HOLDING BACK THE TIDE OF EMINENT DOMAIN

Jeremy P. Hopkins
Waldo & Lyle P.C.
Norfolk, Virginia
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Holding Back the Tide of Eminent Domain

I. Introduction

For years, eminent domain was just an obscure governmental power known only by individuals who have fallen victim to its exercise and to those who wield the power. The average citizen knew little about eminent domain. Over time, and under the radar, this invasive government power grew immensely. So much so that in 2005 the United States Supreme Court announced the government can take one person’s home to give it to another. Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005).

This striking decision, which seemingly belied both the United States Constitution and the American spirit, was not a surprise to those who had waged war in the trenches of America’s eminent domain courts. Sadly, Kelo was merely the culmination of a long road toward the demise of private property rights.

The silver lining in Kelo is that it brought unprecedented attention to eminent domain, its many abuses, and the citizens left in its wake. The decision sparked public debate about injustices related to the Public Use Clause of the United States Constitution. Despite this newfound interest in eminent domain, many other abuses continue to occur with little attention.

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1 Jeremy P. Hopkins is a partner with the law firm of Waldo & Lyle, P.C., a firm dedicated to protecting the constitutional rights of property owners in eminent domain, inverse condemnation, and other property rights matters. This paper was prepared by Mr. Hopkins for a presentation given at the Property Rights Foundation of America, Inc.’s Nineteenth Annual National Conference on Private Property Rights in Latham, New York on October 17, 2015. Mr. Hopkins reserves all rights to publish all or any portion of this material elsewhere.

2 Those who have experienced the invasive power of eminent domain firsthand quickly realize the truth in President Reagan’s admonition that “the nine most terrifying words in the English language are ‘I’m from the government and I’m here to help.’” available at <http://www.reaganfoundation.org/pdf/SQP081286.pdf> (from News Conference, Aug. 12, 1986) (last visited Oct. 12, 2015). Chief Red Cloud of the Oglala Lakota tribe is reported as saying in his old age, something to the effect of: “they made us many promises, more than I can remember. They kept only one — they said they would take our land and they did.” Weeks, Phillip (ed.), They Made Us Many Promises: The American Indian Experience, 1524 to the Present (Wiley-Blackwell 2nd ed. Dec. 2002).

The systematic denial of just compensation and coercive tactics the government employs against owners represent some of the many abuses.

Many of the practices giving rise to these abuses took root long ago and continue today simply because it has become the way things are done in America’s eminent domain courts. The practical, legal, and financial difficulties facing owners who seek to challenge these practices only add to their longevity. While the “long habit of not thinking [these practices] wrong gives [them] a superficial appearance of being right,” it “does not convert injustice [caused by these practices] into justice.” Just because the government has done a wrong thing for a long time does not make it right. Hopefully this paper will illuminate the many abuses property owners continue to suffer in eminent domain courts and will encourage citizens to take action.

II. Importance of Private Property Rights

The right to private property has set America apart from other nations and enabled its citizens to enjoy unparalleled personal and economic freedom. America’s founders understood the importance of private property. James Madison’s 1792 article in the National Gazette embodied this universal belief. There he stated: “Government is instituted to protect property of

The difficulties owners face in challenging government abuse is precisely the reason that “[u]nconstitutional encroachments reach across time zones and centuries.” Patel v. Texas Dep’t of Licensing & Regulation, No. 12-0657, 2015 WL 3982687, at 22 (Tex. June 26, 2015) (Willett, J., concurring). “Just this [year], in a case that took almost 80 years to bring, the U[nited] S[ates] Supreme Court struck down as unconstitutional a New Deal-era, raisin-confiscation regime that had spanned thirteen Presidents.” Id. (citing Horne v. Dep’t of Agric., 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015). In Horne, the United States Supreme Court held the government unlawfully confiscated owners’ raisins without just compensation. The owners faced millions of dollars in fines if they did not prevail—simply because they refused to hand over their raisins when the government demanded them. Horne, 135 S. Ct. 2419. Not only was this litigation costly, but it took years in court and meant almost certain bankruptcy for the owners if they lost on appeal. Owners in many states cannot challenge the condemnor’s practices or tactics until after they incur the cost of an entire trial and thereby exhausts their resources in the lower courts.

“The third absolute right, inherent in every Englishman, is that of property.” 1 William Blackstone, Commentaries 134.
every sort.”7 The Complete Madison at 267-68 (Saul K. Padover ed., 1953) remarks published in
National Gazette, Mar. 29, 1792. In 1795, The United States Supreme Court declared:

The right of acquiring and possessing property, and having it protected, is one of
the natural, inherent, and unalienable rights of man. Men have a sense of property:
Property is necessary to their subsistence, and correspondent to their natural wants
and desires; its security was one of the objects, that induced them to unite in
society. No man would become a member of a community, in which he could not
enjoy the fruits of his honest labour and industry. The preservation of property
then is a primary object of the social compact. VanHorne’s Lessee v. Dorrance, 2
U.S. 304, 310, 1 L. Ed. 391 (C.C.D. Pa. 1795).

“[I]n any society the fullness and sufficiency of the securities which surround the
individual in the use and enjoyment of his property constitute one of the most certain tests of the
character and value of the government.” Monongahela Nav. Co. v. United States, 148 U.S. 312,
324, 13 S. Ct. 622, 625, 37 L. Ed. 463 (1893). Unlike communist nations that subscribe to the
Marxist view of abolishing private property or socialist nations that severely restrict and
encroach upon private property rights, America’s founders put a system in place that respected,
encouraged, and protected private property. And their nation flourished.8

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7 Federalists and Anti-federalists agreed on the importance of property rights. John Adams believed “property must
be secured or liberty cannot exist.” James W. Ely, Jr., The Guardian of Every Other Right 43 (2nd ed. 1998).
“[Alexander] Hamilton described ‘the security of Property’ as one of the ‘great objects’ of Government.” Sapero
v. Mayor & City Council of Baltimore, 398 Md. 317, 343 (2007) (discussing the fundamental right of private
property). Thomas Jefferson wrote, “The true foundation of republican government is the equal right of every
citizen in his person and property, and in their management.” Bergh, Albert Ellery (ed.), The Writings of Thomas
Horney, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006) (discussing the “bundle of venerable rights associated with
property” and contrasting the individual’s fundamental right to just compensation and government’s power of
eminent domain); Miller v. McKenna, 23 Cal. 2d 774, 783, 147 P.2d 531 (1944) (“The right of ‘acquiring,
possessing and protecting property’ is anchored in the first section of the first article of our Constitution. This right
is as old as Magna Charta [sic]. It lies at the foundation of our constitutional government, and is necessary to the
existence of civil liberty and free institutions.”).

8 The pilgrims’ failed experiment with communal living in Plymouth, Massachusetts led Governor William Bradford
to institute a system of private property under which the colony began to thrive. See Bernard H. Siegan, Property
Rights: From Magna Carta to Fourteenth Amendment 55-56 (2001); Tom Bethell, The Noblest Triumph 42-43
Private property promotes personal freedom and economic prosperity for several reasons. Private property encourages individuals to maximize their God-given abilities, as it allows them to keep, use, and enjoy the fruit of their labors. The individual efforts of the industrious also benefit others as they create jobs and the need for additional resources to advance new ideas, services, and products. Clear and strong protections for private property bring the stability necessary for economic and personal freedom. Hernando De Soto, The Mystery of Capital (2000).

Private property divides power, and it empowers the individual. It gives individuals a sphere in which they can act free from the interference of others or the government. Individuals become invested in their community, literally and figuratively, when they own property.

The right to private property further provides freedom and liberty because it undergirds other rights. Virginia’s Arthur Lee captured this point when he declared that private property is “the guardian of every other right.” James W. Ely, Jr., The Guardian of Every Other Right (2nd ed. 1998); see also Richard Pipes, Property and Freedom (1999).

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10 “To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin.... I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.” Frederick Douglass’s irrepressible joy at exercising his hard-won freedom captures just how fundamental—and transformative—economic liberty is. Self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.” Patel at 17.
11 “But ‘economic’ and ‘noneconomic’ rights indisputably overlap. As the U[nited] S[tates] Supreme Court has recognized, freedom of speech would be meaningless if government banned bloggers from owning computers. Economic freedom is indispensable to enjoying other freedoms—for example, buying a Facebook ad to boost your political campaign. A decade (and three days) ago in Kelo v. City of New London, the landmark takings case that prompted a massive national backlash, Justice Thomas’s dissent lamented the bias against economic rights this way: ‘Something has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.’” Patel at 34; see also Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236, 17 S. Ct. 581, 584, 41 L. Ed. 979 (1897) (“Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”).
12 “The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary.” Dep’t of Agric. & Consumer Servs. v. Bogorff, 35 So. 3d 84, 92 (Fla. Dist. Ct. App. 2010) (Levine, J., concurring) (citing Joseph Story, The Value and Importance of
A quick review of the Bill of Rights reveals how private property undergirds other rights. For example, the First Amendment would be worth little without the right to private property. What good would the freedom of religion be if citizens could not own property on which to assemble and worship or could not own Bibles or other religious texts?

