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Eminent Domain and the Sanctity of Home

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EMINENT DOMAIN AND THE SANCTITY OF HOME

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> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"
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> —William Pitt (1763)[1]

INTRODUCTION

We have heard much recently about government's power of eminent domain and how it threatens homeowners. In the recent Su-

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1 Miller v. United States, 357 U.S. 301, 307 (1958) (quoting THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953)). William Pitt's statement refers originally to the Crown's authority to quarter troops in a private person's home. *Id.*

preme Court decision, *Kelo v. City of New London*,[2] the Supreme Court upheld a city's taking of a residential neighborhood to clear land for a private redevelopment.[3] One of the residents who opposed the taking, Wilhelmina Dyer, had lived in her home for eighty-seven years.[4] Soon her home and others nearby will be bulldozed because the local government concluded that Pfizer, Inc. would make better use of the land. Actions similar to this have occurred across the country[5] and have sparked an outcry among property rights advocates, politicians, and legal commentators.[6]

It is interesting that many who criticize the Supreme Court's ruling in *Kelo*, and who now wish to reform eminent domain legislatively,[7] have rallied around the theme of protecting the private home. The Institute for Justice, which argued *Kelo* for the property owners, announced the decision with the headline: "Supreme Court: No Home is Safe."[8] Likewise, its grassroots campaign to restrict eminent domain is called the "Hands Off My Home" campaign.[9] Following the same theme, only days after *Kelo* was decided, Senator Cornyn proposed a bill in Congress entitled the "Protection of Homes, Small Businesses, and Private Property Act of 2005."[10] Even Justice Thomas, in his dissenting opinion in *Kelo*, made appeal to the "sanctity of the

2 125 S. Ct. 2655 (2005).

3 *Id.* at 2658–60, 2664–68.

4 *Id.* at 2660.

5 *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), *available at* http://www.castlecoalition.org/pdf/report/ed_report.pdf (collecting hundreds of examples of governments' use of eminent domain for private redevelopment state-by-state during the period from 1998 through 2002).

6 *See* Juliana Gruenwald, Kelo *Decision Unleashes Grass Roots Backlash Against Private Property Seizures*, 74 U.S.L.W. 2067 (Aug. 9, 2005). There are too many scholarly criticisms of eminent domain abuse, especially as to redevelopment projects, to list comprehensively. For some recent examples, see Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (arguing for a form of heightened means-end scrutiny to avoid eminent domain abuse); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207 (2004) (arguing for a narrower public use doctrine); Symposium, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock, 2004 MICH. ST. L. REV. 837 (collecting articles on eminent domain and redevelopment, most of which are critical of the overuse of eminent domain).

7 *See* Gruenwald, *supra* note 6.

8 The Institute for Justice published this headline originally on its Castle Coalition website, http://www.castlecoalition.org (July 7, 2005).

9 *See* Press Release, The Institute for Justice, IJ's $3 Million National Campaign Tells Lawmakers: "Hands Off My Home" (June 29, 2005), *available at* http://www.ij.org/private_property/castle/6_29_05pr.html.

10 S. 1313, 109th Cong. (2005).

home."[11] He noted the Court's respectful treatment of the home in cases where the government wishes to search the home, and contrasted it to the lack of protection when the government wishes to take it, concluding that "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."[12]

Advocates and public figures are correct to be concerned about the government's frequent and sometimes casual use of eminent domain against homeowners. But the solution that reformers typically propose, a stricter public use doctrine, provides only incidental protection for homeowners. The public use doctrine focuses on what the government proposes to do with the land after the taking, not its status to the owner before the taking. It makes no distinction between homes and other kinds of property, and it offers no protection to homeowners in cases where the government acquires land for traditional public uses, such as to widen a road, no matter how questionable the government's justification for the proposed public use. Whatever may be said for a stricter public use doctrine on its own terms, much of the recent rhetoric of protecting the private home through such a doctrine seems to be misplaced.

This Article focuses on protecting the home against the government's power of eminent domain more directly, and strategies whereby that might be accomplished.[13] I conclude that current eminent domain law does not adequately protect the home, and that the most effective correction to this problem would be to increase the compensation that government must pay for taking homes. Government should be required to pay more than market value for taking a person's home, since owners typically value their own homes differently than the market does, and since "willingness to pay" is the most effective way to test whether a proposed project is important enough to justify displacing homeowners without asking courts to second-guess the policy judgments of elected officials.

There are reasonable statutory ways of adjusting compensation to the appropriate level of deterrence without causing the uncertainty of heightened judicial scrutiny or of open-ended jury awards. For example, the law might require government to pay an additional percentage of market value depending on how long the owner has lived in the home. An appropriate measure of compensation should aim to

11 Kelo v. City of New London, 125 S. Ct. 2655, 2685 (2005) (Thomas, J., dissenting).

12 *Id.*

13 Some of the analysis of this Article might extend partially to other forms of highly personalized property that eminent domain law undervalues, such as religious property or family business property, but I leave those arguments for another day.

deter government from using eminent domain against homes except in cases of genuine public necessity, as measured by the government's willingness to pay a premium above market value.

Part I describes the current state of eminent domain law, and how it undervalues the home in relation to other types of property. Part II discusses the public use doctrine as a partial solution. Part III discusses potential heightened scrutiny and procedural solutions. Part IV discusses the compensation solution and is followed by a sample statutory model for heightened compensation in cases of eminent domain against the home.

I. CONDEMNATION LAW UNDERPROTECTS THE HOME

Judge Plager of the Federal Circuit once coldly observed, "A man's home may be his castle, but that does not keep the government from taking it."[14] Indeed, while many areas of law contain special protections for the home, eminent domain law recognizes virtually none.[15]

A. The Heightened Status of the Home in Many Areas of Law

Federal constitutional law recognizes the unique status of the home in several ways. A person's First Amendment right to possess and read literature is enhanced in the home relative to other places.[16] A person's right to avoid undesirable speech is greater in the home than in other locations.[17] The Third Amendment restricts government from quartering troops in a person's home.[18] And, of course, a long line of Fourth Amendment cases recognize "the sanctity of the

14 Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991).

15 I discuss the Uniform Relocation and Assistance Act, which provides limited relocation assistance to persons displaced by eminent domain, at *infra* Part I.C.

16 Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding that government may not prosecute possession of obscenity in the home, although it may do so elsewhere, because "[i]f the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch").

17 *See* Frisby v. Schultz, 487 U.S. 474, 484–88 (1988) (holding that targeted picketing at a person's home is not protected because of the sanctity of home); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737–38 (1970) (declaring that mailing unwanted literature to a person's home is not protected because "[t]he ancient concept that 'a man's home is his castle' . . . has lost none of its vitality").

18 The Third Amendment provides, "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

home" as a basis for special rules governing home searches.[19] For example, in *Kyllo v. United States*,[20] the Supreme Court held that the government may not use thermal imaging to measure activity in a home without a warrant, noting that "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[21]

Some important areas of statutory and common law also recognize the home as a special place worth preserving. The federal law of bankruptcy and state debtor-creditor laws recognize a "homestead exemption," allowing a debtor to keep an interest in his or her personal home, even if the person cannot otherwise pay unsecured debts.[22] Moreover, the criminal law of many states, like traditional English law, allows a person to use deadly force in defense of one's home even in some circumstances that do not meet the usual requirements of self-defense.[23] Indeed, it was in this context that Sir William Coke made popular the maxim "a man's home is his castle," by which he meant "castle" in a military sense, describing the legal right of an Englishman to use deadly force in defense of home.[24]

The special status of the home in many areas of law is consistent with philosophical accounts of property as an extension of personhood.[25] When a person's identity becomes closely bound up with certain things with society's acquiescence, as in the example of a wedding ring, there arises a moral expectation and presumptive entitle-

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19 *See* Wilson v. Layne, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home.").

20 533 U.S. 27 (2001).

21 *Id.* at 37.

22 *See* 11 U.S.C.A. § 522(d)(1) (West 2004 & Supp. 2005) (federal homestead exemption); *id.* (allowing pass-through of state homestead exemptions in federal bankruptcy); *see also* Ryan P. Rivera, *State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws*, 39 REAL PROP. PROB. & TR. J. 71 (2004) (tracing the development of the state homestead exemptions).

23 *See* WAYNE R. LAFAVE, CRIMINAL LAW § 10.6(b) (4th ed. 2003) (summarizing the law of various states and comparing these to the law of self-defense); *see also* Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1 (analyzing recently proliferated "Make My Day" laws, which allow expanded use of force in defense of the home).

24 *See* SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161–62 (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein & Co. 1986) (1644).

25 *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing property as an extension of the person and the implications of such a theory for modern law).

ment to the continuation of the person's enjoyment of that thing.[26] Some objects of property are more closely bound up with personhood than others, and therefore entitled to greater protection under the law.[27] In the range of property assets, the private home generally rests at the highly personal end of the spectrum, thus explaining why autonomy, security, privacy, memory, and expression are so valued in this personal space. For many owners, their home is an extension of themselves, or like a part of their family,[28] both in its expressive and protective aspects. Its highest value is not as a commodity.

