

The Restitutionary Approach to Just Compensation

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I. INTRODUCTION

Can the just compensation clause save the public use clause?¹ Many commentators agree that public use is a sham-ble, if not a “dead letter.”² Despite the less deferential public use standard set forth by the Michigan Supreme Court in *County of Wayne v. Hathcock*,³ the U.S. Supreme Court’s decision in *Kelo v. City of New London*⁴ shattered any hope of restoring a property rule⁵ to the public use clause at the federal level. *Hathcock* set forth a three pronged disjunctive test to restrict the local government practice of handing off condemned property to rent-seeking private developers.⁶ This was just the sort of test that propertarians were hoping the Supreme Court would establish in

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¹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

² See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) [hereinafter Merrill, *The Economics of Public Use*] (remarking that, even 20 years ago, “most observers today think the public use limitation is a dead letter”). Timothy Sandefur has remarked that current takings jurisprudence has “reduce[d] the public use clause to a pointless redundancy.” Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651, 673 (2005).

³ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overturning the controversial and widely deferential holding of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)).

⁴ 125 S. Ct. 2655 (2005).

⁵ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–06 (1972) (explaining that the takings clause provides both a property rule, which prevents against nonconsensual forfeiture of property, and a liability rule, which provides for forced transfers of entitlement).

⁶ *Hathcock*, 684 N.W.2d at 783.

Kelo. Instead, *Kelo* preserved a tradition of deference⁷ to state and local legislatures, and reaffirmed that “it is only the taking’s purpose, and not its mechanics’ . . . that matters in determining public use.”⁸ *Kelo* does more than to reaffirm local governments’ eminent domain power to develop public works; it extends deference over condemnations that turn land over to *private developers* for purely economic stimulation.⁹ As a result, eminent domain is justified even though the project has no direct benefit to the public, no public oversight, and no independent public usefulness.¹⁰ In the wake of the Court’s near-total refusal to impose a check on the legislature through the public use clause,¹¹ can any confidence in our property rights be restored through the just compensation clause? Despite the trend among scholars “to focus on the public use limitation to eminent domain as the only way to prevent eminent domain abuse,”¹² the answer is yes.¹³ In fact, the just compensation clause is probably where we should have been looking all along.

What is a public use but something that is useful to the public, and how should meaningful limits be interpreted? A public use under current takings jurisprudence is any use that fits within the broad scope of the police powers. It may be a use that promotes efficiency. It may be a use that promotes ends that are political, social, ecological, economic, or egalitarian. It could be any combination of these goals. Because it is the state and local governments’ job to evaluate these needs and apply the eminent

⁷ *Kelo*, 125 S. Ct. at 2663 (“Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”); *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551 (1946) (“We think that it is the function of Congress to decide what type of taking is for a public use . . .”).

⁸ *Kelo*, 125 S. Ct. at 2664 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

⁹ *Id.* at 2668.

¹⁰ The majority declines to look past the purpose of the condemnation and a mere showing that the means are not irrational. *See id.*; *see also infra* note 89.

¹¹ Merrill, *The Economics of Public Use*, *supra* note 2, at 64 (“[C]ourts have effectively declared that liability rules alone shall protect all private property rights.”).

¹² Katherine M. McFarland, Note, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 143 (2004).

¹³ *See* Brief of the American Planning Association et al. as Amici Curiae in Support of Respondents at 28, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2005 WL 166929 [hereinafter American Planning Association Brief] (“Adjusting 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.”). *See also The Kelo Decision: Investigating Takings of Homes and other Private Property: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. (2005) (statement of Thomas A. Merrill, Charles Keller Beekman Professor of Law, Columbia Law School), available at http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661 [hereinafter *The Kelo Decision*] (“[A] promising reform idea would be to require more complete compensation for persons whose property is taken by eminent domain.”).

domain power towards them, a strong standard of deference might not be so unreasonable. Thus, perhaps we can forgive the Court for finding itself on a slippery slope in its public use analysis, since there appear to be few non-arbitrary lines.

It is the just compensation clause that might actually provide some limits to the eminent domain power. Where public use is a relative question that deserves some standard of deference to the legislative authority, just compensation operates on universal economic principles, and thus does not need to become entangled in notions of deference as does its public use counterpart. If the true cost of the taking must be awarded as just compensation, then we can guarantee that the taking is truly just from an economics perspective. That is, if we take full account of all the interests affected by the taking, then we can ensure that the eminent domain power is used properly. This comment posits that a restitutionary analysis can provide a compensation value that is truly just, and that truly just compensation can bring the proper equilibrium to the power and use of eminent domain. From an economics perspective, while it may be impracticable to properly recognize and assess every effect of a condemnation,¹⁴ restitution theory can provide a remarkably fair and practical valuation mechanism. On the other hand, “fair market value,” the “default standard for determining just compensation,”¹⁵ ignores many important costs that attend eminent domain. “Each person has a price for which he would sell just about everything he owns, but by definition he will accept fair market value for an item only if he desires to sell it, as fair market value implies a seller who does not have to but is willing to sell.”¹⁶ “It seems imperative . . . that when the polity takes an individual’s property against his or her will, a more sophisticated analysis should be required.”¹⁷ “Because a condemnee, by definition, is an unwilling seller, payment of market value will not compensate the person for the

¹⁴ *But see* H. Dixon Montague, *The Role of the “Separate Economic Unit” in the Determination of Just Compensation*, in *EMINENT DOMAIN AND LAND VALUATION LITIGATION* 129, 137 (ALI-ABA Course of Study, January 10–12, 2002), available at Westlaw, SG059 ALI-ABA 129.

[I]n no instance should the court exclude from consideration the elements of value that the buying and selling public [consider] in the real world . . . [P]revailing rules permit proof of all of the varied elements of value . . . [The Supreme Court] stated unequivocally that an honest market value assessment must include consideration of every factor that may influence a willing buyer and willing seller in a free market transaction.

Id. at 136–37.

¹⁵ American Planning Association Brief, *supra* note 13, at 27.

¹⁶ Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 *OR. L. REV.* 203, 244 (1978).

¹⁷ Steven M. Crafton, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 *EMORY L.J.* 857, 889 (1983).

loss.”¹⁸

The traditional policies against granting restitution to the condemnee have been (1) that the public should not be made to pay additional costs over and above the condemnee’s harm, and (2) that the condemnee already realizes additional value flowing from the public work.¹⁹ The purpose of this comment is to outline factors to be analyzed in individual instances of takings, as an analysis of these factors in the context of individual cases reveals whether the policies against restitution have evaporated, thus providing an opportunity to apply the restitutionary model.

As the less-famous half of the takings clause,²⁰ the “just compensation” clause requires a determination of how much the governmental body must pay a condemnee for taking his property.²¹ The government must first determine whether taking the owner’s property will provide a greater good to the community. That is, is there a public use?²² The government must next determine what amount of compensation must be paid to the owner.²³ But determining just compensation is not merely the second half of the inquiry; in certain instances, *it is an inextricable component of determining when a public use in fact exists*. In other words, if paying for the actual cost of the taking would cause the project to become economically unfeasible, this will inform the local government that the project does not actually serve the greater good of the community. If the value of the private property exceeds the utility of the public use, the project creates aggregate loss, and is therefore not a public use at all.²⁴ Demoralization costs—the loss of value that results from the psychological impact of condemnations—may also undermine the aggregate public benefit.²⁵ Without requiring an accurate and truly just measure of compensation, local governments will tend to overregulate.²⁶ Without a diligent approach towards deter-

¹⁸ *Id.* at 890.

¹⁹ See *Bauman v. Ross*, 167 U.S. 548, 570 (1897).

²⁰ See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) [hereinafter Serkin, *The Meaning of Value*] (“Valuing just compensation turns out to be largely unstudied but essential for defining the extent of constitutional protection for private property.”).

²¹ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

²² *Id.*; see also *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²³ *Midkiff*, 467 U.S. at 231; see also *Olson v. United States*, 292 U.S. 246, 255 (1934).

²⁴ Merrill, *The Economics of Public Use*, *supra* note 2, at 92.

²⁵ Serkin, *The Meaning of Value*, *supra* note 20, at 720.

