titillation (no pun intended) involves speech. I am also puzzled as to why (in contrast with judicial solicitude for the voyeurs among us) justifiable concerns about the serious national problems of declining housing affordability contributed to by regulatory obstacles to housing construction do not inspire similar judicial solicitude, if not on behalf of landowners then at least on behalf of the country's growing population of housing have-nots. See Michael M. Berger, Wet T-Shirts, Property Rights: A Constitutional Conundrum, L.A. DAILY J., May 11, 1994, at 7; John J. Delaney, Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations That Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?, 33 U. BALTIMORE L. REV. 153 (2004); see also Cecily Talbert, California's Response to Its Affordable Housing Crisis, 2007 Institute on Planning, Zoning and Eminent Domain, Ctr. for Am. & Int'l L., 8-1 ("It is estimated that, on an annual basis, between 60,000 and 80,000 more housing units are needed every year than are currently being built."); id. at 8-2.


31. Compare Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003), cert. denied, 543 U.S. 875 (2004) ("We do not believe that the Supreme Court intended in Williamson County to deprive all property owners in states whose takings jurisprudence generally follows federal law (i.e., those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court."); with Kottschade v. City of Rochester, 319 F.3d 1038, 1041 (8th Cir. 2003) (conceding that the prevailing state of the law is anomalous, but instead of addressing the anomaly, chickening out and passing the buck to the Supreme Court which denied certiorari, 540 U.S. 825 (2003)).
claims as inappropriate efforts to get them to act as zoning "Grand Muftis." Why the federal courts have no trouble routinely assuming the role of zoning "Grand Muftis" in cases involving local land-use regulations of all sorts of things and activities, while scorning cases of uncompensated regulatory takings or deprivations of property without due process of law, has never been rationally explained. In theory, people's rights in property are not supposed to be the law's "poor relation," to borrow Chief Justice Rehnquist's expression, but in reality they are treated by the federal courts as such. Property owners are routinely denied not only even-handed justice, but beyond that, access to courts, to present their federal constitutional claims on the merits.

Though the philosophical antipathy to individuals asserting their property rights on constitutional grounds raised its head as legal doctrine in the 1930s, in the wake of a born-again judiciary's interpretation of New Deal legislation (much of which was candidly influenced by Marxist hostility to private rights in property), today's anomalous remedial regime came about piecemeal in the 1980s. The case law of that period gave no indication that the Supreme Court

32. E.g., Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998, 1002 (7th Cir. 2004); Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998); Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989); see also Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988). For a particularly virulent display of unwarranted judicial nastiness directed at relief-seeking plaintiff-property owners, see Chongris v. Board of Appeals, 811 F.2d 36 (1st Cir. 1987), cert. denied, 483 U.S. 1021 (1987), denying relief to plainly deserving property owners (who, without any basis in law, had been denied the use of their land for a lawful business) and taunting them in the process. If you suppose that the Chongris court's sarcasm was in any way justified, be assured it was not. Chongris gave rise to a mainstream constitutional issue arising out of an unwarranted delay of lawful property use. Cf. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (affirming an award of damages to owners of land whose lawful use was temporarily prevented by local municipal regulators). See also the New York Keystone Associates litigation, in which the state courts awarded substantial damages for a similar legally unjustified delay in allowing a landowner to build on the site of the former Metropolitan Opera House in New York. For a description and analysis of that controversy, see Gideon Kanner, Measure of Damages in Nonphysical Inverse Condemnation Cases, Proceedings of the 1989 Inst. on Planning, Zoning and Eminent Domain §§ 12.01, 12.02[2][f] (1989), discussing the series of cases comprising the Keystone Associates litigation. So whatever can be rationally said of the Chongris plaintiffs' position, it was, if not meritorious, certainly not frivolous, and it did not justify anything like the shabby treatment they received from the court.

33. See cases collected in Shell Game!, supra note 24, at 692, 693 n.102.

34. Compare the judicial statements of principle quoted in the text accompanying infra notes 92-96. At one time it was thought that for some unexplainable reason, civil rights protected by 42 U.S.C. § 1983 did not include individual property rights, but the Supreme Court put that erroneous belief to rest in Lynch v. Household Financial Corp., 405 U.S. 358 (1972).

had thought through, or even understood, the interaction of its case by case holdings in its then haphazardly evolving law of remedies in takings cases, with the law of claim and issue preclusion. One is justified in surmising that the Court, then unsure of its command of regulatory inverse condemnation law, became so preoccupied with finding excuses for deferring the day of decision on the issue of remedies until it was more confident of its ability to decide whether invalidation of the confiscatory regulation or just compensation was the proper remedy in regulatory takings,\textsuperscript{36} that it simply did not reflect on the interaction of its ad hoc holding in \textit{Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City}\textsuperscript{37} with \textit{City of Chicago v. International College of Surgeons}.\textsuperscript{38} A juxtaposition of these decisions suggests that the Court did not understand the Alice-in-Wonderland problem it was creating\textsuperscript{39} until it was confronted by it after the fact in the \textit{San Remo} case.\textsuperscript{40} There, despite its evident understanding of the problem it had created, the Court chose not to address it. Instead, the Court casually conferred on American property owners complaining of uncompensated takings, the status of legal pariahs who, unlike other constitutionally aggrieved plaintiffs, are barred from seeking their federal constitutional remedy from the federal courts. They are also barred, as Chief Justice Rehnquist noted in his \textit{San Remo} concurrence, from seeking a federal law remedy in \textit{any} court. Of course, I could be wrong. Perhaps the Court did understand all too well what it was doing, in which case its \textit{San Remo} decision would not only be mind-boggling, but positively malevolent in thus excluding American property owners as a class from the scope of the federal


\textsuperscript{37} 473 U.S. 172 (1985).

\textsuperscript{38} 522 U.S. 156 (1997).

\textsuperscript{39} See infra notes 49–52 and accompanying text.

\textsuperscript{40} San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005); Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007); see J. David Breemer, \textit{You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review}, 33 B.C. ENVTL. AFF. L. REV. 247 (2006).
constitutional protection that is readily enforced by the federal courts for all other constitutionally aggrieved plaintiffs.

With regard to how this anomalous law evolved, my views are a matter of record, and I see no reason to replow that much-tilled ground again. Yet, because of the crudely discriminatory treatment of property owners by the courts, those views make for an appropriate departure point for examining other aspects of eminent domain law for instances of similar mistreatment of property owners. As it turns out, one need not look far; the law of eminent domain historically has been and remains to this day replete with inconsistencies, doctrinal anomalies, lack of judicial even-handedness, and raw injustice. This article, accordingly, deals with several selected issues in this field, without attempting to canvass the entire subject.

III. YOU CAN’T GET THERE FROM HERE

It may seem a bit perverse that one taking claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court. But this is the nature of federal-state interplay after Williamson.

The most stark illustration of the invidiously disparate judicial treatment of property owners arises when they seek relief for


42. If there is one thing that commentators of all stripes agree on, it is that the law of regulatory takings is an intellectual morass of confusion, inconsistency and at times outright nonsense. Some have even characterized it as judicial fraud on the litigants.

43. When I began to write my first law review article almost forty years ago, I was struck by the fact that legal literature was replete with strongly worded criticisms of eminent domain decisional law, by a host of first-rank legal commentators of varying ideological perspectives. For a collection of some of these critical expressions, see Gideon Kanner, When Is “Property” Not “Property Itself”: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain, 6 CAL. W. L. REV. 57, 58 (1969). Not much has changed in eminent domain law since then; inverse condemnation law has grown more anomalous and the scholarly invective directed at it justifiably more intemperate.

44. McNamara v. City of Rittman, 2007 FED App. 0004P at 6 (6th Cir.). This is reminiscent of the Queen of Hearts informing Alice that she could have had jam on her toast yesterday, and will be able to have it tomorrow, but never today.
uncompensated takings of their property by suing (or more accurately, trying to sue) for violation of their federal constitutional rights in federal courts. *San Remo Hotel v. City & County of San Francisco* made it official: American property owners complaining of takings of their property are not entitled to the same remedial regime as other Americans complaining of deprivation of their other constitutional rights. Egregiously, while these litigants have been barred from seeking relief in federal courts, their adversaries in the same cases enjoy free access to federal courts when they choose to remove state court actions to federal court.

Under *Williamson County Regional Planning Commission v. Hamilton Bank*, property owners' federal takings claims are deemed unripe until after they sue in state courts and unsuccessfully seek just compensation there first. Only then, holds *Williamson County*, do these property owners' federal claims become ripe. However, if they do precisely what *Williamson County* prescribes, and ripen their federal claims by suing first in state courts where relief is denied, they are told by *San Remo* that the state court adjudication gives rise to claim or issue preclusion, so that their federal claims will not be heard at all—either in state or in federal court. Four concurring Justices of the Supreme Court have expressed their puzzlement in *San Remo* as to why this harsh rule should apply only to property owners and no one else. But, inasmuch as the *San Remo* petitioner did not challenge the *Williamson County* rule, the rule was left standing, and in a

45. 545 U.S. 323 (2005).
46. See id. at 346–47.
48. Id. at 194–95.
49. See, e.g., Rockstead v. City of Crystal City, 486 F.3d 963 (7th Cir. 2007) (federal court denying relief even though no relief was available under existing state black-letter law); Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 967 F. Supp. 998, 1005 (W.D. Tenn. 1997), aff'd without opinion, 178 F.3d 1295 (6th Cir. 1999) (federal court barring inverse condemnation action under res judicata even though the County conceded that the owners were treated unconstitutionally and that the state courts erroneously denied relief); see also Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998); Manufactured Home Cmtys., Inc. v. City of San Jose, 358 F. Supp. 2d 896 (N.D. Cal. 2003). There is vast legal literature on this subject, so this ground need not be canvassed here again. For collected citations, see *Shell Game!*, supra note 24, at 693 n.102. Note particularly the collection of scholarly invective by knowledgeable commentators on both sides of the issue, directed at the Supreme Court's handiwork, ranging from "inherently nonsensical" to "a fraud or hoax on landowners." Id. at 702–03.
subsequent case that did raise this issue the Court denied certiorari, leaving the pertinent law in its concededly anomalous condition.\textsuperscript{51} None of the Justices who had criticized \textit{Williamson County} in the \textit{San Remo} case voted in favor of granting certiorari in \textit{Kottschade}, thus forgoing the opportunity to address this judicially conceded anomaly in the law, and raising the question as to whether they really understood the problem, and if so, whether they meant to acquiesce to it.

Nor is that all. There are two wrinkles to this rule that make this legal regime even worse. First, under \textit{City of Monterey v. Del Monte Dunes},\textsuperscript{52} property owners who seek compensation for regulatory takings by suing under 42 U.S.C. § 1983 (2000) are entitled to trial by jury on the issue of liability, at least to the extent their case presents fact-bound questions (which land use cases usually do).\textsuperscript{53} However, state courts do not provide trials by jury on the issue of inverse condemnation liability,\textsuperscript{54} so that the aggrieved owners can never obtain the trial by jury that is ostensibly their right under federal law. By the time they complete litigation in state courts and are theoretically able to assert for the first time a ripe federal constitutional claim to be resolved by a jury trial, their case is said to be barred by the state court judgment at the precise moment that it becomes ripe. As Professor Roberts put it: "An unripe [takings] suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten."\textsuperscript{55} Therefore, in spite of the explicit \textit{Del Monte Dunes} black-letter holding establishing a right to a trial by jury under § 1983 on the issue of liability,\textsuperscript{56} the aggrieved landowners cannot avail themselves of it.

\textsuperscript{51} See supra note 5; see also \textit{Kottschade v. City of Rochester}, 319 F.3d 1038 (8th Cir. 2003), cert. denied, 540 U.S. 825 (2003).
\textsuperscript{52} 526 U.S. 687 (1999).
\textsuperscript{53} Id. at 721-22.
\textsuperscript{54} See, e.g., Cumberland Farms, Inc. v. Town of Groton, 808 A.2d 1107, 1127 (Conn. 2002). Note that on this point state law is dispositive because the Seventh Amendment applies only to the federal government and is not binding on the states. See \textit{Walker v. Sauvinet}, 92 U.S. 90, 92 (1875).
\textsuperscript{56} 526 U.S. at 721-22 (1999).
Second, adding insult to injury, unlike plaintiffs claiming an uncompensated taking of their property, municipal defendants in such cases are not bound by the *Williamson County* rule, and may freely litigate in federal court in the first instance, if they so choose, simply by removing the action to federal court when the owners, acting in obedience to *Williamson County*, file their inverse condemnation action in state court.\(^\text{57}\) The absurd result is that federal courts may not entertain these cases for lack of ripeness (and hence lack of jurisdiction) when property owners sue, but *simultaneously* they do have jurisdiction and can entertain them when the defendants transfer the case there under 28 U.S.C. § 1441. The self-stultifying "explanation" (if that word may be used here without doing violence to the English language) provided by the Supreme Court in *Surgeons* is that such cases may be transferred from state to federal court because the plaintiff-property owners could have filed the action in federal court in the first instance\(^\text{58}\) even though under *Williamson County*, the plaintiffs could not do so, thus making the *Surgeons* "explanation" simply irrational.

This absurd judicial reasoning has led to a legal regime in which, as required by *Williamson County*, aggrieved property owners who are denied access to the federal forum duly file their takings cases in state courts only to have the government defendants remove them to federal courts, and once there, argue that the federal courts lack jurisdiction (on account of lack of ripeness) and that the cases must therefore be dismissed because the plaintiffs should have sued in state court first (which of course they did, or at least tried to do until the defendants removed the case unilaterally to federal court). Actually, even on this Alice in Wonderland premise, once the federal courts agree that they lack jurisdiction for lack of ripeness, such removed cases should be remanded to state court, and some of them are. But many others are dismissed by the federal courts.\(^\text{59}\) Even worse, some federal courts acknowledge lack of ripeness and, hence,

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58. Coll. of Surgeons, 522 U.S. at 164.

59. See, e.g., Palomar Mobilehome Park Ass’n v. City of San Marcos, 989 F.2d 362, 364–65 (9th Cir. 1993); Peduto v. City of North Wildwood, 878 F.2d 725, 726–29 (3d Cir. 1989).
of jurisdiction, but then go on to make substantive rulings on the merits against the plaintiffs anyway.  

No other species of American plaintiffs are subjected to such judicial jiggery-pokery. Indeed, even convicted criminals who fail to exhaust their state court post-conviction remedies, as they are required to do before seeking habeas corpus in federal courts, are treated better. Unlike property owners, when convicted criminals’ claims are based on federal constitutional law and the state courts deny relief, they are free to sue for habeas corpus in federal courts, with no res judicata effect arising from their prior state court action. Even when they fail to exhaust their state remedies first, they may still receive federal court relief.

This is a poorly understood situation, even in the legal profession at large, as evidenced by the steady stream of actions for uncompensated takings being filed directly in the federal courts that find them to be unripe and dismiss them. I surmise that large numbers of Americans, as well as their lawyers, simply cannot bring themselves to believe that aggrieved property owners who seek vindication of their federal constitutional rights have been cast out by the courts into some sort of outer darkness as far as their federal constitutional rights are concerned. This is a civically corrosive problem. Being told that, unlike other plaintiffs, faultless property owners have no enforceable federal rights under the U.S. Constitution is certain to erode public confidence in the courts and to bring them into deserved public disrepute.

Our justice system works, to the extent that it works, because people have confidence in it. Not just confidence that it reaches the right result (though that is important), but also confidence that everyone gets a fair hearing before a fair judge, and that the process itself is neither rigged nor weighed. In other words, people place their trust in judging that is truly independent ... of both outside influence and dispositive predisposition.

Alas, the current state of inverse condemnation law falls short of these admirable criteria.

60. See, e.g., McNamara v. City of Rittman, 2007 FED App. 0004P (6th Cir.).
61. See Smith v. Baldwin, 466 F.3d 805, 811–12 (9th Cir. 2006).
IV. WHAT’S YOURS, ISN’T

On the subject of the right to take private property for public use, little need be said. The recent Supreme Court decision in *Kelo v. City of New London* makes clear that property owners’ ostensible constitutional right not to have their homes taken by eminent domain, except for public uses, is not treated seriously by the Court. Instead, that right is seen by the Court’s majority, not as the weighty constitutional guarantee that it is, but rather as an annoying impediment to local governance—something to be brushed aside before yielding the constitutional question of whether the taking is indeed for “public use” to condemners’ do-it-yourself “legislative” powers that, in fact, are not subject to meaningful constitutional review by the Court. The message embedded in the all too evident subtext of this Supreme Court decisional law is to tell the condemners, “Do what you want, and don’t worry about the Constitution.”

Elsewhere in the law, though the courts may apply varying degrees of deference to the legislatures whose enactments are brought to them for review, they do review the constitutionally challenged legislation or government policy on some level, as is their prerogative and duty under *Marbury v. Madison*. Indeed, in other cases, courts stress that judicial review of government activities is particularly appropriate where the government purpose is benign, thus creating a temptation to advance it at the cost of individual rights. But in eminent domain cases, the mighty U.S. Supreme Court stands this judicial policy on its head and proclaims itself to be

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63. 545 U.S. 469, 489–90 (2005) (holding that private property may be taken for “economic redevelopment,” not to create any public works or eliminate social harms, but simply to be turned over gratis to private developers who hope to make lots of money, some of which will hopefully trickle down to the community). For my commentaries on *Kelo*, see Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006), Bad Law, supra note 17, and Gideon Kanner, *We Don’t Have to Follow Any Stinkin’ Planning—Sorry About that Justice Stevens*, 39 Urb. Law. 529 (2007).

64. I use quotation marks because, in contrast with enabling legislation articulating categories of public uses authorizing eminent domain actions, actual decisions to condemn a particular property for a particular use are in fact made by bodies that are not legislative (e.g., state highway commissions and turnpike authorities, as well as flood control districts and similar subordinate administrative bodies comprised of unelected government functionaries).

65. 5 U.S. (1 Cranch) 137, 177–78 (1803).

66. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (stressing the need to observe individual constitutional rights, particularly as against demands of “praiseworthy government officials” concerned with efficiency).
putty in the hands of local municipalities. It holds that it can only rubber-stamp whatever any one-horse burg or, worse, its unelected redevelopment agency, decides to call “public use.” The Court deems such decisions to condemn to be “well-nigh conclusive,” unless a decision not only fails the rationality test but, beyond that, is so far out that it is not even rationally related to the conceivable.

67. Berman v. Parker, 348 U.S. 26, 32 (1954); see Kelo, 545 U.S. at 488–89 (stressing the Court’s assertedly limited authority and its inability to overrule a condemning body’s finding of public use).

68. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984). No one, to the best of my knowledge, has ever explained what proposed land uses (other than criminal activities) could not be said to be rationally related to some conceivable public benefit, and—more important from a lawyer’s point of view—what evidence one would have to put on to demonstrate to a court’s satisfaction that the proposed use is not rationally related to the conceivable, or that its objective is inconceivable. For, as countless science fiction writers have demonstrated, anything—anything at all—is conceivable.

In my post-Midkiff lectures, I have been using as an example of the absurdity inherent in this judicial formulation a hypothetical taking for senior housing for elderly Martians living among us. Would that pass muster as a “public use”? Hyperbole, you say? Be careful. In a prime example of Oscar Wilde’s dictum that life imitates art, I offer for your consideration the pertinent part of the transcript of an oral argument before the U.S. Court of Appeals for the Ninth Circuit. There, the U.S. Justice Department asserted that, if Congress were to enact laws for the benefit of unseen and undetected “space aliens” among us, the courts would have no alternative but to approve it as consistent with the Constitution:

JUDGE FLETCHER: Can I get at your definition of “conceivable?” To take an outer-boundary sort of example . . . .
MR. YELLIN: Sure.
JUDGE FLETCHER: . . . not related to this case. Is it conceivable that space aliens are visiting this planet in invisible and undetectable craft?
MR. YELLIN: Is it conceivable?
JUDGE FLETCHER: That’s my question.
MR. YELLIN: Yes, it’s conceivable.
JUDGE FLETCHER: And that would be a basis for sustaining Congressional legislation, if . . . the person sponsoring the bill said, “Space aliens are visiting us in invisible and undetectable craft, and that’s the basis for my legislation,” we can’t touch it?
MR. YELLIN: If Congress made a finding of that sort?
JUDGE FLETCHER: That’s my question.
MR. YELLIN: Your Honor, I think if Congress made a finding of that sort, I think, Your Honor, it would not be appropriate for this Court to second guess that.
JUDGE FLETCHER: Okay, in other words, “conceivable” is “any piece of nonsense is enough.”
MR. YELLIN: Your Honor, I don’t think . . . . It is largely unbounded. It is not completely unbounded. There are the outlying—
JUDGE FLETCHER: How can you say it’s not completely unbounded when you agreed with my absolutely preposterous example of what’s conceivable?

