The Real Story of Eminent Domain in Virginia

The Rise, Fall, and Undetermined Future of Private Property Rights in the Commonwealth

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by Jeremy P. Hopkins, Esq.
The Real Story of Eminent Domain in Virginia: 
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INTRODUCTION

A state’s treatment of the right to private property is one of the most telling indicators of the character and nature of its government. Where strong private property rights exist, freedom and liberty almost always abound. Where private property does not exist, or where the protections of this right are weak, government control and domination prevail. As the United States Supreme Court once declared, “[i]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.” Virginia’s own Thomas Jefferson announced that “the defense of private property is the standard by which ‘every provision’ of law, past and present, shall be judged.” The Court’s stated test and the standard Thomas Jefferson pronounced both indicate that the character and nature of Virginia’s government has fallen a long way since the days of Virginia’s founders.

I. The Importance of the Right to Private Property

The right to private property is one of the fundamental rights of a free society. It protects all persons, regardless of gender, race, age or socio-economic status, and it provides a bulwark against tyranny and arbitrary or abusive governmental action. Without this right, the people cannot be truly free and independent of their government. As George Washington proclaimed: “Private property and freedom are inseparable.”

The right to private property protects individuals in many ways. First, it divides power, both between the government and the people and between the people themselves. It provides individuals with a sphere of freedom and independence in which each individual may act unmolested by government or by others. This sphere of freedom gives individuals control and independence within the sphere and provides a buffer from governmental encroachment or interference from others.

Secondly, the right to own, possess, use, and dispose of property allows people to gain true security and independence, in addition to giving individuals the opportunity to attain a better quality of life. Private property gives individuals control over goods, resources, and

2 The right to private property and firm protections of this right also greatly benefit society as a whole because private property encourages individuals to be industrious, to take risks, to invest, and to expend their energy and resources on new and productive endeavors. See generally Hernando De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000) (discussing ways in which the protection of private property benefits society); see also Richard Pipes, Property and Freedom 63 (1999); David Upham, The Primacy of Property Rights and the American Founding, 48 The Freeman: Ideas on Liberty 2 (Feb. 1998) (visited Oct. 6, 2006) <http://www.fee.org/publications/the-freeman/article.asp?aid=3188> (explaining the Founders belief that “the private ownership of property provided not only real power to the citizens, it also instilled in them that virtue of self-reliance and self-governance essential to a politically self-governing people”).

The Virginia colonists at Jamestown, as well as the Massachusetts colonists at Plymouth, struggled until they instituted a system of private property. Tom Bethell, NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 34-43 (1998). James Madison also touched on the benefits of property rights when he rhetorically asked: “What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?” The Federalist No. 62, at 324 (James Madison) (George W. Carey and James
means of production, which in turn lends individuals the opportunity to obtain economic independence and security. In the words of Thomas Jefferson: “[Economic d]ependence begets subservience and venality.” Contrarily, economic independence begets freedom, liberty, and industriousness. While many other countries have either denied the right to private property or provided little protections for this right, the opportunity to obtain, possess, use, and transfer private property has attracted millions of immigrants to America. American history is replete with individuals, many from modest and humble backgrounds, who attained “the American dream” due in large part to their right to obtain and use property in productive ways. Meanwhile, thousands of Americans have shed their blood to preserve this cherished right for themselves and their posterity.

Thirdly, the right to private property empowers the people and leads to political freedom. In any society where the right to private property existed without political freedom, the people could simply remove themselves from the oppressive state or finance a revolution, just as America’s forefathers did. History proves that governments that control the property within a state control the people. Many of history’s most tyrannical rulers stripped the people of their right to private property precisely because this right empowers the people and makes it more difficult for those in power to control the people. “Property . . . by its very nature sets limits to state authority.” It “is the antithesis of Socialism or Communism [and] . . . an insuperable barrier to the establishment of either collective system of government.”

Finally, the right to private property undergirds and protects all other rights. It truly is “the guardian of every other right.” A cursory review of the Bill of Rights reveals that many of the rights Americans cherish have little significance without the recognition and protection of private property. Not only do many of these rights presume the right to private property, but these rights have little meaning without the right to private property.

For instance, what good is the right to free speech if one has no property from which


4 Id.

5 See Pipes, supra note 2, at 211-25. The Communist Manifesto states that “the theory of the Communists may be summed up in a single sentence: Abolition of private property.” Id. at 51.

6 Id. at 211.


9 JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 26 (2nd ed. 1998) [hereinafter GUARDIAN]; see also Chodorov, supra note 3 (demonstrating how the denial of the right to private property drastically reduces the value and meaning of other rights).

10 The Fourth Amendment guarantees that “the people [shall] be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Third Amendment provides that “[n]o soldiers shall, in time of peace be quartered in any house, without the consent of the owner.” U.S. Const. amend. III. The Second Amendment assures “the right of the people to keep and bear arms.” U.S. Const. amend. II. The Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law” and that no person’s “private property [shall] be taken for public use, without just compensation.” U.S. Const. amend. V.
to speak freely? What good is the right to free speech if the government owns all printing presses and all means of recording, producing, and dispensing speech? What good is the right to assemble and petition the government if one has no property on which to freely assemble and petition? What good is the right to worship freely if one has no property on which to freely worship?11 What good is the right to worship freely if the state owns the church, employs the clergymen, and prints all religious material? What good is the right to keep and bear arms if one cannot own and possess arms? What good is the right to be free from the quartering of troops or to be free from unreasonable searches and seizures if one does not own property from which to exclude troops or be free from unreasonable searches? Without private property, all these rights become mere privileges that are subject to government control.

II. Virginia’s Early History of Protecting the Right to Private Property

The founding fathers from Virginia were acutely aware of the importance of private property rights. They recognized the interdependence between property rights and individual liberty, and they understood the true nature of property rights. They knew the right to private property is different from a mere privilege. The first is an inalienable right, independent of government, while the latter is merely a license, granted by and taken away at the discretion of the government.

The Virginia Constitution of 1776 states

[that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.12]

Early Virginians understood that government does not create or grant property rights. Instead, as James Madison wrote, “[g]overnment is instituted to protect property of every sort.”13 Arthur Lee of Virginia captured the importance the founders placed on property rights when he announced that “[t]he right of property is the guardian of every other right, and to deprive a people of this is, in fact, to deprive them of their liberty.”14

Due to their recognition of the importance of private property rights, Virginia’s founders placed great protections around the right to private property. During the state ratifying conventions, Virginia was one of two states to call for specific safeguards of private property

11 America’s law books are filled with cases in which individuals were prohibited from worshipping or exercising their religion (even in peaceful and non-harmful ways) on government-owned property and facilities.


13 See James Madison, Property, in Private Property and Political Control 30 (The Foundation for Economic Education 1992) (1792). Aside from making clear that government is instituted to protect private property, James Madison’s essay entitled “Property” eloquently explains the nature of property and some of its many virtues. See Id.; see also Frédéric Bastiat, Property and Law, in SELECTED ESSAYS ON POLITICAL ECONOMY (Seymour Cain., trans., George B. de Huszar, ed. 1995) (1848) available at <http://www.econlib.org/LIBRARY/Bastiat/basEss3.html> (explaining that property pre-exists the state and that the state does not create property but rather the state is created to protect property).

14 GUARDIAN, supra note 9, at 26.
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In addition to acknowledging private property as an inalienable right, the Virginia Constitution of 1776 stated that Virginians “cannot be . . . deprived of their property for public uses, without their own consent, or that of their representatives so elected.” The 1776 Constitution also guaranteed Virginians the right to a jury trial in all cases involving property: “That in controversies respecting property . . . the ancient trial by jury is preferable to any other, and ought to be held sacred.”

Even before Virginia added a provision requiring just compensation to its Constitution, Virginia lawmakers began requiring payment of just compensation for takings of private property. “[U]ncompensated condemnation of private property was thought to violate the fundamental principles of [Virginia’s] legal system.” In Crenshaw v. Slater River Co., which was decided before Virginia added the Just Compensation Clause to its Constitution, the Virginia Supreme Court declared that “fair compensation must always be made to the individual” in order for a taking to be “lawful.”

All four of the judges [in Crenshaw] agreed that the attempt to take property without compensation was unconstitutional. Three rested their decision on broad principles of law, while one maintained that this action violated the mandates of Art. I, § I of the Virginia Declaration of Rights in that it deprived persons of the means of “possessing property.”

The Virginia Constitution of 1830 added a provision that expressly guaranteed just compensation for property taken. “The men who framed that Constitution . . . saw fit to make th[e] limitation upon the rights of the Legislature, [so] that they should pass no law whereby private property should be taken for public uses without just compensation.” The Virginia Constitution of 1902 added further protections for Virginia property owners by extending the right to compensation for property that is “damaged” but not physically taken. One representative at the Virginia Constitutional Convention of 1901-02 summarized the purpose of this added protection as follows:

What we wish to do is to insure the right of an individual, when his property is damaged, to be compensated just as . . . the Constitution of 1829-30 guaranteed his right to be compensated for property taken . . . All we propose to say now is . . . that you shall not injure . . . materially damage . . . [or] permanently diminish the value of an individual’s property for any purpose without making due compensation to him.

15 Id. at 53.
16 Va. Const. of 1776, § 6, supra note 12.
18 See Guardian, supra note 9, at 31.
21 1 Howard, supra note 19, at 212 n.126.
22 The Constitutional Convention of 1829-30 has been called “the last of the great constituent assemblies in American history.” Id. at 10. James Madison, James Monroe, John Tyler, John Marshall, and John Randolph of Roanoke were among the notables. Id. Three past, present, or future United States Presidents, seven past, present, or future United States Senators, and twenty-six past, present, or future United States Congressman were delegates to the Convention of 1829-30. Id.
23 1 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Held in the City of Richmond, June 12, 1901 to June 26, 1902 714 (1906) [hereinafter Debates].
24 Id. at 724.
The change in the Virginia Constitution of 1902 was a direct “response to a growing concern that some individuals were being forced to bear an inequitable portion of the expense of public projects.”

The debates at the Virginia Constitutional Convention of 1901-02 indicate that most Virginians at that time were unwilling to sacrifice individual rights and liberties, particularly the individual right to private property, for the sake of so-called progress. The representatives at the convention believed that “progress” is not truly progress if it comes at the expense of any individual’s private property rights. One representative captured this prevailing belief when he declared that he was “against the idea that there is any legitimate progress in a State where the individual rights are ignored for anybody’s benefit.” The representatives genuinely believed “there can never be any permanent benefit to a State where the individual rights of the citizen are not recognized over and above everything else.”

The importance of protecting each individual’s private property rights led the representatives to vote to ensure that no individual suffers losses or a disproportionate share of the cost of a public project, even if this new requirement of compensation meant less “progress” or “capital” for Virginia’s cities. One representative declared that he was “willing, if capital chooses to get scared because the Constitutional Convention of Virginia wants to protect her citizens in the enjoyment of their property and prevent its being sacrificed for public use, to let capital get scared and stay out of here, if it is that scary.”

In other words, the representatives were unwilling to sacrifice the property of any individual for more capital or revenue for Virginia or its cities. Unlike today, the representatives placed more value on individual constitutional rights than on money, increased jobs, and growth. Another representative explained that while he “desire[d] to see the progressive cities of this state go forward . . . it should not be done at the expense of the individual.” This representative further added:

> If it is necessary for progress that these great works [i.e., public projects] should go on, then let the burden be borne by the entire community, or . . . by the corporation which is seeking for its own private gain to take or injure or to destroy or to damage the property of the individual.

Contrary to today, principled reasoning and adherence to strong protections of each individual’s private property rights held sway over pragmatic reasoning and utilitarian notions that progress can be attained by sacrificing select individuals and their private property.

Virginia’s early recognition of the importance of private property rights, its belief in the sacredness of this right, and its strong protections of this right mirror the prevailing view in early America. America’s founders “saw property ownership as a buffer protecting individuals

25 1 Howard, supra note 19, at 221.
26 They believed, in the words of Sir William Blackstone, that “the public good is in nothing more essentially interested, than in the protection of every individual’s private rights . . . .” 1 William Blackstone, Commentaries *135.
27 Debates, supra note 23, at 729.
28 Id.
29 Id. at 713.
30 Id. at 715.
31 Id.
The frame of the property protections alongside the Fifth Amendment’s “criminal justice protections, such as the prohibitions against double jeopardy and self incrimination, underscored the close association of property rights with personal liberty.”

Aside from referring to the three fundamental rights of life, liberty, and property, “[t]he Fifth Amendment explicitly incorporated into the Constitution the Lockean conception that protection of property is a chief aim of government.”

In Federalist 10, James Madison noted that “democracies have ever been . . . found incompatible with . . . the rights of property.” Democracies place the private property of each individual at the whim of the majority or a politically connected faction. Unlike a democracy, which allows controlling factions to use government to invade the property rights of others for its own benefit, the framers constructed a constitutional form of republican government that protects each individual from the government’s bending to the will of a powerful or

from governmental coercion.” Unlike modern courts, the founders “did not distinguish between personal and property rights.” Instead, they believed true liberty could not exist without the right to private property; they believed property rights and personal rights were interdependent.

In Federalist 54, James Madison penned: “Government is instituted no less for the protection of the property than of the persons of individuals.” In his “Address at the Virginia Convention” he stated:

"Government is instituted no less for the protection of the property than of the persons of individuals."
politically connected faction. The Public Use and Just Compensation Clauses place defined restrictions on the government’s power to invade the rights of individual property owners. These constitutional restrictions prohibit any faction, large or small, from improperly using the powers of government to harm or invade the rights of individual property owners.

The United States Constitution reflects America’s rich tradition of strong private property rights. Many of Virginia’s own founders fostered this tradition, which was further solidified by the judicial decisions of Virginia’s John Marshall in his role as Chief Justice of the United States Supreme Court. Sadly, Virginia has disregarded the right to private property its founders held dear, and it has eliminated many of the protections its forefathers put in place to protect this sacred right. Where Virginia was once unwilling to seek progress at the expense of individual property owners, it is now willing to sacrifice individual property owners for what state and local officials deem “progress.”

III. An Overview of the Demise of Private Property Rights in Virginia and the Causes of this Demise

The growth of government greatly eroded the once powerful protections for private property. As government has grown, private property rights have diminished. With the growth of government came an increase in the number of governmental, quasi-governmental, and private entities able to wield the extraordinary power of eminent domain over the people. The growth of government also spawned numerous government, social, and public programs that greatly diminished private property rights. The traditional and constitutional protections of private property stand in the way of many of the public programs politicians seek to implement, and both politicians and courts often deem their desired programs to be more important than the private property rights of the people and the protections of these rights.

All three branches of Virginia’s government are responsible for the demise of private property and the diminished protections of this right in Virginia. The General Assembly (hereinafter Assembly) greatly diminished the protections of the people’s property rights by loosely defining public use and by carelessly granting broad powers of eminent domain to a myriad of entities, both public and private. The Assembly gave immense, unbridled, and often unchecked power to numerous entities, many of which are unelected bodies that are wholly unaccountable to the people. At the same time the Assembly doled out the power of eminent domain and broadened the scope and reach of this power over the people, it repeatedly refused to lend protection to Virginia property owners, the very people subject to this power.

40 See Akers v. Mathieson Alkali Works, 151 Va. 1, 11, 144 S.E. 492, 495 (1928) (acknowledging that “taking[s] for private purposes . . . [are] forbidden by the fundamental principles of a republican form of government”).
42 With regard to private property, one constitutional scholar noted that the “Marxist . . . wants to abolish it, . . . the social democrat . . . wants to limit it, and the Lockean . . . wants to protect it.” Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 25 (1985). Virginia shifted from the Lockean view to the social democratic view, and it is moving closer to the Marxist view.
44 See Guardian, supra note 9, at 135-36; Pipes, supra note 2, at 210.
45 This paper focuses on eminent domain, not on taxation, zoning, and other areas in which Virginia’s government has greatly diminished private property rights. As such, this paper will not include a discussion of many of the public programs that have diminished private property rights.
Courts eroded the constitutional protections of private property through result-oriented judicial decisions that redefined the Constitution’s written protections of private property so as to avoid the inherent conflict between the constitutional protections of private property and certain government projects or takings. With regard to eminent domain, courts have shirked their role as a check on the legislative branch and made legislators the judges in their own case. In *Kelo v. City of New London*, Justice O’Connor stated that “[a]n external, judicial check on how the public use requirement is interpreted . . . is necessary if this constraint on government power is to retain any meaning.”46 Far from providing an “external, judicial check” on the Assembly and those exercising the Assembly’s power of eminent domain, Virginia’s courts have quashed many of the protections against this intrusive power.

In *Kelo v. City of New London*, Justice O’Connor stated that “[a]n external, judicial check on how the public use requirement is interpreted . . . is necessary if this constraint on government power is to retain any meaning.”

The United States Supreme Court once warned that illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.47

Virginia’s Assembly continues to erode property rights and the protections surrounding these rights through “silent approaches and slight deviations from legal modes of procedure,” as well as through patent degradation of private property rights. Yet, far from “adhering to the rule that constitutional provisions for the security of person and property should be liberally construed” (emphasis added), Virginia’s courts narrowly construe the protections for private property owners.

Virginia’s executive branch of government also played a role in diminishing the protections of private property in Virginia. Virginia’s governors signed into law the many bills that both expanded the power of eminent domain over the people and greatly diminished the people’s protections from this power. These governors did not demand adequate checks on the power of eminent domain, nor did they demand increased protections for Virginia property owners subject to increased powers of eminent domain.48 Moreover, the Virginia Department of Transportation (hereinafter VDOT) and the Attorney General’s office, both of which fall within Virginia’s executive branch, perpetrate many of the eminent domain abuses in Virginia. VDOT commits many injustices against property owners, and the Attorney General frequently defends VDOT’s actions in Virginia’s courts.49

**IV. Current Property Rights Abuses in Virginia**

The United States Supreme Court’s infamous decision in *Kelo* thrust eminent domain into

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46 545 U.S. 469, 125 S. Ct. 2655, 2673 (2005) (O’Connor, J., dissenting). In *Kelo*, the United States Supreme Court declared that the Constitution does not prohibit local governments from using the power of eminent domain to take property from one person to give it to another.


the national spotlight and made eminent domain a topic of public debate for the first time in years. The *Kelo* case shocked the public conscience. However, the abuses seen in *Kelo* are not new to Virginians.50

A. Virginia Supreme Court Decisions

1. Ottofaro v. City of Hampton

In 2003, two years before the United States Supreme Court’s decision in *Kelo*, the Virginia Supreme Court approved a *Kelo*-type abuse in Virginia. In *Ottofaro v. City of Hampton*,51 the Virginia Supreme Court allowed the City of Hampton to take Frank and Dora Ottofaro’s property and give eighty-two percent of the property to a private developer to build a shopping center.52 The court’s attempted justification of its ruling is even more troublesome than its final decision. The court reasoned that the taking was permissible because the City would maintain ownership of the property and was merely “leasing” the property to the developer instead of selling it to him.53

Under the court’s rationale, the government or other condemnors in Virginia may take a person’s property solely to lease the property to another person. This case paves the way for takings in which property is taken from one person and transferred to another. The only restriction apparent in the *Ottofaro* decision is that the condemnor must lease the property to the person receiving it, instead of selling the property to that person.

2. Hunter v. Norfolk Redevelopment and Housing Authority

In *Hunter v. Norfolk Redevelopment and Housing Authority*,54 (hereinafter NRHA) the NRHA took Robert and Emily Hunter’s property solely because their neighbors had not maintained their property. The Virginia Supreme Court ruled that the government can take non-blighted properties simply because these properties are within an area that local officials deem to be blighted.55 At its essence, the ruling means that the government may take the well-maintained property of a law-abiding, tax-paying property owner simply because his neighbors

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50 The abuses discussed herein are just a sampling of the many abuses in Virginia. It is by no means an exhaustive list. The author has first-hand knowledge of each case discussed in sections IV.A, IV.B, and IV.C of this paper, except the *Hunter* and *Hoffman* cases discussed infra in sections IV.A.2. and IV.A.4. Other abuses in Virginia are listed at The Virginia Property Rights Coalition, *Examples of Eminent Domain Abuse in Virginia* (visited Aug. 29, 2006) <http://www.vapropertyrights.org/support/06abuses.html>.


52 The city used the other eighteen percent of the property for a public road.

53 The supreme court pointed out that

contra the landowners’ contention, there is no evidence in the record that suggests that the residue of the landowners’ former property will be conveyed to a private entity. Rather, according to the record, the City may transfer the residue of the landowners’ former property to the Hampton Industrial Development Authority, a political subdivision of the Commonwealth, which will lease the property to a private developer.

*Ottofaro*, 265 Va. at 32, 574 S.E.2d at 238 (emphasis added).

54 195 Va. 326, 78 S.E.2d 893 (1953).

55 In the words of the Virginia Supreme Court:

The condemnees contend that they were unlawfully denied the right to introduce evidence to show that their property was not ‘blighted,’ or a slum, or ‘detrimental to the safety, health, morals, or welfare of the community,’ within the meaning of section 36-49. The answer to this argument is that the statute is designed to eradicate slum or blighted areas. Consequently, if an area as a whole is subject to rehabilitation[,] the condition of a single structure is immaterial.

*Hunter*, 195 Va. at 339, 78 S.E.2d at 901.
have not maintained their property. The court’s ruling allows local governments to strip one person of his hard-earned property based on the actions of his neighbor. No other area of the law allows the government to strip an individual of his constitutional rights based wholly on the actions of another.

3. Norfolk Redevelopment and Housing Authority v. C & C Real Estate, Inc.

In Norfolk Redevelopment and Housing Authority v. C & C Real Estate, Inc.,\textsuperscript{56} the NRHA attempted to take a family business for the benefit of the Coca-Cola Company. Under the guise of its conservation project, the NRHA attempted to take a small business owner’s property to build a parking lot for the Coca-Cola Company, which is situated adjacent to the owner’s property. The owner operates an auto parts salvage yard in an industrial zone of the city—the only part of the city designated for salvage yards. When Coca-Cola hinted that it might expand its Norfolk facility or relocate to another city, the NRHA decided to help by acquiring the salvage yard through eminent domain and turning it into a parking lot.

This case marks one of the rare examples in which the landowners successfully defeated the taking, as the owners prevailed in the lower court. However, when NRHA appealed, the Virginia Supreme Court granted its appeal and upheld the lower court’s decision only on technical grounds. Under the court’s decision, the NRHA is free to take the owner’s property after waiting one year.