Freedom of speech is likewise rendered fruitless without private property. If citizens could not own property from which they could speak or could not own printing presses and other means to disseminate speech, the government would control all speech. The same is true for the right to assemble and petition the government. If citizens owned no land on which they could assemble, that right would be worthless. Citizens could assemble only when and where the government allowed them to do so.

The right to bear arms in the Second Amendment is similarly useless without the right to own and possess firearms. Private property is the premise of the Third Amendment's right to be free from the quartering of troops as it expressly allows citizens to exclude troops from their homes. The same is true for the Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" presupposes a right to private property. Individuals could not be secure in their persons, houses,

Legal Studies (1829), in Miscellaneous Writings of Joseph Story 503, 519 (William W. Story ed., 1852)). Judge Story added: "What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us and all our posterity? What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity? What remains to nourish a spirit of independence, or a love of country, if the very soil, on which we tread, is ours only at the beck of the village tyrant? If the home of our parents, which nursed our infancy and protected our manhood, may be torn from us without recompense or remorse? If the very graveyards, which contain the memorials of our love and our sorrow, are not secure against the hands of violence? If the church of yesterday may be the barrack of to-day [sic], and become the gaol of to-morrow [sic]? If the practical text of civil procedure contains no better gloss than the Border maxim, that the right to plunder is only bounded by the power?" Joseph Story, Miscellaneous Writings, Literary, Critical, Juridical, and Political of Joseph Story 453 (1835).

"The first 10 amendments to the constitution, adopted as they were soon after the adoption of the constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights." Monongahela Nav. Co. v. U.S., 148 U.S. 312, 324, 13 S. Ct. 622, 625, 37 L. Ed. 463 (1893).
papers, and effects unless they first had an ownership and possessory right in each—a right separate and independent of government.

The Takings Clause in the Fifth Amendment also presumes the right to private property. It prohibits the government from taking a person’s private property for any reason except a public use. The Takings Clause also guarantees just compensation for property taken.

Last, but not least, private property rights protect all persons regardless of race, religion, gender, age, or socio-economic status. Private property is both neutral and neutralizing. It is neutral in that it protects all people and undergirds other rights; meanwhile, it neutralizes the power of government by empowering the individual.

III. Degradation of Private Property Rights

Despite the importance of private property, politicians, judges, and those with the power of eminent domain have greatly weakened Americans’ private property rights and the protections surrounding them. The demise of property rights led to an increasing number of eminent domain abuses. The growth of government and years of slow, small encroachments on the right to private property eventually rendered feeble this once powerful bulwark of liberty.

As ambitious public officials began to view private property rights, and property owners, as an impediment to their desired public projects or redistributive policies, they began chipping away at long-established property rights protections. Other officials failed to recognize the danger in small departures from traditional protections of private property. These well-meaning representatives fell prey to the tyranny of good intentions.14

Far from acting as a check on government overreaching, courts began giving property rights reduced judicial protection and abdicated their role as a check on the other branches of

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14 “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.” Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting), overruled by Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967).
government. These courts began treating private property as an inferior right. See, e.g., Clajon Production Corp. v. Petera, 70 F.3d 1566, 1580 (10th Cir. 1995) (“Economic regulations--i.e., those burdening one’s property rights--have traditionally been afforded only rational relation scrutiny under the Equal Protection Clause.”); Bleiler v. Chief of Dover Police Dep’t, 155 N.H. 693, 698-99, 927 A.2d 1216, 1222 (2007) (explaining that property rights receive less protection than other rights because infringements on property rights “regulate property for the public good”).

One bedrock feature of 20th-century jurisprudence, starting with the U[nited] S[tates] Supreme Court’s New Deal-era decisions, was to relegate economic rights to a more junior-varsity echelon of constitutional protection than ‘fundamental’ rights. . . . Economic liberty [now] gets less constitutional protection than other constitutional rights. This is not opinion but irrefutable, demonstrable fact. Ever since what is universally known as ‘the most famous footnote in constitutional law’—footnote four in Carolene Products in 1938—the U[nited] S[tates] Supreme Court has applied varying tiers of scrutiny to constitutional challenges. Simplified, the Court divides constitutional rights into two discrete categories: fundamental and non-fundamental. . . . First Amendment speech rights receive stronger judicial protection than your disfavored Fifth Amendment property rights. The fragmentation is less logical than rhetorical, and is anchored less in principle than in power. Under the post-New Deal picking and choosing, speech gets preferred status while economic liberty is treated as ‘a poor relation’—despite the Due Process Clause’s explicit inclusion of ‘property’ . . . . Speech rights get no-nonsense ‘strict scrutiny’ to ensure government is behaving itself while property rights get servile, pro-government treatment. Patel v. Texas Dep’t of Licensing & Regulation, No. 12-0657, 2015 WL 3982687, at 32-33 (Tex. June 26, 2015) (Willett, J., concurring).

15 While some twenty-first century courts gave lip service to the importance of private property, their opinions continued to erode these rights. Compare Lynch v. Household Fin. Corp., 405 U.S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972) (“[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.”) and Dolan v. City of Tigard, 512 U.S. 374, 392, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994) (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”) with Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) (allowing the taking of one person’s property because his neighbors failed to maintain their property) and Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) (allowing the government to take one person’s property to give to another).
The lack of judicial protection for property rights and economic liberties is no secret. In defending his Affordable Care Act, President Obama argued it would be “unprecedented” for the Supreme Court to declare the Act unconstitutional. Patel at 22. He stated, “We have not seen a court overturn a law that was passed by Congress on an economic issue . . . for decades. . . . We’re going to the ’30’s, pre-New Deal.” Id.

In a lively and well-supported opinion, Justice Willett of the Texas Supreme Court documented the reduced judicial protection of property rights. In the 1920s and 1930s, liberals began backing judicial protection of noneconomic rights, while resisting similar protection for property rights and other economic freedoms. The Progressives’ preference for judicial nonintervention was later embraced by post-New Deal conservatives like Judge Bork. Id. at 21 (emphasis in original). Kelo demonstrates that this extreme judicial deference to government and reduced protections for property owners apply in eminent domain courts. Id. at 34. Justice O’Connor’s spirited dissent in Kelo “forcefully accused her colleagues of shirking their constitutional duty” to give property rights the same protection the court gives other rights. Id. Rather than being “neutral arbiters” as they are “in other constitutional settings,” many courts have become “bend-over-backwards advocates for the government.” Id. Courts have shunned “authentic judicial scrutiny [for] a rubber-stamp exercise that stacks the legal deck in government’s favor.” Id. at 31.

Excessive judicial restraint, i.e., courts abdicating their constitutional role, has done as much as any other practice to destroy property rights.17

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16 The Constitution “divid[es] government power so that each branch checks and balances the other.” Patel at 36. Judges should not engage in “[j]udicial activism, inventing rights [or powers] not rooted in the law.” Id. “But the opposite extreme, judicial passivism, is corrosive too—judges who, while not activist, are not active in preserving the liberties and the limits, our Framers actually enshrined.” Id.

17 The difference between a constitutional republic and democracy is that the majority dictates its will in the latter. In “The Case Against the Supreme Court,” leading liberal scholar, Erwin Chemerinsky, noted that “the primary reason for having a Supreme Court . . . is to enforce the Constitution against the will of the majority.” Excessive judicial restraint threatens the constitutional republic just as much as excessive judicial activism by which judges create non-existing rights and powers.
The Founders understood that a ‘limited Constitution’ can be preserved ‘no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.’ Judicial duty—‘so arduous a duty,’ Hamilton called it—requires courts to be ‘bulwarks of a limited Constitution against legislative encroachments,’ . . . Such is life in a constitutional republic, which exalts constitutionalism over majoritarianism precisely in order to tell government ‘no.’\textsuperscript{18} Patel at 40.

While courts should not create non-existing rights or powers, they must safeguard existing individual rights and uphold restrictions on governmental power. “Government’s conception of its own power as limitless is hard-wired.” Id. at 39. The courts’ dereliction of its constitutional duty of judicial review leaves property owners’ homes, farms, businesses, and places of worship at the whim of legislatures and public officials wielding the power of eminent domain.\textsuperscript{19} Kelo is proof of the resulting danger.

The assault on property rights is not surprising when one considers the fact that the legal academy, which educates judges and many politicians, had long ago grown hostile to property

\textsuperscript{18} The United States Supreme Court has recognized that the sheer will of the majority, i.e., democracy, is a “despotism of the many.” Citizens’ Sav. & Loan Ass’n v. City of Topeka, 87 U.S. 655, 662, 22 L. Ed. 455 (1874) (“It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.”); see also Marbury v. Madison, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) (recognizing the importance of proper judicial review where there is a “written” Constitution and declaring that laws “repugnant to the constitution [are] void”).

\textsuperscript{19} Writing for the United States Supreme Court, Justice Story recognized that the people did not leave their property rights solely to the will of the legislature. Wilkinson v. Leland, 27 U.S. 627, 657, 7 L. Ed. 542 (1829) (“That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention.”).
Many in the academy perceive these rights, once viewed as a venerable pillar of freedom, as an impediment to increasing government projects and progressive policies.