Audio Recording of Oral Argument, Alaska Cent. Express, Inc. v. United States, 145 F. App’x 211 (9th Cir. 2005) (No. 03-35902) (questions by Judge William Fletcher; answers by Lewis
This is a standard that the Court, to the best of my knowledge, has never explained and whose violation it has never encountered in the past century, thus taking a page from Will Rogers, who once said that he never met a man he did not like. Apart from its vagueness, its unmanageable breadth, and its encouragement of constitutional overreaching, the fundamental deficiency of that absurd non-standard of review is that it looks only to the prognosticated benefits foreshadowed by the redevelopment project's self-promoting sponsors. Yet, in disregard of the verity that there is no such thing as a free lunch, it studiously ignores the detriments certain to be caused as well by such projects, such as the trauma of mass displacements of urban populations, to take an obvious example. Nor is there any inquiry into whether or not the proposed project is even capable of being constructed or of producing the benefits ascribed to it.

Moreover, this standard creates a virtually insurmountable obstacle in the path of property owners seeking to demonstrate that a municipal finding of "public use" is in fact unwarranted, or perhaps that the net effect of the project (after both its net impact and demonstrable externalities are taken into account) may be negative and thus not a benefit at all. This standard permits judicial conjecture about matters said to support the decision to take, that the governing body of the condemnor-city has never considered and perhaps would never accept, were they presented to it. Thus, under this standard, the Court "reviews" not the decision to condemn that is on the record before it, but rather some nonexistent fictional "decision" that the condemning body might have but never did make.

Yellin, U.S. Dept. of Justice). In what must have been a tour de force of self-restraint (at least I hope so), Judge Fletcher and his colleagues refrained from sharing this fascinating government position with the readers of their opinion, even as they ruled in the government's favor on grounds unrelated to E.T.'s invisible cousin's visit to Earth.

69. Will Rogers obviously did not move in my circles and was innocent of knowing some of the condemning agency functionaries that it has been my misfortune to run into in my forty years of practicing eminent domain law. See Gideon Kanner, Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts, 25 Loy. L.A. L. Rev. 81, 84 n.13, 85 n.16, 86 n.22, 89 n.40 (1991); see also Gideon Kanner, Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation, 6 Loy. L.A. L. Rev. 447, 460-67 (1973) [hereinafter Sic Transit Gloria].

70. See Thomas J. Posey, This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity, 78 Chi.-Kent L. Rev. 1403, 1404-05 (2003) (discussing cases in which courts permitted condemnations to proceed even where it was clear or undisputed that the proposed projects could not be built for lack of funds or even for legal reasons).
thereby substituting unarticulated, possibly unrealistic judicial
fantasy for palpable reality.\footnote{71} Since Supreme Court Justices can be
presumed to be smarter and less constrained in their thinking by
realities of municipal power politics than local politicians, this
approach also means that the Justices are free to conjure up
rationales for “public” benefits that the local municipal functionaries
may not be able to imagine.

In contrast with this extreme \textit{laissez-faire} judicial attitude in
eminent domain cases, in other areas of the law the Court takes a dim
view of legislative efforts to determine the substantive meaning of
constitutional terms.\footnote{72} But when it comes to determining the
meaning of the Fifth Amendment phrase “public use,” it surrenders
its incontestably available authority to do so to municipal politicians
and unelected redevelopment agency functionaries, who, urban
political reality being what it is, may be under the thumb of well-
connected, politically powerful private interests out to make a buck
at the expense of condemnees and of the public fisc.\footnote{73} The process of
constitutional review thus becomes a do-it-yourself imprimatur for
the project’s proponents, as well as an invitation to municipal
corruption.\footnote{74}

\footnote{71} Though not involving public use, the Court provided us with an excellent example of
using erroneous judicial suppositions as a substitute for land-use realities in \textit{Tahoe-Sierra
it misunderstood the use of moratoria as a land-use planning tool. See David L. Callies, \textit{Kelo v.
City of New London: Of Planning, Federalism, and a Switch in Time}, 28 U. HAW. L. REV. 327,
347 (2006) (commenting on the Court’s evident lack of understanding of how moratoria are
legitimately used in the planning process), \textit{see also Snark, supra} note 41, at 337–41 (discussing
the Court’s evident lack of understanding of variances and other land use rules and practices).

\footnote{72} \textit{See generally City of Boerne v. Flores}, 521 U.S. 507, 529 (1997) (holding that a
congressional attempt to define the substantive meaning of the Fourteenth Amendment was
invalid \textit{in the context of land use}).

\footnote{73} In Los Angeles, 73.6 percent of the funds disbursed by the city’s Community
Redevelopment Agency to redevelopers have gone to 10 percent of the redevelopers. Patrick
example of a redeveloper dictating to a city to such an extent as to be considered a proverbial
“800-pound gorilla” by city functionaries, see \textit{99 Cents Only Stores v. Lancaster Redevelopment
with the city, as is often done, granted the redeveloper the power to dictate to the city whether
eminent domain should be used, and if so, when).

\footnote{74} \textit{See Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.}, 605 F. Supp. 612, 618
(S.D.N.Y. 1985), \textit{aff’d}, 771 F.2d 44, 46 (2d Cir. 1985) (refusing to consider on the merits the
owners’ charge that the redevelopment project was corruptly drawn to enrich Mayor’s friends).
In other areas of the law the Court has it that, where government acts in its own financial self-interest, its contested acts are properly subject to heightened judicial review.\textsuperscript{75} On the other hand, in "commercial redevelopment" cases such as \textit{Kelo}, where government financial self-interest was concededly the engine that drove the redevelopment process, the Court was content to let the local, revenue-hungry municipality and its private sector, profit-seeking partners call the constitutional tune, despite their manifest conflict of interest. Moreover, while conventional wisdom has it that this sort of judicial review—or perhaps more accurately, judicial non-review—is justified because the aggrieved citizen’s proper remedy is to appeal to the legislative bodies that are said to exercise the power of eminent domain, in fact, the decision to condemn and if so, which property and to what extent, is made not by democratically responsive legislatures, but by unelected local agencies or unresponsive corporations that are created for the purpose of acquiring land by eminent domain.

\textbf{V. WE DON’T HAVE TO SHOW YOU ANY STINKIN’ DUE PROCESS}

\textit{Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: It can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted...}  \textsuperscript{76}

Why the federal courts should so casually approve of denial of due process of law in property takings cases, the Supreme Court has never even tried to explain.\textsuperscript{77} Procedural due process, in many ways


\textsuperscript{76}. Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973) (emphasis added).

\textsuperscript{77}. See Kelo v. City of New London, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Whether you agree with Justice Thomas’ substantive views or not, he was on target when he noted that the law of eminent domain developed “with little discussion of the [Taking] Clause’s history and original meaning.” Id. at 514; see Allison Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63, 105 (one of the country’s first-rank scholars concluding, after a thorough analysis of the decisional law in this field, that the Court’s efforts have been a failure); see also Bad Law, supra note 17, at 216–
the holy of holies in American constitutional law, occupies at best a tenuous role in eminent domain law and may be freely ignored by the condemning bodies. When an action in eminent domain is actually filed, there is a judicially enforced requirement of giving proper notice to the condemnees, but that may not be a meaningful safeguard.

In reality, the government is not obliged to bring a condemnation action at all and need not observe any procedural niceties. In United States v. Dow, the U.S. Supreme Court stated that property may be taken by the government by physical seizure. Federal courts of appeal have opined that the government is free to seize private property and say to the dispossessed owner “sue me.” In haec verba. Also, Congress can engage in legislative expropriation by simply passing a bill transferring title to a specified

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18, 222–24 (commenting on the anomalies in the doctrinal development of eminent domain law, and on the Court’s misreading of precedents).


79. Schroeder v. City of New York, 371 U.S. 208 (1962); City of Walker v. Hutchinson, 352 U.S. 112, 115 (1956); see Brody v. Vill. of Port Chester, 345 F.3d 103, 105–06 (2d Cir. 2003) (stating that notice of an impending condemnation must be meaningful and calculated to put the owner on actual notice).

80. 357 U.S. 17 (1958).

81. Id. at 21.

82. See Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973), and United States v. Herrero, 416 F.2d 945, 947 (9th Cir. 1969), both holding explicitly that the federal government can just seize private property and say to its owners “sue me.”

In eminent domain actions, by a process known as prejudgment possession, sometimes referred to as “quick take,” the law allows condemning to obtain ex parte court orders of prejudgment possession with neither notice to the condemnees nor an opportunity for them to be heard until after the fact. See 40 U.S.C. § 3114 (2000); CAL. CIV. PROC. CODE § 1255.410(a) (West 2007), amended by 2006 Cal. Legis. Serv. Page No. 3767–74 (West). Compare the Supreme Court’s disapproval of procedures limiting judicial review in this after-the-fact fashion in non-eminent-domain cases. See, e.g., Armstrong v. Manzo, 380 U.S. 545 (1965).

For an egregious example of abuse of such ex parte procedure, see Rhode Island Economic Development Corp. v. Parking Co., 892 A.2d 87, 94, 98 (R.I. 2006) (holding that the condemnees were not entitled to notice and hearing before a court ordered their property condemned and transferred prejudgment possession to the condemnor, in spite of the fact that the condemnor took advantage of the ex parte nature of these proceedings to withhold essential information from the trial court). Compare that with a non-condemnation case, United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (explaining that a person guilty of drug possession and whose property was therefore subject to forfeiture was, nonetheless, entitled to pre-deprivation notice and hearing). See also Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (holding, in a replevin action, that legal owners of the property in question are not entitled to an ex parte order granting them prejudgment possession of their own property pending the outcome of the case, because that would deny due process of law to the property’s possessor).
tract of land from its rightful owners to the government, relegating
them to hiring lawyers and appraisers and becoming plaintiffs in
lawsuits for compensation in the U.S. Court of Federal Claims—a
process which can consume years before payment is actually made.
While the method of property acquisition by physical seizure may
have made sense as a matter of necessity in the nineteenth century
when the U.S. Cavalry roamed the remote reaches of the Wild West
and had to requisition mounts, fodder and provisions from local
ranchers, it makes no sense in today’s world. These days, the
suggestion that absent a showing of great urgency, federal
functionaries are free to ride over the crest of a hill and, like the
Tsar’s Cossacks of yore, forcibly seize privately owned land for
government uses, telling the dispossessed owners that “some day
your price will come,” is repugnant to today’s prevailing moral and
civic values, and is at war with even the most rudimentary notions of
due process. Nonetheless, this attitude on the part of the Court
persists despite the fact that the Uniform Relocation Assistance Act
of 1971 ostensibly requires federal agencies to institute eminent
domain proceedings to acquire the private property they covet, and
forbids government conduct that compels the aggrieved property
owners to sue for compensation.

Nor is it an acceptable justification to argue that eminent domain
is different from other governmental actions, in that it implicates

83. Congress used this method of land acquisition to create the Redwood National Park in California. See Jacques B. Gelin & David W. Miller, The Federal Law of Eminent Domain 6 n.11 (Stephen R. Saltzburg & Kenneth R. Redden eds., 1982). More recently it was used to create the Manassas Battlefield Monument in Virginia.

84. In spite of the enactment of the Uniform Relocation Assistance Act ("URA") of 1971, 42 U.S.C. §§ 4601–4655 (2000 & Supp. 2004), ostensibly forbidding the practice of taking first and paying later, id. § 4651(8), the Supreme Court takes the position that it has not “ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation.” Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 195 n.14 (1985). Just what the displaced owners, deprived of both their property and their compensation, are supposed to do until their litigation is over (a process that can take years) the Court did not deign to explain.

85. 42 U.S.C. § 4651(8). Note that Stringer v. United States, 471 F.2d 381, was decided two years after the enactment of the URA, but the Stringer court did not deign to take note of this statutory provision, much less enforce it. Another court held that the URA does not afford condemnees any right to a due process hearing before the taking of their property. United States v. 131.68 Acres of Land, 695 F.2d 872, 876 (5th Cir. 1983).

86. See County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 192 (1959) ("Surely eminent domain is no more mystically involved with ‘sovereign prerogative’ than a State’s power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city’s power to issue certain bonds without a referendum, its power to license motor vehicles, and a host of other
constitutional guarantees of the Eminent Domain Clause as opposed to the Due Process Clause. The Eminent Domain Clause only provides substantive takings criteria ("public use" and "just compensation") while its procedural aspects are [in theory] subject to the Due Process Clause, as evidenced by cases such as Schroeder v. City of New York and Walker v. City of Hutchinson. As the Court put it in James Daniel Good, "[C]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." The fact that the government is permitted to pursue the substantive ends of condemning private property for public use should not excuse it from observing the constitutionally and statutorily required due process procedures for doing so. Nor should it matter that in most condemnation cases the government is entitled to proceed with the taking. In the James Daniel Good case the Supreme Court rejected that very argument (that Good had already been found guilty of drug possession and the government was thus clearly entitled to pursue forfeiture of his property with or without notice), saying "[f]air procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case."

So here, once again we confront a line of judicial authority holding that unlike other litigants, condemnees are not entitled to the same fair treatment that is deemed to be a constitutional minimum in the case of other litigants who are being deprived of ownership or lawful possession of property. Unlike other cases implicating transfer of private property from its owners or lawful possessors to others, the government in its capacity as a taker may simply seize the subject land without due process and tell its rightful owners "sue me," thereby inviting them to engage in years of litigation to receive what is ostensibly their indisputable constitutional due. This can occur even though under the Uniform Relocation Assistance Act the governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law." (citations omitted)).

87. 371 U.S. 208, 212-13 (1962) (holding that, when a condemnation action is filed, personal notice must be given to the property owner).
90. Id. at 62.
government is supposed to offer to purchase the property and initiate eminent domain litigation before its seizure, so that the owner should not have to sue to receive their due.

VI. FAIRNESS BE DAMNED—IT’S ALL ABOUT MONEY

A. "Fairness and Equity" and All That Jazz

The ascertainment of just compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.\(^9\)

When it comes to interpretation of the Just Compensation Clause of the Fifth Amendment, the Supreme Court changes policies, and as noted in the above quotation, stresses that it is the courts, not legislatures, that have the sole authority to determine compensation and formulate rules of compensability, and indeed that no power exists in the other two branches of government to do so. Ostensibly laying down the judicial policy against which specific compensability rules are to be measured, the Court tells us that as a matter of constitutional principle, eminent domain law is a reflection of "political ethics,"\(^92\) an embodiment of fairness and equity,\(^93\) that "just compensation" must put condemnees in the same position pecuniarily they would be in had their property not been taken,\(^94\) i.e., that indemnity is the standard of "just compensation"; and that it is the deprivation of the owners, not the gain to the taker, that constitutes the compensable taking.\(^95\) But specific judge-made rules of compensation routinely contradict these principles and fail to

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\(^91\) United States v. New River Collieries Co., 262 U.S. 341, 343 (1923); see also Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) (holding that Congress may not constitutionally fix just compensation in eminent domain cases). Of course, when the Court thus spoke of judicial supremacy in determining compensation, it spoke of the constitutionally required minimum arrived via judicial interpretation of the constitutional term "just compensation." Legislatures are free to provide more generous compensation than the constitutional minimum. Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676–77 (1923). Legislatures are also free to adopt stricter "public use" criteria than those created by the federal Constitution as interpreted by the Supreme Court. Kelo v. City of New London, 545 U.S. 469, 489 (2005).


provide indemnity to condemnees for a variety of their demonstrable and usually undisputed economic losses. In a notable example of circular reasoning, the Court explained that “[o]nly in the sense that he is to receive such [market] value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken.”

Thus, after the benign-sounding judicial rhetoric is done with and the Court gets down to business, it tells us that the ostensibly fair and just compensability law of its making is actually “harsh;” that although the courts are supreme in formulating rules of compensability, it is up to condemnation’s victims to supplicate the legislature for relief from the harsh, judge-made law as a matter of legislative grace; that the true standard of compensation is not indemnity, but rather fair market value so artfully defined as to exclude factors that sellers and buyers in voluntary transactions would consider, and that the government need pay only for what it acquires, not for what the owner has lost. Thus, in spite of the flowery language in court opinions, expounding ideas of fairness, justice and indemnity said to be the constitutional due of property owners whose property is taken, it turns out that American condemnees are harshly treated and routinely undercompensated.

96. Id. at 379.
97. Id. at 382.
98. Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949); Gen. Motors, 323 U.S. at 379.
100. See Comment, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 YALE L.J. 61, 63 n.8 (1957). The U.S. Supreme Court has conceded that its benign expressions are more in the nature of moral window dressing than legal doctrine:

“In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.' However, this principle of indemnity has not been given its full and literal force.”


The California Supreme Court has been even more explicit, putting its sincerity into question by dismissing its own exhortations of fairness in eminent domain cases as mere “panoramic” expressions, e.g., County of Los Angeles v. Ortiz, 490 P.2d 1142, 1146 (Cal. 1971), that when relied on by condemnees only reveal their “fundamental misunderstanding” of eminent domain law. Cmty. Redev. Agency v. Abrams, 543 P.2d 905, 909 (Cal. 1975).
My observation has been that when a judge starts talking about "fairness and justice" and all that jazz, it is a reasonably safe bet that the ruling he or she is about to make will likely turn out to favor the government and be prejudicial to the property owner's vital interests. A judge once actually said to me, "I know this is very unjust to your client, counsel, but that's just compensation."

An example of such intellectual and moral judicial bobbing and weaving was provided by the California Supreme Court's handiwork dealing with the well-nigh universally condemned but nonetheless durable judge-made rule denying compensation for the loss of business goodwill that occurs when a condemnation destroys business premises and the business operator is unable to relocate. In Abrams, the court recognized the incompatibility of its decisional law with modern urban reality and constitutional policy, but disclaimed any ability to rectify its own concededly unjust precedent denying compensation for business goodwill lost by condemnees. It offered "considerations of institutional competence" as an excuse. This from the court that at the time prided itself on, and was widely regarded as the nation's leading activist court, that was ever ready to change prevailing rules of law in the name of fairness.

Needless to say, in other fields of law California courts sing an altogether different tune. The most famous, or most notorious case

101. See, e.g., United States v. Certain Land Situated in the City of Detroit, 2006 FED App. 0193P at 9 (6th Cir.) (paying lip service to the indemnity principle, in litigation pending since 1980, but departing from the vaunted "fair market value" standard when awarding interest and allowing only $12,873,452 based on the statutory weekly average one-year treasury paper as opposed to the $40,732,947 that would have been yielded by marketable bonds, thus shortchanging the condemnee by $27,499,495).

102. As a matter of historical interest, the U.S. Supreme Court said something quite similar when in Joslin Manufacturing Co. v. City of Providence, 262 U.S. 668 (1923), it evidently overlooked the fact that it was construing the law of "just compensation," and explained that for condemnees to seek relief from the legislature was appropriate because it is not unlawful to make an unjust law just, thus unwittingly conceding that its decisional law of just compensation is unjust. See id. at 676–77.


105. Id. at 916.

106. E.g., Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 752 (Ct. App. 1969) ("The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that
of that kind, depending on one’s perspective, was *People v. Anderson*,
where the California Supreme Court struck down the death penalty as cruel and unusual, declaring it to be its “mandate of the most imperative nature” to change prevailing rules of law when faced with social changes, and to bring the law into conformance with “contemporary standards of decency.”