The case of Hoffman Family, L.L.C. v. City of Alexandria\textsuperscript{57} is the latest eminent domain abuse in Virginia. This case reveals that the limited protections the United States Supreme Court announced in \textit{Kelo} are much greater than the protections the Virginia Supreme Court now gives Virginia property owners. In \textit{Hoffman}, a private developer, the Trammell Crow Company, sought its neighbor’s property. The developer wanted to move a stormwater drainage box culvert off of its property and onto the Hoffmans’ property so that it could construct a larger and much more lucrative private development consisting of condominiums, apartments, and commercial office space.

After the Hoffmans declined to sell their property to the developer, the City decided to take the Hoffman’s property for the developer and to move the box culvert located on the developer’s property onto the Hoffman’s property. The taking was entirely unnecessary but for the developer’s private development, and the city’s own employees confirmed this fact. The Virginia Supreme Court upheld the taking despite the fact that the city took the Hoffman’s property specifically to benefit the private developer.

The court explained that “the fact that neighboring property owners will benefit from [a taking] is irrelevant.”\textsuperscript{58} The court added that it will “not inquire into the issue of a locality’s good faith in initiating condemnation proceedings if the locality’s purpose is clearly stated in the resolution or ordinance [authorizing the taking].”\textsuperscript{59} In other words, Virginia’s courts will permit takings for the benefit of an identifiable private party. If courts cannot inquire into a locality’s “good faith in initiating condemnation proceedings,” they cannot provide a check against bad-faith takings designed to benefit a private party. The court effectively gave condemnors a free

\textsuperscript{56} 272 Va. 2, 630 S.E.2d 505 (2006).
\textsuperscript{57} 634 S.E.2d 722 (Va. 2006).
\textsuperscript{58} Id. at 729.
\textsuperscript{59} Id. at 728.
pass to circumvent the constitutional prohibition against takings for private purposes. The Hoffman decision paves the way for takings that are a mere pretext for bestowing a private benefit on a particular private party that will benefit from the taking.60

Contrary to the Virginia Supreme Court’s ruling and rationale in Hoffman, the United States Supreme Court in Kelo stated that “the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.”61 The Court added: “Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”62 The Court then pointed out the fact that “there was no evidence of an illegitimate purpose in the [Kelo] case . . . [and] the City’s development plan was not adopted ‘to benefit a particular class of identifiable individuals.’”63 Thus, contrary to the Virginia Supreme Court’s interpretation of Virginia law as expressed in Hoffman, the United States Supreme Court’s interpretation of federal law in Kelo prohibits takings that are mere pretexts for bestowing a benefit on an identifiable private party. The public was outraged by Kelo; however, Kelo gives Virginia property owners significantly more protection than the Virginia Supreme Court’s ruling in Hoffman gives them.64

5. Cartwright v. Commonwealth Transportation Commissioner of Virginia

In Cartwright v. Commonwealth Transportation Commissioner of Virginia,65 Raymond

60 If courts refuse to review the actual purposes of a taking, they will not prohibit takings for private purposes in which the alleged public use is an outright sham or pretext for achieving private purposes. Under the court’s decision in Hoffman, a taking is per se constitutional the moment a condemnor declares its taking is for a public use, regardless whether ulterior motives exist or whether the taking is actually designed to further private purposes. Compare City of Novi v. Robert Adell Children’s Funded Trust, 253 Mich. App. 330, 659 N.W.2d 615 (2002) with City of Novi v. Robert Adell Children’s Funded Trust, 473 Mich. 242, 701 N.W.2d 144 (2005).

The court in the first case held that:

The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited. Where . . . the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.


The court in the second case effectively ruled that takings for public roads are per se constitutional regardless of the real motives or purposes behind the taking, even if such purposes are to serve identifiable private interests. In other words, local governments may take property for developers or big businesses, as long as they are building a “public” road for the developer or big business. Under the rationale of the second case, courts ignore the fact that the developer or business asked for the taking, funded the taking, and will be the only conceivable person to use or benefit from the taking and construction of the road. The legal principles applied in the first case provide a check on local governments; the legal rationale expressed in the second case removes this check. Over the last several years, the Virginia Supreme Court has adopted the position of the court in the second case and, as Chief Justice Hassell noted in his dissent in Hoffman, has rejected the principles it expressed in Rudee and Phillips.

61 125 S. Ct. at 2661.
62 Id.
63 Id. at 2661-62.
64 The Fifth Amendment of the United States Constitution, and the protections it provides, was not at issue in Hoffman. See Hoffman, 634 S.E.2d 722, 731, n.7 (Va. 2006) (stating that “the holding in Kelo was based exclusively on the United States Constitution, which is not at issue in this appeal”).
65 270 Va. 58, 613 S.E.2d 449 (2005). This case arose out of a condemnation action discussed infra in section
Cartwright, a citizen of Virginia, sought a document from VDOT under the Virginia Freedom of Information Act (hereinafter FOIA). This document was a compilation of public records that VDOT collected with money provided by the Virginia taxpayers. When Mr. Cartwright asked for the document under FOIA, VDOT denied his request. VDOT claimed that Mr. Cartwright, unlike his neighbor and other Virginia citizens, could not have the document because he was a victim of eminent domain. VDOT argued that because it had sued Mr. Cartwright to take his property, he could no longer exercise his rights under FOIA. VDOT essentially contended that Mr. Cartwright lost his rights as a Virginia citizen the moment VDOT took his property. VDOT asserted that Mr. Cartwright must pay an attorney to get the document through the eminent domain action.

The lower court agreed with VDOT and denied Mr. Cartwright the document. Mr. Cartwright appealed to the Virginia Supreme Court. After Mr. Cartwright appealed, the Virginia Attorney General's office took the case and opposed Mr. Cartwright on appeal. Only after the Virginia Supreme Court granted Mr. Cartwright's appeal did the Attorney General's office finally relinquish the document. The Attorney General's office then asked the court to dismiss the case because it had provided Mr. Cartwright with the document. Importantly, the Attorney General's office refused to reimburse Mr. Cartwright for the significant costs and expenses VDOT and the Attorney General's office forced him to incur up to that point to obtain a document to which he was entitled from the beginning.

The supreme court did not dismiss the case. Instead, it heard the case, reversed the lower court, and corrected the injustice. VDOT and the Attorney General's office spent more than $60,000 of the taxpayers’ money trying to keep a document from a citizen of Virginia—a document the citizen was clearly entitled to under Virginia's FOIA provisions.

B. Virginia Circuit Court Decisions

The vast majority of property rights abuses in Virginia occur in the lower courts, where they go unnoticed and unpublicized. Many of the cases in which these abuses occur never make it out of the lower courts because the property owners do not have the money needed to fund an appeal. Other cases do not make it out of the lower courts because the Virginia Supreme Court refuses to hear the cases. Property owners who lose their property in the lower courts have no automatic right of appeal in Virginia, and the Virginia Supreme Court grants an appeal in less than one of every ten cases appealed to it.66 Thus, many owners never get relief from the injustices they suffer in the lower courts.

1. Board of Supervisors of Halifax County v. Lacy

A most egregious abuse occurred in the case of Board of Supervisors of Halifax County v. Lacy.67 In this case, the Board of Supervisors of Halifax County (hereinafter Board) took the Lacys’ property to build a driveway for the Lacys’ neighbor, the King family. The Board unabashedly admitted that the taking was to “serve” the King family.

The Kings access their property by a gravel driveway that crosses the Lacys’ property. Until and unless the driveway is graded and paved to meet VDOT standards, local

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67 No. CL05-125 (Halifax County Cir. Ct. 2005).
ordinances prohibit the Kings from subdividing their property and selling it to non-family members. A paved road meeting VDOT standards will greatly increase the value of the Kings’ property and allow them to develop their property. Needless to say, the Kings greatly desire this road.

The Kings asked the Lacys to buy the property on which the driveway is located, but the parties could not agree on a price. After the Lacys refused to sell their property, the Kings asked the Board to take the Lacys’ property for them. The Kings also gave the Board a check for the estimated cost of acquiring the Lacys’ property. The Board subsequently took the Lacys’ property by eminent domain.

The Board used the King’s money to pay for the acquisition of the Lacys’ property, and it is now using the state taxpayers’ money, through VDOT funds, to build and maintain a so-called public road for the Kings that is really no more than a paved driveway. This driveway runs 9/10 of a mile and dead ends into the King’s property. The road literally goes nowhere but to the King’s property. It does not connect any other roads, and the only conceivable persons who will use this road are the Kings and their visitors.

The Lacys attempted to defend their property, but a Virginia circuit court ruled that Virginia law does not prohibit the taking. The Lacys appealed to the Virginia Supreme Court, but it denied their appeal. This case sets dangerous precedent in Virginia. Private developers, corporations such as Wal-Mart, and politically connected parties like the Kings will be able to buy property with little or no access and then have the local government take the surrounding property in order to provide them better access and to allow them to develop their property.

The Virginia circuit court in Lacy gave less protection to the Lacys than the United States Supreme Court gave to the owners in Kelo. In Kelo, the majority stated that condemnsrns cannot take property “to benefit a particular class of identifiable individuals.” The Court pointed out the fact that the beneficiary of the taking, Pfizer, Inc., was unknown at the time the city adopted its project. In other words, the city did not adopt the project particularly to benefit Pfizer. The Court further stated that condemnsrns are not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”

Under the United States Supreme Court’s rationale, the taking in Lacy is impermissible. The Board’s taking was always intended to benefit the Kings, “a particular class of identifiable individuals.” The Kings asked for the taking, paid for the taking, and are the sole beneficiaries of the taking. Furthermore, the Board unabashedly admits that it took the Lacys’ property because

68 VDOT is using hundreds of thousands of state tax dollars to construct this driveway. During a time in which the Assembly raised taxes due to a shortage in state funding, it is curious that VDOT has enough money to construct and maintain a driveway for the Kings at an expense of several hundred thousand dollars.

One interesting point should be noted here: If Virginia’s current eminent domain laws did not permit the government to take property much more cheaply than one can buy it on the open market, developers and other politically connected parties would not use the government to take property for them. As the Kings discovered, it is much cheaper for a buyer to give his money to the county and have the county take property for it. In the Lacy case, the Lacys would not sell part of their farm without accounting for the business losses they would suffer as a result of the sale and construction of the proposed road. The construction of the proposed road, which included raising the grade of the road and adding more than five drainage easements that directed water runoff into the Lacys’ crop fields, severely impacted their crop production and, thus, their farming business. By taking the Lacys’ property through eminent domain, the Kings did not have to compensate the Lacys for their business losses because such losses are non-compensable in eminent domain cases. See infra note 77.

69 125 S. Ct. at 2662.
70 Id. at 2661-62 n.6.
71 Id. at 2661.
of the Kings and to serve the Kings. Similar to the *Hoffman* case,\(^{72}\) the *Lacy* case reveals that Virginia property owners have even less protection than the United States Supreme Court gave the owners in *Kelo*.

2. Norfolk Redevelopment and Housing Authority v. Stevenson

The case of *Norfolk Redevelopment and Housing Authority v. Stevenson*\(^ {73}\) greatly illustrates the diminished protections of property rights in Virginia. In that case, the court denied Ms. Stevenson equal rights under Virginia law *solely* because she was a condemnee—a person whose property is taken by eminent domain. Virginia law allows all persons served with a lawsuit by publication, except condemnees, to reopen a case to correct “any injustice.”\(^ {74}\) The Assembly specifically singles out condemnees from all other persons in Virginia and denies them the same protections given to all other persons.

Ms. Stevenson owned a home in Norfolk, Virginia.\(^ {75}\) She lived in New Jersey and worked as a police officer while her father renovated the home. Ms. Stevenson’s father completed tens of thousands of dollars of renovations to the home and was continuing work on the home. He arrived at the home one day to discover a placard declaring that the NRHA owned the property. Ms. Stevenson immediately inquired about this placard and discovered that the circuit court had given NRHA her property without her notice and at a price fixed by NRHA.

NRHA claimed it was unable to locate Ms. Stevenson. Instead of making a concerted effort to locate Ms. Stevenson, the NRHA published notice in an obscure (and now defunct) business publication rather than publishing notice in the Virginian Pilot, a well-circulated and widely read local newspaper, where it was more likely to be seen. Although NRHA was able to place notice of its ownership on Ms. Stevenson’s home after it took her property, NRHA did not post notice of its impending taking on Ms. Stevenson’s home before it took her home.

The most appalling part of this story, however, was NRHA’s representation of value to the court. Obviously, Ms. Stevenson was not present at the court proceeding in which compensation was determined because no one notified her of the hearing, and she was unaware that NRHA was taking her home. In her absence, NRHA informed the court that Ms. Stevenson’s property was worth only $40,000. NRHA failed to inform the court of the extensive renovations Ms. Stevenson’s father had done to the inside of the house. NRHA also failed to inform the court that it paid $71,000 and $98,000, respectively, for two similar properties located in the same neighborhood and on the same street.

In Ms. Stevenson’s absence, the judge gave NRHA Ms. Stevenson’s property for only $40,000—the exact amount alleged by NRHA to be the value of the property. The judge declined to view the property before valuing it. Thus, two parties that had never been inside the home placed a value on it—the judge, who never viewed the property at all, and NRHA, which never saw the inside of the home.

Upon learning of the grossly unfair amount of compensation, Ms. Stevenson filed a motion to reopen the case to correct the amount of compensation the court awarded as “just compensation.” Ms. Stevenson filed her motion less than two months after the court gave NRHA her home for a mere $40,000. The court denied Ms. Stevenson’s request and held that

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72 See supra section IV.A.4.
74 Va. Code §§ 8.01-316, 8.01-317, 8.01-322.
75 The home was nearly 3,500 square feet and was situated on two residential lots.
the Virginia Code allows all persons, except condemnees such as Ms. Stevenson, to reopen a case to correct injustice in the judicial proceeding.

Ms. Stevenson also asked the court to give her constitutional right to just compensation the same protection given to all other fundamental rights. Such protection would have allowed the court to correct the unjust compensation based on the fact that Virginia law impermissibly infringed on Ms. Stevenson’s fundamental right to just compensation. The lower court refused to recognize Ms. Stevenson’s constitutional right to just compensation as a fundamental right. To the contrary, the court held that Ms. Stevenson was not entitled to the same protections that she would be given if another of her rights were invaded. The lower court reduced Ms. Stevenson’s right to just compensation to an inferior status among other rights and gave it the least judicial protection a court can give to any right.

Ms. Stevenson appealed to the Virginia Supreme Court. One of the main issues on appeal was whether private property and just compensation are fundamental rights. As in many of the eminent domain cases appealed to Virginia’s high court, the Virginia Supreme Court denied her appeal.

3. Commonwealth Transportation Commissioner of Virginia v. Wilmouth

In Commonwealth Transportation Commissioner of Virginia v. Wilmouth,76 VDOT took part of the Wilmouths’ property for construction of Route 221 in Bedford County, Virginia. The Wilmouths built a new, high-tech car wash on their property, which included a heated concrete pad and state of the art equipment. In addition to the property VDOT permanently took, VDOT also took the right to use the Wilmouths’ property during construction of Route 221. During the period of construction, which lasted more than a year, VDOT used the Wilmouths’ car wash as a staging area for construction and other construction-related purposes. VDOT stored heavy equipment and construction materials on the Wilmouths’ property and conducted construction activities on the property. VDOT’s use of the Wilmouths’ property severely interfered with the car wash and cut the Wilmouths’ sales in half during the period of construction. The Wilmouths struggled to keep their car wash in business.

At the trial to determine just compensation, the lower court did not allow the Wilmouths to tell the jury about the damages and severe losses VDOT’s physical occupation and use of their property inflicted upon their car wash. The lower court prohibited the Wilmouths from telling the jury about several facts, including (1) that VDOT completely extinguished access to their property from Route 221 for a period of four months, (2) that cars could not adequately maneuver in and out of the car wash while VDOT occupied the property, (3) that VDOT parked equipment upon, dumped gravel upon, and stored construction material on their property, (4) that VDOT cut off water to the car wash during certain periods of construction, (5) that VDOT’s construction activities on the property interfered with the use and operation of the Wilmouths’ car wash, and (6) that the actual number of vehicles washed during and after construction was drastically reduced. The court did not even allow the Wilmouths to show pictures of the actual construction that took place on their property.

The court held that Virginia law does not allow owners to recover damages resulting from construction a condemnor conducts on the owner’s property. The court also held that Virginia law does not allow owners to recover business losses resulting from a taking.

76 No. CL03010565-00 (Bedford County Cir. Ct. 2003).
Wilmouths received no compensation for the damages and losses VDOT inflicted upon them and their property. Virginia law permitted VDOT to take the Wilmouths’ property and occupy the property for construction purposes without reimbursing the Wilmouths for the resulting losses.

The Wilmouths appealed to the Virginia Supreme Court, but it denied their appeal, stating that it saw no reversible error in the lower court’s decision. The court reaffirmed its position that just compensation does not require compensation for business losses and that just compensation does not require condemnors to make owners whole for losses they inflict upon the owners.77 The Virginia Supreme Court’s refusal to correct this injustice has far-reaching implications.

Under the rationale of the lower court’s decision in Wilmouth, a condemnor could put a business owner completely out of business without having to compensate the owner for his losses. For example, VDOT could occupy a restaurant’s entire parking lot for several years during construction of a project, thereby eliminating all parking for the restaurant. Yet, as long as VDOT returns the parking lot to the owner at the end of construction, it would not have to pay the owner for the resulting loss of business. VDOT could put the restaurant completely out of business without having to compensate the owner for his losses. Surely, these circumstances do not reflect “just” compensation.

4. Willis v. City of Chesapeake

The case of Willis v. City of Chesapeake78 arose when the City took Mrs. Willis’ property without offering her any compensation. The City took her property for the construction of Highway 168, the Chesapeake Expressway. The City took a small portion of Mrs. Willis’ property, installed a drainage system on her property, redirected traffic across her property during construction, parked heavy equipment on her property, and damaged a water pipe to an old outbuilding located on the property.

When Mrs. Willis notified the City it had unlawfully taken and damaged her property, the City refused to acknowledge her claim. When Mrs. Willis filed suit to recover just compensation for the taking, the City’s actions got even worse. The City (1) denied that it had taken her property despite Mrs. Willis’ survey showing otherwise, (2) refused to compensate her for the taking, (3) countersued her for her horse fence that the City claimed encroached upon City property, even though the City had issued her a permit for the fence in its existing location, (4) filed numerous defenses, and (5) stated that even if the City had taken her property, it was the construction contractor’s fault, despite the fact that the City had given the contractor plans directing it to perform the construction on Mrs. Willis’ property. The City then fought Mrs. Willis for approximately two years before finally admitting it took her property and that it had directed the contractor to perform the construction on Mrs. Willis’ property. Even after admitting it had taken Mrs. Willis’ property and thus owed her compensation, the City offered Mrs. Willis a mere $7.56 for the taking. The city eventually offered Mrs. Willis more than

77 See Ryan v. Davis, 201 Va. 79, 82-83, 109 S.E.2d 409, 412-13 (1959) (stating business losses are non-compensable); see also May v. Dewey, 201 Va. 621, 632, 112 S.E.2d 838, 847 (1960) (“It seems to be well established that damages to the trade or business of the landowner are generally too remote to be a subject of damages, because they depend upon contingencies too uncertain and speculative to be allowed.”); Brown v. May, 202 Va. 300, 308, 117 S.E.2d 101, 107 (1960) (“Profits or losses from the operation of a business are too speculative and uncertain to be considered in determining value and may not be shown.”); Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 368, 137 S.E. 458, 462 (1927) (“No damages can be allowed for injuries to the [owner’s] business.”).

78 No. CL02-1351 (Chesapeake Cir. Ct. 2002).
$100,000 for the taking, a far cry from the insulting offer of $7.56.

5. Claytor v. Roanoke Redevelopment and Housing Authority

In Claytor v. Roanoke Redevelopment and Housing Authority, the Roanoke Redevelopment and Housing Authority (hereinafter RRHA) adopted a redevelopment plan and publicly stated that it was going to take the Claytor family’s property. When the Claytors’ tenants learned of the looming taking, they vacated the property. The RRHA’s continuing and public threat of condemnation made it nearly impossible for the Claytors to secure other tenants. At one point, the RRHA even offered to sell the Claytors’ property to a local church. The RRHA continued its actions for almost 20 years, all the while keeping the Claytors’ property under the threat of condemnation. The RRHA’s actions practically ruined the Claytors’ once-thriving property during this time. As the lower court found:

[T]enants vacated the area; (2) RRHA acquired, razed, and boarded up buildings in the surrounding neighborhood; (3) vandalism occurred (the Claytors’ buildings were repeatedly vandalized and were set on fire by arsonists); (4) underwriters refused to insure the vacant buildings, and thus the Claytors were not compensated for losses to these structures; (5) other nearby owners, who could not find tenants to occupy their properties, where unable to adequately maintain their properties; and (6) RRHA publicly offered tenants money to relocate out of the project area.

At the end of this twenty-year period, the RRHA decided it no longer desired the Claytors’ property and that it thus did not owe the Claytors any compensation for its actions. When the Claytors brought suit to recover compensation for the damages RRHA’s actions inflicted upon them, the RRHA took an interesting position. The RRHA argued that the Claytors could not recover compensation for their losses because their suit was both too early and too late. The RRHA contended that the Claytors were too late in their attempt to recover compensation because the statute of limitations expired. It simultaneously argued that the Claytors could not recover compensation until a later date because the RRHA claimed its redevelopment plan was still in progress and that it may still take the Claytors’ property at some time in the future.

Instead of using its resources to deal fairly with the Claytors and to provide compensation for the damages it inflicted upon the Claytors, the RRHA used its resources to fight the Claytors for almost five years. After intense and prolonged litigation, the Claytors eventually prevailed. The RRHA not only had to compensate the Claytors, but it paid dearly for immense legal expenses it could have easily avoided.

6. Commonwealth Transportation Commissioner of Virginia v. Stull

In Commonwealth Transportation Commissioner of Virginia v. Stull, VDOT took a portion of the Stull’s dairy farm. The dairy farm was the family’s livelihood, and the Stulls used several buildings, including barns, a milking parlor, and a silo, in their farming operation. VDOT took every one of the buildings the Stulls used for their farming operation and demolished them.