Additionally, many judges in today’s system are former government attorneys who, given their experiences, have a proclivity to side with the government. It seems that being a prior government attorney is a prerequisite to being on the bench in some courts. This phenomenon has made property rights victories even more difficult to attain.

Consistent with extreme judicial deference that requires courts to turn a blind eye to governmental encroachments on property rights, many of the abuses prior to Kelo went unnoticed. This fact is evident from a string of United States Supreme Court decisions on eminent domain, as well as many state court decisions. While Kelo sparked long-overdue public debate regarding eminent domain abuse, the United States Supreme Court issued two earlier opinions that quietly set the stage for Kelo.

In 1954, the High Court declared that the government can take a person’s home solely because his or her neighbors failed to maintain their property. Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). The undeniable impact of this case was that government could now take a person’s private property based on the actions of another. Then, in 1984, the Supreme Court effectively ruled the state could take a person’s property because that person owned too much. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d

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20 The government’s hostility toward property owners in Virginia rose to such a level that the Virginia Department of Emergency Management’s training manual, which is used for orientation of state employees, listed “property rights activists” as domestic terrorists because they “undermine confidence in the government [and] influence government or social policy.” Al-Qaeda, the Klan and Property Activists?, Fredericksburg Star, Jeremy Hopkins, January 20, 2011. It listed “property rights activists” among groups such as Al-Qaeda, Hamas, and Hezbollah. When the Mountain States Legal Foundation contacted the governor’s office regarding this situation, Virginia changed “property rights activists” to “property rights extremists: anti- eminent domain.” Id. United States Supreme Court Justice Lewis Powell, himself a Virginian, was right; “History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies.” United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 314, 92 S. Ct. 2125, 2135, 32 L. Ed. 2d 752 (1972).
Regardless of the rationale behind this decision, the court sanctioned an outright taking of one person’s property, the landlord, to give to another, the tenant.

Many state courts have issued similar decisions that carve away at property rights, while legislatures continue to dole out immense powers of eminent domain to a slew of public and private entities. Many of these entities have little, if any, public accountability. Over time the right to private property, once a bulwark against government encroachment, became little more than a speed bump standing in the way of ever-ambitious government officials.

IV. Grievances: From the Declaration of Independence to Modern Day Eminent Domain Practices

Today’s eminent domain abuses are reminiscent of a few of the colonists’ grievances in the Declaration of Independence. The colonists complained that the king “has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.” To individuals who have been forced to surrender their property under the current eminent domain regime and its multitude of officials, this complaint rings true.

The colonists further complained that the king had agreed to laws “altering fundamentally the forms of [their] government.” Individual, federal judges that have unilaterally granted powers of eminent domain to private companies, despite Congress’s decision to withhold such powers, have undeniably altered the constitutional form of government and trampled the constitutional separation of powers.

The colonists also complained that the king had assented to legislation “depriving [colonists], in many cases, of the benefits of trial by jury.” To individuals whose property has been taken, the court sanctioned an outright taking of one person’s property, the landlord, to give to another, the tenant.

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Many state courts have issued similar decisions that carve away at property rights, while legislatures continue to dole out immense powers of eminent domain to a slew of public and private entities. Many of these entities have little, if any, public accountability. Over time the right to private property, once a bulwark against government encroachment, became little more than a speed bump standing in the way of ever-ambitious government officials.

IV. Grievances: From the Declaration of Independence to Modern Day Eminent Domain Practices

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been taken in federal court where they have no right to a jury, this complaint strikes close to home.

Finally, the colonists complained that the king and his officials engaged in practices “for the sole purpose of fatiguing them into compliance with his measures.” Today the government routinely engages in strong-arm tactics designed to fatigue owners into compliance with their demands, such as sandbagging, protracted litigation, and others. Stated differently, the government routinely tries to litigate owners into submission so that it can take the owner’s property at its desired price.

A. **Harassing Property Owners and Eating Out Their Substance Through A Vast Number of Entities Possessing Broad Powers of Eminent Domain**

The growth in size and scope of government led to a massive expansion of the eminent domain power. Legislatures have doled out immense powers of eminent domain to an array of private, public, and quasi-governmental entities. Politicians seeking to avoid personal accountability for unpopular takings have created a multitude of governmental and quasi-governmental agencies to do the dirty business of taking property. Among these are housing authorities and other entities that are often led by unelected bureaucrats.

The list of entities that now possess the power to take property reads like a phone book. And the powers they possess are just as vast. Unelected, unaccountable government bureaucrats, as well as private parties taking property for financial gain, now threaten citizens’ homes, farms, businesses, and places of worship.

In Virginia, for example, Mosquito Control Commissions and the Virginia Baseball Stadium Authority, among others, can take a person’s property. *The Law of Eminent Domain* (Hopkins, Jeremy P., author of Virginia Chapter) – Fifty State Survey, American Bar Association / First Chair Press, 1st Ed. (William G. Blake, Editor) (2012); see also Va. Code §§
In their quest for profit and power, the many entities possessing the power of eminent domain have created a well-organized and highly-funded takers lobby, which continues to chip away at protections for private property rights almost annually.

More remarkable than the number of entities that can take property is the power they possess. Many states have created an extraordinary power called the quick take power. Most citizens are unaware of this immense power, which allows a condemnor to take an owner’s property merely by recording a document at the courthouse.23 Upon recording this document the condemnor immediately gets the property. The owner loses his or her property, and must vacate, before receiving just compensation.

The problems do not end there. In Virginia, for example, the law does not require condemnors to tell owners when it takes their property. The law requires only that the condemnor send the owner a letter saying it intends to take the owner’s property at some time in the future. Sometimes condemnors send these letters and never take the property. At other times, owners check the mail to find a letter saying they have 90 days or less to vacate their home, never knowing the condemnor took their property months earlier.24 Such unsuspecting owners continue maintaining and paying taxes on property long after they own it.

The quick take power works like this: The condemnor records a document at the courthouse, deposits what its agents say the property is worth, and immediately gets ownership of the property. The owner is forced to leave his or her home, with the opportunity to withdraw

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23 Almost all states have some form of the quick take power.
24 Virginia has a statute that says, “to the greatest extent practicable,” the government cannot evict a person with less than 90 days notice. Va. Code § 25.1-417(A)(5). Importantly, however, the statute concludes by saying: “The provisions of this section create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.” Va. Code § 25.1-417(B). One court held that similar language in a federal statute rendered meaningless any protections the statute provided. See Clear Sky Car Wash LLC v. City of Chesapeake, 743 F.3d 438 (4th Cir. 2014). Many condemnors have resorted to sending the “90-day letter” before they actually take the property and then attempt to give owners less than 90 days to vacate after they take the property.
from court whatever amount the condemnor chose to deposit—\(^25\)—and a potential trial at which the owner can seek the actual value of the property taken. However, mortgages and other legal issues often prohibit or delay the owner from being able to withdraw the money from court, and some courts even charge the owner a fee for withdrawing the money.

Practically speaking, the condemnor, as the buyer, sets the price and evicts the owner who must then use the limited money deposited, if he or she can get it, to pay off any existing mortgages, secure a new home, and somehow obtain the additional resources needed to wage a legal battle for just compensation. Needless to say, many owners succumb to this pressure cooker called the quick take power. Condemnors seeking to get property cheaply recognize that the quick take power is just the right tool to force owners into surrendering their property at the condemnor’s desired price. Although the purpose of the quick take power is to expedite construction, condemnors that possess this power use it almost exclusively, even when construction is far off.

**B. Altering the Constitutional Form of Government Through Judicial Grants of Legislative Powers of Eminent Domain**

Similar to the colonists’ complaints about the king altering the form of government, modern judges presiding over eminent domain cases have singlehandedly altered the constitutional form of government. Eminent domain is a legislative power.\(^26\) Only the

\(^25\) As one government acquisition agent’s testimony made clear, the government’s deposit often amounts to about 30 cents on the dollar. *Althaus v. United States*, 7 Cl. Ct. 688, 691-92 (Cl. Ct. 1985); see also *United States v. 341.45 Acres*, 751 F.2d 924, 927 (8th Cir. 1984).

\(^26\) The power of eminent domain resides exclusively in the legislature, can only be exercised by entities to which the legislature has granted the power, and can be exercised only in the manner the legislature prescribes and upon satisfying the conditions the legislature places upon such power: 1A *Nichols on Eminent Domain* § 3.03 (rev. 3d ed. 2003) (stating that the power of eminent domain lies dormant until legislative action is employed, pointing out the occasions, modes, agencies, and conditions for its exercise); *United States v. 9.94 Acres*, 51 F. Supp. 478, 480-81 (E.D.S.C. 1943) (stating that Congress determines by whom, when, and how the power of eminent domain will be exercised); *State ex rel. Nelson v. Butler*, 145 Neb. 638, 646, 17 N.W.2d 683, 689 (1945); *Root v. State*, 207 Ind. 312, 192 N.E. 447, 448 (1934); *Johnson v. Wells Cnty. Water Res. Bd.*, 410 N.W.2d 525, 527-28 (N.D. 1987); *Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 26 (Ala. 2012), as modified on denial of reh’g (Sept. 27, 2013) (Murdock, J., concurring in part and dissenting in part) (discussing this universal rule of
legislature can grant the power.\textsuperscript{27} Only the legislature can decide how the power will be exercised when it is granted.\textsuperscript{28}

Yet, some federal judges have granted extraordinary powers of eminent domain to private companies even when the judges acknowledge that the legislature chose to withhold these powers from these companies. See East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004). These judges invade the province of the legislature to grant private gas companies the power to seize owners’ property before paying for it. At least one federal appellate court relied on a court-created rule, not a law, to uphold this judicial usurpation.