²⁶ See Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1583 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) [hereinafter Merrill, *Rent Seeking*] (“According to [the ‘fiscal illusion’ principle], if the government is not required to compensate for losses inflicted by its actions, then it will tend to overregulate.”); see also Berger, *supra* note 16, at 244.

mining the costs associated with a taking, we do a disservice to our egalitarian conscience and enable obtuse local government officials to disturb the market and usurp the rights of property owners.²⁷ The public use and just compensation clauses are not disjunctive, and a single calculus of just compensation is neither sufficient nor appropriate.

The remainder of this introduction will provide further policy and scholarly background on just compensation. Part II describes the *Hathcock* approach to analyzing public use. The determination of public use under the *Hathcock* standard will inform the application of restitution theory in determining just compensation. Part III will apply restitution theory in terms of the *Hathcock* standard, and then discuss the principles underlying just compensation, explaining why there is no satisfactory principled justification in granting the private developer all of the assembly gains. Finally, restitution theory is applied to four basic condemnation scenarios.

A. What Restitution Is, and What It Provides

This comment suggests adopting the type of restitution articulated by Thomas W. Merrill:

[W]hen a condemnation produces a gain in the underlying land values due to the assembly of multiple parcels, some part of this assembly gain has to be shared with the people whose property is taken. Under current law, all of the assembly gain goes to the condemning authority, or the entity to which the property is transferred after the condemnation.²⁸

Restitution is typically defined as holding one person accountable to another on the basis that one person unjustly receives benefits or the other unjustly suffers loss.²⁹ The principle

It is inefficient to allow a condemner to take such an owner's property at a value less than he would be willing to sell it. To do so takes property from the hands of a person who values it more and gives it to one who pays less for it, thereby encouraging the overuse of the taking power and the excessive acquisition and construction of facilities by those instrumentalities which happen to have eminent domain power. This argues for using a value greater than fair market value in condemnation.

Id.

²⁷ See Shelby D. Green, *Defending the "Time Culture": The Public and Private Interests of Media Corporations*, 43 FED. COMM. L.J. 391, 397 (1991) ("granting of special privileges . . . were 'reconciled with our egalitarian conscience, first, by insisting that government's action . . . by legitimated by determining that it was in the public interest to confer special privileges to obtain services or public convenience or necessity.'") (quoting J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970*, at 60 (1970)).

²⁸ *The Kelo Decision*, *supra* note 13.

²⁹ JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 600 (4th ed. 1998).

behind the rule is that “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.”³⁰ Restitution theory requires that the

condemning authority . . . disgorge or at least share with the condemnee the assembly gains realized through the exercise of eminent domain. Either way, enhanced compensation would have two effects: it would soften the blow to condemnees, and it would reduce the incidence of eminent domain by increasing the costs of condemning property.³¹

Frank I. Michelman discusses restitution in terms of “efficiency gains,” which are defined “as the excess of benefits produced by a measure over losses inflicted by it.”³² The property owner should be treated as a partner in the transaction, as a speculator in the property, not as brush and debris to be cleared away before construction can begin. That one party is given the full benefit of this shift while the condemnee gains nothing belittles the policy that “just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual.”³³ Any approach towards just compensa-

³⁰ *Id.* (quoting RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937)). A discussion of why the developer’s enrichment is “unjust” is found in Part 0. See also Emily Sherwin & Maimon Schwarzschild, Comment, *Epstein and Levmore: Objections from the Right?*, 67 S. CAL. L. REV. 1451, 1451 (1994).

Restitution is a slippery term, and it may help at the outset to clarify how it is being used here. In one sense of the word, restitution is a principle of responsibility that comes into play when one person benefits unfairly at another’s expense. The common shorthand phrase for this idea is “unjust enrichment.” In the more technical sense of the word, restitution is a set of legal remedies that measure liability by gains received rather than losses imposed.

Id.

³¹ *The Kelo Decision*, *supra* note 13. See also Merrill, *The Economics of Public Use*, *supra* note 2, at 64 (“Consensual exchange is almost always beneficial to both parties in a transaction, while coerced exchange may or may not be, depending on whether the compensation is sufficient to make the coerced party indifferent to the loss.”).

³² Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967).

The compensation strategy does this by providing more money to persons whose property is taken in eminent domain. And it too leads to a substitution away from eminent domain, insofar as the costs go up relative to other modes of resource acquisition.

. . . The compensation strategy dovetails nicely with the use of contingent fee representation, since higher compensation leads directly to higher fees for those who represent property owners in eminent domain. The process solution is also more compatible with contingent fee representation, insofar as enhanced process rights in eminent domain proceedings themselves magnify the leverage of property owners in negotiations over settlement amounts.

The Kelo Decision, *supra* note 13.

³³ Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 64 (1998) (internal quotations omitted).

What justifies a taking against the owner’s will? It will be recalled, we ar-

tion should not be so circumscribed as to conclude that the landowner has not been injured in this situation; the rights and benefits he would have had in the marketplace have been stripped away by a schema that insists that he is not entitled to more than the present value of his property, although it is clearly worth more to the private rent-seeker.³⁴ In this way, we begin to understand why the private developer's enrichment is "unjust," even where the condemnee is arguably fully restored: the community suffers other injuries that are not easily quantified, such as demoralization costs and loss of subjective attached to the condemnee's property.³⁵ Moreover, there is no principle to justify the private developer's keeping the incremental land value after it has been assembled through eminent domain.³⁶

Restitutionary compensation mitigates the demoralization costs associated with condemnations. Demoralization costs, or insurance costs,³⁷ is a term coined by Frank Michelman, who defines them thusly:

[T]he total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated

gued (1) that the policy underlying the monopoly requirement was the promotion of efficiency by preventing the charging of a supracompetitive price, and (2) that if the condemnee had no monopoly, efficiency would be promoted by letting the market work its will. . . . In each case, society would benefit from competition and the potentially lower cost of such improvements. Condemnee monopoly should be a requisite to condemner's right to take.

Berger, *supra* note 16, at 239–40. See also Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 220 (2001) ("Liability rules are best applied when transaction costs are high and bargaining is impossible or difficult In these situations, liability rules should mimic the outcome that otherwise would have been reached by the market.").

³⁴ See Berger, *supra* note 16, at 244.

Each person has a price for which he would sell just about everything he owns, but by definition he will accept fair market value for an item only if he desires to sell it, as fair market value implies a seller who does not have to but is willing to sell. . . . It is inefficient to allow a condemner to take such an owner's property at a value less than he would be willing to sell it. To do so takes property from the hands of a person who values it more and gives it to one who pays less for it, thereby encouraging the overuse of the taking power and the excessive acquisition and construction of facilities by those instrumentalities which happen to have eminent domain power. This argues for using a value greater than fair market value in condemnation.

Id.

³⁵ American Planning Association Brief, *supra* note 13, at 27 ("The most obvious shortfall is the subjective value that individual owners attach to their properties. . . . These values are ignored under the fair market value test.").

³⁶ See discussion *infra* Part III.B.

³⁷ Merrill, *Rent Seeking*, *supra* note 26, at 1581 ("Michelman originally framed the insurance theory in terms of 'demoralization costs.'").

losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.³⁸

When a local government condemns property and then hands it off to private developers, it undermines the presumption that the project has the public's best interests in mind. Michelman explains that "[w]hen pursuit of efficiency gains entails capricious redistribution, either demoralization costs or settlement costs must be incurred."³⁹ In these cases, where the private developer, not the public, is the primary benefactor of the project, the land-owning community is likely to perceive the redistribution as capricious. Although the public receives incidental benefit, such as through tax revenue and jobs, it is the private developer who receives the principal benefits of the project. The perception of this fact leads to demoralization costs. "According to this theory, the government should compensate in order to overcome the disutilities associated with risk—specifically, the risk of governmental actions that reduce or destroy the value of private property."⁴⁰ Professor Merrill remarks that "there is something curiously incomplete about a theory of the takings clause that makes little mention of reliance, risk, and demoralization costs."⁴¹ Justice O'Connor alludes to demoralization costs in her dissenting opinion in *Kelo*: "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property."⁴²

B. Determining Where Restitutionary Compensation Applies

The typical valuation method used to determine just com-

³⁸ Michelman, *supra* note 32, at 1214.

³⁹ *Id.* at 1215. Michelman defines settlement costs as "the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs." *Id.* at 1214.

⁴⁰ Merrill, *Rent Seeking*, *supra* note 26, at 1581. Merrill explained that Michelman defined demoralization costs as

the sum of the disutilities that accrue to the losers and their sympathizers when they realize that no compensation is available for present losses, plus the value of the decline in future production caused by the realization that no compensation will be forthcoming for similar losses in the future. . . . Compensation in this view performs the same function as insurance: pooling (or in this case socializing) risks to reduce total costs (and thereby increase the wealth) of society.