B. Judicial Deference Towards Eminent Domain

In contrast to other areas of law, eminent domain law regards the home as no different than any other kind of property, and as something that is remarkably easy for government to take. The federal public use doctrine, which ostensibly holds that government may only take private property for public use, provides only a paper-thin defense for homeowners. As the Supreme Court reiterated in *Kelo*, the public use requirement is satisfied if the taking is rationally designed to benefit the public,[29] a standard that allows government to displace homeowners based on the mere hope that a new use of the condemned property would benefit the public more than its old use, without accountability as to whether that hope is justified. Applying this deferential standard of review, the Supreme Court has upheld eminent domain projects based on government findings that the target

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26 There are various ways to reason to this conclusion. *See id.* at 962–78 (discussing Locke's, Kant's, and Hegel's views of personhood and the implications of each for property).

27 *Id.* at 978.

28 For example, Samuel Clemens described the Victorian home that he and his wife lived in as if it were alive:

> [I]t had a heart and a soul, and eyes to see with; and approvals and solicitudes, and deep sympathies; it was of us, and we were in its confidence, and lived in its grace and in the peace of its benediction. We never came home from an absence that its face did not light up and speak out its eloquent welcome—and we could not enter it unmoved.

Letter from Samuel L. Clemens (Mark Twain) to Joseph H. Twichell (Jan. 19, 1897), *in* 2 MARK TWAIN'S LETTERS 641 (Albert Bigelow Paine ed., 1917).

29 Kelo v. City of New London, 125 S. Ct. 2655, 2663 (2005) (describing deferential standard); *see also id.* at 2660 (describing how some of the petitioners in *Kelo* were homeowners and others were investors, and making no distinction between them for legal purposes).

neighborhood is blighted,[30] that the current distribution of property is unfair,[31] or that new owners would revitalize the local economy and tax base.[32]

Some states have imposed stricter public use doctrines than the federal doctrine, making eminent domain generally unavailable for redevelopment projects,[33] but this approach only limits some of the ends for which government may use eminent domain. Even these states require no more than a rational basis to take a home for a traditional public use, such as a road or airport, although the government's choice of location might merely be one of convenience.[34] If a government agency proposes to take a person's home to build a road, neither constitutional law nor statutory law requires it to consider alternatives, nor does it require any substantial justification or meaningful judicial scrutiny of the government's choice.

By contrast, if a federally-funded transportation project would negatively impact the natural environment[35] or deplete the supply of public parks,[36] federal law requires agencies to study alternatives in depth before they may proceed. If the public project would harm an endangered species, the prohibition is even stricter.[37] Relative to protecting the environment and public parks, however, eminent domain law regards the protection of homes as a low priority when deciding where to locate roads and other public goods.

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30 Berman v. Parker, 348 U.S. 26, 34–36 (1954) (deferring to a local government agency's decision to address blight on an area-wide basis, rather than structure-by-structure, even though this meant condemning many nonblighted buildings).

31 Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–44 (1984) (upholding eminent domain for the purpose of breaking a land oligopoly).

32 *Kelo*, 125 S. Ct. at 2665–68.

33 *See, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002); County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

34 *See, e.g.*, *Hathcock*, 684 N.W.2d at 783 (setting forth a set of narrow public use requirements applicable when the government transfers the property to a private entity, implying that the usual rational basis review applies in other cases).

35 *See, e.g.*, Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152 (10th Cir. 2002) (enjoining a highway project because the government's environmental impact statement was inadequate under the National Environmental Policy Act (NEPA) insofar as it failed to evaluate certain alternatives to the proposed highway).

36 *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (enjoining a highway project because it would cut through a city park and because the Secretary of Transportation neglected to find an absence of feasible alternatives as required by statute).

37 *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (enjoining the completion of a dam that would destroy the critical habitat of the snail darter, even though the dam was nearly completed and had cost millions of dollars to that point).

C. *The Inadequacy of Market Compensation*

The requirement to pay just compensation provides a more meaningful deterrent to government's overuse of eminent domain than the public use doctrine. Were it not for the law of just compensation, it would be far easier for government to overuse eminent domain in abusive ways.[38] The law of just compensation, however, fails to recognize the home as anything other than an exchangeable commodity. Because just compensation law generally undervalues the home, it does not adequately deter government from using eminent domain against homes.

The constitutional measure of just compensation is "market value,"[39] which the Supreme Court has defined as "'what a willing buyer would pay to a willing seller' at the time of the taking."[40] Commentators have long recognized that the standard of market value does not always make owners whole.[41] The inadequacy of market value is a general eminent domain problem.[42]

But the standard of market value is especially harsh for homeowners, who, more often than others, commonly value their own property in significant ways that the market does not recognize. The concept of market value predicts what strangers to the property would be willing to pay for it. An appraiser would therefore see a house for its fungible characteristics: its size, quality of building materials, proximity to important locations, number of bathrooms, etc.[43] By contrast,

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38 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 56 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."). I discuss this fiscal illusion problem and its application to homes in greater depth *infra* Part I.D.

39 United States v. 564.54 Acres of Land, 441 U.S. 506, 510–12 (1979). Deviation from a market value standard generally only is required when there is no ascertainable market for the property at issue, *see id.* at 513–14, which rarely applies to residential property.

40 *Id.* at 511 (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

41 *See, e.g.*, Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962 ("It is a truism that market value . . . does not compensate landowners completely."); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) ("The most striking feature of American compensation law . . . is that just compensation means incomplete compensation.").

42 The Supreme Court has recognized the inaccuracy of using market value, but has retained the standard for practical reasons. *See 564.54 Acres of Land*, 441 U.S. at 510–12.

43 Thomas Merrill has described this as "an impersonal standard of compensation, but not an objective one," since a finding of market value necessarily depends upon inference and a degree of discretionary choice. Merrill, *supra* note 41, at 119–20.

the value of a home to one who has lived there for many years often includes benefits that take time to develop and that are personal.[44] These might include a home's connection to memories,[45] its proximity to a particular community of friends and family, its ability to provide an atmosphere of stability and comfort,[46] its ability to communicate the owner's personality to others,[47] its ability to represent an owner's personal work product, and its ability to satisfy the unique aesthetic desires of the owner. While these benefits are largely subjective and nontransferable, they are real nonetheless. When government takes such interests away from homeowners, it takes some of the most essential elements of property. For some owners, these personal elements are far more valuable than the marketable elements of property.

Federal and state eminent domain statutes do require government agencies to pay more than market value in some circumstances. Most importantly, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA)[48] requires federal agencies and state agencies using federal funds to provide relocation expenses to persons displaced by eminent domain.[49] Relocation expenses apply to homeowners, tenants, businesses, and farm owners.[50] The URA also compensates homeowners and tenants for the costs of

44 Margaret Jane Radin's influential article, *Property and Personhood*, *supra* note 25, develops the personhood theory of property in depth. As Radin explains, property rights most deserving of legal protection are those that are closely bound to an owner's identity and personhood, as opposed to those that serve primarily as commodities. *Id.* at 978–91. Chief among this higher class of property rights are the rights in one's personal home. *Id.* at 991–1000 (applying examples).

45 *See id.* at 967 ("Much of the property we unhesitatingly consider personal—for example, family albums, diaries, photographs, heirlooms, and the home—is connected with memory and the continuity of self through memory.").

46 As art critic and philosopher John Ruskin famously said, "This is the true nature of home—it is the place of Peace; the shelter, not only from injury, but from all terror, doubt, and division." JOHN R. RUSKIN, SESAME AND LILIES 77 (Deborah Epstein Nord ed., Yale Univ. Press 2002) (1865).

47 *See* Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673, 674 (2002) ("[P]roperty can be seen as essential to personhood: our possessions are the outward manifestations of our selves, and without them true self-development is impossible.").

48 42 U.S.C. §§ 4601–4655 (2000).

49 *Id.* § 4622.

50 *Id.* §§ 4601(6), 4622(a)–(c).

acquiring a "comparable replacement dwelling."[51] Some states have enacted eminent domain statutes modeled on this federal law.[52]

The relocation assistance provided by the URA and similar state statutes, however, still fails in significant ways to recognize the intrinsic value of a home to its owner. Under the Act, a displaced person is deemed whole if she is relocated to a dwelling that is equivalent according to objective factors.[53] Thus, like the concept of market value, the URA's measure of compensation treats homes as if they are generic and exchangeable—as if society may force an owner to exchange one home for another without causing any harm. It does not recognize nontransferable benefits that accrue to owners over time by remaining in the same home, and which are lost when eminent domain forces owners to relocate.

In contrast to its valuation of homes, eminent domain law does a better job of compensating business and investment property owners. This is true for two reasons. First, the concept of market value more closely reflects how business and investment owners typically value their property. If an owner holds property primarily for its long-term investment value, its current appraised value should reflect its long-term investment potential. If the owner holds property primarily for the income that it currently generates, its market value should also reflect this, using the income-capitalization method of appraising value.[54] Even if the owner has adapted the property for a special business use, and the use is not transferable to other locations, the owner may determine market value according to this "highest and best use."[55] By contrast, a unique or personally adapted residential use

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51 *Id.* §§ 4623–4624.