In Sage, a natural gas company sought to take property from several farmers and other rural owners. Recognizing Congress had not granted private gas companies the quick take power, the company asked a federal judge to give it this power so the company could take the property before paying the owners just compensation. The United States Court of Appeals for the Fourth Circuit acknowledged that Congress withheld this extraordinary power from private gas companies. It then declared that individual judges may grant these companies the quick take power even though Congress chose to withhold it from them. This judicial practice tramples the constitutional separation of powers and allows individual judges to substitute their will for the deliberative decisions of Congress.

Unfortunately for owners, this practice is commonplace throughout the country, with only a few courts recognizing the problems inherent in it. Notably, the Fourth Circuit never

\textsuperscript{27} See n. 26 supra.
\textsuperscript{28} See n. 26 supra.
addressed the constitutional separation of powers but instead cited a court-created rule to uphold the judicial invasion of legislative prerogative. 29

C. Depriving Property Owners of the Right to a Jury

The United States Constitution guarantees the right to a jury, but federal law denies property owners this right in eminent domain cases. 30 United States v. Reynolds, 397 U.S. 14, 18, 90 S. Ct. 803, 806, 25 L. Ed. 2d 12 (1970) (“For it has long been settled that there is no constitutional right to a jury in eminent domain proceedings.”). The Seventh Amendment of the United States Constitution is clear. It states: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”

Just as courts use a court-created rule to exercise legislative powers and thereby alter the constitutional form of government, the United States Supreme Court created a rule that denies owners a right to a jury in eminent domain cases. See Rule 71.1 31 (authorizing judges to deny owners a right to a jury in eminent domain cases). It did so despite the Seventh Amendment’s guarantee. The Constitution giveth, but the High Court taketh away.

Twenty Michigan property owners are currently challenging the denial of the right to a jury. In documents filed in court, their counsel noted:

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29 The Court relied upon Federal Rule of Civil Procedure 65. To further support its opinion, the Sage court misconstrued the holding in a prior United States Supreme Court case, Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890). The issue in Cherokee Nation was whether the railroad could take possession of the owner’s property after just compensation was determined but while the case was on appeal. The Court in Cherokee Nation held condemning could take possession of an owner’s property after a just compensation trial while an appeal was pending. The Sage court mis cites Cherokee Nation for the proposition that “the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid.” Sage, 361 F.3d at 824. While the Court in Cherokee Nation authorized possession of the property after the just compensation trial and award, the Sage court authorized possession of the property before the just compensation trial and award.

30 The United States Supreme Court has limited the jury’s role even in cases where a federal judge allows a jury. United States v. Reynolds, 397 U.S. 14, 20, 90 S. Ct. 803, 807, 25 L. Ed. 2d 12 (1970) (“Although the matter could be decided either way without doing violence to the language of Rule 71A(h), we think the Rule’s basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge.”).

31 This rule was formerly Rule 71A.
Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-Saxon law. . . . [The] right to be justly compensated is an action that, under English and American law since the Magna Carta, recognized the owner’s right to vindicate their ownership of property with trial by jury. Brott v. United States of America, Complaint and Jury Demand filed by owners’ counsel, Mark F. (Thor) Hearne II at 12-13.; see also Magna Carta §§ 39, 52.

These owners explained that the right to a jury trial is most important in citizens’ actions against the government, where an impartial panel of citizens sit as a check on government power. Id. at 13 (citing George E. Butler II, Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury, 1 Notre Dame J.L. Ethics & Pub. Pol’y, 595 (1985)).

The right to a jury in takings cases is so sacred that, in 1787, the North Carolina Supreme Court upheld this right even for British sympathizers whose property had been taken. Id. at 14 (citing Bayard v. Singleton, 1 N.C. 5 (1787). In 1810, Chief Justice John Marshall found that the law authorizing the government to take land owned by Martha Washington’s heirs to build a turnpike in the District of Columbia expressly recognized the right to a jury. Id. at 15 (citing Custiss v. The Georgetown & Alexandria Tpk. Co., 10 U.S. 233, 234 (1810)). Landowners in England were entitled to a jury trial even when the King took their land. Id. at 11-15 (citing De Keyser’s Royal Hotel v. The King, ch. 2, p. 222 (1919) and discussing English history).

Today, however, court-created rules deprive Americans of their right to a jury when their property is taken. Time is long overdue for Congress to act to restore property owners’ rights to a jury in eminent domain cases. Citizens facing the confiscation of their property under the power of eminent domain should be entitled to have just compensation determined by a jury of their peers, not by a government appointed judge or whomever the judge wants to set the value.

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32 As the government continues to employ an increasing number of citizens, and even more persons become reliant on government in some fashion, it will be interesting to see ifjuries will be more tolerant of government-overreach or if they will continue to fulfill their role as an unbiased and impartial check on government.
D. Fatiguing Property Owners Into Compliance Through Sandbagging, Undercompensation, and Other Pressure Tactics

1. Sandbagging

The quick take power has led to other abuses, such as sandbagging. Sandbagging is where the government takes the owner’s property by quick take, pays the owner the amount the government claims the property is worth, and then later changes its position on valuation. The government next demands that the owner pay back a portion of the money unless the owner waives the right to have a jury determine the actual value.

Reminiscent of the epic line in the Godfather, the government makes the owner “an offer he cannot refuse.” The government tells the owner it will honor the initial payment if the owner does not demand a jury trial. Otherwise, the government will get another appraisal with a lower value and seek to make the owner return a large portion of the initial funds the government paid when it took the property.

At this point, the owner has already vacated the property and used the deposit (i.e., the purchase price paid by the government) to pay the old mortgage and to relocate. Some owners in this position face bankruptcy. The condemnor forces these owners to vacate their property, and the bank demands the money to pay off the mortgage on the property the owner lost. Many of these owners must also procure a new mortgage to obtain a replacement property. They do not have money to return in these situations.

If that pressure is not enough, the government then takes the position that the court should not allow the jury to know that the government previously told the owner the property

33 Some states refer to this tactic as lowballing.
34 In a recent case in the Texas appellate courts, the condemnor’s own attorney sought to ask jurors if they believed the government engaged in the practice of lowballing owners. State v. Treeline Partners, Ltd., No. 14-14-00462-CV, 2015 WL 5092610, at 1 (Tex. App. Aug. 27, 2015) (“In the dispositive issue, we conclude that the trial court abused its discretion by informing the State’s attorney during voir dire that the attorney would be held in contempt if she tried ‘to talk about whether anybody believes that the State lowballs’ or ‘anything similar.’”).
was worth substantially more than what it will tell the jury. Finally, if the uniformed jury determines the value is more than the government’s new, lower value but less than the government’s original, higher value, the owner must repay the difference.

Owners with enough resolve and resources to press forward with a jury trial learn that the government will carry out its threat. At trial the government asks the court to hide from the jury its original (higher) value of the property. The government also asks the court to keep the jury from knowing the owner may have to pay back money.

Many trial courts have allowed the government to conceal this evidence from the jury. These courts charge the jury to carry out justice, but then do not let the jury hear all the facts or the predicament in which the government has placed the owner. This strong-arm tactic has proven to be an effective weapon for pressuring owners into settling or taking the government’s first offer.

The frequency with which condemnors use this practice demonstrates it is more than buyer’s remorse. This tactic is calculated to subdue the owner. It allows the government to take the property at one price and then demand money back after the owner has used the funds to pay off the old mortgage and obtain a mortgage for a replacement property. Condemnors have

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35 This practice is a fraud on the jury because the court instructs the jury to carry out justice but prohibits the jury from hearing the facts. When just compensation or the value of the property is the sole issue at trial what could be more relevant and probative than the government’s former statement about just compensation and the value of the property?  
36 Alan Ackerman, an experienced Michigan property rights attorney, has noted that “a lot of the government agencies . . . across the country . . . are lowering their offers to punish people for fighting them.” Hinkle, Barton, VDOT Muscle: An Eminently Unfair Practice, Richmond Times Dispatch (Feb. 16, 2014). After stating that the practice of sandbagging is “very, very common,” Gideon Kanner, another seasoned property rights attorney and law professor, was quoted as saying, “sandbagging . . . sends a powerful signal to the owner that if he doesn’t settle, he runs the risk of having to cough up cash he hasn’t got.” Id. Professor Kanner has previously written that “This practice [of sandbagging] is so old that it was cautioned against by the late Dick Huxtable in the 1960 edition of the CEB California Condemnation Practice, CLE book, (§12.24, pp. 243-244) and was repeated in the 1973 edition. (§9.57, at pp. 244-245), as well as the current one. There have even been cases in which condemnors had the chutzpa to try and pull this ‘sandbagging’ routine by using one appraiser who testified to one figure for purposes of fixing the deposit, and the same appraiser trying to use another [lower] figure in trial. County of Contra Costa v. Pinole Point Properties, 27 Cal.App.4th 1105 (1994), and see Community Redevelopment Agency v. World Wide Enterprises, No. B122176 (2000) (opinion vacated when condemnor settled).” available at <http://gideonstrumpet.info/?p=5225> (last visited on Oct. 12, 2015).
employed this tactic for years in states such as Virginia. Some condemnor have been so brazen as to threaten the use of this tactic at the outset of negotiations, even before exercising the quick take power.