Id.

⁴¹ *Id.* at 1582.

⁴² *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (O'Connor, J., dissenting); see also Berger, *supra* note 16, at 237 (arguing that monopoly and efficiency are not sufficient to justify a taking without an impending public need); see also Sandefur, *supra* note 2, at 678 ("Americans in most states are at risk of losing their homes to whatever faction is able to gain political influence.").

compensation has been to assess the harm to the condemnee. That is, the condemnee should be paid for the fair market value of the property and no more.⁴³ Courts have historically denied compensation awards based on the benefit to the condemnor⁴⁴ largely because of the policy that the public should not be made to pay any more than necessary for the legitimate public use of the land.⁴⁵ This policy is properly at work in traditional public use takings, where the government initiates condemnations for the purposes of creating dams,⁴⁶ reservoirs,⁴⁷ levees,⁴⁸ national parks,⁴⁹ low-cost housing,⁵⁰ or public roads.⁵¹ In such traditional takings, it seems intrinsically unfair to require the public to make restitution to the condemnee in the value that it will derive from the new use. This would be unwise for several reasons. First, as the Supreme Court in *Bauman v. Ross* explained over a century ago, “the Constitution does not require that the value should be paid, but that just compensation should be given.”⁵² The Supreme Court surmised that if the condemnee “would, by the proposed public work, receive a benefit to the full value of the property taken . . . it might happen that no compensation at all, or, at most, a nominal compensation would be made.”⁵³ This dicta from *Bauman* voices two important points: just compensation requires an evaluation of all factors, not merely a determination of fair market value, and the proposed project should provide a significant benefit, not merely a distant or theoretic benefit, to the public.⁵⁴ The latter point will become more important later, when this comment provides an evaluation on how just compensation valuations differ depending on the type of project proposed. Second, quantifying demoralization costs is difficult. What is the amount of diminution in property value arising from an instance of condemnation? How is this diminution affected when the condemnation occurs to provide a dam or a levee, compared to a shopping center or an office building?

Accordingly, at least in terms of more traditional public pro-

⁴³ *The Kelo Decision*, *supra* note 13 (“The constitutional standard requires fair market value, no more and no less.”).

⁴⁴ Berger, *supra* note 16, at 233 n.146.

⁴⁵ *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“[The owner] is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.”).

⁴⁶ *United States v. 13.20 Acres of Land*, 629 F. Supp. 242 (E.D. Wash. 1986).

⁴⁷ *United States v. 49.01 Acres of Land*, 669 F.2d 1364 (10th Cir. 1982).

⁴⁸ *Dayton Gold and Silver Mining Co. v. W.M. Seawell*, 11 Nev. 394 (Nev. 1876).

⁴⁹ *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979).

⁵⁰ *Mobeco Indus., Inc. v. City of Omaha*, 598 N.W. 2d 445 (Neb. 1999).

⁵¹ *Mobile County v. Brantley*, 507 So. 2d 483 (Ala. 1987).

⁵² *Bauman v. Ross*, 167 U.S. 548, 570 (1897).

⁵³ *Id.*

⁵⁴ *Id.* at 562, 569–70.

jects, the rationale outlined in *Bauman* rightly mandates a policy against employing restitution theory in determining just compensation depending on the use and the amount of utility that actually flows to the public. But what shall we make of just compensation when these policies are not controlling? What about those situations that find themselves at the outer limits of public use—projects initiated, planned and owned by private developers, employing the government's power of eminent domain only when the developer finds it less costly than the particular transaction costs it might face? Where a project faces the low ebb of public usefulness, investment and control, and where a private developer stands ready to incur the majority of the benefits, the *Bauman* guideposts evaporate.

C. Renewed Consideration of Restitution

Without the *Bauman* rationale—that the public should not be disgorge, and the utility of a true public use flows to the condemnee⁵⁵—there is no reason that restitution theory should not apply. Instead, the private developer, who, in such instances, will have incurred substantial assembly gains through the exercise of eminent domain, should be made to share some of these gains with the condemnee. Restitution is a desirable valuation mechanism for scenarios where the *Bauman* policies do not apply. If the project's value to the public is slight, and if the public does not incur the cost of paying restitution to the condemnee, restitution theory makes the taking more like a market-based transaction. Moreover, if the developer realizes that it will be disgorge of a share of its profits, it will be less-inclined to initiate projects unless they represent a significant upward shift in the property's value and usefulness.⁵⁶ The allure of using restitution as a valuation mechanism is that it is completely practical. An independent appraisal will readily quantify the assembly costs, and the developer, who is in the business of assessing the profitability of such developments, has the job of determining whether the project is still profitable; if it is not, then the forced transfer is unjustified from an economic perspective—we may not ever need to bother with the pesky constitutional issues.⁵⁷ If

⁵⁵ *Bauman*, 167 U.S. at 581.

⁵⁶ Note that only the profit from the property transaction would be disgorge; the profit from the subsequent use would remain in the developer.

⁵⁷ See Berger, *supra* note 16, at 241–42.

[I]t is probable that the railroad and the public golf course takings would . . . present difficult if not insurmountable problems in measuring efficiency, whereas the industrial park, manufacturer's expansion, and urban renewal cases might more easily be handled. My guess would be that, if an increase in value requirement were imposed in the latter cases, some of these projects

the forced transfer is profitable, then every interested party—the private developer, the public,⁵⁸ and the condemnee—stand to gain from the transaction under a restitutionary model. Requiring restitution maintains our property system’s middle-ground approach to property rights; utility cannot prevail against private interests unless the utility achieved is substantially greater than the private interest. After all, protecting the individual promotes utility in its own way⁵⁹ while staying within our chosen construct of capitalism with a strong presumption towards private property rights.⁶⁰

Bauman reiterates the general idea that just compensation is not a fixed term, but merely a “general principle.”⁶¹ “Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual”⁶² The Supreme Court “has been careful not to reduce the concept of ‘just compensation’ to a formula.”⁶³ In awarding just compensation, the jury is free to consider the relevant facts and determine what compensation is appropriate.⁶⁴

Flowing from this general policy of fairness to the public is

would never be undertaken in the first place.

. . . .
 [T]he condemner’s objective need for the condemnee’s land should clearly outweigh the degree of impingement upon the latter’s interest. . . . [It is] unfair to impose the drastic remedy of involuntary taking upon another for frivolous reasons.

Id.

⁵⁸ We may presume that demoralization costs will be substantially diminished if payment of restitution becomes the norm. If the community does not perceive the possibility of condemnation as a threat due to the fact that they stand to gain by virtue of sharing in the assembly costs, demoralization costs will be insubstantial.

⁵⁹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 477–78 (The University of Chicago Press 1976) (1776).

[E]very individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

Id. at 477–78.

⁶⁰ JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1095 (5th ed. 2002) (explaining that it is speculated that Madison inserted the compensation requirement to ward off egalitarian redistributions of wealth).

⁶¹ *Bauman v. Ross*, 167 U.S. 548, 569 (1897); see also *id.* at 570 (quoting *Chesapeake & Ohio Canal Co. v. Key*, 5 F. Cas. 563, 564 (C.C.D.C. 1829) (No. 2,649) (“It is impossible for the legislature to fix the compensation in every individual case.”)).

⁶² *Bauman v. Ross*, 167 U.S. 548, 570 (1897).

⁶³ *United States v. Cors*, 337 U.S. 325, 332 (1949).

⁶⁴ See *Bauman*, 167 U.S. at 569–70 (citing *Chesapeake & Ohio Canal Co. v. Key*, 5 F. Cas. 563, 564 (C.C.D.C. 1829) (No. 2,649)).

the notion that the public should not be required to pay a premium in order to effect legitimate public purposes.⁶⁵ After all, “[p]roperty rights serve human values. They are recognized to that end, and are limited by it.”⁶⁶ The power of eminent domain is held in trust by the government to promote the benefit of the public as a whole, including the condemnee. In fact, as *Bauman* pointed out, the public project might create such a benefit to the condemnee that “it might happen that no compensation at all, or, at most, a nominal compensation would be made.”⁶⁷

II. FACTORS THAT DETERMINE A PUBLIC USE

We have discussed the policies underlying just compensation. This part discusses how the public use affects the determination of just compensation, evaluating the aforementioned policies in the context of nontraditional takings.