As it happened, for all the brave judicial talk about acting in tune with changing social conditions and standards, the *Anderson* court completely misperceived the prevailing mainstream values of California society to which it looked for inspiration. Rather, it was simply acting in harmony with the ideological predilections of its members. Its handiwork in *Anderson* was promptly repealed by the people by initiative. Eventually, the chief justice and two associate justices of the California Supreme Court were denied retention on the court in the election of 1986, precisely because they were widely perceived as being soft on the death penalty. The court never took the trouble to explain why it should feel such an imperative duty toward duly convicted murderers but not toward ordinary, law-abiding citizens facing uncompensated destruction of their life’s work, even though in *Abrams*, the court was explicit in voicing its recognition and

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108. Id. at 887, 891.
110. In California, as elsewhere, business goodwill is incontestably deemed to be property. CAL. BUS. & PROF. CODE § 14102 (West 1987); see CAL. CIV. CODE § 655 (West 1982). Before the legislature made loss of goodwill compensable in eminent domain under some circumstances, the court got around that inconvenient statutory scheme by simply asserting that business goodwill, though incontestably property, is not “the form of property” that is protected by the Constitution in eminent domain, implicitly suggesting that property, sort of like ice cream, comes in different flavors, some more and others less appealing to the courts. Significantly, the California Supreme Court never provided a doctrinal framework for identifying such different “forms” of property and never found goodwill to be the form of property that is not subject to taxation. *Abrams*, 543 P.2d at 909.
understanding of changed urban conditions that rendered its preexisting law inconsistent with modern constitutional policy. 111

Even in the paradigmatic, ordinary direct condemnation case, where the taking is conceded and so is entitlement to “just compensation,” and where the condemnees recover at trial the full amount claimed by them under prevailing compensability rules, they remain inherently undercompensated. This is so because (a) the constitutionally mandated “just” compensation is judicially defined primarily as fair market value, in such a way that it excludes factors that individual sellers and buyers in a voluntary market transaction would consider; 112 (b) the judicially formulated measure of compensation inherently excludes a variety of incidental losses suffered by condemnees, 113 and (c) out of the award, the condemnees must pay for their litigation expenses, 114 including fees of their appraisers, lawyers, engineers, land-use and environmental consultants, aerial photographers, as well as more esoteric experts (e.g., experts on the economics of service stations, hotels, etc. whose opinions are at times indispensable to the proper presentation of a valuation case). 115 All this translates into the verity that, as Professor Merrill put it, “The most striking feature of American compensation law—even in the context of formal condemnation or expropriation—
is that just compensation means incomplete compensation."\textsuperscript{116} Another commentator juxtaposed the misleadingly benign judicial rhetoric with courtroom reality, and concluded:

> Not untypically, however, the broad sweeping language is generally contradicted by the actual results of the [judicial] decisions. Despite its origin in principles of natural justice, despite the declared object of making the victim whole, despite the generally broad understanding of the term "just compensation" itself—it is clear that only a bare minimum of the effects of a taking become the subject matter of financial awards.\textsuperscript{117}

This is hardly news. Professor Scheiber assessed the practices of American courts in nineteenth-century eminent domain cases in strikingly similar language:

> Even while the courts were propounding doctrines that theoretically limited state eminent domain powers, affording private property owners protection against arbitrary state action, judges were in fact lending sanction to the systematic extraction of involuntary subsidies from persons on whom the costs of so-called "public" enterprises fortuitously first fell.\textsuperscript{118}

Today's robber barons tend to build privately owned downtown office buildings, shopping centers, automobile plants and dealerships, and gambling casinos rather than railroads. For all the insincere judicial exhortations of "fairness and justice," the judge-made law of eminent domain still makes noncompensable a variety

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\item[118.] Harry N. Scheiber, Private Property, "Takings," and the Rights of the Public in American Law, 1790–1860, at 18 (Oct. 14, 1976) (unpublished paper presented at the Institute of Humane Studies Conference on the Taking Issue: A Constitutional Perspective, Oct. 14–16, 1976, copy on file with the author) [hereinafter Scheiber, Private Property]. "Many of the state courts went beyond their legislatures in fashioning a law of eminent domain that reduced the obligation to pay in takings." \textit{Id.} at 19. Acting with judicial approval, railroads frequently abused the doctrine of offsetting benefits in partial takings and condemned land for nominal consideration and in many cases, none at all. \textit{Id.} at 21. This abuse was not interdicted by California courts, but was eventually curbed by the enactment of article I, section 14 of the California Constitution (repealed and replaced by article I, section 19), providing that in condemnations by corporations (other than municipal corporations) benefits could not be offset against compensation for partial takings.
\end{footnotes}
of demonstrable economic losses that are incontestably inflicted on condemnees, as opposed to law in other fields that requires such harms to be paid for.\textsuperscript{119} Mind you, I speak here not of personal, emotional, subjective losses that are routinely compensated in tort cases. Nor do I suggest here that such damages should be made similarly compensable in eminent domain cases\textsuperscript{120}. I note however that eviction from one’s home or business can certainly cause similar personal harms that can and do occur in non-condemnation cases.\textsuperscript{121} Nonetheless, I limit myself here to stressing that demonstrable \textit{economic} losses that are disregarded by the eminent domain valuation process, can and do leave condemnees inherently undercompensated, and certainly not in the same economic position they would be in had their property not been taken. These losses, that are not deemed a part of “just compensation,” include moving expenses, the cost of acquisition and renovation of substitute premises, loss of the going concern value of businesses located on the condemned land, loss of use and loss of rents of commercial property while the condemnation action is pending (a process that can take years), loss of or damage to the stock in trade of a displaced business,\textsuperscript{122} as well as (in partial takings), the impact of the taking and of the public project on value of the remaining land to the extent

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\item \textsuperscript{119} E.g., Risinger, \textit{supra} note 103, at 493, 495, 519–520 (discussing disparities between compensability standards in eminent domain as compared to other fields of law).
\item \textsuperscript{120} I note, however, that there are some condemnation cases where this may be appropriate. For example, I was once involved in a case in which the city served an order for immediate possession on the landlord but not on the tenants who operated a Baskin-Robbins ice cream parlor on the premises. Because of the city’s blunder, one morning, with no warning, a city bulldozer drove right through the thirty-one flavors even as the store’s owners were about to dish out ice cream to customers. Fortunately, no one was hurt physically. The infuriated lawyer representing the tenants (who happened to be his parents) filed a cross-complaint for emotional distress against the city. Violating an eminent domain taboo on personal damages, the trial judge allowed that claim to go to the jury which awarded the tenants the modest sum of $1,500 in addition to their “just compensation” (which included nothing for the value of their business). The city had the good sense not to appeal that award.
\item \textsuperscript{122} Cmty. Redev. Agency v. Abrams, 543 P.2d 905, 922 (Cal. 1975). Some of these losses are subject to partial compensation under the Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601–4655 (2003), and its state counterpart, CAL. GOV’T CODE §§ 7260–7277 (West 1995 & Supp. 2007), but the Act is to a large extent a “paper tiger” because it offers only supplemental compensation for some losses and does not purport to make condemnees whole. Courts in some states apply it only to condemnations for federally aided projects, leaving other condemnees outside the purview of its provisions.
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it originates on land taken from others, condemnors’ manipulation of the date of value, and diminished access to the land’s remainder in partial takings.

Judicial rhetoric notwithstanding, “just compensation” as formulated by the courts is simply not compensation; courts do not even try to recompense condemnees for their demonstrable economic losses proximately caused by the condemnation, and to restore them to their precondemnation economic condition. The word “compensation” inherently implies that some economic harm or detriment has been inflicted on a party and the law now requires recompense for that harm. On the other hand, “value” or “fair market value” of a particular property is what it is, and its payment may or may not compensate its owners for the harm or loss inflicted on them by its seizure and by their eviction. In short, by definition, “value” is not “compensation.” So, if we say with Justice Holmes that the Constitution deals with people, not with tracts of land, and that the question is “what has the owner lost?”, it follows that the law should look to the economic harm inflicted on a condemnee and provide proper recompense based on the facts of the case. As one court observed in an oft-cited phrase, the word “compensation” standing alone suggests that the condemnees are to be made whole,

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123. See People ex rel. Dep’t of Pub. Works v. Symons, 357 P.2d 451 (Cal. 1960). The court, applied the archaic rule that in part-taking cases, entitlement to severance damages is based not on the diminution in value inflicted on the owner’s remaining land by the partial taking and operation of the public project, but on whether the harm-producing activities originated on the land taken from that owner or from a neighbor, e.g., Keller v. Miller, 165 P. 774 (Colo. 1917), which of course is irrelevant to the question of whether the economic harm has in fact occurred. Symons, 357 P.2d at 455. In a striking instance of lack of even-handedness, California courts had it that when it came to the flip side of this problem, i.e., to special benefits that are offset against severance damages, it did not matter where those benefits originated. The Symons rule was legislatively repealed in 1976 by section 1263.420(b) of the California Code of Civil Procedure, which put recovery of severance damages on the same footing as the offset of benefits. See CAL. CIV. PROC. CODE §§ 1263.420–430 (West 1982).

124. In order to recover compensation for impairment of access, it is insufficient that the condemnees show a physical diminution in access and diminution in the value of the remainder parcel in its after condition, caused by the diminished access, even though the so-called before-and-after rule is frequently used in eminent domain valuation. Instead, the condemnees must prove that the impairment is “substantial”—a maddeningly imprecise standard of proof. Breidert v. S. Pac. Co., 394 P.2d 719, 725 (Cal. 1964). Failure to do so results in denial of this element of compensation, notwithstanding that the value of the remainder property is demonstrably or even undisputedly diminished. Condemnees who want to demonstrate the substantiality of the impairment of access to their remaining property by showing its severe decline in value in the after condition are not permitted to do so. Perrin v. L.A. County Transp. Comm’n, 50 Cal. Rptr. 2d 488, 493 (Ct. App. 1996); Wagner v. California ex rel. Dep’t of Pub. Works, 124 Cal. Rptr. 224, 228 (Ct. App. 1975).
and the addition of the adjective "just" only emphasizes the fairness attribute of the constitutional command.  

Perversely, when property owners argue that the law should take into account their particular economic situations, i.e., that they should be justly compensated for the demonstrable individual economic losses suffered by them as a result of the specific impact of the taking in issue, the courts respond with the rule that property must be valued as it would be by the market in general, without tailoring damages to the compensatory demands of a particular owner's losses inflicted by the condemnation. Thus, to take a common example, the value added to the subject property by the owners' plans (no matter how imminent and how realistic) for its improvement is disregarded in eminent domain valuation even though they would be considered in a voluntary sales transaction. The judicial presumption is that the taking is to be treated as if it were a voluntary sales transaction, yet it ignores the fact that no rational property owners would voluntarily sell their land (or some arbitrarily carved out part of it) under circumstances that would leave them undercompensated or worse, impoverished. Adding insult to injury, when the shoe is on the other foot and condemnees happen to be in a position where application of the general market approach would yield a higher figure than their specific situation calls for, the

125. Va. & Truckee R.R. Co. v. Henry, 8 Nev. 165, 171–72 (1873) ("[T]he word 'just' is used evidently to intensify the meaning of the word 'compensation' to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution.").

126. Mt. Laurel Twp. v. MiPro Homes, L.L.C., 910 A.2d 617, 618 (N.J. 2006) (holding that compensation to the landowner, who obtained all entitlements and started development of a subdivision on the condemned land, would be limited to fair market value, taking into account the influence of subdivision approval but excluding unrequited costs incurred by the owner); accord People v. La Macchia, 264 P.2d 15, 24–25 (Cal. 1953) ("[E]vidence as to what the owner intended to do with the land cannot be considered."). But cf MiPro Homes, 910 A. 2d at 620–21 (Rivera-Soto, J., dissenting).

127. The courts acknowledge that their idea of "market value" does not correspond with that of the market:

No doubt all these elements [of compensation] would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.

United States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945). Why not, if "fair market value" is to be the measure of just compensation?
courts execute an about-face and have it that the condemnee's particular situation should govern instead.\textsuperscript{128} It's a case of "heads I win; tails you lose."

It is thus incontestable that the treatment of condemnees in both direct and inverse condemnation cases does not compare favorably with the courts' treatment of other Americans seeking compensatory relief from the courts (injunctive relief is not available at all in eminent domain cases).\textsuperscript{129} Thus, in non-condemnation cases the California Supreme Court takes the position that invasion of property rights axiomatically results in compensable harm to the land's occupants:

The California cases appear to draw no distinction between cases involving nuisance and those involving trespass in permitting an award of damages for discomfort and annoyance directly resulting from an injury to real property. There seems to be no sound reason to refuse to award damages for discomfort and annoyance \textit{where the only injury is to the real property} since it is obvious that such an injury may cause discomfort and annoyance

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\item \textsuperscript{128} Thus, in \textit{City of Los Angeles v. Ricards}, 515 P.2d 585 (Cal. 1973), the property owner invoked the familiar rule that the existence of a condemnee's subjective development plans \textit{vel non} is irrelevant, and that therefore her property was to be valued irrespective of those. But, the \textit{Ricards} court held that inasmuch as there was no evidence of the owner's plans to develop her land, she would be denied compensation for temporary deprivation of access to it and would receive nominal damages only, thus abruptly making the usually irrelevant existence of the owner's development plans the \textit{sine qua non} of recovery. \textit{Id.} at 587-88.

Similarly, in \textit{Boston Chamber of Commerce v. City of Boston}, 217 U.S. 189 (1910), the owner invoked the so-called "undivided fee rule," under which the taken property is usually valued as the market would value it if it were owned by one person, and the award then apportioned among the owners with various interests in it. \textit{See, e.g.}, CAL. CODE CIV. PROC. \textsection 1260.220 (West 2007). But on the facts of the \textit{Boston Chamber of Commerce} case, this approach would have yielded a higher compensation figure than the alternative, aggregate-of-interests approach of valuing the individual interests separately and adding up the respective awards. The Court rejected the use of the "undivided fee rule" and endorsed the aggregate-of-interests valuation approach, holding in the process that the Constitution deals with people, not with tracts of land. \textit{Boston Chamber of Commerce}, 217 U.S. at 195. For a fuller discussion of the problems of and limitations on the "undivided fee rule," see \textit{People ex rel. Dep't of Pub. Works v. Lynbar, Inc.}, 62 Cal. Rptr. 320 (Ct. App. 1967). \textit{See also} Gideon Kanner, \textit{And Now, for a Word from the Sponsor: People v. Lynbar, Inc. Revisited}, 5 U.S.F.L. REV. 39 (1970).

\item \textsuperscript{129} \textit{See} Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); \textit{see also} Hurley v. Kincaid, 285 U.S. 95, 104 (1932).
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without also causing an actual physical injury to the person.\textsuperscript{130}

Beyond that, tort plaintiffs not only collect subjective general damages (including easily exaggerated claims of emotional distress and loss of consortium),\textsuperscript{131} but, more pertinent to the subject at hand, they also benefit from the collateral source rule, which entitles them to collect the same damages more than once from collateral sources.\textsuperscript{132} The California Supreme Court candidly justified such multiple recoveries in tort cases as performing a “legitimate and indispensable” function of providing funds with which to pay plaintiffs’ attorneys, and stressed that allowing only one recovery would not provide “completeness of compensation.” It is difficult to see why the desideratum of “completeness of compensation” should not also be the judicial watchword in eminent domain cases where (a) the Constitution calls for an award of just compensation; (b) faultless citizens are deliberately harmed economically for public good; and (c) for its money, unlike in tort cases, the public receives a substantial quid pro quo in the form of the condemnees’ land at its judicially determined fair market value. Significantly, because of that, in eminent domain cases involving total takings of condemnees’ land, the government pays nothing (except for transactional costs) because it only exchanges one asset (money) for another asset (land) at the latter’s judicially determined fair market value, so that its balance sheet remains unchanged because of the acquisition. Indeed, the condemnor often profits after the condemnation when the former owner’s land may and often does become more valuable than the compensation paid for it, as it becomes available for or put to use as part of a public improvement or (particularly) a major commercial

\textsuperscript{130} Kornoff v. Kingsburg Cotton Oil Co., 288 P.2d 507, 513 (Cal. 1955) (emphasis added).

\textsuperscript{131} Annoyance and discomfort were natural consequences of... ‘an invasion of a protectible interest in real property.’” Id. at 512 (emphasis added).

redevelopment use (which is why eminent domain law requires that value to the taker not be allowed as just compensation).133

B. Run for the Hills! The Embargo Is Coming!

There is nearly universal consensus that legal “fair market value” is practically a euphemism, in the sense that it generally does not fairly compensate landowners.134

In theory, condemnees are to be indemnified and placed in the same pecuniary position in which they would have been had there been no condemnation of their property. But in spite of being confronted with the manifest injustices being inflicted on faultless people in the name of “just” compensation, California judges assert that it is their duty to keep condemnation awards down,135 often repeating the mantra that “fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.”136 The quoted expression has been repeated by California courts at least eight times137 without the courts once inquiring into (a) who expressed those fears; (b) were those fears realistic or did the party voicing them exaggerate or pursue its self-interest in doing so; (c) on the basis of what credible evidence were those fears expressed; and (d) why would it be “too liberal” to indemnify condemnees for all demonstrable economic losses inflicted on them by the condemnation, given the many judicial statements of principle that condemnees are to be made whole. It seems clear that unless these inquiries are honestly made, any judicial fears of unaffordability are without substance and merely disclose an institutionalized anti-condemnee bias on the part of the courts. To

133. “[T]he question is what has the owner lost? not, What has the taker gained?” Boston Chamber of Commerce, 217 U.S. at 195.


put this judicial failure to substantiate such hyperbolic assertions into focus, compare *City of Santa Barbara v. Superior Court (Janeway)*, a tort case where the California Supreme Court responded to “parade of horribles” apprehensions of excessive liability by conducting an extensive, meticulous, multi-page inquiry into the merits of assertions that invalidation of exculpatory agreements in cases of gross negligence (as being against public policy) would eliminate or unduly impact recreational activities provided by operators intimidated by a specter of liability.

The courts also take refuge at times in the bromide that just compensation must be just to the taker as well as to the owner whose property is taken. Obviously, it is unobjectionable to say that the owners should receive no more than the full measure of “just compensation,” objectively and fairly determined. But it is quite another story when courts overtly manipulate the definition and extent of that “just” compensation to favor condemnors by avowedly keeping the cost of land acquisitions down, rather than ensuring that full and fair compensation is paid to the parties whose property is taken and who sustain demonstrable economic losses in the process. Just how consciously depressing condemnees’ allowable compensation, or denying them compensation altogether for a variety of economic losses admittedly suffered by them but judicially deemed to be noncompensable, constitutes “justice” to anybody, much less to the condemnor who thus gains an unjustified windfall by being able to acquire property on the cheap, these courts have never explained. Remember also that, inasmuch as we are dealing here with economic losses, the total cost of public projects is the same whether the condemnees are fairly compensated or not; the only valid question is whether the full project cost will be spread on the benefited society or disproportionately imposed on the condemnees.

The just-to-the-condemnor bromide originated in the Supreme Court’s outright misunderstanding of basic property law and is at
best a cheap shot. No one, to the best of my knowledge, argues that condemnors should be unjustly treated by the courts. All litigants are entitled to fair treatment. So what? The problem is what policy choice should the courts make in those situations where ruling one way would be arguably “unfair” to one side, but ruling the other way would be arguably “unfair” to that party’s adversary. At this point in the decision-making process, judicial invocation of justice for the condemnor, when the Bill of Rights guarantees just compensation to condemnees for the taking of their property, does nothing to resolve the economic or ethical problem. It only provides a smoke screen for unprincipled decision making that, for all the pious talk about judicial independence, disregards the other “I-word” (impartiality) and builds in pro-condemnor bias into judicial decision making as a matter of policy.

139. The “just to the taker” notion traces back to Searl v. School District, 133 U.S. 553 (1890). Searl involved a unique factual situation in which a school district, believing itself to be the rightful owner of the subject property, built a school on it. To clear title as against another party claiming a so-called “squatter’s title” under Colorado law, the District brought a condemnation action in which the holder of that title claimed not only the value of the land but also the value of the school buildings erected in good faith by the District. The Court rejected that claim and in the process of ruling for the District stated, “[I]t is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.” Id. at 562. But the Searl Court’s offhand statement was hardly consistent with prevailing property law and indeed, eminent domain law. See United States v. Jacks, 47 Cal. 515 (1874) (holding that the condemnor, who trespassed on the owner’s land and built improvements on it, had to pay for them when it later formally condemned the property); Village of St. Johns ville v. Smith, 77 N.E. 617, 619–21 (N.Y. 1906) (same). Suffice it to say that the law governing the rights of improvers of someone else’s property is not as simple as Searl made it appear to be. See CAL. CODE CIV. PROC. § 741(b) (West 2007). See generally Taliaferro v. Colasso, 294 P.2d 774 (Cal. Ct. App. 1956). In short, the Searl Court’s glib assertion, for all its superficial moral appeal, was simply bad law.