After years of this abusive tactic in Virginia, this government tactic was exposed in Ramsey v. Comm’r of Highways, 770 S.E.2d 487 (Va. 2015), a case before the Supreme Court of Virginia. The issue in that case was not about the propriety of this tactic but centered on the government’s ability to keep its former statement of value from the jury. Trial courts in Virginia had ruled that, while an owner’s former statement about the value of his or her property was admissible, the government’s former statement of value about the owner’s property was not admissible. The Supreme Court of Virginia, in a unanimous decision, held that condemnor in Virginia can no longer hide this evidence from the jury when it chooses to engage in this tactic. After years of abuse, Virginia owners now have a more even playing field in their fight for just compensation.

2. Undercompensation

It is no secret that property owners in eminent domain cases get undercompensated. In a 2010 opinion, the United States Court of Appeals for the Seventh Circuit recognized “[t]he fact that ‘just compensation’ tends systematically to undercompensate the owners of property taken by eminent domain.” United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) (acknowledging that undercompensation is not deemed a “wrongful act”). The Court readily acknowledged that, “just compensation is less than full compensation.” Id. at 834.

37 The Supreme Court of Virginia cited other appellate courts across the country that had likewise noted the fundamental unfairness of this tactic of keeping relevant evidence from the jury. See, e.g., United States v. 320 Acres, 605 F.2d 762, 822-25 (5th Cir. 1979) (“Government is not completely free to play fast and loose with the landowners—telling them one thing in the office and something else in the courtroom.”); Michigan Dep’t of Transp. v. Frankenlust Lutheran Congregation, 269 Mich. App. 570, 584, 711 N.W.2d 453, 462 (2006) (“Permitting the landowner to dispute a condemning authority’s contention of a lower value at trial . . . will serve as a limited [and wholly appropriate] check on the broad powers of the State in condemnation proceedings.”).
This opinion should be no surprise given the United States Supreme Court’s
pronouncement that it is willing to tolerate undercompensation. In Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10, n.15, 104 S. Ct. 2187, 2194 n.15 (1984), the Court declared: “[I]n some cases, th[e] [court’s] standard [of just compensation] fails to fully indemnify the owner for his loss . . . [and] does not make the owner whole. We are willing to tolerate such occasional inequity.”

Some courts have explained that they allow undercompensation because it is too difficult to determine actual just compensation. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 104 S. Ct. 2187 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506, 512, 99 S. Ct. 1854, 1858, 60 L. Ed. 2d 435 (1979) (stating in some cases “the indemnity principle [embodied in the just compensation requirement] must yield to some extent before the need for a practical general rule”). Other courts promote undercompensation because they see their duty as controlling the costs of public projects, even at the expense of those forced to surrender their property. These courts view their role as protecting the government from the owner whose property is being taken. In People ex. rel. Dep’t of Pub. Works v. Symons, 54 Cal. 2d 855, 860-62, 357 P.2d 451, 454-55 (1960), the Supreme Court of California stated that “courts have assumed the burden and responsibility of seeing to it that the cost of public improvements . . . be not unduly enhanced.” It added that full compensation would “place an embargo upon the creation of new and desirable roads.” Id.

Courts such as the Supreme Court of California seem to forget their role as a check on the other branches of government, and instead act as a check on the citizen whose property the

38 In United States v. Petty Motor Co., 327 U.S. 377-78, 66 S. Ct. 596, 599-600 (1946), the Court proclaimed: “It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory.”
government is taking. 39 “Our Bill of Rights[,] which includes the Just Compensation Clause[,] is not mere hortatory fluff; it is a purposeful check on government power.” Patel at 38. As its name implies, a Bill of Rights recognizes “rights” of the citizens, not powers of the government.

Courts do not sit to safeguard the government but rather to act as a check on the other branches of government. This role is especially true in eminent domain cases where a condemnor wielding the full powers and machinery of the state hails an innocent owner into court against his or her will.

“Our Framers understood that government was inclined to advance its own interests, even to the point of ham-fisted bullying, which is precisely why the Constitution was written—to keep government on a leash, not We the People.” Id. Too few courts remember that “when the Constitution is at stake, it is not impolite to say ‘no’ to government. Liberties for ‘We the People’ necessarily mean limits on ‘We the Government.’ That’s the very reason constitutions are written: to stop government abuses, not to ratify them.” 40 Id. at 37.

The undercompensation of property owners is difficult to comprehend given the Constitution’s express requirement to provide “just compensation” to owners who are forced to surrender their property for public use. “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

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39 See Marbury v. Madison, 5 U.S. 137, 137, 2 L. Ed. 60 (1803) (seminal case on judicial review); see also Jacobs v. United States, 290 U.S. 13, 17, 54 S. Ct. 26, 28, 78 L. Ed. 142 (1933) (stating “the right to just compensation could not be taken away by statute,” which recognizes courts sit as check on government when it encroaches upon an owner’s right to just compensation).

40 “Judicial restraint does not require courts to ignore the nonrestraint of the other branches, not when their actions imperil the constitutional liberties of people increasingly hamstrung in their enjoyment of ‘Life, Liberty and the pursuit of Happiness.’” Patel at 37. As Justice Willett pointed out: “there is a fateful difference between active judges who defend rights and activist judges who concoct rights. If judicial review means anything, it is that judicial restraint does not allow everything.” Id. at 20.
be borne by the public as a whole.\footnote{\textit{Armstrong v. United States}, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960). Even “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 416, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922). Nevertheless, the practice of undercompensation continues.}

\begin{itemize}
  \item \textbf{Litigation Expenses: Forfeiting a Portion of Just Compensation Solely Because the Government Makes an Unconstitutionally Low Offer}

  Two major causes of undercompensation are litigation expenses and non-compensable damages. While every state constitution guarantees property owners just compensation, many states’ laws guarantee that owners cannot receive just compensation.\footnote{North Carolina’s Constitution does not have a Just Compensation Clause, but its courts have interpreted the “law of the land” clause to require just compensation. \textit{Dep’t of Transp. v. Rowe}, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (“The right to just compensation is not expressly mentioned in the North Carolina Constitution, but this Court has inferred such a provision as a fundamental right integral to the ‘law of the land’ clause.”).} The reason is simple: many states do not provide reimbursement for litigation expenses even when the condemnor makes a low offer that requires the owner to go to court to get justly compensated. Unless the government makes a fair offer for the property, the owner has no choice but to seek just compensation in court. There he or she is forced to forfeit a portion of just compensation to litigation expenses.

  For example, if the government offers an owner $60,000 for a home worth $100,000, the owner can either (1) accept the offer and forfeit $40,000 or (2) seek just compensation in court. If the jury awards $100,000, the fair market value of the home, the owner must still pay attorney’s fees, expert witness fees, such as an appraiser, and other court costs. If these costs total $20,000, the owner receives $80,000 for a home worth $100,000. The owner, who is

\footnote{“It has been held that an individual has a fundamental right to compensation when his or her land is taken for public use, and that the legislature is bound by unwritten restrictions to respect this right. Disregard of this right has been held to be a violation of the ‘unwritten law,’ of the ‘spirit of the Constitution,’ and of ‘common law principles,’ against ‘natural equity,’ and a travesty on ‘natural justice.’” 3 Nichols on Eminent Domain § 8.01[2] at 8-4 – 8-5 (3d ed. 2010).}
constitutionally guaranteed just compensation, receives an amount considerably lower than the value of his or her home. Sure, the owner gets $20,000 more than the government’s offer, but the owner did not get “just compensation.” Far from making the owner whole, this situation is wholly unjust.

Forcing owners to bear the cost of the government’s mistake or unconstitutionally low offer is not just. Even when owners prove in court that the government’s offer was below market value, courts do not require the government to reimburse owners for the litigation expenses they incurred as a result of the low offer.43

[I]ndirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. Thus, [a]ttorneys’ fees and expenses are not embraced within just compensation. . . . Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. . . . But such compensation is a matter of legislative grace rather than constitutional command. United States v. Bodecaw Co., 440 U.S. 202, 203-04 (1979) (emphasis added).