Justice O’Connor in *Kelo* opined in her dissent that public use should not extend so far as to cover economic development takings.⁶⁸ The Court has intimated that the “extraordinary demand” associated with a project may be a significant factor in determining whether it is a public use.⁶⁹ Public initiation of a project creates a strong presumption that the project is for the benefit of the public.⁷⁰ Inversely, initiation by a private developer typically means that the benefit, risk, and control are all in the private actor. These differences fundamentally alter the balance of the underlying policies that determine the proper valuation of the property.

A. Defining Just Compensation as a Function of Public Use

In *County of Wayne v. Hathcock*,⁷¹ the Michigan Supreme Court adopted Justice Ryan’s dissent in *Poletown Neighborhood Council v. City of Detroit*,⁷² and held that, although the condem-

⁶⁵ *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979) (“[T]he Government, in pursuing public benefits through the power of eminent domain, is not forced to overcompensate private-propertyholders.”).

⁶⁶ *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

⁶⁷ *Bauman*, 167 U.S. at 570 (citing *Chesapeake & Ohio Canal Co. v. Key*, 5 F. Cas. 563, 564 (C.C.D.C. 1829) (No. 2,649)).

⁶⁸ *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005) (O’Connor, J., dissenting) (“Are economic development takings constitutional? I would hold that they are not.”).

⁶⁹ *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979) (quoting *United States v. Cors*, 337 U.S. 325, 333 (1949)).

⁷⁰ *Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532, 539 (N.Y. Sup. Ct. 1983) (holding that projects that are initiated and financed by the private developer cannot be considered public works projects).

⁷¹ *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004).

⁷² *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 464 (Mich. 1981) (Ryan, J., dissenting).

nations qualified as a legitimate public use, the transfer of the condemned property to private developers did not pass constitutional muster.⁷³

The foregoing indicates that the transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where “public necessity of the extreme sort” requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of “facts of independent public significance,” rather than the interests of the private entity to which the property is eventually transferred.⁷⁴

Thus *Hathcock* imposed a separate rule for different types of public uses. A condemnation that is not a truly necessary means of achieving a public use, not subject to public oversight, and not effected for the direct and immediate purpose of public health and safety (such as removing blight), will not pass constitutional muster under the *Hathcock* standard. This public use test seeks to restore the property rule in the public use clause. The *Hathcock* test defines a public use as a use that is truly for the public benefit, and not merely a tenuous claim that the private development will result in some utility flowing to the community.⁷⁵ Looking to the control that the local government maintains over the project provides a reasonable assurance that the project is indeed for the good of the public. Finally, the *Hathcock* standard still allows for hand-offs to private development, but only when the initial condemnation independently satisfies the public use requirement—thus a condemnation that removes “urban blight for the sake of public health and safety” satisfies the public use requirement,⁷⁶ and a subsequent hand-off to private developers would then be permissible.

A court need not be inclined to so restrict its public use guidelines as the Michigan Supreme Court did in *Hathcock*. However, the same inquiry made in *Hathcock* ought to be made in any condemnation case, irrespective of the particular jurisdictional disposition towards public use, since the factors of *Hathcock*'s public use test are relevant to employing restitution, to the extent that they affect the *Bauman* rationale. In other words, because *Bauman* prevents restitution, we must determine whether *Bauman* is controlling, and the best way to do that is through a *Hathcock* analysis. Regardless of the outcome of the

⁷³ *Hathcock*, 684 N.W. 2d at 781.

⁷⁴ *Hathcock*, 684 N.W. 2d at 783.

⁷⁵ *Id.* at 795.

⁷⁶ *Id.* at 783.

public use question, the questions posed by *Hathcock* are necessary to determine the proper measure of just compensation. Such an inquiry helps to illustrate a continuum of public usefulness and defines the location of a particular condemnation proceeding along this continuum. Where the public usefulness is great, *Bauman* would require that the public not be required to pay more than market value. As discussed earlier, the *Bauman* rule serves egalitarian ends, but is also rooted in sound economic theory, since a true public good will bring value to all members of the public, including the condemnee. In this way, *Bauman* satisfies our desire to give additional compensation to the condemnee who has suffered the loss of his property rights. However, what shall we make of situations where the public usefulness is meager, tenuous, or dubious? In these circumstances, of course, we could not say, as in *Bauman*, that the condemnee receives any real benefit from the project. Takings jurisprudence has long supposed that public use is not a binary determination, but rather a matter of degree, and that at some point, “if regulation goes too far it will be recognized as a taking.”⁷⁷ As such, it is not troubling to conclude that the just compensation inquiry will also be one of degree and based upon the particular facts in question.⁷⁸ In other words, as the public usefulness of the project decreases, the amount of just compensation must increase. The need for varying valuation mechanisms for just compensation parallels the need for heightened scrutiny in certain types of takings.⁷⁹ The question we must then ask is just how the public use inquiry determines the just compensation inquiry. We now turn to the *Hathcock* test to find our answer.

1. The *Hathcock* Test

If the public use depends on the private development, the property has not been “selected on the basis of ‘facts of independent public significance,’”⁸⁰ and thus there must either be public

⁷⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (describing in now-famous language the historical difficulty of line-drawing in the realm of public use).

⁷⁸ *United States v. 320.0 Acres of Land*, 605 F.2d 762, 780–81 (5th Cir. 1979) (“But these obvious (although sometimes overlooked) precepts do not, by themselves, decide the multitudinous condemnation cases with their almost limitless range of fact complexes.”).

⁷⁹ See Brief of Amici Curiae New London Landmarks, Inc. et al. in Support of Petitioners on the Merits at 7, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2812009 (“Courts should apply heightened scrutiny to takings for a private benefit, for general, undefined economic benefits, or for an uncertain or unduly vague intended use.”); see, e.g., Brief of Amicus Curiae of Professors David L. Callies et al. in Support of Petitioners at 21–22, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2803192 (suggesting an intermediate level of scrutiny similar to that used for exactions).

⁸⁰ *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)); see also Redevelopment Agency

oversight or an extraordinary need for the project to satisfy the *Hathcock* test. Where, on the other hand, the “act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, was a public use,”⁸¹ the condemnation is selected on the basis of “facts of independent public significance.”⁸² Although the condemning agency is generally entitled to a presumption of validity,⁸³ where the public benefit is coterminous with the private benefit, this presumption may be undermined under this prong of the *Hathcock* test.⁸⁴ The fact that a private developer stands to receive substantial benefit should be enough to trigger a court’s suspicion. The Supreme Court of Washington in *City of Seattle v. Westlake Project*⁸⁵ rejected the use of eminent domain because of the concern that the benefits to the public were incidental as compared with the benefits that would flow to private interests.⁸⁶

of San Francisco v. Hayes, 266 P.2d 105, 114 (Cal. 1954).

Originally the definition of “public use” was very narrowly restricted. . . . [T]he more modern courts have enlarged the traditional definition of public use to include “public purpose.” The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest.

Id. at 123. “[Since] the acquiring of the property is for a public use, its sale and the transfer of the property from one individual to another, so far as they may occur, are merely incidental to that use . . .” *Id.*

⁸¹ *Hathcock*, 684 N.W.2d at 782.

⁸² *Id.* at 783.

⁸³ See Gary P. Johnson, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 373–74 (1981) (“Consequently, courts began to look at the ultimate purpose of a project in order to justify a taking that eventually would benefit the public.”).

To say, as has been too often carelessly said, that “the acts done by these corporations are done with a view to their own interests, from which an incidental benefit springs to the public,” is to admit their private character, and the private use of the property condemned to their use. But it is obvious, that the object which determines the character of a corporation is that designed by the legislature, rather than that sought by the company. If that object be primarily the private interest of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private, but if that object be the public interest, to be secured by the exercise of powers, delegated for that purpose, which would otherwise repose in the State, then, although private interest may be incidentally promoted, the corporation is in its nature public—it is essentially the trustee of the government for the promotion of the objects desired—a mere agent, to which authority is delegated to work out the public interest through the means provided by government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally, and not necessarily, from its operations.

Swan v. Williams, 2 Mich. 427, 435 (1852).

⁸⁴ *County of Wayne v. Hathcock*, 684 N.W. 2d 765, 783 (Mich. 2004) (“[T]he underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.”).

⁸⁵ 638 P.2d 549 (1981).

