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CHAPTER 7

Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo

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I. Introduction

Eminent domain is a power either granted or inherent in most general purpose governments throughout the world. The power to take or re­claim private property for governmental purposes is generally consid­ered to be a natural attribute of sovereignty. However, most governments—or the judicial branches thereof—require that compulsory purchase not only be accomplished for some governmental or public purpose, but also that the private landowner from whom the property is taken be fairly compensated for the loss.

The concept of "just compensation" is typically measured by the fair market value of the property or interest in property (easement, leasehold, servitude) taken by government. Generally, fair market value is what a willing buyer would pay a willing seller for the property. While simple to state, the fair market value standard is not so easily applied in many situations. For example, what if government, through additional regulation, acts to reduce the market value of property by limiting the number of legal uses available to the landowner just prior to government acquisition? What if government undertakes activity short of such additional regulation through announcements and publicity which also has the effect of reducing the property’s fair market

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value? Or, what if the government’s purpose in condemning private property is to assemble property for redevelopment by private entities in order to increase tax revenues? All of these scenarios may be encountered when local and state governments use eminent domain to promote the economic well-being of their communities through private redevelopment.

A recent Supreme Court case, *Kelo v. City of New London*, contained elements implicating the issues surrounding just compensation.\(^3\) Though these issues were not directly before the Court, the *Kelo* oral argument transcript reflects the Justices’ concerns about valuation.\(^4\) Justice Kennedy asked, “Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee can receive some sort of a premium for the development?”\(^5\) Scott G. Bullock, on behalf of the petitioners, agreed with Justice Kennedy’s assessment of current law; when value is determined a court must ignore the proposed project and instead presume “a willing buyer and willing seller, without reference to the project.”\(^6\) Justice Kennedy, however, continued to question whether “there has been any scholarship to indicate that maybe [the just] compensation measure ought to be adjusted when A is losing property for the economic benefit of B.”\(^7\)

Neither petitioner nor respondent was able to respond effectively to Justice Kennedy’s question about a premium compensation standard when private property is condemned for private economic benefit.\(^8\) Justice Kennedy raised the issue again when he stated, “It does seem ironic that 100 percent of the premium for the new development goes to the developer and to the taxpayers and not to the property owner.”\(^9\) Justice Breyer then underscored Justice Kennedy’s point about compensation by asking, “[I]s there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn’t have to sell his house? Or is he inevitably worse off?”\(^10\) Although the Justices recognized that the measure of compensation was not at issue in the *Kelo* case,\(^11\) several of them were bothered by the problem of making the property owner whole.\(^12\)

In *Kelo*, the United States Supreme Court confirmed its adherence\(^13\) to the holdings in *Berman v. Parker*\(^14\) and *Hawaii Housing Authority v. Midkiff*\(^15\) that the government may exercise its eminent domain power so long as it is “rationally related to a conceivable public purpose.”\(^16\) Accordingly, the Public Use Clause of the Fifth Amendment continues to be of limited assistance in protecting private property rights.\(^17\) Just-
tice O'Connor in her dissent criticized the majority's reasoning as "wash[ing] out any distinction between private and public use of property—and thereby effectively . . . delet[ing] the words ‘for public use' from the Takings Clause of the Fifth Amendment." However, even prior to the *Kelo* case, several commentators had encouraged using only the concept of just compensation to control government abuse of the eminent domain power.19

This chapter explores how just compensation is determined when redevelopment projects utilize eminent domain for land assembly. In the *Kelo* oral argument, Justice Breyer described the public’s adverse reaction to such eminent domain action when "an individual has a house and they want to . . . not [be] made a lot worse off, at least not made a lot worse off just so some other people can get a lot more money."20 However, Justice Kennedy pointed out that "a fundamental [rule] of condemnation law [is] that you can not value the property being taken based on what it's going to be worth after the project."21

We begin by looking at this general rule of valuation and its application in four different cases. We next address two major concerns that arise when the fundamental rule is applied: 1) precondemnation government action, whether done with the intention of driving down compensation or not, may unfairly diminish the landowner’s eventual compensation; and 2) the fair market value measure of compensation may not make the property owner whole. There are two exceptions to the general rule that attempt to address these concerns: 1) the scope of the project exception if the condemned property is outside the scope of the original project, and 2) the precondemnation blight exception where the government’s precondemnation actions intentionally reduce the property’s fair market value, entitling the owner to *Klopping* damages.23 Finally, we examine what components are taken into account when valuing property that is being condemned to facilitate economic development by private entities and whether some type of premium can be awarded when “A is losing property for the economic benefit of B.”24

II. General Rule Regarding the Effect on Valuation of Government’s Intended or Actual Use

As a general rule, when valuing land for condemnation, neither the government nor the property owner may receive the benefit or the burden of the government’s intended use.25 The Supreme Court ex-
plained in *United States v. Reynolds* that “to permit compensation to be either reduced or increased because of an alteration in the market value attributable to the project itself would not lead to the ‘just compensation’ that the Constitution requires.” Although the general rule was first created by common law, several states and the Model Eminent Domain Code have codified the rule. This section discusses four cases in which various courts applied the general rule to limit landowner recovery or loss by excluding the government’s actual or intended use.

In *State v. Sovich*, the state of Indiana sought to condemn a .75 acre parcel and a 1.80 acre parcel of the Sovich’s larger property to widen an interstate highway. At trial, the state called an expert witness who “concluded that the future development would impair the value of the property as sites for modern service stations, and that the highest and best use of the land would be as commercial or industrial sites.” On cross-examination, however, the expert admitted that “his opinion . . . was partially based on the changes that would be brought about upon completion of the project for which appellees’ property was being taken.” The Sovichs moved to strike and the trial court sustained.

On appeal, the state argued that a trial court may “consider . . . the decrease in market value occasioned by the same project for which it is necessary to take the property in the first place.” The Supreme Court noted that it had not considered this “precise issue” before, but it observed that “[i]t is difficult to imagine a more specious argument than the state’s.” According to the Court, adoption of the proposed rule would allow state or local government to depress property values prior to condemnation: “If appellant’s argument were adopted by this Court it would be a simple matter for any condemnor to depress property values merely by publishing details of the planned project.” The Court supported its conclusion by further noting that “the weight of authority holds that neither an increase nor a decrease in the market value of the property sought to be taken, which is brought about by the same project for which the property is being taken, may be considered in determining the value of the property.”