Put simply, condemnors do not have to reimburse owners for costs their takings inflict upon the owners. Such a rule hardly seems fair, especially when the condemnor is taking the owner’s property against his or her will. With seemingly limitless resources, the government

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43 The law provides no deterrent to low offers. This fact is often revealed in court. In one case, a federal acquisition agent stated: “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 wait for a couple of years. If you don’t take 30 cents on the dollar right now, you wait for a couple of years. After a couple of years if you won’t take 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.” Althaus v. United States, 7 Ct. 688, 691-92 (Cl. Ct. 1985); see also United States v. 341.45 Acres, 751 F.2d 924, 927 (8th Cir. 1984); see also David Boaz, Donald Trump’s Eminent Domain Love Nearly Cost a Widow Her House, originally appeared in The Guardian (Aug. 19, 2015) available at <http://www.cato.org/publications/commentary/donald-trumps-eminent-domain-love-nearly-cost-widow-her-house> (last visited Oct 13, 2015) (stating Casino Reinvestment Development Authority offered Russian immigrant $174,000 for a property he had recently purchased for $500,000 and then told him to leave).
frequently relies on this advantage to engage in protracted litigation that pressures many owners into surrendering.\textsuperscript{44}

Failing to reimburse owners is fundamentally unfair and contrary to the constitutional requirement of “just” compensation. Just compensation is a personal right that exists to protect the owner.\textsuperscript{45} The Constitution guarantees an owner “just compensation” and entitles the owner to no less than this amount.

If payment of another amount, such as market value, fails to provide the owner with “just compensation,” it should not be used.\textsuperscript{46} \textit{United States v. Fuller}, 409 U.S. 488, 490, 93 S. Ct. 801, 803, 35 L. Ed. 2d 16 (1973) (stating that “fair market value . . . is not an absolute standard nor an exclusive method of valuation”). Similarly, when the government makes a low offer that inflicts litigation expenses on the owner, the owner must receive an amount that equates to “just compensation,” not merely market value minus litigation expenses. The owner has a right to compensation that is just; the government has no right to pay anything less. The constitutional guarantee of just compensation cannot be achieved without reimbursement for litigation expenses in cases where the government makes a low offer that forces the owner into court.

\textsuperscript{44} Condemnors’ tactics of delay and obfuscation often result in decades, not merely years, of litigation. See, e.g., \textit{Koontz v. St. Johns River Water Mgmt. Dist.}, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (a two-decade-long legal fight resulting in a United States Supreme Court opinion declaring the water management district had taken the owner’s property without just compensation). While many states require reimbursement for inverse condemnation actions, expenses from protracted straight condemnation cases often go unreimbursed.

\textsuperscript{45} \textit{Boston Chamber of Commerce v. City of Boston}, 217 U.S. 189, 195, 30 S. Ct. 459, 460, 54 L. Ed. 725 (1910) (The right to just compensation “deals with persons, not with tracts of land. And the question is, What has the owner lost? [N]ot, [w]hat has the taker gained?”); \textit{Lynch v. Household Fin. Corp.}, 405 U.S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972) (stating property is a personal right); \textit{McCarran Int’l Airport v. Sisolak}, 122 Nev. 645, 669, 137 P.3d 1110, 1126 (2006) (“The constitutional requirement that the government must first make or secure just compensation before taking private property is a personal [right] for the benefit of the property owner.”).

\textsuperscript{46} \textit{Almota Farmers Elevator & Warehouse Co. v. United States}, 409 U.S. 470, 483, 93 S. Ct. 791, 799, 35 L. Ed. 2d 1 (1973) (“The notion of ‘fair market value’ is not a universal formula for determining just compensation under the Fifth Amendment.”); \textit{United States v. Cors}, 337 U.S. 325, 332, 69 S. Ct. 1086, 1090, 93 L. Ed. 1392 (1949) (stating the Supreme Court “has refused to make a fetish even of market value, since it may not be the best measure of value in some cases”); \textit{United States v. Toronto, Hamilton & Buffalo Nav. Co.}, 338 U.S. 396, 407, 70 S. Ct. 217, 224, 94 L. Ed. 195 (1949) (Frankfurter, J., concurring) (“Resort to the conventional formulas for ascertaining just compensation for the taking of property rarely bought and sold, and having therefore no recognized market value, does not yield fruitful results.”).
b. Non-Compensable Damages

While litigation expenses mark one cause of undercompensation, the judicial doctrine of noncompensable damages further shortchanges property owners. Just compensation requires condemnors to make the owner whole. “Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.” United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279-80, 87 L. Ed. 336 (1943). “The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law.” United States v. Fuller, 409 U.S. 488, 490, 93 S. Ct. 801, 803, 35 L. Ed. 2d 16 (1973); see also 1 William Blackstone, Commentaries 139-40 (stating the law must give owners “a full indemnification and equivalent for the injury thereby sustained”).

Despite the requirement to make the owner whole, some states have developed an entire category of non-compensable damages. Many state highway departments have manuals containing an exhaustive list of damages they can allegedly inflict on owners without compensating the owners for these losses. Virginia Department of Transportation, Right of Way Manual of Instructions (3rd Ed.) § 4.3.22: Non-Compensable Damages; Oregon

\footnote{Olson v. United States, 292 U.S. 246, 254-55, 54 S. Ct. 704, 708, 78 L. Ed. 1236 (1934) (“[N]o private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner’ aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.”).}

\footnote{In many jurisdictions, the taking causes numerous damages that are non-compensable. Owners suffer these losses without reimbursement. See U. S. ex rel. & for Use of Tennessee Valley Auth. v. Powelson, 319 U.S. 266, 281, 63 S. Ct. 1047, 1055-56, 87 L. Ed. 1390 (U.S. 1943) (“There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken, not all losses suffered by the owner are compensable under the Fifth Amendment.”).}

\footnote{Unfortunately, attorneys representing the highway department and other condemnors frequently try to fit compensable damages into one of the non-compensable categories in an effort to avoid compensating the owner. In nearly every case, the condemnor’s attorney files motions designed solely to limit compensation and to get the court to exclude evidence of damages from the jury.}
Department of Transportation Right of Way Manual (Jan. 2012) § 4.450: Non-Compensable Damages. As the name implies, non-compensable damages are damages an owner suffers without compensation. The doctrine of non-compensable damages is inconsistent with any notion of “just” compensation.

An improper application of fair market value inflicts further uncompensated damages on owners. Courts have adopted fair market value as the standard for determining just compensation, but some courts force juries to value property based on a fictional value. These courts require juries valuing the property to disregard the very public project for which an owner’s property is taken. The courts’ rationale is that the condemnor does not have to pay the owner for damages caused by the public project. See, e.g., State v. Colonia Tepeyac, Ltd., 391 S.W.3d 563, 568 (Tex. App. 2012) (stating that “[n]ot all damages to remainder property are compensable” and noting “two distinct reasons for concluding particular remainder damages are noncompensable”).

This approach is problematic because juries often determine just compensation by measuring the difference between the fair market value of the property before the project (as if the taking and project never occurred) and the fair market value of the property after the project (as if the taking and project are complete). If the project cannot be considered, the judge or

50 “It is conceivable that an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the ‘value’ the ‘market value’, and the ‘fair market value’ of what is taken. The term ‘fair’ hardly adds anything to the phrase ‘market value’, which denotes what ‘it fairly may be believed that a purchaser in fair market conditions would have given’, or, more concisely, ‘market value fairly determined.” United States v. Miller, 317 U.S. 369, 373-74, 63 S. Ct. 276, 280, 87 L. Ed. 336 (1943); but see United States v. Cors, 337 U.S. 325, 332, 69 S. Ct. 1086, 1090, 93 L. Ed. 1392 (1949) (“The Court in its construction of the constitutional provision has been careful not to reduce the concept of ‘just compensation’ to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of ‘just compensation’ is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases.”); see also Lynch v. Com. Transp. Comm’r, 247 Va. 388, 391, 442 S.E.2d 388, 389-90 (1994) (“The measure of compensation for the property taken is the fair market value of the property at the time of the taking. . . The test of
jury cannot be said to have considered market value. Instead, they calculate just compensation based on a fiction, or fictional value, because they ignore the project and its impact on the owner’s property. The court instructs the jury to determine market value and then tells the jury they cannot consider existing facts and circumstances that ordinary buyers and sellers would consider in determining value.

The following example demonstrates how this approach flies in the face of fairness, logic, and common sense. If a developer needs part of an owner’s property to build a sewage plant, the owner, in negotiating the sales price, would consider the sewage plant’s impact on the value of his remaining property. Why should a judge or jury not likewise consider the sewage plant in setting the sales price? The government should not stand on any better footing than any other market participant, such as the developer in this example. And owners should not be given something less than true market value when they are forced to sell.

Owners forced to surrender their property should not bear a disproportionate share of the cost of a public project. To borrow from the United States Supreme Court’s declaration in 1795, while “[e]very person ought to contribute his proportion for public purposes and public exigencies . . . [the law should not] lay[] a burden upon an individual, which ought to be sustained by the society at large.” VanHorne’s Lessee v. Dorrance, 2 U.S. 304, 310, 1 L. Ed. 391 (C.C.D. Pa. 1795). Whether reimbursed to the owner or not, damages caused by a public project are part of the costs of the project. Justice and fairness demand that the public, which benefits from the project, share equally in the costs. An owner “should be in no better position than if it had sold . . . to a private buyer. . . . But its position should surely be no worse.” Almota

damages to the land remaining after the taking is the difference in the residue’s value immediately before and immediately after the taking.”).  