140. See, e.g., L.A. County Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809 (Cal. 1997). There, the court held that general benefits to the area, not just special benefits flowing directly to the remainder of the partially taken property, may be offset against severance damages because to do otherwise (by following the established precedent, Beveridge v. Lewis, 70 P. 1083 (Cal. 1902)) would be unfair to the condemnor who would thus pay more than the loss in value of the remaining property. But that, went the counterargument, would be unfair to the condemnees who would thus be charged for those general benefits by having their “just” compensation reduced, while their neighbors would get the same general benefits gratis. The court invoked the “just to the condemnor” bromide and chose the first option, overruling Beveridge v. Lewis in the process. It joined a miniscule minority of jurisdictions and held that general benefits may be offset against severance damages, thus imposing greater economic burdens on condemnees than on anyone else. 941 P.2d at 824. But, though asked to do so, the court refrained from expressly overruling a correlative precedent denying recovery of general damages in condemnation cases. Id. at 821; see Eachus v. L.A. Consol. Elec. Ry. Co., 37 P. 750, 751 (Cal. 1894) (holding general damages to be noncompensable in eminent domain). And that, folks, is what we call “justice” in California eminent domain law.
The correct, or at least principled, resolution of this policy problem can only come from a candid judicial acknowledgement of the purpose of the limitations imposed on the government by the Bill of Rights, namely to protect the people from the government, not the other way around. As Professor Callies put it, the Fifth Amendment "is a bedrock principle contained in the Bill of Rights amendments to our Federal Constitution, designed not to further the goals and desires of the majority, but as a shield against majoritarian excesses at the expense of an otherwise defenseless minority . . . ." If a condemnor chooses to pursue projects that are costly and inflict great economic harm on persons displaced in the process, that is hardly "unjust" to it. It is the direct result of its own judicially unreviewable decision making. It is inconsistent to argue that the compensatory consequences of the condemnor's own decision as to what kind of land and how much of it to take for a project of its own design give rise to "unfairness" to it, and that therefore the courts should make things "fair" by abandoning their neutrality and ride to the government's rescue by shortchanging the constitutionally protected condemnees. Ironically, under California decisional law, when defense lawyers in general civil litigation urge a jury to bring in a low verdict because the impecunious condition of their clients would make a high verdict unfair, the courts deem that to be prejudicial misconduct of counsel giving rise to reversible error. I fail to see how such misconduct can be said to rise to the level of legitimate policy when engaged in by judges rather than lawyers, in eminent domain cases rather than tort trials.

141. Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining that the purpose of the Fifth Amendment's Just Compensation Clause is to distribute the cost of public works on the society that benefits from them, and not force individuals to bear them disproportionately).  
142. Callies, supra note 71, at 343 (emphasis added).  
143. See Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (holding that a condemnor's determinations of necessity for the public project and its design are conclusive).  
144. The condemnors' position in this regard brings to mind the illustration of chutzpa, in which a mugger beats up his victim while loudly yelling "Help! Help!"  
145. Hoffman v. Brandt, 421 P.2d 425, 429 (Cal. 1966) ("Obviously, the questions of liability and the amount of damages, if any, in the ordinary personal injury case are to be determined without regard to the defendant's ability to pay any judgment rendered against him."). Why isn't this equally obvious in eminent domain cases where a fortiori the liable party (unlike a tort defendant in a personal injury case) receives a full quid pro quo for its payment of damages?
It is difficult to improve on Professor Michelman's point when he called for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized," exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.\footnote{Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1181 (1967) (footnote omitted).}

Harking back to the U.S. Supreme Court's endorsement of "political ethics" as the policy underlying eminent domain law, it is difficult to reconcile any notion of ethics with the plight of property owners who fortuitously find themselves in the path of public projects but who are then shortchanged to facilitate supposed "justice" to the government for the economic consequences of its own choices.\footnote{It cannot be emphasized often enough and strongly enough that large amounts of damages can be awarded to condemnees only when they have been deprived of very valuable property, or where the condemnation inflicts very high severance damages on their remaining land in partial takings cases. To suggest that high levels of damages would be awarded even though unwarranted is to suggest that the judiciary is incapable of distinguishing between meritorious and frivolous claims, a proposition indignantly rejected by the California Supreme Court in Dillon v. Legg, 441 P.2d 912, 922–23 (Cal. 1968).} A fortiori, where the government undertakes unduly costly and at times wasteful projects, particularly where those projects are pursued to enrich redevelopers or to enhance the local economy. To say nothing of enhancing the standing of politicians seeking to curry favor with their constituencies by "bringing home the pork" in the form of federal or state funds, enabling them to brag about receiving "free money."\footnote{See Molho & Kanner, supra note 121, at 628 n.5 (quoting redevelopment officials bragging about receiving "free money" for their projects).} This is a particularly important consideration when reflected on in the context of the tidal wave of public money that is earmarked by Congress and profligately spent by state and local governments ostensibly for proposed public
projects, but is in fact squandered,\textsuperscript{149} or fails to achieve any legitimate public purpose.\textsuperscript{150}

To suggest in the context of the history of ineptitude and consistent underestimating of the cost of public projects,\textsuperscript{151} which has

\textsuperscript{149} For an egregious recent example, see the case of the infamous Gravina Island bridge affair in which Congress appropriated some $250 million for a new bridge in Alaska, rivaling in size the Golden Gate Bridge but going from nowhere to nowhere. William Neikirk, \textit{In D.C., the New "S" Word is "Sacrifice" to Offset Spending}, CHI. TRIB., Oct. 2, 2005, at C12. Responding to a withering wave of public criticism, Alaska has abandoned plans to build this "bridge to nowhere," but it got to keep the $233 million which it is now free to spend (or fritter away) on anything it wants. \textit{Alaska Seeks Alternative to Bridge Plan}, N.Y. TIMES, Sept. 23, 2007, at 24. Another example is Boston's "Big Dig," an underground freeway originally estimated to cost some $2.6 billion, that has already consumed over $14 billion and has produced a faulty system of tunnels that have been the subject of leaks and, in one instance, a collapse of the ceiling. "It is the most expensive highway project in American history and had been plagued by cost overruns and leaks before the [recent] fatal collapse." \textit{All but One Tunnel Are Open in Big Dig}, N.Y. TIMES, Jan. 15, 2007, at A8; see Jason H. Peterson, \textit{Note, The Big Dig Disaster: Was Design-Build the Answer?}, 40 SUFFOLK U. L. REV. 909, 923–24 (2007). The sheer size of these boondoggles is attention-arresting, but that should not obscure the fact that failures and deficiencies of lesser projects, for which private land has been acquired by eminent domain, is a commonplace event.

\textsuperscript{150} For a fuller discussion of such problems, see \textit{Laws and Sausages}, supra note 41, at 713 n.142, 719 n.165, 789–791 nn.450–56. Note particularly the local case of the nonexistent Los Angeles "Intercontinental" Airport (located in Palmdale), consisting of some 17,500 acres of land acquired by the city in the 1970s at a cost of over $100 million, with nothing to show for it. \textit{Id.} at 789 n.450. Then there is the case of the Los Angeles "Belmont educational center," a high school on which the local school district spent $217 million only to discover that it had built an unusable facility by locating it on an abandoned oil field that is seeping methane, making the "educational center" unusable as a school. \textit{Id.} at 713 n.142. Not to be overlooked is the North Hollywood redevelopment project on which the L.A. Community Redevelopment Agency spent some $117 million only to discover that its plan (pursued for 20 years) that centered on construction of new studios, was infeasible, forcing it to start all over again, hoping this time that a nearby subway terminus will attract residential tenants for its born-again redevelopment project. \textit{Id.;} Patrick McGreevy \& T. Christian Miller, \textit{Heady Plans, Hard Reality}, L.A. TIMES, Jan. 30, 2000, at A1. And, there is also the Los Angeles Convention Center (built on land condemned in the 1960s), that has failed to live up to its promises and (in spite of its enlargement that was supposed to lure more exhibitors) is costing the city some $30 million annually in debt service. Joel Kotkin, \textit{Urban Myths; Don't Feed the White Elephant}, L.A. TIMES, July 9, 2006, at M1.

\textsuperscript{151} As far back as 1966, a California Highway Commissioner noted that the actual cost of highways consistently exceeded estimates by 32 percent, "most of the increment coming from additional right-of-way costs." Joseph C. Houghteling, \textit{Confessions of a Highway Commissioner}, CRY CALIFORNIA, Spring 1966, at 29, 30 (suggesting pervasive underestimation of right-of-way costs).

The proponents of public projects have an incentive to understate the property acquisition costs associated with a project to facilitate its approval. It is particularly easy to underestimate or omit damages to property that is not acquired but will suffer a negative impact from the project. When the true cost of the acquisition is revealed through the judicial process, usually years later, these same proponents blame the property owners, the attorneys representing them, or juries for the cost overruns.

Charles S. McFarland, \textit{Protecting Private Property Rights After the Public Use Ship Has Sailed}, LITIG., Fall 2007, at 25, 30. This is consistent with studies indicating a persistent pattern of underestimation of the cost of public works of all sorts, "Project estimates between 1910 and
been common in many public works projects, that it would be “unfair” to the government to require it to provide genuine compensation to the victims of its ambitions, even as it squanders huge amounts of public funds, is to invert moral standards. If the government has billions of dollars to waste, it surely has the necessary funds to make whole people whom it targets to be bulldozed aside to make room for public and not-so-public projects. Judges who, without factual inquiries, facilitate such government conduct have much to be ashamed of when they resort to joining condemners’ advocates’ fiscal lamentations without any factual inquiry into whether such “poor mouth” arguments have any economic merit.  

Apart from the moral point, the economic point is that the total cost of public projects, whether sound or not, is what it is, regardless of whether the condemnees whose land is taken are fairly compensated. The only valid question is who will bear the total economic burdens resulting from the creation of such projects: the government that designs them, chooses what land to take, benefits from the activity in question, and has the ability to spread the cost fairly on the public that benefits from its activity? Or should that burden fall disproportionately on individual condemnees who suffer a taking of their homes and businesses, and who may thus be forced to bear substantial losses alone?  

The problem of undercompensation, particularly in the form of inadequate precondemnation offers, is widespread. Offers are

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1998 were short of the final costs an average of 28 percent.” Michael Wilson, Study Finds Steady Overruns in Public Projects, N.Y. TIMES, July 11, 2002, at A14. And that does not include situations in which funds are budgeted for public projects, but later squandered on other things. California state government is currently engaged in a course of conduct whereby funds raised by the sale of bonds approved by the electorate for water and levee improvement projects are being squandered on unrelated local pet projects of legislators, such as museums, aquariums and recreational trails. Evan Halper, Water Bond May Be Tapped for Many Uses, L.A. TIMES, May 21, 2007, at B1. Much the same is happening at the federal level. Richard Simon, Water Bill Is Flooded with Earmarks, L.A. TIMES, May 21, 2007, at A10.

152. For a refreshing and all too rare example of a court making such an inquiry, see City of Los Angeles v. Keck, 92 Cal. Rptr. 599, 604 (Ct. App. 1971) (finding the proposed taking unnecessary and chastising the city for its wasteful expenditure of public funds). See also Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 205 (Ct. App. 1977) (deploring the municipal practice of taking on risky private commercial projects that place public funds at risk).

153. Armstrong v. United States, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was 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.”).
frequently accepted by large numbers of property owners, in spite of their inadequacy. This occurs because those owners are unsophisticated and believe the offers are fair, or that their government would not try to shortchange them,\textsuperscript{154} or they are convinced that "you can't fight city hall," or they want the process to be done with so they can get on with their lives, or, most importantly, they lack the knowledge and funds necessary to ascertain true value and mount an effective legal defense. Moreover, in smaller cases, the economic stakes do not justify litigation because probable increases over and above the condemning’s initial offer may be close to or less than the unrecoverable cost of litigation. The consensus among condemnation lawyers is that, unless the “spread” between the condemning’s offer and the property’s demonstrable value is on the order of $75,000 to $100,000, litigation is not economically feasible. Thus, condemning agencies regularly reap unjustified windfalls from the fact that the majority of their offers (including the many low-ball ones) are accepted without litigation or even without involvement by a private appraiser or lawyer. The additional sums they may have to pay after trials of the relatively few cases where their offers are rejected, are offset to a large extent (or perhaps entirely) by the gains secured by settling the vast majority of land acquisitions for parsimonious amounts.

\textbf{C. The Floccinaucinihilipilificators}\textsuperscript{155}

\textit{I am in charge of acquiring lands for the National Park Service. Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don’t have to accept this 30 cents on the dollar. We will let you

\textsuperscript{154} Over the years, I have found it interesting that, notwithstanding the prevailing skepticism about government, people who face forcible acquisition of their land want to believe that the system will treat them fairly. For an insight into the unpleasant reality, see \textit{City of Naperville v. Old Second National Bank of Aurora}, 763 N.E.2d 951, 956 (Ill. App. 2002) (offering below condemning’s own appraisal), and \textit{Althaus v. United States}, 7 Cl. Ct. 688, 691–92 (1985) (quoting a Park Service official who demanded that owners sell their land to the government for thirty cents on the dollar, on pain of the acquisition process being interminably delayed, requiring the owners to incur large expenses for lawyers). \textit{See also United States v. 320.0 Acres of Land}, 605 F.2d 762, 777–80 n.22 (5th Cir. 1979) (describing wholesale abuses of unrepresented small property owners, consisting of taking their properties without affording them a trial).

\textsuperscript{155} Mayor & City Council of Baltimore v. Kelso Corp., 416 A.2d 1339, 1340 (Md. Ct. Spec. App. 1980) (“It means the habit of estimating things as worthless or of belittling the achievements of others.” (citing SUSAN KELZ SPERLING, POPOLLIES AND BELLIBONES, A CELEBRATION OF LOST WORDS 98 (1977))).
wait for a couple of years. If you don't take 30 cents on the dollar right now you wait a couple of years. After a couple of years, if you don't take the 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.\(^\text{156}\)

This government attitude is a predictable result of the mass appraisal process that is used in connection with laying out public works such as highway rights-of-way and redevelopment projects. Also, because of the time lag between the gathering of market data and completion of the pre-litigation appraisals, it often happens that the value of the subject land may have gone up so that the appraisals are outdated when the offers based on them are made. As a result, the owners receive offers of, not the current value of their land, but the value at the time the appraisals were made. In the rapidly rising real estate market that we have been experiencing historically in California, that can make a great deal of difference.\(^\text{157}\) And that is not all. As a knowledgeable appraiser described the process:

The most important factor that affects appraisers preparing reports for governmental agencies is that the majority of assignments involve 'projects' that have multiple parcels. An example of this type of project is a road widening project that requires the acquisition of right-of-way from several parcels along a particular road. In these multiple parcel projects the initial appraisals are written with time and budget restraints. Appraisers who are hired by government agencies must submit a fee schedule that is competitive with other appraisers who are bidding on the project. The appraisal process and fees are part of the

\(^{156}\) Althaus, 7 Cl. Ct. at 691–92 (quoting the National Park Service Chief Land Acquisition Officer, addressing a group of landowners whose property was slated for acquisition for a National Park). Note that apart from its extortionate nature, this statement was untrue; condemnation lawyers do not charge one-third of the recovery, but only one-third of what they recover for the client over and above the condemnor's offer.

\(^{157}\) Saratoga Fire Prot. Dist. v. Hackett, 118 Cal. Rptr. 2d 696, 697 (Ct. App. 2002) (stating that the value of the subject property increased by $1.2 million while the case was pending); see Bigham, supra note 114, at 76–77 (noting the delays between a condemnor’s appraisal and offer and the heavy legal fees associated with collecting the resulting difference in opinions of value).
overall budget that the government agency has set in order to complete the project.

It is difficult for appraisers who accept these multiple parcel assignments to spend time and effort in preparing an effective initial report due to the fact that the fee allocated to each parcel reflects a bulk discount and the appraiser is not in a mindset that each report will end up being involved in a court proceeding. As appraisers we all know that an appraisal that is intended to assist in eminent domain proceedings can end up being involved in a court proceeding and we may have to provide expert testimony based on the initial report. However, we also realize that if a property owner does not accept the offer of just compensation based on the initial report and condemnation proceedings are filed, we will have the opportunity to complete another report knowing that this appraisal will have to stand up to cross examination and much more scrutiny.

I call the initial appraisal process involving a multiple parcel project, ‘Throw it against the wall and see what sticks.’ As appraisers we know that only a few private property owners want to take their cases to court. In other words, even assuming good faith on the part of the condemnor’s right-of-way acquisition personnel, the initial appraisals on which prelitigation offers are based are mass-produced by hasty and—human nature being what it is—often shoddy appraisal work performed by people striving to be successful low bidders but still meet their deadlines and make a profit. The government appraisals produced for use in valuation trials (where they will be subjected to critical scrutiny) are generally better but not consistently adequate because, among other reasons, they too are performed under pressure to please the appraisers’ government employer in order to secure future business. Remember that there


is no such thing as evidence of value; there is only evidence of the appraisal witness' opinion of value, and opinions are the stuff of horse races and lawsuits. Unsurprisingly, government appraisers tend to exercise their judgment by tending to value property conservatively, hoping to secure future appraisal business. Condemnees who reject precondemnation offers and go to trial usually fare much better than those who accept the prelitigation government offers. Moreover, even at its best, appraising is not a

160. See, e.g., CAL. EVID. CODE § 813 (Deering 2004) (stating that the value of property may be shown only by the opinion testimony of qualified witnesses).
161. See Department of Transportation ex rel. People v. 151 Interstate Road Corp., 777 N.E.2d 369 (Ill. App. 2002), for an example of a court dissecting the deficiencies of a condemnor's appraisal. The vast majority of condemnees have no repeat business to offer their appraisers. It is a rare and unfortunate property owner who is sued in eminent domain more than once in a lifetime. That, however, is not the full story because forensic appraisers are usually recommended for employment as expert witnesses by condemnees' lawyers. Thus, appraisers may try to impress condemnees' counsel with their skills in appraising property liberally in the hope of securing future employment by word of mouth. But there is no realistic prospect of such appraisers being able to secure employment on a mass scale comparable to that available to appraisers who work for the government. Also, since some economic losses inflicted on condemnees are not compensable, they have a legitimate incentive to maximize the damages that are allowed by the courts, and their selection of appraisers generally tends to reflect that. This is consistent with the law that defines fair market value as the highest price that would be agreed on the date of value by buyers and sellers in a voluntary transaction. CAL CIV. PROC. CODE § 1263.320 (West Supp. 2007). The underlying theory is that inasmuch as condemnees are deprived of an opportunity to take their time to find a voluntary buyer willing to pay top dollar, the law provides them with that benefit. Thus, the appraiser selection process on the owner's side prizes appraisers' skills and track record with not much of a premium on being a low bidder—condemnees realize that they face probably their only condemnation experience of a lifetime so they and their lawyers who recommend appraisers seek quality rather than low cost, tending to result in a better product.
162. In 1999 the California Law Revision Commission reviewed the report of the Institute for Legislative Practice, Some Descriptive Statistics, that examined the results in California eminent domain cases between early 1985 through April 15, 1999, and concluded that "[t]he average jury verdict is about 41% higher than the plaintiff's offer and the average bench verdict is 33% above the plaintiff's offer." Cal. Law Revision Comm'n, First Supplement to Memorandum 99-66: Litigation Expenses in Eminent Domain Cases 2 (Nov. 16, 1999). The Commission noted that the 41 percent rate is identical to that found in an earlier Utah study published by the Salt Lake Tribune. That study indicated that of the property owners who reject condemnors' offers and insist on valuation trials, 80 percent recover more than the offers, in amounts averaging 41 percent over those offers. Ray Rivera, UDOT: Fair Deals or Land Grabs?, SALT LAKE TRIB., Oct. 24, 1999, at A1; Ray Rivera & Dan Harrie, UDOT Appraisals Lose in Court, SALT LAKE TRIB., Oct. 24, 1999, at A9. Similar results were observed in Minnesota. See Dan Browning, Losing Ground: MnDOT's Tactics Squeeze Landowners, STAR TRIB., Sep. 21, 2003, at 1A ("The Star Tribune analyzed MnDOT's computer records covering more than 1,200 cases since the late 1980s in which disagreements over land value were decided by court-appointed commissions. In two-thirds of those cases, the commission determined that property owners deserved at least 20 percent more money than MnDOT first offered. In a third of the cases, the award was at least double. . . . When property owners refuse MnDOT's purchase price, they can appeal to a commission appointed by the court to determine the value. These commissions often find MnDOT's offers too low. Here are the results of 847 such cases decided from 1998 to 2003. 
science; it involves a number of assumptions and subjective judgments on the part of the appraisers who work for the government. They are thus within their professional prerogatives to take a conservative approach if they so choose, and thus come up with low values. The proof of the pudding lies in condemnees’ lawyers’ practice of charging contingent fees based—*not* on the *entire recovery* as is done in tort cases—but only on the overage, i.e., the amount of money they secure for their clients over and above the condemnor’s offer or evidence. Since condemnation lawyers are generally prosperous, it necessarily follows that—unless we posit that they are magicians consistently capable of reducing jurors’ minds to putty with their silver-tongued rhetoric—government appraisals are often deficient and readily refuted in court. This is particularly true in cases of very large spreads between condemnors’ and condemnees’ evidence of value, where large property owners (unlike the run-of-the-mill small fry who occupy the unenviable position of fish in a barrel) are able to secure the best representation and appraisal talent, with results that speak for themselves.