In *Piedmont Triad Regional Water Authority v. Unger*, the Piedmont Water Authority designated as watershed 94.11 acres of the Unger’s larger property in August 1995, but waited until June 28, 2000 to actually condemn approximately 19.513 acres of the larger 94.11 acre parcel. The court in *Piedmont* began by setting forth the general common law rule, which had been codified by the North
Carolina legislature: ""[t]he value of the property taken ... does not include an increase or decrease in value before the date of valuation that is caused by: (i) the proposed improvement or project for which the property is taken . . . ."" After articulating the general rule, the court held that the ""[d]efendants [were] entitled to introduce evidence of the property's value before the development and density restrictions were adopted . . . .""

Similarly, in City of Boulder v. Fowler Irrevocable Trust, the city of Boulder designated as a floodway a portion of the trust's land. Prior to the designation, the property had been zoned to allow some development on the property. After the designation, the property was rezoned to a classification that ""essentially prohibited"" development. The trial court found that the change in zoning designation ""was a direct result of Boulder's flood control project[,]"" and therefore the change should not affect the value of the property. The Colorado Court of Appeals affirmed, noting that ""because the designations reducing the value of the property resulted from the project for which the property was being taken, they could not be considered in valuing the property.""

In McAsahan v. Delhi Gas Pipeline Corp., Delhi Corp. condemned a 3.36 acre parcel of plaintiff's larger 6,800 acre ranch for use as a compressor station, meter loop, and road easement. Prior to condemnation, plaintiff used the parcel as a pasture, but introduced an expert witness at trial who ""offered evidence of several leases of compressor sites situated on ranches in the [surrounding] area . . . . This evidence was offered to prove the value of the property taken and that the highest and best use of the property was as a compressor site."" The issue on appeal was whether the leases were relevant to determining the value of the land for condemnation.

The court set forth the general rule: ""a condemnor should not be required to pay an enhanced value for property due to the placing of a public improvement on the property."" The condemnee argued that the court should value the 3.36 acre parcel after considering the pipeline compressor improvements because the parcel was not within ""the original scope of the project . . . ."" The scope of the project doctrine is an exception to the general rule which allows a landowner to claim fair market value based on the enhanced value of the land with the public improvement if the condemnation action taken is not within the original scope of the condemnation project. After considering the landowner's argument, the court held that the exception did not apply and that ""the trial court did not err in its . . . finding that the highest
and best use of the land was for grazing cattle[,]" not for use as a compressor station.\textsuperscript{49}

In the \textit{Kelo} oral arguments, this general rule surfaced when Justice Breyer asked Wesley W. Horton, counsel for the respondents, to address what would be the right remedy for a homeowner who loses a home "just so some other people can get a lot more money."\textsuperscript{50} Mr. Horton initially responded erroneously by stating that if the case were about "just compensation, in deciding what the fair market value is today, you can certainly take into account the economic plan that's going into effect."\textsuperscript{51} Justice Kennedy corrected Mr. Horton by stating the general rule, but Justice Scalia intervened by pointing out that the petitioner was not asking for higher compensation, but was instead objecting in principle to the use of eminent domain based on the public use requirement.\textsuperscript{52}

Determining value by considering the nature of the project going into effect would be contrary to the general rule that it may not be taken into account unless the condemnation is not within the original scope of the project. However, when property is condemned for the purpose of assembling land for general economic development, allowing consideration of the project going into effect and awarding a larger share of the profit to the condemnee would offset, to some degree, the distaste expressed by the Court and the general public for the idea of taking property from A to give to B for the government's general economic benefit.

\section*{III. Exceptions to General Rule: Scope of Project Doctrine and Precondemnation Blight}

The general rule, which is straightforward in theory, becomes complicated in practice when either (1) a property owner owns land adjacent to a parcel initially condemned by the government, but outside the scope of the project, and there is an increase in property value resulting from planned improvements, or (2) the government precondemnation activity in the area decreases the market value prior to actual condemnation of the landowner's property.

In either case, the fundamental question is the same as in all takings cases: what does just compensation require? Does just compensation require remuneration for an increase in value of the second parcel due to improvements made by the government on the first? Conversely, if the property declines in value because of precondemnation activity by the government, must the property owner
silently bear the burden of the decrease? In response to these problems, courts have developed two exceptions: (1) the "scope of the project doctrine," which states that the owner of the subsequently condemned parcel is entitled to any increase in value if his or her parcel is outside of the scope of the original project;53 and (2) "Klopping damages," which provide the landowner with more than fair market value when a court finds actionable governmental precondemnation activity.54

A. The Scope of the Project Doctrine

The scope of the project doctrine has been applied by courts to limit or increase recovery. The United States Supreme Court first set forth the scope of the project doctrine in United States v. Miller.55 In Miller, the federal government condemned a strip across the Millers' land on behalf of the Central Pacific Railroad.56 The United States formally filed a complaint seeking condemnation on December 14, 1938, though alternate routes (including the route across the Millers' property) had been surveyed and staked by March 1936 and the project had received its final authorization in August 1937.57

At trial, the Millers offered witnesses who testified to the property's value as of December 14, 1938.58 The government, on the other hand, argued that the Millers were "not entitled to have included in an estimate of value . . . any increment of value due" that occurred between August 1937 and December 1938 because "the United States was definitely committed to the project [as of] August 26, 1937. . . ."59 The trial court agreed with the government and excluded any "value accruing after August 26, 1937. . . ."60

The Supreme Court began its analysis in Miller by conceding that the condemnation of a single tract may increase the value of surrounding lots "due to the proximity of the public improvement erected on the land taken."61 The Court then set forth the exception: "[S]hould the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity."62 If, however, "the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken . . . ."63

According to the Court, a trial court faced with similar facts must determine, "whether the respondents' lands were probably within the scope of the project from the time the Government was commit-
Chapter 7

led to it." If the parcel was not within the scope of the original project, but was "merely adjacent" to the original project, "the subsequent enlargement of the project . . . ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement." If, however, the project was within the scope of the original project, the "Government ought not . . . pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." In this case, the Millers' land fell clearly within the scope of the project because "[the project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands." Therefore, "it was proper . . . that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property."

In a more recent case reflecting the evolution of this doctrine, the Tennessee Court of Appeals in *Nashville v. Overnite Transp. Co.* explained that "courts have refined the . . . scope of the project rule to reflect landowners' and prospective purchasers' reasonable expectations as to whether a piece of property will be taken." Land is currently within the scope of the project "when a buyer in the real estate market would reasonably expect that the property in question might become part of the project and when the increase in value of the property is attributable to speculation on the government's activities." In the case before the court, the Tennessee State Department of Transportation and the Metropolitan Nashville Airport Authority condemned four acres of Overnite's property and a jury awarded an enhanced market value of $1,759,578.10 based on the new project which included an access road and a new airport terminal. On appeal, the court vacated and remanded the case to the trial court because "the foreseeability that the State would take Overnite's property, the length of time from the date the State committed to the new terminal project to the date of the taking, and the State's representations as to the finality of the original plans all support a finding that Overnite's property was within the scope of the new terminal project.