VDOT used its “quick-take” power, which allowed VDOT to take the Stulls’ property and raze their farm buildings before it paid the Stulls just compensation for the property. The quick-

80 Id. at *3.
81 No. CL02-65 (Alleghany County Cir. Ct. 2002).
take power allows certain condemnors, such as VDOT, to instantly take an owner’s property and evict the owner before it pays the owner just compensation. The quick-take power allows condemnors to effectively take an owner’s property now and pay for it later. The condemnor takes immediate title to the owner’s property and can also seize immediate possession of the owner’s property simply by filing a certificate in the local courthouse and depositing into court what it determines to be the value of the property taken.82

As is often the case, the trial to ascertain the compensation VDOT owed the Stulls did not take place until more than two years after VDOT took the Stulls’ property. During the long interim, the Stulls could not operate their dairy farm. They had no farm buildings (VDOT razed them) and no money to construct new buildings that were necessary to continue their farming operation. The Stulls did not have the necessary funds to rebuild the buildings VDOT demolished because the money VDOT deposited into court was less than 20% of the value of the buildings and land it had taken. VDOT erroneously claimed that the buildings had little value because they were “old.” VDOT ignored the fact that these buildings were entirely functional, were in good condition for their use, were well built, and had a long useful life remaining. The inability to continue their dairy farming operation inflicted severe losses on the Stulls.83 They had to sell their dairy cows and shut down their dairy farming operation.

When the trial to determine just compensation finally arrived, the jury awarded the Stulls more than $375,000 (excluding business losses) for the property VDOT had taken. VDOT had deposited approximately $75,000 with the court. The court did not allow the Stulls to recover the business losses they suffered during the years VDOT put them completely out of business even though VDOT’s grossly inadequate deposit caused the losses by denying the Stulls the money they needed to rebuild. Again, Virginia law does not allow owners to recover for business losses a condemnor inflicts upon them.84

7. Commonwealth Transportation Commissioner of Virginia v. Cartwright

The case of Commonwealth Transportation Commissioner of Virginia v. Cartwright85 represents another case in which VDOT attempted to take property without providing “just” compensation. The Cartwrights owned a large farm in Chesapeake, Virginia, one of the fastest growing areas in Virginia. VDOT sought to take a large portion of the Cartwright farm to construct a restricted access highway across the farm. This highway landlocked more than 390 acres of the Cartwrights’ farm, making the land undevelopable. VDOT initially offered the Cartwrights approximately $112,000 and claimed that the highest and best use of the Cartwrights’ land was for farming. VDOT ignored all the development and escalating land values in Chesapeake.

The Cartwrights were skeptical of VDOT’s offer, so they consulted local appraisers and real estate agents who informed the Cartwrights that the market value of the land sought by

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83 The Stulls not only suffered business losses during the time in which they could not rebuild their farm, but they also permanently lost many customers who had to find new milk suppliers when the Stulls could no longer fulfill their milk orders.
84 See supra note 77 and accompanying text.
85 No. 03-535 (Chesapeake Cir. Ct. 2003). See supra section IV.A.5 for a discussion of a companion FOIA action that arose out of the facts of this case.
VDOT and the damages resulting from landlocking more than 390 acres was more than $2 million. At trial, a jury awarded the Cartwrights approximately $2.4 million for land for which VDOT had offered only $112,000.

Unfortunately, many condemnors, such as VDOT, view themselves as an ordinary market participant, and they attempt to take property as cheaply as possible. These condemnors ignore the fact that their acquisition is a forced sale; it is not a normal and voluntary sale on the open-market. More importantly, these same condemnors ignore the fact that they are exercising extreme governmental powers, and when they exercise such powers, they have a constitutional duty to provide the involuntary seller “just” compensation.86

8. Commonwealth Transportation Commissioner of Virginia v. Warwick Lodge

The case of Commonwealth Transportation Commissioner of Virginia v. Warwick Lodge87 represents one of the many problems with the extremely harsh quick-take power discussed earlier.88 In that case, VDOT took the owner’s property through the “quick-take” power. After filing the necessary certificate, VDOT served the owner with a notice to vacate the property. However, when the owner tried to get the money VDOT had supposedly deposited for the owner’s use, VDOT refused to release the funds. VDOT erroneously claimed that the owners title to the property was defective.

The owner informed VDOT that it could not relocate until VDOT provided it with the money on deposit, and the owner notified VDOT that its title was clear. Although the law required VDOT to conduct a title report, which should have shown the owner’s clear title, VDOT forced the owner to hire a title examiner and an attorney to prove its title was clear. The title examination confirmed the owner had good title.

VDOT later admitted it had made a mistake, yet it charged the owner back-rent for the time the owner remained in its own property. In other words, VDOT took the property, refused to allow the owner to withdraw the payment it was required by law to deposit for the owner’s benefit, and then charged the owner rent to remain in its own property! Despite VDOT’s mistaken belief that title was defective and despite the fact that VDOT refused to


VDOT is not the only condemnor that has made low offers or practiced coercive tactics. In Althaus v. United States, the court noted some interesting comments made by a land acquisition agent for the National Park Service. 7 Cl. Ct. 688, 691-92 (1985). The land acquisition agent stated:

I am in charge of acquiring lands for the National Park Service. Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don’t have to accept this 30 cents on the dollar. We will let you wait for a couple of years. If you don’t take 30 cents on the dollar right now, you wait for a couple of years. After a couple of years if you won’t take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.

Id.

87 No. 35767-EH (Newport News Cir. Ct. 2003).

88 See supra section IV.B.6.
allow the owner access to the money on deposit for the owner's use, the lower court required
the owner to pay VDOT approximately $14,000 as rent for the time the owner remained in
its own property while VDOT denied it the funds on deposit. The court ruled that Virginia
law required the owner to pay rent to remain in its own property even when the condemnor
refuses to provide the owner with any payment for the property.

C. Virginia Federal Court Decision:
   East Tennessee Natural Gas Company v. Thomas

   Eminent domain abuse does not just occur in Virginia’s state courts. It also occurs in
   Virginia’s federal courts. Many farmers and other property owners in rural Virginia became
   victims of the federal judiciary’s diminished protection of private property. The United States
   Congress delegated the power of eminent domain to private natural gas companies. However,
   Congress did not grant these private companies the extraordinary quick-take power.

   When East Tennessee Natural Gas Company (hereinafter ETNG) sought to take
   Virginians’ property to construct a high-pressured natural gas pipeline, it sought to seize the
   owners’ property before it compensated the owners. ETNG sought to exert the quick-take
   power even though Congress withheld this power from private gas companies. The United
   States District Court acknowledged that Congress had not granted ETNG the quick-take
   power, yet the court then proceeded to unilaterally grant ETNG the power to seize and
   possess the owners’ property before it compensated the owners. The court used what it
called its “inherent” power to judicially grant ETNG the quick-take power, the most intrusive
power of eminent domain, despite the fact that Congress withheld this immense and invasive
power from private gas companies. The court’s use of its “inherent” power transformed the
court into a one person, unelected super-legislature with the power to give away Virginians’
private property.

   Aside from giving individuals’ farms and private property to the private corporation
before the corporation paid the owners just compensation, the court’s other actions cost many
landowners a great portion of the compensation to which they were constitutionally entitled.
For example, in the case of ETNG v. Thomas, Mr. Thomas asked for a jury trial. The court
denied Mr. Thomas’ request and handpicked a three-person commission to determine the value
of the property ETNG took. After the commission issued its opinion of value in other ETNG
cases that were heard prior to Mr. Thomas’ case, the court determined that the commission’s
opinion of value was too high. The court thereafter disbanded the commission, ordered new
trials in those cases already heard by the commission, and decided that juries would determine
value in all future cases, just as the owners had requested in the first place.

   Mr. Thomas did receive his jury trial. Although ETNG offered Mr. Thomas approximately

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89 Imagine if courts had permitted Enron to seize possession of owners’ properties and begin construction upon
those properties prior to compensating the owners for the property taken. What would have happened to those
landowners who had not yet received compensation when Enron filed bankruptcy? There is a reason the legislature
made a deliberate decision to withhold quick-take power from private companies, and the courts, in disrupting that
decision, place owners at an increased risk of harm.

90 In East Tennessee Natural Gas Co. v. Sage, the United States Court of Appeals for the Fourth Circuit held that
lower courts may use their inherent power to grant private gas companies the extraordinary quick-take power even
though Congress withheld this power from such companies. 361 F.3d 808 (4th Cir. 2004). Although the issue of
separation of powers was before the court, the court shirked this constitutional issue altogether and never addressed
it. The owners appealed to the United States Supreme Court, which denied their appeal.

91 No. 4:02CV00146 (W.D. Va. 2002).
$14,000, the jury awarded Mr. Thomas approximately $770,000 for the property ETNG took and damaged. Just as it had done with the commission's determination of value, the court determined that the jury's opinion of value was too high, so the court struck the jury's award and ordered a new trial with a new jury. Thus far, the court was neither satisfied with the opinion of its own handpicked three-member commission (a retired judge, an appraiser, and attorney) nor with the jury's opinion.

Lost in this whole process is the impact the continued litigation had on Mr. Thomas and his constitutional right to just compensation. Solely because the court believes the jury's value to be too high, Mr. Thomas must pay for two trials. Even if the second jury also vindicates Mr. Thomas and proves that ETNG's offer is well below market value, Mr. Thomas will never be reimbursed for the great expenses of the first trial, or the second trial, or for the costs related to his attempt to obtain a jury trial after the court originally denied him a jury. Mr. Thomas should not have to forfeit a portion of the compensation to which he is constitutionally entitled simply because the court thought the jury's award was too high, especially when the jury's opinion of value was well within the evidence and opinions presented at trial.

Owners must be increasingly wary of takings by the judiciary—the very branch that exists to protect individual rights and to act as a check on the other two branches. The court in this case not only unilaterally took Mr. Thomas' property and gave it to ETNG before ETNG paid Mr. Thomas just compensation, but the court then stripped a large portion of the just compensation Mr. Thomas ultimately recovered from a jury of his peers.

D. The Virginia Code

Many of the abuses discussed above are a direct result of the Assembly and the Code it enacted. Some of the abuses occurred because the Assembly specifically singled out property owners and excluded them from the protections given to all other persons in Virginia or because the Assembly has given condemnors immense powers over Virginians and their property. Other abuses occurred because the Assembly refuses to enact statutes that would either limit condemnors' power or otherwise lend protection to property owners.

1. The Assembly's Numerous and Broad Delegations of Eminent Domain Powers

A. The Increasing Number of Entities with the Power to Take Virginians' Property

Virginia law allows the Assembly to delegate its power of eminent domain—and delegate is exactly what the Assembly has done.92 The Assembly granted powers of eminent domain to an absurd number of both public and private entities. The Assembly rids itself of accountability for unpopular takings by delegating the power of eminent domain to others who now carry out these takings without any oversight of the Assembly. Local representatives followed the Assembly's example as city council members encouraged the creation of new layers of government, such as redevelopment authorities, to do the unpopular work of taking people's property. Those in public office who must face elections do not want to be seen as the persons responsible for taking people's property, especially when the taking is for questionable purposes. While delegating the power of eminent domain may help elected representatives avoid blame for unpopular takings perpetrated by others, these delegations of power subject

While delegating the power of eminent domain may help elected representatives avoid blame for unpopular takings perpetrated by others, these delegations of power subject

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92 Light v. City of Danville, 168 Va. 181, 201, 190 S.E. 276, 283-84 (1937) ("Eminent domain is the right of the nation or the state or of those to whom the power has been lawfully delegated to condemn private property . . . .")
Virginians’ homes, farms, businesses, and churches to the whim of unelected, unaccountable bureaucrats and private officials who now wield immense powers over Virginians and their private property.

Most representatives can name only a fraction of the entities with the power to take Virginians’ homes, farms, businesses, and churches. The Assembly’s own legislative services compiled a list of the numerous entities that now possess the power of eminent domain in Virginia. Among other curious delegations of power, the list reveals the Assembly gave mosquito-control commissions the power to take Virginians’ property. Produce Market Authorities, Localities for Virginia Baseball Stadium Authority, and the Frontier Culture Museum of Virginia are among other entities that have the power to take Virginians’ property.

In 1998, the Virginia State Corporation Commission (hereinafter SCC) notified the Assembly, specifically the Courts of Justice Committees in both houses, of its concern over the number of entities that would possess the power of eminent domain after deregulation of the public utility industry. The SCC stated that prior to deregulation, “companies furnishing utility services were assigned discrete operating territories in which they were the sole provider of a particular service, such as electricity or telecommunications.” Companies could only take property in their assigned territory. The SCC was concerned that after deregulation, all public service companies would be able to take property by eminent domain anywhere in the state, thus subjecting Virginia property owners to an increased number of takings.

The SCC identified one more problem stemming from the increased number of private corporations with the power to take. “[T]he nature of competition means some such companies will flourish, while others will fail. In the case of failure, what recourse will the landowner have regarding now useless facilities . . . constructed on his property by such companies?”

The SCC warned the Courts of Justice Committees in both houses that it “believes there is a very real question of whether public policy still requires private companies of this nature [i.e., public service corporations] be allowed continued use of the power of eminent domain to the same extent permitted in the past.” The SCC recommended that “the power of eminent domain could be denied to private companies and a procedure established whereby such companies would have to request the state, counties, or local government to condemn property for their use.” The SCC stated that “[p]lacing such authority at the appropriate government level could offer affected landowners better protection against unnecessary or ill-advised condemnations.”

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93 Appendix C: Provisions in Titles Other Than Title 25 That Authorize Entities to Acquire Property by Condemnation (visited Oct. 3, 2006) <http://legis.state.va.us/codecomm/reports/rec25/welcome.htm>. The list depicts some condemnors as a group instead of naming each individual entity within the group, such as localities and public service corporations, because it would be too cumbersome to list each condemnor within each group.
94 Id.
95 Id.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
The Assembly rejected the SCC's suggestion, probably because it is better politically to avoid the accountability that comes with having to approve unpopular takings. The sheer number of entities possessing the power to take alarmed the SCC. However, it apparently did not concern the General Assembly which distributed the power.

Edd Jennings of Wythe County is a marked example of the type of concerns the SCC raised. His family's property has been taken by eminent domain ten different times by at least four different condemning authorities. An array of easements and public projects criss-cross his property, including a natural gas pipeline, electric power lines, an interstate highway, an overhead bridge, and a county road. Mr. Jennings is living testimony of the type of concerns the SCC raised. As the SCC stated, "the real possibility exists that the same parcel of private property could be encumbered, against the will of the owner, by numerous easements of competing companies seeking routes for fiber optic lines, cables, power lines, etc."

b. The Broad Powers Given to Condemnors

Equally disturbing to the sheer number of entities that can take Virginians' homes, farms, businesses, and churches is the breadth of power the Assembly granted to many of these entities. For example, the Assembly approved city charters that allow Virginia cities to take Virginians' property for almost any purpose. Norfolk's city charter allows the city to take property "for any purposes of the city." Norfolk's charter also authorizes the city to take property "within or without the city or state" and allows the city to sell or transfer, without restriction, the property it has taken.

The Assembly also approved the City of Norton's charter despite the fact that the charter gives the city nearly every power of eminent domain contained in the Virginia Code, almost without restriction. The charter states that "[t]he powers of eminent domain set forth in Title 33.1, Chapter 1, Title 15.1 and Title 25, Chapter 1.1 of the Code of Virginia (1950), as amended, and all acts amendatory thereof and supplemental thereto, mutatis mutandis, are hereby conferred upon the City of Norton." Like Norton, cities, counties, and towns may simply adopt the entire Virginia Code pertaining to eminent domain mutatis mutandis, which gives the locality nearly every power of eminent domain, including the extreme quick-take power.

Powers of eminent domain granted by charters are extremely dangerous because the Assembly drafted the Virginia Code in such a manner that it exempted powers of eminent domain granted by charter from the public use restriction in the Virginia Constitution. Powers conferred by charter currently trump the restrictions on eminent domain contained in Title

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102 Id. The SCC did not contemplate the many entities other than public service companies that also possess the power of eminent domain.
103 These numbers do not include attempted but unsuccessful takings, such as a cable company that unsuccessfully attempted to take a piece of the Jennings' property.
104 SCC Memorandum, supra note 96. The Jennings' property contains easements of companies that provide different sources of energy, but it is not yet encumbered by easements of competing companies in the same industry. VDOT recently expanded an overhead bridge across the Jennings' property. During construction, portions of the Jennings' property were flooded and the Jennings' house was covered with concrete dust and residue from the construction. The dust is so heavy that it seeped inside the home and peeled wallpaper off the walls in some places. VDOT refuses to compensate the Jennings for these damages, and a suit is now pending.
106 Id.
15.2 of the Virginia Code. While Article I, § 11 of the Virginia Constitution limits takings to those that are for “public use,” it also allows the Assembly to define “public use” and, thus, which takings are constitutionally permissible. Importantly, the Assembly defined public use in Virginia Code § 15.2-1900.\(^\text{108}\)

Virginia Code § 15.2-1900 must be read in conjunction with Virginia Code § 15.2-100, which states:

Except when otherwise expressly provided by the words, ‘Notwithstanding any contrary provision of law, general or special,’ or words of similar import, the provisions of this title shall not repeal, amend, impair or affect any power, right or privilege conferred on counties, cities and towns by charter.

Virginia Code § 15.2-1900 does not contain the specific language required by Virginia Code § 15.2-100. Thus, the current restrictions on the power of eminent domain contained in Virginia Code § 15.2-1900 do not limit the powers granted to cities, counties or towns in their charters. The current restrictions contained in Virginia Code § 15.2-1900 do not “repeal, amend, impair or affect any power . . . conferred on counties, cities, and towns by charter” because this statute does not state that the limitations apply “notwithstanding any contrary provision of law” as required by Virginia Code § 15.2-100. In City of Norton v. Goad, the lower court held that the restrictions on the power of eminent domain contained in title 15.1 of the Virginia Code (now title 15.2) did not apply to the city because the city’s charter trumped the restrictions contained in that title of the Virginia Code. The court stated that the only “limitation in the city charter is . . . the exercise of its power of eminent domain for any lawful public purpose.”\(^\text{109}\)

In addition to powers granted to localities through charters, the Assembly delegated housing authorities the power to take an owner’s well-maintained and non-blighted property solely because city planners believe others in the owner’s neighborhood have not maintained their property. Thus, as it did in the Hunter case discussed above,\(^\text{110}\) a condemnor may take one man’s home simply because his neighbor’s property is “blighted.” The Virginia Code not only allows local planners to strip one owner of his private property because of his neighbor’s actions, but the Assembly has so loosely defined “blight” that it is almost anything local planners want it to be.\(^\text{111}\) The Virginia Code contains a very broad and vague definition of blight and leaves great leeway for local planners seeking to take property under the guise of blight.

A loose definition of blight is especially dangerous because government planners use “blight” as their “catch-all” or “take-all” provision that allows them to take almost any property they desire. Government planners often use “blight” to take property either because they simply do not like or prefer the owner’s use of the property or because they believe someone else, including themselves, can put the owner’s property to a better or more profitable use. Takings for “blight” are fraught with abuse.

As far back as 1964, the late President Reagan warned America about the “assault on freedom” that was being conducted under the guise of “urban renewal” (i.e., “blight”).\(^\text{112}\) As he

\(^{108}\) Virginia Code § 15.2-1900 defines public uses as “all uses which are necessary for public purposes.”

\(^{109}\) Goad, 1992 WL at *5.

\(^{110}\) See supra section IV.A.2.


stated then, “[p]rivate property rights [are] so diluted that public interest is almost anything that a few government planners decide it should be.”

Many of the public projects carried out under the guise of urban renewal or “blight” are simply government handouts or corporate welfare to the politically connected. These programs “take[] from the needy and give[] to the greedy.”

It is, as Frédéric Bastiat once stated, “legal plunder.”

But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.

This “assault on freedom” and the “legal plunder” associated with it are readily apparent in many Virginia cases, including several discussed in this paper.

2. The Assembly’s Expansive Definition of Public Use

The Assembly’s expansive definition of the term “public uses” also enlarges the power of eminent domain over the people of Virginia and subjects Virginians to a much greater number of takings. While the Virginia Constitution only permits takings of private property that are for “public uses,” it allows the Assembly to define “public uses.” The Assembly can thus define which uses justify the taking of private property in Virginia.

The Assembly broadly defined “public uses” as “all uses which are necessary for public purposes.” The Assembly’s expansive definition of public uses is strikingly similar to the United States Supreme Court's definition of “public use” in Kelo. Just as the majority of the Court in Kelo expanded the words “public use” to include “public purposes,” the Assembly defined the restrictive words “public uses” in such a manner that takings to achieve “public purposes” are now permissible under the letter of Virginia law.

Contrary to the Assembly’s broad definition of public use, the terms “public use” and “public purpose” are not one and the same. “Public use” suggests government ownership and public possession, occupation, control, and use of property. “Public purpose” is a much broader term that includes creating a public benefit, such as increasing jobs, generating more tax revenue, or simply improving general economic health and welfare. Creating such public benefits constitutes a public purpose even though it is not a public use. Allowing takings for “public purposes” permits condemnors to take property for public or private “uses” as long as the use provides a public “benefit,” such as an increase in jobs or tax revenues.

Justice Thomas noted in his dissent in Kelo that the framers could have authorized takings for “public purposes” permits condemnors to take property for public or private “uses” as long as the use provides a public “benefit,” such as an increase in jobs or tax revenues.
for the “general welfare,” a clause used elsewhere in the Constitution, if they sought to authorize more sweeping takings. 120 He then explained that the “the phrase ‘public use’ contrasts with the very different phrase ‘general welfare’ used elsewhere in the Constitution.” 121 As he pointed out, the framers chose the narrower words “public use,” and this phrase does not authorize takings simply because “the public realizes [some] conceivable benefit from the taking.” 122

3. The Notice by Publication Statutes: Making Property Owners Second Class Citizens

The Assembly’s treatment of property owners for purposes of notice of a lawsuit in condemnation123 actions also gives rise to eminent domain abuses such as those seen in Ms. Stevenson’s case. 124 These statutes give condemnees—persons whose property is taken by eminent domain—less protection than every other person in Virginia. 125 In fact, the statutes give more protection to debtors who refuse to pay their bills than to tax-paying property owners whose property is taken by eminent domain. The Code singles out condemnees and specifically excludes them from the protections given to every other person in Virginia.

The Virginia Code spells out the procedures a plaintiff must follow when he cannot find the defendant he is suing. These procedures, which are often called the “notice by publication” procedures, are designed to ensure the defendant obtains notice of the lawsuit and can appear to defend himself or his property. These statutes differentiate between so-called regular civil defendants and condemnees. 126 A quick comparison of the required procedures demonstrates clearly that the Assembly gives far less protection to condemnees than to all other persons.