It strains credulity beyond its breaking point to suppose that in all these huge, hard-fought cases, condemnees’ lawyers and appraisers consistently bamboozled judges and jurors (who, lest we forget, are taxpayers themselves) to the extent of obtaining such favorable results, as against condemnors’ appraisals presented by highly experienced career condemnation lawyers who are employed by the government. And even that fanciful scenario would not account for the voluntarily arrived-at settlement figures listed in the

MnDOT’s appraisals: $78.8 million. Amount paid or pending: $130.5 million.”); see also unpublished paper by Clemson and Emory University Professors S. Alan Aycock and Roy T. Black, Special Master Bias in Eminent Domain Cases, Oct. 5, 2007 (demonstrating that, in Georgia, the Special Masters appointed by courts to perform the initial valuation in eminent domain cases consistently undervalue the taken land, and finding that the mean condemnor appraisal is $32,722, the mean Special Master Award is $51,304, and the mean final judicial award to the owner is $177,758 (id. at 7), an increase of 543 percent over the condemnor’s evidence) (copy on file with author).

163. Florida has codified such a system of lawyer compensation. *See* FLA. STAT. ANN. §§ 73.092, 73.015(5) (West 2004). One unfortunate aspect of that reality is that, unless the spread between the condemnor’s offer and the property’s demonstrable value is large enough, the condemnee may not be able to secure competent representation. *See* State ex rel. Dept. of Transp. v. Downey, 172 P.3d 225, 227 (Okla. Civ. App. 2007) (noting that attorneys’ fees may consume the gain in compensation secured in condemnation proceedings to such an extent that the condemnee would be better off accepting the condemnor’s demonstrably inadequate offer).

164. *See* infra Appendix.
Appendix. In each of these cases there had to be serious flaws in the condemners’ appraisal approaches or in the credibility of their evidence, so that the efforts of their usually skilled and highly experienced lawyers were unavailing.

Notwithstanding this reality, the sometimes explicit but usually unspoken message in judicial attitudes toward condemnees is the judges’ unjustified belief that genuinely fair compensation to condemnees, for all the demonstrable economic losses concededly suffered by them, would unduly burden the public treasury, and that it is therefore the responsibility of the courts to keep condemnation awards down lest an “embargo” on public projects be declared, and that courts must be receptive to condemners’ desire to guard the public fisc in awarding compensation. But, as one commentator put it, “The obvious question which springs to the fore is: How do the courts know? Having never afforded compensation for most consequential injuries arising from eminent domain, it becomes clear that the courts can not ‘know.’”

The justifications for favoring condemnors were formulated over a century ago, long before urban redevelopment and urban highways, with their mass displacement of urban populations, burst upon the scene. These judicial expressions, however unwarranted, at least revealed a concern for the creation of genuine public works and originally dealt with takings of uninhabited land. But in an era of redevelopment, “economic” or otherwise, it is no longer a case of public works being supposedly at stake. In redevelopment cases, now with the blessing of Kelo, the engine that drives the newly minted “public purpose” is the redevelopers’ private financial gain, which is essential to the redevelopment project’s economic success. Unlike some earlier cases in which it was said that private gain was incidental to the public use, in redevelopment cases, particularly in

165. See Robert Kratovil & Frank J. Harrison, Jr., Eminent Domain—Policy and Concept, 42 CAL. L. REV. 596, 599 (1954) (“These policy factors . . . are usually left undisclosed or concealed behind a veil of concept.” (citing Bacich v. Bd. of Control of Cal., 144 P.2d 818, 823 (Cal. 1943))).


168. Klein, supra note 117, at 34. Others have been less charitable: “The old chestnut that increased compensation will bankrupt the states has absolutely no validity.” Frank A. Aloi & Arthur Abba Goldberg, A Reexamination of Value, Good Will, and Business Losses in Eminent Domain, 53 CORNELL L. REV. 604, 647 (1968).
those financed by tax increment bonds, private gain is essential to the enterprise, with any anticipated public benefits deriving from the redevelopers’ prosperity. In other words, the hoped-for increase in tax revenues is an incidental byproduct of the indispensable private gain enjoyed by the redevelopers and their vendees or tenants.

To achieve the promised success, the subsidized redevelopers must make large profits, some of which will hopefully trickle down into the community, thus justifying the process. That is what “economic redevelopment” is all about. Thus, “public” use or not, these projects are designed to generate large amounts of private money, so that it is difficult to see why those who stand to gain in this fashion should not be required to forgo a part of their gain to pay for the true cost of doing business, and not be able to fob off a substantial part of that cost on innocent bystanders. It is an old maxim of jurisprudence that “[h]e who takes the benefit must bear the burden,” and it fits this situation like the proverbial glove.

**D. The Clouded Crystal Ball**

History has not dealt kindly with judicial fears of the “embargo.” The nineteenth-century Farmer case (which intoned the “embargo” shibboleth for the first time) was eventually overruled by the California Supreme Court itself because it was inconsistent with modern transportation reality and the Symons rule was legislatively repealed by the adoption of section 1263.420(b) of the California Code of Civil Procedure. As for Rodoni (discussed infra), not only was its rule repealed by section 1240.410 of the California Code of Civil Procedure, but the California Supreme Court’s majority opinion further suffered the indignity of being publicly exposed as unfounded by an investigation of State excess land acquisitions, conducted by the Little Hoover Commission. The Commission’s investigation revealed that condemnation of excess lands by the California Division of Highways, far from saving the

169. CAL. CIV. CODE § 3521 (West 1997).
170. Levee Dist. No. 9 v. Farmer, 35 P. 569 (Cal. 1894).
172. LITTLE HOOVER COMM'N, PRELIMINARY FINDINGS OF THE SUBCOMMITTEE ON CALIFORNIA DIVISION OF HIGHWAYS EXCESS RIGHT OF WAY (1972); see also William Endicott, Handling of State Freeway Land Hit, L.A. TIMES, Jan. 12, 1972, at A1 (“Report [c]harges [m]ismanagement of $100 [m]illion.”). Little has changed since then. See infra note 174.
State money as successfully urged by the condemnor in Rodoni, proved to be a proverbial rat hole for public funds. It wasted some one hundred million dollars accumulating large holdings of distressed land that the State could neither use itself nor sell. Indeed, it turned out that the State’s excess-lands program was so incompetently run that its managers were not aware that the State owned some ten million dollars worth of excess lands as part of it.\(^{173}\) So much for protecting the fisc. Little has changed in that regard, as disclosed by a recent exposé of the State’s incompetence and inefficiency in holding large tracts of improved and unimproved land it acquired in the past but is unable to use.\(^{174}\) A recent study by the Orange County Register shows that, of all the land acquired by the California Department of Transportation (“CalTrans”) since 1992, only 53 percent has been devoted to the building of roads, 36 percent has been declared excess or sold or is being held with its future unknown, and another 11 percent, though assigned to projects, was later declared excess or sold.\(^{175}\)

These were not the only examples of such misguided judicial concerns over nonexistent economic problems. In Friesen v. City of Glendale,\(^{176}\) the California Supreme Court succumbed to the importunings of some twenty governmental amici curiae and held that covenants running with the land were not compensable property interests in eminent domain actions, even though they were treated as

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173. Endicott, supra note 172.


175. Kindy, supra note 172.

176. 288 P. 1080, 1083 (Cal. 1930).
such in all other areas of law. But in time it became obvious that the Friesen rule was unsound, followed only by a small minority of less-than-stellar courts, and accordingly, it was overruled by the court in Southern California Edison Co. v. Bourgerie.

The alarming extent to which otherwise brilliant and revered jurists could be induced to swallow condemns’ economic “parades of horribles” is illustrated by Chief Justice Traynor’s economic misadventures, notably his dissent in Bacich v. Board of Control of California, where he expressed his concern that awarding just compensation for substantial impairment of access in partial takings was likely to make the cost of freeways prohibitive and leave California with only the two freeways existing at the time: the Arroyo Seco Parkway (now the Pasadena Freeway) and a freeway in San Rafael. Of course, these hyperbolic concerns proved to be overstated (to put it politely), and before long, the California freeway network was measured in the thousands of miles, without any untoward effects on the public treasury. In fact, in the late 1960s and early 1970s, in spite of an ongoing, massive freeway building program, annual surpluses in the state highway budgets ran into the hundreds of millions of dollars.

That someone as bright and accomplished as Chief Justice Traynor could be so easily taken in by condemns’ hyperbole is quite remarkable because he was the one who wrote: “At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis . . . .” It bears noting that by the time he thus criticized “timid judges” easily intimidated by “bogus defenders of stare decisis” to such an extent as to forego “painstaking analysis,” it was all-too-obvious that his own hyperbolic concerns, voiced twenty years earlier in Bacich,
were unfounded. Nonetheless, he continued to cling to his clearly unsound dissenting views.\textsuperscript{183}

Chief Justice Traynor's intellectual misadventures were further underscored by the economics of the \textit{Rodoni} case.\textsuperscript{184} There, the State Division of Highways took the position that, by condemning excess land (i.e., land in addition to what it intended to use for its highway), it would convert a partial taking into a total taking and thereby save money by forgoing its obligation to pay severance damages that its partial taking would inflict on Roy Rodoni's remaining farmland, which would become landlocked by the partial taking. The obvious problem with that approach, as correctly pointed out in Justice Mosk's dissent,\textsuperscript{185} was that by taking eighty-three times as much land as it would actually use, the State could not possibly save money, unless it meant to engage in the constitutionally forbidden practice of recoupment, such as taking excess land with the intention of reselling it at a profit.\textsuperscript{186} As a matter of simple arithmetic, an entire parcel can be worth only 100 percent of its value, so that by taking it all the condemnor must necessarily pay the maximum amount possible, inherently saving nothing and indeed paying more, not less, than for a partial taking, since in partial takings the remainder parcel retains some value even if landlocked (a condition in which it could be sold by the condemnee to the neighbors, or to which access could be provided by a private condemnation).\textsuperscript{187}

Still, Chief Justice Traynor was able to muster a majority of the court for his unsound views, with only Justices Mosk and Peters dissenting.\textsuperscript{188} The majority thus went along with the condemnor's deficient argument that it was protecting the fisc, paying scant

\begin{footnotesize}
\begin{enumerate}
\item[184.] People \textit{ex rel.} Dep't of Pub. Works v. Superior Court (\textit{Rodoni}), 436 P.2d 342 (Cal. 1968).
\item[185.] \textit{Id.} at 350.
\item[186.] \textit{See}, e.g., Robert E. Capron, \textit{Excess Condemnation in California—A Further Expansion of the Right to Take}, 20 HASTINGS L.J. 571, 585 n.73 (1969) (discussing excess condemnation, the practice of taking more land than will be used for the public project); \textit{see also} CAL. CODE CIV. PROC. § 1240.410 (West 2007) (limiting excess takings to useless remnants in partial takings).
\item[188.] \textit{Rodoni}, 436 P.2d at 349–52.
\end{enumerate}
\end{footnotesize}
attention to the economic absurdity inherent in its position (i.e., that
by taking more land, the condemnor would pay less compens-
ration). As noted, economic reality eventually asserted itself when
a later Little Hoover Commission investigation revealed that Justice
Mosk was right and the majority wrong, and that far from "protecting
the fisc," the practice of excess condemnation resulted in the State
accumulating large amounts of useless land and produced huge net
losses. Why then was this course of action pursued by the State?
It turned out that, just as Justice Mosk suggested in his dissent, the
State was using threats of excess condemnation to coerce prospective
condemnees into unfavorable settlements, a matter that, though
conceded by the State, was evidently of no concern to the court's
majority, thus again shedding an illuminating if oblique light on the
prevailing judicial attitude toward condemnees.

Though not quite as embarrassing as the excess condemnation
fiasco, a similar fate befell Justice Burke's dissent in Southern
California Edison Co. v. Bourgerie, where he lamented that allowing
compensation for takings of covenants running with the land would
result in large numbers of tenuous claims in future condemnation
cases. In fact, in the quarter century that has elapsed since
Bourgerie was decided, there have been no reported appellate cases,
at least none known to me, litigating valuation of such covenants,
much less raising multiple large claims of that sort. Justice Burke's
concern thus proved to be fanciful.

A similar fate met the apprehensions voiced by Justice Edmonds
in his dissent in People v. Ricciardi, prophesying that the court's
decision allowing severance damages for substantial impairment of
access "will, in large measure, make the construction of necessary
highway improvements prohibitive in cost." A more recent
judicial performance of this sort was delivered in Agins v. City of

189. Id. at 344.
190. See LITTLE HOOVER COMM’N, supra note 172.
191. 436 P.2d at 350.
192. See Capron, supra note 186, at 585 n.73, for the text of a coercive letter used by the
State in an effort to extort favorable settlements from condemnees on pain of taking excess land
from them.
193. 436 P.2d at 349.
195. 144 P.2d 799 (Cal. 1943).
196. Id. at 807.
Tiburon (Agins I), an inverse condemnation case in which Justice Richardson, speaking for the majority, voiced apprehensions that:

“If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.”

The utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. “This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe.”

As it happened, this statement was doubly wrong. First, the “parade of horribles” conjured up by Justice Richardson, apprehending liability on the basis of mere designation of private property for future public use in land-use plans, had already been aired by the court at length in Klopping v. City of Whittier and 197 9

197. 598 P.2d 25 (Cal. 1979).

198. Id. at 30 (quoting Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111, 117 (Cal. 1973); Barbara J. Hall, Note, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 HASTINGS L.J. 1569, 1597 (1977)), aff'd on other grounds, 447 U.S. 255 (1980), overruled by First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 310–11 (1987). Note that the courts never worry about being in control of expenditure of public funds when they decide private tort claims against the government. It should also be noted that the Agins plaintiffs did not contend that a taking of their land occurred “merely” because their land had been designated for public use. There was a great deal more to it than that. Id. at 30. They had been subjected to a complex, transparently bad-faith process that eventually took over 30 years to overcome. See Philip Hager, Courting a Dream: 20-Year Fight to Build Tiburon Home Not Over Yet, L.A. TIMES, Aug. 3, 1987, at 2 (Part I); Charles Gallardo, Home OK'd but Not for Original Family, MARIN IND. J., Oct. 21, 1997, at 1.

199. 500 P.2d 1345, 1350 n.1 (Cal. 1972). The Agins plaintiffs’ complaint was not merely that their land had been designated for future acquisition. The City made extensively publicized studies concluding that the Agins’ parcel should be used for a public park, sold bonds for its acquisition, and actually filed and then abandoned a condemnation action and adopted land use regulations making economically reasonable use of the subject property a matter of municipal discretion. Pursuit of non-monetary remedies would have been futile as demonstrated by subsequent events. It took Ms. Agins $500,000 in expenditures required to meet the city’s land-use regulations and 30 years of litigation and negotiations to receive permission to build three
Selby Realty Co. v. City of San Buenaventura, both concluding that, au contraire, mere inclusion of a privately owned parcel of land in future acquisition plans does not result in government liability. To give rise to such liability, the government must have a presently discernible intent to acquire the subject land, and must conduct itself unreasonably vis-à-vis the prospective condemnor. Alternatively, to face liability, the condemnor must reveal its intention to acquire the subject property and then delay acquisition for an unreasonable period of time, thus rendering the targeted property unattractive to buyers or prospective users, with the threat of imminent condemnation hanging over it.

Second, however arrived at, the Agins I holding (that a compensatory remedy was not available) for which the above-quoted passage provided a rationale, turned out to be simply wrong, and was expressly overruled by the U.S. Supreme Court in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.

Justices of the California Supreme Court have not been the only ones to gaze into the “clouded crystal ball.” At times, Supreme Court Justices too have revealed their ineptitude as prophets. For example, in United States v. General Motors Corp., Justice Douglas lamented the prospects of “swollen verdicts” for moving expenses, even in cases of temporary takings of leaseholds (where the tenant has to move out and then move back in when the condemnor takes a temporary “slice” out of an existing lease). Unchastened by experience that demonstrated the unsoundness of

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houses on her five-acre parcel of land. Interview with Ms. Bonnie Agins, Plaintiff, Agins v. City of Tiburon, in Tiburon, Cal. (1989), discussed above. Even that costly “half a loaf” relief came only after the U.S. Supreme Court’s 1987 First English decision that for the first time confronted the city regulators with the prospect of having to pay compensation for their continued denial of reasonable use of the Agins’ parcel.

201. Klopping, 500 P.2d at 1350 n.1; Selby Realty, 514 P.2d at 115–16.
202. See People ex rel. Dep’t of Pub. Works v. Peninsula Enter., Inc., 153 Cal. Rptr. 895, 907 (Ct. App. 1979). Whether the city’s conduct in Agins met these liability criteria was, of course, an issue of fact, but the court treated it as if it were an issue of law to be decided on demurrer, without hearing any evidence.
203. 482 U.S. 304, 310–11 (1987) (holding that “the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment”).
204. 323 U.S. 373 (1945).
205. Id. at 385.
such concerns, Justice Douglas repeated his hyperbolic performance in the *Regional Rail Reorganization Act Cases*,\(^\text{206}\) where he lamented that the Court’s holding, requiring the payment of just compensation to holders of secured liens in property of bankrupt railroads taken over by the government, would produce multi-billion-dollar liabilities.\(^\text{207}\) Neither of Justice Douglas’ concerns materialized. Moving expenses are now routinely paid to displaced condemnees\(^\text{208}\) without any discernible effect on the construction of public works. As for those fancied multi-billion-dollar liabilities that so worried Justice Douglas in the *Regional Rail Reorganization Act Cases*, economic reality proved their insubstantiality.\(^\text{209}\)

Justice Black fared no better with his dissent in *United States v. Causby*,\(^\text{210}\) where he decried an award for the inverse taking of an avigation easement as an act of unwarranted judicial interference with congressional power to regulate developing aviation.\(^\text{211}\) Yet, as we know, aviation has come a long way since 1942 when waves of Army Air Corps bombers swooped at treetop level over Tom Causby’s farm in North Carolina, wreaking havoc on his chickens.

**E. To the Barricades, Citizens!**

When freeway plans were cancelled in California (and elsewhere), it was not because of excessive cost of land, but because of intense community resistance, poor planning, and illegal conduct by the State. The best known instance of freeway plan cancellation was San Francisco’s “Freeway Revolt” in which freeway construction was stopped in mid-project, leaving unfinished elevated freeway stubs looming over parts of the city.\(^\text{212}\) Several other freeways were cancelled for similar reasons.\(^\text{213}\) In Los Angeles, there


\(^{207}\) Id. at 180.


\(^{210}\) 328 U.S. 256 (1946).

\(^{211}\) Id. at 275 (Black, J., dissenting).