52 *See* 4 NICHOLS ON EMINENT DOMAIN § 13.05[7], at 13-54 to -55 (Julius L. Sackman et al. eds., 3d ed. 2004) (discussing relocation assistance for owners and referencing LA. REV. STAT. ANN. § 38:3101 (2005)); *id.* § 13.19[1], at 13-182 & nn. 21–22 (citing R.I. GEN. LAWS §§ 37-6.1-3 to 37-6.1-12 (1997); WIS. STAT. § 32.19 (1998)).

53 Under the Act, a "comparable replacement dwelling" is one that is

> (A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

42 U.S.C. § 4601(10).

54 *See* 4 NICHOLS ON EMINENT DOMAIN, *supra* note 52, § 13.01[12], at 13-22 to -23.

55 *See, e.g.*, Correia v. New Bedford Redev. Auth., 377 N.E.2d 909 (Mass. 1978) (allowing compensation based on the owner's use of the property as a tire-retreading

does not qualify as the "highest and best use" (although the current owner may derive great satisfaction from its unique features), unless it generates income or would be valued by others on the open real estate market.

Second, there now is a trend to compensate for the loss of going-concern value and business interruption damages when eminent domain forces businesses to relocate, repairing what was a significant element of under compensation for businesses.[56] By contrast, eminent domain law recognizes no homeowner equivalent to a business owner's loss of going concern, although homeowners also stand to lose valuable connections to their communities when they are forced to relocate.

Admittedly, some business owners, like homeowners, become personally attached to their business property in ways that the market and eminent domain statutes do not value. It seems, however, that personal attachment is generally less likely to be a factor when government takes business or investment property than when it takes homes, and when it is a factor, it is less likely to be as significant. There has always been something uniquely personal about one's own home, making it different and in a sense of higher value than other forms of real property, although it might not appraise as such.[57] As a famous poem observes: "Be it ever so humble, there's no place like home."[58] Even an individually-owned business does not approach the home in terms of its socially recognized connection to one's personal identity, memories, comfort, and security. Other areas of law recognize the

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shop, even though there is no discernible market for the specially adapted property); *see also* 4 NICHOLS ON EMINENT DOMAIN, *supra* note 52, § 12B.13, at 12B-133 to -137.

56 4 NICHOLS ON EMINENT DOMAIN, *supra* note 52, § 13.18[3]–[4], at 13-169 to -173 (describing the trend towards compensating for going concern losses); *id.* § 13.19[2], at 13-182 to -183 (discussing business interruption losses).

57 Even traditional zoning ordinances generally treat the single-family home as the highest, most protected use. As one classic zoning case described, in upholding the segregation of homes from other uses:

> [W]e think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. . . . The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole.

Miller v. Bd. of Pub. Works, 234 P. 381, 386–87 (Cal. 1925).

58 John Howard Payne, *Home, Sweet Home* (1822), *reprinted in* YALE BOOK OF AMERICAN VERSE 34, 34 (Thomas R. Lounsbury ed., 1912).

unique "sanctity of the home" for this reason. Eminent domain law does not.

This is not to say that it would be simple to measure the non-marketable elements of home value in eminent domain law. I will say more about these elements of home value and the difficulties of compensating for them in Part IV. Moreover, I acknowledge that some owners may attach unreasonable subjective value to their homes, and that an ideal system of eminent domain should not compensate such owners for unreasonable feelings of attachment or loss.[59] But as long as we accept that homeowners do commonly derive personal value from their homes in excess of market value, and that to a large extent this is reasonable, it follows that homeowners are routinely undercompensated in eminent domain actions.

D. The Distortion of Government Decisionmaking

Because eminent domain law undervalues homes, and does so in relation to other kinds of property, this is likely to distort government decisionmaking, at least if one reasonably assumes that governments are influenced by budgetary costs.[60] Current eminent domain law encourages government agencies to value homes based solely on their marketable elements (ignoring the intrinsic value of homes to their owners), and therefore encourages them to take homes more often than they should, particularly when the condemnees have little political influence.

Commentators have called this distortion effect "fiscal illusion."[61] It arises when governments' budgetary costs for a given course of action do not include the full costs of the action to society, and so create the appearance to government planners that a particular project would improve the overall social welfare, when in fact society might be better off without the action. The compensation requirement in eminent domain generally serves to correct fiscal illusion, by forcing government to internalize the cost to condemnees, but it does not perform this function well when the measure of compensation is inaccurate, as when government is allowed to take owner occupied homes for mere market value. Indeed, an inaccurate measure of "just com-

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59 *See infra* Part IV.A.

60 *See* POSNER, *supra* note 38, at 58–59 ("[I]t would be reckless to assume that the government is immune to budgetary considerations and could therefore be relied on always to buy the socially least costly inputs, regardless of their price.").

61 *See, e.g.*, THOMAS J. MICELI, ECONOMICS OF THE LAW 141 (1997); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1297 (1985).

pensation" might in a way contribute to the illusion, by purporting to make owners whole and therefore giving government planners a reason to believe they have already accounted for the owners' interests, when in fact they have not.

The current system of under compensation is likely to cause governments to overuse eminent domain against homes in at least three kinds of scenarios: (1) where the public value of an eminent domain project does not outweigh the value of the homes to the owners, and therefore should not happen, although the low appraisal value of the homes makes it appear otherwise; (2) where government would maximize the public welfare by taking nonresidential property instead of residential property for a given project, yet low appraisal values of residential property make it appear more sensible to take residential property; (3) where government would maximize public welfare by scaling back the size of a project and taking fewer homes, but where low home appraisals make it appear preferable to take more.

Although it is impossible to measure the extent of this distortion, there are many examples of governments' apparently casual and disturbingly frequent use of eminent domain against homeowners that are consistent with the theory of fiscal illusion.[62] One of the most infamous cases occurred when the City of Detroit condemned the neighborhood of Poletown in 1981 to clear way for General Motors to build a Cadillac plant.[63] The fact that the City displaced over 4200 people from their homes, including many elderly and long-term residents, to make way for a private business that could exist in other places might alone cause one to question the City's cost-benefit analysis.[64] But what makes the case worse is that the City rejected credible alternative designs, including a parking garage option that would have preserved many of the homes.[65] In fact, community members

62 *See generally* BERLINER, *supra* note 5 (collecting hundreds of examples of questionable condemnations state-by-state, including many against homeowners); *id.* at 58 (describing examples of entire neighborhoods being condemned).

63 *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (upholding the action on the basis of public benefits, despite arguments that the taking violated Michigan's public use doctrine). Although *Poletown* has served as a leading precedent in eminent domain, the Michigan Supreme Court recently overruled it in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), and announced a far more restrictive public use doctrine. For a collection of scholarly reactions, see Symposium, *supra* note 6.

64 JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 49 (1989). The story is also the subject of a film documentary, POLETOWN LIVES (Information Factory 1982), in which the residents describe how the City betrayed them, and depicts their social protest which ultimately failed.

65 WYLIE, *supra* note 64, at 141–42.

presented four alternative plans to the City in an effort to accommodate both the plant and portions of the neighborhood, and the City rejected all of them outright, noting that parking structures would cause traffic delays for workers.[66] The City's failure to appreciate the interests of homeowners appears by the fact that the City condemned 465 acres of dense urban property for an automobile plant, but only seventy of those acres were occupied by the actual plant; a remaining 295 acres were used for green space, parking, and rail operations, while 100 acres had no designated use at all.[67]

Another more typical example occurred recently when the City of Bristol, Connecticut, condemned the homes of several elderly people to make way for a new industrial park.[68] Although the residents objected and offered an alternative plan whereby the industrial park could exist alongside one of the homes, the City rejected the alternative because it would cause the park to have an irregular shape and because the appearance of the house might hurt the marketability of the new industrial park.[69]

While one can always debate whether a particular public project was socially optimal, cases such as these do not inspire confidence that governments are sufficiently motivated to consider the interests of homeowners and look for alternatives to taking homes. As we continue to hear of government taking homes for reasons that are questionable, there is good reason to believe that fiscal illusion is part of the problem. It is no wonder that property rights advocates and legislators are calling to reform eminent domain in a way that would better protect homes.

II. THE PUBLIC USE SOLUTION

A commonly suggested solution to government's overuse of eminent domain today is to bar government from using it for private beneficiaries, especially for economic redevelopment.[70] One pending federal bill, for example, would provide that "[t]he power of eminent domain shall be available only for public use," and "the term 'public

66 *Id.* at 143.

67 *Id.* at 49, 51.

68 *See* Bugryn v. City of Bristol, 774 A.2d 1042 (Conn. App. Ct. 2001).

69 *Id.* at 1050–51 & n.12.

70 For a collection of pending local, state, and federal bills that would narrow the public use doctrine, essentially barring its use for redevelopment, see Castle Coalition, Legislative Center, http://www.castlecoalition.org/legislation/index.html (last visited Feb. 19, 2006). Others have proposed heightened judicial scrutiny as a restriction on government's power to use eminent domain to transfer property between private parties. *See, e.g.*, Garnett, *supra* note 6, at 982.

use' shall not be construed to include economic development."[71] Proposals such as this aim to nullify the Supreme Court's decision in *Kelo v. City of New London*[72] and adopt the dissenting Justices' interpretation of the public use doctrine.[73]

Whether the Supreme Court correctly applied the public use doctrine in *Kelo v. City of New London*[74] and whether public use legislation is desirable for reasons other than to protect homes is beyond the scope of this Article. Whatever may be said, however, for narrowing the public use doctrine for other reasons, it is at best an awkward and incomplete way to protect the sanctity of home.