Although the general rule that the fair market valuation cannot include an enhanced value based upon the public improvement has limited just compensation, this exception has allowed a landowner to benefit from the enhanced value a project generates so long as the prop-
Is Fair Market Value Just Compensation? 145

Property is not part of the initial project plan. In City of Phoenix v. Clauss, the city of Phoenix condemned 88.567 acres of Clauss’ property for inclusion in the Phoenix Mountain Preserve, which was in existence prior to the acquisition and “may have contributed to the desirability of [the Clauss’] property.” The trial court, applying the general rule over the landowner’s objection, “instructed the jury that it could assign neither a higher nor a lower value to the property if the increase or decrease in value was caused by the taking itself or by the planned public project that included the taking.” At trial, the landowner produced a real estate appraiser who testified that the property was worth $2,965,000 on the date of valuation. The jury, however, awarded a mere $1,250,000.

The Arizona Court of Appeals referred to the general rule which “holds that property may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project.” According to the court, “[t]he condemnor shoulders the burden of proving that the subject property was ‘probably within the scope of the project from the time the government was committed to it.’ In this case, Phoenix (the condemnor) did not present any evidence that the Clauss’ property was within the original scope of the project, and the court found that the jury instruction incorrectly suggested that the jury “should disregard expert evidence from several sources that the location of [the Clauss’] property next to public open space . . . enhanced its fair market value.” The general valuation rule was not applied to exclude the enhanced value because the property was not within the original scope of the project.

Application of this exception to the property in Kelo would not have strengthened the petitioner’s argument because the property would likely have been considered part of a long-range plan. In Kelo, incorporation of parcels within a long-range plan facilitated voluntary sales because landowners were aware that the city had the ability to condemn the property if they did not sell, but it also generated the likelihood of “a more severe holdout problem.” The scope of the project doctrine precluded both the voluntary sellers and the condemnees from negotiating for increased values according to expectations that the new project would bring economic prosperity and higher real estate values because their property was identified as part of the original project. They could not have claimed a higher market value based on the planned development because they were not outside the scope of the project.
B. Precondemnation Activity

It is generally agreed that the landowner is not entitled to any increase in value resulting from the government’s precondemnation activity, but what about the converse? Is the landowner entitled to precondemnation market value when government activity lowers the value prior to condemnation? The general rule prohibits the intended public project and the precondemnation activity from raising or lowering the value of the property for compensation purposes. The general rule, however, is often applied in a one-sided fashion. While the landowner is typically not entitled to any increase in compensation resulting from government intentions with respect to private property that government intends to compulsorily acquire, the contrary principle is not so often litigated. Nevertheless, courts in many jurisdictions have held that threats of condemnation in a variety of forms that reduce the value of private property prior to actual condemnation require establishment of the higher precondemnation market value for purposes of just compensation.

Of course condemnees have always been awarded full market value compensation if the condemnor intentionally depresses property values prior to the date of condemnation. Commonly referred to as *Klopping damages*, a condemnee may recover for precondemnation activity which results in a decline in value prior to the date of taking if the condemnor acts unreasonably in 1) issuing precondemnation statements, 2) excessively delays eminent domain action, or 3) engages in other oppressive conduct.

Actionable precondemnation activity “may manifest itself in a number of ways, and be presented ... in a variety of procedural contexts.” For example, a condemning agency may “announce ... or threaten ... that the subject property is about to be taken, but the taking never materializes[; or] similar announcements or threats are made, but are followed by protracted delay ...” Another example of actionable precondemnation activity is the

... denial of building permits, sometimes coupled with a simultaneous demand that the owner make improvements to bring his building up to building code requirements. Yet another governmental ploy is to notify tenants of the affected buildings that a taking is imminent, followed by a protracted delay, thereby leaving the owner with a nearly empty building which produces not income, but continues to drain his resources.
through taxes, insurance premiums, and secured debt servicing.93

The rule regarding actionable precondemnation activity limits courts’ deference to local governmental planning. While courts have recognized that local governments must be allowed some delay and flexibility to conduct comprehensive, consultative planning,94 unreasonable precondemnation government activity will require a fair market valuation that accounts for valuation decreases caused by such actionable behavior.95 If the government activity is determined not to be actionable, however, the Klopping rule will not apply, producing harsh results. Missouri v. Edelen illustrates this harshness when a court fails to find that the governmental entity was unreasonable in issuing precondemnation statements, excessively delaying the eminent domain action, or engaging in other oppressive conduct.96

In Edelen, the Missouri Court of Appeals refused to award damages for a decline in the value of the landowners’ land due to a “delay in the condemnation of Select’s land . . . [because] the excluded evidence does not reveal any specific evidence demonstrating aggravated delay, bad faith or untoward activity by the commission.”97 The court sympathetically noted, however:

[w]e understand Select’s frustrating plight. While the sword of condemnation hung precariously overhead for 10 years, Select had to watch property value decline without being able to sell the land, develop it or seek legal recourse. The market value for its property, and nearby property as well, suffered a continual decline during the years of publicity concerning the pending condemnation.98

Terminals Equipment Co. v. City of San Francisco typifies a court’s attempt to deny a landowner recovery of precondemnation activities by characterizing precondemnation activity as noncompensable planning activity.99 In Terminals, “the board of supervisors of the City . . . adopted a resolution [in 1977] designating a portion of the City[, which included TEC’s property,] . . . as a ‘Survey Area’ to be studied for possible redevelopment.”100 In August 1979, the City Planning Commission adopted a resolution calling for the redevelopment of TEC’s property.101 In October 1979, TEC sought a building permit to demolish the existing structure and build a new structure, which the city denied.102 The property
was held in “limbo” through governmental inaction until June 10, 1988, when TEC finally filed a complaint for inverse condemnation and precondemnation damages. The trial court, however, dismissed TEC’s complaint for failure to state a claim.

On appeal, the court began by noting the need for some sort of formal announcement in order to recover for precondemnation activity: “In order for any right to precondemnation damages to accrue . . . there must have been either some formal announcement by the condemning agency of its intention to condemn, or some other official act or expression of intent to acquire the property in question.” The court also noted that planning does not equal the intent to condemn: “[A] planning designation is not the functional equivalent of an announced intent to condemn . . . ‘The plan is by its very nature merely tentative and subject to change.’” The court then held that “there was no resolution of condemnation . . . no announcement of intent to condemn, nor . . . any official act by the city towards acquiring the property . . . [T]here were public meetings, negotiations, planning, debates and an advisory ballot proposition calling for acquisition but . . . no official act done . . . towards acquiring the property.” In the court’s opinion, these actions constituted general, noncompensable planning.