The first big difference between the protections the Code gives to regular defendants and the greatly limited protections the Code gives to condemnees is the right to reopen a case to correct injustice. The Code allows all persons served with a lawsuit by publication, except condemnees, to reopen a case to correct “any injustice.” 127 If a condemnor serves an owner with notice of a lawsuit by publication and subsequently takes that owner’s property without the owner’s knowledge, the owner, unlike every other person in Virginia, cannot reopen the case—even to correct an unjust or grossly inadequate amount of compensation.

In addition to prohibiting owners from reopening a case, the Code’s diminished protections for condemnees make it much less likely that condemnees will receive actual notice of a taking. When a plaintiff cannot find a regular defendant, the Code requires the plaintiff to publish notice of the lawsuit once a week for four consecutive weeks. 128 Additionally, plaintiffs must send regular defendants notice by mail. 129 When a condemnor cannot find a condemnee, the Code only requires the condemnor to publish notice of the lawsuit once a week for two

120 545 U.S. 469, 125 S. Ct. at 2679-80 (Thomas, J., dissenting).
121 1d.
122 1d. at 2680.
123 Takings cases are often referred to as condemnation or eminent domain cases.
124 See supra section IV.B.2.
126 Virginia Code §§ 8.01-316 and 8.01-317 delineate the procedures for civil litigants in general and Virginia Code §§ 25.1-210 and 25.1-211 set forth the procedures for condemnees who are served with notice by publication.
127 Va. Code §§ 8.01-316, 8.01-317, 8.01-322.
Condemnors do not have to give property owners notice by mail. Instead, they merely have to post notice of the taking on the door of the courthouse.

When a plaintiff cannot find a regular defendant, the Code requires the plaintiff to publish notice in a paper approved by the judge or clerk of court, both of whom are likely to know which publication is most widely read and most likely to actually notify the defendant of the lawsuit. When a condemnor cannot find a condemnee, the Code allows the condemnor to publish notice in any newspaper located in the city or town where the property sought is located or, if no such paper exists, in any newspaper having a general circulation in the city or town where the property is located. Thus, the Code allows condemnors to give notice in any obscure newspaper, just as the condemnor did in Stevenson. The condemnor in Ms. Stevenson’s case chose a business journal which, at that time, had a poor circulation, and is now out of publication altogether even though other publications that are well-known, highly circulated, and well-read were available to the condemnor.

Moreover, the Code gives regular defendants at least fifty days after entry of the order of publication to respond and defend their rights and property, whereas the Code gives condemnees only ten days to respond and defend their rights and property. All of these notice by publication requirements make it much more probable that regular defendants will learn of the lawsuit pending against them and much less probable that condemnees will find out a condemnor is taking their property.

The following chart depicts the diminished protections for property owners whose property is taken by eminent domain.

<table>
<thead>
<tr>
<th>CONDEMNNEES</th>
<th>ALL OTHER PERSONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 weeks notice</td>
<td>4 weeks notice</td>
</tr>
<tr>
<td>notice in any paper</td>
<td>notice in paper approved by court or court clerk</td>
</tr>
<tr>
<td>10 days to respond</td>
<td>50 days to respond</td>
</tr>
<tr>
<td>no right to reopen</td>
<td>right to reopen to correct “any injustice”</td>
</tr>
<tr>
<td>no notice by mail</td>
<td>notice by mail</td>
</tr>
</tbody>
</table>

The way the Assembly drafted the notice by publication statutes places every Virginian’s property in constant danger. Any person who leaves the area for a short period of time (two weeks or more) not only risks losing his property but risks losing his property at a price fixed forever by the condemnor that takes the property. Teachers, students, retirees, and others who may spend extended time out of the area should especially beware.

4. The Quick-Take Power: One of the Harshest and Most Intrusive Powers of Government

Like the Code provisions involving notice by publication, the Code provisions dealing with the quick-take power also give rise to much eminent domain abuse. The Stull and

134 See supra section IV.B.2.
136 See supra section IV.B.6.
cases both demonstrate some of the problems with the quick-take power. As previously stated in the discussion of those cases, the quick-take power allows condemnors to take immediate title to and seize immediate possession of the owner’s property merely by filing a certificate in the local courthouse and depositing into court an amount the condemnor believes to be the value of the property taken.

The Code contains no process that allows an owner to challenge the propriety of the taking before the law gives the condemnor title to and possession of the owner’s property. Virginia law allows a condemnor with quick-take power to file a certificate and get immediate possession of an owner’s property even though the condemnor may not have the legal right or authority to actually take the property. Condemnors can seize an owner’s property and begin construction on the property before the condemnor even proves it has the right or authority to take the property or to construct its project.

It is entirely possible that a condemnor could seize possession of an owner’s property through quick-take and raze buildings on the owner’s property even when the courts ultimately decide the condemnor has no right or authority to take the property. For instance, in the Stull case, VDOT demolished all the buildings the Stulls needed to operate their dairy farm. Suppose a court later determined that VDOT could not take the property: the damage is already done. Not only are the buildings gone, but Virginia law does not allow the Stulls to recover compensation for their business losses resulting from the demolition of their buildings and the consequent inability to continue their farming business. This situation also arises when cases are on appeal. For example, in Ottofaro, the city bulldozed the Ottofaros’ home after the lower court trial but before the Virginia Supreme Court ruled that the City was authorized to take the Ottofaros’ home.

The quick-take power also creates other problems that work great hardships on property owners. The delay in payment of just compensation is one such problem. The trial to determine just compensation and the subsequent payment of compensation often do not occur until years after the condemnor takes the owner’s property and evicts the owner. Virginia Code § 33.1-127 does not require VDOT to file suit to initiate the condemnation proceeding to determine just compensation until approximately six months after it takes the owner’s property. Under Virginia Code § 25.1-313, condemnors do not have to file suit to initiate the condemnation proceeding to determine just compensation until sixty days after the condemnor completes its construction on the owner’s property.

Making matters worse for owners is the fact that the just compensation trial may not take place until years after the condemnor files the suit to initiate the condemnation proceeding. Many of the owners in the ETNG cases, which were discussed earlier in section IV.C, are still waiting to receive trial dates for suits that were filed back in 2002. Virginia Code § 25.1-318 is supposed to provide relief for owners in state court who are in this predicament by

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137 See supra section IV.B.8.
139 The quick-take power raises serious due process concerns. However, courts have consistently upheld the quick-take power and stated that the Constitution does not prohibit the quick-take power. See Sweet v. Rechel, 159 U.S. 380 (1895); Richmond Fairfield Ry. Co. v. Llewellyn, 156 Va. 258, 157 S.E. 809 (1931). Courts have consistently permitted condemnors to seize owners’ property before they pay the owners for the property.
140 See supra note 77 and accompanying text.
allowing owners to initiate the condemnation proceeding if the condemnor fails to timely do so. However, that statute does not allow owners to initiate the condemnation proceeding until sixty days after the condemnor completes construction on the owner’s property or one year after the condemnor takes possession of the owner’s property. Even after an owner initiates a condemnation proceeding, the just compensation trial does not occur until several months or years later.

Some condemnors, most notably VDOT, increase the hardship on owners by engaging in practices that further delay the payment of compensation to owners. VDOT will seize possession of an owner’s property and then, after finally filing the suit to initiate the condemnation proceeding, will seek multiple continuances to postpone the trial to determine just compensation. VDOT’s actions prove that once a condemnor gains possession of the owner’s property, it greatly reduces the condemnor’s incentive to move the case along quickly so the owner can obtain his compensation. The condemnor is in no hurry to pay the owner compensation.

The delay in payment to owners also creates negative incentives for condemnors. The condemnors know that owners who are stripped of their property before they are paid just compensation become much more likely to accept a lower offer simply to get the cash they need to move into a new location. As the delay in payment increases, so too does the hardship on the owner who needs funds to relocate or rebuild. The delay in payment of compensation and the practices that extend this delay work great hardships on owners.

Condemnors’ insufficient monetary deposits aggravate the hardships caused by the delay in payment. The Code merely requires the condemnor to deposit with the court an amount of money equal to what the condemnor thinks the property is worth. While this seems practical in theory, it does not provide owners sufficient protection. When a condemnor undervalues the property, as VDOT did in Stull, its financial deposit does not provide the owner with enough money to relocate or to rebuild.

In the Stulls’ case, VDOT greatly undervalued the buildings, and its deficient financial deposit denied the Stulls the funds needed to rebuild the buildings and to continue their farming operation while they awaited trial. The just compensation trial did not occur until more than two years after VDOT seized possession of the Stulls’ property. During these years, the Stulls were unable to continue their farming operation. VDOT demolished their existing buildings, and VDOT’s grossly inadequate deposit did not provide the Stulls the funds needed to construct new buildings. The Stulls closed their farming operation.

Another problematic aspect of the condemnor’s monetary deposit occurs when the condemnor refuses to allow the owner to withdraw the funds deposited with the court. As seen in the Warwick Lodge case, the Code creates situations where the condemnor evicts the owner from his property and simultaneously denies the owner the funds necessary to relocate. In these cases, the Code requires the owner to vacate his property and relocate without any payment prior to eviction. While the Assembly amended Virginia Code § 33.1-120 in 2004 to address situations similar to those that arose in the Warwick Lodge case, this statute only applies to VDOT and does not limit other condemnors who exercise the quick-take power.

The condemnors know that owners who are stripped of their property before they are paid just compensation become much more likely to accept a lower offer simply to get the cash they need to move into a new location.

5. The Landowners’ Bill of Rights: A Bill of Rights that Contains No Rights

Ironically, another problematic statute the Assembly enacted is the Landowners’ Bill of Rights (hereinafter LBOR), Virginia Code § 25.1-417. This statute demonstrates the Assembly’s utter refusal to provide owners any real and meaningful protections. This supposed bill of “rights” actually creates no rights. After purporting to grant owners substantial rights and protections, the Assembly added a provision to the end of the statute that reads as follows: “The provisions of this section create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.” Thus, the LBOR contains no rights. Imagine if the Bill of Rights in the United States Constitution stated that “the provisions in the Bill of Rights create no rights or liabilities.”

The LBOR is a perfect example of the superficial protections the Assembly gives property owners, and it is a direct result of the control condemnors have in the Assembly. The Assembly will enact a statute that sounds good on its face and purports to protect property owners but actually does nothing to limit condemnors’ powers of eminent domain. These statutes appease condemnors and allow Assembly members to claim they acted to protect property owners.

6. The Assembly’s Refusal to Lessen the Harshness of the Quick-Take Power

A. Priority on the Civil Docket

The statutes the Assembly refuses to enact perpetuate the abuses created by the statutes it has enacted. The Assembly refuses to act to protect owners even in the face of demonstrable injustice. For example, the Assembly could eliminate several of the injustices discussed above by giving quick-take cases priority on the civil docket of the courts of Virginia, as the Colorado legislature did in all eminent domain cases. If these cases were heard quickly, it would lessen the current hardships on owners because they would get their just compensation more quickly. In addition, a condemnor’s attempt to block the owner from withdrawing the funds, or the condemnor’s demolishing the owner’s buildings, would be less devastating to the owner because the matter would be heard quicker, so the owner could obtain just compensation sooner.

B. Lowering the Appraisal: If It Is Good Enough for the Offer, It Should Be Good Enough for the Courtroom

The Assembly has not seen fit to correct, or at least to curtail, other abusive tactics its quick-take statutes permit condemnors to practice, particularly the practice of lowering the appraisal. It is a general principle of law and evidence that a prior inconsistent statement may be used to impeach the credibility of a witness. Yet, the Assembly specifically exempted condemnors from this principle of law that applies to all other parties. If the owner or his witnesses make a prior inconsistent statement, the condemnor can use the statement against

143 See infra section V.A.4 for a more thorough discussion.
145 See infra section V.A.4. The LBOR is modeled after the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, which contains similar language to the LBOR. See 42 U.S.C. 4601 et. seq.
146 See, e.g., C.R.S.A. § 38-1-119 (“To assure that property owners receive compensation for the taking of their property at the earliest practical time and to reduce the interest obligation of petitioners, all courts wherein such actions are pending shall give such actions preference over other civil actions therein in the manner of setting the same for trial”).
the owner. However, if the condemnor makes certain inconsistent statements, the owner cannot use the statement against the owner. If the condemnor claims that the owner’s property is worth X in its offer to the owner and later claims that the property is worth Y, the owner cannot tell the jury about the condemnor’s prior and inconsistent opinion of value.

When the condemnor files its quick-take certificate and deposits the requisite money into court, the amount is based on an appraisal that the condemnor is required to approve. If the owner does not eventually accept the condemnor’s offer, condemnors often get a lower appraisal for use in court. Virginia law does not allow the owner to tell the jury about the earlier appraisal the condemnor approved and relied upon, including the condemnor’s statement of value it made when it filed its quick-take certificate.

For example, in *Ottofaro*, the city approved an appraisal and gave it to the Ottofaros. Based on this appraisal, the City claimed the Ottofaros’ property was worth approximately $160,000. When the Ottofaros rejected the City’s offer and the case went to court, the City claimed the property was only worth approximately $120,000, despite the prior appraisal the City approved. The court refused to allow the Ottofaros to tell the jury about the prior appraisal, even though it was a prior inconsistent statement.

Virginia law allows condemnors to play fast and loose with Virginia property owners because it allows condemnors to approve one appraisal for the offer and another for trial. If the appraisal is good enough for the offer to the owner, it should be good enough for the jury to see. The United States Court of Appeals for the Fifth Circuit addressed these concerns when it declared that “[g]overnment is not completely free to play fast and loose with the landowners—telling them one thing in the office and something else in the courtroom.” Virginia should do likewise.

7. Outrageous Legal Expenses: Harming the Owner and the Taxpayers

Yet another abuse the Assembly fails to correct is an abuse that harms both the taxpayers who ultimately pay for the taking and the individual owners required to surrender their property. This abuse stems from the entire structure of the eminent domain process in Virginia. Instead of having in-house, salaried attorneys to handle eminent domain cases, many government condemnors, including VDOT, hire private law firms to handle their eminent domain litigation. These law firms bill the condemnor—and ultimately the taxpayers—by the hour, which gives the attorneys little incentive to decrease litigation or to settle a case before billing enough hours to make it worth the attorneys’ time and effort.

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149 See, e.g., *Russell v. Commonwealth Transp. Comm’n*, 261 Va. 617, 544 S.E.2d 311 (2001) (holding that the condemnor could impeach the owner’s appraiser with a prior inconsistent statement of value made by the appraiser’s firm); see also *Ryan v. Davis*, 201 Va. 79, 83-84, 109 S.E.2d 409, 413 (1959) (holding that the condemnor may impeach the owner’s appraiser with a prior inconsistent statement of value made by the appraiser).

150 See *Ryan*, 201 Va. at 83-84, 109 S.E.2d at 413-14 (1959) (holding that the prior inconsistent statement of value made by the owner’s appraiser is admissible but VDOT’s prior inconsistent statement of value, which stemmed from its statutorily required deposit, is not admissible); see also infra note 153 and accompanying text.


153 For further discussion of the case, see The Virginia Property Rights Coalition, Examples of Eminent Domain Abuse in Virginia (visited Aug. 29, 2006) <http://www.vapropertyrights.org/support/06abuses.html>.

154 United States v. 320 Acres, 605 F.2d 762, 825 (5th Cir. 1979).
VDOT paid one law firm alone “about $4 million in legal fees during the past five years.”155 In one case, VDOT’s final offer to the owner was $27,466, the owner recovered approximately $112,500 in court, and VDOT’s attorneys pocketed $115,000.156 Incredibly, VDOT did not need the property taken. After paying its attorneys $115,000 to take this property, VDOT set aside the project for lack of money.157

The “$1,000 coin toss” also illustrates the unnecessary and excessive litigation expenses sometimes created by private attorneys and hourly billing. For years Virginia used a somewhat archaic system to determine just compensation.158 Each party submitted a list of names to the court, and the court would appoint five persons from the two lists to act as a commission that would determine just compensation.159 The court would flip a coin to determine which party could choose three persons for the commission and which party could choose only two for the commission.

Some condemners’ attorneys made the simple coin toss a billing extravaganza at the taxpayers’ expense. Instead of allowing the judge to flip the coin at trial when both parties were present at court, these attorneys insisted on having a separate court hearing to flip the coin. These attorneys drafted and filed formal motions requesting a separate hearing to flip the coin and then scheduled a court date for the coin toss. The attorneys then drafted and filed notices of the hearing and later prepared and filed formal orders declaring the outcome of the coin toss. The attorneys sent this order to the owner’s attorney and often followed up with phone calls or correspondence regarding the order. For one simple coin toss, the attorneys billed the taxpayers for (1) preparing and filing a motion and a notice of hearing, (2) a court appearance, (3) preparing and filing an order, and (4) any phone calls and correspondence relating to these issues. At $150 an hour, this sum could easily exceed $1,000—for a coin toss.

Some condemners’ attorneys file countless motions and create numerous hearings on all sorts of issues. Condemners in these cases spend ludicrous amounts of time and money on unnecessary motions and litigation. Both the taxpayers and the individual owner subject to the taking lose in these situations as the costs of litigation rise dramatically for each of the parties. The only real winners in these cases are the private law firms and attorneys representing the government condemnor.

Other states have in-house counsel who are experts on eminent domain and who have no incentive to create prolonged litigation. Virginia should examine the many virtues of a similar system. Many experts in the field of Virginia property law and eminent domain understand that “Virginia likely would be better off reverting to in-house representation.”160 As a property law professor from Washington and Lee University stated, “[f]or the amount of money [VDOT is] paying out, they could have a staff of 15 lawyers to handle eminent domain cases. . . . That

155 What’s Wrong with This Scenario?, supra note 86.
156 What’s Wrong with This Scenario?, supra note 86.
157 Id.
158 Virginia Code § 25.1-220 abolished the commissioner system.
160 See, e.g., What’s Wrong with This Scenario?, supra note 86.
would be more than enough to handle [the] workload.”

8. The Assembly’s Refusal to Make Property Owners Whole

Putting all these abuses aside for a moment, perhaps the Assembly’s most disconcerting failure to act to protect Virginia property owners is its refusal to take real steps toward ensuring that property owners are made whole when they have been subject to an eminent domain lawsuit. After all, owners are in court through no fault or even alleged misconduct of their own; they are in court solely because the condemnor wants their property. If the owner does not accept the condemnor’s offer, the condemnor simply sues the owner and drags the owner into court. Virginia sorely needs a statute that guarantees owners in this situation full indemnification. Such a statute is needed because the Virginia’s courts have not required condemnors to reimburse owners for all damages and losses the condemnor inflicts upon the owner.

The Virginia Supreme Court declared long ago that condemnors must provide owners with “a full indemnification and equivalent for the injury thereby sustained” as a result of a taking. The court acknowledged that “Natural Law, Civil Law, Common Law, and the Law of every civilized country” require no less than “full indemnification.” The court also announced that condemnors must put an owner in as good a monetary position after the taking as the owner occupied before the taking. As the Virginia Supreme Court stated, “the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.” The court recognized that just compensation “rests on equitable principles” and requires that owners “be made whole” for their losses.

While the above principles seem to guarantee that owners are made whole for their losses, the Virginia Supreme Court interprets the Just Compensation Clause in a manner that guarantees owners are not put in as good a position pecuniarily as they would have occupied if their property had not been taken. Despite the principles of indemnity contained in the Just Compensation Clause, the court does not require condemnors to make owners whole in many cases. The court declared that owners are entitled to “any damages . . . flowing directly from the taking of a part of the land [which are] not merely speculative.” The court further stated that it would be “unconstitutional” for the Assembly to enact a compensation statute that “exclude[s] . . . any element of damage that directly flows from the taking.” Yet, the court itself excludes whole categories or elements of damage that flow directly from the taking.

The Virginia Supreme Court repeatedly declares that just compensation does not require condemnors to reimburse owners for all damages the condemnor inflicts upon owners. Virginia law prohibits owners from recovering business losses, certain loss or restriction of access, litigation expenses, and other damages that flow directly from the taking. Condemnors frequently attempt to avoid compensating owners by

161 Id.
163 Id.
165 Id.
167 Shirley v. Russell, 149 Va. 658, 666-67, 140 S.E. 816, 818 (1927) (“Should the General Assembly exclude from the statute any element of damage that directly flows from the taking . . . such a provision would be unconstitutional.”).
168 See, e.g., State Highway and Transp. Comm’r v. Lanier Farm, Inc., 233 Va. 506, 510, 357 S.E.2d 531, 533 (1987) (stating that “frustration of the owner’s plans for development or future use of the property . . . loss of good will, loss of profits, and difficulty of relocating” are non-compensable elements of damage because they are merely “loss[es] personal to the owner or to the business conducted on the land by the owner”); Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959) (stating that litigation expenses and business losses flowing from the taking are non-compensable); see also Comm. ex rel. State Water Control Bd. v. County Util. Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982) (stating that “even where . . . an exercise [of the police power] results in substantial diminution of property values, an owner has no right to compensation therefore”).
these elements of damage to be non-compensable damages for which condemnors do not have to reimburse owners.

The idea of non-compensable damages and just compensation are incompatible. The phrases “just compensation” and “non-compensable damage” are mutually exclusive. One cannot be said to receive just compensation if the law forces him to suffer non-compensable damages. Nevertheless, the Virginia Supreme Court repeatedly declares that just compensation does not require condemnors to reimburse owners for all damages the condemnor inflicts upon owners. Virginia law prohibits owners from recovering business losses, certain losses or restriction of access, litigation expenses, and other damages that flow directly from the taking.

A. BUSINESS LOSSES

One non-compensable damage in Virginia is business losses; Virginia law does not allow property owners to recover for business losses a taking inflicts upon them. Remarkably, Virginia law permits a condemnor to put an owner completely out of business without reimbursing the owner for the resulting losses. For example, if VDOT took the entire parking lot of a small restaurant for two years during construction of a highway, the owner could not recover the business losses the restaurant suffered as a result of having no parking for two years.

In cases other than eminent domain, the Virginia Supreme Court allows recovery of business losses and lost profits. It is well settled that in actions . . . involving injury to business or loss of profits, where the existence of a loss has been established, absolute certainty in proving its quantum is not required. Where the plaintiff has shown to the satisfaction of the jury that he has suffered substantial damage by the injury, he is not precluded from recovering nor confined to merely nominal damages because he cannot show the exact amount with certainty. The quantum may be fixed when the facts and circumstances are such as to permit of an intelligent and probable estimate thereof.