⁸⁶ *Id.* at 559. Public benefit included new stores in which to shop; private benefits included higher incomes. See *id.*

The second prong of the *Hathcock* test asks whether the condemnation is necessary towards the realization of a public purpose.⁸⁷ The condemning authority must demonstrate that the transfer of the condemned property “to a private entity involved ‘public necessity of the extreme sort otherwise impracticable.’”⁸⁸ The type of extreme deference that is characteristic of most courts, including most notably the U.S. Supreme Court in *Kelo*, does not exist under a *Hathcock* analysis.⁸⁹ The necessity required by the Michigan Supreme Court is an actual, physical necessity; the “very *existence* [of the public benefits] depends on the use of land.”⁹⁰ This standard intimates the very sort of holdout behavior that would make public projects impracticable without the power of eminent domain. This sort of necessity is found in classic public uses such as “highways, railroads, [and] canals”⁹¹

The third prong of the *Hathcock* test concerns forced transfers that do not remain “accountable to the public in its use of [the] property.”⁹² “Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*”⁹³ This language again suggests a return to

⁸⁷ See *Hathcock*, 684 N.W.2d at 782.

⁸⁸ *Id.* at 781 (quoting *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

⁸⁹ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005) (“Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”). The majority attempts to rein in its sweeping deference by employing “meaningful rational basis review” that seeks to prevent takings that are “intended to favor a particular private party, with only incidental or pretextual public benefits.” *Id.* at 2669–70 (Kennedy, J., concurring). But this lax standard of review is easily bested by legal engineering. Justice Kennedy wrote that because “benefiting Pfizer was not ‘the primary motivation or effect of this development plan,’” and that instead “‘the primary motivation for [respondents] was to *take advantage* of Pfizer’s presence,” the taking was permitted. *Id.* at 2670 (emphasis added). Thus, as long as local governments properly frame their intentions, it will evade judicial review of its use of eminent domain.

Courts might then take the intellectual path set out by the California Court of Appeal’s decision in *Redevelopment Agency of San Francisco v. Del-Camp Investments*. In that case, the property owner argued that the public use requirement prohibited a redevelopment agency from taking his property for the construction of a hotel. The court rejected this argument because “the public use for which defendant’s property was to be taken was community redevelopment, not the construction of a hotel.” In the end, the condemnation is the same, merely with a different name.

Sandefur, *supra* note 2, at 670 (quoting *Redevelopment Agency of San Francisco v. Del-Camp Investments*, 113 Cal. Rptr. 762, 766 (1974)).

⁹⁰ *Hathcock*, 684 N.W. 2d at 781 (quoting *Poletown*, 304 N.W.2d 455, 478 (Ryan, J., dissenting)).

⁹¹ Sandefur, *supra* note 2, at 669 (quoting *Poletown*, 304 N.W. 2d 455, 478 (Ryan, J., dissenting)).

⁹² *Hathcock*, 684 N.W.2d at 782.

⁹³ *Id.* (quoting *Poletown*, 304 N.W.2d 455, 476 (Ryan, J., dissenting) (quoting Berrien

common sense ideas about the limits of eminent domain powers, and that a substantial public interest must exist to overcome an owner's property rights. Regulation⁹⁴ and subsidies⁹⁵ over private projects are often indicative of an intrinsic public interest. Regulation and subsidies may entitle the project to a presumption of public use, since government subsidies suggest that the project is of extraordinary public interest.⁹⁶ Historically, governments have subsidized private developments when there is substantial public need for the project, but the project itself carries too much risk for the private developer to proceed without government assistance,⁹⁷ or because the project is not lucrative enough to attract redevelopment without subsidization.⁹⁸ When the public subsidizes a project, public oversight is likely to follow.⁹⁹

The general principle under eminent domain "excludes enhancement of value resulting from the government's special or extraordinary demand for the property."¹⁰⁰ In the type of public use required by *Hathcock*, we see that the principle elucidated in *Bauman* applies.

Springs Water Power Co. v. Berrien Circuit Judge, 94 N.W. 379, 380–81 (Mich. 1903)).

⁹⁴ See Sandefur, *supra* note 2, at 656 ("One chief rationalization [for finding a public use] was that the railroad was regulated by the government in such a way as to render it essentially 'public.'").

⁹⁵ See Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 653, 727 (2005) (remarking that subsidies were given to railroads because of the substantial reciprocal benefits given to society, and because of the great risk taken by the railroads, intimating that the government wished to make up the cost of risk by granting subsidies. However, subsidies are often also granted towards wasteful projects to reward political supporters. *Id.* at 762–63; see also Greater Westchester Homeowners Ass'n v. Los Angeles, 603 P.2d 1329, 1333 (Cal. 1979) ("[A]irports so subsidized must be available for public use on 'fair and reasonable terms and without unjust discrimination, . . .').

⁹⁶ See Kanner, *supra* note 95, at 727 (discussing the importance of the role of railroads as the reason for their subsidization).

⁹⁷ See *id.*

⁹⁸ See George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991 *passim* (2001) (explaining how local governments seek out "blighted" areas in need of redevelopment, and offering subsidies to developers if needed). But see Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 322 (2004) (explaining how private developers exploit redevelopment by seeking "the 'blight that's right'—an area with at least some of the conditions needed to make a plausible case for subsidized redevelopment, but not so run-down as to put private investment at risk").

⁹⁹ See Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 479 (2001) ("[I]n exchange for subsidies, developers are being required to provide community benefits packages, which, in addition to living wage provisions, typically include job training programs and community hiring agreements."); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 237 (2003) ("Historically, government has facilitated transportation by building the airports, the seaports, the rail and transit lines, subsidized their operations where necessary, and established the basic codes and rules pursuant to which the industry serves the public.").

¹⁰⁰ United States v. Cors, 337 U.S. 325, 333 (1949).

[A]n unwilling seller, a condemnee, receives “just” compensation only in the limiting case in which the property is taken for the purpose of providing a “pure public good.” Only in this case does the condemnee receive the additional benefits flowing from the provision of the pure-public good itself that augment the incomplete compensation resulting from the “market value” of the property. . . . Only in the case of a taking for the purpose of providing a pure public good can the benefits, both pecuniary and nonpecuniary, that flow from the “pure public good,” added to the fair market value (plus incidental expenses) equal the just compensation mandate of the fifth amendment.¹⁰¹

Under *Bauman*, the reason that just compensation should be limited to the amount of the condemnee’s harm is that the public should not be made to pay more for public works projects, and that the condemnee shares in the benefits of the public works project. In this sense, we satisfy the Rawlsian “justice as fairness” idea, that just compensation must do better than to merely place the condemnee in a neutral position.¹⁰² Thus, a taking should not evade the possibility of restitutionary compensation where the public use does not satisfy a *Hathcock* inquiry. Stated alternatively, where a condemnation arises out of public necessity, there is an added presumption that the just compensation award should be based solely on the condemnee’s harm, since, according to *Bauman*, the condemnee already realizes value flowing from the public project. Conversely, where necessity does not exist, it follows that there will be a stronger presumption towards awarding the condemnee a greater recovery. “As one moves away from the central case of the ‘pure public good’ . . . the benefits to the condemnee diminish.”¹⁰³ Without an “extraordinary demand for the property,”¹⁰⁴ the public has a reduced interest in the condemnation, and thus has a weaker presumption in taking the better of the bargain for itself.¹⁰⁵

Where the public’s interest in the condemned property is coterminous with that of the private developer, the public’s interest is represented by the private developer; thus, the presumption of validity of the government’s exercise of eminent domain is diminished. Eminent domain is a mechanism whereby the public is

¹⁰¹ Crafton, *supra* note 17, at 891–92.

¹⁰² See Michelman, *supra* note 32, at 1219.

¹⁰³ *Id.* at 892.

¹⁰⁴ *Cors*, 337 U.S. at 333.