Precondemnation activity by government clearly affects the market value of private property prior to actual condemnation. The line between activity designed to purposely decrease market value and activity that unintentionally causes such decrease is often blurred. Since it is generally accepted that increases in value due to the nature of a project on land to be condemned may not be considered in awarding compensation, it is only fair that, conversely, a decrease in such value ought also to be ignored in the compensation process so that the property is valued based on a fair market value determination prior to any precondemnation activity.

IV. Making Just Compensation Just

When the government exercises its eminent domain power to acquire property needed for private redevelopment to increase the economic viability of the community, the general rule, as discussed, precludes the condemnee from claiming the greater value anticipated from this private redevelopment. Thus, as Justice Kennedy pointed out in oral argument, “when A is losing property for the economic benefit of B,” the general rule requires that the project be ignored.
when the value is determined. Justice Kennedy inquired as to whether there is any scholarship to support awarding a development premium to a condemnee when property is being taken from one private person and given to another. Though there has been some scholarship, "[v]alue is a elusive but essential for defining the extent of constitutional protection for private property."

While the *Kelo* litigants focused on the public use portion of the Fifth Amendment to protect their private property, the Justices spent at least 20 percent of their time during oral argument talking about compensation. In reference to the then pending *Kelo* decision, it was observed that instead of deciding whether a local government is allowed to take property for commercial purposes, "the Court could permit the government to condemn property for commercial uses, but only by paying at least some portion of the resulting gain." It was asserted that "the adequacy of compensation cannot be determined in the abstract but must rather be judged by how effectively a damages award advances the goals of the Takings Clause." This section will consider how just compensation is, or should be, determined in the *Kelo* context where property is being assembled through eminent domain for a redevelopment project expected to bring economic benefit primarily to private entities and only *indirectly* to the community.

In *Kimball Laundry Co. v. United States*, the Supreme Court made it clear that market price is the proper measurement of compensation under the Fifth Amendment, even though property value may include attributes that are not transferable:

The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.

The Court has also noted, however, that there are some situations where market value is not the appropriate standard. The goal of
just compensation is "to put the owner of condemned property 'in as
good a position pecuniarily as if his property had not been taken." The Court acknowledged that "this principle of indemnity has not been
given its full and literal force," and recognized that this "indemnity
principle must yield to some extent before the need for a practical
general rule" such as market value, Although the Court found it
appropriate to apply the fair market value rule in the case before it,
it has not always used market value as the only measure of just compen-
sation. The Court has refused to apply the general fair market value
rule where its application "would be impracticable...[or]... diverge
so substantially from the indemnity principle as to violate the Fifth
Amendment."  

The Court reiterated in United States v. Commodities Trading Corp.
that fair market value may not always be an appropriate standard,
specifically where "market value has been too difficult to find, or when
its application would result in manifest injustice to owner or public." In
situations like Kelo where private property is condemned to indi-
rectly benefit the public by assembling land for private development,
market value may not be difficult to find. However, the owner may be
treated unjustly if the general rule that just compensation "is measured
by the property owner's loss rather than the government's gain" is
applied. The rule precludes a condemnee from sharing any pre-
mium realized by a private entity that has benefited directly from the
government acquisition. The property owner is not entitled to any
nonpecuniary losses such as those "attributable to his unique need or
property or idiosyncratic attachment to it." Without a change in
these general rules, just compensation may not always be just.

The Kelo majority recognized that the fairness of the just compensa-
tion determination is important, but declined to discuss the issue since
"these questions are not before us in this litigation." The majority
emphasized that states are allowed to place further restrictions on the
exercise of eminent domain power. As the Court pointed out, this has
already been done through the judicial interpretation of state constitu-
tional law and through state eminent domain statutes. State legisla-
tures can provide for additional factors to be included in the just
compensation calculation and can grant premium compensation when
condemnations are undertaken for economic revitalization. State courts
can also include additional components to the fair market value stan-
dard to determine just compensation. In fact, trial courts are generally
given great discretion in deciding what constitutes just compensation
so that the property owner is put "in as good a position pecuniarily as if
his property had not been taken." The traditional rules restricting this
determination to fair market value can be expanded by judicial decisions to include additional components such as interest, damages for loss of goodwill, relocation expenses, and even subjective values.

For example, in Board of Comm'rs of Tensas Basin Levee Dist. v. Crawford, the Louisiana appellate court, relying on state precedent, allowed "severance damages" for the loss in value to property retained by the landowner. The Levee District's condemnation of a riverfront servitude reduced the yard size of homes creating a loss of foliage, which affected aesthetic considerations and reduced the market value of the remaining property. The court also awarded the landowner expert witness fees and attorney's fees to help him obtain just compensation. In County of Wayne v. Hathcock, the Michigan Supreme Court overruled the infamous Poletown case, finding that "Poletown's conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community' has no support in the Court's eminent domain jurisprudence." The New Hampshire Supreme Court has similarly interpreted its state constitutional requirement of public use to limit eminent domain power to only those condemnations that directly benefit the public. California, on the other hand, has chosen to restrict the power statutorily by allowing the taking of land for economic development only when the area has been designated as blighted.

Interest payments have also been awarded under both state and federal law as a component of just compensation when the government condemns land but delays the payment disbursement. The government is not required to pay interest when it "pays the owner before or at the time the property is taken." However, if the government delays disbursement, the landowner is entitled to an award of interest "to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." In California, for example, interest is awarded when the government takes property under a "quick-take" procedure and defers payment to the landowner. Although the state statute provides for the interest award in addition to other damages such as loss of business goodwill, a statutory ceiling on the interest award is not constitutional if the statutory guidelines are inadequate to provide the landowner with just compensation under the state constitution or the Fifth Amendment.

Federal courts have also been flexible in determining fair market value. In Yancey v. United States, the Federal Circuit included in its
determination of fair market value "an assessment of the property’s capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the property." The court allowed turkey farmers to receive compensation for the government quarantine of diseased flocks based on the commercial value of the birds as a breeder flock capable of producing hatching eggs. While the court did not consider this compensation to constitute lost profits, which are not available under the Fifth Amendment, it did allow the Claims Court to consider the property’s potential future income when assessing market value.