51 Prohibiting juries from considering the project or other elements that buyers and sellers would consider flies in the face of “fair market value.” Olson v. United States, 292 U.S. 246, 258, 54 S. Ct. 704, 710, 78 L. Ed. 1236 (1934) (“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.”).

c. Changing the Take

The government has yet another tactic in its arsenal, one which it wields with increasingly regularity. The government changes its taking after the owner has exhausted his or her resources defending against the original take. It works like this: the government takes more property from the owner than it needs. It then forces the owner into expensive and drawn out litigation. Then, soon before trial and after the owner has exhausted his resources defending against the original taking, the government informs the owner it took too much property and changes its taking.

The changes are often so drastic that the owner spends more defending against the original taking than the value of the property the government ultimately takes. Because some courts have held the government does not have to reimburse the owner for litigation expenses, even when it inflicts unnecessary costs upon them, owners in this situation often result with a net loss when the costs defending against the original taking exceed the value of the later taking.

Situations similar to the following example occur in Virginia. The highway department takes an overhead power line easement and a communications easement through one of two rows of parking at a mom and pop restaurant. This easement allows utility companies to construct boxes, poles, lines, and other aboveground structures in the parking lot. The easement eliminates valuable parking spaces and forces the owners to relocate their lighting, signs, and main entrance. The owners hire a traffic engineer to redesign the entrance, drive aisle, and parking, an electrical engineer to redesign the lighting and signage, and an appraiser to determine the costs to adjust the property to the changed conditions.
After the owner incurs thousands of dollars in expenses made necessary by the original taking, the highway department notifies the owner that it no longer needs the communications easement and that it will now put underground many of the power line structures it was originally placing aboveground in the parking lot. The owners now have to pay the appraiser to reappraise the property and other experts to reassess the impact of the new taking. Owners in this situation bear many litigation expenses twice. Some courts have recognized the fundamental unfairness in this tactic and have required condemnors to reimburse owners for the expenses they incurred. Other courts have not, leaving financially-depleted owners with no choice but to run up the white flag and surrender their property.

E. Other Tactics and Unfair Practices

1. Burden of Proof

The burden of proof is another area fraught with injustice. Owners in eminent domain cases are defendants, but they have done nothing wrong other than own and pay taxes on property coveted by another. Unlike defendants in all other cases, the property owner in an eminent domain case is not accused of any crime, not alleged to have broken any promise or breached any duty, and not charged with having committed any wrongful, tortious, or negligent act. Instead, the owner is thrust into litigation solely because the government or other condemnor wants his or her property.

Nevertheless, the deck is stacked against the owner from the outset in many jurisdictions. For example, in Virginia, the owner is the defendant. Unlike defendants in all other cases, some courts have held that the owner bears the burden of proof on damages to his or her property. The uneven playing field does not end there, however. Despite bearing the burden of proof like plaintiffs in all other cases, the owner does not get the benefit of the first and last word as do all other persons who bear the burden of proof in other cases.
Thus, some Virginia courts impose both the burdens of plaintiffs and the disadvantages of defendants on property owners who have done no wrong. While plaintiffs and defendants each bear some disadvantage in other litigation, the law places all disadvantages on innocent property owners in eminent domain cases. No other litigants bear this huge disadvantage. The playing field could not be more uneven in this regard.

2. Government Funded Lobbyists

The reason the laws on eminent domain are heavily skewed in favor of the government and other condemnors is simple. The average citizen is busy working, providing for his or her family, and paying taxes. Such persons do not typically attend the legislature when it convenes, and the average citizen does not have a personal lobbyist. Most citizens are politically uninvolved and unaware of eminent domain until it touches them personally.\(^2\)

Contrarily, condemnors have a politically-connected, well-funded lobbying machine that is constantly seeking to broaden its powers of eminent domain, which means shrinking protections for individual property owners. This lobby consists of local, state, and federal governments and their varied agencies and subdivisions, such as the highway department, cities, counties, city and county trade associations, and housing authorities. Wealthy private companies and their employees, such as utility companies, are also part of this machine. This lobby further includes various quasi-governmental entities and others with the power of eminent domain, as

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\(^2\)“Private property is the antithesis of Socialism or Communism. Indeed, it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner’s right to be saved from harm by even the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.” 

well as additional groups that benefit from forced takings, such as politically-connected developers and their trade associations. These organizations swarm state legislatures and are well-entrenched with elected officials.

Some localities and state agencies not only use their own government employees to lobby, but they also hire independent lobbyists. Yes, these cities, counties, and state agencies use tax dollars to hire registered lobbyists who then seek more power for these public bodies.

In a perverse twist of fate, the government forces owners to fund the demise of their own property rights. Some states have laws that specifically authorize government to use public funds for registered lobbyists. See, e.g., Tex. Gov’t Code Ann. § 305.026; see also Tex. Atty. Gen. Op., EAO JC-0089 (stating that “Section 305.026 of the Government Code [of Texas] authorizes a county to expend public funds to retain the services of a registered lobbyist.”); see also Limitations on Public Funds for Lobbying, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 18, 2013 6:40 PM), http://www.ncsl.org/research/ethics/50-state-chart-limits-on-public-funds-to-lobby.aspx. Others, like Virginia, even allow public employees to lobby on the taxpayers’ dime.

Cities and counties in some states, such as Virginia, use citizens’ tax dollars more covertly. Virginia cities and counties have created two trade organizations, the Virginia Municipal League and the Virginia Association of Counties, through which these localities

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54 The Attorney General Opinion recognizes that the government may use tax money to pay lobbyists to influence legislation. Tex. Atty. Gen. Op., EAO JC-0089 (“You ask whether a county may use public funds to pay a registered lobbyist to communicate with legislators in order to influence legislation. We conclude that section 305.026 of the Government Code provides statutory authority for the county to do so.”).
funnel tax dollars to lobbyists. These localities impose real estate taxes on their citizens, send part of that money to their trade organizations, and then have those organizations hire lobbyists on their behalf. Virginia law further allows localities to hire lobbyists directly. Va. Code § 2.2-434. Thus, some localities in Virginia have simultaneously hired multiple lobbyists, some directly and others indirectly through their trade organizations.

Albeit in a context other than eminent domain, the United States Supreme Court long ago warned about this practice. It stated that “the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine.” United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO, 413 U.S. 548, 565, 93 S. Ct. 2880, 2890, 37 L.Ed.2d796 (1973); see also Fair Political Practices Com. v. Superior Court, 25 Cal. 3d 33, 44-45, 599 P.2d 46, 52 (1979) (stating “the large number of governmental employees might become a huge political machine defeating our democratic processes”). The Georgia Supreme Court aptly summarized the dangers of this practice more than 150 years ago, stating:

It may be, it doubtless is true, that our people have as good reason to confide in the justice and forbearance of the Legislature as they ever had. It may be, that in all the future, the Legislature may not, in a single instance, assume the land of the citizen, without a just compensation. We know not. But this we do know, that the power of government ever tends towards enhancement and encroachment. Corporation influence may become too strong for legislative resistance. Capital combinations may wield a power too potent for the popular will. Degeneracy may seize the times, and the virtues of simple, honest revolutionary republicanism depart. The sacredness of private property ought not to be confided to the uncertain virtue of those who govern. Parham v. Justices of Inferior Court of Decatur Cnty., 9 Ga. 341, 348 (1851).

The extreme judicial deference to government in property rights cases, which was discussed earlier, is especially dangerous given the strong takers lobby.

The practical effect of [this judicial deference] . . . is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free reign to subjugate the common good and individual liberty to the
electoral calculus of politicians, the whims of majorities, or the self-interest of factions. Judicial deference means property is at the mercy of the pillagers. Patel at 26.

Without judicial review of legislation the takers lobby is able to procure, the average citizen is no match for condemnors and their powerful lobby. “[B]arriers, often stemming from interest-group politics, are often insurmountable for [citizens] on the lower rungs of the economic ladder (who unsurprisingly lack political power).” Patel at 39.

Thomas Jefferson warned that “[t]he natural progress of things is for liberty to yield, and government to gain ground.” Thomas Jefferson to Edward Carrington, Paris, May 27, 1788.

Government funded lobbyists in the eminent domain arena have done as much to carry out the prophetic words of Thomas Jefferson as any other practice.

3. Protecting the Taxpayers at the Expense of the Taxpayer

Attorneys representing condemnors too often forget that they have a constitutional duty to the property owner.

Just as the Government’s interest ‘in a criminal prosecution is not that it shall win a case, but that justice shall be done,’ so its interest as a taker in eminent domain is to pay ‘the full and perfect equivalent in money of the property taken,’ neither more nor less- not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives.55 United States v. Certain Property Located in Borough of Manhattan, 306 F.2d 439, 452-53 (2nd Cir. 1962) (citations omitted).

As is true with attorney’s representing the government in other types of cases, the condemnor’s attorney “is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. [The government’s] chief

55 “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935).
business is not to achieve victory but to establish justice. . . . [T]he Government wins its point when justice is done in its courts.” Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 n.2 (1963).