¹⁰⁵ It is conceivable that the opposite could be argued: that one would pay a premium on a more urgent project, and less on a more frivolous project. But this is not our context in takings analysis, in which the justification is based on the grave need, and the reason for paying as little compensation as justice requires is to allow the public to realize a useful project. Inversely, justice requires that the public pay more to a condemnee when the project is frivolous, or the property is used by the government as capital, or the taking is otherwise not truly necessary to effect a legitimate public purpose.

empowered to avoid expensive transaction costs and to transact as a unitary body. The power of eminent domain is not meant to buttress private developers whose interests just so happen to align with the government's interests. Thus, *Hathcock* held that where "there are no facts of independent public significance (such as the need to promote health and safety) that might justify the condemnation of defendants' lands[,] there may be a reduced presumption of validity of the condemnation."¹⁰⁶

III. RESTITUTION AS A VALUATION MECHANISM

Thus far, this comment has sought to establish the policies underlying compensation awards in traditional condemnations. These types of takings are defined by the test set forth in *Hathcock*: (1) "where [the] 'public necessity [is] of the extreme sort'"; (2) "where the property remains subject to public oversight"; or (3) the taking occurs "because of 'facts of independent public significance.'"¹⁰⁷ The Michigan Supreme Court in *Hathcock* held that a condemnation that does not conform to any of the three tests does not pass constitutional muster as a public use in the first place.¹⁰⁸ When a proposed project fails to conform to one or more of the *Hathcock* factors, the project affects the policies that control the amount of just compensation owed to the condemnee. The result is that transfers of condemned property to a private entity that fail one or more of the *Hathcock* tests are subject to a diminished presumption of public usefulness, and thus an increased presumption of benefit to the condemnee through just compensation. In such scenarios, awarding compensation that goes beyond the condemnee's harm (such as restitutionary awards) would not be *just* compensation. Conversely, where the policies set forth in *Bauman* do not exist, then neither does any reason to limit the condemnee's compensation award to the amount of harm incurred. Clearly, as we have seen, the quantifiable harm incurred is not the only cost associated with the taking. Demoralization costs,¹⁰⁹ as well as the subjective value of the property to the condemnee, are losses that, although difficult to measure, should be considered in determining just compensation if just compensation is to fulfill its constitutional purpose in providing substantial justice. Professor Berger argued that "the recovery allowed should be substantially in excess of the loss, perhaps fifty percent higher, in order to compensate the condemnee for the gross infliction of injury for private purposes solely in the

¹⁰⁶ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 784 (Mich. 2004).

¹⁰⁷ *Id.* at 797 (Weaver, J., concurring in part and dissenting in part).

¹⁰⁸ *Id.* at 783.

¹⁰⁹ See *supra* Part I.A (defining demoralization costs).

name of efficiency.”¹¹⁰ Awarding market value in absence of any additional award may be a matter of expediency, since it excuses the court and the condemnor from engaging in an inquiry of actual costs and the requirement of justice, but it should not be regarded as constitutionally sufficient.

A. Restitution as Generally Equitable

Courts have long held that the taker’s gain should not determine the measure of just compensation.¹¹¹ “The Constitution requires ‘just compensation,’ not fair market value.”¹¹² The Court has reasoned that it must “adopt working rules in order to do substantial justice in eminent domain proceedings,”¹¹³ suggesting that the market value rule is based as much on expediency as anything else. Thus the current rule regarding just compensation represents an idea of efficacy in the law, but it is not so clear that it represents one of justice, as the constitution requires. As this comment has argued, restitution may even be constitutionally required in most cases of condemnations for traditional public uses; as *Bauman* demonstrates, restitution simply does not make sense in certain condemnation scenarios. Stated broadly, there are two types of takings: ones in which private developers are major stakeholders, and ones in which they are not. We are not here concerned with the latter—it is safe enough to assume that these types of takings are of the sort that will readily meet the *Hathcock* standard, and are therefore the sort in which the *Bauman* principles apply. Lawrence Berger defines a public taking as “one which benefits large numbers of persons in a nondiscriminatory and nonexclusionary manner. Takings for railroads, hospitals, streets, and governmental buildings would clearly come within the classification.”¹¹⁴ The incidence of private

¹¹⁰ Berger, *supra* note 16, at 236–37.

¹¹¹ See *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943) (“It is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken . . .”); *United States v. Miller*, 317 U.S. 369, 375 (1943) (“Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.”); *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.”); Berger, *supra* note 16, at 233 n.146 (“It is of course well established that a condemnee is *not* entitled to recover the benefit the condemnor reaps through the condemnation.”).

¹¹² American Planning Association Brief, *supra* note 13, at 28. “The Court has been reluctant to endorse deviations from the market value standard . . . because differentiating between claimants . . . would create administrative problems for courts.” *Id.* at 28–29. See also Berger, *supra* note 16, at 233 (describing some situations in which “it is perfectly sensible as well as just to allow the condemnee the greater recovery”).

¹¹³ *United States v. Miller*, 317 U.S. 369, 375 (1943).

¹¹⁴ Berger, *supra* note 16, at 225.

stakeholders in such takings is merely a matter of expedience; the development of these projects is not generally the sort that presents a substantial pecuniary opportunity to private developers. Thus, it is generally safe to assume that these projects are public uses in a traditional, non-controversial sense.

Restitution awards reduce demoralization costs,¹¹⁵ preserve predictability, protect condemnees' infra-marginal value,¹¹⁶ and generally promote private property rights. In takings involving a pure public use, courts balance several factors against these interests, including the *Bauman* principle of preserving a low price to the public, overcoming monopoly behavior and holdouts, and generally serving utilitarian property goals.¹¹⁷ A valuation method that affords condemnees only that which will "make them whole" while allowing the government to appropriate the property for the good of the public, is arguably *just* compensation for takings that survive the *Hathcock* analysis. However, takings that fail the *Hathcock* analysis undermine the conclusion that "fair market value" will satisfy the demand of just compensation.

B. An Argument from Principles

Our system of property rights is informed by ideas of both individual rights and utilitarianism. Property rules are based on an individual rights approach to ownership; liability rules are based on a utilitarian approach.¹¹⁸ Where individual rights are sufficiently outweighed by perceived social interests, the utilitarian perspective informs the operation of the eminent domain power. Thus, eminent domain is typically employed "to overcome barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer."¹¹⁹ Since

¹¹⁵ See discussion *supra* Part 0.

¹¹⁶ See Crafton, *supra* note 17, at 889. "An infra-marginal seller is one who values the good being held in stock more than the price offered on the market." *Id.* n.181.

¹¹⁷ See generally *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 230 (1984) (breakup of an oligopoly is a valid public purpose); *Berman v. Parker*, 348 U.S. 26, 28 (1954) (blight-removal is a valid public purpose). Additionally, courts have opined that monetary compensation might not even be required at all if the benefit made available to the public may be counted towards the condemnee's just compensation.

If the jury would have a right to consider the benefit, as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that, under the provisions of the charter it might happen that no compensation at all, or, at most, a nominal compensation, would be made.

Bauman v. Ross, 167 U.S. 548, 570 (1897).

¹¹⁸ See Calabresi & Melamed, *supra* note 5, at 1105–06 (explaining how property is generally viewed as an entitlement that may not be taken unless the holder sells it willingly, but this general rule may in certain cases be ignored, allowing a forced transfer of the entitlement to better serve public utility).

¹¹⁹ Merrill, *The Economics of Public Use*, *supra* note 2, at 65.

the Fifth Amendment is basically a liability rule,¹²⁰ it presumes a utilitarian analysis. That is, provided that the government shows that the taking is for a “public use,” the property rule of the takings clause is satisfied, leaving only a liability rule—that just compensation be paid. As we have seen, disgorgement of the public is not justified. A public use is naturally one whose goal is to enrich the public, and the condemnee’s interest may not be permitted to disgorge such enrichment. However, where a public use project is initiated and controlled by a private developer, the utilitarian perspective does not inform as to what should be done with any surplus gains. Once the developer is adequately incentivized to proceed with the project, to whom do the surplus gains owe?

The utilitarian approach justifies a calculus that disgorges the developer as long as it leaves enough to incentivize that developer to go through with the useful project.¹²¹ As long as the developer is adequately incentivized, there is no further utilitarian justification to allow him to keep any surplus profits. Instead, the utilitarian perspective might instruct that the surplus gains be allotted to the government. This is a poor idea, however, since it results in the local government deriving profit from a project for which it bore no risk. Such a policy would result in local governments liberally invoking eminent domain power for private development so that the local government might keep the surplus profits, resulting in treatment of property as capital rather than for legitimate public projects, and ultimately undermining the role of property rights.

If the utilitarian perspective does not inform as to the allocation of surplus profits, then, as Professor Merrill suggested, perhaps labor theory informs that the surplus should remain in the developer.¹²² “The labor theory may be out of fashion, but as between a condemnor and a condemnee, the condemnor is typically

¹²⁰ See *id.* at 64 (“[C]ourts have effectively declared that liability rules alone shall protect all private property rights.”). This is probably much to the chagrin of the Founders, however. See Sandefur, *supra* note 2, at 662.