Virginia Code § 8.01-221.1 allows recovery of business losses for businesses that do not even exist. This statute states:

Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.

Despite allowing litigants to recover business losses in other cases, Virginia courts strictly prohibit property owners from recovering business losses or lost profits in eminent domain cases, even when the owner can prove that a taking inflicted such losses to an established business the owner was operating on the property. The Virginia Supreme Court does not allow property owners asserting that the damages they inflict upon owners are non-compensable. For example, VDOT recently asserted that noise caused by a highway it constructed through an owner's property was non-compensable, despite the severe impact the noise had on the use and value of the owner's home and property. See Commonwealth Transp. Comm'n v. Odinetz, No. CL05-2281 (Va. Beach Cir. Ct. 2005).

169 See supra note 77 and accompanying text.
172 See supra note 77 and accompanying text.
to recover business losses because it claims that business losses in eminent domain cases, unlike all other cases, are too speculative to ever allow recovery. The Stull and Wilmouth cases both demonstrate the inequities and injustice in prohibiting owners from recovering business losses that takings inflict upon them. Neither of the families in those two cases was made whole for its losses.

Fairness, justice, and common sense demand a change in this area of Virginia law. When an owner suffers business losses that are directly attributable to a condemnor’s actions, the condemnor should be required to reimburse the owner for those losses. If the owner is not reimbursed for these losses, it cannot truly be said that the owner received just compensation for the damages he sustained as a result of the taking.

B. Litigation Expenses

Virginia law also fails to satisfy the written mandate of just compensation in other ways. Virginia law prohibits owners from being reimbursed for litigation expenses that takings force them to incur. As stated earlier, when an owner rejects a condemnor’s offer, the condemnor simply sues the owner. Even if the owner proves in court that the condemnor’s offer was grossly inadequate and thus necessitated the litigation, Virginia law denies the owner reimbursement for the expenses the condemnor’s low offer forced upon him. Virginia law requires the owner to forfeit a portion of his compensation to the litigation expenses, regardless of the sufficiency or fairness of the condemnor’s offer.

The end result of this rule is that Virginia property owners cannot receive just compensation under Virginia law unless the condemnor benevolently makes the owner a fair offer. Virginia property owners faced with a low offer have one choice: either accept the low offer or forfeit a portion of their compensation to litigation expenses. Either way, the owner loses; the owner gets less than the value of the property taken.

Some persons have referred to the losses litigation inflicts upon owners as “the condemnation discount.” Typically, owners lose 33% to lawyers’ fees, 10% to experts’ and appraisers’ fees, and 20% to taxes. Owners should not be punished for the condemnor’s actions. Owners should not forfeit a portion of their compensation solely because the condemnor refused to make the owner a fair offer.

The justice in reimbursing owners for litigation expenses when the condemnor fails to make a fair and just offer is readily apparent. A daring dissenter on the Iowa Supreme Court once summarized the apparent propriety and justice in awarding owners reimbursement for such costs:

It is illogical to contend . . . that costs in a condemnation proceeding should be treated as costs in any other action. This is no ordinary lawsuit. We are here breathing life into a constitutional right—the right to possess and protect property. We are further charged with enforcing a constitutional mandate that such property shall not be taken without payment of just compensation. Every other justiciable controversy of a civil nature arises

173 Id.
174 See supra section IV.B.6.
175 See supra section IV.B.3.
176 Ryan v. Davis, 201 Va. 79, 85, 109 S.E.2d 409, 414 (1959); see also supra note 86 (discussing Althaus and demonstrating how the lack of reimbursement to owners for litigation expenses actually creates an incentive for condemnors to make offers below fair market value because it places owners in the position of either accepting the low offer or forfeiting a portion of his compensation to litigation expenses).
177 Highway Robbery, supra note 86.
178 Id.
out of some prior relationship or contact between the parties. . . . But in the condemnation proceeding the condemnee (who is actually the defendant although in this state forced to assume plaintiff’s burdens) has admittedly done no wrong, broken no promises and committed no negligence. He has only exercised his constitutional right to possess property—which in the condemnation situation, unfortunately, is property coveted by another. The Supreme Court of Florida aptly said, ‘Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received ‘just compensation’ for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value.’

As it now stands in Virginia, an owner forfeits his constitutional right to just compensation simply by exercising his right to just compensation. To make owners forfeit a portion of their constitutional right to just compensation solely because the condemnor’s actions (i.e., inadequate or unjust offer) required the owner to exercise this right is wholly unjust and fails to satisfy the plain language of the constitutional right to just compensation. The Constitution guarantees just compensation. Surely just compensation does not imply that the owner should ultimately receive less than the value of the property taken from him.

C. Access

Virginia law requires Virginia property owners to suffer at least one other non-compensable damage worth noting. In many cases, Virginia law does not require condemnors to compensate the owner when the condemnor restricts or severely diminishes access to an owner’s property.

Dade County v. Brigham, 47 So. 2d 602, 604-05 (1950) (citations omitted).

While Virginia law requires owners to suffer other non-compensable damages, this paper will not attempt to address all such damages. Moreover, this paper does not address all areas in which courts frequently deny owners recovery of certain losses or damages that should be recoverable under the letter of Virginia law. For example, in Commonwealth Transp. Comm’r v. Coffey, the court acknowledged that Rule 4:1(b)(4)(D) of the Rules of the Supreme Court of Virginia requires “the condemnor in eminent domain proceedings, when it initiates discovery, [to] pay all costs thereof, including without limitation the cost and expense of those experts discoverable under subdivision (b) of this Rule.” 31 Va. Cir. 354, 1993 WL 964186, *1 (1993) (emphasis added). However, after recognizing that Rule 4:1(b)(4)(D) “provides for recovery of ‘all costs and expenses’ of the [owners’] expert,” the court denied the owners reimbursement for “the expenses incurred by [the owners’] expert in preparing to respond to discovery and to develop his work product.” Id. The court effectively held that the provision requiring reimbursement for “all costs” means something less than reimbursement for all costs.

See, e.g., State Highway and Transp. Comm’r v. Linsky, 223 Va. 437, 290 S.E.2d 834 (1982) (stating that a “reduction or limitation of direct access to an abutting landowner’s property generally is not compensable”); State Highway Comm’r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974) (holding that access damages caused by the installation of curbing are non-compensable); State Highway Comm’r v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973) (holding that access damages caused by the installation of a median are non-compensable); but see State Highway and Transp. Comm’r v. Dennison, 231 Va. 239, 245-46, 343 S.E.2d 324, 328-29 (1986) (holding that access damages are compensable if the jury determines that the access to an owner’s property after a taking is not reasonable).

179 Peel v. Burk, 197 N.W.2d 617, 621-22 (Iowa 1972). The Florida Supreme Court also provided a sound explanation for reimbursing owners for their litigation expenses:

Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received ‘just compensation’ for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value. The plight of the land owner in this situation is well stated . . . as follows: He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the Legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right.

180 See, e.g., State Highway and Transp. Comm’r v. Linsky, 223 Va. 437, 290 S.E.2d 834 (1982) (stating that a “reduction or limitation of direct access to an abutting landowner’s property generally is not compensable”); State Highway Comm’r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974) (holding that access damages caused by the installation of curbing are non-compensable); State Highway Comm’r v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973) (holding that access damages caused by the installation of a median are non-compensable); but see State Highway and Transp. Comm’r v. Dennison, 231 Va. 239, 245-46, 343 S.E.2d 324, 328-29 (1986) (holding that access damages are compensable if the jury determines that the access to an owner’s property after a taking is not reasonable).
Courts allow condemnors to inflict significant access damages upon owners without providing the owners compensation for such damages.

The courts’ treatment of access rights also reveals one of the many double standards contained in Virginia law. Virginia law does not allow owners to recover damages resulting from a restriction of access caused by changes in the flow of traffic on the highway, even if such changes severely impact access to the owner’s property and drastically affect the use of the property. Yet, the law allows condemnors to reduce the owner’s compensation based on changes in the flow of traffic on the highway.

For example, when VDOT installs a median as part of a road project, it may eliminate certain access to and from an owner’s property, but the owner cannot recover the damages flowing directly from this loss of access. However, if VDOT later takes additional property from the same owner, the law does not prohibit VDOT from showing that the owner’s property is less valuable because of the existence of the median and the lack of access it causes. Moreover, if VDOT removes a median during a road project, the law allows VDOT to show that its road project (including the removal of the median and the resulting increase in access) enhances the owner’s property value and thus reduces the compensation the condemnor must pay the owner. Effectively, property owners cannot recover damages from medians, but VDOT can use medians to reduce the damages owed to property owners. The law requires owners to substitute fact for fiction and act as if the median does not exist, while VDOT may use the median to its advantage as it sees fit.

However, while Dennison purports to allow recovery of access damages, many lower courts do not allow owners to recover access damages and do not allow the jury to even hear or consider such damages. The confusion in the lower courts stems from a case decided a year after Dennison. See State Highway and Transp. Comm’r of Virginia v. Lanier Farm, Inc., 233 Va. 506, 357 S.E.2d 531 (1987). In Lanier, the court stated:

Although a ‘complete extinguishment and termination of all the landowners’ rights of direct access’ to an abutting highway constitutes a compensable ‘taking’ within the eminent domain clause of the Virginia Constitution, a mere partial reduction or limitation of an abutting landowner’s rights of direct access, imposed by governmental authority in the interest of traffic control and public safety, constitutes a valid exercise of the police power and is not compensable in condemnation proceedings.

Id. at 510, 357 at 533.

182 See also supra section IV.D.6.b (discussing the admissibility of prior inconsistent statements of value).
183 Linsly, 223 Va. at 442, 290 S.E.2d at 837 (noting that "circuity of access imposed upon the [owner] was an incidental non-compensable inconvenience caused by the lawful exercise of the police power to regulate traffic").
184 See Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941) (acknowledging that the Assembly amended Virginia law to allow VDOT to offset any damages with "enhancement . . . resulting form the construction of the new road"); compare Va. Code § 33.1-130 (allowing damages to be offset by general "enhancement" from a highway project) with Va. Code § 25.1-230 (allowing damages, in some cases, to be offset only by "peculiar benefits"); see also Bd. of Supervisors v. Smith, 17 Va. Cir. 147 (1989) (acknowledging that Virginia Code § 33.1-130 allows VDOT to reduce an owner’s compensation based on general enhancement from a highway); see also Brown v. May, 202 Va. 300, 306-07, 117 S.E.2d 101, 106 (1960) (stating that "in determining the amount of damages [owed to the owner] . . . [the commissioners] shall offset the enhancement in value of the residue . . . by reason of the construction of the project") (emphasis added).
186 Enhancement occurs in partial taking cases in which the taking and construction of a public project enhances or increases the value of the property that remains after the taking. Enhancement may be used to offset the damages owed to the property owner. Town of Galax v. Waugh, 143 Va. 213, 129 S.E. 504 (1925). For example, if VDOT inflicts $50,000 of damage to a property but its project enhances the property by $10,000, VDOT must provide the owner with $40,000. Enhancement is permissible because, while it may produce "inequality" between various landowners, it does not produce "injustice," as long as each owner is in no worse position (financially) after the taking as he was before the taking. Id. at 236, 129 S.E. at 511.
The case of *Davis v. Marr*\(^{187}\) demonstrates the injustice of the double standard when dealing with medians. In *Davis*, VDOT took a portion of Mr. Marr’s property to convert a three-lane highway into a four-lane limited access highway with a median in the middle. By written contract, VDOT agreed to place an opening in the median adjacent to Mr. Marr’s property in order to provide access to a restaurant located on the property. In return, Mr. Marr agreed to convey VDOT a piece of his land at a reduced price.

VDOT originally established the opening in the median as agreed, and VDOT kept the opening in use for several years. However, VDOT later reneged on its agreement and placed a “no left turn” sign in the median, thereby severely restricting access to Mr. Marr’s property. The elimination of this access point practically destroyed the restaurant business on the property and rendered the tenants who ran the restaurant unable to pay their rent. Relying on grounds other than principles of eminent domain law, the Virginia Supreme Court ruled that Mr. Marr could not recover damages for the effective closure of the median opening and subsequent elimination of access. Thus, VDOT was able to reduce the damages owed to Mr. Marr by providing an opening in the median, but Mr. Marr was unable to recover damages when VDOT eliminated the same opening in the median.

As Mr. Marr learned, access damages can drastically impact the use of a property and the businesses conducted on the property. Access damages are extremely severe to restaurants and retail businesses, where easy access to the property is the property’s greatest attribute and value. Some states have acted to correct the problems associated with access damages, but Virginia is not one of them.\(^{188}\)

### d. The Logic and Justice in Making Just Compensation . . . “Just”

Apart from the constitutional mandate, there is tremendous logic and justice in making an owner’s compensation just. To provide owners anything less than the total value of the property taken is to place a disproportionate share of the cost of the public project on the individual owner whose property is taken. If the project is a legitimate public use or public project, the public should share equally in the cost. Those already required to surrender their property for the project should not also be forced to bear a disproportionate share of the cost of the project. The just compensation requirement should “prevent[] the public from loading upon one individual more than his just share of the burdens of government.”\(^{189}\)

The natural response of condemnors is that owners cannot be permitted to recover all

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187 200 Va. 479, 106 S.E.2d 722 (1959); see also Fugate v. Martin, 208 Va. 529, 159 S.E.2d 669 (1968) (holding that access damages are non-compensable in eminent domain actions even when VDOT breaches its own covenant in the deed to an owner’s property, which states that “full and free access” to the property “shall not be obstructed”). Thus, even though VDOT may promise to keep an owner’s access free and clear and may place that promise in the owner’s deed to the property, VDOT may not have to compensate the owner for such access damages in a later eminent domain proceeding in which VDOT breaks its promise and obstructs access in violation of its promise.

188 For example, Missouri law states:

In any case in which the commission exercises eminent domain involving a taking of real estate, the court, commissioners, and jury shall consider the restriction of or loss of access to any adjacent highway as an element in assessing the damages. As used in this subsection, ‘restriction of or loss of access’ includes, but is not limited to, the prohibition of making right or left turns into or out of the real estate involved, provided that such access was present before the proposed improvement or taking.

Mo. Rev. Stat. § 227.120.

189 Monongahela Nav. Co. v. United States, 148 U.S. 312, 325, 13 S. Ct. 622, 626 (1893); Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).
their losses because the cost of public projects would then be prohibitive. In other words, the concern is that the cost of public projects will increase if condemnors are required to adequately compensate owners. Condemnors ignore one critical fact: the cost of the project is what it is. The cost of the project remains the same whether the condemnor adequately reimburses owners for their losses or not. The only question is who will pay the cost of the project: the public as a whole or only those owners forced to surrender their property. If owners can recover the losses they suffer as a result of the project, the public shares equally in the cost. If owners cannot recover the losses they suffer as a result of the project, those owners bear a disproportionate share of the cost.

Any argument against full indemnification for owners begs the same questions that were asked in Virginia more than 100 years ago, and the answers to these questions should be no different. "Is there ever, under any circumstances, so imperative a demand for a public improvement as that it shall be done at the expense of one or two individuals of the city?"  

Are we to stop and pander to the demands of capital when the private property of the individual citizen is being taken, when under the guise of law the private citizen is being robbed of his rights, shall we stop and say that capital will not come in if we pass this law? For one I cannot, I will not. If we cannot improve our condition as fast as we should like and as many would demand, I am opposed to advancing so rapidly along those lines as to sacrifice the property of the individual citizen. If the property of the individual citizen is damaged and it is for public benefit, then I ask who ought to pay for it.  

The Virginia Constitution guarantees property owners just compensation for property taken or damaged. Virginia's laws should guarantee property owners no less.

V. The Reasons Why Property Rights Abuses Continue in Virginia

The obvious questions that remain after reviewing the previously discussed abuses are: Why and how do these abuses continue? Why does the Assembly not take action to curb these abuses? Why do Virginia's courts not lend property owners subject to such abuses more protection?

A. Special Interest Politics

The Assembly's refusal to enact meaningful eminent domain reform is partly because most representatives are not affected or threatened by eminent domain. Those with political power, such as delegates, senators, and judges, are rarely the target of eminent domain, and, on the rare occasion they are required to surrender their property, they seldom have to go to court to obtain "just" compensation. However, the single largest factor leading to the Assembly's refusal to enact meaningful eminent domain reform is pure politics—special interest politics.

1. The Condemnors' Lobby

The Assembly refuses to place limits on the power of eminent domain and refuses to

190 Debates, supra note 23, at 701.
191 Id. at 712.
192 Those representatives who were threatened by eminent domain before entering political office, such as former Delegate Thelma Drake, who is now in the United States House of Representatives, understand the current problems related to eminent domain and are typically among the strongest advocates for eminent domain reform.
A strong and savvy condemnors’ lobby has successfully urged the Assembly to gradually chip away at private property rights over the years. Meanwhile, this lobby has successfully opposed any meaningful eminent domain reform that would place real restrictions on condemnors’ power. Whenever eminent domain reform is discussed in Richmond or when the Assembly appoints a commission or work group to study eminent domain, it is like a condemnors’ convention.

For example, of the twelve-member Eminent Domain Work Group of the Virginia Housing Commission appointed in 2005 to discuss eminent domain reform, only two members clearly represented the property owners’ interests while seven clearly represented condemnors. Four members were condemnors, and three members were paid lobbyists for condemnors. In December of 2000, six entities gave public comments at a joint subcommittee studying eminent domain issues. All six entities were condemnors. Condemnors also dominated the 2004 Eminent Domain Work Group. Of the sixteen members present at the July 14, 2004 and September 23, 2004 meetings of the Work Group, seven were condemnors, five were condemnors’ lobbyists, and only three members could arguably be said to represent the property owners’ interests.

The condemnors’ lobby consists of both public and private entities. It includes large utility corporations, railroad companies, local governments (cities and counties), state agencies such as VDOT, and many others, not to mention the large law firms, individual attorneys, and former state representatives that condemning authorities frequently employ to lobby on their behalf. While the large corporations have great financial resources with which they can influence politicians, members of local governments, influential law firms, and former representatives can influence politicians through the great political sway they typically have with representatives and those in the representatives’ local districts.

2. Government Lobbyists: Taxing Owners to Fund Lobbyists Opposed to Owners

It is no surprise that private condemnors, such as large gas and power companies, have extensive financial resources to fight against eminent domain reform. However, the amount of time, money, and resources that government condemnors, such as VDOT and local governments, expend to combat eminent domain reform is shocking. In addition to sending city attorneys, city planners, housing authority members, and other city and county employees to Washington, D.C., to testify at the House Committee on Government Reform and Oversight, members of local governments also worked with their lobbyists to advocate against eminent domain reform. For example, the City of Suffolk, Virginia, has used its limited financial resources to hire lobbyists to oppose eminent domain reform. Eminent Domain Work Group: Status Report – 2004 Interim (visited Oct. 3, 2006) <http://dls.state.va.us/HousingCommission/meetings/2004Meetings/Full/111504/E_D_status.pdf>.


194 Id.


to the Assembly to oppose eminent domain reform, Virginia’s cities and counties have formed strong coalitions that frequently use their resources to oppose eminent domain reform.197

The Virginia Municipal League (hereinafter VML) and the Virginia Association of Counties (hereinafter VACO) are two of the most ardent opponents of eminent domain reform. VML, a coalition of Virginia’s cities, declared that “the Kelo decision is a correct outcome.”198 In 2005, VML opposed an eminent domain reform bill because the bill “would have limited condemnation to pure public uses.”199 In its 2006 General Laws Policy Statement, VML opposed legislation that would make Virginia property owners whole in cases where condemnors failed to make the owner a fair offer.200 VML is also a member of the National League of Cities, a group that “strongly opposes . . . the Private Property Rights Protection Act of 2005,” a bill offered in response to Kelo and designed to eliminate the abuses seen in Kelo.201 The National League of Cities also filed an amicus brief in the United States Supreme Court in the Kelo case. Not surprisingly, the brief opposed the property owners and supported the city.202

Along with VML, VACO lobbies hard against Virginia property owners and eminent domain reform. In its newsletter dated January 27, 2006, VACO asks its members to contact the Senators on the Senate Courts of Justice Committee to oppose a meaningful eminent domain reform bill.203 VACO urges support for a watered down version of the bill that does not “diminish[] previously granted eminent domain authority.”204 VACO declares in its letter that its favored bill is “supported by a broad-based coalition of interested parties,” which is

It is a painful irony that Virginia property owners—the taxpayers—involuntarily pay taxes to their state and local governments, only to have the government turn and use that money to pay government employees to lobby against the property owners themselves.

197 Surprisingly, some local governments in Virginia appear to be using Virginians’ money (tax money) to fund political candidates and political action committees. The Virginia Public Access Project’s website shows that certain cities and counties gave monetary donations and gifts to political candidates and political action committees. See Vpap.org, Donors (visited Oct. 6, 2006). The results can be obtained by putting the words “city” and “county” into the search box.

198 Local Use of Eminent Domain Upheld in Connecticut Case, VML Update (Virginia Municipal League, Richmond, VA), July 1, 2005, at 2 (emphasis added).

199 Id. This statement is most telling, as VML admits that Virginia law currently allows takings for purposes other than “pure public uses.”

200 See Virginia Municipal League, 2006 General Laws Policy Statement available at <http://www.vml.org/LEG/06LegPrgrm/Final%20Gen%20Laws%20Statement%2011-8-05.doc>. The letter states that Virginia should not permit property owners to recover compensation beyond the courts’ current interpretation of “just compensation.” The courts’ current interpretation denies owners the opportunity to recover business losses the condemnor inflicts upon them and does not permit the owner to recover litigation expenses the owner incurs as a result of the condemnor’s grossly inadequate offer.

201 See Letter from Donald J. Borut, Executive Director of the National League of Cities, to James Sensenbrenner, Chair of the House Judiciary Committee, and John Conyers, Jr., Ranking Member of the House Judiciary Committee (Nov. 3, 2005) available at <http://www.nlc.org/content/Files/NLCAgainstHR4128ltr10-05.pdf>.

202 See U.S. Supreme Court Hears Eminent Domain Case, VML Update (Virginia Municipal League, Richmond, VA), March 11, 2005, at 1.