Though federal courts have shown some flexibility, it is doubtful that federal legislation restricting eminent domain power would be constitutionally viable under the Public Use Clause of the Fifth Amendment. At the very least, however, federal legislation can be effective to help ensure that the just compensation determination is just. For example, the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act of 1970 [hereinafter Uniform Relocation Act] provides assistance in certain circumstances to residents and businesses displaced by eminent domain by giving relief in the form of moving expenses, a dislocation allowance, an accommodation down payment, and other incidental expenses. The Uniform Relocation Act does not apply to urban renewal projects that are not federal in nature such as those that are based on locally financed programs or private development. Consequently, this federal legislation will not be useful to increase the compensation level awarded to landowners displaced by state or local economic redevelopment programs like that undertaken by the city of New London in the Kelo case.

Federal legislation may not be able to adequately address the issues at hand, but state legislatures can provide for additional components of the fair market value determination in redevelopment cases like Kelo. Some states have specifically granted special compensation for redevelopment condemnations. In Oklahoma, “urban renewal condemnations may be classified separately from other condemnations for purposes of awarding attorney fees,” and statutes that provide for such a distinction have been upheld as constitutional. The Kansas Supreme Court has also upheld a state urban redevelopment statute which granted a 25 percent compensation premium and relocation assistance payments to owners of property condemned for re-
In spite of states' ability to further limit the government's eminent domain power, legal scholars have continued to criticize the effectiveness of the fair market value standard and have suggested alternative standards. Professor Thomas W. Merrill, as the Counsel of record for the amicus brief by the American Planning Association in support of the respondents, argued that “[a]djusting compensation awards to provide more complete indemnification would be a far more effective reform of the existing system of eminent domain than increasing federal judicial review of public use determinations.” Professor Merrill has advocated reform for some time and has suggested at least two alternatives to using the fair market value standard. One alternative is to compensate the condemnee based on the benefit received by the entity taking the property.

In the land assembly situation, such as that found in the _Kelo_ case, the parcels involved in the project generally have a higher unit value once the condemnation process has successfully assembled the land. An unjust enrichment standard, as one alternate suggested by Professor Merrill, would likely render greater compensation than the fair market value measure. A second alternative is to measure compensation based on the owner’s loss. Such an indemnification standard would result in higher awards because it would take into account subjective damages and “all consequential damages associated with condemnation, such as lost future profits, lost business goodwill associated with the location of the property, moving expenses, and attorneys’ fees.”

Professor Christopher Serkin also suggests several approaches for resolving the “deep confusion and contradictory approaches” taken by the courts in measuring the fair market value. From seemingly fact-specific computations of compensation in the cases, he identifies nine different valuation mechanisms, several of which are directly relevant to the _Kelo_ land assembly scenario. In particular, Professor Serkin notes that a property owner may obtain higher compensation where “the purpose of the taking is to create or facilitate a new commercial enterprise” if the condemnee is “allowed to capture at least some of the benefit of the new enterprise.” He also observes that while the Court’s general rules preclude awarding compensation for subjective value, “damage awards can implicitly compensate for at least some subjective value by redefining the property taken to include an owner’s special use for her property.” Finally, although generally prohibited, courts have awarded replacement value as an
alternative to fair market value in situations where market value is not known or where such a measure would result in manifest injustice. 168

V. Conclusion

In exercising the power of eminent domain, government exercises one of its most draconian powers over its citizens: the compulsory deprivation of property. Liberals and conservatives, scholars and practitioners, have lamented the unfairness of government condemnations of homes for redevelopment programs.169 And now, the Kelo decision has generated a great outcry from the general public against the government’s power to condemn private property for the sole purpose of increasing the economic benefit of land use.170 The Fifth Amendment of the United States Constitution provides for two levels of protection against the exercise of this power: public use and just compensation.171 The just compensation determination provides a mechanism for courts and legislatures to control government abuse by demanding that property owners be treated fairly when they are required to involuntarily relinquish their private property rights. With the serious decline in protection provided by the Public Use Clause,172 the protection provided through the right to just compensation needs to be as secure as possible.

The fair market value standard, however, may not adequately secure the right to just compensation. Professor Gideon Kanner maintains that eminent domain law has failed to progress over the years and that “[t]he problem of undercompensation is still with us.”173 The scope of the project doctrine and damages for actionable precondemnation activities (whether or not “intentional”) are not sufficient exceptions to the general rule that fair market value must be determined without regard to the economic benefit or detriment of the public development project. If landowners are denied the beneficial impact of public development on the fair market value of the condemned property, they should also be entitled to a fair market valuation based on the land value as it existed before any precondemnation activity, regardless of the government’s motivation. In addition to allowing a condemnee to claim a premium by overriding the general rule when A is losing property for the economic benefit of B, perhaps other components of valuation like social value, relocation, attorneys’ fees, and replacement value should be taken into account when determining just compensation.
Notes