The use of eminent domain to redistribute “resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want” puts political popularity ahead of justice. Thomas Hobbes argued that in the state of nature “there [can] be no propriety, no dominion, no mine and thine distinct; but only that to be every man’s that he can get: and for so long, as he can keep it.” The goal of the Constitution was to curb these problems. As a founding father, James Madison strove to maintain the distinction between might and right.

Id.

¹²¹ This assumes, of course, that the project passes constitutional muster as a “public use” in the first event.

¹²² Merrill, *The Economics of Public Use*, *supra* note 2, at 86.

more responsible for, and hence arguably deserving of, the surplus generated by the project.”¹²³ However, this argument cannot be taken seriously, since labor theory is a rule that stands to protect those who have actually used and added to property.¹²⁴ Professor Merrill presumes to apply it to a developer who has, as of yet, only made a claim to add value to the property. Because the assembly value is realized through the exercise of the eminent domain power, it is difficult to understand how labor theory yields any helpful insight here.

Because utilitarian principles have been served, and because labor theory does not apply, the individual rights principle must be reinstated. Presumably, the developer sought condemnation in order to overcome high transaction costs. If we properly recognize eminent domain as a power designed to ensure that useful projects occur, but not designed to ensure maximum profits to rent-seekers, then we understand that eminent domain only suspends individual rights to the extent that the useful project occurs. Once the project is adequately incentivized, eminent domain authority ends, and its egalitarian principles are no longer relevant in determining the distribution of surplus profits. At this point, the condemnee’s rights may now govern the distribution of the surplus gains. As we have discussed, the developer’s claim to individual rights to the property via labor theory fails. Thus, any surplus assembly gains derived from the exercise of eminent domain power must therefore vest in the condemnee.

It is worth noting that restitution theory presumes to disgorge the assembly value realized through eminent domain. That is, the increased value of the *property*, not the profit from the use itself. Were this not so, inefficient use would certainly occur, as the developer would have no incentive to continue in profitable activity if profits from such activities were disgorged. Instead, restitution theory would disgorge the developer’s profit from the increased value of the land that arises from its redistribution and new use. The general idea is that the developer should not profit twice from the transaction. The value from the

¹²³ *Id.*

¹²⁴ See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27, 17 (Thomas P. Reardon ed., Liberal Arts Press 1952) (1690). Locke explains that “every man has a property in his own person; . . . [t]he labor of his body and the work of his hands . . . are properly his. Whatsoever then he removes out of the state that Nature has provided and left in, he has mixed his labor with, and joined to it something that is his own, and thereby made it his property.” *Id.* We may properly understand this rule to apply *ex post*; labor theory does not entitle a developer who merely *intends* to add his labor—the theory does not disgorge one owner simple because another makes plans to put his hands to the soil. Instead, labor theory only makes land the rightful property of the laborer at the conclusion of his labor.

use owes to the developer, but the value of the property that is acquired through a forced transfer owes to the condemnee.¹²⁵

1. Eminent Domain's Purpose is to Facilitate the Market

Transaction costs, from the developer's perspective, are what an owner stands to gain from selling his property to an extraordinarily motivated buyer. It is the amount between the market value and the developer's valuation of the property that the owner seeks to claim for himself. The problem with transaction costs is that the two parties run the risk that they will not settle on an agreeable amount (due to the monopoly problem,¹²⁶ the holdout problem, or otherwise failed negotiations), and the transaction—which presumably would create a substantial aggregate benefit—will not occur.

Thus, the function of eminent domain in this transaction is to provide an escape hatch so that it will occur,¹²⁷ even if the failed negotiations prevent it from occurring in the market. But, it must not be made more than an escape hatch: eminent domain should resume the work of finding the amount which both the buyer and seller would have agreed to if negotiations had been successful. Of course, one of the flaws may have been that the price at which the owner would have sold was simply more than the developer would have paid. In this instance, if there is a public use, then the owner would receive less than he wanted; however, this would still be more than the property was worth (this is necessarily so, since the aggregate benefit is improved). Therefore, we might rightly call the owner "greedy," and be satisfied by saying that he should be happy with the amount that he receives. However, some scholars have used game theory to show that negotiations that fail due to greedy landowners is the exception rather than the rule.

[A]nalysis of "Ultimatum Game" bargaining experiments—which resemble negotiation under property rules—reveals that, contrary to standard economic assumptions, people do not try to hold out for all

¹²⁵ Notice that this reflects the way the transaction would likely occur in the market. An unwilling seller, faced with a willing developer-buyer, would seek to ascertain the developer's valuation of the property, and seek to negotiate a sale price at that amount. If property is necessary to the project, if the seller is truly unwilling (that is, uninterested in selling for market price), if the buyer is truly willing, and if rent-seeking is not an option, the negotiated price will invariably gravitate towards the developer's subjective value of the property.

¹²⁶ Merrill, *The Economics of Public Use*, *supra* note 2, at 65 ("[W]hen a seller of resources is in position to extract economic rents from a buyer[,] [t]his . . . can lead to monopoly pricing by the seller, to unacceptably high transaction costs, or to both."); Berger, *supra* note 16, at 225 ("Purchase is generally not feasible where the other party is in a monopoly position and does not want to sell at or even above the fair market value . . .").

¹²⁷ Presuming, of course, that the transaction would serve a public purpose.

the gains from a trade, but fairly split its potential profits. This optimistic finding regarding probable bargaining success is further supported by studies exploring the difference between sellers' and buyers' attitudes toward risk. Consequently, negotiation under property rules in real life should be more successful than theoretically inclined scholars tend to assume. Indeed, property rules may be viewed as promoting agreement and fair sharing among the parties.¹²⁸

Despite predictions that the responder will seek to maximize his profits by accepting whatever is offered, Lewinsohn-Zamir explains that offers that deviate substantially from fifty percent are typically rejected.¹²⁹ This rejection is due to the tendency of individuals to resist unfairness by rejecting substantially unfair offers.¹³⁰ In addition, “[i]t is highly unlikely that people ordinarily feel entitled to all the profits of every transaction. Rather, they expect to receive a certain, acceptable share.”¹³¹ If Lewinsohn-Zamir’s projections are correct, we should assume that, if negotiations were to succeed in the market, landowners would typically share forty to fifty percent of the assembly gains.¹³²

C. Determining Where Restitution Is Appropriate

As the Supreme Court affirms the constitutionality of taking property to hand-off to private developers, the valuation tests that weigh the public interests against the condemnees’ interests should now tip in favor of the condemnees. As such, valuation mechanisms must be reassessed in order to determine the correct mechanism in these scenarios. After all, a one-size-fits-all valuation mechanism has never been deemed appropriate.¹³³ Where private developers are the primary benefactors (thus failing *Hathcock’s* “independent public significance” test), just compensation based on fair market value, while making the condemnee whole, still enriches the rent-seeker. In the context of eminent domain, when a party who is not the public at large is

¹²⁸ Lewinsohn-Zamir, *supra* note 33, at 221.

¹²⁹ *Id.* at 232.

¹³⁰ *Id.* at 229–30.

¹³¹ *Id.* at 233.

¹³² *Id.* at 239.

¹³³ *Bauman v. Ross*, 167 U.S. 548, 569 (1897) (“It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just compensation.”); *see also* *United States v. 320.0 Acres of Land*, 605 F.2d 762, 780–81 (5th Cir. 1979).

But these obvious (although sometimes overlooked) precepts do not, by themselves, decide the multitudinous condemnation cases with their almost limitless range of fact complexes. Supplementing these precepts are a number of “working rules” and “practical standards” developed by the courts in their endeavor to do substantial justice in eminent domain proceedings.

Id. (citing *United States v. Cors*, 337 U.S. 325, 332 (1949)).

enriched,¹³⁴ it is appropriate to apply restitution as against the enriched party in order to afford the condemnee an opportunity to share in the profits of the endeavor. What becomes clear is that restitution is generally an inappropriate valuation mechanism by virtue of the fact that, nearly categorically, the public may not be disgorged.¹³⁵ As we have seen in *Hathcock*, when the government oversees a necessary project by which it derives direct benefit on behalf of the public,¹³⁶ the condemnee must be content with fair market value plus costs.