204 See supra note 203.
undoubtedly the condemnors’ lobby.205

It is a painful irony that Virginia property owners—the taxpayers—involuntarily pay taxes to their state and local governments, only to have the government turn and use that money to pay government employees to lobby against the property owners themselves. Almost every time a significant eminent domain bill is in committee for review, VDOT employees, as well as employees and attorneys from Virginia’s cities and counties, attend these meetings while on the taxpayers’ dime, and oppose the interests of tax-paying property owners. In essence, Virginians involuntarily fund the demise of their own private property rights.

3. Capturing Elected Representatives: Gifts, Favors, Reelection, and Conflicts of Interest

To its credit, the condemnors’ lobby is a very strong and successful coalition. The condemnors’ lobby understands Virginia’s political process well and works effectively within that framework. It knows that any bill designed to reform eminent domain in Virginia must first escape the Courts of Justice Committee in each house before it can even come up for a vote on the floor of that house. Consequently, the condemnors’ lobby targeted and appears to have captured the loyalty of key representatives on these important committees. The means by which the condemnors’ lobby holds sway over these representatives are not always obvious to the public eye, but the results are devastating to Virginia property owners.

A. GIFTS AND FAVORS

One way private condemnors actively capture the loyalty of key representatives is by bestowing gifts and favors upon those representatives. One large condemnor treated key members of the Senate Courts of Justice Committee to out-of-state hunting trips that cost more than $1,700 per person.206 The same condemnor treated other members of the Courts of Justice Committee to high-profile sporting events and extravagant dinners.207 Two key

205 Id. In another newsletter, VACO announces it has joined a large group of “stakeholders” (i.e., condemnors) to promote a bill that “preserves current condemnation authority for state and local government and other entities that have the power of eminent domain.” House and Senate Courts to Hear Eminent Domain Bills, Capitol Contact, at 2 (Jan. 18, 2006) <http://www.vaco.org/PUBLICATIONS/Capitol%20Contact.php>. VACO and other condemnors aggressively fight to retain the vast and often unrestricted powers the Assembly has given them.


members of the Senate Courts of Justice Committee have been among the highest gift recipients in the Assembly.208

One condemnor stated that it “uses gifts to create good relations with legislators.”209 These gifts, including extravagant trips and dinners, are personal gifts given in addition to the generous campaign contributions condemnors give to representatives.210 Obviously, representatives receiving such gifts from condemnors face an enormous conflict of interest when they vote on eminent domain bills that directly affect the gift-giver.

b. Reelection

Yet another way the condemnors’ lobby influences certain representatives on the Courts of Justice Committee is related to the representative’s goal of reelection. The most apparent way condemnors influence politicians is through campaign contributions. While such contributions do exist—one large condemnor is among the largest donors of campaign contributions in the Commonwealth211—political connections within a representative’s district garner much attention from representatives who will seek reelection in that district.

Many representatives have a close relationship with members of local governments within their political district. These local officials, such as city council members and members of county boards of supervisors, often wield great political power in their local districts—districts in which state representatives will eventually seek reelection. These local officials can use their political clout and connections to impact public opinion, and ultimately voters. State representatives keen on reelection have much political incentive to please these officials, especially given the traditionally low turnouts in state elections in which the politically active comprise a large portion of the vote.

c. Conflicts of Interest

In addition to the gifts, favors, campaign contributions, and reelection pressure that

Obviously, representatives receiving such gifts from condemnors face an enormous conflict of interest when they vote on eminent domain bills that directly affect the gift-giver.
likely influence their stance on eminent domain reform bills, many of the representatives who routinely oppose meaningful eminent domain reform have an inherent conflict of interest. Specifically, some of the representatives on the Courts of Justice Committee who routinely vote against meaningful eminent domain reform are lawyers whose law firms represent condemnors in eminent domain litigation as well as other areas. The representatives’ law firms profit greatly from business given to them by their condemnor clients. Thus, representatives with this conflict are voting on bills that directly impact and affect their clients and the profits of their own law firms.

Two leading members of the Senate Courts of Justice Committee are partners with the law firm of Kaufman & Canoles.212 This firm has a large practice of representing municipalities and local governments in several areas, including takings and eminent domain cases. The statement of economic interests filed by the two partners of Kaufman & Canoles who serve on the Senate Courts of Justice Committee reveal that their firm made over $250,000 a year representing municipalities and local governments.213 The same statements reveal that their firm additionally earns up to $250,000 annually representing utility companies, another major condemnor in Virginia.214

Kaufman and Canoles advertises on its website that it “repesent[s] a significant number of municipalities” and that “[s]erving local government attorneys and municipalities has become an increased percentage of our work.”215 The firm further states that “[d]efending local governments from . . . constitutional claims comprises a considerable part of our Municipal Law Practice Group focus.”216 One of the claims highlighted is “taking[s] of private property” in which the firm represents municipalities.217 The firm also lists “condemnation” and “eminent domain” as “Types of Litigation Matters Handled By Kaufman & Canoles, P.C. for Local Governments and Governmental Entities.”218

The firm’s website specifically advertises that its two Senators “work[] closely [together] in presenting the firm to prospective corporate and governmental clients.”219 The website further proclaims that one of its Senator’s “political know-how . . . boosts [his] value to [the


214 Id.


216 Id.

217 Id.


firm’s] clients” and boasts that the Senator “has, over his years in the Senate, developed a vast . . . network of . . . government . . . leaders.” The website also acknowledges that its other Senator’s “professional focus is representing Kaufman and Canoles to prospective corporate and governmental clients.”

This law firm undoubtedly reaps substantial financial benefits from representing municipalities and local governments, two active condemnor who ardently oppose eminent domain reform, in addition to the large income generated from representing utility companies, large corporate condemnor. Members of this firm who serve on the Courts of Justice Committee have an undeniable conflict of interest when they are asked to vote on eminent domain reform bills. When these representatives vote on eminent domain bills, they are voting on the very laws that will determine the outcome of their own firm’s legal cases and on laws that directly affect their established clients in those cases.

In addition, one of the Kaufman & Canoles partners who serves on the Courts of Justice Committee owns significant stock in a large corporate condemnor. The statement of economic interests filed by this representative reveals that he owns more than $50,000 worth of stock in the parent company of one of Virginia’s largest corporate condemnor. This situation poses a significant conflict of interest. Stockholders of these companies are voting on bills that will directly impact their company, their stock, and their own financial gain.

4. The Work of Captured Representatives: The Roadblock to Real Eminent Domain Reform

Not surprisingly, all these gifts, favors, campaign contributions, reelection pressure, and financial gain for themselves, their companies, and their law firms put great pressure on many of the representatives and create an apparent conflict of interest for key representatives on the Courts of Justice Committee. Instead of abstaining from the vote in instances in which this conflict is present, many of the representatives faced with this conflict lead the charge against eminent domain reform or work behind the scenes to block any meaningful eminent domain reform.

Largely due to the work of key members of the Courts of Justice Committee, the Assembly has continuously rejected meaningful eminent domain reform. For example, the Assembly rejected bills to reimburse owners for litigation expenses, see S.B. 111 (2000 session), S.B. 1123 (2001 session), S.B. 1171 (2001 session), S.B. 1173 (2001 session), H.B. 826 (2004 session), a bill to reimburse owners for business losses, see H.B. 291 (2002 session), a bill to give eminent domain cases priority on the civil docket, see H.B. 826 (2004 session), a bill to give property owners served by publication the same rights as all other persons in Virginia, see H.B. 832 (2004 session), a bill to make the Landowners’ Bill of Rights actually contain enforceable rights, see H.B. 826 (2004 session), and a bill to prohibit condemnor from using the coercive tactic of lowering appraisals on owners when the owners do not accept the condemnor’s offer, see H.B. 826 (2004 session). The Assembly stripped other reform bills of meaningful protections without entirely rejecting such bills. See, e.g., H.B. 1946 (2003 session), H.B. 1949 (2003 session), and H.B. 1821 (2005 session). It was not until 2000 that the Assembly finally enacted a law to allow owners to receive a copy of the
While these same individuals support artificial reform that sounds good on its face but does little to limit condemnors’ power, they actually ensure that all attempts at meaningful reform fail. Consequently, any bills designed to provide meaningful eminent domain reform have not survived the Courts of Justice Committees intact. The representatives in these committees have either killed the bills entirely or disemboweled the bills before they ever left the committee.

Certain committee members have become highly skilled at taking meaningful eminent domain reform bills and rendering them meaningless. Each time a strong eminent domain reform bill is proposed, these committee members take the bill and water it down to the point that the bill provides little protection for property owners and does little to limit the power of condemnors. This process allows the representatives to play both sides: they can claim to have supported “eminent domain reform” (by voting in favor of the watered down bill) while simultaneously appeasing the condemnors’ lobby and preserving the condemnors’ position of power (by rendering the original bill meaningless). Nearly every bill passed in this manner sounds good on the surface but does little to restore protections for Virginia property owners.

A prime example of this tactic is the Landowners’ Bill of Rights (LBOR), Virginia Code § 25.1-417.224 While this statute seems to give property owners several rights, it actually gives them none. After purporting to give property owners several rights and protections, the last sentence of the statute takes all the rights away. This sentence states that “[t]he provisions of this section create no rights . . . and shall not affect the validity of any property acquisitions by purchase or condemnation.”225 This statute is an oddity to say the least: it gives rights and then takes them all away.

In 2005, the Courts of Justice Committee for both houses had an opportunity to delete the “right-removing” sentence from the LBOR and to thereby place in the statute real rights that property owners could enforce and condemnors must respect. Both committees refused. House Bill 1821 sought to make the LBOR enforceable and to add additional rights to the statute.226 The history of H.B. 1821 is an example of the crafty politics played out in relative anonymity in the Courts of Justice Committees. Instead of voting in favor of H.B. 1821, the committees stripped H.B. 1821 of all real protections for property owners.

When condemnors discovered H.B. 1821 proposed to make the LBOR enforceable, they clamored for the attention of the representatives on the committees and eventually persuaded the committees to make sure this did not happen. Consequently, the first action both committees took was to craft an amendment that moved the language in H.B. 1821

224 See supra section IV.D.5.
225 Va. Code 25.1-417(B); see also supra note 145.
226 See H.B. 1821, 2005 Leg., 2005 Sess. (Va. 2005), available at HB 1821 Eminent Domain; Procedure for Acquisition of Property by State (visited Oct 2, 2006) <http://leg1.state.va.us/cgi-bin/legp504.exe?051+sum+HB1821>. The original version as introduced can be found by clicking on the hyperlink marked “01/05/050 House: Prefiled & ordered printed; offered 01/12/05 054173520 (impacts statements).” For the House amended version, choose the hyperlink marked “02/05/05 House: Committee substitute printed 055532148-H1”; for the Senate amended version, choose the hyperlink marked “02/22/05 Senate: Committee substitute printed 050619520-S1.” The bill as passed by the House and Senate can be accessed by choosing the hyperlink marked “03/07/05 House: Bill text as passed House and Senate (HB1821ER) (impact statement).”
from the LBOR to another Code section. This subtle and seemingly benign political move was a shrewd political tactic that protected the condemnors’ interests without killing the bill entirely. By moving the proposed language of H.B. 1821 to another section of the Code, the committees took the LBOR off the table and eliminated the possibility that the LBOR would become enforceable.

The committees’ amendments also effectively rendered all the meaningful protections proposed in H.B. 1821 meaningless. When H.B. 1821 was introduced, it provided property owners with legitimate protection. The bill as originally written required condemnors to reimburse owners for their costs and experts’ fees (not attorneys’ fees) in cases in which the owner proved in court that the condemnor’s initial offer to the owner was fifteen percent or more below the actual value of the property. The bill was designed to encourage fair offers and to thereby reduce costly litigation.

Far from requiring condemnors to reimburse owners in cases where the condemnor makes a low offer that necessitates litigation, the committees’ amended bill states that courts “may,” not must, require a condemnor to reimburse the owner when the owner proves the condemnor’s offer was insufficient. Furthermore, the committee substantially raised the condemnors’ margin of error. H.B. 1821 required condemnors to reimburse the owner when the owner proved the condemnor’s offer is fifteen percent or more below the actual value of the owner’s property, but the committees’ amended bill allows courts to order reimbursement only if the condemnor’s offer is at least thirty percent less than the actual value of the property.

Under the committee’s amended bill, an owner with a home worth $200,000 cannot be made whole if the condemnor offers him $140,001 or more. The owner can either accept the condemnor’s offer of almost $60,000 less than the actual value of his home, or he can forfeit a large portion of his compensation to litigation expenses. Either way, the owner loses.

The committee made further changes that greatly reduced the protections contained in the original bill. Under the original bill, courts look at the condemnor’s initial offer (before the lawsuit) to determine if the condemnor’s offer was fifteen percent below the actual value of the owner’s property. Under the committees’ amended bill, the condemnor’s initial offer is irrelevant. The amended bill requires courts to look at the last offer the condemnor made within eighty-one days after the condemnor sues the owner. The committee’s bill gives condemnors no incentive to make a fair offer before it sues the owner and forces the owner to hire an attorney. Condemnors can avoid any liability under the committees’ amended bill simply by making a low offer, suing the owner when he rejects the low offer, and then, eighty-one days after the condemnor sues the owner.

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227 Id.
228 Id.
229 See id.
230 See id.
231 Eminent domain litigation is very costly. Not only does litigation require attorneys, but eminent domain litigation also requires expert witnesses who can testify to the value and other aspects of the property. It is not uncommon for owners to incur tens of thousands of dollars in litigation expenses.
232 See supra note 226.
233 See id.
one days after suing the owner, making an offer that is not more than 29.9% below the actual value of the property taken.

The committees’ amended bill also weakened other protections contained in H.B. 1821. Under the committee’s amended bill, even if a court did order a condemnor to reimburse the owner, the owner can only be reimbursed for three expert witnesses at most, regardless of how many witnesses the condemnor uses at trial. Practically speaking, this means the condemnor could call multiple witnesses, such as surveyors, land planners, real estate agents, appraisers, soil scientists, and engineers, to testify at trial. Meanwhile, the landowner must choose whether to rebut all these experts with his own expert witnesses, and bear the cost of all but three, or to gamble on three experts he hopes and prays will be sufficient to present his evidence adequately.

After drastically weakening or removing all the protections proposed in H.B. 1821, the committees delivered a final blow to H.B. 1821, a blow that will be mostly felt by small landowners in Virginia. At the urging of public utility corporations, the committee added a section to the amended bill that states the protections contained in the bill “shall not apply to those condemnation actions involving easements valued at less than $10,000.” Thus, in cases where the easement inflicts less than $10,000 of damage, the bill provides absolutely no protection for the affected owner.

The 2006 legislative session of the Virginia Assembly further illustrates the Assembly’s refusal to enact meaningful eminent domain reform. Virginia is one of only thirteen states in the entire nation to refuse to enact legislation in response to the infamous *Kelo* decision.

During the 2006 legislative session, the condemnors’ lobby supported House Bill 94 (hereinafter H.B. 94), a bill drafted largely by a coalition of condemnors that dominated the Virginia Housing Commission’s Eminent Domain Work Group. While H.B. 94 pretended to

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234 See id.
235 It is not unusual for VDOT and other condemnors to call multiple expert witnesses to testify at trial.
236 In a case directly addressing costs in eminent domain proceedings, the Florida Supreme Court cogently and logically explained the injustice in arbitrarily limiting reimbursement for the owner’s costs.

The courts should not be blind to the realities of the condemnation process. Any excuse which the Court might have for disclaiming knowledge of just what goes on is entirely removed by the fact that the Court itself views the trial and proceedings and has personal knowledge of all such matters. The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings prepared by expert draftsmen. The court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifications, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like services of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket.

Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950).
237 See id.
240 See supra note 193 and accompanying text. The members or participants of the 2005 Eminent Domain Work Group consisted mainly of condemnors, condemnor lobbyists, and parties who are typically the beneficiaries of eminent domain, such as developers and the realtors who sell the new developments that developers build on
give property owners protection, it actually preserved the condemnors’ power and did little
to protect Virginians from eminent domain abuse. H.B. 94 “contains almost no restrictions at
all.”241 As VACO stated in its legislative publication, H.B. 94 “preserves current condemnation
authority for state and local governments and other entities that have the power of eminent
domain.”242

After the House Courts of Justice Committee voted in favor of H.B. 94, the bill came up
for discussion on the House floor. During this time, Delegate Johnny Joannou courageously
opposed the bill and offered an amendment to provide Virginians meaningful protection
against eminent domain abuse. Delegate Joannou warned that H.B. 94 merely pretends to give
Virginians protection. After proposing his amendment to H.B. 94, Delegate Joannou informed
the House that they had a choice of “two clear paths”—one path to protect Virginia property
owners (his amendment to H.B. 94) and one path to preserve condemnors’ power and to allow
continued eminent domain abuses in Virginia (H.B. 94).243 The difference between H.B. 94 and
Delegate Joannou’s amendment to H.B. 94 “is the perfect example of the clash between real and
cosmetic reform—a battle between those who want to save their homes and those who want the
power to take them.”244

241 Steven Anderson, The Virginia Property Rights Coalition, Our Legislators Have a Choice of “Two Paths”: One Is
PUBLICATIONS/Capitol%20Contact.php>; Housing Commission Refers Eminent Domain Legislation to Courts,
243 Steven Anderson, The Virginia Property Rights Coalition, Our Legislators Have a Choice of “Two Paths”: One Is
244 Anderson, supra note 241. As VACO stated, the bills are “drastically different.” VACO, Eminent Domain Bills
Drastically Different, Capitol Contact 16, at 1 (Feb. 22, 2006) and VACO, Eminent Domain Bills in Conference,

After proposing his amendment to H.B. 94, Delegate Joannou informed
the House that they had a choice of “two clear paths”—one path to protect Virginia property
owners (his amendment to H.B. 94) and one path to preserve condemnors’
power and to allow continued eminent domain abuses in Virginia (H.B. 94).
The House responded to Delegate Joannou’s impassioned plea to curb eminent domain abuse in Virginia, and it voted in favor of Delegate Joannou’s amended version of H.B. 94.\(^{245}\) However, the Senate, led once again by key representatives in the Courts of Justice Committee, refused to support Delegate Joannou’s amendment. Instead, the Senate Courts of Justice Committee amended Senate Bill 394\(^{246}\) (hereinafter S.B. 394) to include broad language similar to H.B. 94.\(^{247}\) As the VML and VACO stated, “S.B. 394 (Stolle) is almost identical to H.B. 94.”\(^{248}\)

The Senate voted in favor of S.B. 394, and it refused to adopt Delegate Joannou’s amendment when the House delivered the amendment to the Senate for a vote. The Senate once again chose “cosmetic reform” (the language of H.B. 94 and S.B. 394) over “real reform” (the language of Delegate Joannou’s amendment).\(^{249}\) When Delegate Joannou and a bipartisan group of delegates in the House refused to weaken the protections for Virginia property owners contained in Delegate Joannou’s amendment, the Senate referred the amendment to a conference committee where it eventually died.\(^{250}\)

Any eminent domain reform proposed in 2007 must pass through the Courts of Justice Committees, where leaders on those committees can once again destroy any meaningful reform. Rest assured that come election time, these same representatives who vote against meaningful eminent domain reform, and who vote in favor of meaningless, eviscerated bills only, will tout their involvement in passing eminent domain reform designed to protect property owners. The truth is that many of these politicians voted in favor of preserving the condemnors’ power. Each time politicians claim they voted in favor of eminent domain reform, voters should ask the following question: Did the representative reject a bill that would have provided real protections for Virginia property owners and vote in favor of a weaker bill or a watered-down amendment in its place? The answer might be revealing.

5. The Absence of Property Owners in the Political Process

The special interest politics that come into play in the Assembly’s refusal to enact real eminent domain reform also serve to highlight the failure of grassroots politics on this issue. While the condemnors’ lobby maintains a strong presence at the Assembly, property owners


have historically been absent from the legislative process involving eminent domain. The absence of property owners should not be surprising. In the first place, individual owners tend not to get involved in the legislative process, either for lack of interest or lack of hope. Secondly, even if individuals do try to affect the legislative process, the imbalance of power between individual property owners and the strong condemnors’ lobby makes it very difficult for owners to accomplish any meaningful reform.

Condemnors obviously have a strong interest in maintaining their power, but until recently, individual property owners did not give much thought to the vulnerability of their ownership rights. While condemnors are highly motivated to affect the legislative process, the vast majority of individual owners have not been so motivated. Eminent domain has not traditionally been at the forefront of people’s minds. Typically, unless individuals are personally affected, they are content to go on with life as usual.251

The Georgia Supreme Court provided an excellent summary of this phenomenon in State Highway Department v. Branch:252

Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner’s right to be saved from harm by even the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.253

As the court alluded to in Branch, the very power of eminent domain that the beneficiaries of a taking may ask the government to exert on others today is the same power from which those beneficiaries will seek protection tomorrow, or at some point in the future when they fall out of political favor. Unfortunately for Virginia property owners, individual owners have not traditionally rallied for eminent domain reform until their own property was threatened.

The silver lining in the cloud of the Kelo decision is that it thrust eminent domain into the national spotlight and drove the issue to the forefront of the minds of many Americans. For the first time in years, Americans feel their homes or businesses could be taken next. Until they felt their property was threatened, most people did not concern themselves with eminent domain legislation.254

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251 The representatives at the Virginia Constitutional Convention of 1901-02 clearly understood the reasons behind the seeming complacency of Virginia property owners. See Debates, supra note 23, at 706, 711-12. As one representative explained, owners “cannot come to the Legislature to get a new law passed [that will] give them a remedy, for after the law is passed it will be too late in almost every instance because [the owner’s personal] remedy will be barred.” Id. at 712; see also infra note 255 and accompanying text.


253 Id. at 772, 152 S.E.2d at 374.

254 Until recently, many Americans were willing to give up some protections of private property in return for government projects or programs they deemed desirable. Most Americans did not believe or realize that eminent
While many Virginia property owners who suffered abuse under Virginia’s eminent domain laws have become increasingly willing to try to influence the legislative process, such participation by landowners has been traditionally lacking. Owners who will gain no relief from the losses they already suffered are usually reticent to devote their limited time and resources to fight a battle that will not help them personally. As the representatives to the Virginia Constitutional Convention of 1901-02 pointed out, owners who already had their property taken and already had their day in court will not get their property back or receive additional compensation from bills the Assembly may enact after their property is taken. These bills are not retroactive.

Many owners who suffered eminent domain abuses lose hope in the governmental system entirely. These owners are not in the mindset to fight another battle, especially when they believe there is little chance of prevailing. After going through intense and prolonged litigation in which they ultimately lose their property or are denied adequate compensation, many owners are simply too tired and discouraged to continue fighting—especially when the government’s judicial system just condoned or refused to correct the injustice done to them.