1. Also compulsory purchase, condemnation.
5. Oral Argument Transcript, supra note 4, at 22.
6. Id.
7. Id. at 23.
8. Id. at 23-24, 30-32.
9. Id. at 44.
10. Id. at 48.
11. Kelo, 125 S. Ct. at 2668 n.21.
12. E.g., Oral Argument Transcript, supra note 4, at 49 (Justice Souter: “I mean, what bothered Justice Breyer I guess bothers a lot of us. And that is, is there a problem of making the homeowner or the property owner whole? But I suppose the answer to that is that goes to the measure of compensation, which is not the issue here.”).
13. Kelo, 125 S. Ct. at 2669 (Kennedy, J., concurring).
14. 348 U.S. 26, 35-36 (1954) (“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project...rests in the discretion of the legislative branch.”).
16. Midkiff, 467 U.S. at 241 (emphasis added).
17. U.S. Const. amend. V (“...nor shall private property be taken for public use, without just compensation.”).
18. Kelo, 125 S. Ct. at 2670 (O’Connor, J., dissenting).
19. See, e.g., Thomas W. Merrill, Incomplete Compensation for Takings, 72 Cornell L. Rev. 61 (1986); Laura H. Burney, Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value, 1989 BYU L. Rev. 789, 790 (“The just compensation requirement has been firmly cast in this deterrence role by the newly-neutered status of the public use requirement.”).
20. Oral Argument Transcript, supra note 4, at 50.
21. Id.
22. See discussion infra Part II.
23. See discussion infra Part III.
24. Oral Argument Transcript, supra note 4, at 23; see discussion infra Part IV.
25. See, e.g., United States v. Va. Elec. & Power Co., 365 U.S. 624, 636 (1961) (“The value of the easement must be neither enhanced nor diminished by the special need which the government had for it.”); United States v. 46,672.96 Acres of Land, 521 F.2d 13, 15-16 (10th Cir. 1975) (“Where...a market for particular use is created solely as a result of the project for which land is condemned, value based on that use must be excluded.”); City of Phoenix v. Clausen, 177 Ariz. 566, 569 (Ariz. Ct. App. 1994) (“[P]roperty may not be charged with a lesser or greater value at the time of taking, when the change in value is caused by the taking itself or by anticipation of appreciation or depreciation arising from the planned project.”); State v. Hollis, 93 Ariz. 200, 206 (Ariz. 1963) (“[P]roperty cannot be charged with a lesser value at the time of taking when the decrease in such value is occa-
tioned by the taking itself.”); Uvodich v. Ariz. Bd. of Regents, 9 Ariz. 400, 406 (Ariz. Ct. App. 1969) (“The damage caused by the imminence of condemnation is merely one of the costs of ownership.”); Tooele County v. Ferree, 844 P.2d 308, 311 (Utah 1992) (“Any increase or decrease in property value due to the project for which property is being condemned shall not be considered in assessing fair market value.”); Dade County v. Still, 377 S.2d 689, 690 (Fla. 1979) (“[A] condemning authority cannot benefit from a depression in property value.”); Lipinski v. Lynn Redevelopment Authority, 355 Mass. 550, 553 (Mass. 1969) (“Where the value of the land is enhanced because it is known that the land will be taken by eminent domain, the landowner is not entitled to this increase in value.”); Mich. State Highway Comm’n v. L & L Concession Co., 31 Mich. App. 222, 226-27 (Mich. Ct. App. 1971) (“It is an established rule of condemnation law that the value of an interest in property is to be determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation.”); County of Clark v. Alper, 100 Nev. 382, 390 (Nev. 1984) (“[T]he impact on the fair market value that resulted from the taking itself should be excluded. The property is to be valued as if the government project that resulted in the taking was neither contemplated nor carried out.”); In re Appropriation of Property of Bunner, 28 Ohio Misc. 165, 170 (Ohio Misc. 1971) (“As a general principle, the owner is . . . not entitled to receive any enhanced value which accrues to his property by reason of the proposed project.”); City of San Diego v. Rancho Penasquitos P’ship, 105 Cal. App. 4th 1013, 1029 (Cal. Ct. App. 2003) (“[I]n determining fair market value, . . . any increase or decrease in the property’s value caused by the project itself may not be considered. . . .”); Sovich, 252 N.E.2d at 588 (“Neither an increase nor a decrease in market value of property sought to be condemned which is brought about by some project for which property is being taken may be considered in determining value of such property.”); Brainerd v. State, 131 N.Y.S. 221, 228 (N.Y. 1911) (“[T]he premises’ market value must be fixed without regard to the prospect of the construction of the new canal, for such a rule might give to claimants in some cases more than their property is worth and in others less than its value.”); Murray v. United States, 130 F.2d 442, 444 (D.C. 1942) (“[I]n determining the compensation for the land being condemned they shall not take into consideration any effect, whether by enhancement or diminution, which the purpose or intention of the government to acquire this property for public use may have had upon its value.”).

27. See, e.g., N.C. GEN. STAT. § 404-63 (1984) (“The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of . . . the complaint unless the claimant’s complaint shall be the date of valuation of the interest taken.”); Ala. Code § 18-1A-22 (“In a taking, the condemning authority shall disregard any decrease or increase in the fair market value of the property caused by the project for which the property is to be acquired or by the reasonable likelihood that the property will be acquired for that project, other than normal depreciation.”); Cal. Civ. Proc. Code § 1265.330 (“The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following: (a) The project for which the property is taken. (b) The eminent domain proceeding in which the property is taken. (c) Any preliminary actions of the plaintiff relating to the taking of the property.”); Model Eminent Domain Code § 1005 (1986) (stating that fair market value of property does not include increase or decrease in value caused by proposal of improvement or project for which property is taken).
28. 252 N.E.2d 582, 582 (Ind. 1969).
29. Id. at 588.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id. (citing Maryland Nat’l Park and Planning Comm’n v. McCaw, 229 A.2d 584 (Md. 1967); United States v. 74.60 Acres, 358 F.2d 143 (7th Cir. 1966); United States v. Miller, 317 U.S. 369 (1942); Kerr v. South Park Comm’rs, 117 U.S. 379 (1886); State Road Dep’t v. Chicone, 158 So. 2d 753, 757 (Fla. 1963) (If this rule were followed, it “would permit a condemnor to depreciate property values by threat of condemnation and take advantage of the depressed value which resulted by paying the landowner the depreciated value. This would amount to a confiscation of an owner’s property to the extent of the decrease in value.”)).
37. Id. at 835 (quoting N.C. GEN STAT. § 40A-65 (1981)).
38. Id. at 837.
40. Id. at 727.
41. Id.
42. Id.
43. 739 S.W.2d 130, 130-31 (1987).
44. Id. at 131.
45. Id.
46. Id.
47. Id.
48. See discussion infra Part IIIA.
49. Id. at 132.
50. Oral Argument Transcript, supra note 4, at 50.
51. Id.
52. Id.
53. United States v. Miller, 317 U.S. 369, 372 (1943); Reynolds, 397 U.S. at 20-21; see also City of Kenai v. Burnett, 860 P.2d 1233, 1243 (1993) (“The ‘scope of the project’ rule … has two components. First, if the land is ‘probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to the project, then the owner is not entitled to any increment in value occasioned by the Government’s undertaking the project.’” (quoting City of Valdez v. 18.99 Acres, 686 P.2d 689, 689 (Alaska 1984)); Matlow Corp. v. State, 321 N.Y.S.2d 734, 737 (N.Y. 1971) (“If it be established on trial that claimant’s property was within scope of project from time state was committed to it, then any depression in value of such property brought about by development of project should be excluded in determining fair market value of property taken.”)).
54. See, e.g., Value Depreciation Caused by Cloud of Condemnation (BAJI), Jan. 2004 edition, The Civil Committee on California Jury Instructions (discussing California Jury Instruction 11.79 regarding Kloppling damages, which states the general rule that “[i]n determining fair market value, [the court should] disregard any decrease in market value caused by the likelihood that it would be acquired for the public improvement” and notes that if the jury finds excessive delay in the commencement of the action “following an announcement of intent to condemn subject property, [the verdict should include] . . . the amount of defendant’s loss of rental income from the subject property . . . due to this delay, and] the
additional amount...the...property would have been worth on the date of valuation but for the delay.