Such proposals are both over and underinclusive as solutions to eminent domain law's failure to protect the sanctity of home. They are overinclusive because they would prohibit the taking of any property through eminent domain for private redevelopment, even if the owner holds land solely for its monetary value and the government is willing to fully compensate the owner for that value. Such a strict and encompassing rule is not justified by the special nature of home property, or even some broader category of property to which owners commonly become attached, or it would apply only to such property.[75]

Public use solutions are also significantly underinclusive because they would leave homes vulnerable to eminent domain for most traditional purposes. To narrow the public use doctrine would do nothing to deter government from casually taking homes for roads, airports, parks, utilities, sports stadiums, government buildings, conservation areas, military bases, and many other public uses. It would do nothing to make sure that the government has considered the true value of a person's home before taking it for public use, nor encourage government to study alternatives before taking homes for a public use, nor encourage government to take non-residential property in lieu of residential property for public use where possible.

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71 S. 1313, 109th Cong. § 3 (2005). This restriction would apply to all federal eminent domain projects and to all state and local projects supported by federal funds. *Id.* § 3(c).

72 125 S. Ct. 2655 (2005).

73 *See* S. 1313, § 2(5)–(10).

74 125 S. Ct. 2655.

75 One notable exception is that proposed in Connecticut, H.B. 5062, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), *available at* http://www.cga.ct.gov/2005/tob/h/2005HB-05062-R00-HB.htm, which would prohibit government from taking only owner-occupied dwellings of four or fewer units if the property would be transferred to another private party. Although this bill is more closely tailored to the problem of home undervaluation than other public use bills, it is still underinclusive because it does not protect homes against traditional public uses.

Of course, no one would dispute that roads, airports, military bases, and public utilities are necessary to society. But the importance of these public goods as a general matter to society does not prove their necessity in particular instances, nor does it prove an absence of alternatives for a given project. Just as the problem of fiscal illusion causes government often to take homes for redevelopment projects that are not worth their full cost to society, fiscal illusion can also cause government to overuse eminent domain for transportation and other traditional public uses. Like redevelopment projects, transportation projects are not always worth their full social costs: they create winners and losers, they are often politically motivated,[76] they can damage the environment, and they can arouse strong public opposition, including from displaced homeowners. Where government agencies fail to consider the full interests of landowners and communities before displacing them, and to balance those heavy interests against the cost of alternative projects, it is easy for agencies casually to decide to take people's homes for public use where they should not.

For example, in 2002, Mexican authorities decided to expropriate 13,300 acres from thousands of families in farming villages near Mexico City for construction of what would be the largest airport in Latin America.[77] The government did not consult the farmers before making its decree, and was surprised when they resisted with force.[78] After a violent standoff of several months by machete-wielding farmers defending their homes, the government announced a change of plans. President Vincete Fox said, "We are not going to trample the rights of anyone . . . . There are alternatives for the airport."[79] Amazingly, polls showed that a majority of citizens were against constructing the new airport anyway.[80] Homeowners should not have to resort to violence to convince the government that there are alternatives to taking so many homes for public use that would better serve the public welfare.

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76 *See, e.g.*, Gary M. Galles, *Transportation Bill—Six Years of Palm-Greasing Pork*, S.F. CHRON., Aug. 10, 2005, at B9 (discussing a recent $286.5 billion federal transportation bill as an "unappetizing smorgasbord of indefensible projects" which came about through political wrangling).

77 Richard Bourdraux & Rafael Aguiree, *Standoff over Land Continues in Mexico*, L.A. TIMES, July 13, 2002, at 5; Gretchen Peters, *Mexico Shows How Not To Conduct a Land Resettlement*, CHRISTIAN SCI. MONITOR, July 30, 2002, at 7.

78 *See* Peters, *supra* note 77, at 7.

79 Ginger Thompson, *Cornfields or Runaways? Zapatas Ghost Watchers*, N.Y. TIMES, July 18, 2002, at A4.

80 Joel Estudillo Rendon, *The Cancellation of Mexico City's Planned Airport Was Politically Wise*, BUS. MEX., Sept. 1, 2002, at 16.

Although in the current legal environment we hear most often about the threat of redevelopment projects to homeowners, traditional public use projects also pose a significant threat, possibly even a greater threat, to the sanctity of the home. The Federal Highway Administration, for example, reports that federal-aid highway projects displace over 2200 households per year from owner-occupied homes.[81] Other federal agencies such as the Federal Aviation Administration,[82] combined with state and local governments,[83] take many more homes for airports, roads, utilities, and other public uses. Given the likely effects of fiscal illusion, it is doubtful that so many home losses are necessary to the public welfare.

Thus, although advocates of public use reform often make appeal to the sanctity of the home, the public use solution seems to focus on the wrong aspect of what makes so many takings of homes today troubling. A homeowner is hurt just as much when government takes the person's home for a traditional public use as when it takes the person's home for redevelopment by a private corporation. Moreover, in either case the government's justification for the taking might be compelling or it might be one of mere convenience or political expediency. Proposals to reform eminent domain would more accurately reconcile the interests of individual homeowners and of society if they would focus the nature of the owner's property interest and the strength of the government's reasons for wanting to take it, rather than on factors associated with a narrow public use doctrine (i.e.,

81 According to FHA reports, federal-aid highway programs provided relocation assistance to 2273 homeowner households in 2001; to 2537 such households in 2000; and to 2593 such households in 1999 (the last three years for which statistics are available). Federal Highway Administration, Annual Right-of-Way Statistics, http://www.fhwa.dot.gov/realestate/stats (last visited Feb. 19, 2006) (collecting reports).

82 Although the FAA does not provide relocation statistics, it has a set of detailed publications and regulations on how to relocate homeowners for airport purposes. See Federal Aviation Administration, *Airport Land Acquisition*, *available at* http://www.faa.gov/arp/environmental/land/index.cfm (last visited Feb. 19, 2006) (collecting documents). These indicate that airports commonly displace homeowners to build new airports and to expand existing ones. Indeed, my own father's home was taken by eminent domain during the 1960s for an expansion of the Los Angeles Airport.

83 For example, government agencies in Connecticut filed 1819 condemnation actions during a five-year period from 1998 to 2002, only 543 of which were for redevelopment projects. *See* BERLINER, *supra* note 5, at 44. While this statistic includes all real property (not just residential), it indicates that the government's core eminent domain authority, even as limited by a strict public use doctrine, remains a significant threat to homeowners. It also underrepresents the actual displacement effects of eminent domain, because it does not include those who sold property to the government under the threat of eminent domain.

whether the government will rely upon a private corporation to produce the public benefit, or whether the project serves a traditional governmental function). While a narrow public doctrine might be justified for other reasons relating to good government, it is not an effective or sufficient way to protect the sanctity of home.

III. ABSOLUTE BAN OR HEIGHTENED SCRUTINY SOLUTIONS

If a primary goal of reforming eminent domain is to protect owner-occupied homes, the most straightforward way to do this would be to enact a law prohibiting the use of eminent domain to acquire owner-occupied homes. Thus, whenever a government wished to acquire an owner's primary residence, it would be required to negotiate with the owner just as a private purchaser would.[84]

There are several attractive aspects of this rule. It is the only rule that would fully protect the sanctity of the home against eminent domain. And since the prohibition would apply only to owner-occupied homes, it would leave eminent domain alternatives for many public projects should a homeowner refuse to sell at a price agreeable to the government. Moreover, testing an owner's willingness to sell and the government's willingness to pay in a negotiated exchange is often thought to be the most accurate way to determine whether a project is worth its social cost.[85]

Nevertheless, strictly prohibiting the taking of homes by eminent domain is probably unwise, as it could in some cases threaten compelling governmental interests. While many homeowners would be quite willing to sell their land to the government for a genuine public neces-

84 In the comedy film, THE CASTLE (Miramax 1999), filmmakers depict the High Court of Australia as fictionally adopting such a rule. The film is based on a man's determined struggle to convince authorities that they cannot take his family's home by eminent domain for an airport runway because homes are sacrosanct, a position that he bases on "the law of bloody common sense." Although there is no actual rule in Australia or in the United States barring eminent domain against homes, the fact that this makes a successful storyline seems to indicate that it has intuitive appeal for many.

85 Although conventional wisdom holds that without government's power of eminent domain holdouts would frustrate the public welfare, some economists have questioned the seriousness of the holdout problem and have suggested that eminent domain might be less efficient than the free market as a mechanism for acquiring property, even for assembling multiple parcels. *See* Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976) (comparing the inefficiencies of eminent domain with the inefficiencies of the market as a means of assembling multiple separately-owned parcels); *see also* Posting of Gary Becker to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/06/index.html (June 27, 2005, 7:35 CDT) (questioning whether we would do better without eminent domain).

sity (albeit, perhaps, at more than market value), some would not, and their reasons for refusing to sell might be irrational or opportunistic. Knowing that the public needs a particular parcel (say, for national security reasons), some owners might refuse to sell because of spite, a craving for power or attention, or disagreement with the government's policies. Others might attempt to extract a windfall for themselves by demanding an extremely high price, even though they do not actually value their property so much. This would allow a lucky few to control the welfare of many, and could lead to costly bargaining failure in the form of a bilateral monopoly problem.[86] Given that most fundamental constitutional rights make allowance for compelling governmental interests, it would seem incongruous to allow private property in homes to trump all other social objectives.