However, where a private actor especially benefits by virtue of the condemnation, he affects the factors that determine the just compensation to be paid. A condemnee's interests are never disregarded, although they may be eclipsed by a more compelling public need. Although, where the public need is particularly slight, or where the condemnee may receive the benefit of the proceeding without burden to the public, the condemnee's interest in receiving such benefit is substantially improved in relation to the interests to be balanced. Where restitution would be paid by a private developer rather than the public, and such payment is from the developer's surplus (thus not destroying his incentive to go forward with the project), restitution is not only appropriate, but obligatory in terms of fairness.

1. Application of Restitution Theory

Some examples may serve to illustrate the mechanics of restitution theory and its supporting principles. The restitution theory proffered here suggests that when a public use is not characterized by an extraordinary public need, public oversight, or independent public significance, as described in *Hathcock*,¹³⁷ the condemnee is entitled to the increased land value that results from the forced transfer of entitlement to the private developer. Supporting this theory are economic principles that illustrate that market value does not describe the total cost of the forced

¹³⁴ Restitution purports to disgorge parties of unjust enrichment. Restitution is thus inapplicable in pure public use takings, since the public at large cannot properly said to be "unjustly enriched." Because the public comprises everyone—including the condemnee—the condemnee cannot claim that anyone has been unjustly enriched, as even the condemnee has benefited by his property being put to public use.

¹³⁵ The public might conceivably be disgorged where the government controls and directly benefits by a project that is so frivolous that it cannot be considered "necessary" under *Hathcock*. However, such a project is not likely to pass constitutional muster as a public use in the first event. A disgorgement rule could be useful, however, if a court is unwilling to prohibit the project, since it could entitle the condemnee to all surplus profits from the project, thus deterring the government from other similar projects reducing demoralization costs and the harm to the condemnee.

¹³⁶ See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781–83 (Mich. 2004).

¹³⁷ See discussion *supra* Part 0.

transfer, foundational principles of property rights.

Assume that each of these scenarios represents a project that has a private developer as a major stakeholder, and that the state or local government does not provide a substantial subsidy for the project. A public use exists under *Hathcock* when there is an extraordinary public necessity, public oversight, or independent public significance.¹³⁸ This kind of public use will be represented as *H*. Assume that the increase in land value due to the forced transfer of entitlement to the private developer is surplus profit to the extent that disgorgement of such increase would not destroy the developer's incentive to go forward with the project. This surplus is represented as *S*. Assume that the market value of the condemned property is undisputed, and is represented as *MV*. Assume that because of additional costs such as demoralization costs, loss of perceived value, etc., *MV* does not represent the true cost of the forced transfer. Finally, assume that the Ultimatum Game indicates that the landowner will share 45% of the assembly gains. Taken as such, there are four possible scenarios:

Scenario A: *H* and *S* both exist.

Scenario B: *H* exists; *S* does not exist.

Scenario C: *H* does not exist; *S* exists.

Scenario D: Neither *H* nor *S* exist.

Under a *Hathcock* rule, we know that neither Scenario C nor D will be constitutionally permitted, since there is no public use under that rule. So our inquiry is at an end in a jurisdiction that adopts the *Hathcock* rule for determining public use as to C and D, since the taking will be prohibited. Restitution theory may inform a non-*Hathcock* jurisdiction as to scenarios, and it may still inform a *Hathcock* jurisdiction as to scenarios A and B.

a. Scenario A

Since *H* exists, and the condemnee receives *MV*, we recognize the need to give him something more to offset the other costs associated with the forced transfer. The public is not paying for the project, so restitution theory would not disgorge the public. However, the other *Bauman* policy applies, since the significant public usefulness of the project will flow to the condemnee. Thus, the condemnee's costs have been covered, and he has been provided with some benefit on top of that, resulting in an economic gain. However, restitution is still supported by the argument

¹³⁸ *Hathcock*, 684 N.W.2d at 783.

from principles. Because there is a presumption towards individual rights, and the eminent domain power should only go so far as to effect useful public projects, we must take notice of the developer's surplus, S . Utilitarianism requires that if a useful public project can occur while making the condemnee whole, then the taking is justified. But, it does not inform as to how to distribute S . Individual rights theory, on the other hand, does inform as to the distribution, and requires that the distribution flow to the condemnee as a nominal compensation for the deprivation of his property right. Finally, the Ultimatum Game suggests that this transaction would in the market arrive somewhere near $MV + (45\% \text{ of } S)$. Thus, restitution theory should allow the condemnee recovery in the amount of $(45\% \text{ of } S)$ over and above MV .¹³⁹

b. Scenario B

Since H exists, and the condemnee receives MV , we again recognize the need to give him something more to offset the other costs associated with the forced transfer. As in scenario A, the public is not paying for the project, so restitution would not disgorge the public, and the public usefulness of the project flows to the condemnee. Thus, we begin much the same as we did in A, where the condemnee's costs have been covered and he has been provided with benefit on top of that, resulting in an economic gain to the condemnee from the transfer. Unlike A, however, S does not exist, and thus, there is nothing to disgorge; anything that is taken from the developer would result in disincentivizing the developer and jeopardizing the project. Because the project satisfies the *Hathcock* test, principles of utilitarianism require that the project be protected. In A, the utilitarian goal in bringing about the project governs the transaction only to the point that it guarantees the realization of the project; once that is assured, the presumption towards protecting individual rights takes over. The presumption towards protecting individual rights will favor the condemnee. In the present scenario, because S does not exist—that is, no value is derived once the presumption towards individual rights takes over—there can be no restitution, because there is nothing to be disgorged. Restitution, therefore, must depend on the existence of S .

¹³⁹ See Berger, *supra* note 16, at 243 (“In the case of a private taking . . . it was suggested that the measure of damages should prima facie be the greater of the increase in value to the condemner's property or 150% of the loss to the condemnee.”). At any rate, the measure of compensation should be substantially greater than market value: the developer's gains should be significant in order to justify a taking that only speciously provides public utility, and equitable distribution of these gains should provide something like 150% of the condemnee's loss, as Berger suggests.

c. Scenario C

Since *H* does not exist, a *Hathcock* jurisdiction would prohibit the taking. Because *S* exists, as in A, there is something to be disgorged. Here, there are even stronger reasons to apply restitution theory. First, as in the previous scenarios, it is not the public who is being disgorged. But here, because *H* does not exist, there is no compelling public use that flows to the condemnee. Thus, *neither* of the *Bauman* policies against awarding restitution apply in this case. Second, the economic rationale is even stronger than in A, since there is heightened concern over demoralization costs.¹⁴⁰ Finally, game theory predicts a similar outcome as in A. Thus, where *S* exists, but *H* does not exist, we find the justification for restitution theory to be at its zenith.

d. Scenario D

For the same reasons as in C, the condemnee has a stronger claim to compensation over and above *MV*. The demoralization costs are also increased as they are in C—perhaps even more so: if we assume from the nonexistence of *S* that the project is only marginally profitable, then the condemnation seems to lack not only a direct public purpose, but also a compelling private interest. This merely marginal aggregate utility might not be sufficient to justify the initial presumption towards individual rights. However, because *S* does not exist, the private developer cannot be disgorged without endangering the project. Accordingly, the condemnee does not receive the benefit of the public project, and the community suffers heightened demoralization costs. This scenario lacks any compelling justification, and should be prohibited as economically inefficient.

IV. CONCLUSION

Redirecting our focus to the just compensation clause is the most effective response to a vacuous public use standard. In cases of condemnations that fail a *Hathcock* analysis, such as condemnations for the benefit of rent-seeking developers, a restitutionary compensation would provide a share of the gains to the condemnee, who deserves it at least as much as the developer himself. The historical presumption against restitution is founded upon: (1) the idea that the public should not be made to pay any more than necessary to effect a public project, and (2) the idea that the public utility of the project flows to the condemnee, providing him with value. In the types of takings we

¹⁴⁰ As the community perceives condemnations to occur more frequently or without compelling public purpose behind them, demoralization costs increase.

have discussed, where the private developer is the primary stakeholder, who foots the bill through the local government to purchase the condemned land, and provides only attenuated benefit to the public, the presumption against restitution evaporates. An analysis of the principles governing the transaction reveals that the condemnee has the strongest claim to surplus assembly gains. Because of demoralization costs, subjective values, speculative public utility, substantial private enrichment, and guiding principles of individual rights and utilitarianism, restitutionary compensation is a significantly more just valuation mechanism than mere fair market value.