Unfortunately, many condemnor attorneys turn the duty to the citizen on its head in eminent domain cases. For example, before Sir William Blackstone announced the principle that it is “better that ten guilty persons escape than that one innocent suffer,”56 the government bore the burden of proof in criminal cases and the benefit of the doubt was given to the citizen who was deemed innocent until proven guilty. Contrarily, in eminent domain cases, not only does the law often place the burden of proof on the owner, but many condemnors zealously approach the case with the idea that it is better that ten owners go undercompensated than one owner get a windfall. Many condemnors seek attorneys who will fight the hardest to shortchange an owner, even if it means the condemnor pays more in attorneys fees than the total amount in dispute.57

These attorneys claim to be representing the interests of the taxpayers, but they forget that the owner who is forced to surrender his or her property is a taxpayer too. Blind allegiance to the taker and zealous representation on behalf of the “taxpayers” often lead to injustice to the individual “taxpayer” who must part with his or her property. As Joseph Story, one of the great jurists in American history, proclaimed in his inaugural address upon becoming a Harvard law professor in 1829:

One of the glorious, and not unfrequently perilous duties of the Bar is the protection of property. . . . The lawyer is placed, as it were, upon the outpost of defence [sic], as a public sentinel, to watch the approach of danger, and to sound the alarm, when oppression is at hand. It is a post, not only full of

56 4 William Blackstone, Commentaries 352.
57 This seemingly irrational approach stems from the fact that studies show that nearly 90% of property owners are so averse to litigation that they settle without a legal fight. Thus, condemnors are willing to pay an immense amount to attorneys and other experts to fight the small minority of owners who do not settle so that it discourages others from fighting. See An Examination of Alternatives to Condemnation Procedures, Virginia Transportation Research Council and Virginia Department of Transportation, April 1989 (on file with the Virginia Department of Transportation).
observation, but of difficulty. It is his duty to resist wrong, let it come in whatever form it may. Joseph Story, The Miscellaneous Writings: Literary, Critical, Juridical, and Political of Joseph Story 453 (1835).

It is high time for all attorneys to remember this duty, even those called to represent entities taking the property of others.

4. The Rule of Law: Governmental Immunity and Openness

In addition to government-funded lobbyists, many government actors wield the powers of government with immunity. For example, prosecutors enjoy unfettered personal immunity even when they purposely violate the rights of a citizen and cause great injury. See Imbler v. Pachtman, 424 U.S. 409, 427-29, 96 S. Ct. 984, 993-94 (1976) (holding that certain government attorneys enjoy “absolute immunity” even though it “leave[s] the genuinely wronged [citizen] without civil redress against a [government attorney] whose malicious or dishonest actions deprives [the citizen] of liberty”). Such immunity contravenes the rule of law, which is an essential component of the American justice system. When select persons are not accountable under the law, the rule of law fades, and the entire system breaks down.

Immunity allows government officials to exercise the full powers and machinery of the state with no personal accountability even if they engage in purposeful misconduct that greatly harms a citizen. This fact holds true for officials who abuse individuals’ property rights. These officials are rarely, if ever, held personally accountable no matter how purposeful, devious, or

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58 “To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor’s immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor’s immunity from actions for malicious prosecution: ‘As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.’” Imbler v. Pachtman, 424 U.S. 409, 427-28, 96 S. Ct. 984, 993-94, 47 L. Ed. 2d 128 (1976).
harmful their conduct may be.

Worse yet, the property owner is not compensated for the expenses he or she must incur defending against improper governmental action or misconduct. Thus, when it comes to lack of reimbursement for these expenses, the law holds the property owner accountable for the misconduct of public officials. Something is drastically wrong with this situation.

Additionally, many public officials have tried to secrete public records related to eminent domain despite open records statutes which are supposed to provide all citizens, including property owners, access to public records. Many condemnors continue to shirk the requirements of open records statutes and have concocted ways to deter individuals from using these laws. See Cartwright v. Commonwealth Transp. Comm’r, 270 Va. 58, 63, 613 S.E.2d 449, 451 (2005).

For example, many condemnors in Virginia will not look for requested public records until the citizen first pays exorbitant fees. The result is that public officials wielding the immense power of eminent domain continue to work largely in the shadows, including utility companies that are allowed in many jurisdictions to wield government power without government responsibility as it relates to openness.

Time is long overdue for courts to clamp down on such government abuse and for legislatures to close the loopholes under which this abuse occurs. Open records statutes should promote freedom and open government. They should not be costly battlegrounds on which public officials continue to evade public scrutiny. Sunshine is a great remedy for abuse.

5. Underwater Mortgages: Another Example of Government Overreaching

Years of nearly unfettered powers and favorable judicial rulings have only emboldened those with the power to take. Local governments have gone so far as to suggest taking underwater mortgages by eminent domain. Those promoting the mortgage condemnation
scheme credit Professor Robert C. Hockett of Cornell Law School with the idea, marking yet another attack on property by the legal academy.

The theory is that localities would take the note or financial instrument but not the real estate secured by the mortgage. The locality would pay the note holder less than the face value of the note or performing loan and then allow the owner of the real estate to refinance on better terms. Interestingly, the same localities clamoring to take notes or financial instruments by eminent domain have traditionally taken the position that, when they take property, they have to compensate owners only for the real estate because everything else is not “property.”. When it comes to their power to take property, they have an expansive view of “property,” but when it comes to their duty to pay, they have a narrow view of “property.”

Setting aside the inconsistencies, the suggestion of taking underwater mortgages belies the most rudimentary constitutional principles. First, the Seventh Amendment prohibits the state and its political subdivisions from interfering with contracts. The agreement between the owner of the real estate and the note holder or mortgage company is undeniably a contract. Aside from the obvious constitutional prohibition, interfering in such contracts would undoubtedly have a regressive impact on the poor, as lenders would become much more hesitant to loan money.

Second, taking property from one person, the note holder, to give to another is not a public use. Third, paying less than the face value of the note will not likely equate to just compensation to the note holder, especially with performing loans. Some scholars and attorneys have further argued that this eminent domain scheme would violate the Commerce Clause of the United States Constitution by allowing impermissible regulation of out-of-state property, as most

notes are part of real estate trusts or pools held in other states. Lastly, many state laws, such as Virginia’s recent constitutional amendment on eminent domain, would prohibit such a scheme.

V. Conclusion: It Is Never Too Late to Restore Lost Freedoms

Those who have gained power by degrading private property rights are well-entrenched and will not give up power without a fight. Virginia’s constitutional amendment on eminent domain in 2013 is a great example of this fact. It was an arduous battle that lasted many years, and there were times that the amendment escaped the condemners’ guillotine by just one vote.60

Restoring private property rights will not be easy. In discussing lost rights under the Fourth Amendment, Justice Brennan of the United States Supreme Court once pronounced:

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\text{[T]he rights guaranteed in the Fourth Amendment are not mere second-class rights but belong in the catalog of indispensable freedoms. Once lost, such rights are difficult to recover. There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom. United States v. Leon, 468 U.S. 897, 959-60, 104 S. Ct. 3430, 3445, 82 L. Ed. 2d 677 (1984) (Brennan, J., dissenting).}
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While he was correct that rights are difficult to restore once lost, Americans cannot wait for courts to restore their property rights.” After all, the courts have sanctioned many of the actions stripping citizens of these rights. Kelo is a prime example. Furthermore, the legal academy that is educating future attorneys and judges continues to wage war on property rights.61 Professor Hockett’s scheme of using the eminent domain power to take mortgages is proof.

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60 For a review of the legislative history behind Virginia’s 2013 constitutional amendment on eminent domain see Obtaining Eminent Domain Reform: A View Through the Lens of Virginia’s Constitutional Amendment, 2014 SV023 ALI-ABA 411, Jeremy P. Hopkins (Jan. 2014).

61 The legal academy’s assault on property is especially concerning given the academy’s sphere of influence. Those who pass through the walls of the academy carry this influence into the legislative assemblies and courtrooms throughout America. Its pervasive reach eventually numbs the mind until the public is lulled to sleep while their rights are stripped away. As Alexis de Tocqueville warned in 1835: “The will of man is not shattered, but softened,
No, Americans can no longer count on attorneys, judges, and courts to guard their individual rights and freedoms. Government is too big and the legal academy is no friend to freedom when it comes to property rights. Instead, Americans must get personally involved. They must engage in public education on the importance of private property rights and must hold their local officials accountable. It all starts at the local level.

Virginia’s recent constitutional amendment on eminent domain is an example of what can be done. It did not contain the precise language owners wanted, but it was a huge step in the right direction. Even this amendment, however, demonstrates how powerful certain condemnors can be and how difficult reform is to achieve. One class of condemnors (utility companies) was so powerful that many legislators would not support the amendment unless this group was exempt from certain portions of the amendment. There were other not-so-favorable compromises, and the amendment literally took years and the tireless efforts of several champions in Virginia’s General Assembly.

Nevertheless, Virginia passed a constitutional amendment that contains protections stronger than what it had before, with nearly three quarters of all voters supporting it. This public support came despite well-funded and coordinated resistance and one political party’s open opposition at the voting polls.

Freedom is no easier to keep than to attain. With continued persistence, Americans can restore their private property rights. If they do not, their posterity will soon discover that without these rights, little liberty remains.