A more reasonable alternative to an absolute ban would be to require a heightened justification for taking homes. Consider, for example, a rule that government may only use eminent domain to acquire owner-occupied homes when narrowly tailored to serve a compelling governmental interest, enforceable through judicial review of eminent domain decisions. A legislative model for such a requirement could be the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[87] which prohibits governments from imposing "land use regulations" that substantially burden religion unless narrowly tailored to serve a compelling governmental interest.[88] Congress enacted RLUIPA in response to a nationwide problem of land use regulators undervaluing religious uses.[89] One court has even applied RLUIPA to restrict a city's power to take religious property through eminent domain.[90] If it makes sense to protect religious land uses against unnecessary government interference by means of a compelling interest test, it might also make sense to do the same for homes insofar as they are threatened by eminent domain.

Another alternative would be to impose strict procedural requirements, similar to those in the National Environmental Policy Act

86 *See* MICELI, supra note 61, at 138 (discussing the bilateral monopoly problem); *see also infra* Part IV.A.

87 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

88 *Id.* § 2000cc-1.

89 146 CONG. REC. 16698, 16698–700 (2000) (joint statement of Sens. Hatch and Kennedy).

90 *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002) (holding that RLUIPA applied to a city's condemnation of a religious center because it was part of a broader zoning plan, and therefore came within the statutory definition of "land use regulation").

(NEPA),[91] that would require a city, state, or government agency to clear certain administrative hurdles before using eminent domain against a homeowner. The requirements might include: (1) that an agency report on the displacement effects of project before taking homes;[92] (2) that the agency allow and respond to public comments before taking homes;[93] and (3) that the agency find that no feasible alternatives exist before taking homes.[94] Requirements such as these would make it more difficult for governments to take homes, facilitate public participation in such decisions, and expand the grounds for judicial review of a government's decision. Through all of this, such requirements could mitigate the fiscal illusion that now encourages government to take too many homes.

Although both heightened scrutiny and procedural solutions would help defend the sanctity of home, a drawback of both is that their effectiveness depends largely on imprecise standards of judicial review. Both proposals would require courts to second-guess legislative judgments related to land use planning, either in deciding whether the government has proven a compelling governmental interest, or in deciding whether the government has sufficiently studied alternatives to the taking, and in so doing courts would probably be inconsistent. This could cause both high litigation costs and unpredictability in land use planning. It would also increase the caseload burden of courts.

Moreover, if some courts are lax in enforcing such requirements, as courts have sometimes been with respect to RLUIPA,[95] even procedural requirements and heightened standards of review might not provide sufficient protection for homes. After all, in *Poletown* the

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91 42 U.S.C. §§ 4321–4370d.

92 *See* Adam P. Hellegers, *Eminent Domain as an Economic Redevelopment Tool: A Proposal To Reform HUD Displacement Policy*, 2001 MICH. ST. L. REV. 901, 956–59 (proposing a requirement that federal agencies file a "socioeconomic impact statement," similar to NEPA's "environmental impact statement" before taking action that would displace residents).

93 *See* 40 C.F.R. § 1503 (2005) (detailing NEPA's public comment procedures).

94 This last requirement would resemble the provisions of the Department of Transportation Act that protect parklands, *see* 23 U.S.C. § 138 (2000), and that were the subject of the Supreme Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

95 *See, e.g.*, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (holding that the substantial burden/compelling interest test of RLUIPA only prohibits governmental action "that bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

Michigan Supreme Court purported to apply heightened scrutiny,[96] and yet the court still upheld Detroit's razing of an entire neighborhood—a case that is considered by many to be the paradigm example of eminent domain abuse. On the other hand, if some courts are extremely strict in applying such requirements, as some courts have been in applying NEPA,[97] it could impose too great a cost to land use planning and transportation objectives. Thus, while such measures would improve the protection for homes overall, the level of protection could vary significantly in individual cases.

NEPA and RLUIPA might represent the best regulatory solutions for protecting the environment and religious land uses, notwithstanding their dependence on imprecise standards of judicial review. But for protecting homes against eminent domain, there exists another way to test whether the government's justification is sufficient to warrant extraordinary action—one that would be more predictable, involve fewer litigation costs and second-guessing by courts, and that would leave displaced homeowners better off. It is to increase the compensation that government must pay for taking a person's home.

IV. THE COMPENSATION SOLUTION

When government is allowed to take private property without sufficiently compensating owners, two problems arise. First, government condemnations of land (even for valid public purposes) tend to impose significantly unequal burdens on citizens. One owner may lose a significant property interest to support a public project, while other citizens contribute nothing, although the project is designed to benefit them all as members of the public. The just compensation requirement, therefore, performs a function like that of the Equal Protection Clause, and "prevents the public from loading upon one individual

96 *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981) ("Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.").

97 The leading case for strict judicial enforcement of NEPA is *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), in which the court chastised an agency for "making mockery of the Act," *id.* at 1117, and welcomed the "flood of new litigation" that the NEPA promised to bring, *id.* at 1111. *See also* Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1169–71 (10th Cir. 2002) (finding the Department of Transportation's environmental impact statement in support of a federal-aid highway inadequate for, among other things, failing to adequately consider alternative transit options).

more than his just share of the burdens of government"[98] by making the general taxpayers, rather than condemnees, bear the ultimate cost of property acquisitions.[99]

Second, when government agencies may take private property without fully compensating owners, there is inadequate deterrence of harmful governmental action.[100] The just compensation requirement serves to correct the problem of fiscal illusion by forcing government agencies to internalize the social costs of eminent domain actions, thus making it more likely that they will undertake only those projects that are socially justified.[101]

Both of the problems that the just compensation requirement addresses (unequal burdens and the overuse of eminent domain), appear when eminent domain law fails to recognize the intrinsic value of a person's home and instead values it solely on market appraisals. Indeed, the widespread criticism that state and local governments today use eminent domain too frequently against homeowners for insufficient reasons,[102] causing significant harm to these homeowners because of their unluckiness that others want their land,[103] is exactly what one should predict from a standard of compensation that is inad-

98 Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

99 *See* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003) (analyzing the Takings Clause, including regulatory takings jurisprudence, as a requirement that government treat citizens equally).

100 *See supra* Part I.D.

101 Of course, the Takings Clause does not internalize all social costs and benefits of governmental action into budgetary costs and benefits, given the many direct and indirect ways that government actions harm and benefit people. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) (proposing a system of "givings" jurisprudence whereby owners who benefit from government action must compensate the government). However, it does at least attempt to do so for those citizens who are singled out in their capacity as property owners to contribute to government projects. Since eminent domain allows government to single out one or a few owners to make a unique and substantial contribution to society, and since those owners often have little political influence when their numbers are small, the problem of fiscal illusion is especially likely to emerge vis-à-vis the interests of condemnees in eminent domain. It is therefore reasonable to require government to compensate condemnees as a correction to fiscal illusion, without attempting the impossible task of internalizing all indirect social costs and benefits into a government's budgetary costs.

102 *See, e.g.*, BERLINER, *supra* note 5 (collecting many examples of troubling eminent domain cases); James W. Ely, Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 PROB. & PROP., Nov.–Dec. 2003, at 31, 31 ("Rightly or wrongly, many individual property owners—homeowners and small business operators—see themselves as victims of governmental abuse.").

103 Nader & Hirsch, *supra* note 6, at 219–22 (describing the plight of homeowners who are displaced by eminent domain).

equate. Because undercompensation lies at the root of the problem, perhaps increasing the measure of compensation is the most sensible solution.

To adjust the law of just compensation to account for nonmarketable elements of home ownership would be consistent with the pattern of expanding remedies in tort law, which has served to correct similar problems of inequity and underdeterrence. For example, it used to be the established law in wrongful death cases that the surviving family members could recover only their pecuniary losses associated with the decedent's death, usually meaning the decedent's lost income,[104] as if family members are only worth to each other what they are capable of earning. In most states, tort law has now corrected this flaw by allowing some form of consortium damages or emotional harm damages in cases of wrongful death.[105] Similarly, although tort law used to forbid all sentimental damages for loss of personal property, many states now allow owners to recover sentimental or emotional damages for the loss of certain kinds of personal property that owners typically value more than market value, such as family pets, heirlooms, and photo albums.[106] In such cases, the owner may be entitled to damages based on the property's unique value to the owner, not merely market value.[107]

Suppose that eminent domain law followed the trend of tort law and expanded the recognition of home value, using the compensation requirement as the primary means of deterring unjustified home

104 *See* 2 DAN B. DOBBS, LAW OF REMEDIES § 8.3(5), at 439–40 (2d. ed. 1993) (discussing the traditional rule in wrongful death as allowing only pecuniary losses, and the problems with such a rule).

105 *Id.* (discussing how most jurisdictions now recognize a remedy for lost consortium, whether by statute or judicial decision, and about one-third allow direct recovery for mental anguish).