The individual property owners who recently got involved in the political struggle for eminent domain reform in Virginia quickly realized that the Assembly was just as unlikely as Virginia’s courts to grant them the protection they sought. While the condemnors’ lobby has extensive resources with which it can influence politicians and shape eminent domain laws, individual property owners do not have similar resources. These resources can be in the form of finances, information, coalitions and networking, logistics, manpower, political influence and connectedness, and sheer convenience.

Lobbyists and government employees are paid to attend meetings at the Assembly as part of their job duties. Individual property owners are not paid to attend these meetings and must take time off from their jobs. Attending legislative meetings is a real sacrifice for individual property owners because they are not reimbursed for travel or lodging expenses, and they are not reimbursed for the time they miss from their jobs. In short, while the condemnors’ lobby attends meetings at the Assembly to preserve their position of power, most property owners are busy working so that they can provide for their families and pay their taxes—taxes the government will then use to pay lobbyists and government employees to oppose Virginia property owners and the meaningful eminent domain reform they seek.

Another reason property owners have been absent from the legislative meetings at which eminent domain bills are crafted is because individual property owners do not have the political domain abuse could strip them of their property; they had forgotten that government is most dangerous when its actions are benevolent. See infra note 271. Now that Kelo helped Americans recognize their own property could be threatened, many Americans are again seeing the importance of strong protections for private property.

255 Debates, supra note 23, at 711-12. Likewise, judicial decisions provide no relief to those persons who previously had their property taken and already had their day in court, even if the judicial decision in their case is ultimately declared to be wrong. For example, in Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), the Michigan Supreme Court allowed the government to take an entire neighborhood and give the property to the General Motors Corporation. In County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004), the court reversed itself and admitted that its decision in Poletown was wrong, but the Hathcock decision did not return the property of the rightful owners in Poletown or provide those owners with any relief for their previous loss. While the Hathcock decision “vindicate[d the] Constitution, protect[ed] the people’s property rights, and preserve[d] the legitimacy of the judicial branch as the expositor—not creator—of fundamental law,” see id. at 483, 684 N.W.2d at 787, it neither restored the property of the rightful owners in Poletown nor provided them any other personal relief.

256 See supra section V.A.2.
connections that the condemners’ lobby possesses. Unlike lobbyists and many members of local governments, individual owners usually have little, if any, relationship with their own state representatives, much less representatives from other districts. Moreover, the owners who typically suffer eminent domain abuses are not the politically connected.257

In addition to their lack of state-wide political connections, individual property owners have not historically had a network that kept them informed about important legislative meetings and upcoming decisions respecting eminent domain. Meanwhile, members of the condemners’ lobby easily keep each other abreast of any meetings at which eminent domain laws will be discussed.258 The condemners’ lobby has a network of people it can call upon to attend legislative meetings, and many members of the condemners’ lobby are already present at the Assembly for each legislative session.

Even when individual owners learn of important meetings regarding eminent domain and make the sacrifices to attend, they have faced several problems, many of which stem from the shrewd politics of Courts of Justice Committee members in both houses of the Assembly. In 2005, for the first time in many years, large numbers of property owners organized themselves and traveled to Richmond to attend committee meetings regarding eminent domain. Many of these owners took time from their busy jobs and drove several hours to attend. After the property owners arrived in Richmond, the committee changed the meeting date without any prior notice to the public or to the owners.

On another occasion, property owners from all across Virginia drove to Richmond to attend a Senate Courts of Justice Committee meeting slotted for the morning. Upon the owners’ arrival, the committee changed the meeting time from the morning to the afternoon. When afternoon came, the committee moved the meeting time to early evening. Then, when evening came, the committee gave members of the condemners’ lobby more than half an hour to speak but gave a room full of property owners fewer than five minutes, collectively, to speak. These owners had driven long distances, taken time off work, and waited all day for an opportunity to address the committee. Political tactics such as these place great hardship on property owners seeking to participate in the political process and effectively deny owners an active voice in the process altogether.259

The circumstances faced by Virginia property owners are not new. The Representatives at the Virginia Constitutional Convention in 1901-02 voted in favor of a constitutional amendment to protect property owners in part because they knew the Assembly would not grant property owners the same protections given in the proposed amendment. As one Representative explained, it was “most probable” that property owners could not get legislation passed if the protections contained in the “proposed [constitutional] amendment were to be embodied in

In 2005, large numbers of property owners organized themselves and traveled to Richmond to attend committee meetings regarding eminent domain. After the property owners arrived in Richmond, the committee changed the meeting date without any prior notice to the public or to the owners.

257 This fact is all the more true given the fact that a condemning authority rarely takes property from those who are politically connected. When such takings do occur, the politically connected individuals are typically compensated to their satisfaction. As Justice Thomas stated in his *Kelo* dissent, condemners frequently take the property of the “least politically powerful” for the benefit of “those citizens with disproportionate influence and power in the political process.” *Kelo*, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting).

258 Aside from a constant presence at the Assembly and personal relationships with representatives and their staff, lobbyists have a variety of resources to keep them informed of pertinent bills and meetings. See, e.g., Alert: House and Senate Courts Committees to Hear Eminent Domain Bills, Capitol Contact 4, at 1 (Jan. 30, 2006) and Issues to Watch, Capitol Contact, at 2 (Jan. 13, 2006) <http://www.vaco.org/PUBLICATIONS/Capitol%20Contact.php>.

259 The General Assembly’s actions do not completely deprive owners of a voice because a vote against these politicians is still the owners’ strongest political voice.
a bill and offered to the next General Assembly.\(^\text{260}\) The Representative pointed to the fact that such a bill would fail because it would be “opposed by corporate interests . . . both municipal and private.”\(^\text{261}\) The Representatives further pointed to the fact that, similar to today, no condemnors welcomed the proposed eminent domain reform, and condemnors would likely succeed in opposing reform in the Assembly.\(^\text{262}\) Other Representatives ably articulated some of the very hardships that still plague owners seeking eminent domain reform today, including the fact that individual owners who previously suffered eminent domain abuse in the courts cannot get recourse for that particular abuse and the fact that most people are apathetic until the abuse happens to them.\(^\text{263}\)

**B. Virginia Courts’ Degradation of Virginians’ Private Property Rights**

With all these factors stacked against the individual property owner and in favor of the condemnors’ lobby, it is much more comprehensible why the Assembly does so little to protect Virginia property owners and their private property rights. However, the question remains regarding why the courts fail to lend more protection to Virginia property owners. One reason that courts do not offer more protection to owners is because judges, just like politicians, are isolated from the menace or threat of eminent domain. Many judges do not fully understand the harshness of this power because they do not feel threatened by it.

Another reason courts fail to offer more protection to owners is that courts do not seem to grasp the nature of an eminent domain case and tend to view the property owner in a negative light. In normal eminent domain cases in Virginia, the property owner is the respondent or defendant.\(^\text{264}\) Unlike defendants in all other types of litigation, property owners in eminent domain cases are truly involuntary parties to the litigation. The lawsuit does not arise due to any fault, or even alleged misconduct, of the owner. The litigation arises solely because the condemnor desires the owner’s property and has chosen to take it. The only guilt the owner bears is his or her exercise of the constitutional right to be free from unlawful takings and to receive just compensation for lawful takings. As former Delegate Bob McDonnell stated before he became Attorney General, “[t]he only thing these citizens did wrong was to own their land.”\(^\text{265}\)

Despite the fact that owners are involuntary parties in eminent domain litigation, many lower courts treat property owners more like criminal defendants than law-abiding property owners. Condemnors often portray the landowner as a roadblock to progress, or as a stubborn holdout standing in the way of a public project, or as a greedy individual looking for a windfall, or some combination of the three. Many judges are former government lawyers, such as prosecutors, or represented the government in some capacity. This prior experience seems to lead to a judicial tendency to trust the government and distrust individuals in opposition to the government.\(^\text{266}\) This tendency may affect the courts’ view of individual landowners or

\(^{260}\) Debates, supra note 23, at 706.

\(^{261}\) Id.

\(^{262}\) Id. at 704-05, 709.

\(^{263}\) Id. at 711-12.

\(^{264}\) In inverse condemnation cases in which the owner is forced to bring suit to recover compensation, the owner is the petitioner or plaintiff. Richmeade, L.P. v. City of Richmond, 267 Va. 598, 594 S.E.2d 606 (2004).

\(^{265}\) Highway Robbery, supra note 86.

\(^{266}\) The tendency of many former government lawyers to trust the government and distrust those in opposition to it is a natural byproduct of their environment and should not be read to imply any ill motives on behalf of
“holdouts” and the courts’ decisions in eminent domain cases.

Yet another reason many Virginia courts fail to protect abused property owners lies in a changing view of the importance of private property rights and the judges’ view of the courts’ own role in the process. Throughout the country, result-oriented courts struggling to save public programs and projects that are repugnant to the traditional and constitutional protections of private property have chipped away at private property rights in order to sustain these programs. These result-oriented courts have either stood by and winked at statutes and individual takings that should be struck as unconstitutional, or, at times, wholly rewritten constitutional protections of private property through judicial construction or reinterpretation.267

The broad expansion of the power of eminent domain appears to have begun with the emergence of the railroads. Railway companies needed much property to construct the railways across the country, and eminent domain was one tool for acquiring the property.268 Railway companies had immense power with legislatures and were able to obtain vast powers of eminent domain.269 As one commentator noted, “[t]he decade of the 1890’s was the railroad era in Virginia both economically and politically; the railroads were lavish in their political contributions and in return could count on the Legislature to do little to inhibit their activities.”270

While the expanded power of eminent domain in turn reduced private property rights, the real assault on private property began during the Franklin D. Roosevelt era and the institution of the New Deal.271 Many of Roosevelt’s New Deal programs were repugnant to the traditional and constitutional protections of private property rights, which stood in the way of these programs and so-called “progress.”272

As the United States Supreme Court once warned:

Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928).

272 While eminent domain is the focus of this paper, zoning, the current tax code, and modern social programs—many of which evolved from the New Deal—demonstrate how politicians have further denigrated private property rights. American government is now a government for sale. Modern politicians “buy partizans [sic] with the [private] property of individuals.” John Taylor, Tyranny Unmasked 17 (F. Thornton Miller, ed., Liberty Fund 1992) (1821).

Today’s politicians sell the private property rights of select groups or people (through eminent domain, zoning, social programs, and manipulation of the tax code) in return for the votes and political support of those benefiting from such sales. Gouverneur Morris once stated: “Give the votes to people who have no property, and they will sell them to the rich, who will be able to buy them.” The people’s private property rights have become modern politicians’ biggest pawn. Politicians take the private property of select persons or groups. They then sell or redistribute that
Franklin Roosevelt, eager to convince the public that the New Deal was not so new, but actually a ‘fulfillment of old and tested American ideals,’ often argued publicly that the Founders did not understand property rights to be as important as other individual rights. In one campaign speech, Roosevelt remarked that Jefferson had distinguished between the rights of ‘personal competency’ (such as freedom of opinion) and property rights; while the former were inviolable, the latter should be modified as times and circumstances required.273

Initially, the United States Supreme Court stood firm in its protection of private property rights even when New Deal programs collided with these rights.274 However, after Roosevelt threatened to pack the Court and immense pressure mounted to uphold the Roosevelt administration’s programs, “several justices shifted their position and accommodated the New Deal’s economic and social program[s].”275 As one scholar noted, before the New Deal, “[t]he Court deemed its mission to be the protection of property against depredations by the people and their legislators. After 1937 it gave up this mission.”276

In its attempt to avoid the inevitable collision between the programs of the New Deal and the constitutional protections of private property, the Court “judicially created [a] dichotomy between property rights and personal liberties.”277 By creating this false dichotomy,278 the Court...
could give great judicial protection to personal liberties while simultaneously giving the lowest judicial protection to private property rights, which stood in the way of the New Deal programs the Court struggled to uphold.\textsuperscript{279} Although the Court became increasingly active in protecting what it deemed “personal” liberties, it gave less and less protection to private property, which soon became one of the “liberties that would be left to the mercy of legislative majorities.”\textsuperscript{280}

The Court soon “relegated property rights to a secondary position.”\textsuperscript{281} The Court replaced its “long heritage of safeguarding property ownership from legislative intrusion” with an extreme judicial deference to legislative actions affecting property rights.\textsuperscript{282} The Court in \textit{Kelo} noted its “longstanding policy of deference to legislative judgments in this field [eminent domain].”\textsuperscript{283} Under the guise of judicial deference, the Court abdicated its role of judicial arbiter and now refuses to perform its duty of judicial review in the field of eminent domain.

While extreme judicial activism poses a threat to our constitutional form of government, \textit{Kelo} proves that extreme judicial deference poses its own threat.\textsuperscript{284} Excessive judicial deference in eminent domain cases eradicates the constitutional check on the legislature’s power of eminent domain and removes significant protections for private property owners. One

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\textsuperscript{279} \textit{Guardian, supra} note 9, at 133.


\textsuperscript{281} \textit{Guardian, supra} note 9, at 120.

\textsuperscript{282} \textit{Id.} at 134.

In Virginia, this extreme judicial deference led to the judiciary’s repudiation of longstanding principles that it once followed to protect Virginia property owners. For example, Virginia’s Courts formerly applied the principle of strict construction to eminent domain statutes. Courts required condemnors to strictly follow the requirements of the law in exercising the power of eminent domain. \textit{See City of Richmond v. Childrey, 127 Va. 261, 103 S.E. 630 (1920)} (stating that condemnors must strictly follow all statutory requirements before they may exercise the power of eminent domain and declaring that “[t]he requirement of the law must be fulfilled, whether reasonable or unreasonable”). If condemnors did not strictly follow the requirements of the law, courts dismissed the case for lack of jurisdiction. \textit{See, e.g., Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950)}.

While Virginia’s courts still recognize this principle on paper, they have totally repudiated this principle in practice. \textit{See Schmidt v. City of Richmond, 206 Va. 211, 132 S.E.2d 573 (1965)} (stating “the jurisdiction of courts [in eminent domain cases] is wholly statutory and that the statutes must be strictly construed and followed”); \textit{Hoffman Family, L.L.C. v. City of Alexandria, 272 Va. 274, 634 S.E.2d 722 (2006)} (“The statutes conferring the power of eminent domain must be strictly construed, and a locality must comply fully with the statutory requirements when attempting to exercise this right.”). In \textit{Lacy}, see infra section IV.B.1., the courts allowed the condemnor to blatantly violate the statutory requirements. \textit{Virginia Code § 25.1-205(A)} states that condemnors cannot initiate condemnation proceedings until they “comply[] with the requirements of § 25.1-206.” Among other things, section 25.1-206 requires condemnors to provide the owner with detailed construction plans of the proposed project on the owner’s property “so as to enable the owner of such property to be reasonably informed of the nature, extent and effect of such taking and the construction [of the project].” Despite the requirements of the Virginia Code, the condemnor did not have construction plans at the time it filed suit against the Lacys. Consequently, it did not give the Lacys the required plans. Instead of requiring the condemnor to comply with the Virginia Code, the courts simply instructed the condemnor to give the Lacys the construction plans once it finally obtained the plans, which did not occur until long after the condemnor filed suit against the Lacys and long after the Lacys had to hire an attorney and appraiser to respond to the suit.

\textsuperscript{283} 125 S. Ct. at 2657.

\textsuperscript{284} The danger of the two extremes can be seen in the Thomas, see supra section IV. C., and \textit{Kelo} cases. In Thomas, the court engaged in extreme judicial activism when it used its “inherent” power to grant legislative powers of eminent domain that the legislature had chosen to withhold. See supra section IV.C. In \textit{Kelo}, the Court exercised extreme judicial restraint when it refused to apply the plain language of the Constitution and thereby failed to provide the constitutional check on the legislature that is contained in the written text of the Constitution. If courts remain excessively active in finding powers of eminent domain and excessively restrained when dealing with the limitations on that power, they pose an exceptional threat to the people, their private property, and the constitutional balance of power.
the villain of the [Kelo] case is excessive judicial restraint.”

To make matters worse for property owners, courts have been excessively active in expanding the power of eminent domain over the people and have simultaneously been excessively restrained in refusing to protect those subject to the increased power.

Eventually this evolving judicial view of property rights filtered down from the United States Supreme Court to other federal and state courts and culminated with the modern, judicial concept that private property rights are no longer fundamental or important rights worthy of strong judicial protection. The Stevenson case demonstrates that Virginia’s courts are among those that no longer consider the constitutional right to just compensation to be a fundamental right. In 1924, the Virginia Supreme Court declared that “[p]rivate ownership of property is one of the fundamental rights of the citizen not surrendered by entering into organized government.” If this principle were still the law in Virginia, Ms. Stevenson would not have suffered the injustice she was forced to endure.

Although the late Chief Justice Rehnquist stated that property rights should not “be relegated to the status of a poor relation” in comparison with other rights, the relegation of property rights is exactly what has occurred in the judicial system: courts have reduced private property rights to an inferior status among all other rights. Courts give private property much less protection than many other rights. As it now stands, courts deem the right to free speech, to vote, to interstate travel, to fairness in the criminal process, to abortion, and to the use of contraceptives as fundamental rights worthy of the highest judicial protection. Meanwhile, courts do not deem private property to be a fundamental right, and they give this right the least judicial protection available. Accordingly, Virginia’s courts fail to correct many of the injustices individual property owners suffer at the hands of condemnors and the Assembly.

VI. Restoring Private Property Rights in Virginia

Virginia’s government has proven it cannot be trusted to protect the people and their private property. Virginia’s Assembly, its courts, and its executive branch repeatedly refuse to protect Virginia property owners. Thus, Virginians have only one place to seek protection: All that remains between the government and the people’s private property is the people themselves. Unless the people take action to protect and secure their private property rights, no Virginian’s home, farm, business, or church will be secure.

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286 See supra note 284 and accompanying text.
287 See, e.g., Abele v. Hernando County, 161 Fed. Appx. 809, 815 (11th Cir. 2005) (“Property rights . . . are not equivalent to fundamental rights”); Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 854-55 (Wyo. 1994) (“[P]roperty rights are not fundamental rights for purposes of deciding the appropriate level of constitutional scrutiny that must be given to state laws that may affect those rights.”). While the definition of private property as a fundamental or non-fundamental right may seem trivial to some readers, it has far-reaching consequences in the protection of private property rights. Courts give great protection to rights that are deemed fundamental; they give much less protection to rights that are not deemed fundamental.
288 See supra section IV.B.2.
289 Raleigh Court Corp. v. Faucett, 140 Va. 126, 124 S.E. 433, 436 (1924).
A. Mere Legislation Is Insufficient to Protect Virginia Property Owners from Continued Eminent Domain Abuses

Mere legislation aimed at curbing eminent domain abuse will not provide Virginians legitimate and lasting protection against such abuses. Asking the Assembly to correct the ongoing eminent domain abuses in Virginia is like asking the fox to guard the henhouse. After all, it is the Assembly’s actions that gave rise to these abuses in the first place.

Furthermore, even after the *Kelo* decision and after Virginia property owners brought the continued abuses in Virginia to the Assembly’s attention, the Assembly refused to limit the government’s power of eminent domain and thereby refused to protect Virginia property owners. During the 2006 legislative session, property owners urged the Assembly to pass legislation in response to the infamous *Kelo* decision. The Assembly refused to enact any such legislation. The Assembly became one of only thirteen state legislative bodies to refuse to pass some form of eminent domain legislation in response to *Kelo*.

Even if the current Assembly succumbed to the recent political pressure to pass some form of legislation designed to prohibit *Kelo*-type abuses in Virginia, any protection the Assembly may provide through mere legislation falls far short of providing legitimate and lasting protection for Virginia property owners. Any protections the Assembly may give property owners today (while political pressure is strong), the Assembly can take away tomorrow. The current Assembly may enact protections for property owners only to have a future Assembly remove those protections. Without a doubt, when eminent domain fades from the national spotlight and is no longer a topic of public debate, the condemnor’s lobby will once again slip into the halls of the Assembly and continue slowly chipping away at any protections owners gain today.

The last time Virginians chose to cure eminent domain abuses with a constitutional amendment they did so because they understood legislation purporting to cure the abuses was insufficient. The representatives at the Virginia Constitutional Convention of 1901-02 explained:

> A limitation upon the legislative power in the matter of eminent domain . . . can find no fitting place anywhere else except in the fundamental law. Why? Because there is where you must place it in order to give it stability. There is where it must be written in order that you may exempt it from the caprice of every succeeding General Assembly that might be inclined to encroach upon this principle.

As one representative pointed out, “whatever is not forbidden in the Constitution the Legislature has a right to deal with.” The same reasoning and principles that rang true in 1901 remain true today.

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293 Id.

294 See supra section V.A.4.


296 The *Kelo* case thrust eminent domain into the national spotlight. Although the United States Supreme Court held that the United States Constitution does not protect landowners against *Kelo*-type takings, the Court stated that individual states may place greater restrictions on the state’s power of eminent domain and may thus give greater protections to landowners. This statement placed great pressure on states to take action to eliminate *Kelo*-type abuses. Unlike Virginia’s Assembly, most states took action to prohibit such abuses. See supra note 295.

297 DEBATES, supra note 23, at 706.

298 Id. at 713.
Where for a long number of years there has existed an injustice by reason of the course of the Legislature in the exercise of its power, it is the duty of a Constitutional Convention . . . to put constitutional limitations upon the exercise of that power. . . . it must strike the mind of anybody that where the Legislature has persistently, for years and years, permitted gross injustice to be done to the people by the exercise of its sovereign power, there ought to be some limitations put upon that power so that the injustice shall not be continued.299

Just as the representatives recognized in 1901, mere legislation is an insufficient response to the continuing eminent domain abuses in Virginia, especially when the Assembly continues to “permit[] gross injustice to be done to the people.”

B. A Constitutional Amendment Is the Only Means of Providing Virginia Property Owners with Lasting Protection Against Eminent Domain Abuse

A constitutional amendment is the only means for Virginians to guarantee strong, permanent protections for their private property. Without such an amendment, Virginians’ private property will not be secure. Unlike mere legislation, a constitutional amendment provides enduring protection because the Assembly cannot change a constitutional amendment without the people’s consent.

Only a majority of the voters can change protections placed in Virginia’s Constitution. Constitutional protection insulates Virginians’ private property rights from the present Assembly, future Assemblies, and the strong condemners’ lobby that works the Assembly while owners are busy working at their jobs. An additional benefit of a constitutional amendment is that the people can determine the strength of the protections given to their private property.