\(^{213}\) See, e.g., Jones v. People ex rel. Dep’t of Transp., 583 P.2d 165 (Cal. 1978) (involving a freeway cancellation in the Sacramento area); M.L. Gunzburg, *Transportation Problems of the*
was also a judicially ordered major downscaling of the Century Freeway brought about, not by any shortage of right-of-way acquisition funds, but by the State’s massive violations of environmental and relocation assistance laws. What sounded the death knell for a number of planned California freeways was not a lack of funds but, rather, Governor Jerry Brown’s decision to allow traffic conditions to worsen, in the mistaken hope that this would drive Californians to use public transit. Brown’s idea did not work because, among other reasons, there was a lack of alternative means of public transportation. Instead, what we got was increased traffic congestion.

F. Chicken Little Goes to Court

Another instructive example of the unsoundness of the “risk to the fisc” argument is provided by California airports that were repeatedly called to account for the damage they inflicted on their neighbors. This despite the airports’ vociferously voiced, though disingenuous, lamentations of impending fiscal doom that would surely follow if homeowners in areas surrounding them were to be

Megalopolitan, 12 UCLA L. REV. 800, 810 (1965) (describing the successful popular resistance to the planned Beverly Hills Freeway); Irv Burleigh, Laurel Canyon: State Suspends Freeway Studies, L.A. TIMES, Dec. 15, 1970, pt. 2, at 1 (describing the suspension of the proposed Laurel Canyon Freeway due to resident opposition); Irv Burleigh, Councilmen Issue Warnings: Freeway Protest Meeting Set, L.A. TIMES, Sept. 9, 1970, pt. 2, at 1 (discussing protest activities related to the Laurel Canyon Freeway); Ray Hebert, Beverly Hills Freeway: To Limbo, L.A. TIMES, Dec. 7, 1970, pt. 2, at D1 (discussing delays related to the Beverly Hills Freeway); No Urgency for Whitnall Route, Report Shows, L.A. TIMES, May 23, 1974, at SF1 (describing opposition to the Whitnall Freeway). The most determined resistance to a freeway, lasting for over 30 years, came from South Pasadena’s opposition to the extension of the 710 Freeway across its territory. See City of South Pasadena v. Slater, 56 F. Supp. 2d 1106 (C.D. Cal. 1999), rev’d sub nom. City of South Pasadena v. Mineta, 284 F.3d 1154 (9th Cir. 2002); FRIEDEN & SAGALYN, supra note 212, at 45 (canvassing urban highway stoppages in Baltimore, Memphis, Milwaukee, Seattle and San Antonio among others). Compensation payable to the landowners in the path of these highways had nothing to do with their cancellation. “The driving force behind the antihighway movement was indignation, and people had good reason to be indignant.” Id. at 46; see also id. at 49–50 (describing successful popular opposition to redevelopment and freeway construction in Manhattan).

compensated for the taking of avigation easements and for nuisance inflicted on them by expanded jet airport operations. These lamentations were pursued despite the fact that there was no indication that the airports’ acquisition of land necessary for their safe operation was in jeopardy or impeded the development of commercial aviation in this state. On the contrary, both the Los Angeles Airport (“LAX”) and the Burbank-Glendale-Pasadena (now Bob Hope Airport) airports proceeded with large-scale expansion plans, though in the aftermath of 9/11 these plans have been scaled back, particularly in Burbank (which originally intended to double its airport size), with the only evident impediments being environmental concerns\textsuperscript{217} and political infighting between the City of Burbank and the joint powers airport authority\textsuperscript{218}. The grandiose LAX expansion plans have recently come to a halt for reasons described by the \textit{Los Angeles Times}, not as a lack of funds but as a “[l]ack of cohesive political leadership, a history of mistrust between the city’s airport agency and nearby communities, grandiose visions for expanding the facility and an incredibly complex planning process [that] have combined to leave officials without a blueprint to modernize LAX. And time is running out.”\textsuperscript{219}

In fact, in the mid-1970s LAX proceeded with a massive land acquisition (of some 17,500 acres) in the high desert area near Palmdale in north Los Angeles County, ostensibly to establish a new, grandly named “Intercontinental” airport, which was an utter failure that was at best sporadically used by a few small, short-hop airlines that eventually terminated their operations there after trying to make a go of it.\textsuperscript{220}

Nonetheless, even as LAX’s large-scale airport expansion and land acquisition plans were being carried out in the 1970s, the

\begin{footnotes}
\item[218.] \textit{See, e.g.}, City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28 (Ct. App. 1999) (airport authority challenged state statute allowing a city to review its development plans).
\end{footnotes}
airport's lawyers pulled off what may have been the most widely publicized parade-of-horribles publicity stunt in California legal history. On May 2, 1972, the (now defunct) Los Angeles Herald-Examiner ran a front-page banner headline: "L.A. AIRPORT FACES SHUTDOWN IN 30 DAYS," reporting that unless the California Supreme Court immediately granted a rehearing in its then-brand-new decision in Nestle v. Santa Monica, and reversed itself on its ruling that California airports could be held liable to their residential neighbors for nuisance, LAX would be shut down. In private conversations with my colleague, Michael M. Berger, and me, the airport's lawyer made no bones over the fact that this story was instigated through the airport's public relations connections. Of course, the headline and the story behind it were as phony as the proverbial three-dollar bill. LAX was in no danger of shutting down because of similar judgments against it. Apart from its ample revenue stream, it had an arrangement with the airlines that were using the airport whereby they would reimburse LAX for such payouts through rents and landing fees. Second, and more important, any shutdown of LAX would stop the airport's cash flow and force a default on the city's revenue bonds, with calamitous consequences to the city's credit standing and the interest rates it would have to pay for any future bonded indebtedness.

Thus, practically speaking, the shutdown of LAX would have been economically suicidal to the city. Of course, the city had no intention of shutting down LAX and made no effort to do so when the California Supreme Court ignored this clumsy attempt at intimidation and denied rehearing in Nestle.

Still, the LAX story is worth retelling because it illustrates, as few others do, the extent to which government functionaries are willing to go, in the belief that courts can be stampeded by municipal "poor mouth" cries of impending insolvency, no matter how

221. For an actual copy of that headline, see Michael M. Berger, The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica, 9 CAL. W. L. REV. 199, 245 (1973). For a fuller discussion of the local airports' unsuccessful public relations campaign, see id. at 245–52.
222. 496 P.2d 480 (Cal. 1972).
223. Id. at 480 (holding that government-operated airports were not immune to charges that their operations constituted a nuisance with regard to surrounding land).
improbable or even false.225 These are not irrational people, and they operate on the premise that, whether true or not, some of their lamentations will have the desired impact on the judiciary—if only in terms of fostering a judicial attitude of suspicion directed at condemnees whose compensatory demands are said to threaten the public fisc.

Apart from such government mummery, the problem is broader than just the shortcomings of eminent domain compensation law and practices standing in isolation. Rather, as noted, it is one that becomes egregious in its lack of even-handedness when juxtaposed with other fields of law—notably tort law—that, insofar as it involves torts against property, is closely analogous to inverse condemnation. It is a watchword of the American tort law reform movement that awards of damages in tort cases are out of control, that excessive punitive damages are being recklessly awarded by the courts in situations that do not warrant them, that in class actions they enrich lawyers without producing commensurate or even significant benefits for individual class members, and that they increasingly constitute an unjustified economic burden on American private and commercial life.226 Some of these concerns may be overstated, but others are not.

This is no place to debate the virtues and shortcomings of modern American tort law, but it is appropriate to take note of and deplore the invidious disparity of treatment of condemnees, as compared to tort plaintiffs whose property has been trespassed upon, damaged, or otherwise interfered with. Some of the contrasts between the two compensation systems are so glaring that they cannot go without note. To reemphasize, in tort law, courts recognize that “[t]he collateral source rule [that allows multiple recoveries for the same harm] partially serves to compensate for the attorney’s share [of the award] and does not actually render ‘double

225. Nor was the LAX caper the only such government “chicken little” performance. Following United States v. General Motors Corp., 323 U.S. 373, 383 (1945) (awarding moving expenses under limited circumstances), the Justice Department lawyer who lost that case prophesied in a speech to the Nassau County (New York) Bar Association that thereafter condemnations of private property for needed public improvement would be impossible. Note, ’Just Compensation’ for the Small Businessman, 2 COLUM. J.L. & SOC. PROBS. 144, 148 n.41 (1966).

recovery' for the plaintiff." In contrast, in eminent domain cases, condemnnees cannot use any part of the damages to compensate their attorneys, appraisers, and other essential expert witnesses without diminishing their narrowly circumscribed compensatory damages. Thus, even in cases they win on the merits, condemnnees' net recovery inherently falls short of compensating them even once for the theoretically compensable economic harm inflicted on them.

Even acknowledging the need for injured tort plaintiffs to recover adequate, or even generous, economic damages for their injuries and their consequences, there is no moral justification for courts to engage in, or tolerate, multiple recoveries or feats of profligacy with tort defendants' money, while at the same time conjuring up unwarranted visions of imminent government insolvency should condemnnees receive genuinely just compensatory awards even once for all their demonstrable economic losses concededly inflicted on them when their homes and businesses are taken and destroyed to benefit society at large. And it is not a case of judicial overprotection of the government; it's a case of underprotection of condemnnees. For in personal injury tort cases against the government, the California Supreme Court has taken the position that liberal imposition of liability on government defendants is a good thing because it tends to provide disincentives to wrongful conduct by government functionaries.

Thus, in Baldwin v. State, the California Supreme Court was faced with an attack on precedents narrowly construing section 830.6 of the California Government Code, which provides the so-called design immunity defense under which liability for personal injury is denied where a harm-causing public improvement is built pursuant to an approved design. Predictably, the defendant responded to the injured party's claim by raising the familiar bankruptcy specter that often works in eminent domain cases. But Baldwin was not such a case, and the court's response was very different:

227. Helfand v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 68 (Cal. 1970). If a tort plaintiff gets to collect damages for the same harm from more than one party, what is it if not multiple recovery for the same harm? What else could it be?


230. Id. at 1129.
We are met, however, by the contention that a narrow interpretation of design immunity will bankrupt public entities by forcing them to spend vast sums of money to update hazardous or obsolescent public improvements. We unhesitatingly reject this contention because we find that the Legislature has adequately protected public entities against crippling financial burdens.\(^{231}\)

The moral problem is particularly acute in redevelopment cases where the condemnation avowedly produces no genuine public works. In reality, these condemnations inherently confer large economic benefits on politically well-connected developers as well as their tenants and vendees, who—even assuming that their self-serving commercial exertions produce collateral public benefits—get to consume a "free lunch" at the expense of condemnees and the public fisc.\(^{232}\) In other words, even if we assume that commercial redevelopment is permissible as a "public use," that does not address the question of fairness of compensation, particularly where the taking destroys condemnees' businesses so that redevelopers can use the taken land for businesses of their own.\(^{233}\)

In sum, the judicial jeremiads conjuring up visions of a helpless government unable to provide the people with needed public works if full and fair compensation—\textit{just} compensation—were to be awarded in eminent domain cases to people displaced by public works, are transparently unfounded or insincere because they are not only factually unsupported, they are also directly contrary to judicial attitudes in other types of cases. Thus, in \textit{Connor v. Great Western Savings \& Loan Ass'n},\(^{234}\) the court was faced with another parade of horribles in the form of an argument by the savings and loan industry. The argument urged that allowing recovery for defective

\begin{footnotes}
\begin{enumerate}
\item\(^{231}\) \textit{Id.} (emphasis added). The Court went on to note that before 1963 California law provided no such immunity, yet public entities had not experienced mass bankruptcies. \textit{Id. at 1130}.
\item\(^{232}\) For a description of egregious examples, see John Gibeaut, \textit{The Money Chase}, 85 A.B.A. J. 58, 59 (1999), particularly the Fort Worth Speedway sweetheart deal, wherein the city paid out some \$129 million in subsidies and tax abatements on a deal that involved a 30-year lease at the end of which the lessee-redeveloper can acquire the property for \$500,000. See also \textit{Kelo}, where the city's plan called for the private redeveloper getting a 99-year lease on a 90-acre waterfront parcel for the rent of \$1 per year. \textit{Kelo v. City of New London}, 545 U.S. 469, 476 n.4 (2005).
\item\(^{234}\) 447 P.2d 609 (Cal. 1968).
\end{enumerate}
\end{footnotes}
home construction against lending institutions that financed the construction and exercised control over it would cause thrift institutions to shun California, depriving its residents of needed housing capital. The court’s response was short and blunt: “These are conjectural claims.”

The author of that opinion was Chief Justice Traynor.

Bottom line: (a) Full and fair compensation to condemnees for all their demonstrable economic losses would only give substance to the constitutional “just compensation” command; (b) confronting condemnors with the natural economic consequences of their unilateral and largely unreviewable decisions to condemn land for projects of their own design, would not deter construction of needed public works—judicial “Chicken Little” dramaturgy notwithstanding; and (c) such a compensation regime would still provide a substantially lesser measure of damages payable to condemnees than is routinely, and in some cases eagerly, provided by the courts to plaintiffs in tort cases.

VII. FEES—IT ALL DEPENDS ON THE CLAIMANT’S POLITICAL CORRECTNESS

When it comes to attorneys’ fees, with the exception of Florida, the black letter rule is that, in eminent domain cases, the fees of attorneys, appraisers, and other experts that condemnees must retain to refute condemnors’ inadequate offers and to prove their own case, are not compensable unless authorized by statute. The conventional wisdom justification of this rule is that, under the so-called “American rule,” litigants in tort and contract cases likewise

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235. See id. at 618.
236. Id. The California legislature codified the Connor liability rule, with no effect on availability of housing finance capital. See also the extended discussion of the history of the parade-of-horribles defense in tort law in Dillon v. Legg, 441 P.2d 912, 922 (Cal. 1968).
237. As pointedly noted by Justice Kourlis of the Colorado Supreme Court, “[a]ny balancing of interests should be conducted by the condemning entity prior to deciding whether to condemn a private individual’s land for a public purpose—not after the decision has been made and the economic consequences of that decision are brought to bear on condemnees.” E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1050 (Colo. 2004) (Kourlis, J., dissenting).
238. Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950).
are not entitled to recover attorneys’ fees. But that justification is fallacious. In tort cases, even without the benefit of the collateral source rule, successful plaintiffs routinely recover subjective non-economic damages that enable them to pay their attorneys and experts while retaining the full amount of their compensatory economic damages. In contrast, in eminent domain law, there is no such thing as non-economic damages. Instead, in order to pay their litigation expenses, condemnees must give up a part of their compensatory award that, in theory, is supposed to be a substitute for their taken property. Similarly, in contract cases, parties can and often do provide, by agreement, that in case of litigation over the terms or performance of the contract, the winner gets to recover litigation expenses. Even when one party to a contract imposes an obligation to pay attorneys’ fees on the other contracting party, the law makes the obligation mutual.

In County of Los Angeles v. Ortiz, involving the taking of modest homes on Los Angeles’s downscale east side, the California Supreme Court expressed sympathy for “small landowner[s]” who are put to a Hobson’s choice of either accepting the condemnor’s inadequate, below-market offer, or absorbing the expense of litigation that in such small cases is likely to erode or consume the small equity in the homes that are being taken. The Ortiz condemnees thus urged that the rule denying them litigation expenses on such facts was de facto depriving them of their constitutionally guaranteed required just compensation. They sought reimbursement of their appraisers’ fees. The Ortiz court declined to address that constitutional argument, holding instead that awarding litigation expenses was a matter of policy “distinguished from constitutional dimension” so that “determination of costs which are permissibly recoverable remains with the Legislature rather than the

241. See Barry L. Friedman, Attorneys’ Fees in Condemnation Proceedings, 20 HASTINGS L.J. 694, 696 (1969) (noting that the fear of litigation costs and attorneys’ fees compels many condemnees to accept a condemnor’s initial purchase offer, even if the offer amounts to less than just compensation).
244. Id. at 1147 n.8.
This holding left no doubt that the court viewed the power to award litigation expenses as legislative, which necessarily rendered the judiciary unable to award fees under the separation of powers doctrine. But in Serrano v. Priest, a non-condemnation case, the judicial power to award litigation expenses (said in Ortiz to be legislative) materialized out of thin air, enabling the same court to award litigation expenses to an evidently more politically correct plaintiff who attacked as unconstitutional the then prevailing method of public school financing through local property taxes. The court sought to justify its position by asserting that, in Serrano, it was invoking an exception to the prevailing rule and was vindicating important, beneficial, constitutional rights. But the doctrinal problem with that excuse was that, in Ortiz, the court had held that the courts lacked power to award litigation expenses because it was a non-constitutional legislative policy matter. Therefore, held Ortiz, the court could not provide relief despite its sympathy for the plight of small property owners forced to accept less than the constitutionally required “just compensation.”

I am at a loss to understand how in Serrano the non-existent judicial power to award litigation expenses could materialize out of thin air as an exception to its absence. Whatever its contours, the courts either do or do not have that power, and if they do not (as held in Ortiz), that is the end of the matter. Moreover, if the power to award litigation expenses is a legislative policy question (as also held in Ortiz), then it cannot be exercised judicially because, under the California Constitution, such an “exception” would violate the separation of powers doctrine. Powers properly exercised by one branch of government may not be exercised by another branch.

245. Id. at 1147 (emphasis added).
246. See CAL. CONST. art. III, § 3.
248. See id. at 1315.
249. Id. at 1312–15.
250. 490 P.2d at 1147 (“[S]ince allowable costs are of policy as distinguished from constitutional dimension, determination of costs which are permissibly recoverable remains with the Legislature rather than the courts.”).
251. See id.
252. CAL. CONST. art. III, § 3.
In short, in *Serrano*, the court declared itself to be "a little bit pregnant." Though in *Ortiz* the court said that it lacks the power to make the policy decision to award litigation expenses, it held in *Serrano* that [sometimes] it does. The court also left an important question unanswered: If this now-you-see-it-now-you-don’t judicial power to award litigation expenses may be properly invoked in cases where citizens' constitutional rights are at stake and an award of litigation expenses fosters the public interest, as in *Serrano*, what about citizens' constitutional rights to receive just compensation? Are those rights chopped liver? Why should condemnees' conceded constitutional rights receive lesser judicial protection than the rights of other litigants? And wouldn’t a rule assuring genuine "just compensation" ostensibly required by the Constitution promote the public interest that, one would hope, encompasses more than condemnors' ability to acquire private property on the cheap? Surely, the court owed us some sort of explanation, but it offered none. *Ortiz* is not even mentioned, much less distinguished, in *Serrano*.

An even more egregious bit of invidious judicial discrimination, also with regard to litigation expenses, occurred in the court's treatment of legislation awarding litigation expenses to successful inverse condemnees. In *Holtz v. San Francisco Bay Area Rapid Transit District*,253 a property owner who won his inverse condemnation case sought an award of litigation expenses under a statute providing for recovery of "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred."254 The court held that, under this statutory language, the owner could only recover litigation expenses incurred in the trial court but not those incurred on appeal because the legislature did not explicitly so provide.255

But compare *Holtz* with *Morcos v. Board of Retirement*.256 There, a successful plaintiff in a non-condemnation case sought

255. *Holtz*, 552 P.2d at 437.
256. 800 P.2d 543 (Cal. 1990).
recovery of litigation expenses under a similar statute but was
denied fees on appeal by the California Court of Appeal, which
reasoned, a la Holtz, that had the legislature intended to award
litigation expenses incurred on appeal, it would have so provided.
But this time, unlike in Holtz, the California Supreme Court
indignantly rejected such a narrow construction of the statute. Said
the court (quoting with approval): "[I]t is established that fees, if
recoverable at all—pursuant either to statute or parties’ agreement—
are available for services at trial and on appeal."