106 *See, e.g.*, Chryar v. Wolf, 21 P.3d 428, 430 (Colo. Ct. App. 2000) (awarding sentimental damages for loss of photos, journals, and other personal items due to intentional tort); Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) (awarding mental distress damages for negligent death of a pet); Bourgeois v. Allstate Ins. Co., 820 So. 2d 1132, 1137 (La. Ct. App. 2002) (awarding damages in excess of market value for lost engagement ring).

107 *See* 1 DOBBS, *supra* note 104, § 5.16(3), at 908 & n.8 ("[C]ourts have had to explain that they do not exclude all claims based on the owner's special attachment but only those based on a 'mawkish and unreasonable attachment,' and have allowed limited recoveries for sentimental value or something that seems indistinguishable from sentimental value in cases of pets, family photographs, heirlooms and personal trophies." (citing Mieske v. Bartell Drug Co., 593 P.2d 1308 (Wash. 1979))). Courts also commonly determine damages based on "value to the owner," as opposed to market value, in cases of destroyed clothing and household goods. *Id.* § 5.16(3), at 907 & n.2.

takings. What should be the measure of compensation, if not market value, when government takes a person's home? And who should adjudicate such value?

A. *Applying the Indemnity Principle to Homes*

The "just compensation" requirement of eminent domain is usually understood as an indemnity principle.[108] Of course, there are practical obstacles to fully indemnifying homeowners in eminent domain.[109] But setting aside these obstacles for the moment, the normative goal of indemnifying homeowners requires a more thorough examination.

The Supreme Court has stated that the indemnity standard aims to place the owner "in as good a position *pecuniarily* as if his property had not been taken," implying that subjective values should not count.[110] On the other hand, some commentators have suggested that just compensation would ideally compensate for every interest that an owner loses as a result of the government's power of eminent domain, including what would have been the owner's right to hold out against the government and refuse to sell at all.[111] This might suggest that the owner should ideally be entitled to some share of the increased land value that an owner might have been able to extract from the government (or a private redeveloper) in a negotiated transaction.[112]

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108 *See, e.g.*, 4 NICHOLS ON EMINENT DOMAIN, *supra* note 52, § 12-01[4], at 12-37 to -47 ("'Compensation,' as used in the constitutional provision as a limitation upon the power of eminent domain, implies full indemnity to the owner, that is, equivalent (usually monetary) for the loss sustained by the owner for the land which has been taken or damaged.").

109 *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510–11 (1979) (recognizing that for practical reasons the Supreme Court has not required full indemnity as a matter of constitutional law).

110 *Id.* at 510 (emphasis added) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

111 *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 15–16 (1985); Fennell, *supra* note 41, at 963–67 (describing the various elements of property value that deserve compensation, including the owner's loss of autonomy and lost subjective value).

112 Lee Anne Fennell, for example, describes the owner's loss of autonomy, the owner's loss of ability to extract surplus from transfer, and the owner's subjective attachment to property as independent property losses for which an owner should be fully indemnified in eminent domain, although not necessarily directly. *See* Fennell, *supra* note 41, at 965–66 (describing one element of undercompensation as the owner's loss of surplus from transfer); *id.* at 1003 (concluding that an eminent domain action is not just unless it leaves the owner, either directly or indirectly, compensated for every element of loss).

I suggest that both of these positions are inaccurate as an ideal measure for just compensation. Neither is fully consistent with the purposes of eminent domain and of the just compensation requirement. Rather, the ideal measure of "just compensation" in the case of taking a person's home should be the amount of compensation required to make the owner indifferent to the land acquisition at issue (not indifferent to the government's choice to use eminent domain as the means of acquisition), accounting for the owner's reasonable subjective value.[113]

Let us take a hypothetical case in which a government agency seeks to acquire the home of a elderly widow to build a new highway. Assume that the market value of the house is $100,000, reflecting what strangers to the property would be willing to pay for it. Assume further that the widow has lived in her home for many years and that she is highly averse to moving, so she would be willing to sell for no less than $200,000. Finally, assume that the highway is important to the government, and that alternative routes would be costly, so the government would be willing to pay (if it had no other choice) up to $500,000 for the widow's parcel.

In summary, the parcel has three values, based on three different perspectives: (1) the value to the government: $500,000; (2) the value to the owner: $200,000; (3) the value to the Market: $100,000.

Because the value of the parcel to the government is the highest of all, social welfare is improved when government acquires the land and converts it to highway use. This would be true whether the government acquired the land through eminent domain or by inducing the widow to sell voluntarily. Two positive things occur, however, by allowing government the power of eminent domain. First, eminent domain helps to ensure that the socially optimal outcome will become reality. Without the power of eminent domain, there exists a bilateral monopoly between the widow and the government, which creates a risk of bargaining failure. Each party, in an effort to extract surplus from the other, might attempt to hold out at the price that they estimate the other party values the land at, which could lead to stalled negotiations.[114] By contrast, if the government has the power of eminent domain, we know that the government will get the land it needs,

113 I deal with the problem of unreasonable and extreme subjective value at *infra* Part IV.C.

114 *See* POSNER, *supra* note 38, at 56–57, 62–63 (discussing the bilateral monopoly problem in relation to eminent domain). If the bilateral monopoly problem seems minor in this case, consider that it is magnified many times when the government must acquire multiple parcels to acquire a project, with the possibility that only one opportunistic holdout could thwart an entire project.

as long as the measure of just compensation does not exceed its value to the government.

Second, some would consider it unfair for the widow to extract a large sum of money from the government (and ultimately from taxpayers) in excess of what she personally values her land simply because the public happened to have a great need for her parcel.[115] Eminent domain also corrects this fairness problem, which is the flip side of an owner suffering disproportionate harm due to the government's need for her land. By allowing the government to acquire the land at the price that would make the owner as well off as being left alone, the owner will not gain an unjustified windfall at the expense of the public.[116]

Considering the fairness and efficiency goals of eminent domain and of just compensation, the ideal award in this case is $200,000—the amount that would make the widow indifferent between selling her land and staying. To award the widow only market value for her land, given that she values it at much more, would cause her to suffer disproportionately for a burden that is more appropriately spread to all taxpayers. It would also fail to deter the government from taking homes in other cases where land's value to the government is less than its intrinsic value to the homeowner.

On the other hand, an award of greater than $200,000 should not be required. Although the land is worth more than this to the government as a highway, the increased value is made possible only because of the government's proposed project, and so it is reasonable for eminent domain law to allow government to keep this surplus.[117] Indeed,

115 Again, if this problem seems minor in this case, consider how it is magnified many times when the government must acquire multiple parcels from similarly situated owners, and how the last few owners to hold out would have a vastly improved bargaining position over the others, possibly gaining millions at the public expense.

116 For examples of the equity argument for eminent domain, see Howard Gensler, *Property Law as an Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 67 (1995) (explaining that "[e]quity and efficiency require that the government reserve the right to purchase property on reasonable terms for important public purposes"); Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1186 (2000) ("Governments have the power of eminent domain precisely in order to avoid such windfalls to owners of assets of significant public value.").

117 *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 236–37 (2003) (holding that compensation for the taking of interest on lawyer's trust accounts "must be measured by [the owner's] net losses rather than the value of the public's gain"); City of N.Y. v. Sage, 239 U.S. 57, 61 (1915) (holding that "[t]he City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots," but recognizing that the owner should be compensated for any potential assemblage value that existed prior to the government's action, if the potential assemblage was apparent

one might say that to preserve this surplus for the public is an important reason why eminent domain exists. This not only spreads the benefits of public projects more evenly through society (in the form of general taxpayer savings rather than through large awards to a lucky few), but it also helps to ensure that government agencies have incentive enough to undertake projects that are socially valuable.[118]

Thus, while the ideal award should make the owner indifferent to losing her land, it does not necessarily make her indifferent to the government's power of eminent domain. In a world in which government had no power of eminent domain, an owner in the widow's position would have a chance to bargain for a selling price anywhere between $200,000 and $500,000, given the public's need for her land. But the ability to extract gains from the government because of the public's special need for one's property is the type of monopoly advantage that eminent domain is designed to disable, for fairness and efficiency reasons.[119] The goal of just compensation should not be to replicate as closely as possible the distribution of entitlements (including windfalls) that would exist in a world without eminent domain; rather, it should be to facilitate public projects that improve the social welfare while leaving condemnees as well off as if the government had left them alone.

B. Assembly Value and Private Redevelopment

The previous example involved the government's taking of a home for a traditional public use. I tentatively argue next that the measure of compensation should be the same—that is, excluding whatever surplus value arises because of the acquisition—even where government condemns land for private redevelopment, although some commentators have argued to the contrary.[120]

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enough to affect the land's market value at that time); Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) ("[T]he question is what has the owner lost, not what has the taker gained.").

118 *See* Merrill, *supra* note 41, at 133–34 (discussing the compensation structure of eminent domain as a subsidy to encourage public goods).

119 *See* Gensler, *supra* note 116, at 66–67.