Another very important reason Virginians must act to amend their Constitution is that the Virginia Constitution presently allows the Assembly to fix the limits of its own power of eminent domain. In 1928, Virginia amended its Constitution to allow the Assembly to define “public uses.”300 The plain language of this amendment allows the Assembly to define the limits of its own power with regard to eminent domain. This amendment was specifically designed to “transfer from the courts to the General Assembly the power to declare what constitutes a public use.”301 Before the amendment, the question of public use was a “judicial question; [whereas] under the [1928] amendment, it will be a legislative question.”302

The courts are one of the few checks on the legislature’s power of eminent domain, and the 1928 amendment is extremely troublesome because the language seemingly removes this check.303 If the Assembly can define the limits of its own power, the Assembly essentially becomes the judge in its own case, and its power becomes limitless. Imagine if a legislature could

299 Id. at 726.

300 This amendment is further proof of the decline of private property rights in the Twentieth Century.

301 1 Howard, supra note 19, at 228.

302 Id.

303 Although courts have rejected the plain meaning of this language and have not interpreted this language to allow the Assembly to define the limits of its own power, the danger still exists. See Mumpower v. Housing Authority, 176 Va. 426 (1940) (stating that despite the plain language of the 1928 Constitution, “the question [of public use] still remains a judicial one”). As courts have proven in many contexts, courts are free to change their interpretation at any time. If the Virginia Supreme Court ever interprets this provision according to the plain meaning of the language, the Assembly will be free to define the limits of its own power when it comes to eminent domain.
define the limits of its power in other areas. For example, what if, as Justice Thomas explained in *Kelo*, the United States Congress could define what is “unreasonable” in determining which types of searches are unreasonable for purposes of the Fourth Amendment?\textsuperscript{304} The provision allowing the Assembly to define “public uses” essentially removes any limitation on the power of eminent domain in Virginia.\textsuperscript{305}

Both Virginia’s courts and its Assembly refuse to correct the ongoing eminent domain abuses.\textsuperscript{306} Thus, Virginians must take action and, in the words of Thomas Jefferson, “bind them [both] down from mischief with the chains of the Constitution.” A constitutional amendment is the perfect means for restricting government intrusions into Virginians’ private property. As Virginia’s own Patrick Henry once declared, “[t]he Constitution is . . . an instrument for the people to restrain the government.”

C. Language for a Constitutional Amendment

If Virginians seek real protection and strive for a constitutional amendment, they must demand a constitutional amendment that addresses eminent domain abuses with regard to both the Public Use and Just Compensation Clauses. Virginians’ will not truly be secure if the people eliminate *Kelo*-type takings but continue to leave Virginians subject to takings in which landowners are not made whole for their losses.

Thomas Jefferson announced long ago that “[o]ur peculiar security is in the possession of a written Constitution,” and he warned that we should “not make it a blank paper by construction.”\textsuperscript{307} Virginia’s courts have reduced the written protections contained in both the Public Use and Just Compensation Clauses to a blank paper. While the main focus of recent eminent domain reform has been on restoring the protections in the Public Use Clause, Virginians must also demand that property owners receive a full indemnity for their losses. The just compensation requirement is an important safeguard. “[T]here are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation . . . .”\textsuperscript{308}

### 1. INSTITUTE FOR JUSTICE’S PROPOSED AMENDMENT

After *Kelo*, many states began considering constitutional amendments designed to protect property owners against *Kelo*-type abuses. The Institute for Justice proposed language for a constitutional amendment with strong property rights protections. The language of that amendment is as follows:

With just compensation paid, private property may be taken only when necessary for the ownership, possession, occupation, and enjoyment of land by the public at large, or by public agencies. Except for privately owned public utilities or common carriers, private property shall not be taken for private commercial enterprise, for economic development, or for any other private use, except with consent of the owner. Property shall not be taken from one owner and transferred to another, on the grounds that the public will benefit from a more profitable private use. Whenever an

\textsuperscript{304} 125 S. Ct. at 2684.

\textsuperscript{305} See supra note 303.

\textsuperscript{306} See supra sections III and IV.

\textsuperscript{307} Chief Justice John Marshall also noted the importance of a written Constitution in *Marbury v. Madison*. “The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

\textsuperscript{308} United States v. Russell, 80 U.S. 623, 627 (1871).
attempt is made to take property for a use alleged to be public, the question whether the contemplated use is truly public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.309

The Institute for Justice drafted this language in light of *Kelo* for the use of all states seeking to eliminate *Kelo*-type abuses. It did not draft this language with the many Virginia-specific abuses in mind. Although the proposed language would curb many eminent domain abuses in Virginia, it does not provide Virginians full protection in light of Virginia’s specific abuses and the magnitude of these abuses. Thus, this amendment does not address all the issues necessary to curb eminent domain abuse in Virginia, including abuses related to the Just Compensation Clause.

2. LANGUAGE OF DELEGATE JOANNOU’S PROPOSED LEGISLATIVE AMENDMENT

During the 2006 legislative session in Virginia, Delegate Johnny Joannou proposed language specifically designed to eliminate *Kelo*-type abuses in Virginia. The language of Delegate Joannou’s bill is as follows:

The right to private property being a fundamental right, the term “public uses” mentioned in Article I, Section 11 of the Constitution of Virginia is hereby defined in all instances to embrace only the ownership, possession, occupation, and enjoyment of land by the public or by public agencies, the use of land for the creation or functioning of any public service corporation or public service company, including but not limited to railroad companies, which has been granted or delegated the power of eminent domain, or the use of land for any entity that owns, operates, or maintains a road that is open to and services the public generally. In determining whether a use constitutes a public use, public benefits or potential public benefits including economic development or private development, an increase in the tax base, tax revenues, employment or general economic health and welfare shall not be considered. Any taking of private property must be necessary to achieve the public use, and the public interest must dominate the private gain. Except as stated herein, the taking of private property for the primary purpose of transferring or leasing to private parties shall not constitute a public use. Any taking under the pretext of an alleged public use shall be impermissible when the primary purpose is to bestow a private benefit.

The property owner whose property is subject to taking shall have the right to rebut the presumption that the taking is for a public use or is necessary for the public use by a preponderance of the evidence.

Nothing contained herein shall be construed as granting or delegating the power of eminent domain not conferred independently of this section.310

Delegate Joannou’s proposed bill represents one of the greatest attempts at eminent domain reform in recent Virginia history. This bill could have done much to restore private property rights in Virginia.


310 See HB 94 Eminent Domain; Definition of Public Uses (visited Oct. 2, 2006) <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&type=bil&val=hb94>. To see the full text as quoted herein, click on the hyperlink marked “02/13/06 House: Printed as engrossed 062873520-EH1.”
Delegate Joannou proposed this language to amend a bill to be enacted by the Assembly; it was not designed to be a constitutional amendment. Thus, future Assemblies would be free to decrease or change the protections in the bill. In addition, the language of the bill would not limit the powers of eminent domain granted to local governments by charter because it does not contain the specific language required by Virginia Code § 15.2-100.311

While Delegate Joannou’s bill provides a great starting point, it does not provide enough protection to eliminate many of the recurring eminent domain abuses in Virginia, especially those abuses relating to the failure of Virginia law to indemnify property owners. Delegate Joannou’s bill was drafted to stop takings that are for private uses and addresses the public use issues so desperately in need of reform. However, as it was not drafted to stop the abuses related to the Just Compensation Clause, the bill neither addresses nor stops such abuses.

To provide owners full protection, any bill or constitutional amendment must fulfill the constitutional requirement of just compensation and ensure Virginians are made whole for their losses. Currently, Virginia’s Constitution guarantees owners just compensation, but Virginia’s laws, and the Virginia Supreme Court’s interpretation of just compensation, guarantee that owners get less than “just” compensation. Even when owners prevail in court and prove the condemnor’s offer was grossly inadequate, owners are not made whole. Thus, additional language must be added to Delegate Joannou’s bill.

3. Virginia Specific Language to Cure Eminent Domain Abuses in Virginia

The language in this section specifically addresses Virginia’s past eminent domain abuses. This language also addresses potential abuses related to both the Public Use and Just Compensation Clauses. The language related to the Public Use Clause is as follows:

The right to private property is a fundamental right possessed by the people, and private property may be taken only for public use and only after payment of just compensation to the owner from whom the property is taken.

Private property may not be taken unless (1) the land taken is for the ownership, possession, occupation, and enjoyment by the public at large, or by public agencies, (2) the land taken is used for the creation or functioning of a public utility or railroad company which possesses the power of eminent domain, or (3) the land taken is blighted and the taking eliminates a direct threat to public health or safety caused by the property in its current condition by (a) removing a public nuisance, (b) removing a structure that is beyond repair or unfit for human habitation or use, or (c) acquiring abandoned property.

No other uses shall be deemed public uses justifying the taking of private property in Virginia, and an increase in tax base, tax revenues, employment, or general economic health and welfare shall not constitute public uses. Property shall not be taken for private commercial enterprise, for economic development, or for any other private use, except with consent of the owner from whom the property is taken. Except in takings to remove blight as stated above, property shall not be taken from one owner and transferred to another, whether the transfer is by sale, lease, or otherwise.

Any taking of private property must be necessary to achieve the alleged public use. The public interest must dominate the private gain, and any taking under the pretext of an alleged public use shall be impermissible when the actual purpose is to bestow

311 See supra section IV.D.1.b.
a private benefit. Any taking for the purpose of conferring a benefit on a particular class of identifiable individuals or private party is impermissible. Whenever an attempt is made to take property for a use alleged to be public, the question whether the contemplated use is truly public shall be a judicial question and determined as such without regard to any legislative assertion that the use is public.\textsuperscript{312}

This language provides true protection for Virginians’ homes, farms, businesses, and churches. A constitutional amendment with this language should prohibit each of the abuses discussed in this paper and prevent similar abuses from recurring in Virginia. Although condemnors may claim this language is too restrictive and would thwart public projects, this language would not prohibit any takings for legitimate public uses. In 1901, condemnors claimed that the proposed constitutional amendment would thwart or “retard [Virginia’s] progress” and “prevent capital from coming into this State.”\textsuperscript{313} History proved the condemnors’ claim wrong, and any similar claim made by condemnors today, like then, is merely an attempt to preserve condemnors’ position of power.

The real debate over eminent domain comes down to one question: Will the Assembly favor individual freedom, liberty, and private property rights, or will it favor continued government power, domination, and control? Property owners must hope the Assembly agrees with Thomas Jefferson, who declared, “I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.”

The first paragraph of the constitutional amendment contained in this section establishes private property as a fundamental right and would force courts to give private property the highest judicial protection. This paragraph also prohibits the quick-take power and thus prevents condemnors from taking an owner’s property and evicting the owner before the condemnor pays the owner just compensation.\textsuperscript{314} The second and third paragraphs limit takings to three categories of public uses: (1) traditional takings in which the public owns and uses the property such as roads and schools, (2) takings for common carriers, such as public utility companies and railway companies that provide public services, and (3) takings of blighted property that pose a direct and defined threat to the public. The third paragraph expressly prohibits \textit{Kelo}-type takings that are for economic development or private commercial enterprise. This paragraph also prohibits condemnors from taking property merely to lease the property to another private party, as the court allowed in \textit{Ottofaro}.\textsuperscript{315}

While the fourth paragraph may be last, it is one of the most important paragraphs. Condemnors have cleverly crafted many innovative ways to take property for private uses. Takings under the guise of public roads represent one area that has become fraught with abuse

\begin{itemize}
  \item Will the Assembly favor individual freedom, liberty, and private property rights, or will it favor continued government power, domination, and control?
  \item Property owners must hope the Assembly agrees with Thomas Jefferson, who declared, “I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.”
  \item Students must also remove the Assembly’s ability to define the limits of its own eminent domain power by deleting the language in Article I, § 11 of the Virginia Constitution that allows the Assembly to define “public uses.”
  \item Debates, supra note 23, at 702; see also id. at 691-94. Condemnors’ historical argument against strong private property rights protections and eminent domain reform is that such reform will stunt growth, drive away capital, increase the costs of public projects, and cause great inconveniences for local governments, public utilities, and other condemnors. History continues to prove just the opposite; strong protections of private property increase investment, private growth, and entrepreneurial endeavors. See supra note 2.
  \item This paragraph could be altered slightly in order to preserve the quick-take power, if, and only if, cases involving the quick-take power had priority on the civil docket. Moreover, owners would need the right to challenge the condemnors’ power or authority to take the property before the owner must vacate his property and before the condemnor could begin construction activities on the property, including demolition.
  \item See supra section IV.A.1.
\end{itemize}
due to condemnors’ shrewd tactics. For example, the Virginia Code allows VDOT to take an additional two acres whenever it takes property for a road. In *Ottofaro*, the City took the property for a public road but leased eighty-two percent of the property to a private developer who built a shopping center. In *Lacy*, the taking is for a so-called “public” road that literally serves as a driveway for the very family that asked for and paid for the taking. The *Hoffman* case is the most recent example of a cleverly disguised taking for private purposes. Given these type of problems, the fourth paragraph is vital.

The fourth paragraph prohibits condemnors from taking property that is not needed to achieve the public use that gave rise to the taking in the first place. The paragraph also prevents takings that are done under the guise of a public use when the taking was truly for a private use or to bestow a private benefit, like the taking in *Lacy* in which the condemnor admits the taking is to “serve” the beneficiary of the taking. The final protection the fourth paragraph provides is that it places owners on an equal playing ground in court. Currently, once the condemnor merely says its use is public, the court presumes the taking is actually for a public use and the court places the burden of proof upon the owner. The last sentence eliminates this undue burden on the owner.

While these four paragraphs protect property owners from takings for private purposes, they do not fully protect Virginia property owners because nothing in this language guarantees that owners are made whole in accordance with the just compensation mandate. Because the Virginia Supreme Court has interpreted the guarantee of just compensation to be something less than full compensation, Virginians must add to their Constitution language giving meaning to the Just Compensation Clause. This issue cannot be left to the Assembly or to the courts, both of which have continuously allowed takings in which owners are not made whole for their losses.

The Virginia Constitution of 1902 gave owners much greater compensation rights—the right to recover compensation for damages even when the property was not physically taken—precisely because courts refused to protect owners even in the face of blatant and obvious abuses. In one case mentioned by the representatives to the Virginia Constitutional Convention of 1901-02, the Virginia Supreme Court denied the owner compensation despite the fact that the condemnor undisputedly damaged the owner’s property. The court’s statement to the owner is telling: “You were damaged to the extent of $5,000, it is admitted, sir, but . . . you are absolutely without relief.” Although no dispute existed as to the fact that the condemnor severely damaged the owner’s property, the court told the owner “while you have suffered loss, while you have sustained damage, the law furnishes you no remedy.” As another representative proclaimed,

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317 See *supra* section IV.A.1.
318 See *supra* section IV.B.1.
319 See *supra* section IV.A.4.
320 See *supra* section IV.B.1.
321 See *Hoffman Family*, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 729 (Va. 2006) (stating that “[a] legislative declaration that an intended use is a public one, although not conclusive, is presumed to be correct”).
322 *Debates, supra* note 23, at 703-04, 711.
323 *Id.* at 704.
324 *Id.* at 711.
the effect [of some takings] . . . upon the individual property owners will be to almost
totally destroy the value of their property, and yet under the present provision of our
Constitution and the prevailing construction placed upon it by our Court of Appeals
these property owners are wholly without legal redress of any kind, notwithstanding
that these public improvements, carried on with a view to promoting the public
welfare of that community, amounts almost to a total confiscation of their property,
under the present status of our law they are absolutely deprived of the right to recover
one dollar of their great loss.325

Similarly, today’s courts refuse to ensure owners are made whole for the damages and
losses condemnors inflict upon them. Courts have largely reduced the Just Compensation
Clause to a “blank paper” that provides little protection for property owners. Virginia’s courts
have followed the lead of the United States Supreme Court—the same court that gave the
people *Kelo*—which said:

We have acknowledged that, in some cases, th[e court’s] standard fails fully to
indemnify the owner for his loss . . . [and] does not make the owner whole. We are
willing to tolerate such occasional inequity.326

Despite the constitutional mandate of just compensation, Virginia’s courts, just like the
United States Supreme Court, are willing to permit cases in which the condemnor “fails fully to
indemnify the owner for his loss . . . and does not make the owner whole.” This judicial attitude
necessitates language guaranteeing that owners are made whole for their losses. Anything less
is less than just compensation.

The following language addresses abuses related to just compensation:

Owners whose property is taken by the power of eminent domain must receive a
full indemnity for their losses, including business losses, lost profits, and all damages
caused by the taking and the public project that justified the taking, whether the
taking is temporary or permanent.

In any case in which a condemnor exercises the power of eminent domain to take
property, the court or jury shall be permitted to consider the condemnor’s interference
with the owner’s use of the property and the restriction, change, or loss of access to
any adjacent highway as an element in assessing the damages. “Restriction of or loss
of access” includes, but is not limited to, the prohibition of making right or left turns
into or out of the real estate involved, provided that such access was present before
the proposed improvement or taking.

If the amount awarded as just compensation at trial is ten percent or more above the
condemnor’s final offer made prior to filing suit against the owner, the condemnor
shall reimburse the owner for his reasonable litigation costs and expenses, including
but not limited to attorneys’ and expert witness’ fees.

This language addresses the deficiencies with current Virginia law and the courts’
refusal to require condemnors to fulfill the constitutional mandate of “just” compensation.327
Virginia courts have declared that the right to just compensation does not guarantee owners
compensation for all losses the condemnor inflicts upon them, including business losses.

325 *Id.* at 703.
327 *See supra* sections IV.D.8 and V.B.
certain losses or restriction of access, and damages caused by construction on an owner’s property or temporary occupation of an owner’s property. Moreover, Virginia courts have ruled that owners may not recover reimbursement for litigation expenses even if the owner incurred these expenses as a result of the condemnor’s unreasonably low offer. As the courts have refused to require “just” compensation, the people must define “just” for the courts. The only way to do so is through a constitutional amendment.

In 1902 Virginians amended their Constitution to give Virginia property owners protections against eminent domain abuses because Virginia’s courts refused to protect the property owners despite obvious abuses and because property owners could not obtain meaningful protections from the Assembly. Virginians face the same problems today. Virginia’s Assembly and its courts refuse to lend property owners protection in the face of obvious, egregious, and ongoing abuses.

Virginians are facing circumstances eerily similar to those in 1902 in that both the Assembly and the courts refuse to require condemners to compensate owners for damages or losses. Condemnors are inflicting upon owners. The only difference today is that in addition to the abuses regarding inadequate compensation, the Assembly and Virginia’s courts are allowing condemnors to take Virginians’ private property for private purposes. In 1902, Virginians chose a constitutional amendment to protect themselves. It is time Virginians do so again. Just as Virginians realized in 1902, the only hope for real and lasting protection is a constitutional amendment. The Virginia Constitution of 1902 cured the abuses occurring then. It is time for Virginians to follow in the path of their forefathers and cure the remaining abuses.

328 Debates, supra note 23, at 703-706, 711-712.
Conclusion

Eminent domain reform is not a partisan issue. The only real division when it comes to eminent domain is the takers versus the taken from\textsuperscript{329} or, as one commentator more eloquently stated, “those who want to save their homes[], farms, and businesses[,] and those who want the power to take them.”\textsuperscript{330} More specifically, the division is special interests versus grassroots, the politically connected versus the politically disconnected, the empowered versus the powerless, and, ultimately, the government and those to whom the government has granted extraordinary power versus the people.\textsuperscript{331} This division has not changed in over one hundred years in Virginia. “It is simply a question of the weak against the strong.”\textsuperscript{332}

Instead of checking injustice, Virginia’s eminent domain laws have become the “invincible weapon of injustice.”\textsuperscript{333} For far too long, the people of Virginia have stood idly by as their government has slowly degraded private property rights to such an extent that Virginians’ homes, farms, businesses, churches, and other property are no longer secure. Now is the time for Virginians to act, while eminent domain is still at the forefront of the public’s mind and collective action is possible. As the German Reverend Martin Niemoller once said,

First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the Trade Unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not speak out. And when they came for me, there was no one left to speak out for me.\textsuperscript{334}

If the people of Virginia do not act now and demand constitutional protections for their private property, it will be too late tomorrow, when their own property is threatened, and they become the next victims of Virginia’s inconstant government.\textsuperscript{335}

\textsuperscript{329} See Special Interests vs. Virginia Taxpayers, \textit{supra} note 292.
\textsuperscript{330} See Anderson, \textit{supra} note 241.
\textsuperscript{331} See Special Interests vs. Virginia Taxpayers, \textit{supra} note 292.
\textsuperscript{332} Debates, \textit{supra} note 23, at 730.
\textsuperscript{333} Frédéric Bastiat once explained how “law, instead of checking injustice, becomes the invincible weapon of injustice.” Bastiat, \textit{supra} note 115, at 7. He further explained how “the law is used by the legislator to destroy . . . [the people’s] personal independence by slavery, their liberty by oppression, and their property by plunder. This is done for the benefit of the person who makes the law, and in proportion to the power that he holds.” \textit{Id.} State and local officials have used eminent domain in Virginia as political plunder for the wealthy and the politically connected.
\textsuperscript{335} Two of the earliest recorded takings in history involved King Ahab, who took property without compensating the rightful owner, and King David, who demanded that the rightful owner receive payment in full. \textit{Compare} I Kings 21:1-20 with I Chronicles 21:22-26. The first recorded condemnation action occurred in 871 B.C. The condemnor, King Ahab, attempted to acquire Naboth’s vineyard. Naboth refused to sell the vineyard voluntarily, and King Ahab exercised the right of eminent domain. Jezebel became, in effect, the trier of fact. The decision at the end of the trial was that King Ahab did, in fact, have the right of eminent domain and title to the vineyard was transferred to him. By way of compensation for the taking, Naboth was stoned to death for his refusal to sell the land voluntarily. There was no appeal.

J.D. Eaton, \textit{Real Estate Valuation in Litigation} 14 (2d ed. 1995) (footnote omitted) (referring to I Kings 21:1-20). When King David asked Ornan to give his threshing floor for the construction of an altar to the Lord, Ornan offered to give King David the property, as well as oxen, wood, and wheat for the burnt offering. However, King David refused to take Ornan’s property without full compensation, stating, “I will surely buy it for the full price; for I will not take what is yours for the Lord, or offer a burnt offering which costs me nothing.” Time will tell whether Virginia will choose to be more like King Ahab or more like King David.
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