When considering precondemnation government activity, another question arises: should there be a distinction, for purposes of determining value, between intentional government action to drive down compensation (Klopping doctrine) and action beyond simple planning that will have the same effect?

56. Id. at 370.
57. Id.
58. Id. at 372.
59. Id.
60. Id.
61. Id. at 376.
62. Id.
63. Id. at 376-77.
64. Id. at 377.
65. Id.
66. Id.
67. Id.
68. Id.
69. 919 S.W.2d 598, 603 (Tenn. Ct. App. 1995).
70. Id.
71. Id. at 600.
72. Id. at 608-09.
73. See, e.g., Mobeco Indus., Inc. v. City of Omaha, 598 N.W.2d 445, 448-49 (Neb. 1999) (finding that seven lots were included in a project from its conception and concluding that the condemnee was not entitled to compensation “for any increase in the value of the subject properties due to the partial completion of the project prior to the date of taking”).
75. Id. at 1222.
76. Id. at 1221.
77. Id.
78. Id. at 1222.
79. Id. (citing City of Tucson v. Ruelas, 508 P.2d 1174, 1176 (Ariz. Ct. App. 1973)).
80. Id.
81. Id.
82. Kelo, 125 S. Ct. at 2656 (The long-range plan included possibilities like the Pfizer facility, a 19th-century fort scheduled to become a state park, a planned hotel, office space, a wastewater treatment facility, and a marina, among other projected uses.).
83. Oral Argument Transcript, supra note 4, at 40.
84. Kelo, 125 S. Ct. at 2656.
86. Compare United States v. Va. Elec. & Power Co., 365 U.S. 624, 636 (1961) (“The value of the easement must be neither enhanced nor diminished by the special need which the government had for it.”), with In re 572 Warren Street, 298 N.Y.S.2d 433 (N.Y. 1968) (holding that “the City may not by virtue of a condemnation and by its own action cause a depreciation in value of property to be condemned and then claim that just compensation is that depreciated value”).
87. See William Anderson, *Consequences of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?* 5 Santa Clara Lawyer 35 (1964) (one of the first scholarly commentaries explaining why a landowner should be entitled to present evidence of lower market value due to government precondemnation activity short of condemnation blight). A recent Hawaii case involving the compulsory purchase of Waimea Falls Park illustrates this issue. Waimea Falls Park occupied 300 acres in Waimea Valley on the island of Oahu, across a highway from the public Waimea Beach Park. The park owner filed for bankruptcy protection and offered the park and virtually all of the rest of the valley for sale in July 2000 at a listing price of $25 million. In November 2000, it received a formal offer of $17.9 million from a buyer in New York for use as a private residential estate, thereby establishing a minimum “market value.” Appalled at the probable loss of the valley for the public to use and view, various groups urged the Honolulu City Council to take action to preserve the park as a public park. In August 2000, two members of the city council proposed a resolution that directed the mayor of Honolulu to use all means at his disposal to acquire the park, including compulsory purchase, if necessary. The mayor of Honolulu proposed to set aside only $5 million to acquire the entire valley. The public statements and the passage of the resolution in October 2000 affected the market value of the site, and a year later the Honolulu City Council passed a resolution of condemnation, and later set aside $5 million but offered far less—far below the market value of the property (at least $17.9 million) just months before. Honolulu has since taken possession of the park and leased it to the local Audubon Society, which now manages it for the public. However, the amount due the bankrupt owner is the subject of a lawsuit over the compulsory taking and purchase of the park. Honolulu maintained the value is $3 million, which it claims is its current appraised value. The owner claims the value is at least $17.9 million, or the fair market value before the city council’s precondemnation statements and activity caused the market value to drop sharply. While one can appreciate the need for preserving the valley as a public resource, it is not clear why the owner should be forced to sell the property to Honolulu at a discount of more than 80% less than market value just because the public wants the property for a public park. The case was scheduled for trial in February of 2006, but was settled before trial commenced when a coalition of government agencies and public interest groups agreed to pay the landowner $12 million for the land.

88. See, e.g., Township of West Windsor v. Nierenberg, 695 A.2d 1344 (N.J. 1996) and further cases cited therein.


90. Id. at 1355-56; see also City of Sparks v. Armstrong, 748 P.2d 7, 9 (Nev. 1987) ("Although the mere planning of a project is generally insufficient to constitute a taking, when precondemnation activities of the government become unreasonable or oppressive in such a manner that those activities adversely affect the market value of the property, then the property owner is entitled to compensation."); Clark County v. Sun State Prop., 72 P.3d 954, 961 (Nev. 2003) ("In State Department of Transportation v. Barsy, this court held that the condemnor’s precondemnation activities may entitle the condemnee to damages in addition to the compensation for the taking."); In re 572 Warren Street, 298 N.Y.S.2d 433, 433 (N.Y. 1968) ("The City may not by virtue of a condemnation and by its own action cause a depreciation in value of property to be condemned and then claim that just compensation is that depreciated value."); Wray v. Stvtark, 700 N.E.2d 347, 359 (Ohio Ct. App. 1997) ("Ordinarily, property taken for public use must be valued as of date of trial, unless prior possession is taken; however, an exception ... is that where activity of appropriating authority ... caused depreciation ... prior to time that it is actually taken, property will be valued immediately prior to its depreciation.").
92. Id.
93. Id.
94. Kloppping, 500 P.2d at 1350 n.1 ("To allow recovery in every instance in which a public authority announces its intention to condemn some unspecified portion of a larger area in which an individual's land is located would be to severely hamper long-range planning by... authorities, some of which may be required by state law.").
95. See, e.g., City of Cleveland v. Carcione, 190 N.E.2d 52, 57 (Ohio Ct. App. 1963) (awarding landowner market value of property prior to city's activities which depreciated the value of the property by encouraging tenants to move out more than two years in advance of the urban renewal condemnation); Wash. Univ. Med. Ctr. Redevelopment Corp. v. Gaertner, 626 S.W.2d 373, 375 (Mo. 1982) (allowing recovery in tort for a landowner whose property value was depressed by the city's blight designation three years before condemnation).
96. 872 S.W.2d 551, 558 (Mo. Ct. App. 1994).
97. Id.
98. Id.
100. Id. at 331-32.
101. Id.
102. Id.
103. Id. at 323-33.
104. Id.
105. Id. at 335.
106. Id. at 336 (citing Guinnane v. City and County of San Francisco, 241 Cal. Rptr. 787, 792 (Cal. Ct. App. 1987)).
107. Id.
108. Id. at 336-37.
109. See supra text accompanying notes 25-54.
110. Oral Argument Transcript, supra note 4, at 22.
111. Id.
113. See generally Oral Argument Transcript, supra note 4 (discussing the issue of just compensation and possible adjustments to the compensation paid).
114. Serkin, supra note 112, at 742 n.55.
115. Id. at 681.
116. 338 U.S. 1, 5 (1949).
118. Id. at 510 (quoting Olson v. United States, 292 U.S. 246, 266 (1934)).
119. Id. at 510-11.
120. Id. at 512.
121. Id. at 516 ("Respondent, like other private owners, is not entitled to recover for nontransferable values arising from its unique need for the property.").
122. Id. at 513.
123. 339 U.S. 121, 123 (1950); but see Michael Debow, Unjust Compensation, 46 S.C. L. Rev. 579, 581 (1995) (noting that even though the Supreme Court "has stated that market value is not a 'fetish' and that the market value approach 'may not be the best measure of value in some cases[,]' the kinds of cases that call for different measures of compensation have been narrowly defined" (quoting United States v. Cors, 337 U.S. 325, 332 (1949)):
Is Fair Market Value Just Compensation?  

Clynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 729-30 (noting that although Supreme Court has suggested that market value might be an unfair standard, in practice, property owners have not successfully convinced Court to use an alternative standard).

125. *Id*. at 236 (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)).
126. *See*, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1210-11 (1967) (discussing demoralization costs to owners when property is condemned); Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580 (1995) (federal law has been criticized but not reformed because of its just compensation definition, which tends to undercompensate); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) (noting that in American law “just compensation means incomplete compensation”); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82-85 (1986) (proposing to partially modify the basic model of eminent domain to take into account subjective losses and other personal losses “such as lost goodwill, consequential damages to other property, relocation costs, and attorney fees,” and to allow courts to “closely scrutinize the decision to condemn whenever an owner’s subjective losses are high”); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1006 (1982) (noting that the personhood perspective has sometimes given extra protection to certain property rights even though it has not provided a general limit on eminent domain).
129. *Id*.
130. *See*, e.g., N.E. Conn. Econ. Alliance, Inc. v. ATC P’ship, 861 A.2d 473, 484-85 (Conn. 2004) (concluding “that the trial court properly considered the availability of state economic development grant funds in calculating the fair market value of the property”); Wronowski v. Redevelopment Agency, 430 A.2d 1284, 1287 (Conn. 1980) (finding that “court correctly considered the existence on the plaintiffs’ property of an established special business use combined with the many unusual characteristics of the property as factors which would enhance its fair market value”).
131. 564.54 Acres of Land, 441 U.S. at 510 (quoting Olson v. United States, 292 U.S. 246, 266 (1934)).
133. *Id*. at 514.
134. *Id*. at 514-16.
135. *Id*. at 516-17.
140. Kirby Forest Indus., 467 U.S. at 10 (citing Danforth v. United States, 308 U.S. 271, 284 (1939)).
141. Id. at 10-11.
143. Id. at 804 (citing CAL. CIV. PROC. CODE § 1263.510 et seq. (West 1985)).
144. Id. at 802-06 (determining a constitutionally proper rate of interest requires the trial court to examine “the rates prevailing during the period a condemnation payment was delayed for all forms of money-market obligations, governmental and private, which prudent depositors and investors normally purchase for income purposes, and whose terms or maturities fall within the period of delay”).
145. 915 F.2d 1534, 1542 (Fed. Cir. 1990) (citing Yachts Am. v. United States, 779 F.2d 656, 660 (Fed. Cir. 1985), cert. denied, 479 U.S. 832 (1986)).
146. Id.
148. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 519-20 (discussing RFRA’s inability to change the Supreme Court’s interpretation of the Constitution in a previous case).
152. Jones v. U.S. Dep’t of Hous. and Urban Dev., 390 F. Supp. 579, 583 (E.D. La. 1974) (“court granted HUD’s motion to dismiss this claim because that statute does not require the payment of benefits to persons displaced by the sale of land to a private developer but only to persons who must be relocated because the construction of new federal projects requires existing structures to be removed”).
153. See, e.g., Young v. Harris, 599 F.2d 870, 877-78 (8th Cir. 1979) (acquisitions of property by private developer in partnership with the city of St. Louis are not within the scope of the Uniform Relocation Act, and “federal financial assistance to a private project is insufficient to bring the project into the realm of the URA”).
154. See, e.g., Knoxville Hous. Auth., Inc. v. Bush, 408 S.W.2d 407, 410 (Tenn. Ct. App. 1966) (holding that mortgage prepayment penalty is not compensable in an eminent domain proceeding because “only those damages which are embraced within the eminent domain statutes” such as “the reasonable expense of removing furniture, household belongings, fixtures, equipment or machinery made necessary by the taking of the property” may be recovered); Young v. Hillsborough Co., 215 So. 2d 300, 301 (Fla. 1968) (“In view of the express provision for business damages when a partial taking destroys a business,” damages must be awarded); Dep’t of Transp. v. Muller, 681 P.2d 1340, 1342 (Cal. 1984) (condemnee entitled to compensation for a loss of goodwill under CAL. CIV. PROC. CODE § 1263.510).
156. Id. at 659.
157. See Tomasic v. Unified Gov’t of Wyandotte County, 962 P.2d 543, 559-60 (Kan. 1998) (allowing legislature to require “a condemning authority to make additional payments beyond ‘just compensation’”).
158. APA Amicus Brief, at 29.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
165. *Id.* at 687-703 (particularly relevant valuation mechanisms include: Harm Versus Gain; Allocating Risk: Highest and Best Use; Timing of the Valuation; Recharacterizing the Property Taken; and Replacement Value).
166. *Id.* at 687-89 (discussing the valuation decision courts must face of “whether to measure the harm to the property owner or the gain to the government caused by the taking”).
167. *Id.* at 700-01; see also Nichols update on *Kelo*, n.40 (noting that “other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. See, e.g., the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in Lee Anne Fennell, *The Death of Poletown: The Future of Eminent Domain and Urban Development* After County of Wayne v. Hathcock: *Taking Eminent Domain Apart*, 2004 Mich. ST. L. REV. 957, 1004 (Winter 2004), and referencing Murray J. Raff’s more lengthy description in chapter 1 of Kotaka & Callies (eds.), *TAKING LAND: COMPULSORY PURCHASE AND LAND USE REGULATION IN ASIAN-PACIFIC COUNTRIES* (2002)).
168. *Id.* at 703 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).
171. U.S. CONST. amend V.
172. *Kelo*, 125 S. Ct. at 2665 (stating that because the city’s economic plan “unequivocally serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment” (emphasis added)).