120 *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859 (arguing that just compensation should be awarded according to a continuum, whereby additional compensation should be required as takings become further removed from traditional public uses and significantly benefit private parties). Justice Kennedy also raised several questions at oral argument in *Kelo v. City of New London* implying his interest in a rule that would require a higher standard of compensation in cases of eminent domain for private redevelopment. *See* Transcript of Oral Argument at 21–23, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

Admittedly, when government uses the power of eminent domain to facilitate private redevelopment, this often allows private developers to capture a bargaining surplus that might otherwise be divided between the owner and developer in a negotiated transaction. While the government, in its role as condemnor, could choose to retain the surplus for itself or allocate it to the owner, there are good reasons why the government should have the flexibility to allocate the surplus to the developer.

First, the indemnity standard I have suggested would still aim to leave the owner as well off as if the land acquisition had not happened, accounting for the owner's reasonable subjective value.[121] In the case of taking a person's home, this should often require compensation beyond market value. Beyond indemnifying the owner, however, it is difficult to justify requiring the government to award a benefit made possible solely because of someone else's unique ability to improve the land.[122] The usual deterrence and equity justifications for just compensation do not require this.

Second, since private redevelopment does create significant public benefits,[123] a local government might reasonably choose to allocate the surplus to induce a developer to use the land in a way that would create such benefits.[124] If the government could have retained the surplus for itself for taking the owner's property, it is reasonable to allow the government to use the surplus instead to encourage positive kinds of redevelopment.

James Krier and Christopher Serkin argue that a higher standard of compensation is warranted in cases of eminent domain for redevelopment than in traditional public use cases because the latter gener-

121 *See supra* Part IV.A.

122 Of course, if there are other developers who would be willing to acquire the land and turn it into something more commercially valuable by combining it with other parcels, its potential for such development should be factored into its present fair market value, and would therefore be compensable even under current law. *See* Olson v. United States, 292 U.S. 246, 256 (1934) ("The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.").

123 *See* Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193, 193–99 (1987) (describing the many benefits of private redevelopment, including site improvements, increased employment, increased spending leverage, increased tax revenue, energy conservation, and inter-city competition).

124 *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 85 (1986) (explaining how awarding eminent domain surplus to the condemnor encourages positive uses of eminent domain, much as profit encourages positive activities in the market).

ally produces greater reciprocal benefits to the owner.[125] They argue that when government takes land for a traditional public use, such as for a highway, it is more likely that the owner receives significant compensation indirectly through the public benefits associated with such projects, accounting for the gap between market value compensation and the actual value of the land to the owner.[126] Accordingly, the law should require a higher measure of direct compensation when government takes land for private redevelopment than when it retains the land for direct public use.[127]

I am skeptical of this argument for two reasons. First, it rests on untested empirical assumptions about the general benefits of differing kinds of eminent domain projects. The argument seems to be quite skeptical of the public benefits of redevelopment projects, while generously assuming the significant and widespread public benefits of traditional eminent domain projects, such as transportation projects.[128] But these generalizations might not be warranted. Both redevelopment projects and transportation projects create general benefits throughout the community, and both usually fail to benefit or please all members of the community. Both can benefit some private individuals and entities significantly more than others, and for this reason can be politically motivated and wasteful.[129] And yet both have the potential to create widely dispersed public benefits.

Suppose, for example, that a city takes one homeowner's house to acquire land for a Walmart store, and another homeowner's house to make a freeway exit ramp next to the Walmart store. Both condemnations would benefit Walmart uniquely, and yet both could also produce widespread public benefits. There is no basis to assume, just because one taking is for a traditional public use and the other is for redevelopment, that more members of the public will benefit from the convenience of using the freeway access ramp than will benefit from the convenience of shopping at Walmart. And certainly, there is no basis to assume that the owner whose land is taken for the freeway access is more adequately compensated by it than the first owner is

125 *See* Krier & Serkin, *supra* note 120, at 865–73.

126 *Id.* at 867 (proposing that eminent domain actions exist along a public use spectrum, and that as one moves away from classic public uses towards naked transfers, reciprocal benefits to the owner decline).

127 *Id.* at 868–69.

128 *Compare id.* at 866 (discussing how the reciprocal benefits of traditional public uses will even out over time as government takes property from different people), *with id.* at 869 (discussing the uneven benefits of redevelopment projects, as in *Kelo*).

129 *See* Galles, *supra* note 76 (criticizing a recent federal transportation bill as a collection of indefensible pork-barrel projects).

compensated by his ability to shop at Walmart. The only way to be reasonably sure whether any owner is compensated by reciprocal benefits of this sort is to examine such benefits case by case, which would eliminate the need for differing compensation standards.

Second, the usual rule for applying reciprocal benefits towards the government's compensation obligation is that general public benefits do not count; only benefits that are special to the owner in relation to the specific project can offset the government's compensation obligation.[130] The reason for the rule against offsetting general public benefits from the government's compensation obligation is consistent with the equalizing function of just compensation: since other members of the public typically do not pay special assessments for the general benefits they receive from public projects, neither should a condemnee be forced to pay a special assessment for such benefits in the form of lost property and reduced compensation, merely because the government happened to need his land.[131]

Thus, the fact that condemnees generally benefit from roads and other public goods, like all members of the public do, is not a sufficient reason for awarding compensation below the subjective indemnity standard, even in traditional public use cases. And the fact that some third party will ultimately acquire the land, or otherwise benefit uniquely from it, does not seem to justify requiring the condemnor to pay the owner more compensation than should be required if the land was taken for a traditional public use.

C. Unreasonable and Unverified Value

The two most serious problems with awarding compensation according to an owner's subjective value have to do with unreasonable and unverified subjective values. Some people, given the choice, would not sell their homes at any price, and others would not sell for

130 *See* 3 NICHOLS ON EMINENT DOMAIN, *supra* note 52, § 8A.02[6], at 8A-47 ("[T]he Supreme Court of the United States and a majority of other jurisdictions have held that only special benefits may be constitutionally setoff."). Even in the minority of jurisdictions that allow the offset of general benefits, the offset only may reduce an owner's severance damages; it does not apply to the valuation of the condemned parcel. *See, e.g.*, *id.* § 8A.03[7], at 8A-66 to -69 (describing California law); *id.* § 8A.03[25], at 8A-90 to -92 (describing Michigan law); *id.* § 8A.03[43], at 8A-110 (describing South Carolina law).

131 *See id.* § 8A.02[6], at 8A-47 ("General benefits may not be used to offset damages because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of the improvement and who shares in the increased value without any pecuniary loss.").

less than many times their homes' market value.[132] Moreover, in an eminent domain proceeding, some would pretend to value their homes more than they actually do if it could gain them greater compensation according to a subjective standard. For these reasons, no system of eminent domain can leave all owners subjectively whole, and, indeed, perhaps in some cases it should not.

Eminent domain law should recognize that there is a point at which an owner's subjective valuation of land in dollars can be so high that it does not correlate with the land's highest actual value to society.[133] Rather, extremely high subjective valuations might simply indicate that the owner does not value wealth very much beyond a certain point,[134] or that the owner is unreasonably unwilling to accommodate the broader interests of society. Extreme and unusual attachments to material things may be akin to fetishism and are not something that law should necessarily encourage or value.[135] When significant public interests are at stake, it is reasonable for government to require property owners sometimes to accommodate the interests of society, and if no amount of compensation could make the owner subjectively whole, it is reasonable for government sometimes to take property for

132 For example, at a public hearing prior to Detroit's acquisition of Poletown, one of the homeowners who had lived in his house for forty-six years angrily protested the City's action and drew cheers when he emphatically told the City that his house was worth a million dollars to him. WYLIE, *supra* note 64, at 63.

133 Although simple economic models often reasonably assume that a resource will generate the most social utility if it is allocated to the person or group who is willing to pay the most for it, this assumption becomes less plausible when extremely large values are at stake. First, not everyone in society has the ability to bargain for high-priced resources, and thereby register their preferences in the market. Second, because of the declining marginal utility of wealth (i.e., the more money one has, or considers acquiring in an exchange, the less each additional dollar is worth to the individual in terms of increased happiness), expensive resources generally produce more utility per dollar when they are widely shared than when one person owns the whole resource. In other words, one person's refusal to sell something for less than one hundred million dollars does not equal, in terms of social utility, the interest of one hundred million people who would be willing each to contribute one dollar for the same resource as a public good.

134 This preference may well be reasonable, but it nevertheless precludes assuming in all cases that an owner's subjective valuation represents the land's highest value to society if it exceeds the government's valuation, for reasons stated *supra* in note 133.

135 *See* Radin, *supra* note 25, at 968–70 (discussing how the personhood theory of property must confront the problem of fetishism, and should establish objective limits).

less than full subjective compensation. This is a further reason why government's eminent domain power exists.[136]

In any case, even if one does not agree that some subjective values are unreasonable, there is the practical problem of verifying subjective values.[137] When compensation is based on subjective value, owners have an enormous incentive to exaggerate what their homes are worth to them personally. In many cases, there would be no way for a neutral fact-finder to know whether an owner's own reported valuation is accurate, exaggerated, or self-deluded.[138] The law could in theory put the matter to juries and ask them to guess case by case what sum of money would reasonably compensate each homeowner for his or her lost subjective value. But this approach would be highly inaccurate and unpredictable. Such a system would tend to reward those homeowners who are most willing to litigate, who value honesty the least, and who are the most sympathetic to juries. Because of the system's unpredictability, it could also generate significant transaction costs and lead to fewer settlements between condemnors and owners.