But not so fast, argued the Board of Retirement. What about the
Holtz case? Didn’t the court hold the opposite there—that unless
expressly so provided by the legislature, attorney fees incurred on
appeal are not recoverable under a statute that provides for recovery
of litigation expenses? The court brushed that argument aside,
confessing that, to put it plainly, it had done a poor job in Holtz
where, it confessed, it “did not analyze or even refer to the great
number of cases discussed above which embody the general rule that
statutory attorney fee provisions are interpreted to apply to attorney
fees on appeal unless the statute specifically provides otherwise.”
So having thus conceded that Holtz was not only wrongly decided
but, also, a shoddy bit of judicial handiwork that had ignored
controlling precedent, did the court overrule it? Hardly. Said the
court: “We have no occasion in this case to determine the continued
validity of Holtz with regard to the proper interpretation of . . . the statute governing the recovery of attorney fees in inverse
condemnation actions.” That, said the court, “would require
consideration of the proper demands and limits of the principle of
stare decisis.” What stare decisis? Morcos plainly held that Holtz
had been wrongly decided. What force then was retained in the
concededly erroneous Holtz holding? Why did the court impose on

257. CAL. GOV’T CODE § 31536 (West 1988).
258. See Morcos, 800 P.2d at 545.
259. Id. (emphasis added) (quoting Serrano v. Unruh, 652 P.2d 985, 995 (Cal. 1982)).
260. See id. at 546.
261. Id.
262. Id. at 546 n.7.
263. Id. The problem was eventually solved by the California Legislature, which amended
section 1036 of the California Code of Civil Procedure to provide for an award of appellate fees
to successful inverse condemnees, as was the legislative intention all along. Act enacted July 24,
successful future inverse condemnees the Herculean task of persuading lower courts to disregard a California Supreme Court precedent that the court itself expressly refused to overrule in spite of its deficiencies?

VIII. BIGOTRY—SOME ANIMALS ARE LESS EQUAL THAN OTHERS

Finally, an insight into how condemnees can be treated in California courts that speaks for itself: In Redevelopment Agency v. Thrifty Oil Co., the issues involved valuation of the business goodwill of a condemnee’s service station (made compensable in 1976 by section 1263.510 of the California Code of Civil Procedure). Under California practice, both sides are required to submit and exchange their appraisal reports before trial, and in this case the condemnor’s report showed a goodwill value of $80,000. But, having thus led the condemnee to believe that this would be the condemnor’s evidence, at trial condemnor’s counsel sprung a surprise—he refused to present any evidence of the value of goodwill, asserting that it was worthless in spite of the condemnor’s own appraiser’s five-figure valuation. The trial court acquiesced in this ploy, in spite of the fact that (a) preexisting decisional law was to the contrary; and (b) condemnor’s counsel (a lawyer, not a business appraiser) was unqualified to express any valuation opinion. His assertions of no value were not only incompetent but also unsworn, and thus were no evidence at all, so that the only evidence of value was the condemnee’s. The condemnee’s counsel then moved for a directed verdict on the value of the goodwill, reasoning that the owner’s valuation (of $125,000) was now the only evidence of goodwill value before the court, and therefore the trier of fact would be required to bring in a verdict neither higher nor lower than the only goodwill valuation evidence before it. The trial court denied

264. 5 Cal. Rptr. 2d 687 (Ct. App. 1992).
265. For a discussion of the origins of this practice and of problems with the application of the appraisal exchange process in the courts, see Sic Transit Gloria, supra note 69, at 452.
266. Thrifty Oil, 5 Cal. Rptr. 2d at 690.
267. See id.
268. The California Evidence Code provides that value may only be shown by opinion testimony of qualified witnesses. CAL. EVID. CODE § 813 (Deering 2004); see Aetna Life & Cas. Co. v. City of Los Angeles, 216 Cal. Rptr. 831, 876–78 (Ct. App. 1985) (finding that a directed verdict was proper where the inverse condemnor failed to present an opinion of value and relied solely on its cross-examination of the owner’s appraiser, precisely the situation in Thrifty Oil).
the motion. Unaware of the condemnor’s appraiser’s conceded $80,000 figure, the jury awarded only $67,500.\textsuperscript{269} On appeal, the appellate court affirmed the trial court’s ruling and held that the directed verdict on goodwill was properly denied because the jury could have disbelieved the owner’s appraiser, notwithstanding that his was the only competent evidence of goodwill value.\textsuperscript{270} But compare what happened where the shoe was on the other foot, and the jury disbelieved the condemnor’s appraisal witness and brought in a verdict higher than that evidence supported.\textsuperscript{271} In \textit{McCullough}, the appellate court had no difficulty reversing that verdict.

The \textit{Thrifty Oil} court’s refusal to follow precedent acquires a particularly unfortunate cast because there, in the midst of trial, the trial judge told an anti-Semitic joke from the bench to the jury (making the condemnee’s counsel, who was Jewish, the butt of it). The point of the joke was that Jews (symbolized by the joke’s protagonist, Mrs. Goldberg) are vulgar, greedy, and given to excessive gesticulation with their hands.\textsuperscript{272}

\begin{flushright}
THE COURT: “Before we do [take a break], you notice that all of us, all the attorneys and Mr. Tennenbaum—and me—we use our hands a lot.”\textsuperscript{273} And [that] reminds me of a story.

“Mrs. Goldberg goes to the Jeweler and she says I want a ring for every finger and I want a different gem on each one of the rings, a diamond, a jade, and all different kinds, and a pearl and all different kinds of rings.

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\textsuperscript{269} \textit{Thrifty Oil}, 5 Cal. Rptr. 2d at 690.
\textsuperscript{270} \textit{Id}. at 690–92.
\textsuperscript{271} \textit{People ex rel. Dep’t of Pub. Works v. McCullough}, 223 P.2d 37, 40 (Cal. Ct. App. 1950) (jury may not disregard evidence of value and award more than the highest opinion of value). Also, a jury may not bring in a verdict for less than the lowest evidence of value. See Redev. Agency of Sacramento v. Modell, 2 Cal. Rptr. 245, 248–49 (Ct. App. 1960).
\textsuperscript{273} Mr. Tennenbaum was the owners’ business appraiser. There was no indication in the record that any of this was true. This statement was also puzzling because there was nothing in the record to suggest that the body language of condemnee’s counsel or anyone else was in any way inappropriate or noteworthy. Nonetheless, shortly before telling his “joke,” the trial judge, for no evident reason, admonished the condemnees’ counsel out of the blue, “[Y]ou don’t have to use your hands that much.” \textit{Id}. at 45. Significantly, condemnor’s counsel, who had an Irish last name, was not so admonished and, of course, the trial judge’s “joke” starred Mrs. Goldberg, not Mrs. Murphy. So much for “all . . . the attorneys . . . and me—we use our hands a lot.” \textit{Id}.
“And [the] Jeweler says, Mrs. Goldberg, that’s going to cost you a lot of money. You really want that? She says yes, you go right ahead and do it.

“So Mrs. Goldberg leaves the store and the Jeweler goes ahead and makes all those wonderful rings and she comes, Mrs. Goldberg comes in, and I have your rings ready for you, Mrs. Goldberg.

“And she puts them on, she puts the diamond on and goes like this, she puts on the pearl and puts it like this, puts them on, but each ring she turns over like this, and the pearl she turns it over like this and put it here (each stone turned [to the] palm of the hand).

“The Jeweler says, Mrs. Goldberg, you spent all of this money for these rings and you cannot wear those rings with the jewels like this.

“So she says, why not (Gesturing with palms up).”

On appeal, the appellate court did not think that this claim of prejudicial conduct on the part of the trial judge required any discussion, and affirmed. The California Supreme Court denied review.

Compare this judicial conduct in Thrifty Oil with how California courts react to questionable judicial ethnic and gender expressions in other types of cases. In In re Marriage of Iverson, the trial judge was chastised and his judgment reversed in a published appellate opinion because he referred to the wife in a marital dissolution trial as “a lovely girl” and found that it was she, not her husband, who pressed for marriage because, as the judge put it, “why... buy the cow when you get the milk free.” Significantly, the appellate court found that the trial judge was not biased against the wife specifically, but the judgment would have to be reversed anyway because of his

274. Id. (first alteration in original). I leave it to the readers to assess whether this joke was funny. My own view is that it was not, and in any event it was ethnically offensive and singularly inappropriate to be told by a judge to a jury in the midst of trial, particularly after having improperly admonished the condemnee’s counsel in front of the jury about the use of his hands. As the court put it in Etzel v. Rosenbloom, “The trial of a lawsuit is a serious matter, and the courtroom is not the forum in which the buffoon should ascend the bench to display his wares.” 189 P.2d 848, 852 (Cal. Ct. App. 1948).
275. See Thrifty Oil, 5 Cal. Rptr. 2d at 694.
276. 15 Cal. Rptr. 2d 70 (Ct. App. 1992).
277. Id. at 72.
display of generalized bias against women that constituted an appearance of lack of judicial impartiality.\textsuperscript{278}

See also the travails that befell another California trial judge who admonished an unruly African-American defendant to answer questions put to him, and when things calmed down said, "Good boy."\textsuperscript{279} The judge was ordered disqualified for saying that though he was eventually exonerated.\textsuperscript{280} But the fates were not as kind to another California judge who was displeased by the legal argument of a Japanese-American lawyer appearing before him and sarcastically inquired if counsel was relying on "Upper Tokyo Reports." For that he found himself the subject of formal disciplinary proceedings and an official reproof.\textsuperscript{281}

What is one to make of the juxtaposition of these events? Why would the Thrifty Oil's trial judge's disparaging ethnic "joke"—told from the bench to the jury in mid-trial—receive greater judicial solicitude than the other comparatively minor incidents of judicial ethnic insensitivity? I leave to others the question whether this incident suggests that California courts are more tolerant of judicial displays of anti-Semitism than of other forms of ethnic bigotry or insensitivity. I, for one, doubt that very much. But if not that, the conclusion seems inescapable that California courts—in this instance three levels of courts—did exhibit anti-condemnee bias or, if you prefer, an unacceptable level of insensitivity to their treatment that is found intolerable in other kinds of court proceedings. If any of my readers have an alternative explanation, I hope they will share it with me.

\textbf{IX. Summing Up}

It was said of the Holy Roman Empire that it was neither holy, nor Roman, nor an empire. In like vein, it can be said of eminent domain law requiring payment of "just compensation" upon taking

\textsuperscript{278} Id.; see also Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 \textit{passim} (Ct. App. 1995) (discussing indications of lack of judicial impartiality manifested through a trial judge's impatience and belittling of a female litigant).


of private property for public use that the use need not be public and the compensation is not just.

The answer to the question put to me (do property owners in takings cases receive harsher treatment by the courts than do other litigants seeking vindication of other Bill of Rights provisions?) is clearly in the affirmative. Why that is so is, of course, the real question. The short and most likely correct answer is that for all the pious talk about judicial independence, judges tend to deemphasize the other "I-word"—impartiality—and in eminent domain cases look upon themselves as a part of the government establishment duty-bound to keep condemnation awards down. As the California Supreme Court conceded, there exists a closeness between trial judges and local government officials acting as condemnors that affects judicial impartiality, at least to the extent of justifying a change of venue when the condemnees are "outsiders." The courts have also repeatedly confessed that instead of being scrupulously impartial in eminent domain cases, they tend to guard against the mythical "embargo" by deliberately keeping condemnation awards down. Thus, the courts are not impartial; they avowedly side with condemnors whose fiscal well being they perceive as superior to citizens' economic interests and their constitutional right to be justly compensated when their property is taken.

In recent years this problem has grown more acute in California and elsewhere, as more new judges come from the ranks of government counsel. This is not to say that judges who are former government lawyers are necessarily unduly biased against condemnees, but it would be denying reality to disregard the verity that people's perceptions of the world in which they function are

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shaped to a large extent by experiences of their formative professional years. It should thus not come as a surprise that many former career government lawyers who have excelled in their jobs sufficiently to be appointed to the bench bring with them a generally positive attitude toward their [former] client-employers—and a corresponding skepticism toward claims of their lifelong adversaries. This is not merely my view. Former California Deputy Attorney General Richard Frank took note of this increasingly prevailing government background of California judges when he noted, with obvious relish, that

[G]overnment attorneys can take considerable comfort from the fact that when issues of special significance to the Public Law Section [of the State Bar] and its members do find their way to the [California Supreme] Court, the Justices will bring to their deliberations the shared experience derived from literally decades of public law service and practice. After all, before they were members of California’s highest court, each of the current justices served a distinguished career as a public lawyer.  

Another, albeit partial, explanation is historical, rooted in nineteenth-century railroad land acquisition practices which dominated the country’s first wave of mass land condemnations and set an unjustified but enduring legal-cultural tone that has shaped subsequent developments in eminent domain law to a surprising extent. As Professor Scheiber put it: “Many of the [nineteenth century] courts went beyond their legislatures in fashioning a law of eminent domain that reduced the obligation to pay for takings.” They did so by “narrow[ing] drastically the very concept of a ‘compensable taking’ so as to exclude altogether nearly all forms of consequential, incidental, or indirect damages.” It was, in short, an


286. Scheiber, Private Property, supra note 118, at 19; see Risinger, supra note 103, at 491–95; see also Comment, supra note 100, at 66–67. See generally Harry N. Scheiber, Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910, 33 J. Econ. Hist. 232, 237–40 (1973) [hereinafter Scheiber, Property Law] (explaining that, because few of the early state constitutions had explicit definitions of eminent domain, it largely fell to the courts to develop states’ powers and limitations).

era during which the robber barons got to run roughshod over condemnees with judicial acquiescence, if not encouragement. During the railroad construction era, it was often the case that unsophisticated farmers were induced or pressured to give land to railroads gratis, on the theory that the coming railroads would bring about general prosperity. However, the railroads often failed to deliver any such prosperity, bringing instead noise, smoke, and fires in farm buildings and haystacks near railroad rights-of-way, caused by sparks emitted by early wood-burning locomotives. As time went on and the rosy prognostications of railroad promoters gave way to harsh realities, and as property owners started to demand realistic just compensation when their increasingly valuable land was taken, they were seen as "mean and stingy," to use Sherman's characterization.

That this should have occurred is deplorable but not entirely surprising. For one thing, at the time, land was cheap and substitute land was readily available. More important, takings were then mostly of right-of-way easements across vacant land so that few condemnees were actually displaced from their homes and fewer still suffered significant noncompensable incidental losses. Thus, the impact of takings was not as severe as it has been in modern times,

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288. See John Sherman, John Sherman's Recollections of Forty Years in the House, Senate and Cabinet 81–82 (The Werner Co. 1895).

289. Id. at 82. Significantly, by the time Sherman wrote in 1895, he had to concede that land values had risen and property owners were no longer interested in just giving their land to the railroads. Still, those who meant to receive their constitutionally promised "just compensation" were looked upon with disfavor. Later, the railroads resorted to a racket whereby in partial takings of rights of way they presented evidence that the benefits anticipated from railroad operations would be so great that the value of the owner's remaining land in its after condition would be greater than the value of the entire parcel in its before condition, thus entitling the condemnee to no compensation at all. When this ploy succeeded, the owners were paid nothing for the taking. When it failed, the railroads could and often did dismiss their condemnation actions and refile them later, hoping for a lower verdict this time, a practice described in City of Los Angeles v. Abbott, 17 P.2d 993 (Cal. 1932). See generally Scheiber, Property Law, supra note 286, at 237–38 n.20 (listing several states in which the offsetting of benefits led to insignificant awards for condemnees). The California Judiciary did nothing to curb such abuses of the judicial process, and it was not until 1872 that the California Legislature put an end to this practice by enacting section 1248(3) of the California Code of Civil Procedure (later repealed and replaced by section 1263.410(b)), which required payment at least for the part taken. See Note, Benefits and Just Compensation in California, 20 Hastings L.J. 764, 771 (1969). This practice was further limited by the enactment of section 1255a(c) (later repealed and replaced by section 1273.040), which provided for the payment of attorneys' fees upon abandonment of a condemnation action, thus putting an end to the railroads' practice of "costing 'em to death."

290. Klein, supra note 117, at 7 (stressing that nineteenth-century condemnations involved no massive redistributive takings).
when urban redevelopment projects and urban highways have, over the years, displaced millions of people from their homes and businesses. But that did not justify what went on. In California in particular, there was an unwholesome, close relationship between the railroads and the bench that took the form of a veritable revolving door between the California Supreme Court and railroad management.

Such unwholesome factors aside, in the nature of things, judges, particularly appellate judges, tend to be older than the general population, such that their perceptions are usually formed by earlier customs and practices they experienced in their formative professional years. Thus, the early judicial culture, accustomed to seeing gifts of rights-of-way as a way of life, as well as frequent uncompensated takings, viewed property owners dissatisfied with condemners' offers as overreaching. This judicial attitude survived into modern times to a surprising degree. I vividly remember appearing before the appellate courts in the 1960s where my submissions on behalf of condemnees were frequently the object of undisguised judicial impatience or even hostility.

Also, in spite of the lack of supporting economic data, many judges feared (and some still do) that genuinely just compensation of condemnees for all their demonstrable economic losses would deter railroad construction (and, later, other public projects). This most likely accounts for the prevalence of the morally and economically deficient judicial notion that strict adherence to the just compensation mandate would be too costly, but as noted, it survives until this day. As two commentators put it, "Denial of recovery for consequential losses in eminent domain proceedings cannot be attributed entirely to history. In part it seems the product of present and conscious decision" on the part of judges.


294. See, e.g., Temple City Rede. Agency v. Bayside Drive Ltd. P'ship, 53 Cal. Rptr. 3d 728, 730 (Ct. App. 2007) (noting that the trial court refused to apply provisions of statute awarding litigation expenses to condemnees upon dismissal of condemnation action for any reason, because he thought that would provide a "windfall" to the condemnee, even though as demonstrated by the Court of Appeal, the dismissal was economically beneficial to the condemnor).

commentator described such judicial expressions as judges’ “fearful
guessimates.”

This judicial attitude persists notwithstanding that its factual
bases are deficient, at least in the sense that they are assumed in
disregard of the truth, because no objective inquiry is permitted into
the government’s ability to pay for what it takes. The result is that
judges cannot possibly know whether what they say when they
intone such lamentations is true. While it is incontestable that
some condemnor may have fewer resources than others and that fact
may affect the scope of public improvements undertaken by them,
one is hard put to understand why the threadbare condition of the
public purse in particular cases (even if genuine) should, as a matter
of generally applicable law, limit all condemnee’s constitutional
right to receive just compensation in the context of projects that the
government—whatever its financial condition—does choose to
undertake. After all, the economic losses inflicted on condemnees
are a part of the overall project cost, the same as the cost of concrete
or labor expended in the construction.

The courts certainly do not hesitate to tell prison wardens who
treat their inmates in an inhumane fashion for lack of budgetary
resources that their limited funds are no excuse for unconstitutional
conduct. Besides, most public entities are well-funded, and no
reason appears why they should get a free ride while intoning
unwarranted poor-mouth lamentations. As Justice Holmes put it, the
public, like everyone else, is only entitled to that for which it pays.

Perhaps more important, by and large, condemnor have ample
funds for the construction of necessary public facilities and thus lack
any colorable basis for suggesting that being required to make fair,
complete compensation to the victims of their ambitions would

296. Klein, supra note 117, at 35.

297. Bacich v. Bd. of Control of Cal., 144 P.2d 818, 839 (Cal. 1943) (“The construction of
improvements is bound to be discouraged by the multitude of claims that would arise, the costs of
negotiation with claimants or of litigation, and the amounts that claimants might recover.”). As
one commentator put it, “Fears that an expanded scope of just compensation would ‘cost too
much’ have repeatedly served as a rationale . . . for many courts which deny recovery for
emotional injuries” to condemnees. Klein, supra note 117, at 34. Yet, “[h]ow do the courts
know? Having never afforded compensation for most consequential injuries arising from eminent
domain, it becomes clear that the courts can not ‘know.’” Id.

298. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see also Griggs v. Allegheny County,
369 U.S. 84, 89–90 (1962) (noting that to wind up with a functioning airport, the airport operator
must acquire and pay for the necessary aircraft approaches).
bankrupt them.\textsuperscript{299} It is difficult to see why they should be the beneficiaries of a system that the \textit{Wall Street Journal} likened to “the world’s kleptocracies.”\textsuperscript{300} I emphasize the word “necessary” because necessity is the Achilles’ heel of modern eminent domain law. While claiming to do so as a narrow exception, the Supreme Court opened the door to private uses of the eminent domain power in the early twentieth century by emphasizing dire necessity for exploitation of natural resources, such as water in the arid West\textsuperscript{301} and mineral deposits,\textsuperscript{302} without which, said the Court, “the very foundations of public welfare could not be laid.”\textsuperscript{303} But having done so, a few years later, the Court proceeded to discard necessity as an element of federal law of eminent domain,\textsuperscript{304} thus unwittingly knocking out the prop holding up the expanded takings power. Later, courts upheld statutes making condemnors’ determination of necessity well-nigh conclusive and thus de facto nonreviewable, and in California officially nonjusticiable altogether, even where the resolution of necessity was procured through fraud, bad faith, and abuse of discretion.\textsuperscript{305} The upshot of all that is a legal regime in

\textsuperscript{299} As noted supra Part VI.B, underestimation of project costs and waste on a colossal scale are ongoing features of the creation of public projects, so that if condemnors’ professed fiscal concerns are genuine rather than feigned, the government can cut back a bit on the “pork” and address the frequent mismanagement of public projects, if that is what it takes to assure genuinely just compensation to victims of the creation of genuinely necessary public projects. See, e.g., Danny Hakim, \textit{New High in ’06 on Borrowing for Pet Projects}, \textit{N.Y. Times}, Jan. 14, 2007, at 1, 29 (noting that money borrowed by the State of New York during 2006 for assorted local “pork” projects, known as “member items,” “exceeded the total amount of borrowed money disbursed over the previous eight years,” and that “[o]ver the last decade, lawmakers have used the [borrowed] money to finance a number of failed economic development projects, including a now-defunct high-speed ferry between Rochester and Canada that cost the state millions of dollars”); see also, Kerry Cavanaugh, \textit{Traffic Fees on Road to Nowhere}, \textit{L.A. Daily News}, Aug. 12, 2007, at 1 (noting that the City of Los Angeles collected nearly $5 million in street improvement funds but failed to undertake any such improvements). In the context of such government conduct it is difficult to summon sympathy for government functionaries’ lamentations that making “just” compensation genuinely just will deter construction of required public works.


\textsuperscript{301} Clark v. Nash, 198 U.S. 361, 369–70 (1905).


\textsuperscript{303} \textit{Id.} at 531.

\textsuperscript{304} Bragg v. Weaver, 251 U.S. 57, 58 (1919).

\textsuperscript{305} People \textit{ex rel.} Dep’t of Pub. Works v. Chevalier, 340 P.2d 598, 602–03 (Cal. 1959) (determination of necessity is nonjusticiable even when procured through fraud, bad faith and abuse of discretion). In 1976 the \textit{Chevalier} rule was modified by sections 1245.255 and 1245.270 of the California Code of Civil Procedure, which provide respectively that the resolution is not
which the power of eminent domain is freely exercised because it is said to be necessary for the creation of public projects, even though that rationale is unverifiable and provides incentives to reckless expenditures of public funds on projects of dubious soundness. But we are simultaneously told by the courts that statutory elements of necessity (which include economic feasibility) are not to be inquired into because necessity is "legislatively" determined by condemnors' own say-so, with no objective judicial inquiry permitted into the question of whether the project is merely a costly, wasteful boondoggle, transparently contrived to transfer funds from the state or federal treasury into the local economy. Nor do courts follow the logic of their policy by holding that, inasmuch as the decision regarding the size, scope, and design of the project are wholly within the discretion of the condemnors, the latter should be required to pay the true cost of the natural consequences of their own decision making; that is, those who design costly projects should be required to pay for them and not be permitted to fob off a part of that cost onto innocent parties who fortuitously happen to wind up in the path of those projects. Finally, if indeed full and fair compensation would be so economically menacing to the government, it perforce is even more menacing to individual condemnees who lack the government's resources or its ability to spread the cost on the public, which benefits from those projects.

Be all that as it may, the cold fact is that (with some regional variations) today property owners whose land is taken, whether by formal expropriation proceedings or by confiscatory regulations, do not receive the same level of even-handed justice from American courts as do other litigants who seek redress for other [constitutional] wrongs inflicted upon them.

In the wake of Kelo, law journals have been suggesting reforms in the law of eminent domain, although a few commentators have had the moral temerity to assert that, though undercompensation is rampant and some of the "public" uses for which private land is

conclusive when procured by "gross abuse of discretion" or bribery. See CAL. CIV. PROC. CODE §§ 1245.255, 1245.270 (West 2007).

306. Florida provides an exception to this rule on the justification that "[t]he reason that Florida courts have consistently held that a judicial inquiry is permissible into the necessity of taking stems from their awareness of the 'tunnel vision' that so often plagues a bureaucracy which deems itself immune from judicial review." Knappen v. Div. of Admin., 352 So. 2d 885, 891 (Fla. Dist. Ct. App. 1977).
taken are anything but that, the substantive eminent domain jurisprudence is satisfactory. There is at best a large question as to whether such statements are insincere or merely uninformed. My own view—based on forty years of practice in the field and involvement in legislative reform efforts—is that either way, they are misguided. This century's experience supports that conclusion. The congressional hearings of the 1960s disclosed prevailing eminent domain practices to be a moral pit of government overreaching and abuse of innocent people, in which undercompensation and misrepresentations were the norm. The California Law Revision Commission, whose effort culminated with the new Eminent Domain Law in 1976, took a disgracefully long time (from 1956 to 1976) to produce a recommendation for reform that made only some substantive changes in areas that were widely acknowledged to involve the worst, morally intolerable injustices, but did nothing to police and discourage the prevalence of undercompensation. More recently, during the 1990s, in spite of the Commission's Executive Director's justified suggestions for a further reform effort clarifying the prevailing confusion in the decisional law dealing with fee shifting in eminent domain cases, the

307. Since the late 1960s, I have been a consultant on eminent domain and inverse condemnation to the California Law Revision Commission, a period that included the large-scale revision of California Eminent Domain Law. See, e.g., CAL. CIV. PROC. CODE §§ 1230.010–070 (West 2007). I also served on the advisory committee on the Uniform Eminent Domain Code, and I was consulted by the Japanese Construction Ministry on that country's contemplated revisions in its expropriation law. On the basis of that long experience it is my unshakable belief that, once the post-Kelo palliative chit-chat is done with, "bogus defenders of the stare decisis" (to borrow Chief Justice Traynor's bon mot) who now argue that Kelo was neither new nor bad, and that its flaws, if any, can be cured by fiddling with procedures, will fight like tigers against the enactment of any meaningful, genuine reforms in the law of eminent domain, particularly any substantial revisions to prevailing rules of compensability. They did so successfully to defeat the Uniform Eminent Domain Code, and to blunt the effect of the Uniform Relocation Assistance Act. They are certain to try doing so again. For an example of such efforts, see Timothy J. Dowling, How to Think About Kelo After the Shouting Dies Down, 38 URB. LAW. 191, 198–99 (2006). In an outstanding example of bad timing, Dowling exhorts the procedures used in Norwood, Ohio, as exemplary of his ideas of reform. But the Ohio Supreme Court has ruled the Norwood redevelopment effort to be unconstitutional. City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

308. E.g., Hearings Before the Select Subcomm. on Real Property Acquisition, Comm. on Public Works, 88th Cong. (1963); Hearing on H.R. 386 & Related Bills Before the H. Comm. on Public Works, 90th Cong. (1968); see Curtis J. Berger & Patrick J. Rohan, The Nassau County Study: An Empirical Look into the Practices of Condemnation, 67 COLUM. L. REV. 430, 457 (1967) (discussing statistical findings that "convey explicit rebuke to a system which took advantage of nearly everyone, but saved the greatest hardships for those—docile, duressed, uncounseled—most entitled to solicitousness").
Commission refused to entertain additional inquiries into needed changes in eminent domain law. The Uniform Code Commissioners' effort in producing the Uniform Eminent Domain Code in 1974 proved to be a failure because of fierce resistance of condemning bodies. The Code was adopted (in modified form) only by Alabama and New Mexico. It has by now been downgraded to the status of a Model Code that is no longer visibly promoted.

Because the "reforms" suggested by the defenders of the status quo in the wake of *Kelo* are not substantive, they can have no direct impact on the outcome of eminent domain litigation and, if adopted, would increase the cost to condemnees who would now have to jump through additional procedural hoops in pursuit of unobtainable substantive relief. One commentator has come up with the antic notion that, in spite of the repeated concessions by the Supreme Court and other courts that "just compensation" is incomplete and harsh, and in spite of studies and commentaries published over a period of decades criticizing the deplorable state of eminent domain law, no substantive reform in compensation law is necessary because the Uniform Relocation Assistance Act makes up for the shortcomings of eminent domain law.

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Paradoxically, in an earlier article Professor Garnett argued that "the measure of damages awarded in an eminent-domain proceeding—namely, the fair market value of the property—frequently fails to make property owners 'whole.'" Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 945 (2003). I agree with that statement, except that, for reasons explored herein, I would substitute "axiomatically" for "frequently." See id. at 948 (noting that the measure of damages falls short with respect to relocation expenses, goodwill associated with a business's physical location, or the cost of replacing the condemned property).
I suggest that the problem lies primarily in judicial attitudes and judges’ unwillingness to give effect to the constitutional mandate that takings be for public use, not private enrichment, and that “just” compensation be just in fact, not just “panoramic” judicial window dressing. The fundamental problem is that courts vainly try to balance two incompatible policies. As the Supreme Court put it in *United States ex rel. TVA v. Powelson*[^311^]: “The law of eminent domain is fashioned out of the conflict between the people’s interest in public projects and the principle of indemnity . . . .”[^312^] That seemingly fair statement actually conceals serious problems. First, it presents us with a false choice—there is no such conflict. The government decides what it needs and what it will cost to satisfy that need, and proceeds accordingly. I am not aware of any studies suggesting that American governments are unable to construct necessary public improvements without engaging in kleptocratic practices of shortchanging condemnees. Even as the Court spoke in *Powelson*, when the country was emerging from the Great Depression, there was no lack of public funds for the construction of a series of huge public works, notably dams. The problem, very much in the public eye of late, is that, in the name of creating public projects, the government is frequently spending huge sums on construction of unneeded, wasteful white elephants whose public benefit is at best dubious and whose not-so-tacit rationale is merely to extract money from the federal treasury and, by means of congressional “earmarks,” transfer it to the congresspersons’ home states and districts.

Assuming a modicum of engineering skill and appraisal integrity, the cost of contemplated public projects should be understood before commencing them, without government lawyers whining in court after government decisions to proceed have already been made that if condemnees receive genuinely just compensation, the civilized world as we know it will surely end[^313^]. The idea that the

[^311^]: 319 U.S. 266 (1943).
[^312^]: Id. at 280.
[^313^]: If you think that this statement is hyperbolic, consider the following passage from the Brief of Respondent State of Cal. Dep’t of Pub. Works at 39, Lombardy v. Peter Kiewit Sons’ Co., 72 Cal. Rptr. 240 (Ct. App. 1968) (2d Civ. No. 31774):

California is on the threshold of the most intensive urbanization in the history of mankind. Streets, roads, freeways, and other forms of rapid transit are the life-giving arteries of this urban civilization. To allow claims of the type presented in the case at
government is deterred from creating necessary public projects because it lacks funds needed to indemnify victimized landowners for all their demonstrable economic losses is ludicrous, or at least wholly unsubstantiated. Second, these days the cost of construction of genuinely public projects, such as water projects and highways, is not the source of the problem, as evidenced by the fact that the people, certainly in California, unhesitatingly vote in favor of bonds with which to finance them. Rather, the public has been rightly aroused by government, notably congressional, profligacy in wasting huge sums on useless “earmarks” and by the Supreme Court’s newly minted notion that the use of the power of eminent domain is proper to enrich powerful private interests at the expense of lower-middle-class homeowners, and then, in an Orwellian linguistic performance, proclaiming the result to be a “public benefit.”

Interestingly, when the Powelson Court spoke, there were no mass redevelopment condemnations of this type being used for private gain, and takings were often of vacant land. The Court’s reference to “public projects” was thus largely accurate. It no longer is. It is time that the Court take into account the massive changes in America that have taken place since 1943 and the huge displacements of urban populations that were unthinkable in the 1940s. Finally, however the government means to use the power of eminent domain, the Constitution requires payment of just compensation, but the payments made to condemnees under prevailing law are neither “compensation” nor are they “just,” as the courts themselves acknowledge.

Much good would be accomplished if judges would refrain from twisting their analysis to achieve desired results, with an eye on their “fearful guesstimates,” as one commentator put it, of the fiscal

bar would not only preclude new and badly needed roads but would necessarily force the closing of many existing roads rather than pay the tribute which could be exacted by the public for continued passage upon such roads by the public. The urban civilization would have found a new method of self-strangulation.

Evidently influenced by such twaddle, the Lombardy court ruled in favor of the State, but its opinion was so wretched that it was later expressly disapproved by the California Supreme Court, not once, but twice. See S. Cal. Edison Co. v. Bourgerie, 507 P.2d 964, 968 (Cal. 1973) (disapproving Lombardy’s holding regarding compensability of covenants running with the land); Nestle v. City of Santa Monica, 496 P.2d 480, 489–91 (Cal. 1972) (disapproving Lombardy’s holding regarding government immunity for nuisance). To the best of my knowledge, “urban civilization” in California has not come to an end in the ensuing quarter century, although the jury is still out on the matter of “mosh pits.”
impact of the outcomes. Judges are not qualified and have no business playing at government fiscal management by avowedly distorting case outcomes to avoid what they fear will be constitutionally required results that imperil the creation of public projects. Making such fiscal planning judgments, as the courts never tire of telling us when the right to take is challenged, is a function of the legislative and executive branches of government that undertake funding and construction of public projects, not of the courts. Judges would therefore be well advised to balance their quest for judicial independence with their duty of judicial impartiality, to perform their basic adjudicative function accordingly, and to treat condemnees no worse than litigants in other fields of law. Merely giving some substance to the platitudinous but insincere judicial exhortations of fairness, justice and indemnity would go a long way toward rectifying much of the prevailing deplorable state of eminent domain law whose defenders concede to be harsh and unjust.

X. CONCLUSION

Whatever the quality of justice meted out to condemnees may be, it is not "Equal Justice Under Law," notwithstanding that this platitude is carved in stone over the entrance to the U.S. Supreme Court. "Unequal Justice Under Law" might provide a more appropriate and certainly a more truthful insight into the litigational reality administered by that Court in takings cases.

I hope that the American people, who have now been properly aroused by the unabashed judicial extremism of the Kelo decision and who now understand what "redevelopment" really means, will maintain pressure on their government and their legislators, and in the long run, will give the lie to enablers and cynics who talk a good game in the face of justified public anger but who are patiently awaiting a dissipation of popular feelings to get back to business as usual. I hope that they will fail and that the people will now insist on long overdue reform that at long last shines some light into this "dark corner of the law."  

314. See supra note 289.

315. The quoted characterization was coined by Lewis Orgel in his treatise. 2 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 266 (2d ed. 1953).
APPENDIX

Comparison of Condemnors’ Offers and Evidence with Awards or Settlements in Large California Condemnation Cases

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Condemnor’s Offer (O); Condemnor’s Evidence (E); Settlement (S); Deposit (D); Final Verdict (V)</th>
</tr>
</thead>
</table>
| Regents of the Univ. of Cal. v. Morris[^316] | $3,250,000 (E)  
| | $4,800,000 (V)  
| | $4,000,000 (S)  
| City of Los Angeles v. Retlaw Enters., Inc.[^317] | $4,000,000 (E)  
| | $14,350,000 (V)  
| City of Burbank v. Lockheed Martin Corp.[^318] | $38,000,000 (O)  
| | $86,000,000 (V)  
| L.A. Unified Sch. Dist. v. 3434 S. Grand Ave.[^319] | $13,650,745 (D)  
| | $21,980,000 (V)  
| Metro. Water Dist. of S. Cal. v. Domenigoni[^320] | $7,000,000 (E)  
| | $33,750,000 (V)  

[^316]: 72 Cal. Rptr. 406 (Ct. App. 1968). The verdict at the end of the first trial was $3,700,000. It was reversed on appeal because of misconduct of condemnor’s appraiser and trial counsel. Following retrial the jury brought in a verdict of $4,800,000, and the case settled for $4,000,000. *Id.* at 408.


[^320]: Interview with Michael M. Berger, Partner, Manatt, Phelps & Phillips LLP, in Los Angeles, CA (Oct. 21, 2007). Mr. Berger served as counsel for the defendant in *Metropolitan Water District of Southern California v. Domenigoni* in the Riverside County Superior Court in 1995. The $43,200,000 verdict was remitted by the trial court to $33,750,000, and the owners recovered an additional $4,416,966 in litigation expenses.
APPENDIX (CONTINUED)

<table>
<thead>
<tr>
<th>Case Study</th>
<th>Financial Details</th>
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| County of San Diego v. Rancho Vista Del Mar, Inc. | $5,000,000 (E) 321  
$38,714,594 (S) |
| People ex rel. Dep’t of Transp. v. S. Cal. Edison Co. 322 | $234,485 (D)  
$49,500,000 (V) |
| CalTrans v. Union Station 323 | $25,000,000 (E)  
$84,700,000 (V) |
| People ex rel. Dep’t of Pub. Works v. City of L.A. 324 | $1,809,315 (E)  
$4,339,234 (V) |
| People ex rel. Dep’t of Transp. v. Calvary Deaf Church 325 | $1,410,000 (O)  
$4,600,000 (S) |

321. County of San Diego v. Rancho Vista Del Mar, 20 Cal. Rptr. 2d 675 (Ct. App. 1993). The original jury verdict of $55 million was remitted by the trial court to $23 million. Following appeal and remand, the case settled for $26.2 million, plus interest in the amount of $12.5 million, for a total of $38.7 million. The settlement is described in Parker, Milliken, Clark, O’Hara & Samuelian v. De La Fuente, No. D041030, 2004 Cal. App. Unpub. LEXIS 5304, at *11 (Ct. App. June 4, 2004).

322. Interview with Michael M. Berger, Partner, Manatt, Phelps & Phillips LLP, in Los Angeles, CA (Oct. 21, 2007). Mr. Berger served as counsel for the defendant in People ex rel. Department of Transportation v. Southern California Edison Co., 996 P.2d 711 (Cal. 2000). In spite of its appraiser’s testimony of $4,285,000 for the part taken, plus $412,000 in severance damages, CalTrans deposited only $234,485 into court as its “good faith” estimate of probable just compensation.


<table>
<thead>
<tr>
<th>Case Description</th>
<th>Settlement Amount</th>
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<tbody>
<tr>
<td>People ex rel. Dep’t of Transp. v. Canyon Springs LLC [326]</td>
<td>$1,054,000 (O)</td>
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<tr>
<td></td>
<td>$3,800,000 (S)</td>
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<tr>
<td>Santa Clara Valley Transit Dist. v. SJW Land [327]</td>
<td>$1,900,000 (O)</td>
</tr>
<tr>
<td></td>
<td>$9,650,000 (S)</td>
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<tr>
<td>S.F. Bay Area Rapid Transit Dist. v. Hertz, Inc. [328]</td>
<td>$9,134,000 (D)</td>
</tr>
<tr>
<td></td>
<td>$23,500,000 (S)</td>
</tr>
<tr>
<td>Inglewood Redev. Agency v. Eschwege [329]</td>
<td>$990,000 (O)</td>
</tr>
<tr>
<td></td>
<td>$2,100,000 (S)</td>
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<tr>
<td>Val Verde Sch. Dist. v. Carolino Constr. [330]</td>
<td>$1,740,000 (O)</td>
</tr>
<tr>
<td></td>
<td>$3,450,000 (S)</td>
</tr>
</tbody>
</table>

326. Interview with John C. Murphy, Partner, Luce, Forward, Hamilton & Scripps, in Orange County, CA (Oct. 24, 2007). Mr. Murphy also served as counsel for the defendant in People ex rel. Department of Transportation v. Canyon Springs LLC in Riverside County Superior Court.

327. Telephone Interview with Norman Matteoni, Partner, Matteoni, O'Laughlin & Hechtman, in San Jose, CA (Nov. 4, 2007). Mr. Matteoni served as counsel in Santa Clara Valley Transit District v. SJW Land in 2004.

328. Id. Mr. Matteoni also served as counsel in San Francisco Bay Area Rapid Transit District v. Hertz, Inc., which settled in 2004.


330. Id. Mr. Hazarabedian also served as counsel in Val Verde School District v. Carolino Construction, which settled in 2005.