The fact that we cannot accurately measure subjective home value, however, is not a good reason for limiting compensation strictly to market value, if there are other methods of more closely approximating what homes are reasonably worth to their owners. As a general matter, eminent domain law significantly undercompensates for homes, which leads to the taking of too many homes. A general correction in the direction of increased compensation would improve matters significantly.

D. Standardizing Home Value

One reasonable approach to improving the valuation of homes would be to use a statutory formula to increase the compensation as

136 *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559–60 (1972) (describing the views of Grotius and other early writers that eminent domain is justified because "public advantage" must prevail over "private advantage").

137 *See* Merrill, *supra* note 124, at 83–84 (discussing the difficulty of measuring subjective value).

138 For this reason, even a self-reporting mechanism with a penalty for false reporting, such as proposed by Abraham Bell and Gideon Parchomovsky, *see* Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 300–07 (2001), would not work for adjudicating subjective value, because auditors would have no reliable way of finding whether someone has falsely reported such value. Bell and Parchomovsky's model is designed to measure changes in market value for derivative takings with improved efficiency; they do not offer it as a method to measure subjective value. *See id.* at 316.

percentage of market value. For example, eminent domain law might require government to pay homeowners market value plus *X* percent of the home's market value, where *X* depends on how long the owner has lived in the home.[139] A statutory model along these lines is included as an Appendix to this Article.[140] The example would award a homeowner an additional two percent of market value for every year that the owner has lived in the home as an owner, up to a bonus of sixty percent for owners who have lived in their homes for thirty years or longer.[141]

A statutory correction to the law of just compensation such as this has several advantages. First, it would more adequately deter government from taking homes than current law does, especially the homes of people who tend to value their homes the most, without making it too costly to take homes in cases of genuine public necessity. To the extent that government agencies pass on the costs of eminent domain to private redevelopers, this system would also deter private redevelopers from using eminent domain simply to acquire land cheaply. Of course, what factor of market value would achieve optimal deterrence (against government and private redevelopers) is something that reasonable people might disagree about, and legislatures rather than courts should have the final word in setting this value. But clearly optimal deterrence does not arise by allowing government to take homes merely for market value, even for traditional public uses.

Using a compensation formula to deter government's overuse of eminent domain is also preferable to heightened scrutiny and procedural alternatives in that it does not require courts to second-guess the policy judgments of government agencies and cities. Instead, it would require governmental agencies to prove that their projects are important enough to take away homes by what they are willing to pay. This would require less litigation than heightened scrutiny or NEPA-type

139 Robert Ellickson has suggested legislative schedules, based on factors that correlate with high subjective value, as a means of compensating for the nontransferable elements of land value without incurring high administrative costs. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973). Similarly, Victoria, Australia reportedly allows condemnees to claim up to ten percent of a home's value to account for subjective losses, which award may be adjusted according to the length of time the owner has lived in the home. *See* Murray J. Raff, *Planning Law and Compulsory Acquisition in Australia*, *in* TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 27, 44 (Tsuyoshi Kotaka & David Callies eds., 2002) (describing the Australian concept of "solatium," which aims to compensate homeowners for lost subjective attachment).

140 *See* Appendix.

141 *See* Appendix.

solutions, and would reasonably distinguish projects of genuine public necessity from those that do not justify taking homes, because the local governments that know their public's interests best would be making the ultimate decisions. Moreover, because the additional compensation would be determined by a statutory formula, the added element would cause no additional uncertainty.

A statutory formula increasing home value would also have the benefit of accommodating two kinds of horizontal fairness. First, by applying the same standard of compensation to all homeowners according to a set formula, the law would avoid wide disparities between what displaced homeowners receive in similar circumstances. At the same time, a formula based on a rough estimation of how homeowners typically value their own homes, rather than how the market values those homes, would come much closer than current law does to achieving fairness between displaced homeowners as a group and other members of society. No longer would the displaced homeowners generally suffer a disproportionate share of the cost of public projects. Some displaced homeowners would feel advantaged as a result of the government's need for their property, and others would still feel disadvantaged. But on average, at least, a well crafted formula should leave displaced homeowners close to indifferent.[142]

Importantly, a rule setting just compensation at "market value plus *X* percent" for eminent domain purposes would not prohibit government agencies from offering to buy homes for less than the eminent domain price. Indeed, in many cases, it would make sense for the government and an owner to agree to exchange property for less than the statutory eminent domain price if they both value the land for less.[143] A system that sets the eminent domain price of land higher than its market value, therefore, should encourage governments more often to bargain for property in the manner that private purchasers do. At the same time, it would allow governments a way to bypass the market in cases where the public interest depends upon acquiring a

142 Using a formula to standardize the social obligations of individuals is a common regulatory tool, especially where it is difficult to adjudicate relevant facts without a high risk of error. For example, the Uniform Probate Code determines a decedent's statutory obligation to provide for a surviving spouse based on how long the marriage existed, roughly assuming that the longer a marriage has existed the more the married partners have a reasonable expectation to share each other's wealth upon death. *See* UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1998).

143 Although some risk of bargaining failure remains in this situation because of a potential bilateral monopoly, *see supra* Part IV.A, the potential bargaining range is significantly restricted by the government's ability to acquire the property at "market value plus *X* percent," thus making bargaining failure a far less serious problem than in a system with no eminent domain power.

particular lot, and where the owner is unwilling to sell for less than the above-market eminent domain price.

To be sure, a system that links compensation to how long the owner has lived in the home could affect some homeowners' incentives. Some owners who know that the government will likely need their land for a future eminent domain project will know that if they move before the government is ready to buy, they will lose the enhanced element of compensation due to them in eminent domain, and therefore might choose to stay to exploit this benefit. But no reasonable owner would choose to stay for this reason if it made him worse off. Moreover, sometimes governments and owners would find it possible to bargain around these incentives. To the extent that this does cause some residual inefficiency in an owner's housing decisions, it is probably a reasonable price to incur as a cost of making the overall standard of compensation generally more accurate, and of improving the government's incentives relating to eminent domain.

CONCLUSION

Commentators, property-rights advocates, and Justice Thomas are all correct to be concerned about how easily government can force people out of their homes for insubstantial reasons. Eminent domain law fails to protect the home adequately, and for this reason needs reform.

The most commonly suggested response to this problem—to narrow the public use doctrine—is not the only potential solution, and indeed is not the most accurate solution. I have examined in this Article several methods of reforming eminent domain law to protect the sanctity of the home, including the public use solution, heightened scrutiny solutions, procedural solutions, and the compensation solution. All of these methods have their benefits, and could potentially work in combination. Of these methods, however, the compensation solution appears to be the most promising. Rather than requiring courts to second-guess the decisions of local governments, it would aim to correct the incentive structure of such governments, forcing them to internalize into their budgetary costs a more reasonable approximation of the intrinsic value of a home.

APPENDIX: MODEL STATUTORY PROVISION FOR PROTECTING HOMES

Compensation for Personal Detachment from the Home

(a) When a state or local agency uses eminent domain to acquire property that is used by the owner as a primary residence, the agency shall compensate the owner by paying (in addition to the property's market value and any relocation expenses required by law) a personal detachment award determined in accordance with subsection (c).

(b) The personal detachment award represents the non-pecuniary losses that homeowners commonly experience when they are displaced from homes. This includes, but is not limited to, emotional losses, aesthetic losses, disruption of expectations, loss of reasonable sentimental attachment, and detachment from community. The requirement to pay a personal detachment award is also designed to discourage agencies from condemning owner-occupied homes when reasonable alternatives are available.

(c) The personal detachment award shall be determined according to the length of time that the owner has continuously lived in the home under a claim of title, according to the following table:

If the owner has continuously lived in the home under a claim of title for:	The personal detachment award shall equal:
Less than 2 years	2% of the home's market value
At least 2 years but less than 4 years	4% of the home's market value
At least 4 years but less than 6 years	8% of the home's market value
At least 6 years but less than 8 years	12% of the home's market value
At least 8 years but less than 10 years	16% of the home's market value
At least 10 years but less than 12 years	20% of the home's market value
At least 12 years but less than 14 years	24% of the home's market value
At least 14 years but less than 16 years	28% of the home's market value
At least 16 years but less than 18 years	32% of the home's market value
At least 18 years but less than 20 years	36% of the home's market value
At least 20 years but less than 22 years	40% of the home's market value
At least 22 years but less than 24 years	44% of the home's market value
At least 24 years but less than 26 years	48% of the home's market value
At least 26 years but less than 28 years	52% of the home's market value
At least 28 years but less than 30 years	56% of the home's market value
30 years or more	60% of the home's market value

(d) For purposes of this section, an owner has continuously lived in a home under a claim of title for as long as he or she has (i) continuously maintained the home as a primary residence; and (ii) continuously maintained ownership or a colorable claim of ownership of the property. A temporary absence from a home, including temporary rental of the home to another, does not disqualify an owner from claiming it as a continuous personal residence if the period of absence is reasonable and if the owner maintains the intention to return to the home.

(e) Notwithstanding other provisions of this section, an owner shall not be entitled to the personal detachment award if: (i) at the time the owner acquired ownership in the home he or she had notice of the government's intentions to condemn the property; and (ii) the condemnation occurred within two years following the owner's acquisition of title to the property.